

COMMENTARY

THE PROBLEM OF “RUBBER-STAMPING” IN STATE CAPITAL HABEAS PROCEEDINGS: A HARRIS COUNTY CASE STUDY

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When the United States Supreme Court embarked on significant constitutional regulation of the American death penalty beginning in the 1960s, prevailing practices were deficient along numerous dimensions. Trial lawyers appointed to represent capital defendants had no particular expertise in death penalty litigation, and they had neither the resources nor the training to develop compelling arguments to spare their clients. State capital statutes contributed to the low level of representation, because they often excluded evidence about a defendant's background or limitations, confining the presentation of evidence to the circumstances of the crime.¹ In some jurisdictions, capital trials were "unitary," with the jury deciding guilt and punishment at the

1. See, e.g., Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1108-20 (1953).

same time, providing no special focus on the question whether death ought to be imposed.² Review of capital sentences was ad hoc. Many states had not modernized their systems for challenging convictions and sentences, instead relying on a set of arcane writs and procedures; indigent death-sentenced inmates by and large were not entitled to post-conviction counsel, so they were left to navigate the procedural morass on their own.³ The absence of clear standards for when death should be imposed, together with rudimentary trial, appellate, and post-conviction processes, led to arbitrary and discriminatory administration of the death penalty. All of these deficiencies, together with the Court's perception that popular support for the death penalty was in steep decline, contributed to the Court's landmark 1972 decision in *Furman v. Georgia* invalidating the old prevailing statutes.⁴ States quickly revised their capital statutes in response, and when the Court confronted the new statutes in 1976, it held that the death penalty is not itself unconstitutional so long as it is administered with heightened procedures to ensure its regular, even-handed application.⁵ New state statutes enumerated aggravating and mitigating circumstances to guide sentencer discretion.⁶ These statutes also bifurcated the guilt and sentencing decisions to ensure focused consideration on whether the defendant should be put to death,⁷ and provided for new systems of review of capital convictions and sentences.⁸

Perhaps one of the most significant structural changes in the two decades following *Furman* involved the overhaul of state post-conviction proceedings. State post-conviction review (also known as "state habeas corpus") affords inmates a forum for litigating claims requiring factual development, such as claims regarding the failure of trial counsel to undertake adequate investigation or

2. *McGautha v. California*, 402 U.S. 183, 208, 232 (1971).

3. Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 340–44 (1998).

4. *Furman v. Georgia*, 408 U.S. 238, 241–42, 245, 249–50, 253, 256–57 (1972) (Douglas, J., concurring); *id.* at 369 (Marshall, J., concurring) (stating that the average citizen, if given "knowledge of all the facts presently available regarding capital punishment" would not support it).

5. *Gregg v. Georgia*, 428 U.S. 153, 198, 206–07 (1976).

6. *See, e.g., id.* at 196–98.

7. *Id.* at 190–92.

8. *See id.* at 198.

the state's failure to disclose exculpatory evidence.⁹ If, for example, state post-conviction investigation reveals that an inmate should have been evaluated for intellectual disability, state post-conviction counsel can seek relief from a capital sentence. Before *Furman*, few states had comprehensive systems of post-conviction remedies and virtually none provided counsel to indigent inmates seeking to challenge their convictions; indeed, many inmates filed their handwritten *pro se* applications without the benefit of an investigation of any kind.¹⁰

States revamped their post-conviction schemes for two reasons. First, the Court's burgeoning constitutional regulation of the death penalty increased the number and complexity of post-conviction claims brought by death-sentenced prisoners and it simply was no longer feasible to rely on ad hoc writs filed by unrepresented inmates to resolve these claims.¹¹ Second, states wanted to insulate their convictions and sentences from *federal* review.¹² In the absence of effective state post-conviction mechanisms, state death-sentenced prisoners can bring their non-record claims directly to federal court, where a federal judge resolves factual disputes in the first instance. But where states facilitate the resolution of such claims in state court, state inmates are required to exhaust those opportunities, and the fact-findings made in state court are afforded deference in federal court.¹³ Moreover, after the passage of the Antiterrorism and Effective Death Penalty Act, state *legal* conclusions receive deferential review as well.¹⁴ These limitations on federal habeas corpus

9. See Nancy J King, *Appeals*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 253, 258–59 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/12_Reforming-Criminal-Justice_Vol_3_Appeals.pdf [<https://perma.cc/K5AY-KRMD>].

10. Stefanie Lindeman, *Because Death is Different: Legal and Moral Arguments for Broadening Defendants' Rights to Discovery in Federal Capital Cases*, 73 ST. JOHN'S L. REV. 541, 562 (2012); Steiker, *supra* note 3 at 340–41; Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 715 (2002).

11. See *Kuhlmann v. Wilson*, 477 U.S. 436, 450 (1986); Jeffrey T. Renz, *Post-Conviction Relief in Montana*, 55 MONT. L. REV. 331, 333–34 (1994); Steiker, *supra* note 3 at 340.

12. Steiker, *supra* note 3, at 316–17, 341; see also CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 171–72 (2016).

13. 28 U.S.C. § 2254(b), (d) (1995).

14. 28 U.S.C. § 2254(d)(1); see e.g. *Buntion v. Quarterman*, 524 F.3d 664, 670 (5th Cir. 2008); cf. *Brown v. Allen*, 344 U.S. 443, 506 (1953) (Frankfurter, J., concurring) (stating that a district judge “may accept” the determination in the prior state proceeding but that

review elevate the importance of meaningful state post-conviction review.¹⁵

Despite the modernization of state post-conviction schemes—including the standardization of procedures for filing claims and the provision of counsel to death-sentenced inmates—state post-conviction adjudication remains one of the most troubling and least reliable aspects of the contemporary American death penalty. At its best, state post-conviction proceedings allow for an important “second look” at what happened (or didn’t happen) at trial. But in many jurisdictions, state post-conviction proceedings are simply a sham, with state trial judges refusing to engage in any meaningful fact-finding. Two practices are particularly problematic: the reluctance of state trial courts to conduct evidentiary hearings to resolve contested factual issues, and the wholesale adoption of proposed state fact-finding instead of independent state court decision-making.

State post-conviction applications often include numerous affidavits from witnesses and experts about important evidence that could have been, but was not, presented at trial. Such affidavits might include evidence related to the accuracy of the conviction, including forensic, alibi, or eyewitness testimony; or the affidavits might highlight important mitigating evidence regarding the inmate’s psychiatric or psychological impairments, abused background, or redeeming qualities. In response, state attorneys will solicit affidavits from trial counsel explaining why such evidence was not discovered or introduced. When conflicting affidavits arrive in this posture, an evidentiary hearing in state post-conviction proceedings is usually essential to resolve the conflicting accounts about trial counsel’s decision-making. An affidavit indicating that trial counsel forwent certain investigation as a matter of “trial strategy” should be subject to cross-examination, and live testimony will afford the trial court a preferred position to make judgments about demeanor and truthfulness. Yet in many courts, starkly different factual

state adjudication cannot “be accepted as binding”).

15. See Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 Notre Dame L. Rev. 443, 460–61 (2017) (quoting Joseph L. Hoffmann & Nancy J. King, Essay, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 809 (2009)) (“The cumulative effect of the substantive and procedural restrictions on the federal habeas remedy—which some prominent scholars now call a ‘pipe dream’—is to transform State PCR into the pivotal postconviction forum.”).

accounts about trial counsel's decision-making are resolved on the pleadings, in a process some courts euphemistically term "paper hearings."¹⁶

Worse still, in some cases state post-conviction courts decide every single factual dispute against the inmate by rubber-stamping the state's proposed findings, even where there are numerous (sometimes over a hundred) contested factual issues.¹⁷ In many instances, the state post-conviction court will not even change the heading of the document, such that the state-drafted order/opinion will become the official decision in the case.¹⁸ The practice of state courts adopting proposed findings verbatim has been subject to criticism from both courts and advocates, and a recent petition for certiorari to the United States Supreme Court challenged the practice as contrary to due process.¹⁹

This Article seeks to provide a thick description of the rubber-stamping phenomenon in a particular jurisdiction—Harris County. The focus on Harris County stems in part from the fact that Harris County has been ground zero of the American death penalty in the modern era, responsible for an extraordinary and disproportionate share of executions in the United States over the past forty years.²⁰ In addition, post-conviction courts have a

16. STEIKER & STEIKER, *supra* note 12, at 136.

17. *Id.*; see also *infra* notes 51–62 (listing many cases where the state's proposed findings were rubber-stamped, even some with over a hundred contested factual issues).

18. Brief for The Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae Supporting Petitioner, *Wood v. Allen*, 558 U.S. 290 (2010) at 2.

19. See, e.g., *Anderson v. City of Bessemer City*, 470 U.S. 564, 571–72 (1985) (discussing circumstances under which a court's adoption of party-authored findings may not deserve deference on review); *Jefferson v. Upton*, 560 U.S. 284, 292–94 (2010) (criticizing verbatim adoption of party-authored facts under circumstances casting doubt on the court's engagement with the underlying facts); *Jefferson v. Sellers*, 250 F. Supp. 3d 1340, 1351–52 (N.D. Ga. Apr. 10, 2017) (arguing that "the practice of adopting verbatim findings of fact prepared by the prevailing party in the context of a death penalty case is especially troublesome, given that factfinding procedures in capital proceedings are to 'aspire to a heightened standard of reliability'" citing *Ford v. Wainwright*, 477 U.S. 399, 411 (1986)); Brief for The Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae Supporting Petitioner, *supra* note 18, at 2, 13, 18–21 (urging that deference should not be afforded to the lower court findings of fact where circumstances suggested a lack of independent judicial fact-finding); Petition for Writ of Certiorari at 3–4, 16–18, *Hamm v. Allen*, 137 S. Ct. 39 (2016) (No. 15–8753) (arguing that deference should not be afforded to the lower court findings of fact where circumstances suggested a lack of independent judicial fact-finding).

20. Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 717, 720 (2009); see also FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX: PART I: AN IN-DEPTH LOOK AT AMERICA'S OUTLIER DEATH PENALTY COUNTIES, 47–52, (2016), <http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf> [<https://perma.cc/J7CG-F9JY>].

reputation in Texas for lax fact-finding practices, rarely holding evidentiary hearings, and frequently rubber-stamping state-proposed findings.²¹ This study examines all available records regarding state post-conviction adjudication in Harris County since 1995. We requested and reviewed files from the archives of the Texas Court of Criminal Appeals (“CCA”), the Texas State Archives, and the Harris County District Clerk’s Office. We reviewed Harris County dockets for all cases in which a post-conviction writ was filed and adjudicated. We obtained copies of the Harris County trial courts’ findings of fact and conclusions of law, the CCA orders ultimately granting or denying relief, and, where possible, copies of the State’s proposed findings of fact and conclusions of law to compare against the official findings entered by the court.

The study reveals cursory, one-sided consideration of contested factual issues. The resulting determinations undermine the accuracy and fairness of the death penalty in Harris County.

We conclude that inadequate development of facts in state habeas prevents Harris County post-conviction courts from enforcing federal constitutional norms. Because even rubber-stamped findings receive deference in federal court, the inadequate state court resolutions frustrate the enforcement of constitutional norms in federal court as well. Moreover, Harris County judges’ frequent recourse to rubber-stamping discourages state post-conviction lawyers from undertaking extensive factual investigation. The rubber-stamping phenomenon creates a vicious cycle, in which state post-conviction courts assume inmates’ petitions lack merit, thereby lowering the quality and quantity of claims brought in state post-conviction. Finally, the rubber-stamping practice undermines the legitimacy of Harris County executions: every time an execution of a Harris County inmate occurs, prosecutors and newspapers recount the many layers of review undertaken before the execution. When those layers of review afforded no meaningful consideration of the inmate’s constitutional claims, they make the general public more comfortable with the execution than is justified by the underlying reality.

21. TEXAS DEFENDER SERVICE, *LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS* 54 (2002), http://texasdefender.org/wp-content/uploads/Lethal-Indiff_web.pdf [<https://perma.cc/2GXQ-GHB4>].

I. FRAMEWORK FOR FACT-FINDING IN TEXAS CAPITAL
HABEAS SCHEME

In 1995, the Texas legislature passed Article 11.071 of the Code of Criminal Procedure,²² establishing the current procedures for habeas corpus proceedings in a capital case and delineating rules for appointment and compensation of counsel,²³ duties and funding regarding investigation,²⁴ treatment of untimely²⁵ and subsequent applications,²⁶ factual development, and resolution of issues.²⁷ The Texas capital habeas corpus statutory scheme imposes on trial judges a series of mandatory duties that render trial court proceedings the “main event” of state habeas corpus proceedings.²⁸ As the Texas CCA has explained, “[t]he legislative framework of Article 11.071 contemplates that the habeas judge is . . . the factfinder who resolves disputed factual issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief.”²⁹ Although the CCA has sole authority to grant habeas corpus relief,³⁰ this court regularly defers to the trial courts by adopting their factual findings and legal conclusions.³¹ Thus, Texas trial judges are fundamentally responsible for making factual findings and adjudicating claims in capital habeas corpus cases.

Capital habeas corpus proceedings begin with the filing of an “application for a writ of habeas corpus” by an inmate, a document that raises claims challenging the constitutionality of the

22. TEX. CODE CRIM. PROC. art. 11.071 (West 2015).

23. *Id.* § 2.

24. *Id.* § 3.

25. *Id.* §§ 4, 4A.

26. *Id.* § 5.

27. *Id.* §§ 8, 9.

28. *Cf.* *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (expanding default on federal habeas to ensure that state capital trials serve as the “main event” in capital litigation).

29. *Ex parte Simpson*, 136 S.W.3d 660, 668 (Tex. Crim. App. 2004).

30. TEX. CONST. art. V, § 5 (1876).

31. *See Ex parte Simpson*, 136 S.W.3d at 668 (“The legislative framework of Article 11.071 contemplates that the habeas judge is . . . the factfinder who resolves disputed factual issues, the judge who applies the law to the facts, enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief.”); *Ex parte Briseño*, 135 S.W.3d 1, 12–13 (Tex. Crim. App. 2004) (stating that, in the habeas context, “we afford almost total deference to the trial judge’s determination of the historical facts supported by the record”); *see also* LETHAL INDIFFERENCE, *supra* note 21, at 68 (a 2002 study conducted by Texas Defender Service found that the Court of Criminal Appeals adopts the trial courts’ findings of fact and conclusions of law in 92% of cases examined).

conviction and/or sentence. For initial applications, a writ issues automatically upon the filing of the application in the trial court.³² The state then files an answer to the claims raised in the application, or may rest on a general denial.³³ No later than twenty days after the state files their answer,³⁴ the habeas court must first determine the existence of “controverted, previously unresolved” issues of material fact. If the convicting court determines that such factual disputes exist, the court must enter an order designating the unresolved issues and the method(s) for resolving them. The statute authorizes the trial court to order affidavits, interrogatories, and evidentiary hearings to develop the necessary factual record.³⁵

Article 11.071 section 9 lays out procedures and timelines for resolving factual disputes through an evidentiary hearing, and mandates that “parties shall file proposed findings of fact and conclusions of law for the convicting court to consider” before the court enters its “written findings of fact necessary to resolve the previously unresolved facts and make conclusions of law.”³⁶ Should the court determine that no material facts are in dispute, it may still request argument of counsel on one or more issues.³⁷ Whether or not additional argument is requested, section 8 similarly requires parties to file proposed findings of fact and conclusions of law for the court to consider³⁸ and requires that “the convicting court shall make appropriate written findings of fact and conclusions of law.”

32. Initial application procedures and timelines are laid out in the Texas Code of Criminal Procedure. *Id.* § 6. Upon receipt of a second or subsequent application, the trial court must immediately forward the application to the CCA for review and authorization. Here, the CCA acts as a gatekeeper, determining if the petitioner has pled “sufficient specific facts” establishing that one (or more) of three narrow exceptions has been met. If the CCA determines that an exception has been met, a writ of habeas corpus is issued and the case returns to the trial court for further proceedings in the same fashion as an initial proceeding. *Id.* § 5(b).

33. *Id.* § 7.

34. *Id.* § 8(c). Although the statute contemplates a regimented set of deadlines and establishes due dates for each step throughout the habeas process, it is common practice statewide for habeas courts—busy with trial dockets—to soften or extend briefing deadlines at the request of parties or even *sua sponte*; just as often (particularly where factual development is necessary and/or the issues are numerous) the convicting court considers the briefings before them for much longer than the period contemplated by statute.

35. *Id.* § 9 (also providing that habeas judges may use “personal recollection” to resolve disputed issues).

36. *Id.* § 9(e) (emphasis added).

37. *Id.* § 8(c).

38. *Id.* § 8(b).

The statute therefore contemplates multiple mechanisms for factual development if the court determines that controverted issues of material fact exist. Additionally, parties may file motions requesting evidentiary hearings or other factual development, but they are not required to do so. The court is always empowered to hold hearings or to order affidavits *sua sponte* when material facts are in dispute,³⁹ and the law always requires that each party submit findings of fact and conclusions of law for the court to consider before entering written findings and conclusions and making a recommendation of relief to the CCA.

Although the CCA reviews the habeas court's findings of fact, conclusions of law, and recommendation before issuing the final order granting or denying relief, the Texas standard of review is extremely deferential. Trial court findings of fact are traditionally reviewed for abuse of discretion,⁴⁰ and the CCA will grant "almost total deference to findings of historical fact[]"⁴¹ even when those findings are supported by affidavits and not live testimony.⁴² In issuing its final order, the CCA routinely adopts the trial court's findings of fact and conclusions of law in their entirety, often in boilerplate two-page orders without any explication of relevant facts or analysis of the claims presented.⁴³ The findings of fact and conclusions of law entered by the habeas court typically become the ultimate factual findings of the case as it proceeds to federal court, and are then subject to deferential review under the Antiterrorism and Effective Death Penalty Act.

Thus, both the statutory scheme and established judicial practice of convicting courts and the CCA situate the trial judge as the primary—and often only—judicial fact-finder in Texas capital habeas corpus proceedings.

II. LOPSIDED FACT-FINDING IN HARRIS COUNTY CAPITAL POST-CONVICTION CASES

In Harris County capital habeas corpus cases, trial courts routinely sign the prosecution's proposed orders in their

39. *Id.* § 9(a).

40. 5 TEX. JUR. 3d *Appellate Review* § 573 (2015).

41. *Ex parte Briseño*, 135 S.W.3d 1, 12–13 (Tex. Crim. App. 2004).

42. *Manzi v. State*, 88 S.W.3d 240, 242–44 (Tex. Crim. App. 2002).

43. A 2002 study found that in 92% of cases examined across Texas, the CCA adopted the convicting court's findings of fact and conclusions of law *in toto*. See LETHAL INDIFFERENCE, *supra* note 21, at 68.

entirety, notwithstanding the presence of significant factual disagreements. Indeed, many Harris County judges have adopted every single finding of fact and conclusion of law proposed by the State and not one finding or conclusion proposed by the defense in the course of adjudicating capital habeas petitions.⁴⁴ The sheer disparity in findings for the state raises the question of whether the state habeas process in Harris County is genuinely adversarial.

The Capital Punishment Clinic at the University of Texas School of Law has collected data in order to shed light on this question. The elements tracked in the study include: the length of time between the prosecution's submission of proposed findings of fact and conclusions of law and the date the habeas judge signed the findings and conclusions of the court; the style and heading of the court's findings and conclusions; the use of an evidentiary hearing or other means of factual development apart from affidavits or proposed findings; the ultimate resolution of any unresolved issues of material fact; the deference to the trial court's recommendation in the CCA; and subsequent review of state determinations in federal court.

This ongoing review of Harris County capital habeas proceedings reveals a pattern of extreme deference to prosecutor-written findings and a strong disinclination to hold evidentiary hearings to resolve disputed facts, raising questions about the depth and accuracy of the trial court's review. In an overwhelming number of Harris County cases, trial courts adopted the state's proposed findings of fact and conclusions of law verbatim, resulting in findings that in some instances are plainly contradicted by the record. The existing data shows that wholesale adoption rates without evidentiary hearings are an enduring and pervasive practice in Harris County.⁴⁵

44. See *id.*, at 54 (noting the practice throughout Texas generally).

45. Administrative issues surrounding the recording and filing of post-conviction documents have impacted the data collection efforts of this study, likely understating the prevalence of the Harris County judiciary's practice of adopting state-authored findings of fact and conclusions of law in their entirety. The Harris County District Clerk's online information system, Judicial Information Management System (JIMS), does not always indicate the dates of filing for parties' proposed findings of fact and conclusions of law. In some cases, the JIMS entry conflicts with the file stamp on the document itself. Some original files have been checked out or are unavailable from the District Clerk's office and/or the off-site warehouse. These issues with record completion and file maintenance are nothing new—similar issues hampered data collection efforts in Texas Defender Service's *Lethal Indifference* study in the early 2000's. See *LETHAL INDIFFERENCE*, *supra* note 21, at

Harris County judges have signed over 200 sets of findings of fact and conclusions of law in Article 11.071 proceedings since the passage of the statute in 1995.⁴⁶ Of those, we have compiled complete data sets—sufficient documentation to ascertain the degree of similarity between the prosecutor’s proposed findings of fact and conclusions of law and the official findings and conclusions of the court—for 199 sets of findings of fact and conclusions of law. In 191 of the 199 sets, the fact-finding process has been contested, with Harris County prosecutors submitting proposed findings of fact and conclusions of law recommending that relief be denied.⁴⁷ The statistical analysis that follows is in the context of those contested cases.

