

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

JOSEPH C. GARCIA,	§	
Petitioner,	§	
	§	
V.	§	Civil Action No. 3:06-CV-2185-M
	§	
WILLIAM STEPHENS, Director,	§	(Death Penalty Case)
Texas Department of Criminal Justice	§	
Correctional Institutions Division,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER  
ACCEPTING AND MODIFYING FINDINGS, CONCLUSIONS, AND  
RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE, AND  
DENYING A CERTIFICATE OF APPEALABILITY

Petitioner Joseph C. Garcia ("Petitioner" and "Garcia") has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. (Pet., doc. 15; Am. Pet., doc. 20.) Respondent William Stephens has answered in opposition. (Ans., doc. 34.) In his Findings, Conclusions and Recommendation to deny relief ("Recommendation," doc. 42), the United States Magistrate Judge commented that, though finding that Garcia had failed to prove certain claims, Garcia may not have been afforded an opportunity to compel production of the evidence that was needed. (Rec. at 22-23, 25-26.) Garcia made objections ("Objections," doc. 45) to the Recommendation and requested that this Court delay these proceedings to consider Supreme Court cases that ultimately created a new exception to procedural bar. This Court granted Garcia the opportunity to prove that any of his claims came within the new exception, but he has not made the required showing. Therefore, following this Court's *de novo* review of those portions of the Recommendation to which objection was made, the Court **OVERRULES** Garcia's objections, **ACCEPTS** the Recommendation as modified by this Order, and **DENIES** Garcia's application for a writ of habeas corpus.

I

Garcia is a Texas inmate convicted of capital murder and sentenced to death for the murder of police officer Aubrey Hawkins during the robbery of a sporting-goods store on Christmas Eve of 2000 with six others who escaped from a Texas prison.<sup>1</sup> In accordance with the jury's answers to the special issues, Garcia was sentenced to death on February 13, 2003. *State v. Garcia*, No. F01-00325-T (283rd Dist. Ct., Dallas County, Texas). Garcia's conviction and sentence were affirmed on direct appeal. *Garcia v. State*, No. AP-74,692, 2005 WL 395433 (Tex. Crim. App. Feb. 6, 2005). While his direct appeal was pending, Garcia filed an application for habeas-corpus relief in the state trial court on December 14, 2004. (Vol. 1, State Habeas Record ("SHR"), at 2.) The state trial court issued its findings of fact and conclusions of law on February 15, 2006, recommending that habeas relief be denied. (2 SHR 358-482.) Those findings were adopted by the Texas Court of Criminal Appeals ("CCA") on November 15, 2006. *Ex parte Garcia*, WR-64,582-01, 2006 WL 3308744.

On November 13, 2007 (Pet., doc. 15), after federal habeas counsel was appointed, Garcia filed a petition for habeas relief, along with an agreed motion to abate these proceedings to allow him to return to state court to exhaust certain claims (Mot., doc. 16). The motion was granted and these proceedings were abated from December 4, 2007 (Order, doc. 17), until April 2, 2008, when Garcia filed a motion to reopen (doc. 18) with his Amended Petition (Am. Pet., doc. 20). These proceedings were then reopened (Order, doc. 25) and referred to the United States Magistrate Judge, who made his Recommendation to deny relief on November 1, 2011. (Rec., doc. 42.) After an extension was granted, Garcia filed his objections (Obj., doc. 45) to the Recommendation.

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<sup>1</sup>These details are agreed upon by the parties. Garcia concurred in the first two of Respondent's proposed findings of fact ("R's FoF," doc. 93, at 7) and included more detail. (Garcia's proposed Findings of Fact, "P's FoF," doc. 95, at 3.)

Following the Supreme Court's opinion in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), creating a new exception to procedural bar, these proceedings were suspended until the Supreme Court's decision in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), which applied the *Martinez* exception to Texas cases. This Court then conducted an evidentiary hearing to allow Garcia to prove that any of his potentially eligible claims would come within the newly created exception to procedural bar. Based on the supplemental briefing by the parties, and the evidence and arguments presented at the hearing, the Court finds that Garcia has not shown that any of his claims come within the exception to procedural bar created in *Martinez*.

## II

In his amended petition for federal habeas corpus relief, Garcia presents seven grounds for relief, some of which include multiple claims. The first four grounds for relief are based solely on the record and include complaints that (1) the mitigation special issue failed to place the burden of proof on the prosecutor, (2) the terms used in the special issues are unconstitutionally vague, (3) the requirement that ten jurors agree in order to answer the mitigation special issue "no" violates due process, and (4) the failure of the CCA to engage in a proportionality review violated due process. In his fifth ground for relief, Garcia complains that he was deprived of the constitutionally guaranteed effective assistance of counsel at trial in failing to:

- (1) object to the prosecutor's challenge of a qualified juror for cause,
- (2) object to a change in jury selection procedure that favored the prosecution,
- (3) object to the prosecutor's argument that the verdict on guilt need not be unanimous,
- (4) object to the prosecutor's mischaracterization of evidence at closing,

(5) request an anti-parties charge in punishment,

(6) object to improper party conspiracy and inferred intent instructions at the guilt/innocence phase, and

(7) properly investigate and present certain mitigating evidence.

(Am. Pet. at 40-83.) In his sixth ground for relief, Garcia complains that appellate counsel was ineffective in failing to:

(1) raise the trial court's improper exclusion of a qualified juror,

(2) complain that jury selection was conducted in violation of a Texas statute,

(3) properly brief an issue regarding extraneous offense evidence,

(4) complain of improper jury instructions regarding intent at guilt/innocence phase,

(5) raise as error the prosecutor's mischaracterization of evidence at closing, and

(6) raise the denial of a motion to suppress evidence obtained with invalid warrants.

(Am. Pet. at 83-115.) In his final ground for relief, Garcia complains that his state habeas counsel was ineffective for failing to raise the deficiencies of trial and appellate counsel in the state habeas proceeding. (Am. Pet. at 116-127.) This was presented as an independent claim for relief, but is also argued to avoid a procedural bar to other claims.

In his objections to the Recommendation of the Magistrate Judge, Garcia briefly reasserted the record claims in the first group to preserve them for appeal (Obj. at 13-14), but emphasized that the ineffective assistance of state habeas counsel should excuse any procedural bar to his claims of ineffective assistance of trial and appellate counsel, arguing that these proceedings should be stayed until the Supreme Court decided *Martinez v. Ryan*. (Obj. at 1-13.) These allegations were subsequently considered by this Court in determining whether any of his claims of ineffective

assistance of trial counsel could fall within the exception to procedural bar created in *Martinez*. Each of Garcia's objections are considered in this *de novo* review of his claims.

