

App. 1

[SEAL]

**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

**NOS. WR-21,005-02, WR-21,005-03,
WR-21,005-04 & WR-21,005-05**

EX PARTE LESTER LEROY BOWER, JR.

**ON APPLICATION FOR
WRIT OF HABEAS CORPUS FROM
CAUSE NOS. 33426, 33427, 33428,
AND 33429 IN THE
15TH JUDICIAL DISTRICT COURT
GRAYSON COUNTY**

Per Curiam.

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

In April 1984, a jury found applicant guilty of four counts of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment in each case at death. This Court affirmed applicant's convictions and sentences on direct appeal. *Bower v. State*, 769 S.W.2d 887 (Tex. Crim. App. 1989). Applicant filed his initial post-conviction application for writ of habeas

corpus in the convicting court on October 2, 1989, pursuant to Article 11.07 then in effect. The application challenged all four convictions and sentences. This Court filed and set each case and ultimately denied applicant relief. *Ex parte Bower*, 823 S.W.2d 284 (Tex. Crim. App. 1991). Applicant then sought habeas relief in the federal district court. The district court conducted an evidentiary hearing in June 2000 and ultimately denied relief in a series of opinions issued in 2002-2004. The Fifth Circuit affirmed the district court's decision on September 18, 2007, and the United States Supreme Court denied applicant's petition for writ of *certiorari* on April 21, 2008.

The instant application attacking all four convictions and sentences was received in this Court on June 25, 2008, along with a motion to stay his execution.¹ However, before this Court ruled on the application, we received notice that the trial court had withdrawn the execution date pending its determination on applicant's motion for forensic testing. In an attempt to avoid piecemeal litigation in the case, this Court issued an order on July 21, 2008, stating that the Court would refrain from acting on the

¹ Because applicant had previously filed an application under Article 11.07, and because this Court had denied relief on that application prior to September 1, 1995, when Article 11.071 became effective, applicant was not entitled to file an initial application under Article 11.071. By the terms of the statute, this application is to be considered a subsequent application which must meet the dictates of Article 11.071 § 5 before the merits may be addressed by any court.

current writ application until the results of the forensic testing litigation were complete. *Ex parte Bower*, No. WR-21,005-02 (Tex. Crim. App. July 21, 2008) (not designated for publication). The trial court subsequently granted forensic testing, and the testing proceeded.

Applicant raised four issues in the instant application: (1) actual innocence based upon newly discovered evidence; (2) *Brady* violations; (3) a claim that Article 37.071 operated unconstitutionally because his jury did not have a vehicle to properly consider mitigating evidence; and (4) a claim that executing him after twenty-four years on death row amounts to cruel and unusual punishment. We held that applicant met the dictates of Article 11.071 § 5 with relation to his first two allegations and remanded those for the trial court to investigate the claims and develop the record. We made no decision regarding whether the third allegation met the Section 5 bar, but because the law had evolved with regard to mitigating evidence, we ordered the trial court to review the third allegation under the prevailing law and make appropriate findings and conclusions. *Ex parte Bower*, No. WR-21,005-02 (Tex. Crim. App. June 13, 2012) (not designated for publication). We did not dispose of the fourth allegation at that time in order to address all allegations together in a concise fashion.

Following the completion of the requested forensic testing, holding a live hearing, and considering the arguments by applicant and the State, the trial

court entered findings of fact and conclusions of law recommending that applicant's first and second claims be denied. After reviewing recent case law, the trial court recommends that the relief sought in applicant's third claim be granted.

We have reviewed the record and the trial court's findings of fact and conclusions of law. Based upon our own review, we deny relief on applicant's first two claims regarding actual innocence and *Brady* violations. We reject the trial court's findings and conclusions recommending relief on applicant's third claim. We have previously held that, unlike the double-edged evidence in *Penry v. Lynaugh*,² the mitigating evidence presented by applicant during the punishment phase of his trial – evidence of his good and non-violent character, his good deeds, and the absence of a prior criminal record – was not outside the scope of the special issues given, nor did it have an aggravating effect when considered within the scope of the special issues. *Ex parte Bower*, 823 S.W.2d at 286. The promulgation of more recent case law by the United States Supreme Court has not changed the definition or nature of what is considered mitigating evidence; thus, applicant was not constitutionally entitled to a separate jury instruction at the punishment phase of trial. *See, e.g., Penry*, 492 U.S. 302 (1989), and *Ex parte Jones*, No. AP-75,896 (Tex. Crim. App. June 10, 2009) (not designated for publication) (holding

² *Penry v. Lynaugh*, 492 U.S. 302 (1989).

positive personal characteristics are the sorts of evidence that can be considered within the scope of the former special issues – no *Penry* issue required). Accordingly, the relief applicant seeks is denied.

Applicant's fourth allegation is dismissed.

IT IS SO ORDERED THIS THE 11th DAY OF JUNE, 2014.

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