In these cases, Harris County post-conviction prosecutors have authored and proposed 21,275 separate findings of fact and conclusions of law and the Harris County courts have adopted 20,261 of the prosecutors’ proposed findings verbatim: an adoption rate of 95%.⁴⁸ In fact, judges in Harris County have adopted all of the prosecutors’ findings verbatim in 183 out of 191 sets of findings, or 96%.⁴⁹ In the vast majority (167) of those

54–55. The data compiled in this ongoing study is continuously being fact-checked and updated as necessary; therefore, when filing dates and grants or denials of evidentiary hearings cannot be confirmed, the data sets are left incomplete rather than making assumptions. Throughout this Article, when a statement of fact contains (or could contain) data points that are either unknown or unconfirmed, it is indicated and, if possible, explained in the notes below.

46. See *infra* notes 56–67.

47. In the remaining eight sets of findings, the State-authored findings either recommended that relief be granted or recommended that the CCA review the applicant’s claims. *Ex parte* Alexander, No. 532255-C (338th Dist. Ct., Harris County, Tex., May 4, 2012) (prosecutors recommended review of Alexander’s *Penry* claim and the trial court recommended relief); *Ex parte* Mason, No. 620024-B (228th Dist. Ct., Harris County, Tex., Nov. 6, 2012) (recommending review of Mason’s *Penry* claim); *Ex parte* Wheatfall, No. 608052-A (178th Dist. Ct., Harris County, Tex., Sept. 7, 2014) (recommending review of Wheatfall’s *Penry* claim); *Ex parte* Reynosa, No. 941651-A (263d Dist. Ct., Harris County, Tex., May 4, 2007) (recommending that the CCA extend Reynosa’s period to file his habeas application after his lawyer missed the filing deadline); *Ex parte* Brown, No. 1035159-A (351st Dist. Ct., Harris County, Tex., May 28, 2013) (recommending relief on a *Brady* claim); *Ex parte* Carr, No. 644434-B (176th Dist. Ct., Harris County, Tex., Dec. 20, 2006) (recommending relief on an *Atkins* claim); *Ex parte* Smith, No. 564448-B (351st Dist. Ct., Harris County, Tex., Feb. 10, 2004) (recommending relief on an *Atkins* claim); *Ex parte* Smith, No. 1045419-A (263d Dist. Ct., Harris County, Tex., Apr. 10, 2012) (recommending relief on an *Atkins* claim).

48. See Appendix 2 (Contested Cases Chart).

49. See Appendix 2 (Contested Cases Chart); *Cf.* LETHAL INDIFFERENCE, *supra* note 21, at 54 (noting a similar study done by Texas Defender Service that found a similar percentage of cases with all prosecutor-authored findings (90%)).

cases, the judges simply signed the state's proposed document without changing the heading.⁵⁰

At least forty-seven judges have signed one or more sets of findings in capital habeas proceedings under 11.071; we were able to locate the data necessary to determine the rate at which judges adopted the state's findings for all but seven judges.⁵¹ Of the forty judges for whom adoption rates can be fully ascertained, thirty-four (85%) have—in every instance— adopted every single finding of fact and conclusion of law proposed by the state verbatim.⁵² For example, Judge Belinda Hill—who was appointed to the 230th District Court in 1997 from the Harris County District Attorney's Office and resigned from the bench in 2012 to return to the prosecutor's office⁵³— adopted the state's proposed findings of fact and conclusions of law *verbatim* in each of the fifteen (15) sets of findings and conclusions she signed during her judicial tenure.⁵⁴ Judge

50. See *infra* notes 56–67; cf. LETHAL INDIFFERENCE, *supra* note 21, at 54 (highlighting the same trend as found in the ongoing University of Texas study).

51. Adoption rates can be fully determined for 40 of 47 judges—for the other seven, a copy of the State's proposed findings of fact and conclusions of law is missing for comparison. However, of those seven judges, five of them have a 99% or higher adoption rate in the cases for which we have complete data sets.

52. See Appendix 3 (Judicial Adoption Rates in Contested Cases Chart).

53. Brian Rogers, *Former Judge to Run District Attorney's Office*, HOUS. CHRON. (Aug. 21, 2013), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Former-judge-to-run-district-attorney-s-office-4778476.php>.

54. *Ex parte* Ayestas, No. 754409-A (230th Dist. Ct., Harris County, Tex., Feb. 18, 2008) (113 findings of fact and conclusions of law); *Ex parte* Davis, No. 616522-A (230th Dist. Ct., Harris County, Tex., Feb. 4, 1999) (15 findings of fact and conclusions of law); *Ex parte* Duncan, No. 9402885-A (230th Dist. Ct., Harris County, Tex., Jul. 13, 2000) (102 findings of fact and conclusions of law); *Ex parte* Fratta, No. 1195044-B (230th Dist. Ct., Harris County, Tex., Jun. 29, 2004) (128 findings of fact and conclusions of law); *Ex parte* Guidry, Nos. 1073163-A, -B (230th Dist. Ct., Harris County, Tex.) (90 findings of fact and conclusions of law in 1073163-A, signed Jul. 14, 2000; 180 findings of fact and conclusions of law in 1073163-B, signed Mar. 14, 2012); *Ex parte* Hunter, No. 968713-A (230th Dist. Ct., Harris County, Tex., Jan. 14, 2008) (97 findings of fact and conclusions of law); *Ex parte* Jackson, No. 748752-A (230th Dist. Ct., Harris County, Tex., Sept. 1, 2004) (74 findings of fact and conclusions of law); *Ex parte* Ogan, No. 549893-A (230th Dist. Ct., Harris County, Tex., Mar. 11, 1999) (57 findings of fact and conclusions of law); *Ex parte* Prystash, Nos. 723036-A, -B (230th Dist. Ct., Harris County, Tex.) (84 findings of fact and conclusions of law in 723036-A, signed Feb. 25, 2004; 125 findings of fact and conclusions of law in 723036-B, signed Sept. 25, 2012); *Ex parte* Rosales, No. 432787-B (230th Dist. Ct., Harris County, Tex., Jun. 5, 2002) (49 findings of fact and conclusions of law); *Ex parte* Rowell, No. 905130-A (230th Dist. Ct., Harris County, Tex., May 29, 2002) (59 findings of fact and conclusions of law); *Ex parte* Smith, No. 274702-C (230th Dist. Ct., Harris County, Tex., Dec. 28, 2012) (114 findings of fact and conclusions of law); *Ex parte* Wilson, No. 823411-A (230th Dist. Ct., Harris County, Tex., Mar. 26, 2003) (101 findings of fact and conclusions of law).

Michael McSpadden of the 209th District Court has presided over nine habeas proceedings,⁵⁵ the entirety of the 209th District's capital habeas docket since the passage of Article 11.071. In all nine proceedings, Judge McSpadden adopted every one of the state's proposed findings of fact and conclusions of law *verbatim*—a total of 1109 findings of fact and conclusions of law.⁵⁶

Judge Marc Carter of the 228th District Court has presided over seven contested capital habeas proceedings in which he signed findings of fact and conclusions of law, and he adopted every one of the state's 886 total proposed findings of fact and conclusions of law, *verbatim*.⁵⁷ Carter's predecessor in the 228th District, Judge Ted Poe, presided over four capital habeas proceedings and adopted every single one of the state's 458 proposed findings and conclusions.⁵⁸ Judge Poe was presiding

55. George Curry's habeas application is currently pending in Judge McSpadden's court and findings of fact and conclusions of law have yet to be entered. Most recently, on December 4, 2017, Judge McSpadden granted trial counsel Doug Durham an extension of time to file an affidavit until December 23, 2017. *Ex parte* Curry, No. 1223596-A (209th Dist. Ct., Harris County, Tex. Dec. 4, 2017). Curry's proceeding will be the tenth in which Judge McSpadden enters findings and conclusions.

56. *Ex parte* Broxton, No. 599218-A (209th Dist. Ct., Harris County, Tex. Sept. 3, 1999) (71 findings of fact and conclusions of law); *Ex parte* Broxton, 599128-B (209th Dist. Ct., Harris County, Tex. July 31, 2009) (110 findings of fact and conclusions of law); *Ex parte* Coleman, No. 735351-A (209th Dist. Ct., Harris County, Tex. Mar. 6, 2001) (97 findings of fact and conclusions of law); *Ex parte* Cotton, No. 733844-A (209th Dist. Ct., Harris County, Tex. Apr. 17, 2000) (83 findings of fact and conclusions of law); *Ex parte* Green, No. 823865-A (209th Dist. Ct., Harris County, Tex. Sept. 12, 2012) (94 findings of fact and conclusions of law); *Ex parte* Kincy, No. 663162-A (209th Dist. Ct., Harris County, Tex. Apr. 18, 2001) (99 findings of fact and conclusions of law); *Ex parte* Landor, No. 1194597-A (209th Dist. Ct., Harris County, Tex. Feb. 12, 2016) (161 findings of fact and conclusions of law); *Ex parte* Pippin, No. 9410637-A (209th Dist. Ct., Harris County, Tex. Sept. 26, 2001) (268 findings of fact and conclusions of law); *Ex parte* Tamayo, No. 9422714-A (209th Dist. Ct., Harris County, Tex. Mar. 28, 2003) (126 findings of fact and conclusions of law).

57. *Ex parte* Greer, No. 602461-B (228th Dist. Ct., Harris County, Tex. Oct. 10, 2006) (27 findings of fact and conclusions of law); *Ex parte* Mason, No. 620074-A (228th Dist. Ct., Harris County, Tex. Dec. 28, 2009) (92 findings of fact and conclusions of law); *Ex parte* Medina, No. 726088-B (228th Dist. Ct., Harris County, Tex. May 26, 2009) (254 findings of fact and conclusions of law); *Ex parte* Rivers, No. 475122-B (228th Dist. Ct., Harris County, Tex. Jan. 3, 2007) (91 findings of fact and conclusions of law); *Ex parte* Rivers, No. 475122-B (228th Dist. Ct., Harris County, Tex. May 22, 2007) (146 findings of fact and conclusions of law); *Ex parte* Westbrook, No. 768395-B (228th Dist. Ct., Harris County, Tex. Jan. 26, 2007) (119 findings of fact and conclusions of law); *Ex parte* Westbrook, No. 768395-B (228th Dist. Ct., Harris County, Tex. Sept. 5, 2014) (158 findings of fact and conclusions of law).

58. *Ex parte* Greer, No. 602461-A (228th Dist. Ct., Harris County, Tex. Aug. 2, 2002) (207 findings of fact and conclusions of law); *Ex parte* McWilliams, No. 735581-A (228th Dist. Ct., Harris County, Tex. Dec. 11, 2000) (43 findings of fact and conclusions of law); *Ex parte* Rivers, No. 475122-A (228th Dist. Ct., Harris County, Tex. Aug. 14, 2002) (163

over the 228th District bench when the provisions of Article 11.071 took effect in 1995, and Judge Carter remains the elected judge in the 228th. In the twenty-two years since 11.071 became law, the judges of the 228th District Court have been presented with 1,466 proposed findings of fact and conclusions of law written by post-conviction prosecutors in contested cases and have adopted every single finding and conclusion verbatim.⁵⁹ And Judge Mary Lou Keel, former judge of the 232nd District Court,⁶⁰ was presented with 905 proposed findings of fact and conclusions of law written by Harris County prosecutors—she presided over all six post-11.071 capital habeas cases adjudicated in the 232nd District. In those six cases, Judge Keel adopted all eight sets of

findings of fact and conclusions of law); *Ex parte Shannon*, No. 639095-A (228th Dist. Ct., Harris County, Tex. Jan. 20, 2001) (45 findings of fact and conclusions of law).

59. Visiting Judge Doug Shaver signed the findings in Coy Wayne Westbrook's initial habeas corpus proceeding in 2002. *Ex parte Westbrook*, No. 768395-A (228th Dist. Ct., Harris County, Tex. Mar. 14, 2002) (122 findings of fact and conclusions of law).

60. Judge Keel now serves on the Court of Criminal Appeals; she was elected to the CCA on November 8, 2016. TEX. JUD. BRANCH, *Judge Mary Lou Keel*, <http://www.txcourts.gov/cca/about-the-court/judges/judge-mary-lou-keel> [<https://perma.cc/5CQX-8NYD>] (last visited Jan. 9, 2018).

the state's proposed findings of fact and conclusions of law, for a 100% adoption rate.⁶¹

Including the examples cited above, at least eight Harris County courts—the 179th,⁶² 183rd,⁶³ 184th,⁶⁴ 209th, 228th, 232nd, 263rd,⁶⁵ 337th,⁶⁶ and 339th⁶⁷ Districts—have *never rejected* a state-authored finding of fact or conclusion of law since the passage of Article 11.071, even when those findings and conclusions are plainly contradicted by the record.⁶⁸

Evidentiary hearings are indispensable tools of post-conviction fact development, and yet preliminary data suggests that Harris

61. *Ex parte* Basso, No. 816855-A (232d Dist. Ct., Harris County, Tex. Nov. 28, 2005) (127 findings of fact and conclusions of law); *Ex parte* Campbell, No. 586190-A (232d Dist. Ct., Harris County, Tex. Nov. 11, 1999) (44 findings of fact and conclusions of law); *Ex parte* Escobedo, No. 783728-A (232d Dist. Ct., Harris County, Tex. Oct. 28, 2008) (112 findings of fact and conclusions of law); *Ex parte* Escobedo, No. 783728-B (232d Dist. Ct., Harris County, Tex. Mar. 9, 2007) (113 findings of fact and conclusions of law; 111 adopted verbatim and pen line through findings of fact 75 “during the cell inventory conducted at the Polunsky Unit on July 20, 2006” and fact 76 “during the July 20, 2006 cell inventory at the Polunsky Unit”); *Ex parte* Escobedo, No. 783728-B (232d Dist. Ct., Harris County, Tex. Sept. 26, 2012) (127 findings of fact and conclusions of law); *Ex parte* Griffith, No. 9426715-A (232d Dist. Ct., Harris County, Tex. Jul. 23, 2003) (14 findings of fact and conclusions of law); *Ex parte* Soffar, No. 319724-C (232d Dist. Ct., Harris County, Tex. Jan. 5, 2012) (315 findings of fact and conclusions of law); *Ex parte* Tercero, No. 762351-A (232d Dist. Ct., Harris County, Tex. Jun. 10, 2005) (53 findings of fact and conclusions of law).

62. *Ex parte* Mamou, No. 800112-A (179th Dist. Ct., Harris County, Tex. Nov. 13, 2013) (55 proposed findings of fact and conclusions of law signed by Judge Kristin Guiney); *Ex parte* Morris, No. 602258-A (179th Dist. Ct., Harris County, Tex. Apr. 11, 2000) (76 proposed findings of fact and conclusions of law signed by Judge Mike Wilkinson); *Ex parte* Rhoades, No. 612408-A (179th Dist. Ct., Harris County, Tex. May 21, 2014) (228 proposed findings of fact and conclusions of law adopted essentially verbatim by Judge Kristin Guiney; Judge Guiney rearranged many of the proposed findings and conclusions and duplicated two proposed findings twice each, for a total of 232 court's findings—all of which were authored by the prosecution); *Ex parte* Sales, No. 893161-A (179th Dist. Ct., Harris County, Tex. Aug. 15, 2014) (180 proposed findings of fact and conclusions of law signed by Judge Kristin Guiney); *Ex parte* Sonnier, No. 648197-A (179th Dist. Ct., Harris County, Tex. Jul. 31, 2003) (38 findings of fact and conclusions of law signed by Judge Mike Wilkinson with a note, “I think I've previously signed this”).

63. *Ex parte* Johnson, No. 573760-A (183d Dist. Ct., Harris County, Tex. May 22, 2003) (69 proposed findings of fact and conclusions of law signed by Judge Joan Huffman); *Ex parte* Matthews, No. 941608-A (183d Dist. Ct., Harris County, Tex. Mar. 11, 2011) (106 proposed findings of fact and conclusions of law “signed in error” by Judge Vanessa Velasquez on Feb. 2, 2011, before Matthews' proposed findings were filed Feb. 18, 2011; state's proposed findings re-signed by Judge Velasquez on Mar. 11, 2011); *Ex parte* Smith, Trial Court No. 1021168-A (183d Dist. Ct., Harris County, Tex. Sept. 26, 2014) (113 proposed findings of fact and conclusions of law signed by Judge Vanessa Velasquez).

64. *Ex parte* Charles, No. 941969-A (184th Dist. Ct., Harris County, Tex. Apr. 25, 2007) (152 proposed findings of fact and conclusions of law signed by Judge Jan Krockner); *Ex parte* Goynes, Nos. 583424-A (184th Dist. Ct., Harris County, Tex. May 6, 2002) (92 proposed findings of fact and conclusions of law signed by Judge Jan Krockner) and 583424-C (184th Dist. Ct., Harris County, Tex. Aug. 30, 2011) (14 proposed findings of fact and conclusions of law signed by Judge Jan Krockner); *Ex parte* Martinez, No. 387158-A (184th

County courts have entered findings of fact and conclusions of law without the benefit of live hearings in the vast majority of capital habeas proceedings conducted in the jurisdiction since the passage of 11.071. In fact, among all fact-finding proceedings examined in the study, available data⁶⁹ indicates that the trial court has held a

Dist. Ct., Harris County, Tex. July 9, 1999) (41 proposed findings of fact and conclusions of law signed by Judge Jan Krockner); *Ex parte* Martinez, No. 387158-C (184th Dist. Ct., Harris County, Tex. Oct. 4, 2012) (88 proposed findings of fact and conclusions of law signed by Judge Jan Krockner); *Ex parte* O'Brien, No. 9402971-A (184th Dist. Ct., Harris County, Tex. Nov. 13, 2011) (107 proposed findings of fact and conclusions of law signed by Judge Jan Krockner); *Ex parte* Sorto, No. 921805-A (184th Dist. Ct., Harris County, Tex. Dec. 29, 2008) (64 findings of fact and conclusions of law signed by Judge Jan Krockner).

65. *Ex parte* Dennes, No. 750313-A (263d Dist. Ct., Harris County, Tex. Aug. 21, 2013) (158 proposed findings of fact and conclusions of law signed by Judge Jim Wallace); *Ex parte* Haynes, No. 783872-A (263d Dist. Ct., Harris County, Tex. Aug. 5, 2004) (50 proposed findings of fact and conclusions of law); *Ex parte* Newton, No. 474102-A (263d Dist. Ct., Harris County, Tex. Jun. 5, 2000) (160 proposed findings of fact and conclusions of law signed by Judge Jim Wallace); *Ex parte* Perez, No. 9414441-A (263d Dist. Ct., Harris County, Tex. Jan. 26, 2001) (28 proposed findings of fact and conclusions of law signed by Judge Jim Wallace); *Ex parte* Reynosa, No. 941651-A (263d Dist. Ct., Harris County, Tex.) (23 proposed findings of fact and conclusions of law signed on October 11, 2006; 29 proposed supplemental findings and conclusions signed on May 4, 2007).

66. *Ex parte* Clay, No. 710714-A (337th Dist. Ct., Harris County, Tex. Oct. 13, 1999) (25 proposed findings of fact and conclusions of law signed by Judge George Godwin); *Ex parte* Cruz-Garcia, No. 1384794-A (337th Dist. Ct., Harris County, Tex. Dec. 29, 2016) (192 proposed findings of fact and conclusions of law signed by Judge Renee Magee); *Ex parte* Freaney, No. 909843-A (337th Dist. Ct., Harris County, Tex. Dec. 5, 2012) (188 proposed findings of fact and conclusions of law signed by Judge Herb Ritchie); *Ex parte* Freaney, No. 909843-A (337th Dist. Ct., Harris County, Tex. Dec. 10, 2013) (68 proposed supplemental findings of fact and conclusions of law signed by Judge Renee Magee); *Ex parte* Thomas, No. 710716-A (337th Dist. Ct., Harris County, Tex. Jan. 3, 2002) (39 proposed findings of fact and conclusions of law signed by Judge Don Stricklin).

67. *Ex parte* Anthony Francois, No. 961278-A (339th Dist. Ct., Harris County, Tex. Dec. 30, 2008) (30 proposed findings of fact and conclusions of law signed by Judge Caprice Cosper); *Ex parte* McCullum, No. 9419102-A (339th Dist. Ct., Harris County, Tex. May 29, 2002) (32 proposed findings of fact and conclusions of law signed by Judge Caprice Cosper); *Ex parte* McGowen, No. 448450-A (339th Dist. Ct., Harris County, Tex. May 19, 2006) (66 findings of fact and conclusions of law signed by Judge Charles Campbell); *Ex parte* Medellin, No. 675430-A (339th Dist. Ct., Harris County, Tex. Jan. 22, 2001) (81 proposed findings of fact and conclusions of law signed by Judge Caprice Cosper); *Ex parte* Morris, No. 597997-A (339th Dist. Ct., Harris County, Tex. Sept. 28, 1999) (106 proposed findings of fact and conclusions of law signed by Judge Caprice Cosper); *Ex parte* Shore, No. 966087-A (339th Dist. Ct., Harris County, Tex. Sept. 11, 2012) (168 proposed findings of fact and conclusions of law); *Ex parte* Whitaker, No. 9424545-A (339th Dist. Ct., Harris County, Tex. Nov. 18, 2002) (108 proposed findings of fact and conclusions of law signed by Judge Caprice Cosper); *Ex parte* Woodard, No. 836845-B (339th Dist. Ct., Harris County, Tex. Sept. 19, 2006) (143 proposed findings of fact and conclusions of law signed by Judge Caprice Cosper).