### III

Federal habeas review of these claims is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), setting forth preliminary requirements that must be satisfied before reaching the merits of a claim made in these proceedings.

#### *A. Exhaustion*

Under the AEDPA, a federal court may not grant habeas relief on any claim that the state prisoner has not exhausted in the state corrective process available to protect his rights. *See* 28 U.S.C. § 2254(b)(1)(A); *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011). The federal court may, however, deny relief on the merits notwithstanding any failure to exhaust. *See* 28 U.S.C. § 2254(b)(2); *Miller v. Dretke*, 431 F.3d 241, 245 (5th Cir. 2005).

#### *B. State-Court Procedural Determinations*

If the state court denies the claim on state procedural grounds, a federal court will not reach the merits of those claims if it determines that the state law grounds are independent of the federal claim and adequate to bar federal review. *See Sawyer v. Whitley*, 505 U.S. 333, 338 (1992). If, however, the state procedural determination is based on state grounds that were inadequate to bar federal habeas review, or if the habeas petitioner shows that an exception to the bar applies, the federal court must resolve the claim without the deference AEDPA otherwise requires. *See Miller v. Johnson*, 200 F.3d 274, 281 n.4 (5th Cir.2000) ("Review is *de novo* when there has been no clear adjudication on the merits.") (citing *Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir. 1997)); *Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999) ("the AEDPA deference scheme outlined in 28

U.S.C. § 2254(d) does not apply” to claims not adjudicated on the merits by the state court); *Woodfox v. Cain*, 609 F.3d 774, 794 (5th Cir. 2010) (the AEDPA deferential standard would not apply to a procedural decision of the state court).

***C. State-Court Merits Determinations***

If the state court denies the claim on the merits, a federal court may not grant relief unless it first determines that the state court unreasonably adjudicated the claim, as defined in § 2254(d):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim——

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

*Id.* In the context of § 2254(d) analysis, “adjudicated on the merits” is a term of art referring to a state court’s disposition of a case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997). This provision does not authorize habeas relief, but restricts this Court’s power to grant relief to state prisoners by barring the relitigation of claims in federal court that were not unreasonably denied by the state courts. The AEDPA limits, rather than expands, the availability of habeas relief. *See Fry v. Pliler*, 551 U.S. 112, 119 (2007); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). “By its terms § 2254(d) bars relitigation of any claim ‘adjudicated on the merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” *Richter*, 131 S. Ct. at 784. “This is a ‘difficult to meet,’ and ‘highly deferential standard for evaluating state-court

rulings, which demands that state-court rulings be given the benefit of the doubt.” *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (internal citations omitted) (quoting *Richter*, 131 S. Ct. at 786, and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

Under the “contrary to” clause, a federal court is not prohibited from granting federal habeas relief if the state court either arrives at a conclusion contrary to that reached by the United States Supreme Court on a question of law or decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. See *Williams v. Taylor*, 529 U.S. at 412-13; *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000). Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case. *Williams*, 529 U.S. at 413. The Supreme Court has repeatedly reaffirmed the high and difficult standard that must be met.

“‘[C]learly established Federal law’” for purposes of § 2254(d)(1) includes only “‘the holdings, as opposed to the dicta, of this Court’s decisions.’” And an “unreasonable application of” those holdings must be “‘objectively unreasonable,’” not merely wrong; even “clear error” will not suffice. Rather, “[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”

*White v. Woodall*, 134 S. Ct. 1697, 1702 (Apr. 23, 2014) (citations omitted).

Federal habeas relief is not available on a claim adjudicated on the merits by the state court, unless the record before the state court satisfies § 2254(d). “[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was

before that state court.” *Pinholster*, 131 S. Ct. at 1400. The evidence required under § 2254(d)(2) must show that the state-court adjudication “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

#### IV

##### *A. Record Claims*

In the first four grounds for relief in his Amended Petition for federal habeas corpus relief, Garcia presents claims based on the record before the state court. Three of these claims attack the trial court’s instructions to the jury in the punishment phase of his trial. In his first ground for relief, Garcia complains that the mitigation special issue failed to place the burden of proof on the state. (Am. Pet. at 24-28.) In his second ground for relief, Garcia complains that the terms used in the special issues are unconstitutionally vague. (Am. Pet. at 28-33.) In his third ground for relief, Garcia complains that the requirement that ten jurors agree in order to answer the mitigation special issue “no” violates due process. (Am. Pet. at 33-37.) In his fourth ground for relief, Garcia contends that the failure of the CCA to engage in a proportionality review violated due process. (Am. Pet. at 38-40.) The Magistrate Judge found, and Garcia concedes, that these claims are foreclosed by Fifth Circuit precedent. (Rec. at 7-8; Obj. at 13-14.) The Court agrees and **ACCEPTS** the Recommendation as to these claims. Garcia’s first four grounds for relief are **DENIED** for lack of merit.

##### *B. Ineffective Assistance of Constitutionally Guaranteed Counsel*

In his fifth and sixth grounds for relief, Garcia complains that he was deprived of the constitutionally guaranteed effective assistance of counsel at his trial and in his direct appeal. The Recommendation correctly set forth the two-prong standard under *Strickland v. Washington*, 466



U.S. 668 (1984), for analysis of a claim of ineffective assistance of counsel. (Rec. at 14-15.) The Magistrate Judge found that one of these claims had been denied on the merits by the state court, and recommended that this claim be denied. (Rec. at 14-18.) The Magistrate Judge also found that the remaining claims in this group were procedurally barred and, because the procedural bar was not clearly asserted, followed the procedure for raising the procedural bar *sua sponte*. (Rec. at 12-14.)

*1. Complaints Against Trial Counsel*

Garcia's fifth ground for relief asserts that his trial counsel provided ineffective assistance. After the Recommendation was made, the Supreme Court created an equitable exception to procedural bar in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), for substantial claims of ineffective assistance of trial counsel that were not presented to the state court due to the ineffective assistance of state habeas counsel. In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Supreme Court applied this new exception to Texas cases. Following these opinions, the Court scheduled an evidentiary hearing (the "*Martinez* hearing") to afford Garcia an opportunity to prove that any of his claims that trial counsel was ineffective would come within the new exception to bar.

At the hearing, it was established that Garcia was represented at trial by three qualified attorneys, two of whom had extensive experience in capital and death penalty litigation, and who were assisted by a highly qualified investigator.<sup>2</sup> Garcia was represented in his state habeas proceedings by an attorney with ample experience in prior death penalty cases, and who filed on Garcia's behalf a 125-page application for habeas relief with 46 claims for relief, including claims

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<sup>2</sup>Garcia concurred in the fourth through seventh, and almost all of the ninth, of Respondent's proposed findings of fact that confirmed these details. (R's FoF at 8; P's FoF at 3.)

of ineffective assistance of trial counsel.<sup>3</sup> Based on the record before this Court and evidence presented at the hearing, the Court finds that none of Garcia's claims come within the exception to procedural bar created in *Martinez*.

*a. Failure to Object to Excusal of Venireperson*

Garcia complains that trial counsel were ineffective for failing to object to the prosecutor's challenge of potential juror David Chmurzynski for cause. (Am. Pet. at 43-52.) The Magistrate Judge found that this claim had been dismissed by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 § 5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge found that Garcia had not shown that counsels' performance was deficient or that an objection would have prevailed. (Rec. at 18-21.) This Court granted the Respondent's motion to exclude this claim from the *Martinez* hearing in light of the record indicating that this venireperson expressed difficulties that would prevent or substantially impair his performance as a juror, and the absence of any specific factual allegations that a biased juror actually served on this jury, that an objection would have prevailed, or that an objection would have preserved a potentially meritorious claim for appeal. (Order Limiting Hearing, doc. 74, at 4-5.) Because the allegations of this claim could not support relief, it has no merit and is not "substantial" under *Martinez*. 132 S. Ct. at 1318. Because the claim lacks merit, state habeas counsel could not have been ineffective for failing to raise it. See *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013) (agreeing with the district court that "habeas counsel was not ineffective in failing to raise [a] claim at the first state proceeding" because "there was no merit to [the

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<sup>3</sup>Garcia concurred in the eighth through twelfth of Respondent's proposed findings of fact that confirmed these details, except for changing the word "trials" to "cases." (R's FoF at 8-9; P's FoF at 3-4.)

petitioner's] claim"); *Beatty v. Stephens*, 759 F.3d 455, 466 (5th Cir. 2014). Therefore, neither of the elements of *Martinez* could be satisfied, and the Recommendation to dismiss it is accepted, as modified by this Order. This claim is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

*b. Failure to Object to Change in Jury Selection Procedures*

Garcia complains that trial counsel was ineffective for failing to object to a change in the jury selection procedures that favored only the prosecution. (Am. Pet at 52-61.) The Magistrate Judge found that this claim had been dismissed by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge found that trial counsel agreed to this change and that Garcia had not overcome the presumption of reasonable trial strategy. (Rec. at 21-22.) This Court granted the Respondent's motion to exclude this claim from the *Martinez* hearing because it did not allege prejudice in that a biased venire member served on the jury but, as with the prior claim, makes conclusory assertions that are incapable of constituting prejudice under *Strickland*. (Order Limiting Hearing at 5-6.) Because the allegations of this claim could not support relief, it is not substantial under *Martinez*, 132 S. Ct. at 1318, and state habeas counsel could not have been ineffective for failing to raise it. *See Garza*, 738 F.3d at 676. Therefore, neither of the elements of *Martinez* could be satisfied, and the Recommendation to dismiss it is accepted, as modified by this Order and the Order Limiting Hearing. This claim is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

*c. Failure to Object to Prosecutor's Misstatement of Law*

Garcia complains that trial counsel was ineffective for failing to object to the prosecutor's closing argument in the guilt/innocence stage that the jurors did not need to agree on the indicted theory of capital murder in order to find Garcia guilty.<sup>4</sup> (Am. Pet. at 61-66.) The Magistrate Judge found that this claim had been dismissed by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge found that this decision not to object to closing argument was a matter of trial strategy that was not shown to be deficient. (Rec. at 22.) The Court granted Garcia the opportunity at the *Martínez* hearing to prove this claim, but he did not show that the prosecutor's argument misstated the law and that an objection would have prevailed.

State habeas counsel did not assert an ineffective-assistance-of-trial-counsel claim, but raised similar complaints against the lack of unanimity required by the jury charge (1 SHR 63-78; Tr. at 125-26), which were denied by the state court as procedurally barred and, alternatively, as lacking merit. (2 SHR 391-410.) The state court determined that Garcia's jury charge did not permit a non-unanimous verdict, but that Garcia was charged and convicted of committing only one crime under state law—the capital murder of Aubrey Hawkins—even though different theories were provided for the jury regarding how that crime was committed. (2 SHR 392-97.) The state court noted that, under its precedent, “when an indictment charges different theories under which a defendant committed a single capital murder, the jury need not agree on which theory has been proven.” (2 SHR 395 (citing *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991).) This precedent

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<sup>4</sup>Garcia concurred in the nineteenth through twenty-first of Respondent's proposed findings of fact that confirmed the pertinent jury instructions and prosecutor's argument. (R's FoF at 10; P's FoF at 4.)

followed *Schad v. Arizona*, 501 U.S. 624, 630-31 (1991), in which the Supreme Court upheld a conviction based on a general verdict that did not require the jury to agree on whether the defendant had committed premeditated murder or felony murder because Arizona characterized first-degree murder “as a single crime as to which a verdict need not be limited to any one statutory alternative.”

In the same way, Texas jury instructions charging alternate means of committing capital murder in the same application paragraph merely set forth differing methods of committing the same offense. “It is appropriate where the alternate theories of committing the same offense are submitted to the jury in the disjunctive for the jury to return a general verdict if the evidence is sufficient to support a finding under any of the theories submitted.” *Kitchens*, 823 S.W.2d at 258.

Respondent argues that this matter of state law has been determined adversely to Garcia and is binding on the federal court. (Tr. at 163; R’s FoF at 29.) This Court agrees. Federal courts in habeas proceedings do not sit in review of a state court’s determination of its own laws. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (“We have repeatedly held that a state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.”). Further, a counsel’s failure to object to a matter of state law that has been determined adversely to the petitioner by the state court cannot support an ineffective assistance of counsel claim in federal court. *See Paredes v. Quarterman*, 574 F.3d 281, 291 (5th Cir. 2009).

In his petition, Garcia argued that the opinion in *United States v. Holley*, 942 F.2d 916 (5th Cir. 1991), supports his position. (Am. Pet. at 64 n.177.) *Holley* is distinguishable in that it addressed whether a federal jury instruction required unanimity and was not addressing whether a

state may permissibly determine that its law provides multiple ways of committing a single offense. Even so, Garcia has not made the showing that would be necessary to prevail under *Holley*.