68. For an example, see the case of Anthony Medina, *infra* notes 108–13 and accompanying text.

69. Available information often does not make clear whether or not a live evidentiary hearing was held. For the purposes of the study, no assumptions were made—data was gathered and compiled for all cases in which either the trial court findings of fact or the CCA order explicitly stated that the trial court *did* hold an evidentiary hearing or the hearing transcript was personally reviewed by the authors; cases were only counted as

live hearing before entering findings of fact and conclusions of law in only twenty-five confirmed instances.⁷⁰ In some cases, the CCA remanded the cause to the trial court with orders for factual development—or specifically for a live hearing—but the trial court either held a perfunctory “paper hearing,” by receiving additional affidavits on the contested issue,⁷¹ or simply declined to hold a hearing and adopted (or re-adopted) the state’s proposed findings and conclusions verbatim.⁷²

III. A CLOSE EXAMINATION OF FACT-FINDING PRACTICES

The overwhelming rate of verbatim adoption of state-authored findings of fact and conclusions of law—usually without a hearing—suggests perfunctory fact-finding and legal analysis. In many cases it is unclear from the clerk’s records whether prosecutors filed a copy of their proposed findings in the clerk’s office before the judge signed and adopted them, and in some cases it is clear that they did not. Where the state does file an unsigned copy with the court, the intervals between filing and signing of the state’s proposed findings are often very brief (sometimes within a single day), even in cases with over a hundred proposed findings of fact and conclusions of law involving extensive factual disputes. Buried in the original district clerk’s files are handwritten notes, some on yellow Post-its, evidencing *ex parte* communications between post-conviction prosecutors and the presiding judges. Misspellings, misnumberings, and other typographical errors are present throughout rubber-stamped orders, suggesting that the court had not reviewed the document before signing and adopting the state-authored findings in their entirety. Despite these practices, the CCA continues to allow and to encourage trial courts to adopt prosecutor-authored findings and recommendations as their own. Indeed, the CCA rubber-stamps the rubber-stamped recommendations of trial courts

having been denied a hearing when the docket indicates denial of a motion for an evidentiary hearing.

70. In 2002, *Lethal Indifference* found that a live evidentiary hearing was held in only 55 of 251, or 22%, of petitions reviewed statewide. See LETHAL INDIFFERENCE, *supra* note 21, p. 54 n. 90. Although the data in the current study is still being compiled and is not yet complete, preliminary indications reveal a Harris County hearing rate (in 25 of 191 contested fact-findings, or 13%) of approximately half that found statewide in 2002.

71. See *Ex parte* Greer, No. 602461-B (228th Dist. Ct., Harris County., Tex., Oct. 10, 2006) (remanded by the CCA for a “live evidentiary hearing,” *Ex parte* Greer, No. WR-53,836-02 (Sept. 14, 2005) and resolved by the trial court after ordering affidavits).

72. For an example, see the case of Steven Butler, *infra* notes 117–29, and accompanying text.

almost without exception⁷³—unless the trial court recommends relief.⁷⁴

A. Adopting Verbatim “State’s Proposed Findings of Fact and Conclusions of Law” in Contested Cases

Harris County judges adopted all of the state’s proposed findings *verbatim* in 183 of 191 instances, or 96% of the time. In the vast majority (87%) of instances, trial judges summarily adopt the state’s findings by signing the last page of the prosecutors’ proposed findings and conclusions, without revising the heading “Respondent’s [or State’s] Proposed Findings of Fact and Conclusions of Law.”⁷⁵ Out of the 191 contested fact-finding proceedings in Harris County for which complete data sets could be obtained, there have been only six recommendations of relief.⁷⁶ In 167 instances in which Harris County trial courts recommended denying state habeas relief, it is clear that the trial court’s findings were authored in their entirety by Harris County prosecutors and embraced by the court, as the trial judge did not change the heading on the prosecutor’s proposed findings of fact and conclusions of law.⁷⁷ In 16 additional instances, the trial judge

73. See LETHAL INDIFFERENCE, *supra* note 21, at 68 (at the time of 2002 study, CCA adopted the trial court’s findings without revision in 92% of cases).

74. See, e.g., *Ex parte* Brown, WR-26,178–03, 2017 WL 4675396 at *1 (Tex. Crim. App. Oct. 18, 2017) (rejecting a trial court recommendation of relief on a faulty ballistics claim); Respondent’s Partially Adopted Proposed Findings of Fact, Conclusions of Law, and Order at 58–67, 131, *Ex parte* Moore, No. 314483-C (trial court recommended relief on Moore’s intellectual disability claim and adopted the state’s proposed findings and conclusions relating to the other forty-seven claims; the CCA denied relief despite the habeas court’s recommendation in *Ex parte* Moore 470 S.W.3d 481, (Tex. Crim. App. 2015), *rev’d sub nom* Moore v. Texas, 137 S. Ct. 1039 (Mar. 28, 2017)); Court’s Findings of Fact, Conclusions of Law and Order at 20, 62, *Ex parte* Sheppard, No. 668505-A (trial court recommended relief on single ineffective assistance of counsel claim, CCA denied relief despite the habeas court’s recommendation in *Ex parte* Sheppard, No. WR-78,132–01, 2013 WL 5568434, at *2 (Tex. Crim. App. Oct. 9, 2013) (per curiam); Findings of Fact and Conclusions of Law, *Ex parte* Smith, No. 564448-A, at 31–32 (351st Dist. Ct., Harris County, Tex., Mar. 11, 1999), (trial court recommended relief after holding an evidentiary hearing but the CCA denied relief over the habeas court’s recommendation in Order at 2, *Ex parte* Smith, No. WR-40,874–01 (Tex. Crim. App. Apr. 21, 1999)).

75. In 167 of 191 contested sets of findings.

76. *Ex parte* Cathey, 451 S.W.3d 1, 4 (Tex. Crim. App. Nov. 5, 2014); *Ex parte* Maldonado, No. 721568-B (338th Dist. Ct., Harris County, Tex., Dec. 12, 2012); *Ex parte* Moore, No. 314483-C (185th Dist. Ct., Harris County, Tex., Feb. 6, 2014); *Ex parte* Plata, No. 693143-B (351st Dist. Ct., Harris County, Tex., Sept. 28, 2007); *Ex parte* Sheppard, No. 668505-A (185th Dist. Ct., Harris County, Tex., Aug. 24, 2012); *Ex parte* Williams, WR-46,736–02 (Tex. Crim. App. Apr. 24, 2002).

77. See *supra* Part III(A) discussing the adoption of proposed findings of fact without modification.

adopted the prosecution's proposed findings *verbatim* after making only cosmetic changes to the document, such as changing the title or rearranging the order of the findings.⁷⁸ Harris County judges produced original work in just *two out of 185* instances, or *1%* of the time, in which they recommended denying habeas relief. Put differently, Harris County courts recommended denying relief in 185 out of 191 instances, and the courts adopted the state's proposed findings *verbatim* in 99% of the orders recommending denial of the death-sentenced inmate's claims.

B. Brief Time Intervals Between the Filing and Signing of the State's Proposed Findings and Conclusions Suggest Cursory Engagement with the Facts of the Case.

It is sometimes unclear from the clerk's records whether prosecutors even filed a copy of their proposed findings before the judge signed and adopted them. In some cases it is clear that prosecutors did not file, in violation of statutory procedure.⁷⁹ Intervals between filing and signing of the state's proposed findings are often remarkably brief, sometimes within a single day. This is true even in cases where the state proposes over a hundred findings of fact and conclusions of law and/or where detailed factual disputes exist. Article 11.071 requires that the parties "shall file" proposed findings of fact and conclusions of law for the court to consider *before* making its own written findings.⁸⁰ But in practice, Harris County courts often run afoul of this statutory mandate. For example, in Ray Freeney's case, Judge Renee Magee signed the prosecutor's proposed supplemental findings on December 10, 2013, thirteen days before the deadline for submission and before Freeney had even submitted his own supplemental findings for the court to consider.⁸¹ In another example, Harris County prosecutors filed their 105 proposed findings of fact and conclusions of law in Bill Gates's case on March 18, 2008; the trial judge signed and adopted them *verbatim* on March 19, 2008.⁸²

78. For an example, see *infra* text accompanying notes 114–16, for a discussion on the case of Dexter Johnson.

79. See TEX. CODE CRIM. PRO. art. 11.071 § 8(b) (West 2015).

80. *Id.*

81. See Clerk's Record, *Ex parte Freeney*, No. 909843-A (337th Dist. Ct., Harris County, Tex. Dec. 10, 2013).

82. Respondent's Amended Proposed Findings of Fact, Conclusions of Law, and Order at 1, 28, *Ex parte Gates*, No. 832407-A (262d Dist. Ct., Harris County, Tex., Mar. 19, 2008);

Swift, verbatim adoption of the prosecutor's proposed findings is a common phenomenon.⁸³ In fact, some judges have rejected fact-intensive claims, based on voluminous trial and post-conviction records, by signing off on the State's proposed findings of fact and conclusions of law on the same day the prosecutors file the document.⁸⁴ In the case of Dexter Johnson, *infra*, the prosecutor filed sixty-one proposed findings of fact and conclusions of law on February 24, 2010, and the judge signed the "Court's Findings" the same day.⁸⁵ In some instances, judges adopt the entirety of the state's proposed findings and conclusions *in toto* without any indication the document has been previously filed at all.⁸⁶ And in one particularly egregious example, Judge Charles Campbell signed and adopted the state's proposed findings of fact and conclusions of law recommending that relief be denied to Roger McGowen on May 19, 2006, and the order was entered into the Harris County docket that same day—but the State's proposed

Trial Court's Findings of Fact and Conclusions of Law and Order of the Court at 22, *Ex parte* Gates, No. 832407-A (262d Dist. Ct., Harris County, Tex., Mar. 19, 2008).

83. See, e.g., State's Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* Dennes, No. 750313-A (263d Dist. Ct., Harris County, Tex., Aug. 21, 2013) (adopting 158 findings and conclusions two days after submission); Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* Martinez, No. 387158-C (184th Dist. Ct., Harris County, Tex., Oct. 4, 2012) (adopting 88 findings and conclusions three days after submission); Respondent's Amended Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* Rivers, No. 475122-B (228th Dist. Ct., Harris County, Tex., May 22, 2007) (adopting 145 findings and conclusions four days after submission); Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* Rivers, No. 475122-A (228th Dist. Ct., Harris County, Tex., Aug. 14, 2002) (adopting 163 findings and conclusions two days after submission); State's Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* Russell, No. 898795-A (182d Dist. Ct., Harris County, Tex., Oct. 9, 2012) (adopting 92 findings and conclusions the day after submission); Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* Washington, No. 449603-B (185th Dist. Ct., Harris County, Tex., Sept. 28, 2006) (adopting 86 findings and conclusions two days after submission); Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* Westbrook, No. 768395-B (228th Dist. Ct., Harris County, Tex., Jan. 26, 2007) (adopting 119 findings and conclusions two days after submission).

84. See, e.g., Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* Matamoros, No. 643410-B (180th Judicial District Ct., Harris County Tex., Dec. 18, 2006) (adopting 169 findings and conclusions based on a record that included a four-day post-conviction hearing); see also Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* Janecka, No. 642963-A (248th Dist. Ct., Harris County, Tex., Sept. 13, 1999) (adopting 29 findings and conclusions on the day of submission).

85. Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* Johnson, No. 1085483-A (208th Dist. Ct., Harris County, Tex., Feb. 24, 2010).

86. Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* Sonnier, (179th Dist. Ct., Harris County, Tex., Jul. 31, 2003) (adopting 38 findings and conclusions on the day of submission with a handwritten note that says "I think I've previously signed this;" JIMS shows no separate filing date for the state's proposed findings and conclusions, and the file stamp on the official court findings is Sept. 22, 2003).

findings themselves were not filed until May 25, 2006, six days after the judge adopted them.⁸⁷

Quick ratification of state proposed fact-finding and conclusions is particularly worrisome when it occurs just before a presiding judge transitions off the bench, often because of an election loss. This has happened numerous times in Harris County.⁸⁸

C. Sticky Notes Found in Files Suggest Ex Parte Communications Between Post-Conviction Prosecutors and Judges Regarding Proposed Findings and Conclusions.

During the course of the study, evidence emerged of *ex parte* communications between post-conviction prosecutors and the presiding judges in the form of handwritten notes, some on yellow Post-its, buried in the original files kept by the post-conviction clerk.

87. Findings of Fact, Conclusions of Law, and Order, *Ex parte* McGowen, No. 448450-A (339th Dist. Ct., Harris County, Tex., May 19, 2006); cf. Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, *Ex parte* McGowen, No. 448450-A (339th Dist. Ct., Harris County, Tex., May 25, 2006) (although the official findings signed by the court are captioned "Findings of Fact, Conclusions of Law, and Order," a side-by-side comparison reveals that the substance of the two documents is otherwise identical).

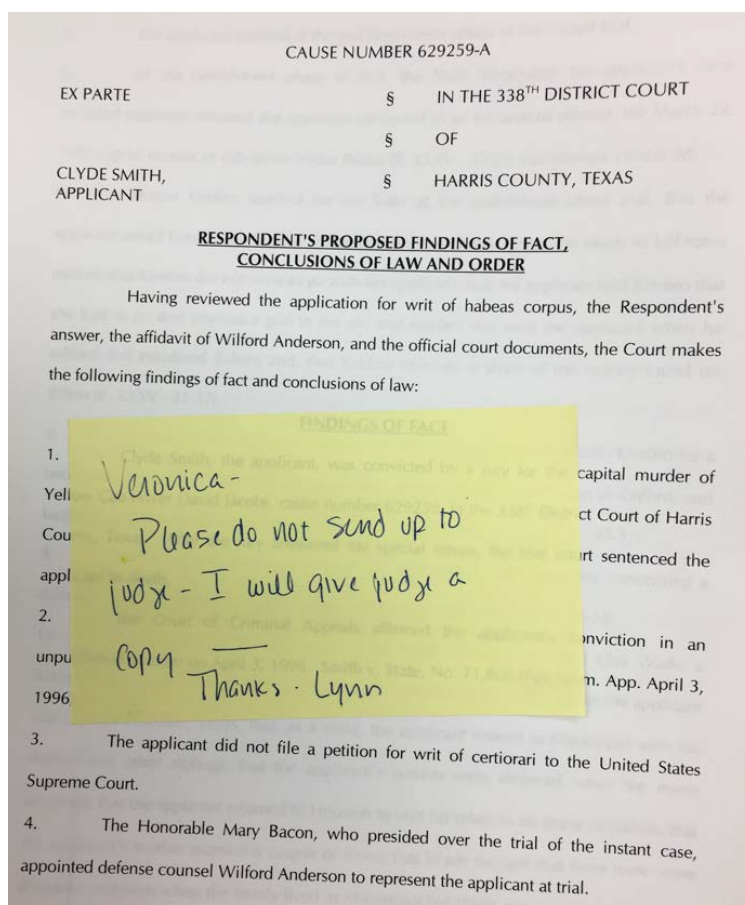
88. *E.g.*, Respondent's Suppl. Proposed Findings of Fact, Conclusions of Law, and Order at 12, *Ex parte* Burton, No. 760321-B, (338th Dist. Ct., Harris County, Tex., Dec. 31, 2008) (47 proposed findings of fact and conclusions of law filed Dec. 5, 2008 and signed by Judge Brock Thomas on Dec. 31, 2008, his last day on the bench); Brock Thomas, https://ballotpedia.org/Brock_Thomas [<https://perma.cc/G2GK-ZVHC>] (last visited Feb. 7, 2018); State's Proposed Findings of Fact, Conclusions of Law, and Order at 51, *Ex parte* Cruz-Garcia, No. 1384974-A (192 proposed findings of fact and conclusions of law filed by the state on Dec. 21, 2016 and adopted by Judge Renee Magee—who had refused to recuse herself from the habeas proceedings despite an allegation of judicial misconduct contained in the pleadings—verbatim on Dec. 29, 2016, two days before her term expired); Applicant's Objections to the Convicting Court's Findings of Fact, Conclusions of Law, and Request for Remand at 16–18, *Ex parte* Cruz-Garcia, WR-85,051–02 (Tex. Crim. App. May 5, 2017); Renee Magee, https://ballotpedia.org/Renee_Magee [<https://perma.cc/Q8NT-HMYZ>] (last visited Feb. 7, 2018); Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 12, *Ex parte* Francois, No. 760321-B (339th Dist. Ct., Harris County, Tex., Dec. 31, 2008) (30 proposed findings of fact and conclusions of law filed Dec. 15, 2008 and signed by Judge Caprice Cospers on Dec. 30, 2008, her second-to-last day on the bench); Mark Bennett, *Judge Caprice Cospers*, DEFENDING PEOPLE: CRIMINAL DEFENSE AND FREE SPEECH (May 21, 2008), <http://blog.bennettandbennett.com/2008/05/judge-cosper/> [<https://perma.cc/2EPA-EY3T>]; State's Proposed Findings of Fact, Conclusions of Law, and Order at 58, *Ex parte* Prevost, No. 1414421-A (351st Dist. Ct., Harris County, Tex., Jan. 3, 2017) (243 proposed findings of fact and conclusions of law filed by the state on Dec. 22, 2016; in Prevost's case, incoming Judge George Powell signed and adopted the state's proposed findings on the third day of his term, while outgoing Judge Mark Ellis signed an identical copy of the prosecutors' proposed findings on Jan. 17, 2017, despite having left the bench on Dec. 31, 2016); George Powell, https://ballotpedia.org/George_Powell [<https://perma.cc/YYN5-QTT8>] (last visited Feb. 7, 2018).

Several of these notes suggest that Harris County post-conviction prosecutors presented their proposed findings and conclusions to the presiding judge off the record. For example, Clyde Smith was executed in 2006 despite a substantial claim of trial counsel ineffectiveness for failure to investigate and present mitigating evidence. Although post-conviction investigation revealed that Smith was abused as a child by his mother and her five husbands, the penalty phase mitigation presentation offered a sanitized, incomplete picture of Smith's childhood. The State's proposed findings credited the affidavit of trial counsel, who stated that he "discovered nothing unusual regarding [Smith]'s background in defense counsel's numerous conversations" with Smith and his family members.⁸⁹ The sequence of filings in Smith's proceedings proved hard to recreate,⁹⁰ and a review of the hard-copy post-conviction file kept at the Harris County District Clerk's warehouse revealed multiple unsigned copies of the state's proposed findings, including one without a signature but date-stamped in the signature line "04/21/99," and a signed copy dated July 27, 2000. Multiple yellow sticky notes reflecting communications between the judge, the prosecutors, and the post-conviction clerks were found in the file on various copies of the proposed findings, including an undated note from a former

89. Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 5, *Ex parte* Smith, No. 629259-A (338th Dist. Ct., Harris County, Tex., July 27, 2000).

90. The Judicial Information Management System used to track Harris County criminal cases but does not indicate a filing date for the proposed findings of fact and conclusions of law, and the earliest file stamp on a copy of the state's proposed findings found in the file is August 10, 1998. Respondent's Proposed Findings of Fact, Conclusions of Law and Order at 8, *Ex parte* Smith, No. 629259-A (338th Dist. Ct., Harris, County, Tex. Aug. 10, 1998).

post-conviction prosecutor: “Veronica - Please do not send up to judge—I will give judge a copy—Thanks, [prosecutor].”⁹¹

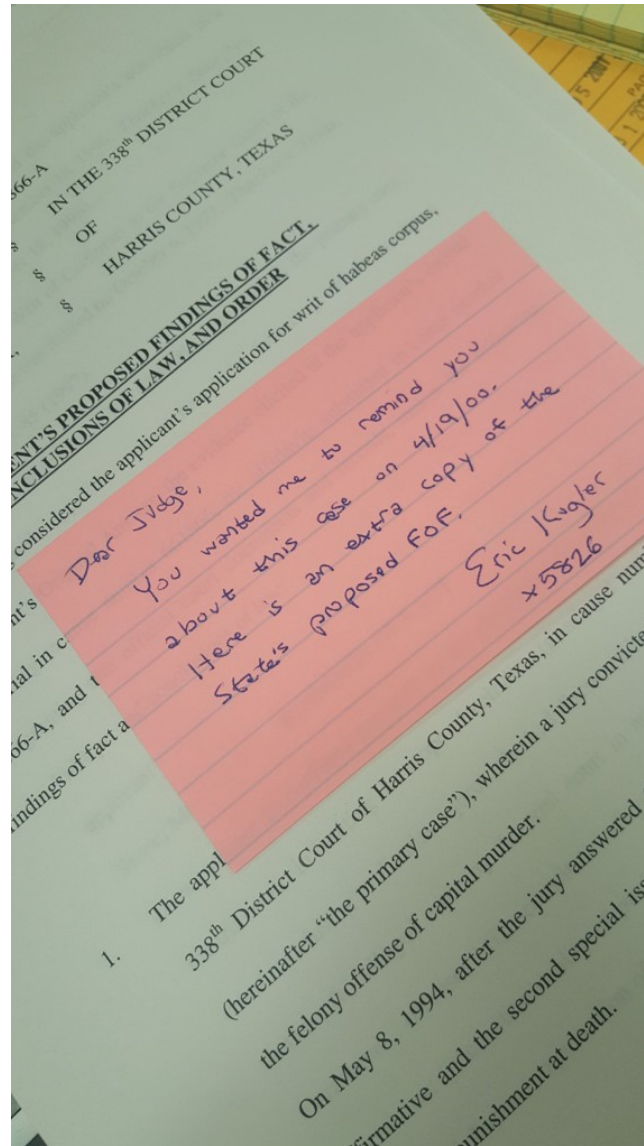


In another example, the note in the file seems to reference previous *ex parte* communications between the prosecutor and the judge. Charles Thacker raised several ineffective assistance of counsel claims in his application for a writ of habeas corpus, and the State attached an affidavit from trial counsel to its answer to undermine Thacker’s assertions.⁹² On the signed copy of the “Respondent’s Proposed Findings of Fact and Conclusions of Law” found in the Harris County District Clerk’s file, a sticky

91. Respondent’s Proposed Findings of Fact, Conclusions of Law, and Order at 1, *Ex parte* Smith, No. 629259-A, prosecutor’s note to Presiding Judge (338th Dist. Ct., Harris County, Tex Apr. 21, 1999) (photographed by study authors on July 26, 2017, during a file review in original post-conviction file in Harris County Clerk Warehouse, 1301 Franklin St.).