Holley was charged with multiple false statements and, to secure a conviction on the various themes, the government was required to prove different facts to show the knowing falsity of each statement. The United States Court of Appeals for the Fifth Circuit noted the rule in support of a general verdict when numerous factual bases for criminal liability are alleged, but held that this rule failed where “there exists a genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts.” *Id.* at 926. The Court of Appeals later observed, in an unpublished opinion, that a “unanimity-of-theory instruction is a constitutional right only when ‘evidence to the contrary’ undermines the expectation that a general unanimity instruction suffices,” and that a “habeas petitioner claiming ineffective assistance of counsel, therefore, must allege more than a duplicitous indictment. He must identify facts and circumstances that raise ‘a genuine risk’ of juror confusion.” *United States v. Tucker*, 434 F. App’x 355, 360 (5th Cir. 2011). Garcia has not attempted to do so, despite the opportunities afforded in these proceedings.

At the evidentiary hearing, trial and state habeas counsel testified that the prosecutor’s closing argument was entirely consistent with state law.<sup>5</sup> (Tr. at 22-23, 32-33, 69-70, 124- 28.) Garcia’s examination did not attempt to impeach that position, or suggest any risk of juror confusion, but focused on whether counsel should have made objections that the law does not yet require, in order to promote a change in the law on appeal. (Tr. at 24-25, 33-35.) During the evidentiary

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<sup>5</sup>Garcia concurred in the twenty-second of Respondent’s proposed findings that “Garcia’s trial counsel testified that they did not object to the prosecutor’s closing argument because it was a correct statement of the law.” (R’s FoF at 10; P’s FoF at 4.)

hearing, the Court specifically asked Garcia's counsel how the failure to object to the prosecutor's argument could be ineffective assistance under *Strickland* if it was not in conflict with state law, and counsel responded, "I would just reurge what we've briefed on the issue. I don't have anything to add to it." (Tr. at 151.) Even if *Holley* were to apply to this matter of state law, Garcia has not shown a genuine risk of juror confusion on the issue that mandates constitutional remediation.

Garcia has not shown that the law at the time actually required or even supported the objection, but argues that an assiduous attorney would have attempted to change the law through an objection. Garcia has not shown that his ineffective assistance claim is substantial under *Martinez*. "Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994). Further, state habeas counsel would not have been ineffective for failing to raise a meritless claim in the state habeas proceedings. *See Garza*, 738 F.3d at 676. Neither of the elements of *Martinez* are satisfied and the Recommendation is thus accepted, as modified by this Order. This claim is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

*d. Failure to Object to Prosecutor's Misstatement of Evidence*

In his petition, Garcia complained that trial counsel was ineffective for failing to object to the prosecutor's statement that Garcia had threatened to kill, contending it was a mischaracterization of the testimony. (Am. Pet at 66-68.) The Magistrate Judge found that this claim had been dismissed by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge found that the decision to not object to closing argument was a matter of trial strategy that was not shown to be deficient. (Rec. at 22.)

At the *Martinez* hearing, Garcia withdrew this claim. Counsel explained that, in reviewing the claim in preparation for the hearing, they determined that the prosecutor's argument "was not a misstatement of the testimony." (Tr. at 3-4.) Because it is withdrawn, the Court will dismiss the claim; in the alternative, the Recommendation is accepted, as modified by this Order. This claim is **DISMISSED** as withdrawn, and alternatively as procedurally barred, or **DENIED** for lack of merit.

*e. Failure to Request an Anti-Parties Charge*

Garcia complains that trial counsel was ineffective for failing to object to the lack of an anti-parties instruction to the jury in the punishment stage of his trial. (Am. Pet. at 68-71.) He argues that he would have been entitled to such an instruction if he had requested it, that the jury consider only his individual moral culpability in determining punishment, because he had been found guilty under instructions that allowed for criminal liability as a party. (Am. Pet. at 68-69.) The Magistrate Judge found that this claim had been denied by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge considered the language of Special Issue No. 2,<sup>6</sup> and noted Circuit precedent that the Texas special issues focused the jury on

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<sup>6</sup>Garcia concurred in the twenty-third of Respondent's proposed finding that "Garcia's jury received the following charge at the punishment phase of trial:

Special Issue No. 2

Do you find from the evidence beyond a reasonable doubt that the defendant, JOSEPH C. GARCIA, actually caused the death of the deceased, Aubrey Hawkins, or did not actually cause the death of the deceased but intended to kill the deceased or anticipated that a human life would be taken?

(R's FoF at 11; P's FoF at 5.)



the individual conduct of the defendant and that this structure made a separate anti-parties charge unnecessary. (Rec. at 22-23 (citing *Westley v. Johnson*, 83 F.3d 714, 723 (5th Cir. 1996)).)

The Court granted Garcia the opportunity at the *Martinez* hearing to prove this claim, but no factual or legal basis was presented at the hearing for requiring that the jury instructions include a separate anti-parties charge in addition to the special issues that were given. Trial and state habeas counsel testified that the existing law did not require any such separate instruction.<sup>7</sup> (Tr. 45-47, 70-71, 130-31, 141.) Garcia's examination of counsel did not attempt to impeach this position, but focused on the need to make an objection to promote a change in existing law. (Tr. at 47-48, 75-76, 142-43.) During the evidentiary hearing, Garcia's counsel was specifically asked whether there was anything to suggest than an objection to the lack of a separate anti-parties instruction would have been proper, but no other support was provided. (Tr. at 151-52.) Garcia's counsel acknowledged Special Issue No. 2, and stated that Garcia's issue is "why would they not preserve something via an objection in the hopes of . . . trying to change the case law on that." (Tr. at 152.)

It does not appear to be disputed that the law as it existed did not require or support the objection. The failure to make a meritless objection is not ineffective assistance of counsel. *See Clark*, 19 F.3d at 966. Because the allegations of this claim could not support relief, it is not substantial under *Martinez*, 132 S. Ct. at 1318, and state habeas counsel could not have been ineffective for failing to raise a meritless claim. *See Garza*, 738 F.3d at 676. Therefore, neither of the elements of *Martinez* could be satisfied and the Recommendation is accepted, as modified by this

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<sup>7</sup>Garcia concurred in the twenty-fifth of Respondent's proposed findings, that "Trial counsel testified that they did not request any further 'anti-parties' charge because Garcia was not entitled to any further charge." (R's FoF at 11; P's FoF at 5.)

Order. This claim is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

*f. Failure to Object to Party Conspiracy and Inferred Intent Instructions*

Garcia complains that trial counsel was ineffective for failing to object to improper party conspiracy and inferred intent instructions at the guilt/innocence phase. (Am. Pet. at 71-77.) As the Magistrate Judge found, this claim had been denied by the state court on the merits.<sup>8</sup> (Rec. at 17.) Therefore, to obtain federal habeas relief, Garcia must demonstrate that the state court's decision on the ineffective assistance claim was contrary to, or an unreasonable application of, the standards set forth under *Strickland*. See *Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003). This makes federal habeas review of a state court's denial of such a claim "doubly deferential." *Pinholster*, 131 S. Ct. at 1403.