92. Respondent’s Proposed Findings of Fact, Conclusions of Law, and Order at 6, *Ex parte* Thacker, No. 661866-A (338th Dist. Ct., Harris County, Tex., Jul. 11, 2000).

note from post-conviction prosecutor Eric Kugler reads, “Dear Judge, **you wanted me to remind you about this case on 4/19/00.** Here is an extra copy of the State’s proposed FOF. Eric Kugler x 5826.”⁹³



93. Respondent’s Proposed Findings of Fact, Conclusions of Law, and Order at 1, *Ex parte* Thacker, No. 661866-A (338th Dist. Ct., Harris County, Tex., Jul. 11, 2000) (Photographed by study authors on July 21, 2017, during a file review in original post-conviction file in Harris County Clerk Warehouse, 1301 Franklin St.).

D. Signs of Perfunctory Review, Including Uncorrected Drafting Mistakes and Proofreading Errors, Appear in Many Findings of Fact and Conclusions of Law Adopted by the Trial Courts.

Misspellings, misnumbering, and other typographical errors are scattered throughout many of these official documents, suggesting that the court either did not read—or gave no more than cursory attention to—the State-authored findings before signing and adopting them in their entirety.

In *Ex parte Thompson*, Judge Denise Bradley signed the State's proposed findings of fact and conclusions of law just one day after the State filed them, on February 8, 2013.⁹⁴ This was all the more extraordinary in light of the facts that (1) *she was not presiding over the case*; and even if she had been assigned to the case, (2) she adopted the State's findings ten days *before* Thompson filed his proposed findings. On February 22, 2013, the judge presiding over the case—Judge Doug Shaver—signed an identical copy of the State's proposed findings. Three days later, Judge Denise Bradley issued an order acknowledging that she was not presiding over the case and rescinded her findings, which were “signed in error.”⁹⁵ Less than two months later, the Court of Criminal Appeals adopted the findings and conclusions of the trial court and followed the lower court's recommendation, denying Thompson relief.⁹⁶ However, the CCA order also noted that the “State's Proposed Findings of Fact, Conclusions of Law and Order” signed by the trial court included an erroneous characterization of a witness's testimony as a punishment phase rather than a guilt-innocence phase witness⁹⁷ and had reached the merits of several non-cognizable claims.⁹⁸

In another example suggesting perfunctory review, Judge Michael McSpadden signed and adopted the State's 99 proposed findings of fact and conclusions of law in Kevin Kincy's case despite multiple misnumberings throughout the document, including on the last page right above the signature line.⁹⁹ Though

94. Findings of Fact, Conclusions of Law, *Ex parte Thompson*, No. 782657-A (262d Dist. Ct., Harris County Tex., Feb. 8, 2013).

95. Order, *Ex parte Thompson*, No. 782657-A (262d Dist. Ct., Harris County Tex., Feb. 25, 2013).

96. *Ex parte Thompson*, Nos. WR-78,135–01, –02, 2013 WL 1655676, at * 1 (Tex. Crim. App. Apr. 17, 2013).

97. *Id.*

98. *Id.*

99. Respondent's Amended Proposed Findings of Fact, Conclusions of Law, and Order at 15, 16, 20, *Ex parte Kincy*, No. 663162-A (209th Dist. Ct., Harris County Tex. Apr. 18, 2001) (misnumberings in findings of fact).

the findings and conclusions in Dexter Johnson’s case are entitled “The Trial Court’s Findings of Fact and Conclusions of Law,” the document itself bears multiple indications that the post-conviction prosecutor produced it, including identical misnumberings in both the “Respondent’s Proposed” and “Trial Court’s” findings and conclusions.¹⁰⁰ And Judge Marc Carter, adopted all 254 state-authored findings verbatim in Anthony Medina’s case—with the result that the official findings of fact and conclusions of law recommending denial of relief on an ineffective assistance of trial counsel claim consistently misspelled trial counsel’s name throughout.¹⁰¹ Despite indications of perfunctory review in the convicting courts, the CCA accepted the state-authored findings in virtually all of the above cases, denying relief with little or no change to the rubber-stamped findings.¹⁰²

IV. THE TEXAS COURT OF CRIMINAL APPEALS’ TOLERATION OF FLAWED FACT-FINDING PRACTICES IN HARRIS COUNTY

The CCA’s reticence to intervene in trial court practices is most evident where the text of the trial court’s findings of fact and conclusions of law contain blatant errors or unsupportable assertions, but is not limited to those cases. The unquestioning deference to post-conviction prosecutors that is pervasive throughout the Harris County courts is particularly problematic in light of the requisite statutory deference to trial court findings of fact and lack of de novo review in the CCA. Thorough and discerning review of a trial courts’ findings of fact, conclusions of

100. Respondent’s Proposed Findings of Fact, Conclusions of Law, and Order at 20–21, *Ex parte Johnson*, No. 1085483-A (208th Dist. Ct., Harris County, Tex. Feb. 12, 2010) *cf.* Trial Court’s Findings of Fact, Conclusions of Law, and Order at 20–21, *Ex parte Johnson*, No. 1085483-A (208th Dist. Ct., Harris County, Tex. Feb. 24, 2010).

101. Respondent’s Proposed Findings of Fact, Conclusions of Law, and Order at 34, *Ex parte Medina*, No. 726088-B (228th Dist. Ct., Harris County Tex. Apr. 25, 2008) (misspelling co-counsel Jack Millin’s name “Mullin” and “Mullins”).

102. See Part II(D) and accompanying text. *Ex parte Burton*, No. WR-64,360–02, 2009 WL 1076776, at *1 (Tex. Crim. App. Apr. 22, 2009); *Ex parte Francois*, No. WR-71,345–01, 2009 WL 624006, at *1 (Tex. Crim. App. Mar. 11, 2009); *Ex parte Freeney*, No. WR-78,109–01, 2014 WL 333695, at *1 (Tex. Crim. App. Jan. 29, 2014); *Ex parte Gates*, No. WR-69,637–01, 2008 WL 3856718, at *1 (Tex. Crim. App. Aug. 20, 2008); *Ex parte Johnson*, No. WR-73,600–01, 2010 WL 2617804, at *1 (Tex. Crim. App. Jun. 30, 2010) (with the exception of footnotes 1, 2, 5, 10–13, & 17); *Ex parte Kincy*, No. WR-50,266–01, at 2 (Tex. Crim. App. Nov. 21, 2001); *Ex parte Medina*, Nos. WR-41,274–02, –04, 2009 WL 2960466, at *1 (Tex. Crim. App. Sept. 16, 2009); *Ex parte Rivers*, No. WR-53,608–02, 2007 WL 2660291, at *1 (Tex. Crim. App. Sept. 12, 2007) (with the exception of finding 27); *Ex parte Russell*, No. WR-78,128–01, 2013 WL 6212211, at *1 (Tex. Crim. App. Nov. 27, 2013); *Ex parte Thompson*, Nos. WR-78,135–01, –02, 2013 WL 1655676, at *1 (Tex. Crim. App. Apr. 17, 2013).

law, and recommendation occurs only in the rare instance in which the trial court recommends that relief be *granted*. In one such case, the petitioner, Eric Cathey, raised a substantial *Atkins* claim in a subsequent application, and his case was remanded to the trial court for a live hearing. In its remand order, the CCA gave the trial court explicit directions on the factual issues to be developed.¹⁰³ After conducting a five-day hearing, presiding Judge Shawna Reagan adopted Cathey's proposed findings and recommended relief on her last day in office, December 31, 2012.¹⁰⁴ The CCA rejected the trial court's findings and recommendation and instead denied Cathey relief. In its lengthy order, the CCA pointed out that the habeas judge signed the findings recommending relief on her last day in office and concluded that "the record does not support the habeas judge's factual findings or legal conclusions."¹⁰⁵ And yet the CCA has adopted numerous rubber-stamped recommendations that relief be *denied* that were signed by trial judges on their way off the bench without reservation.¹⁰⁶ The recommendation of relief in Eric Cathey's case was one of only three confirmed instances in which the Harris County courts have adopted an *applicant's* proposed findings of fact and conclusions of law in a contested case since the passage of Article 11.071 in 1995.¹⁰⁷

V. UNRELIABLE RESULTS: A FEW ILLUSTRATIONS OF FLAWED FACT-FINDING PRACTICES IN HARRIS COUNTY

The failure of Harris County state post-conviction courts to afford fair and reliable consideration of inmates' constitutional claims becomes apparent when individual cases are examined closely. Anthony Medina's state habeas proceedings reflect a case in which the prosecutor alone controlled the fact-finding process, resulting in findings inconsistent with the trial record. The findings of fact and conclusions of law in Dexter Johnson's case suggest that the problem of one-sided rubber-stamping might be more prevalent than a review of document headings would

103. *Ex parte* Cathey, No. WR-55,161-02, 2008 WL 4927446, at *1 (Tex. Crim. App. Nov. 18, 2008).

104. Order at 2, *Ex parte* Cathey, No. 713189-B (176th Dist. Ct., Harris County Tex. Dec. 31, 2012).

105. *Ex parte* Cathey, 451 S.W.3d 1, 4 (Tex. Crim. App. 2014).

106. See *supra* note 88 and accompanying text (discussing expedient judicial adoptions of the state's proposed findings of fact and conclusions of law as judges depart after an election loss).

107. *Ex parte* Brown, No. 636535-B (351st Dist. Ct., Harris County Tex., Dec. 19, 2016); *Ex parte* Cathey, *supra* note 127; *Ex parte* Nelson, No. 483164-B (178th Dist. Ct., Harris County Tex., Dec. 28, 2012).

indicate because the trial court chose not to sign the prosecutor's proposed findings only to reproduce the identical findings and issue them as its own. Steven Butler's case provides the rare example of a case in which a CCA judge expressed dismay with the rubber-stamping process in the Harris County trial court. The case of Martin Draughon demonstrates that Harris County's rubber-stamping process will inevitably fail to vindicate meritorious claims.

A. Anthony Medina.

Anthony Medina's state habeas proceedings are illustrative of a case in which the central fact-finding role was played by the prosecutor: it is clear that the post-conviction prosecutor authored not only the state court findings of fact and conclusions of law, but the affidavits of critical actors on which the findings relied, including the affidavit submitted by Medina's trial lawyer in response to a substantial claim of ineffective assistance of counsel. Medina's case was the last of four unrelated capital cases that his lead counsel tried over a seven-month period. Lead counsel was in trial on the first of these four cases when appointed to Medina's case and, despite trying two other capital cases in the interim, he took Mr. Medina's case to trial just six months after being appointed. Second chair counsel tried two other capital murder cases during the six months between his appointment in Medina's case and taking it to trial. He was also fatally ill during trial and passed away during the month following the verdict.¹⁰⁸

In his state habeas application, Medina alleged that his attorneys' pre-trial investigation was deficient in numerous respects. For example, Medina alleged that counsel failed to secure records showing Medina's good behavior in the Harris County jail prior to trial. Lead counsel's post-conviction affidavit in response stated that the omission was a strategic decision because "juries are typically not impressed" with an argument that a defendant posed no problems in jail.¹⁰⁹ However, the record shows that the defense argued just that—that Medina posed no problems in jail—during his closing argument and was shut down by a state objection due to the lack of evidence in the record.¹¹⁰ In addition to being squarely contradicted by the record, a reviewing court might

108. Application for Writ of Habeas Corpus by a Person Sentenced to Death at 28–33, *Ex parte* Medina, No. 726088-B (228th Dist. Ct., Harris County, Tex. Apr. 10, 2001).

109. Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, Ex. C at 3, *Ex parte* Medina, No. 726088-B (228th Dist. Ct., Harris County, Tex. Apr. 25, 2008).

110. Application at 131–33, *Ex parte* Medina, No. 726088-B (228th Dist. Ct., Harris County, Tex. Apr. 10, 2001).

have found lead counsel's post-conviction affidavit suspect for another reason. The second chair counsel's last name was "Millin," and lead counsel had tried other cases with him the past. Yet, lead counsel's affidavit referred to his co-counsel as "Mullin" throughout.¹¹¹ This same misspelling of the co-counsel's name appeared throughout the prosecutor's pleadings, including her answer to Medina's application and her proposed findings of fact,¹¹² leaving no doubt that these documents were all prepared by the same person. Despite the consistent misspelling of a central actor in the case and assertions clearly contradicted by the trial transcript, the trial court rubber stamped all 254 of the state's proposed findings of fact and conclusions of law—which repeatedly relied on the "credible" affidavit of trial counsel—without so much as changing the heading, let alone addressing the inaccuracies of the findings themselves.¹¹³

B. Dexter Johnson.

While the number of trial court findings that bear the "State's Proposed" caption is high, the findings of fact and conclusions of law in Dexter Johnson's case suggest that the problem of one-sided rubber-stamping may be more prevalent than a review of document headings would indicate. Instead of a signed copy of the prosecutor's proposed findings summarily adopted as the findings and conclusions of the trial judge, the findings of fact and conclusions of law document in Johnson's case is captioned "The Trial Court's Findings of Fact and Conclusions of Law and Order of the Court."¹¹⁴ However, a line-by-line comparison against the state's proposed findings and conclusions indicates that the two documents are entirely identical in substance, with the exception that the court's findings do not bear the prosecutor's signature block or certificate of service and the spacing has been rearranged to make up for the extra room left at the bottom of the last page by the omission of the signature block.¹¹⁵ The prosecutor's proposed

111. Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, Ex. C, *Ex parte* Medina, No. 726088-B (228th Dist. Ct., Harris County, Tex. Apr. 25, 2008).

112. See e.g., Respondent's Proposed Findings of Fact, Conclusions of Law and Order at 34–35, *Ex parte* Medina, No. 726088-B (228th Dist. Ct., Harris County Tex. Apr. 25, 2008).

113. Findings of Fact, and Conclusions of Law at 34–35, *Ex parte* Medina, No. 726088-B (228th Dist. Ct., Harris County, Tex. May. 26, 2008). Mr. Marcus is currently counsel for Mr. Medina in federal habeas corpus proceedings but did not represent Medina in the state proceedings described herein.

114. Trial Court's Findings of Fact, Conclusions of Law, and Order at 1, *Ex parte* Johnson, No. 1085483-A (208th Dist. Ct., Harris County, Tex. Feb. 24, 2010).

115. *Id.* at 21–22; Respondent's Proposed Findings of Fact, Conclusions of Law, and

findings and the trial court's adopted findings are written in the same distinctive font and share the same mistake in numbering in the final set of conclusions of law. Both sets are file-stamped on February 24, 2010, and Judge Denise Collins signed the document captioned "The Trial Court's Findings" on the same day.

The issues in Johnson's case were not boilerplate—he had a history of low IQ scores, schizophrenia, brain damage, and learning difficulties, and the claims raised in his habeas application attack both the voluntariness of his statements to police and the effectiveness of his appellate counsel.¹¹⁶ However, circumstances indicate that the trial judge either signed the findings authored by the state the very same day they were filed (changing the heading herself), received an *ex parte* copy of the state's proposed findings to consider before they were filed with the court, or was provided with a clean and revised copy of the state's proposed findings by the prosecutor to further streamline the rubber-stamping process. Out of 185 sets of findings recommending that relief be denied in contested cases, sixteen of the eighteen sets that are not captioned "State's [or Respondent's] Proposed Findings" are nevertheless identical in substance—like in Dexter Johnson's case—with only minor cosmetic changes.

C. *Steven Butler*.

Steven Butler's is the rare case in which a CCA judge expressed dismay with the rubber-stamping process in the Harris County trial courts. Butler's first subsequent post-conviction writ raising an *Atkins* claim was denied in 2007,¹¹⁷ after a hearing in which Dr. George Denkowski testified for the state.¹¹⁸ Despite Butler's extensive evidence of intellectual disability, including an IQ score of 69 (administered by Denkowski himself in 2006) and testimony from a defense expert contradicting and refuting Denkowski's statements and methodology, the trial court adopted the state's proposed findings verbatim and denied relief based in

Order, at 21–22, *Ex parte* Johnson, No. 1085483-A (208th Dist. Ct., Harris County, Tex. Feb. 24, 2010).

116. See Trial Court's Findings of Fact, Conclusions of Law, and Order at 2, 4–5, 13–14, *Ex parte* Johnson, No. 1085483-A (208th Dist. Ct., Harris County, Tex. Feb. 24, 2010).

117. *Ex parte* Butler, 416 S.W.3d. 863, 863–64 (Tex. Crim. App. 2012) (per curiam).

118. *Id.* at 863–64.

large part on Denkowski's evaluation, affidavit, and testimony.¹¹⁹ Butler then sought relief in federal court.

Denkowski was subsequently disciplined by the Texas State Board of Examiners of Psychologists and entered into a settlement agreement with the State of Texas to no longer engage in intellectual disability evaluations of death-row inmates.¹²⁰ The Court of Appeals for the Fifth Circuit then granted Butler's request for a stay of the federal proceedings to return to state court for reconsideration of his *Atkins* claim.¹²¹ The CCA revisited the prior habeas denial on its own motion,¹²² remanding the cause to the trial court "to allow it the opportunity to re-evaluate its initial findings, conclusions, and recommendation in light of the Denkowski Settlement" and inviting the convicting court to "order affidavits or hold a live hearing if warranted."¹²³

On remand, Butler offered new affidavits and moved for a hearing, but the trial court announced that it would not reconsider its *Atkins* ruling and did not rule on the hearing request. Instead, the court ordered the state to submit a new set of proposed findings (without requesting the same from Butler) and signed the state's proposed findings without a single change on February 28, 2012.¹²⁴

The state's "new" findings merely removed the word "credible" from the existing citations to "the credible affidavit of Dr. Denkowski." At least nineteen findings of fact were edited this way (#57, 60, 62, 63, 69, 70, 71, 74, 75, 76, 85, 88, 90, 92, 93, 94, 95, 96, 97); in two conclusions of law the citation to "the credible affidavit of Dr. Denkowski" is removed entirely, but the conclusions are otherwise copied verbatim from the prior findings. Butler filed objections to the trial court's wholesale adoption of the thinly-revised findings of fact and conclusions of law, but the CCA affirmed the trial court's denial of relief.¹²⁵ The case is remarkable for the lengthy dissent, authored by Judge Price and

119. *Id.* at 872–73, 878–81 (Price, J., dissenting).

120. *See* Maldonado v. Thaler, 625 F.3d 229, 234 (5th Cir. 2010) (noting the proceedings brought against Denkowski in the State Office of Administrative Hearings); Pierce v. Thaler, 604 F.3d 197, 213 (5th Cir. 2010) (noting that the CCA had recently found Denkowski's credibility to be lacking in *Ex parte* Plata, No. AP-75,820, 2008 WL 151296 (Tex. Crim. App., Jan. 16, 2008)).

121. *See Ex parte* Butler, 416 S.W.3d. at 863.

122. In most cases where the state relied on testimony from Denkowski to combat a claim of intellectual disability, the CCA exercised its authority to revisit prior determinations on its own motion, as in *Ex parte* Butler, No. WR-41,121–02, 2011 WL 6288411, at *1 (Tex. Crim. App. Dec. 14, 2011) (per curiam).

123. *Id.*

124. State's Proposed Findings of Fact, Conclusions of Law, and Order Following Remand, *Ex parte* Butler, No. 511112-B (185th Dist. Ct., Harris County, Tex. Feb. 28, 2012).

125. *Ex parte* Butler, 416 S.W.3d. at 864.

joined by Judge Johnson, lamenting both the rubber-stamping and lack of meaningful engagement in the trial court, and criticizing the majority's adoption of the lower court recommendation.¹²⁶ The dissenters "would [have] reject[ed] the convicting court's recommended findings of fact and conclusions of law as insupportable,"¹²⁷ asserting that although the case was remanded for reconsideration, "[t]he convicting court has apparently refused to avail itself of this opportunity."¹²⁸ Despite the minor revisions in the findings on remand, Judge Price found that "[n]either the amendments themselves nor the process by which they were made inspire confidence."¹²⁹

D. Martin Draughon.

The case of Martin Draughon illustrates how meaningful review can make a difference in constitutional adjudication. Draughon was denied relief based on findings that were authored by Harris County prosecutors and rubber-stamped by both the habeas court and the CCA. Draughon thereafter won relief in federal court.

Draughon was charged and convicted of capital murder during the course of a robbery.¹³⁰ At trial, Draughon testified that he fired his gun aiming above the crowd from a pick-up truck bed as he and his codefendant were fleeing the robbery. Draughon testified that he did not intend to hurt anyone and did not know at the time that he had in fact shot someone. The state presented expert testimony that the bullet that killed the decedent showed no signs of a ricochet and was likely fired at close range; the defense did not present any ballistics testimony to counter the state's narrative. In his state habeas petition, Draughon raised an ineffective assistance of counsel claim for failure to investigate and present ballistics evidence, offering an affidavit from Dr. Vincent DiMaio stating that the bullet found at the autopsy showed signs of a ricochet/impact before contact with the victim. Draughon also offered an affidavit from his codefendant Gafford corroborating Draughon's version of events and asserting that Gafford had shared this information with police at the time of arrest. The trial court found that no evidentiary hearing was necessary and signed the state's proposed findings declaring Draughon's evidence

126. *Id.* at 878, 883–84 (Price, J., dissenting).

127. *Id.* at 883–84.

128. *Id.* at 880.

129. *Id.* at 881.

130. *Draughon v. State*, 831 S.W.2d 331, 333 (Tex. Crim. App. 1992).

incredible and rejecting the ineffective assistance of trial counsel claim. The CCA in turn adopted the prosecutor-authored findings and denied relief.¹³¹

However, the federal district court found deficient representation and granted both guilt- and penalty-phase relief, holding that the state courts' decision that Draughon received effective assistance was an unreasonable application of federal law.¹³² In its opinion affirming the district court decision, the Fifth Circuit noted:

[T]he crux [of the district court's holding] was that . . . the [ballistics] evidence [offered in post-conviction] should have been presented in the state trial. The court found that had this evidence been adduced at trial, it would have directly confronted the state's core theory. . . [and] the state court's rejection of the *Strickland* claim was an unreasonable application of federal law.¹³³

The Fifth Circuit agreed that there existed a "reasonable probability of a different outcome" had his trial counsel properly investigated the merits of Draughon's claim.¹³⁴ Not only did the federal courts find the state court's decision that trial counsel was effective to be unreasonable, but also that the facts developed at the federal evidentiary hearing directly contradicted the findings written by Harris County prosecutors and rubber-stamped by the trial court and accepted by the CCA.

VI. FACTORS CONTRIBUTING TO THE RUBBER-STAMPING PHENOMENON

The widespread practice in Harris County of rubber-stamping state-proposed findings results from a myriad of factors. State trial courts lack the resources of state appellate and federal courts and are ill-equipped to independently produce lengthy orders containing independent findings. Such resource deficiencies were likely exacerbated by the sheer volume of capital cases that moved through the Harris County courts from the late 1980s onward. Additionally, locating non-record fact finding in the court of conviction undermines independent decision-making. Although this practice is designed for efficiency (the trial judge is already familiar with many of the details of the case), it creates a problem

131. Order, *Ex parte Draughon*, No. WR-27,511-02, at 2 (Tex. Crim. App. May 9, 2001) (per curiam).

132. *Draughon v. Dretke*, 427 F.3d 286, 295-98 (5th Cir. 2005).

133. *Id.* at 294.

134. *Id.* at 297.

of dissonance: a trial judge who has presided over a capital trial yielding a conviction and death sentence is invested in the underlying fairness and accuracy of that result. The selection of state trial judges in Texas—through partisan elections—also places pressures on those judges to err on the side of the prosecution, contributing to the rubber-stamping phenomenon. Moreover, the common career trajectory of state trial judges in Harris County—moving from the District Attorney’s office to the bench—creates an unseemly collaborative ethos between judges and prosecutors, as reflected in a number of the cases discussed above.

A. Resources

Trial judges in Harris County, unlike judges on the CCA or in federal court, do not have law clerks to assist in preparing lengthy opinions or orders. In most litigation, this deficiency is not significant, as many trial orders are short or issued from the bench. In capital habeas litigation, though, the number and complexity of issues (both factual and legal) make it exceedingly difficult for judges to independently produce lengthy, detailed, and independent findings. The temptation to simply sign proposed findings in this context is very strong, as is borne out by the astonishing rate of rubber-stamped orders. The frequency of rubber-stamping in Harris County was likely compounded by the unprecedented volume of capital cases moving into state habeas beginning in the 1990s and continuing through the first decade of the twenty-first century: Harris County sent more than 50 inmates to death row in the five-year period 1999–2003 alone, which amounts to more inmates than the entire state of Texas has sent to death row over the past seven years.¹³⁵ In many jurisdictions, state trial judges will rarely see multiple capital post-conviction applications. In Harris County, multiple applications were the norm, putting additional pressure on judges already managing high volume dockets.

B. Locating Post-Conviction Review in the Court of Conviction

Many jurisdictions, like Texas, locate post-conviction review in the court of conviction.¹³⁶ This choice is premised on the efficiency gains associated with giving decision-making authority to a trial

135. FAIR PUNISHMENT PROJECT, *supra* note 20, at 47–48.

136. King, *supra* note 9, at 220.

judge familiar with the underlying pre-trial proceedings and trial. But there are real costs to allocating jurisdiction in this way: asking trial judges to pass on the fairness and accuracy of trials over which they presided creates a problem of dissonance. Judges who have expended hundreds of hours of court time and likely hundreds of thousands of dollars of county resources are often understandably hesitant to find reversible error necessitating a new trial. Moreover, in some cases the errors complained of on state post-conviction are errors that the trial judge might have avoided with better oversight, such as the failure of trial counsel to present any mitigating case at punishment. The purported efficiency gains of the practice are also overstated. The central purpose of state post-conviction is to uncover and examine facts *outside* of the trial record. The trial judge is often in no better position to assess the persuasiveness of such claims than a judge with no exposure to the original trial. The role of dissonance in producing rubber-stamped orders is confirmed in part by the much higher rate at which relief is recommended by trial courts in cases where the Harris County judge assigned to the post-conviction proceeding had not presided over trial.¹³⁷

C. Trial Judge Selection

State trial judges in Texas are selected through partisan elections and there is no retention mechanism other than to stand for re-election. This level of popular control creates obvious disincentives against granting relief in post-conviction. Judges are justifiably concerned that a grant of relief will be used against them in subsequent elections. Moreover, given that the post-conviction judge presided over trial, a decision to grant relief is an acknowledgement that the judge somehow “allowed” the original trial to be defective. Many Texas trial judges campaign on “tough-on-crime” platforms, and some have even gone so far as to take credit for capital convictions obtained in their courtroom.¹³⁸

137. See, e.g., *Ex parte Brown*, No. WR-26,178-03, 2017 WL 4675396, at *12 (Tex. Crim. App. Oct. 18, 2017); *Ex parte Cathey*, 451 S.W.3d at 4-6; *Ex parte Maldonado*, No. WR-51,612-02, 2013 WL 2368771, at *1 (Tex. Crim. App. May 22, 2013); *Ex parte Sheppard*, No. WR-78, 132-01, 2013 WL 5568434, at *1-2 (Tex. Crim. App. Oct. 9, 2013).

138. Jordan M. Steiker, *Penry v. Lynaugh: The Hazards of Predicting the Future*, in DEATH PENALTY STORIES 277, 316 (John H. Blume & Jordan M. Steiker eds., 2009) (quoting from the campaign reelection literature of former Judge Elizabeth Coker who, distributed materials declaring, “[c]riminals fear walking into Judge Coker’s courtroom because they know her reputation for handing down tough sentences. When the John Paul Penry capital murder trial came before her court in 2002, Judge Coker cleared the way for the jury to issue a death sentence.”).

The politicization of the judicial function is compounded by the informal career track of state trial judges in Harris County, which sees many prosecutors in the district attorney's office running for and then occupying seats on the bench.¹³⁹ The presence of former prosecutors on the bench contributes to some of the informality in communications between prosecutors and judges seen in some of the cases discussed above. The frequent movement of former prosecutors to Harris County trial courts likely increases the dynamic of rubber-stamping findings. Prosecutors who have participated in the practice of drafting proposed findings (and who have become accustomed to the rubber-stamped acceptance of those findings in state post-conviction) are likely less inclined to reflect upon and reject that practice when they join the bench.

D. No Consequences for Trial Courts' Rubber-Stamping Approach

Though a variety of institutional, historical, and structural circumstances have contributed to the prevailing rubber-stamping practice, the most likely explanation for the sustained embrace of the practice in Harris County is the willingness of the CCA and federal courts to accept fact findings generated in such a fashion. The CCA is no doubt aware of the ubiquity of rubber-stamping and yet affords deference to such findings in the same manner as those produced after more extensive, independent proceedings (evidentiary hearings followed by independent court-drafted orders). Similarly, federal courts within the Court of Appeals for the Fifth Circuit routinely defer to fact findings contained in rubber-stamped state-proposed orders, insisting such deference is mandated by the federal habeas statute. So long as rubber-stamping continues to receive the imprimatur of the CCA and the federal courts, state post-conviction judges have little incentive to abandon the practice.

VII. RESPONSES TO RUBBER-STAMPING

There are several possible state-level responses to the post-conviction rubber-stamping phenomenon in Harris County. State statutory law could be amended to require post-conviction courts to make independent findings and to prohibit wholesale adoption of proposed findings. The CCA could exercise its

139. See *supra* note 87 and accompanying text. At least 37 of 47 judges (80%) who signed findings of fact and conclusions of law encompassed in this study were formerly employed by the Harris County District Attorney's office; several of the judges who were *not* previous employees were visiting judges without a regular Harris County docket.

supervisory authority to discourage the practice by remanding cases involving rubber-stamped findings for further consideration. Finally, Texas could choose to eliminate the state post-conviction forum in capital cases, channeling post-conviction claims directly to federal court.

Each of these potential responses has strengths and weaknesses. Amending 11.071 section 9 to require “independent” findings and to discourage wholesale adoption of one party’s proposed findings might send a sufficient signal to trial courts to improve their practices. But the requirement of “independent” findings would be illusory if trial judges maintain their prevailing practice of resolving factual disputes without hearings and without any genuine adversarial engagement. Courts could essentially continue on their current course by merely tinkering with state-proposed findings and passing them off as their own (as was done by trial judges in some of the cases described above). Moreover, if the lack of resources is a strong contributing factor to the problem, mandating independent findings would not be enough: funds would need to be allocated to facilitate robust, independent review in state post-conviction.

The CCA is in a comparatively better position than the legislature to end the prevailing undesirable practice. Because the CCA is ultimately responsible for disposing of post-conviction writs, it can communicate clearly and frequently what it expects in terms of trial court fact finding and decision-making. The failure of the CCA to do so thus far reflects some of the same problems contributing to rubber-stamping approach at the trial court level. CCA judges are selected in partisan elections and disproportionately possess prosecutorial backgrounds. Texas is one of only two states in the country with a separate high criminal court; the separation of criminal and civil courts at the top of state justice systems, especially when combined with partisan elections, amplifies the pressure on judges to favor prosecution over defendant interests in the run of cases. No one runs for statewide judicial office on the platform of increasing protection for criminal defendants. These pressures notwithstanding, the CCA could enhance the reliability of capital proceedings by insisting post-conviction courts engage in their own fact-finding.

Alternatively, Texas could forego capital state post-conviction proceedings altogether. Where states fail to afford death-sentenced inmates a forum for litigating their non-record claims, inmates can bring such claims directly to federal court; in such circumstances, federal district courts are authorized to hold evidentiary hearings on contested issues of fact and to decide those

factual disputes de novo. This approach would be preferable to the status quo. Instead of having two sets of courts expend resources litigating federal constitutional claims—and having neither of those courts engage the underlying facts in a meaningful and reliable way—the elimination of state post-conviction would ensure one real opportunity for federal constitutional norm enforcement.

Absent corrective action by the state, federal courts should refuse to embrace rubber-stamped findings. Under prevailing federal habeas law, habeas relief cannot be granted on constitutional claims “adjudicated on the merits in State court” unless the state court adjudication involved unreasonable legal or factual determinations.¹⁴⁰ As a threshold matter, although federal courts typically regard a state court order denying relief on a prisoner’s claims as an “adjudication on the merits,”¹⁴¹ the presumption is rebuttable.¹⁴² Federal courts faced with rubber-stamped findings should look closely to see whether the state court engaged in genuine fact-finding. When a rubber-stamped order is accompanied by other indicia that the trial judge did not attempt to engage contested issues of fact, a federal habeas court should not indulge the fiction of an “adjudication.”

Prevailing doctrine treats the question of “[w]hether a claim has been adjudicated on the merits [as] a case-specific inquiry.”¹⁴³ An “adjudication on the merits” in the federal habeas context requires that a *court* has “heard and *evaluated* the evidence and the parties’ substantive arguments.”¹⁴⁴ Federal habeas courts accordingly have declined to consider a state court process “an adjudication on the merits” when, for example, state courts failed to allow appropriate development of the record with adequate safeguards.¹⁴⁵ In our view, among the considerations a federal habeas court should consider in assessing whether the state court factfinding process qualifies as an “adjudication on the merits” are whether:

140. 28 U.S.C. § 2254(d) (2012).

141. *Harrington v. Richter*, 562 U.S. 86, 99 (2011) (“When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.”).

142. *Id.*

143. *Winston v. Pearson* (*Winston II*), 683 F.3d 489, 496 (4th Cir. 2012).

144. *Johnson v. Williams*, 568 U.S. 289, 302 (2013) (emphasis in the original).

145. *Winston*, 683 F.3d. at 502; *see also* *Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015) (“A claim is not ‘adjudicated on the merits’ when the state court makes its decision ‘on a materially incomplete record,’ . . . [a] record may be materially incomplete ‘when a state court unreasonably refuses to permit further development of the facts’ of a claim.”) (quoting *Winston II*, 683 F.3d at 496).

- The trial court relied exclusively on the prosecution's evidence, without any indications that the state court engaged the prisoner's evidence and arguments;
- The trial court relied on evidence not in the record and available only to the prosecution;
- The trial court unreasonably refused to permit necessary fact development;
- The trial court only acknowledged and ruled on motions filed by the prosecution;
- The trial court signed the prosecution's proposed findings so soon after their submission such that it could not have ascertained whether they were accurate and supported by the record;
- The rubber-stamped findings include basic errors—such as obvious typographical errors and misspellings—that make clear that the state court failed to review, much less evaluate, the state's order before signing it;
- The trial court signed the prosecution's proposed findings before the petitioner's were filed and available for review, suggesting a complete breakdown of the adversarial process;
- The presence of ex parte contacts between the court and prosecution in the process of rubber-stamping the state's order;
- A trial court's repeated practice of signing state-proposed findings verbatim;
- The prosecution-submitted findings include obvious errors that cannot be squared with the evidence or the record before the state court.

This is not an exhaustive list of factors suggesting a breakdown in the adversarial process, but they are all factors we observed during our review of Harris County cases. Other circumstances might likewise suggest the state court process should not be deemed “an adjudication on the merits.”

Second, even where the state court proceeding qualifies as an adjudication on the merits, the federal habeas statute authorizes relief for state prisoners where a state court decision is “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”¹⁴⁶ The Supreme Court has suggested that a state court determination is

146. 28 U.S.C. §2254(d)(2) (2012).

unreasonable not merely when it is wrong or lacks support, but also when an inmate makes a significant factual showing and the procedure used by the state to arrive at its resolution is deeply flawed.¹⁴⁷ Lower courts and commentators also agree.¹⁴⁸ Rubber-stamping, in combination with some of the above enumerated circumstances—or others that may arise in a particular case, may qualify as a procedurally unreasonable determination of fact under § 2254(d)(2).

The refusal of a state post-conviction court to provide adequate procedure and consideration when a petitioner's claim raises important issues of contested fact, followed by a rubber-stamped order embracing prosecution proposed findings, negates the application of § 2254(d). Restrictions on federal habeas relief should be reserved for cases in which the state court provides an inmate with a meaningful opportunity to be heard and issues an independent decision.

VIII. CONCLUSION

Texas has been the unquestioned leader of the American death penalty in the modern era, accounting for over a third of the executions nationwide since executions resumed in 1977.¹⁴⁹

147. See, e.g., *Brumfield v. Cain*, 135 S. Ct. 2269, 2282–83 (2015) (holding that the failure of state court to hold evidentiary hearing to resolve contested fact issue regarding petitioner's claim of intellectual disability enabled petitioner to overcome § 2254(d)(2) barrier to merits consideration of his claim).

148. See *Milke v. Ryan*, 711 F.3d 998, 1007 (9th Cir. 2013) (“[U]nreasonable determinations ‘come in several flavors,’ one of them being ‘where the fact-finding process itself is defective.’”) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000–01 (9th Cir. 2004)); *Moore v. Hardee*, 723 F.3d 488, 499 (4th Cir. 2013) (“‘[W]here the state court has before it, yet apparently ignores, evidence that supports [the] petitioner’s claim,’ the state court fact-finding process is defective.”) (quoting *Taylor*, 366 F.3d at 1001); *Simmons v. Beard*, 590 F.3d 223, 237 (3d Cir. Pa. 2009) (“A state court’s fact-finding may qualify as unreasonable where ‘the state court . . . had before it, and apparently ignored,’ evidence supporting the habeas petitioner’s claim.”) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003)); *Byrd v. Workman*, 645 F.3d 1159, 1171–72 (10th Cir. 2011) (“[W]here the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner’s claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable”) (quoting *Taylor*, 366 F.3d at 1001) (internal quotations omitted); *Norton v. Spencer*, 351 F.3d 1, 7 (1st Cir. Mass. 2003) (circumstances suggesting the state court failed to actually review evidence it subsequently deemed credible “is an unreasonable determination of the facts.”). See also Hertz & Liebman, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE*, § 20.2[c] n.87 (7th Ed.) (“The word ‘determination’ in section 2254(d)(2) has two meanings in common parlance—the *process* by which a decision is reached, and the *substance* of the decision that is reached . . . Section 2254(d) appears to use the word in both senses.”).

149. See DEATH PENALTY INFO. CTR., *FACTS ABOUT THE DEATH PENALTY* 3, <https://deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/WSK4-KVSN>] (last updated Feb. 23, 2018).

And Harris County has been the unquestioned leader of the Texas death penalty, with more executions than any State during this period (other than Texas itself).¹⁵⁰ An important, and troubling, contributing factor to this success has been the failure of Harris County courts to rigorously and impartially enforce constitutional norms in state post-conviction proceedings. The types of claims raised in these proceedings go to the heart of the fairness of the Texas capital system. It is the sole forum available to challenge ineffective representation at trial and prosecutorial misconduct, among other significant claims.

Despite statutory authority to conduct hearings regarding contested facts, Harris County courts have chosen not to exercise this power. Instead, in the vast majority of cases, Harris County courts have simply signed off on prosecution-authored findings, without regard to whether they comport with the facts on the ground. It is one thing to side with the prosecution in case after case, it is quite another to brazenly conclude, without the benefit of live testimony, that every single assertion by the state is true and every assertion by a petitioner is false. Close examination of post-conviction litigation in Harris County reveals the process to be even worse, with trial judges signing lengthy prosecution-drafted orders within hours of their receipt, without the benefit of petitioner submissions, with manifest errors, and, in a particular extreme example, in a case assigned to a different judge.

The failure of Harris County courts to take their role seriously has gone unchallenged by the Texas Court of Criminal Appeals, which itself has routinely rubber stamped the trial courts' rubber-stamped recommendations. Federal courts, in turn, have afforded deference to the fact findings produced in this strikingly non-adversarial fashion.

The overall effect of prevailing practice is to legitimate a manifestly malfunctioning system. Prior to the modern era, death-sentenced inmates had few constitutional protections and few mechanisms for their enforcement. Today, it is widely known that death-sentenced inmates have important constitutional rights and several layers of review to secure those rights. Less well known is the extent to which those rights and mechanisms of review have become an empty formality, in which courts have

150. DEATH PENALTY INFO. CTR., *Top 15 Counties by Execution Since 1976: As of 1/1/2013*, <https://deathpenaltyinfo.org/executions-county#overall> (last accessed Feb. 23, 2018) (From 1976 through Jan. 1, 2013, Harris County accounted for 116 executions); cf. DEATH PENALTY INFO. CTR., *supra* note 149, at 3 (showing that Virginia, the second-leading state after Texas, has executed 113 individuals since 1977).

outsourced their responsibility to the prosecution. Rather than enhancing the reliability of the capital system, post-conviction litigation in Harris County has become an unfortunate obstacle to constitutional norm enforcement, a black eye for the most active death penalty county in the most active death penalty state.