Garcia's claim depends on a determination that the jury instruction was legally improper and subject to objection. As noted by the Magistrate Judge (Rec. at 17) and set out above, *see supra* Section IV, B, 1, c, this jury charge was found to be proper by the state court. Garcia has not otherwise shown that this determination violated a federal constitutional requirement. And the fact that this matter of state law has been determined adversely to Garcia means it cannot support an ineffective-assistance-of-counsel claim in federal court. See *Paredes*, 574 F.3d 921. The state court's decision was not an unreasonable application of federal law as determined by the Supreme Court. See 28 U.S.C. § 2254(d)(1). The Recommendation to deny relief is thus accepted, and this claim is **DENIED**.

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<sup>8</sup>Garcia concurred in the twenty-eighth and twenty-ninth of Respondent's proposed findings that set forth the state court's rejection of the merits of this claim. (R's FoF at 12; P's FoF at 6.)

*g. Failure to Investigate and Present Mitigating Evidence*

In his final complaint against trial counsel, Garcia complains that counsel were ineffective for failing to investigate and present certain mitigating evidence at the punishment stage of his trial. (Am. Pet. at 77-83.) The Magistrate Judge found that this claim had been denied by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge noted that Garcia frames the claim as a failure to obtain a mitigation specialist, but that the record before this Court shows that trial counsel obtained the services of experts with qualifications that favorably compare with the qualifications of the mitigation expert now presented. (Rec. at 23, 25.) The Magistrate Judge also found that Garcia has not shown that any of the information uncovered by his current mitigation investigator was unknown to trial counsel at the time of trial or that the expert assistance trial counsel received was deficient, particularly in light of the record indicating that the critical information referenced in the petition was extensively placed before the jury at trial. (Rec. at 25-26.)

The Magistrate Judge acknowledged, however, that Garcia had not been afforded the opportunity to discover what was known to trial counsel to prove the claim. (Rec. at 25-26.) Following *Martinez*, this Court granted a hearing to allow Garcia the opportunity to prove that this claim is substantial and that state habeas counsel was ineffective for not presenting it to the state court. At the hearing, the mitigating evidence that was identified as not having been presented at

trial was that during the second time that Garcia was in New York, after his mother had abandoned him there, he had been sexually abused.<sup>9</sup>

It is undisputed that Garcia did not reveal any information concerning the sexual abuse to trial counsel or to either of the mental health experts that had been appointed to aid the defense by examining Garcia and offering expert testimony at his trial. (Tr. at 148-49.) It is also undisputed that the only ones that would have known of the abuse were Garcia and the perpetrator, and that the trial court would not have allowed Garcia's mental health experts to testify regarding such events unless they were corroborated. (Tr. at 153-57.) Even in the seven years since federal habeas counsel was appointed during which time they apparently received this information from Garcia, and with the opportunity to present it at the *Martinez* hearing, no corroboration has been presented to this Court or shown to have been available to trial counsel. Therefore, even if Garcia had disclosed the asserted sexual abuse to his mental health experts, they would not have been permitted to testify regarding such an uncorroborated event. In light of Garcia's decision to not testify at his trial, he has not shown how this evidence could have been presented to the jury at his trial even if it occurred and had been disclosed to his counsel and experts.

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<sup>9</sup>At the *Martinez* hearing, Garcia's counsel examined the trial counsel responsible for the mitigation case about the "one thing" that the federal habeas investigator found not to be in the evidence presented to the jury "and that concerned Mr. Garcia being sexually abused while he was in New York City." (Tr. at 39.) Garcia previously alleged that he had also witnessed violent acts including a murder during that time (Am. Pet. at 80) and included witnessing a murder in his proffer of testimony (Tr. at 149). No details have been provided about such murder, however, except that it occurred while he walked in a park. (Psychosocial History by Knox, at 10.) Garcia made no effort to examine trial counsel about the murder, and there is no indication that it had any impact on Garcia or that evidence of it would have enhanced the mitigation case presented at trial. In fact, neither of the parties' proposed findings of fact even mentioned it. Therefore, Garcia does not appear to rely upon evidence of this murder in his complaint against trial counsel's mitigation investigation and presentation. The Court's analysis focuses, instead, on the evidence that Garcia does appear to rely upon, that he was sexually abused during that same time period.

It is disputed, however, that the abuse actually occurred. Trial counsel Bradley Lollar testified that in the records of Child Protective Services, Garcia denied that he had suffered any sexual abuse.<sup>10</sup> (Tr. at 62.) Garcia's proffer of testimony included the statement that Garcia believed those CPS records were incorrect, but that even if they were not, he would have been 12 to 14 years old when he made the statement. (Tr. at 149.) Garcia provided no details concerning the alleged sexual assault except to identify the abuser as the younger brother of his mother's boyfriend Papa Calo, with whom he shared a room. (Psychosocial History by Knox at 10, 23; Tr. at 156.)

The Court finds that counsel reasonably investigated potential mitigating evidence and reasonably relied upon the information received, including Garcia's statements in the CPS records, in making decisions regarding the most fruitful places to focus the defense team's limited investigative resources. Therefore, Garcia has not shown how trial counsel's performance was deficient. Instead, as noted by the Magistrate Judge, much of Garcia's claim constitutes the type of second-guessing of investigative strategy that is precisely the inquiry this Court must avoid under *Strickland*. (Rec. at 26 (citing *Granados v. Quarterman*, 455 F.3d 529, 534 (5th Cir.2006)).) The Court also finds that, if such abuse occurred, Garcia has not shown how it would have been corroborated and come into evidence before the jury. Further, no details regarding the alleged sexual abuse were presented to the Court, and there is no indication that the abuse was severe or would have added materially to the extensive mitigation case presented at trial. Therefore, Garcia has not shown how he could satisfy the prejudice prong of *Strickland*.

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<sup>10</sup>Bradley Lollar testified that he was primarily responsible for the mitigation investigation and presentation at the punishment stage. (Tr. at 28, 35-36.)