APPENDIX 1 COMPLETE SETS CHART

| | Applicant | CCA Writ No. | Recommendation | Habeas Judge | State's Proposed FOFCL File Date | Trial Court's FOFCL Signed | Total State Proposed FOFCL | Total Trial Ct FOFCL | State's Proposed Adopted Verbatim |
|----|---------------------|------------------|----------------|--------------|----------------------------------|----------------------------|----------------------------|----------------------|-----------------------------------|
| 1 | Martinez, Raymond | WR-42,341-01 | Deny | (illegible) | Unknown | 7/9/1999 | 41 | 41 | 41 |
| 2 | Demery, Gregory | WR-52,238-01 | Deny | Alcala | Unknown | 5/13/2002 | 58 | 58 | 58 |
| 3 | Draughon, Martin | WR-27,511-02 | Deny | Alcala | Unknown | 6/28/2000 | 161 | 161 | 161 |
| 4 | Smith, Jr., Clyde | WR-48,130-01 | Deny | Alcala | 8/10/1998 | 4/21/1999 | 29 | 29 | 29 |
| 5 | Thacker, Charles | WR-48,092-01 | Deny | Alcala | Unknown | 7/11/2000 | 54 | 54 | 54 |
| 6 | Estrada, Larry | WR-53,499-01 | Deny | Anderson | 8/16/2002 | 8/26/2002 | 32 | 32 | 32 |
| 7 | Fuentes, Anthony | WR - 45,719-01 | Deny | Anderson | Unknown | 5/1/2000 | 146 | 146 | 146 |
| 8 | Gates, Bill | WR-69,637-01 | Deny | Anderson | 3/18/2008 | 3/19/2008 | 105 | 105 | 105 |
| 9 | Green, Dominque | WR-45,219-01 | Deny | Anderson | 2/22/2000 | 2/25/2000 | 194 | 194 | 194 |
| 10 | Moody, Stephen | WR-42,832-01 | Deny | Anderson | 8/11/1999 | 8/19/1999 | 64 | 64 | 64 |
| 11 | Maldonado, Virgilio | WR-51,612-01 | Deny | Bacon | Unknown | 7/11/2001 | 40 | 40 | 40 |
| 12 | Matamoros, John | WR-50,791-02 | Deny | Bacon | 12/18/2006 | 12/18/2006 | 169 | 169 | 169 |
| 13 | Richard, Michael | WR-47,911-02 | Deny | Bacon | 12/2/2006 | 12/28/2006 | 143 | 143 | 143 |
| 14 | Adams, Timothy | WR-65,698-01 | Deny | Barr | 6/23/2006 | 8/17/2006 | 122 | 122 | 122 |
| 15 | Gallo, Tomas | WR-40,339-01 | Deny | Barr | 6/18/2012 | 6/25/2012 | 206 | 206 | 206 |
| 16 | Harper, Garland | WR-81,576-01 | Deny | Barr | 11/25/2014 | 12/11/2014 | 315 | 315 | 315 |
| 17 | Richard, Michael | WR-47,911-01 | Deny | Barr | 2/29/2000 | 11/7/2000 | 42 | 42 | 42 |
| 18 | Slater, Paul | WR-78,134-01 | Deny | Bond | 10/1/2012 | 2/13/2014 | 197 | 202 | 200 |
| 19 | Slater, Paul | WR-78,134-01 | Deny | Bond | 10/9/2013 | 3/5/2015 | 201 | 202 | 200 |
| 20 | Russell, Jr., Pete | WR-78,128-01 | Deny | Bradley | 10/8/2012 | 10/9/2012 | 92 | 92 | 92 |
| 21 | Cubas, Edgardo | WR-71,259-01 | Deny | Bridgewater | 11/7/2008 | 11/13/2008 | 135 | 135 | 135 |
| 22 | Tong, Chuong | WR-71,377-01 | Deny | Bridgewater | 6/20/2008 | 11/10/2008 | 206 | 206 | 206 |
| 23 | Matamoros, John | WR-50,791-02 | Deny | Brown, M. | 3/5/2012 | 3/30/2012 | 142 | 142 | 142 |
| 24 | Butler, Steven | WR-41,121-02 | Deny | Brown, S. | 3/5/2007 | 3/30/2007 | 175 | 175 | 175 |
| 25 | Butler, Steven | WR-41,121-01 | Deny | Brown, S. | 2/10/1999 | 3/12/1999 | 30 | 30 | 30 |
| 26 | Butler, Steven | WR-41,121-02 | Deny | Brown, S. | 2/20/2012 | 2/28/2012 | 183 | 183 | 183 |
| 27 | Butler, Steven | WR-41,121-01 | Deny | Brown, S. | Unknown | 12/2/1998 | 28 | 28 | 28 |
| 28 | Garcia, Juan | WR-67,096-01 | Deny | Brown, S. | 2/27/2007 | 3/5/2007 | 133 | 133 | 133 |
| 29 | Martinez, Alexander | WR-61,844-01 | Dismiss | Brown, S. | Unknown | 3/31/2005 | 10 | 10 | 10 |
| 30 | McCoskey, Jamie | WR-56,820-01 | Deny | Brown, S. | 12/21/2006 | 1/26/2007 | 131 | 131 | 131 |
| 31 | McCoskey, Jamie | WR-56,820-02 | Deny | Brown, S. | 4/15/2008 | 6/23/2008 | 161 | 161 | 161 |
| 32 | Moore, Bobby | WR-13,374-05 | Grant* | Brown, S. | 1/23/2014 | 2/6/2014 | 544 | 577 | 409 |
| 33 | Rodriguez, Lionell | WR-50,773-01 | Deny | Brown, S. | Unknown | 10/8/2001 | 187 | 187 | 187 |
| 34 | Rousseau, Anibal | WR-43,534-01 | Deny | Brown, S. | Unknown | 10/5/1999 | 13 | 13 | 13 |
| 35 | Sheppard, Erica | WR-78,132-01 | Grant* | Brown, S. | 10/4/2011 | 8/24/2012 | 240 | 244 | 230 |
| 36 | Washington, Willie | WR-35,410-02, 03 | Deny | Brown, S. | 9/26/2006 | 9/28/2006 | 86 | 86 | 86 |
| 37 | Will, II, Robert | WR-63,590-01 | Deny | Brown, S. | 9/1/2005 | 11/15/2005 | 26 | 26 | 26 |
| 38 | Will, II, Robert | WR-63,590-03 | Deny | Brown, S. | 12/31/2014 | 1/26/2015 | 120 | 120 | 120 |
| 39 | Irvan, William | WR-75,428-01 | Deny | Brown, M. | 12/15/2010 | 1/14/2011 | 227 | 227 | 227 |
| 40 | Bernal, Johnnie | WR-54,854-01 | Deny | Burdette | 4/24/2002 | 6/21/2002 | 87 | 87 | 87 |
| 41 | McGowen, Roger | WR-64,992-01 | Deny | Campbell, C. | 5/25/2006 | 5/19/2006 | 66 | 66 | 66 |
| 42 | Jones, Shelton | WR-62,589-03 | Deny | Campbell, J. | 7/20/2007 | 12/18/2007 | 79 | 79 | 79 |
| 43 | Jones, Shelton | WR-62,589-01 | Deny | Campbell, J. | 1/15/2003 | 7/5/2005 | 106 | 106 | 106 |
| 44 | Raby, Charles | WR-48,131-01 | Deny | Campbell, J. | Unknown | 11/14/2000 | 44 | 44 | 44 |
| 45 | Ripkowski, Britt | WR-65,238-01 | Deny | Campbell, J. | 12/9/2005 | 5/2/2006 | 93 | 93 | 93 |
| 46 | Williams, Naron | WR-46,736-02 | Grant* | Campbell, J. | Unknown | 5/3/2001 | 227 | 207 | 113 |
| 47 | Greer, Randolph | WR-53,836-02 | Deny | Carter | Unknown | 10/10/2006 | 27 | 27 | 27 |

| | Applicant | CCA Writ No. | Recommendation | Habeas Judge | State's Proposed FOFCL File Date | Trial Court's FOFCL Signed | Total State Proposed FOFCL | Total Trial Ct FOFCL | State's Proposed Adopted Verbatim |
|----|----------------------|----------------------|----------------|--------------|----------------------------------|----------------------------|----------------------------|----------------------|-----------------------------------|
| 48 | Mason, William | WR-73,408-01, 02, 03 | Deny | Carter | 10/25/2005 | 12/28/2009 | 92 | 92 | 92 |
| 49 | Mason, William | AP-76,997 | Review | Carter | 10/15/2012 | 11/6/2012 | 43 | 43 | 43 |
| 50 | Medina, Anthony | WR-41,274-02 | Deny | Carter | 4/25/2008 | 5/26/2009 | 254 | 254 | 254 |
| 51 | Rivers, Warren | WR-53,608-02 | Deny | Carter | 12/15/2006 | 1/3/2007 | 91 | 91 | 91 |
| 52 | Rivers, Warren | WR-53,608-02 | Deny | Carter | 5/18/2007 | 5/22/2007 | 145 | 146 | 145 |
| 53 | Wesbrook, Coy | WR-52,120-02 | Deny | Carter | 1/24/2007 | 1/26/2007 | 119 | 119 | 119 |
| 54 | Wesbrook, Coy | WR-52,120-02 | Deny | Carter | 6/27/2014 | 9/5/2014 | 158 | 158 | 158 |
| 55 | Buck, Duane | WR-57,004-01 | Deny | Collins | 7/11/2003 | 7/23/2003 | 33 | 33 | 33 |
| 56 | Johnson, Dexter | WR-73,600-01 | Deny | Collins | 2/24/2010 | 2/24/2010 | 61 | 61 | 61 |
| 57 | Nenno, Eric | WR-50,598-01 | Deny | Collins | Unknown | 9/27/2001 | 12 | 12 | 12 |
| 58 | Smith, Roy | WR-42,801-01 | Deny | Collins | Unknown | 8/24/1999 | 42 | 42 | 42 |
| 59 | Villanueva, Jorge | WR-49,591-01 | Deny | Collins | Unknown | 5/17/2001 | 149 | 149 | 149 |
| 60 | Williams, Arthur | WR-71,404-01, 02 | Deny | Collins | 6/1/2010 | 6/30/2010 | 49 | 49 | 49 |
| 61 | Francois, Anthony | WR-71,345-01 | Deny | Cosper | 12/15/2008 | 12/30/2008 | 30 | 30 | 30 |
| 62 | McCullum, Demarco | WR-52,642-01 | Deny | Cosper | Unknown | 5/29/2002 | 32 | 32 | 32 |
| 63 | Mecelein, Jose | WR-50,191-01 | Deny | Cosper | Unknown | 1/22/2001 | 81 | 81 | 81 |
| 64 | Morris, Kenneth | WR-43,550-01 | Deny | Cosper | Unknown | 9/28/1999 | 106 | 106 | 106 |
| 65 | Whitaker, II, George | WR-54,762-01, 02 | Deny | Cosper | 8/19/2002 | 11/18/2002 | 108 | 108 | 108 |
| 66 | Woodard, Robert | WR-46,501-02 | Deny | Cosper | 8/14/2006 | 9/19/2006 | 143 | 143 | 143 |
| 67 | Carty, Linda | WR-61,055-01 | Deny | Davies | 11/1/2004 | 12/2/2004 | 93 | 93 | 93 |
| 68 | Jackson, Donell | WR-52-532-01 | Deny | Davies | 3/25/2002 | 5/15/2002 | 45 | 45 | 45 |
| 69 | Williams, Jeffrey | WR-50,662-01 | Deny | Davies | Unknown | 2/20/2003 | 75 | 75 | 75 |
| 70 | Janecka, Allen | WR-24,976-02 | Deny | Densen | 9/13/1999 | 9/13/1999 | 29 | 29 | 29 |
| 71 | Allen, Kerry | WR-73,586-01 | Deny | Ellis | 4/25/2008 | 3/2/2009 | 126 | 126 | 126 |
| 72 | Bible, Danny | WR 76,122-01 | Deny | Ellis | 3/30/2009 | 6/24/2011 | 127 | 127 | 127 |
| 73 | Brown, Alfred | WR-68,786-01 | Grant | Ellis | 5/22/2013 | 5/28/2013 | 40 | 40 | 40 |
| 74 | Brown, Arthur | WR-26,178-02 | Deny | Ellis | 6/30/2006 | 8/31/2007 | 86 | 86 | 86 |
| 75 | Elizalde, Jr., Jaime | WR-48,957-01 | Deny | Ellis | Unknown | 3/9/2001 | 56 | 56 | 56 |
| 76 | Joubert, Elijah | WR-78,119-01 | Deny | Ellis | 4/8/2013 | 4/18/2013 | 130 | 130 | 130 |
| 77 | Norris, Michael | WR-72,835-02 | Deny | Ellis | 1/18/2012 | 8/22/2012 | 108 | 108 | 108 |
| 78 | Plata, Daniel | WR-46,749-02 | Grant | Ellis | 3/9/2007 | 9/28/2007 | 175 | 287 | 175 |
| 79 | Plata, Daniel | WR-46,749-01 | Deny | Ellis | Unknown | 6/27/2000 | 48 | 48 | 48 |
| 80 | Prible, Jr., Ronald | WR-69,328-01 | Deny | Ellis | 1/4/2008 | 1/25/2008 | 76 | 76 | 76 |
| 81 | Smith, Robert | WR-40,874-01 | Deny | Ellis | 12/17/1998 | 3/11/1998 | 123 | 123 | 123 |
| 82 | Smith, Robert | WR-40,874-02 | Grant | Ellis | 2/10/2004 | 2/10/2004 | 13 | 13 | 13 |
| 83 | Thompson, Robert | WR-61,379-01 | Deny | Ellis | Unknown | 1/25/2005 | 76 | 76 | 76 |
| 84 | Hamilton, Ronald | WR-87,114-01 | Deny | Evans | 8/12/2014 | 11/25/2014 | 116 | 116 | 116 |
| 85 | Marshall, Gerald | WR-17,752-02, 03 | Deny | Evans | 3/18/2014 | 7/18/2014 | 92 | 92 | 92 |
| 86 | Carty, Linda | WR-61,055-02 | Deny | Garner | 8/29/2016 | 9/1/2016 | 191 | 140 | 97 |
| 87 | Alix, Franklin | WR-50,786-01 | Deny | Godwin | Unknown | 10/8/2001 | 59 | 59 | 59 |
| 88 | Clay, Keith | WR-43,906-01 | Deny | Godwin | Unknown | 10/13/1999 | 25 | 25 | 25 |
| 89 | Conner, Johnny | WR-50,268-01 | Deny | Godwin | Unknown | 8/16/2001 | 20 | 20 | 20 |
| 90 | Hughes, Preston | WR-45-876-01 | Deny | Godwin | Unknown | 5/19/2000 | 155 | 155 | 155 |
| 91 | McFarland, George | WR-59,337-01 | Deny | Godwin | 10/1/2003 | 6/8/2004 | 175 | 173 | 173 |
| 92 | Pierce, Anthony | WR-15,859-04 | Deny | Godwin | 12/1/2006 | 1/12/2007 | 104 | 104 | 104 |
| 93 | Vaile, Yovannis | WR-63,068-01 | Deny | Godwin | 9/1/2005 | 9/13/2005 | 73 | 73 | 73 |
| 94 | Williams, Richard | WR-43,907-01 | Deny | Godwin | Unknown | 10/13/1999 | 93 | 93 | 93 |

| | Applicant | CCA Writ No. | Recommendation | Habeas Judge | State's Proposed FOFCL File Date | Trial Court's FOFCL Signed | Total State Proposed FOFCL | Total Trial Ct FOFCL | State's Proposed Adopted Verbatim |
|-----|----------------------|----------------------|----------------|--------------|----------------------------------|----------------------------|----------------------------|----------------------|-----------------------------------|
| 95 | Batiste, Tedderick | WR-81,570-01 | Deny | Guerrero | 12/15/2014 | 1/21/2015 | 211 | 211 | 211 |
| 96 | Mamou, Jr., Charles | WR-78,122-01, 02, 03 | Deny | Guiney | 11/6/2013 | 11/13/2013 | 55 | 55 | 55 |
| 97 | Rhoades, Rick | WR-78,124-01 | Deny | Guiney | 10/26/2013 | 5/21/2014 | 228 | 232 | 228 |
| 98 | Sales, Tarus | WR-78,131-01 | Deny | Guiney | 5/1/2013 | 8/15/2014 | 180 | 180 | 180 |
| 99 | Cantu, Peter | WR-65,334-01 | Deny | Harmon | 11/29/2005 | 6/7/2006 | 80 | 80 | 80 |
| 100 | Capetillo, Edward | WR-49,239-01 | Deny | Harmon | Unknown | 3/15/2001 | 44 | 44 | 44 |
| 101 | Eldridge, Gerald | WR-46,854-02 | Deny | Harmon | 9/14/2004 | 9/24/2004 | 77 | 77 | 76 |
| 102 | Jackson, James | WR-52,904-01 | Deny | Harmon | 2/21/2002 | 6/20/2002 | 36 | 36 | 36 |
| 103 | Matchett, Farley | WR-31,797-02 | Deny | Harmon | Unknown | 1/30/1999 | 92 | 92 | 92 |
| 104 | Nelson, Marlin | WR-53,148-01 | Deny | Harmon | Unknown | 7/8/2002 | 111 | 111 | 111 |
| 105 | Nichols, Joseph | WR-21,253-02 | Deny | Harmon | Unknown | 4/9/2001 | 122 | 117 | 112 |
| 106 | Resencio, Angel | WR 58,172-01 | Deny | Harmon | 1/15/2004 | 1/21/2004 | 23 | 23 | 23 |
| 107 | Rocha, Felix | WR-52,515-01 | Deny | Harmon | 10/24/2001 | 11/1/2001 | 67 | 67 | 67 |
| 108 | Williams, Perry | WR-63,237-01 | Deny | Harmon | 8/23/2005 | 8/26/2005 | 42 | 42 | 42 |
| 109 | Cole, Jaime | WR-84,322-01 | Deny | Hart | 6/3/2016 | 6/14/2016 | 141 | 141 | 141 |
| 110 | Davis, Brian | WR-40,339-05 | Deny | Hart | 3/25/2005 | 7/25/2005 | 141 | 159 | 138 |
| 111 | Davis, Brian | WR-40,339-07, 08 | Deny | Hart | 2/12/2015 | 1/7/2016 | 233 | 233 | 233 |
| 112 | Fratta, Robert | WR-31,536-04 | Deny | Hart | 11/18/2013 | 12/18/2013 | 160 | 160 | 160 |
| 113 | Jackson, Christopher | WR-78-121-01 | Deny | Hart | 6/24/2013 | 12/2/2013 | 193 | 193 | 193 |
| 114 | Jean, Joseph | WR-84,327-01 | Deny | Hart | 7/8/2016 | 7/21/2016 | 326 | 326 | 326 |
| 115 | Ayestas, Carlos | WR-69,674-01 | Deny | Hill | 1/17/2008 | 2/18/2008 | 113 | 113 | 113 |
| 116 | Davis, Brian | WR-40,339-01 | Deny | Hill | 2/3/1999 | 2/4/1999 | 15 | 15 | 15 |
| 117 | Duncan, Richard | WR-46,927-01 | Deny | Hill | Unknown | 7/13/2000 | 102 | 102 | 102 |
| 118 | Fratta, Robert | WR-31,536-02 | Deny | Hill | 3/31/2004 | 6/29/2004 | 128 | 128 | 128 |
| 119 | Guidry, Howard | WR-47,417-02 | Deny | Hill | 7/28/2011 | 3/14/2012 | 180 | 180 | 180 |
| 120 | Guidry, Howard | WR-47,417-01 | Deny | Hill | Unknown | 7/14/2000 | 90 | 90 | 90 |
| 121 | Hunter, Calvin | WR-69,291-01 | Deny | Hill | 8/20/2007 | 1/14/2008 | 97 | 97 | 97 |
| 122 | Jackson, Derrick | WR-60,124-01 | Deny | Hill | 7/6/2004 | 9/1/2004 | 74 | 74 | 74 |
| 123 | Ogan, Craig | WR-41,220-01 | Deny | Hill | 2/4/1999 | 3/11/1999 | 57 | 57 | 57 |
| 124 | Prystash, Joseph | WR-58,537-01 | Deny | Hill | 11/17/2003 | 2/25/2004 | 84 | 84 | 84 |
| 125 | Prystash, Joseph | WR-58,537-02 | Deny | Hill | 12/2/2011 | 9/25/2012 | 125 | 125 | 125 |
| 126 | Rosales, Mariano | WR-16,180-03 | Deny | Hill | 5/31/2002 | 6/5/2002 | 49 | 49 | 49 |
| 127 | Rowell, Robert | WR-52,673-01 | Deny | Hill | Unknown | 5/29/2002 | 59 | 59 | 59 |
| 128 | Smith, Jack | WR-8,315-07 | Deny | Hill | 10/14/2011 | 12/28/2012 | 114 | 114 | 114 |
| 129 | Wilson, Geno | WR-55,545-01 | Deny | Hill | Unknown | 3/26/2003 | 101 | 101 | 101 |
| 130 | Johnson, Lonnie | WR-56,197-01 | Deny | Huffman | 2/5/2002 | 5/22/2003 | 69 | 69 | 69 |
| 131 | Shore, Anthony | WR-78,133-01 | Deny | Jackson | 9/4/2012 | 9/11/2012 | 168 | 168 | 168 |
| 132 | Alexander, Guy | WR-57,156-02 | Grant | Jones | 7/28/2011 | 5/4/2012 | 138 | 67 | 0 |
| 133 | Maldonado, Virgilio | WR 51,612-02 | Grant | Jones | 11/30/2012 | 12/12/2012 | 161 | 195 | 0 |
| 134 | Basso, Suzanne | WR-63,672-01 | Deny | Keel | 9/27/2005 | 11/28/2005 | 127 | 127 | 127 |
| 135 | Campbell, Robert | WR-44,551-01 | Deny | Keel | Unknown | 11/11/1999 | 44 | 44 | 44 |
| 136 | Escobedo, Joel | WR-56,818-01 | Deny | Keel | 12/21/2005 | 3/9/2007 | 113 | 113 | 113 |
| 137 | Escobedo, Joel | WR-56,818-02 | Deny | Keel | 4/1/2008 | 10/28/2008 | 112 | 112 | 112 |
| 138 | Escobedo, Joel | WR-56,818-01 | Deny | Keel | 8/21/2012 | 9/26/2012 | 127 | 127 | 127 |
| 139 | Griffith, Michael | WR-56,987-01 | Deny | Keel | 1/14/2003 | 7/23/2003 | 14 | 14 | 14 |
| 140 | Soffar, Max | WR-29,980-03 | Deny | Keel | 12/16/2011 | 1/5/2012 | 315 | 315 | 315 |
| 141 | Tercero, Bernardo | WR-62,593-01 | Deny | Keel | 12/1/2004 | 6/10/2005 | 53 | 53 | 53 |

| | Applicant | CCA Writ No. | Recommendation | Habeas Judge | State's Proposed FOFCL File Date | Trial Court's FOFCL Signed | Total State Proposed FOFCL | Total Trial Ct FOFCL | State's Proposed Adopted Verbatim |
|-----|-----------------------|--------------------|----------------|--------------|----------------------------------|----------------------------|----------------------------|----------------------|-----------------------------------|
| 142 | Charles, Derrick | WR-67,717-01 | Deny | Krocker | 4/23/2007 | 4/25/2007 | 152 | 152 | 152 |
| 143 | Goynes, Theodore | WR-52,481-03 | Dismiss | Krocker | 8/22/2011 | 8/30/2011 | 14 | 14 | 14 |
| 144 | Goynes, Theodore | WR-52,481-01 | Deny | Krocker | Unknown | 5/6/2002 | 92 | 92 | 92 |
| 145 | Martinez, Raymond | WR-42,341-03 | Deny | Krocker | 10/1/2012 | 10/4/2012 | 88 | 88 | 88 |
| 146 | O'Brien, Derrick | WR-51,264-01 | Deny | Krocker | 11/9/2001 | 11/13/2001 | 104 | 104 | 104 |
| 147 | Sorto, Walter | WR-71,381-01 | Deny | Krocker | 12/18/2008 | 12/29/2008 | 64 | 64 | 64 |
| 148 | Cruz-Garcia, Obel | WR-85,051-02 | Deny | Magee | 12/21/2016 | 12/29/2016 | 192 | 192 | 192 |
| 149 | Freeney, Ray | WR-78,109-01 | Deny | Magee | Unknown | 12/10/13 | 68 | 68 | 68 |
| 150 | Broxton, Eugene | WR-42,781-02 | Deny | McSpadden | 7/28/2009 | 7/31/2009 | 110 | 110 | 110 |
| 151 | Broxton, Eugene | WR-42,781-01 | Deny | McSpadden | Unknown | 9/3/1999 | 71 | 71 | 71 |
| 152 | Coleman, Christopher | WR-48,523-01 | Deny | McSpadden | Unknown | 11/7/2000 | 97 | 97 | 97 |
| 153 | Cotton, Marcus | WR-45,499-01 | Deny | McSpadden | Unknown | 4/17/2000? | 83 | 83 | 83 |
| 154 | Green, Travis | WR-48,019-02 | Deny | McSpadden | 8/31/2012 | 9/12/2012 | 94 | 94 | 94 |
| 155 | Kincy, Kevin | WR-50,266-01 | Deny | McSpadden | 6/12/2000? | 4/18/2001 | 99 | 99 | 99 |
| 156 | Landor, III, Mabry | WR-81,579-01 | Deny | McSpadden | 10/15/2014 | 2/12/2016 | 161 | 161 | 161 |
| 157 | Pippin, Roy | WR-50,613-01, 02 | Deny | McSpadden | Unknown | 9/26/2001 | 268 | 268 | 268 |
| 158 | Tamayo, Edgar | WR-55,690-01 | Deny | McSpadden | 2/27/2003 | 3/28/2003 | 126 | 126 | 126 |
| 159 | Burton, Carl | WR-22,548-04 | Deny | Mendoza | 8/30/2016 | 12/28/2016 | 168 | 168 | 164 |
| 160 | Wheatfall, Daryl | WR-81,585-01 | Review | Mendoza | 7/9/2014 | 9/7/2014 | 49 | 49 | 49 |
| 161 | Greer, Randolph | WR-53,836-01 | Deny | Poe | 10/19/2000(1?) | 8/2/2002 | 207 | 207 | 207 |
| 162 | McWilliams, Frederick | WR-48,282-01 | Deny | Poe | Unknown | 12/11/2000 | 43 | 43 | 43 |
| 163 | Rivers, Warren | WR-53,608-01 | Deny | Poe | 8/12/2002 | 8/14/2002 | 163 | 163 | 163 |
| 164 | Shannon, Willie | WR-50,117-01 | Deny | Poe | Unknown | 1/20/2001 | 45 | 45 | 45 |
| 165 | Prevost, Jeffery | WR-84,068-01 | Deny | Powell | 12/22/2016 | 1/3/2017 | 243 | 243 | 243 |
| 166 | Robinson, William | WR-57,207-01 | Deny | Price | 2/9/2007 | 3/13/2007 | 119 | 0 | 0 |
| 167 | Carr, Darrell | WR-55,033-02 | Grant | Rains | 12/22/2006 | 12/20/2006 | 42 | 42 | 42 |
| 168 | Carr, Darrell | WR-55,033-01 | Deny | Rains | Unknown | 1/29/2003 | 85 | 85 | 85 |
| 169 | Cathey, Eric | WR-55,161-01 | Deny | Rains | 10/1/2002 | 1/29/2003 | 35 | 35 | 35 |
| 170 | Masterson, Richard | WR-59,481-01 | Deny | Rains | 2/18/2008 | 3/13/2008 | 62 | 62 | 62 |
| 171 | Mays, Rex | WR-42,831-01 | Deny | Rains | Unknown | 9/3/1999 | 33 | 33 | 33 |
| 172 | Rachal, Rodney | WR-60,394-01 | Deny | Rains | 7/23/2004 | 10/4/2004 | 47 | 47 | 47 |
| 173 | Cathey, Eric | WR-55,161-02 | Grant* | Reagin | 2/21/2011 | 12/31/2012 | 363 | 215 | 0 |
| 174 | Freeney, Ray | WR-78,109-01 | Deny | Ritchie | 11/28/2012 | 12/5/2012 | 188 | 188 | 188 |
| 175 | Coulson, Robert | WR-40,437-01 | Deny | Robertson | 12/14/1998 | 1/5/1999 | 111 | 111 | 111 |
| 176 | Thompson, Charles | WR-78,135-01, -02 | Deny | Shaver | 2/7/2013 | 2/22/2013 | 166 | 166 | 166 |
| 177 | Trottie, Willie | WR-70,302-01 | Deny | Shaver | 6/6/2008 | 7/10/2008 | 92 | 92 | 92 |
| 178 | Wesbrook, Coy | WR-52,120-01 | Deny | Shaver | 3/4/2002 | 3/14/2002 | 122 | 122 | 122 |
| 179 | Dudley, Marion | WR-46,854-01 & -02 | Deny | Stricklin | Unknown | 7/28/2000 | 42 | 42 | 42 |
| 180 | Guevara, Gilmar | WR-63,926-01 | Deny | Stricklin | 8/1/2005 | 1/19/2006 | 120 | 120 | 120 |
| 181 | Matamoros, John | WR-50,791-01 | Deny | Stricklin | 10/11/2001 | 11/1/2001 | 107 | 107 | 107 |
| 182 | Thomas, Daniel | WR-15,153-07 | Deny | Stricklin | Unknown | 9/3/2004 | 342 | 342 | 342 |
| 183 | Thomas, Shannon | WR-51,306-01 | Deny | Stricklin | Unknown | 5/22/2001 | 39 | 39 | 39 |
| 184 | Alexander, Guy | WR-57,156-01 | Deny | Thomas | 4/14/2003 | 9/4/2003 | 94 | 94 | 94 |
| 185 | Alvarez, Juan | WR-62,426-01 | Deny | Thomas | 2/7/2008 | 5/23/2008 | 92 | 92 | 92 |
| 186 | Burton, Arthur | WR- 64,360-01 | Deny | Thomas | 9/15/2005 | 3/10/2006 | 51 | 51 | 51 |
| 187 | Burton, Arthur | WR- 64,360-01 | Deny | Thomas | 12/5/2008 | 12/31/2008 | 47 | 47 | 47 |
| 188 | Matthews, Damon | WR-75,919-01 | Deny | Velasquez | 1/31/2011 | 2/2/2011 | 106 | 106 | 106 |

| | Applicant | CCA Writ No. | Recommendation | Habeas Judge | State's Proposed FOFCL File Date | Trial Court's FOFCL Signed | Total State Proposed FOFCL | Total Trial Ct FOFCL | State's Proposed Adopted Verbatim |
|-------|------------------|--------------|---------------------|--------------|----------------------------------|----------------------------|----------------------------|----------------------|-----------------------------------|
| 189 | Smith, Demetrius | WR-70,593-01 | Deny | Velasquez | 7/18/2014 | 9/26/2014 | 113 | 113 | 113 |
| 190 | Dennes, Reinaldo | WR-34,627-02 | Deny | Wallace | 8/19/2013 | 8/21/2013 | 158 | 158 | 158 |
| 191 | Haynes, Anthony | WR-59,929-01 | Deny | Wallace | 8/3/2004 | 8/5/2004 | 50 | 50 | 50 |
| 192 | Newton, Frances | WR-47,025-01 | Deny | Wallace | Unknown | 6/5/2000 | 160 | 160 | 160 |
| 193 | Perez, Efrain | WR-48,614-01 | Deny | Wallace | Unknown | 1/26/2001 | 28 | 28 | 28 |
| 194 | Reynosa, Juan | WR 66,260-01 | Extend [*] | Wallace | 5/4/2007 | 5/4/2007 | 29 | 29 | 29 |
| 195 | Reynosa, Juan | WR 66,260-01 | Deny | Wallace | 10/5/2006 | 10/11/2006 | 23 | 23 | 23 |
| 196 | Smith, Roosevelt | WR-77,646-01 | Grant | Wallace | 4/10/2012 | 4/10/2012 | 29 | 29 | 29 |
| 197 | Johnson, Johnny | WR-57,854-01 | Deny | Wilkinson | 2/16/2000 | 8/30/2000 | 63 | 63 | 63 |
| 198 | Morris, Lorenzo | WR-45,156-01 | Deny | Wilkinson | Unknown | 4/11/2000 | 76 | 76 | 76 |
| 199 | Sonnier, Derrick | WR-57,256-01 | Deny | Wilkinson | 7/31/2003 | 7/31/2003 | 38 | 38 | 38 |
| TOTAL | | | | | | | 21658 | 21454 | 20506 |

^{*}CCA overrode recommendation

^{*} Trial court made no recommendation

^{*}Remanded to consider attorney abandonment/default, court recommended extending filing period

APPENDIX 2 CONTESTED CASES CHART

| | Applicant | CCA Writ No. | Recommendation | Habeas Judge | State's Proposed FOFCL File Date | Trial Court's FOFCL Signed | Total State Proposed FOFCL | Total Trial Ct FOFCL | State's Proposed Adopted Verbatim |
|----|----------------------|------------------|----------------|--------------|----------------------------------|----------------------------|----------------------------|----------------------|-----------------------------------|
| 1 | Adams, Timothy | WR-65,698-01 | Deny | Barr | 6/23/2006 | 8/17/2006 | 122 | 122 | 122 |
| 2 | Alexander, Guy | WR-57,156-01 | Deny | Thomas | 4/14/2003 | 9/4/2003 | 94 | 94 | 94 |
| 3 | Alix, Franklin | WR-50,786-01 | Deny | Godwin | Unknown | 10/8/2001 | 59 | 59 | 59 |
| 4 | Allen, Kerry | WR-73,586-01 | Deny | Ellis | 4/25/2008 | 3/2/2009 | 126 | 126 | 126 |
| 5 | Alvarez, Juan | WR-62,426-01 | Deny | Thomas | 2/7/2008 | 5/23/2008 | 92 | 92 | 92 |
| 6 | Ayestas, Carlos | WR-69,674-01 | Deny | Hill | 1/17/2008 | 2/18/2008 | 113 | 113 | 113 |
| 7 | Basso, Suzanne | WR-63,672-01 | Deny | Keel | 9/27/2005 | 11/28/2005 | 127 | 127 | 127 |
| 8 | Batiste, Tedderick | WR-81,570-01 | Deny | Guerrero | 12/15/2014 | 1/21/2015 | 211 | 211 | 211 |
| 9 | Bernal, Johnnie | WR-54,854-01 | Deny | Burdette | 4/24/2002 | 6/21/2002 | 87 | 87 | 87 |
| 10 | Bible, Danny | WR 76,122-01 | Deny | Ellis | 3/30/2009 | 6/24/2011 | 127 | 127 | 127 |
| 11 | Brown, Arthur | WR-26,178-02 | Deny | Ellis | 6/30/2006 | 8/31/2007 | 86 | 86 | 86 |
| 12 | Broxton, Eugene | WR-42,781-01 | Deny | McSpadden | Unknown | 9/3/1999 | 71 | 71 | 71 |
| 13 | Broxton, Eugene | WR-42,781-02 | Deny | McSpadden | 7/28/2009 | 7/31/2009 | 110 | 110 | 110 |
| 14 | Buck, Duane | WR-57,004-01 | Deny | Collins | 7/11/2003 | 7/23/2003 | 33 | 33 | 33 |
| 15 | Buntion, Carl | WR-22,548-04 | Deny | Mendoza | 8/30/2016 | 12/28/2016 | 168 | 168 | 164 |
| 16 | Burton, Arthur | WR-64,360-01 | Deny | Thomas | 12/5/2008 | 12/31/2008 | 47 | 47 | 47 |
| 17 | Burton, Arthur | WR-64,360-01 | Deny | Thomas | 9/15/2005 | 3/10/2006 | 51 | 51 | 51 |
| 18 | Butler, Steven | WR-41,121-01 | Deny | Brown, S. | Unknown | 12/2/1998 | 28 | 28 | 28 |
| 19 | Butler, Steven | WR-41,121-01 | Deny | Brown, S. | 2/10/1999 | 3/12/1999 | 30 | 30 | 30 |
| 20 | Butler, Steven | WR-41,121-02 | Deny | Brown, S. | 3/5/2007 | 3/30/2007 | 175 | 175 | 175 |
| 21 | Butler, Steven | WR-41,121-02 | Deny | Brown, S. | 2/20/2012 | 2/28/2012 | 183 | 183 | 183 |
| 22 | Campbell, Robert | WR-44,551-01 | Deny | Keel | Unknown | 11/11/1999 | 44 | 44 | 44 |
| 23 | Cantu, Peter | WR-65,334-01 | Deny | Harmon | 11/29/2005 | 6/7/2006 | 80 | 80 | 80 |
| 24 | Capetillo, Edward | WR-49,239-01 | Deny | Harmon | Unknown | 3/15/2001 | 44 | 44 | 44 |
| 25 | Carr, Darrell | WR-55,033-01 | Deny | Rains | Unknown | 1/29/2003 | 85 | 85 | 85 |
| 26 | Carty, Linda | WR-61,055-01 | Deny | Davies | 11/1/2004 | 12/2/2004 | 93 | 93 | 93 |
| 27 | Carty, Linda | WR-61,055-02 | Deny | Garner | 8/29/2016 | 9/1/2016 | 191 | 140 | 97 |
| 28 | Cathey, Eric | WR-55,161-02 | Grant* | Reagin | 2/21/2011 | 12/31/2012 | 363 | 215 | 0 |
| 29 | Cathey, Eric | WR-55,161-01 | Deny | Rains | 10/1/2002 | 1/29/2003 | 35 | 35 | 35 |
| 30 | Charles, Derrick | WR-67,717-01 | Deny | Krocker | 4/23/2007 | 4/25/2007 | 152 | 152 | 152 |
| 31 | Clay, Keith | WR-43,906-01 | Deny | Godwin | Unknown | 10/13/1999 | 25 | 25 | 25 |
| 32 | Cole, Jaime | WR-84,322-01 | Deny | Hart | 6/3/2016 | 6/14/2016 | 141 | 141 | 141 |
| 33 | Coleman, Christopher | WR-48,523-01 | Deny | McSpadden | Unknown | 11/7/2000 | 97 | 97 | 97 |
| 34 | Conner, Johnny | WR-50,268-01 | Deny | Godwin | Unknown | 8/16/2001 | 20 | 20 | 20 |
| 35 | Cotton, Marcus | WR-45,499-01 | Deny | McSpadden | Unknown | 4/17/2000? | 83 | 83 | 83 |
| 36 | Coulson, Robert | WR-40,437-01 | Deny | Robertson | 12/14/1998 | 1/5/1999 | 111 | 111 | 111 |
| 37 | Cruz-Garcia, Obel | WR-85,051-02 | Deny | Magee | 12/21/2016 | 12/29/2016 | 192 | 192 | 192 |
| 38 | Cubas, Edgardo | WR-71,259-01 | Deny | Bridgewater | 11/7/2008 | 11/13/2008 | 135 | 135 | 135 |
| 39 | Davis, Brian | WR-40,339-01 | Deny | Hill | 2/3/1999 | 2/4/1999 | 15 | 15 | 15 |
| 40 | Davis, Brian | WR-40,339-05 | Deny | Hart | 3/25/2005 | 7/25/2005 | 141 | 159 | 138 |
| 41 | Davis, Brian | WR-40,339-07, 08 | Deny | Hart | 2/12/2015 | 1/7/2016 | 233 | 233 | 233 |
| 42 | Demery, Gregory | WR-52,238-01 | Deny | Alcala | Unknown | 5/13/2002 | 58 | 58 | 58 |
| 43 | Dennes, Reinaldo | WR-34,627-02 | Deny | Wallace | 8/19/2013 | 8/21/2013 | 158 | 158 | 158 |
| 44 | Draughon, Martin | WR-27,511-02 | Deny | Alcala | Unknown | 6/28/2000 | 161 | 161 | 161 |
| 45 | Dudley, Marion | WR-46,854-01, 02 | Deny | Stricklin | Unknown | 7/28/2000 | 42 | 42 | 42 |
| 46 | Duncan, Richard | WR-46,927-01 | Deny | Hill | Unknown | 7/13/2000 | 102 | 102 | 102 |
| 47 | Eldridge, Gerald | WR-46,854-02 | Deny | Harmon | 9/14/2004 | 9/24/2004 | 77 | 77 | 76 |
| 48 | Elizalde, Jr., Jaime | WR-48,957-01 | Deny | Ellis | Unknown | 3/9/2001 | 56 | 56 | 56 |
| 49 | Escobedo, Joel | WR-56,818-02 | Deny | Keel | 4/1/2008 | 10/28/2008 | 112 | 112 | 112 |

| | Applicant | CCA Writ No. | Recommendation | Habeas Judge | State's Proposed FOFCL File Date | Trial Court's FOFCL Signed | Total State Proposed FOFCL | Total Trial Ct FOFCL | State's Proposed Adopted Verbatim |
|----|----------------------|----------------------|----------------|--------------|----------------------------------|----------------------------|----------------------------|----------------------|-----------------------------------|
| 50 | Escobedo, Joel | WR-56,818-01 | Deny | Keel | 12/21/2006 | 3/9/2007 | 113 | 113 | 113 |
| 51 | Escobedo, Joel | WR-56,818-01 | Deny | Keel | 8/21/2012 | 9/26/2012 | 127 | 127 | 127 |
| 52 | Estrada, Larry | WR-53,499-01 | Deny | Anderson | 8/16/2002 | 8/26/2002 | 32 | 32 | 32 |
| 53 | Francois, Anthony | WR-71,345-01 | Deny | Cosper | 12/15/2008 | 12/30/2008 | 30 | 30 | 30 |
| 54 | Fratta, Robert | WR-31,536-02 | Deny | Hill | 3/31/2004 | 6/29/2004 | 128 | 128 | 128 |
| 55 | Fratta, Robert | WR-31,536-04 | Deny | Hart | 11/18/2013 | 12/18/2013 | 160 | 160 | 160 |
| 56 | Freeney, Ray | WR-78,109-01 | Deny | Magee | Unknown | 12/10/13 | 68 | 68 | 68 |
| 57 | Freeney, Ray | WR-78,109-01 | Deny | Ritchie | 11/28/2012 | 12/5/2012 | 188 | 188 | 188 |
| 58 | Fuentes, Anthony | WR - 45,719-01 | Deny | Anderson | Unknown | 5/1/2000 | 146 | 146 | 146 |
| 59 | Gallo, Tomas | WR-40,339-01 | Deny | Barr | 6/18/2012 | 6/25/2012 | 206 | 206 | 206 |
| 60 | Garcia, Juan | WR-67,096-01 | Deny | Brown, S. | 2/27/2007 | 3/5/2007 | 133 | 133 | 133 |
| 61 | Gates, Bill | WR-69,637-01 | Deny | Anderson | 3/18/2008 | 3/19/2008 | 105 | 105 | 105 |
| 62 | Goynes, Theodore | WR-52,481-03 | Dismiss | Krockner | 8/22/2011 | 8/30/2011 | 14 | 14 | 14 |
| 63 | Goynes, Theodore | WR-52,481-01 | Deny | Krockner | Unknown | 5/6/2002 | 92 | 92 | 92 |
| 64 | Green, Dominique | WR-45,219-01 | Deny | Anderson | 2/22/2000 | 2/25/2000 | 194 | 194 | 194 |
| 65 | Green, Travis | WR-48,019-02 | Deny | McSpadden | 8/31/2012 | 9/12/2012 | 94 | 94 | 94 |
| 66 | Greer, Randolph | WR-53,836-02 | Deny | Carter | Unknown | 10/10/2006 | 27 | 27 | 27 |
| 67 | Greer, Randolph | WR-53,836-01 | Deny | Poe | 10/19/2006[1?] | 8/2/2002 | 207 | 207 | 207 |
| 68 | Griffith, Michael | WR-56,987-01 | Deny | Keel | 1/14/2003 | 7/23/2003 | 14 | 14 | 14 |
| 69 | Guevara, Gilmar | WR-63,926-01 | Deny | Stricklin | 8/1/2005 | 1/19/2006 | 120 | 120 | 120 |
| 70 | Guidry, Howard | WR-47,417-01 | Deny | Hill | Unknown | 7/14/2000 | 90 | 90 | 90 |
| 71 | Guidry, Howard | WR-47,417-02 | Deny | Hill | 7/28/2011 | 3/14/2012 | 180 | 180 | 180 |
| 72 | Hamilton, Ronald | WR-87,114-01 | Deny | Evans | 8/12/2014 | 11/25/2014 | 116 | 116 | 116 |
| 73 | Harper, Garland | WR-81,576-01 | Deny | Barr | 11/25/2014 | 12/11/2014 | 315 | 315 | 315 |
| 74 | Haynes, Anthony | WR-59,929-01 | Deny | Wallace | 8/3/2004 | 8/5/2004 | 50 | 50 | 50 |
| 75 | Hughes, Preston | WR-45-876-01 | Deny | Godwin | Unknown | 5/19/2000 | 155 | 155 | 155 |
| 76 | Hunter, Calvin | WR-69,291-01 | Deny | Hill | 8/20/2007 | 1/14/2008 | 97 | 97 | 97 |
| 77 | Irvan, William | WR-75,428-01 | Deny | Brown, M. | 12/15/2010 | 1/14/2011 | 227 | 227 | 227 |
| 78 | Jackson, Christopher | WR-78-121-01 | Deny | Hart | 6/24/2013 | 12/2/2013 | 193 | 193 | 193 |
| 79 | Jackson, Derrick | WR-60,124-01 | Deny | Hill | 7/6/2004 | 9/1/2004 | 74 | 74 | 74 |
| 80 | Jackson, Donell | WR-52-532-01 | Deny | Davies | 3/25/2002 | 5/15/2002 | 45 | 45 | 45 |
| 81 | Jackson, James | WR-52,904-01 | Deny | Harmon | 2/21/2002 | 6/20/2002 | 36 | 36 | 36 |
| 82 | Janecka, Allen | WR-24,976-02 | Deny | Densen | 9/13/1999 | 9/13/1999 | 29 | 29 | 29 |
| 83 | Jean, Joseph | WR-84,327-01 | Deny | Hart | 7/8/2016 | 7/21/2016 | 326 | 326 | 326 |
| 84 | Johnson, Dexter | WR-73,600-01 | Deny | Collins | 2/24/2010 | 2/24/2010 | 61 | 61 | 61 |
| 85 | Johnson, Johnny | WR-57,854-01 | Deny | Wilkinson | 2/16/2000 | 8/30/2000 | 63 | 63 | 63 |
| 86 | Johnson, Lonnie | WR-56,197-01 | Deny | Huffman | 2/5/2002 | 5/22/2003 | 69 | 69 | 69 |
| 87 | Jones, Shelton | WR-62,589-03 | Deny | Campbell, J. | 7/20/2007 | 12/18/2007 | 79 | 79 | 79 |
| 88 | Jones, Shelton | WR-62,589-01 | Deny | Campbell, J. | 1/15/2003 | 7/5/2005 | 106 | 106 | 106 |
| 89 | Joubert, Elijah | WR-78,119-01 | Deny | Ellis | 4/8/2013 | 4/18/2013 | 130 | 130 | 130 |
| 90 | Kincy, Kevin | WR-50,266-01 | Deny | McSpadden | 6/12/2000? | 4/18/2001 | 99 | 99 | 99 |
| 91 | Landor, III, Mabry | WR-81,579-01 | Deny | McSpadden | 10/15/2014 | 2/12/2016 | 161 | 161 | 161 |
| 92 | Maldonado, Virgilio | WR-51,612-02 | Grant | Jones | 11/30/2012 | 12/12/2012 | 161 | 195 | 0 |
| 93 | Maldonado, Virgilio | WR-51,612-01 | Deny | Bacon | Unknown | 7/11/2001 | 40 | 40 | 40 |
| 94 | Mamou, Jr., Charles | WR-78,122-01, 02, 03 | Deny | Guiney | 11/6/2013 | 11/13/2013 | 55 | 55 | 55 |
| 95 | Marshall, Gerald | WR-17,752-02, 03 | Deny | Evans | 3/18/2014 | 7/18/2014 | 92 | 92 | 92 |
| 96 | Martinez, Alexander | WR-61,844-01 | Dismiss | Brown, S. | Unknown | 3/31/2005 | 10 | 10 | 10 |
| 97 | Martinez, Raymond | WR-42,341-01 | Deny | (illegible) | Unknown | 7/9/1999 | 41 | 41 | 41 |
| 98 | Martinez, Raymond | WR-42,341-03 | Deny | Krockner | 10/1/2012 | 10/4/2012 | 88 | 88 | 88 |