Because the allegations of this claim could not support relief, it is not substantial under *Martinez*, 132 S. Ct. at 1318, and state habeas counsel could not have been ineffective for failing to raise it. *See Garza*, 738 F.3d at 676. Therefore, neither of the elements of *Martinez* could be satisfied and the Recommendation is accepted, as modified by this Order. This claim is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

## *2. Complaints Against Appellate Counsel*

In his sixth ground for relief, Garcia complains that appellate counsel provided ineffective assistance in six listed ways. (Am. Pet. at 83-115.) The Magistrate Judge found that these claims were denied by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) The exception to procedural bar created in *Martinez* is limited to claims of ineffective assistance of trial counsel and may not excuse a procedural bar of claims that appellate counsel was ineffective. *See Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014); *but see Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1296 (9th Cir. 2013) (holding that *Martinez* extends to claims of ineffective assistance of appellate counsel). Therefore, none of these claims were included in the *Martinez* hearing, even though some of the same issues were presented.

The Magistrate Judge correctly analyzed the merits of each of these claims, in the alternative. (Rec. at 26-31.) Regarding Garcia's claim that appellate counsel failed to raise points of error on appeal regarding the guilt phase jury instructions (Rec. at 29), the Recommendation is modified to add the discussion of the analysis above of Garcia's claims that trial counsel failed to object to the instructions at trial, *see supra* Section IV, B, 1, c, and to an improper statement of the law by the prosecutor. *See supra* Section IV, B, 1, f. Regarding the claim that appellate counsel failed to raise

as error the prosecutor's mischaracterization of evidence (Rec. at 29-30), the Recommendation is modified to note that the underlying complaint concerning trial counsel was withdrawn by Garcia at the *Martinez* hearing on the basis that the prosecutor's argument was not incorrect. (Tr. at 3-4.) The same failure to object, therefore, could not form the basis for a complaint against appellate counsel for failing to raise it. The findings and recommendations regarding the claims against appellate counsel are accepted as modified. Garcia's sixth ground for relief, including all of its claims, is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

*C. Ineffective Assistance of State Habeas Counsel*

In his seventh ground for relief, Garcia complains that state habeas counsel provided ineffective assistance. (Am. Pet. at 116-27.) The Magistrate Judge found that the ineffective assistance of state habeas counsel did not constitute an independent ground upon which federal habeas relief may be granted. (Rec. at 31-32.) The Magistrate Judge also found that it could not constitute cause to excuse a procedural default of other claims. (Rec. at 32.) To the extent that the equitable exception to procedural bar in *Martinez* and *Trevino* altered this rule, the Recommendation is modified by this Order to reflect those changes and to incorporate the discussions of the opportunity afforded Garcia at the *Martinez* hearing to prove his claims that trial counsel provided ineffective assistance. *See supra* Section IV, B, 1. The findings and recommendations regarding the claims against state habeas counsel are accepted, as modified by this Order. Garcia's seventh ground for relief is **DISMISSED** as not cognizable as a separate claim in federal habeas proceedings, and his arguments in support of an exception to procedural bar are **DENIED**.

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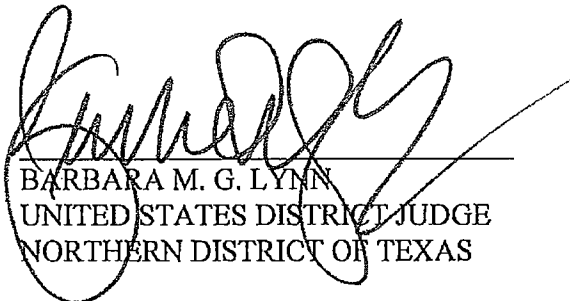
The Objections (doc. 45) are **OVERRULED**, the Recommendation (doc. 42) is **ACCEPTED AS MODIFIED** in this Order, and the amended petition for a writ of habeas corpus (doc. 20) is **DENIED**.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court **DENIES** a certificate of appealability. The Court **ADOPTS and INCORPORATES by reference** the Magistrate Judge's Findings, Conclusions and Recommendation filed in this case, as **MODIFIED in this Order**, in support of its finding that the petitioner has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In the event he files a notice of appeal, Garcia will be allowed to proceed *in forma pauperis*.

**SO ORDERED.**

Date: May 28, 2015.

  
BARBARA M. G. LYNN  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF TEXAS



IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 15-70039

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United States Court of Appeals  
Fifth Circuit

**FILED**

July 21, 2017

Lyle W. Cayce  
Clerk

JOSEPH C. GARCIA,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL  
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:06-CV-2185

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Before JOLLY, DENNIS, and PRADO, Circuit Judges.

JAMES L. DENNIS, Circuit Judge:\*

Joseph C. Garcia was convicted of capital murder and sentenced to death in a Texas state court for the December 2000 killing of Irving, Texas, police officer Aubrey Hawkins. The Texas Court of Criminal Appeals (TCCA) summarized the facts of the crime as follows:

On December 13, 2000, seven inmates, including [Garcia], escaped from the Texas Department of Criminal Justice Connally Unit,

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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taking with them a number of firearms stolen from the unit. On December 24th, the group committed a robbery at a sporting-goods store in Irving, killing Irving police officer Aubrey Hawkins as they fled. The escapees used the weapons they stole from the prison to commit the robbery and murder. The escapees then made their way to Colorado where they lived in an RV park until January 2001, when six were apprehended and one committed suicide.

The TCCA upheld Garcia's conviction and sentence on direct appeal. See *Garcia v. State*, No. AP-74692, 2005 WL 395433, at \*1 (Tex. Crim. App. Feb. 16, 2005). Garcia filed a state post-conviction application for a writ of habeas corpus, but the TCCA denied relief. See *Ex parte Garcia*, No. WR-64,582-01, 2006 WL 3308744, at \*1 (Tex. Crim. App. Nov. 15, 2006).

Garcia then filed a federal habeas application under 28 U.S.C. § 2254, in which he included several claims that he had not presented to the state courts. The district court held an evidentiary hearing as to some of those unexhausted claims to determine if Garcia could establish cause and prejudice for his procedural default. However, the court excluded from the evidentiary hearing Garcia's claims of ineffective assistance of counsel at jury selection. Ultimately, the district court denied relief on all of Garcia's claims and denied a certificate of appealability (COA). Garcia now seeks a COA from this court on his claims that: (1) trial counsel rendered ineffective assistance in failing to request an "anti-parties" jury charge; (2) trial counsel rendered ineffective assistance in failing to object to the prosecutor's closing argument; (3) appellate counsel rendered ineffective assistance in failing to challenge on appeal the trial court's admission of evidence of Garcia's prison escape; (4) the term "probability," as used in the jury charge, is unconstitutionally vague; and (5) the State's death-penalty scheme is unconstitutional because it does not require the jury to find the lack of sufficient mitigating circumstances beyond a reasonable doubt. Garcia also appeals the district court's denial of evidentiary hearings as to his claims that trial counsel rendered ineffective

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assistance at jury selection. For the following reasons, we deny a COA as to all of Garcia's claims and affirm the district court's denial of evidentiary hearings. We discuss Garcia's requests for a COA before turning to his appeal of the district court's denial of evidentiary hearings.

## I. APPLICATION FOR COA

Our review of this § 2254 habeas proceeding is subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Foster v. Quarterman*, 466 F.3d 359, 364 (5th Cir. 2006). Under AEDPA, a habeas applicant may not appeal the district court's denial of habeas relief unless he first obtains a COA from either the district court or this court. § 2253(c). We may grant a COA only upon "a substantial showing of the denial of a constitutional right." § 2253(c)(2). When the district court rejects an applicant's constitutional claims on the merits, we will issue a COA only if the applicant shows that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). We must decide this "threshold question . . . without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 336). In a case that involves the death penalty, any doubts as to whether a COA should issue must be resolved in favor of the applicant. *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

AEDPA requires federal courts to give substantial deference to state court decisions. *See Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005). A federal court cannot grant habeas relief regarding any claim adjudicated on the merits in state court proceedings unless, as relevant in this case, the state court's decision "involved an unreasonable application of[] clearly established Federal law[] as determined by the Supreme Court of the United States."

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§ 2254(d)(1). A state court's decision involves an unreasonable application of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008).

If a claim was not exhausted in state court, a prisoner may obtain federal review only if he shows cause for that default and actual prejudice as a result of the alleged violation of federal law. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Once cause and prejudice have been established, the district court reviews the claim in the first instance; because the claims have not been "adjudicated on the merits in State court proceedings," the deferential standard of review under § 2254(d) does not apply. Rather, a federal court's review of an unexhausted claim is de novo. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009).

**a. Ineffective Assistance of Counsel**

A habeas applicant who wishes to demonstrate ineffective assistance of counsel must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In considering an ineffective-assistance claim, the court must apply a "strong presumption" that counsel's performance was within the wide range of reasonable professional assistance. *Id.* at 689. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690).

To show prejudice, an applicant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

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have been different.” *Strickland*, 466 U.S. at 694. Reasonable probability means “a probability sufficient to undermine confidence in the outcome.” *Id.* An applicant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693. In his application for a COA, Garcia asserts multiple claims of ineffective assistance of counsel. We address each of them in turn.

i. Trial counsel’s failure to request anti-parties charge

Garcia contends that his trial counsel rendered ineffective assistance in failing to request an “anti-parties” charge at the penalty phase of his trial. Under the Texas Law of Parties, contained in section 7.02 of the Texas Penal Code, a defendant may be held criminally responsible for the conduct of another under certain circumstances.<sup>1</sup> The TCCA has held that if a jury is instructed on the Law of Parties in the guilt phase of a capital trial, the trial court should, upon the defendant’s request, submit an “anti-parties” charge during the penalty phase. *Martinez v. State*, 899 S.W.2d 655, 656–57 (Tex. Crim. App. 1994). An anti-parties charge informs the jury that it must limit its consideration of punishment evidence to the defendant’s conduct, *id.* at 657, and it is meant to comply with the constitutional directive that, for the purposes of imposing the death penalty, the “punishment must be tailored to [the defendant’s] personal responsibility and moral guilt,” *Enmund v. Florida*, 458 U.S. 782, 801 (1982). During the guilt phase of Garcia’s trial, the jury received a Law of Parties instruction. He contends that he was therefore

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<sup>1</sup> As relevant here, section 7.02(b) provides:

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

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entitled to an anti-parties charge at the penalty phase of his trial and that his trial counsel was ineffective in failing to request such a charge.

At the punishment phase of his trial, Garcia's jury was asked to answer three "special issues" pursuant to article 37.071, section 2 of the Texas Code of Criminal Procedure. The jury was required to answer the questions presented in the first two special issues affirmatively before the death penalty could be imposed. In the second special issue, the jury was asked:

Do you find from the evidence beyond a reasonable doubt that the defendant, JOSEPH C. GARCIA, actually caused the death of the deceased, Aubrey Hawkins, or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken?

The jury answered this question in the affirmative.

In denying Garcia's state habeas application, the TCCA held that the second special issue provided a sufficient anti-parties charge under Texas state law. Thus, to the extent that Garcia's claim is based on state law, its lack of merit is not debatable among jurists of reason. *See Charles v. Thaler*, 629 F.3d 494, 500 (5th Cir. 2011) ("We defer to the Texas Court of Criminal Appeals's determination of state law. It is not our function as a federal appellate court in a habeas proceeding to review a state's interpretation of its own law." (quoting *Schaetzle v. Cockrell*, 343 F.3d 440, 448-49 (5th Cir.2003))). To the extent Garcia's claim is based on federal law, it similarly does not raise a debatable issue among jurists of reason, as we have previously held that the question in the second special issue satisfied *Enmund's* requirement of an individualized liability finding by the jury during the punishment phase,<sup>2</sup> *see*

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<sup>2</sup> Garcia nevertheless contends that the question submitted to the jury did not comply with constitutional mandates. He points to the Supreme Court's decision in *Tison v. Arizona*, 481 U.S. 137, 158 (1987), in which the Court held that a felony-murder defendant who did not actually kill or attempt to kill may be sentenced to death if he (1) was a major participant in the felony committed; and (2) demonstrated reckless indifference to human life. Garcia

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*Ramirez v. Dretke*, 398 F.3d 691, 697 (5th Cir. 2005), and Garcia does not argue that there has been any intervening change in the law.

Garcia's counsel did not render deficient performance in failing to seek a duplicative or additional instruction to which he was not entitled. *See Wood v. Quarterman*, 503 F.3d 408, 413 (5th Cir. 2007) (counsel cannot be considered constitutionally ineffective for failing to raise a meritless claim). Accordingly, reasonable jurists would not find the district court's rejection of this claim debatable.

ii. Trial counsel's failure to object to the prosecutor's closing argument

At Garcia's trial, the prosecution presented six alternative theories of Garcia's guilt to the jury: the killing of a peace officer as a (1) principal, (2) party, or (3) conspirator, or killing in the course of a robbery as (4) principal, (5) party, or (6) conspirator. At closing argument, the prosecutor told the jurors that they did not have to unanimously agree on a single theory of guilt in order to find Garcia guilty. In his federal habeas application, Garcia argued that his trial counsel was ineffective in failing to object to that statement by the prosecutor, as he argued that the jury had to unanimously agree at least on whether Garcia was responsible for the killing of a peace officer or for killing in the course of a robbery. The district court rejected this claim, concluding that the prosecution's alternative theories represented alternative means of

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argues that the second special issue submitted to the jury does not meet the standard established in *Tison* because it does not require a finding of reckless indifference to human life. We have previously granted a COA as to a claim that Texas's second special issue fails to comply with *Tison*. *See Gongora v. Quarterman*, No. 07-70031, 2008 WL 4656992, at \*7 (5th Cir. Oct. 22, 2008). However, Garcia did not raise his *Tison*-based argument before the district court, and he has therefore forfeited it. *See, e.g., Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 626 (5th Cir. 2017) (citing *In re Paige*, 610 F.3d 865, 871 (5th Cir. 2010)) ("[T]his court generally does not consider arguments raised for the first time on appeal.").