| | Applicant | CCA Writ No. | Recommendation | Habeas Judge | State's Proposed FOFCL File Date | Trial Court's FOFCL Signed | Total State Proposed FOFCL | Total Trial Ct FOFCL | State's Proposed Adopted Verbatim |
|-----|-----------------------|----------------------|----------------|--------------|----------------------------------|----------------------------|----------------------------|----------------------|-----------------------------------|
| 99 | Mason, William | WR-73,408-01, 02, 03 | Deny | Carter | 10/25/2005 | 12/28/2009 | 92 | 92 | 92 |
| 100 | Masterson, Richard | WR-59,481-01 | Deny | Rains | 2/18/2008 | 3/13/2008 | 62 | 62 | 62 |
| 101 | Matamoros, John | WR-50,791-01 | Deny | Stricklin | 10/11/2001 | 11/1/2001 | 107 | 107 | 107 |
| 102 | Matamoros, John | WR-50,791-02 | Deny | Brown, M. | 3/5/2012 | 3/30/2012 | 142 | 142 | 142 |
| 103 | Matamoros, John | WR-50,791-02 | Deny | Bacon | 12/18/2006 | 12/18/2006 | 169 | 169 | 169 |
| 104 | Matchett, Farley | WR-31,797-02 | Deny | Harmon | Unknown | 1/30/1999 | 92 | 92 | 92 |
| 105 | Matthews, Damon | WR-75,919-01 | Deny | Velasquez | 1/31/2011 | 2/2/2011 | 106 | 106 | 106 |
| 106 | Mays, Rex | WR-42,831-01 | Deny | Rains | Unknown | 9/3/1999 | 33 | 33 | 33 |
| 107 | McCoskey, Jamie | WR-56,820-01 | Deny | Brown, S. | 12/21/2006 | 1/26/2007 | 131 | 131 | 131 |
| 108 | McCoskey, Jamie | WR-56,820-02 | Deny | Brown, S. | 4/15/2008 | 6/23/2008 | 161 | 161 | 161 |
| 109 | McCullum, Demarco | WR-52,642-01 | Deny | Cosper | Unknown | 5/29/2002 | 32 | 32 | 32 |
| 110 | McFarland, George | WR-59,337-01 | Deny | Godwin | 10/1/2003 | 6/8/2004 | 175 | 173 | 173 |
| 111 | McGowen, Roger | WR-64,992-01 | Deny | Campbell, C. | 5/25/2006 | 5/19/2006 | 66 | 66 | 66 |
| 112 | McWilliams, Frederick | WR-48,282-01 | Deny | Poe | Unknown | 12/11/2000 | 43 | 43 | 43 |
| 113 | Medellin, Jose | WR-50,191-01 | Deny | Cosper | Unknown | 1/22/2001 | 81 | 81 | 81 |
| 114 | Medina, Anthony | WR-41,274-02 | Deny | Carter | 4/25/2008 | 5/26/2009 | 254 | 254 | 254 |
| 115 | Moody, Stephen | WR-42,832-01 | Deny | Anderson | 8/11/1999 | 8/19/1999 | 64 | 64 | 64 |
| 116 | Moore, Bobby | WR-13,374-05 | Grant* | Brown, S. | 1/23/2014 | 2/6/2014 | 544 | 577 | 409 |
| 117 | Morris, Kenneth | WR-43,550-01 | Deny | Cosper | Unknown | 9/28/1999 | 106 | 106 | 106 |
| 118 | Morris, Lorenzo | WR-45,156-01 | Deny | Wilkinson | Unknown | 4/11/2000 | 76 | 76 | 76 |
| 119 | Nelson, Marlin | WR-53,148-01 | Deny | Harmon | Unknown | 7/8/2002 | 111 | 111 | 111 |
| 120 | Nerino, Eric | WR-50,598-01 | Deny | Collins | Unknown | 9/27/2001 | 12 | 12 | 12 |
| 121 | Newton, Frances | WR-47,025-01 | Deny | Wallace | Unknown | 6/5/2000 | 160 | 160 | 160 |
| 122 | Nichols, Joseph | WR-21,253-02 | Deny | Harmon | Unknown | 4/9/2001 | 122 | 117 | 112 |
| 123 | Norris, Michael | WR-72,835-02 | Deny | Ellis | 1/18/2012 | 8/22/2012 | 108 | 108 | 108 |
| 124 | O'Brien, Derrick | WR-51,264-01 | Deny | Krocker | 11/9/2001 | 11/13/2001 | 104 | 104 | 104 |
| 125 | Ogan, Craig | WR-41,220-01 | Deny | Hill | 2/4/1999 | 3/11/1999 | 57 | 57 | 57 |
| 126 | Perez, Efrain | WR-48,614-01 | Deny | Wallace | Unknown | 1/26/2001 | 28 | 28 | 28 |
| 127 | Pierce, Anthony | WR-15,859-04 | Deny | Godwin | 12/1/2006 | 1/12/2007 | 104 | 104 | 104 |
| 128 | Pippin, Roy | WR-50,613-01, 02 | Deny | McSpadden | Unknown | 9/26/2001 | 268 | 268 | 268 |
| 129 | Plata, Daniel | WR-46,749-01 | Deny | Ellis | Unknown | 6/27/2000 | 48 | 48 | 48 |
| 130 | Plata, Daniel | WR-46,749-02 | Grant | Ellis | 3/9/2007 | 9/28/2007 | 175 | 287 | 175 |
| 131 | Prevost, Jeffery | WR-84,068-01 | Deny | Powell | 12/22/2016 | 1/3/2017 | 243 | 243 | 243 |
| 132 | Prible, Jr., Ronald | WR-69,328-01 | Deny | Ellis | 1/4/2008 | 1/25/2008 | 76 | 76 | 76 |
| 133 | Prystash, Joseph | WR-58,537-01 | Deny | Hill | 11/17/2003 | 2/25/2004 | 84 | 84 | 84 |
| 134 | Prystash, Joseph | WR-58,537-02 | Deny | Hill | 12/2/2011 | 9/25/2012 | 125 | 125 | 125 |
| 135 | Raby, Charles | WR-48,131-01 | Deny | Campbell, J. | Unknown | 11/14/2000 | 44 | 44 | 44 |
| 136 | Rachal, Rodney | WR-60,394-01 | Deny | Rains | 7/23/2004 | 10/4/2004 | 47 | 47 | 47 |
| 137 | Resendiz, Angel | WR 58,172-01 | Deny | Harmon | 1/15/2004 | 1/21/2004 | 23 | 23 | 23 |
| 138 | Reynosa, Juan | WR 66,260-01 | Deny | Wallace | 10/5/2006 | 10/11/2006 | 23 | 23 | 23 |
| 139 | Rhoades, Rick | WR-78,124-01 | Deny | Guiney | 10/26/2013 | 5/21/2014 | 228 | 232 | 228 |
| 140 | Richard, Michael | WR-47,911-01 | Deny | Barr | 2/29/2000 | 11/7/2000 | 42 | 42 | 42 |
| 141 | Richard, Michael | WR-47,911-02 | Deny | Bacon | 12/2/2006 | 12/28/2006 | 143 | 143 | 143 |
| 142 | Ripkowski, Britt | WR-65,238-01 | Deny | Campbell, J. | 12/9/2005 | 5/2/2006 | 93 | 93 | 93 |
| 143 | Rivers, Warren | WR-53,608-02 | Deny | Carter | 12/15/2006 | 1/3/2007 | 91 | 91 | 91 |
| 144 | Rivers, Warren | WR-53,608-02 | Deny | Carter | 5/18/2007 | 5/22/2007 | 145 | 146 | 145 |
| 145 | Rivers, Warren | WR-53,608-01 | Deny | Poe | 8/12/2002 | 8/14/2002 | 163 | 163 | 163 |
| 146 | Robinson, William | WR-57,207-01 | Deny | Price | 2/9/2007 | 3/13/2007 | 119 | 0 | 0 |
| 147 | Rocha, Felix | WR-52,515-01 | Deny | Harmon | 10/24/2001 | 11/1/2001 | 67 | 67 | 67 |

| | Applicant | CCA Writ No. | Recommendation | Habeas Judge | State's Proposed FOFCL File Date | Trial Court's FOFCL Signed | Total State Proposed FOFCL | Total Trial Ct FOFCL | State's Proposed Adopted Verbatim |
|-----|----------------------|------------------|------------------------------|--------------|----------------------------------|----------------------------|----------------------------|----------------------|-----------------------------------|
| 148 | Rodriguez, Lionell | WR-50,773-01 | Deny | Brown, S. | Unknown | 10/8/2001 | 187 | 187 | 187 |
| 149 | Rosales, Mariano | WR-16,180-03 | Deny | Hill | 5/31/2002 | 6/5/2002 | 49 | 49 | 49 |
| 150 | Rousseau, Anibal | WR-43,534-01 | Deny | Brown, S. | Unknown | 10/5/1999 | 13 | 13 | 13 |
| 151 | Rowell, Robert | WR-52,673-01 | Deny | Hill | Unknown | 5/29/2002 | 59 | 59 | 59 |
| 152 | Russell, Jr., Pete | WR-78,128-01 | Deny | Bradley | 10/8/2012 | 10/9/2012 | 92 | 92 | 92 |
| 153 | Sales, Tarus | WR-78,131-01 | Deny | Guiney | 5/1/2013 | 8/15/2014 | 180 | 180 | 180 |
| 154 | Shannon, Willie | WR-50,117-01 | Deny | Poe | Unknown | 1/20/2001 | 45 | 45 | 45 |
| 155 | Sheppard, Erica | WR-78,132-01 | Grant* | Brown, S. | 10/4/2011 | 8/24/2012 | 240 | 244 | 230 |
| 156 | Shore, Anthony | WR-78,133-01 | Deny | Jackson | 9/4/2012 | 9/11/2012 | 168 | 168 | 168 |
| 157 | Slater, Paul | WR-78,134-01 | Deny | Bond | 10/1/2012 | 2/13/2014 | 197 | 202 | 200 |
| 158 | Slater, Paul | WR-78,134-01 | Deny | Bond | 10/9/2013 | 3/5/2015 | 201 | 202 | 200 |
| 159 | Smith, Demetrius | WR-70,593-01 | Deny | Velasquez | 7/18/2014 | 9/26/2014 | 113 | 113 | 113 |
| 160 | Smith, Jack | WR-8,315-07 | Deny | Hill | 10/14/2011 | 12/28/2012 | 114 | 114 | 114 |
| 161 | Smith, Jr., Clyde | WR-48,130-01 | Deny | Alcala | 8/10/1998 | 4/21/1999 | 29 | 29 | 29 |
| 162 | Smith, Robert | WR-40,874-01 | Deny | Ellis | 12/17/1998 | 3/11/1998 | 123 | 123 | 123 |
| 163 | Smith, Roy | WR-42,801-01 | Deny | Collins | Unknown | 8/24/1999 | 42 | 42 | 42 |
| 164 | Soffar, Max | WR-29,980-03 | Deny | Keel | 12/16/2011 | 1/5/2012 | 315 | 315 | 315 |
| 165 | Sonnier, Derrick | WR-57,256-01 | Deny | Wilkinson | 7/31/2003 | 7/31/2003 | 38 | 38 | 38 |
| 166 | Sorto, Walter | WR-71,381-01 | Deny | Krocker | 12/18/2008 | 12/29/2008 | 64 | 64 | 64 |
| 167 | Tamayo, Edgar | WR-55,690-01 | Deny | McSpadden | 2/27/2003 | 3/28/2003 | 126 | 126 | 126 |
| 168 | Tercero, Bernardo | WR-62,593-01 | Deny | Keel | 12/1/2004 | 6/10/2005 | 53 | 53 | 53 |
| 169 | Thacker, Charles | WR-48,092-01 | Deny | Alcala | Unknown | 7/11/2000 | 54 | 54 | 54 |
| 170 | Thomas, Daniel | WR-15,153-07 | Deny | Stricklin | Unknown | 9/3/2004 | 342 | 342 | 342 |
| 171 | Thomas, Shannon | WR-51,306-01 | Deny | Stricklin | Unknown | 5/22/2001 | 39 | 39 | 39 |
| 172 | Thompson, Charles | WR-78,135-01, 02 | Deny | Shaver | 2/7/2013 | 2/22/2013 | 166 | 166 | 166 |
| 173 | Thompson, Robert | WR-61,379-01 | Deny | Ellis | Unknown | 1/25/2005 | 76 | 76 | 76 |
| 174 | Tong, Chuong | WR-71,377-01 | Deny | Bridgewater | 6/20/2008 | 11/10/2008 | 206 | 206 | 206 |
| 175 | Trottie, Willie | WR-70,302-01 | Deny | Shaver | 6/6/2008 | 7/10/2008 | 92 | 92 | 92 |
| 176 | Valle, Yosvanis | WR-63,068-01 | Deny | Godwin | 9/1/2005 | 9/13/2005 | 73 | 73 | 73 |
| 177 | Villanueva, Jorge | WR-49,591-01 | Deny | Collins | Unknown | 5/17/2001 | 149 | 149 | 149 |
| 178 | Washington, Willie | WR-35,410-02, 03 | Deny | Brown, S. | 9/26/2006 | 9/28/2006 | 86 | 86 | 86 |
| 179 | Wesbrook, Coy | WR-52,120-02 | Deny | Carter | 1/24/2007 | 1/26/2007 | 119 | 119 | 119 |
| 180 | Wesbrook, Coy | WR-52,120-01 | Deny | Shaver | 3/4/2002 | 3/14/2002 | 122 | 122 | 122 |
| 181 | Wesbrook, Coy | WR-52,120-02 | Deny | Carter | 6/27/2014 | 9/5/2014 | 158 | 158 | 158 |
| 182 | Whitaker, II, George | WR-54,762-01, 02 | Deny | Cosper | 8/19/2002 | 11/18/2002 | 108 | 108 | 108 |
| 183 | Will, II, Robert | WR-63,590-01 | Deny | Brown, S. | 9/1/2005 | 11/15/2005 | 26 | 26 | 26 |
| 184 | Will, II, Robert | WR-63,590-03 | Deny | Brown, S. | 12/31/2014 | 1/26/2015 | 120 | 120 | 120 |
| 185 | Williams, Arthur | WR-71,404-01, 02 | Deny | Collins | 6/1/2010 | 6/30/2010 | 49 | 49 | 49 |
| 186 | Williams, Jeffrey | WR-50,662-01 | Deny | Davies | Unknown | 2/20/2003 | 75 | 75 | 75 |
| 187 | Williams, Nanon | WR-46,736-02 | Grant* | Campbell, J. | Unknown | 5/3/2001 | 227 | 207 | 113 |
| 188 | Williams, Perry | WR-63,237-01 | Deny | Harmon | 8/23/2005 | 8/26/2005 | 42 | 42 | 42 |
| 189 | Williams, Richard | WR-43,907-01 | Deny | Godwin | Unknown | 10/13/1999 | 93 | 93 | 93 |
| 190 | Wilson, Geno | WR-55,545-01 | Deny | Hill | Unknown | 3/26/2003 | 101 | 101 | 101 |
| 191 | Woodard, Robert | WR-46,501-02 | Deny | Cosper | 8/14/2006 | 9/19/2006 | 143 | 143 | 143 |
| | | | *CCA overrode recommendation | | | TOTAL | 21275 | 21142 | 20261 |

APPENDIX 3
JUDICIAL ADOPTION RATES
IN CONTESTED CASES

| | Habeas Judge | Sets of Findings Signed | Total State's Proposed | Total Adopted Verbatim | Adoption Rate | Former HCADA? |
|----|--------------|-------------------------|------------------------|------------------------|---------------|---------------|
| 1 | Hill | 15 | 1388 | 1388 | 100% | Yes |
| 2 | McSpadden | 9 | 1109 | 1109 | 100% | Yes |
| 3 | Keel | 8 | 905 | 905 | 100% | Yes |
| 4 | Carter | 7 | 886 | 886 | 100% | Yes |
| 5 | Collins | 6 | 346 | 346 | 100% | No |
| 6 | Cosper | 6 | 500 | 500 | 100% | Yes |
| 7 | Krocker | 6 | 514 | 514 | 100% | Yes |
| 8 | Anderson | 5 | 541 | 541 | 100% | Yes |
| 9 | Rains | 5 | 262 | 262 | 100% | Yes |
| 10 | Wallace | 5 | 419 | 419 | 100% | No |
| 11 | Alcala | 4 | 302 | 302 | 100% | Yes |
| 12 | Barr | 4 | 695 | 695 | 100% | Yes |
| 13 | Poe | 4 | 458 | 458 | 100% | Yes |
| 14 | Bacon | 3 | 312 | 312 | 100% | No |
| 15 | Davies | 3 | 213 | 213 | 100% | Yes |
| 16 | Guiney | 3 | 463 | 463 | 100% | Yes |
| 17 | Shaver | 3 | 380 | 380 | 100% | Yes |
| 18 | Wilkinson | 3 | 177 | 177 | 100% | Yes |
| 19 | Bond | 2 | 398 | 398 | 100% | Yes |
| 20 | Bridgewater | 2 | 341 | 341 | 100% | Yes |
| 21 | Brown, M. | 2 | 369 | 369 | 100% | Yes |
| 22 | Magee | 2 | 260 | 260 | 100% | Yes |
| 23 | Evans | 2 | 208 | 208 | 100% | Yes |
| 24 | Velasquez | 2 | 219 | 219 | 100% | Yes |
| 25 | Burdette | 1 | 87 | 87 | 100% | Yes |
| 26 | Campbell, C. | 1 | 66 | 66 | 100% | Yes |
| 27 | Guerrero | 1 | 211 | 211 | 100% | No |
| 28 | Huffman | 1 | 69 | 69 | 100% | Yes |
| 29 | Jackson | 1 | 168 | 168 | 100% | No |
| 30 | Powell | 1 | 243 | 243 | 100% | No |
| 31 | Ritchie | 1 | 188 | 188 | 100% | No |
| 32 | Robertson | 1 | 111 | 111 | 100% | Yes |
| 33 | Bradley | 1 | 92 | 92 | 100% | Yes |
| 34 | Denson | 1 | 29 | 29 | 100% | No |
| 35 | Harmon | 10 | 694 | 684 | 99% | Yes |
| 36 | Brown, S. | 15 | 2067 | 1922 | 93% | Yes |
| 37 | Campbell, J. | 4 | 443 | 329 | 79% | Yes |
| 38 | Garner | 1 | 191 | 97 | 51% | No |
| 39 | Price | 1 | 119 | 0 | 0% | Yes |
| 40 | Reagin | 1 | 363 | 0 | 0% | No |
| | Total | 153 | 16806 | 15961 | | |