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committing a single offense—capital murder—and therefore did not require jury unanimity as to a particular theory.

In his application for a COA, Garcia does not challenge this conclusion. Instead, he points to other closing-argument statements by the prosecutor, which he contends were improper and may have misled the jurors to believe that they could find Garcia guilty *as a principal* based on the actions and mens rea of the seven escaped inmates as a group. However, Garcia did not make this particular argument below, and we therefore do not consider it. *See, e.g., Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 626 (5th Cir. 2017) (citing *In re Paige*, 610 F.3d 865, 871 (5th Cir. 2010)) (“[T]his court generally does not consider arguments raised for the first time on appeal.”).

iii. Appellate counsel’s failure to challenge admission of evidence of prison escape as unduly prejudicial

Garcia claims that he was denied constitutionally effective assistance because his state appellate counsel failed to argue that the extraneous offense evidence of his prison escape was erroneously admitted during the guilt phase of trial because it was unduly prejudicial. Garcia raised this claim for the first time in a subsequent state habeas application, and the state court dismissed it as procedurally defaulted. As previously explained, federal courts generally cannot grant habeas relief on claims that were not properly exhausted in state courts. *See* 28 U.S.C. § 2254(b)(1). In federal district court, Garcia argued that his lack of exhaustion and procedural default of the claim should be excused pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012), under which ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of trial counsel claim. The district court dismissed the claim as procedurally barred, stating that *Martinez’s* exception to the procedural bar does not apply to claims of



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ineffective assistance of appellate counsel. In his application for a COA, Garcia renews his contention that *Martinez* applies to claims of ineffective assistance of appellate counsel. After briefing was concluded, the Supreme Court issued its opinion in *Davila v. Davis*, 137 S. Ct. 2058 (2017), in which the Court held that *Martinez's* exception does not apply to claims of ineffective assistance of appellate counsel. Accordingly, jurists of reasons would not find the district court's procedural ruling debatable.

#### **b. Unconstitutionally Vague Jury Charge**

As previously noted, at the punishment phase of Garcia's trial, the jury was asked to answer three "special issues" pursuant to article 37.071, section 2 of the Texas Code of Criminal Procedure, and an affirmative answer to the first two was required for a death sentence to be rendered. In the first special issue, the jury was asked: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, JOSEPH C. GARCIA, would commit criminal acts of violence that would constitute a continuing threat to society?" The jury answered this question in the affirmative.

In his federal habeas application, Garcia argued that the term "probability" as used in the first special issue is unconstitutionally vague in violation of the Due Process Clause. He conceded, however, that his claim was foreclosed by this court's precedent, *see, e.g., James v. Collins*, 987 F.2d 1116, 1120 (5th Cir. 1993), and he stated that he wished to preserve it for further review. The district court therefore denied relief as to this claim for lack of merit. In his application for a COA, Garcia contends that, this court's precedent approving of the state's general use of the word "probability" notwithstanding, the use of that undefined term in his particular case was unconstitutional because the jurors had demonstrated their confusion regarding the meaning of that term during voir dire. However, here, too,

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Garcia did not make this particular argument below, and we therefore do not consider it. *See, e.g., Jefferson Cmty. Health Care Ctrs., Inc.*, 849 F.3d at 626.

**c. Failure to Require Finding of Lack of Mitigating Circumstances Beyond Reasonable Doubt**

Pursuant to article 37.071, section 2(e)(1) of the Texas Code of Criminal Procedure, the third special issue submitted to the jury at the penalty phase of Garcia's trial asked:

Do you find, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

The jury answered this question in the negative, which was required for a death sentence to be rendered. TEX. CODE CRIM. PRO. art. 37.071, § 2(g).

On direct appeal to the TCCA, Garcia contended that the third special issue was unconstitutional in that it did not require the jury to find a lack of sufficient mitigating circumstances beyond a reasonable doubt. Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he argued that the third special issue was "the functional equivalent of [an] element[], and must therefore be proven to a jury beyond a reasonable doubt." The TCCA rejected this claim as foreclosed under its precedent. *See Garcia v. State*, No. AP-74692, 2005 WL 395433, at \*4 (Tex. Crim. App. Feb. 16, 2005) (citing *Escamilla v. State*, 143 S.W.3d 814, 828 (Tex. Crim. App. 2004)). In his federal habeas application, Garcia pressed the same claim while noting that it was foreclosed by this court's opinion in *Rowell v. Dretke*, 398 F.3d 370 (5th Cir. 2005).

In his application for a COA, Garcia again asserts this claim, and he points to the Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), as establishing his entitlement to relief. In *Hurst*, the Court held Florida's death-penalty sentencing scheme unconstitutional because it

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required the sentencing judge, not the jury, to decide whether to impose the death penalty based on the judge's independent determination and weighing of aggravating and mitigating circumstances. *Id.* at 620. In so doing, the Court relied on its prior holding in *Ring v. Arizona*, 536 U.S. 584 (2002), that capital defendants are entitled to a jury determination beyond a reasonable doubt of any fact on which the legislature conditions the imposition of the death penalty. *Hurst*, 136 S. Ct. at 621–22 (discussing *Ring*, 536 U.S. at 604).

This court has “specifically held that the Texas death penalty scheme did not violate either *Apprendi* or *Ring* by failing to require the state to prove beyond a reasonable doubt the absence of mitigating circumstances.” *Allen v. Stephens*, 805 F.3d 617, 627–28 (5th Cir. 2015) (internal quotation marks omitted) (quoting *Scheanette v. Quarterman*, 482 F.3d 815, 828 (5th Cir. 2007)). This holding rested on the reasoning that “through the guilt-innocence phase, ‘the state was required to prove beyond a reasonable doubt every finding prerequisite to exposing [the defendant] to the maximum penalty of death. . . . [A] finding of mitigating circumstances reduces a sentence from death, rather than increasing it to death.’” *Id.* at 628 (quoting *Granados v. Quarterman*, 455 F.3d 529, 536–37 (5th Cir. 2006)). Garcia has not shown how the Supreme Court’s opinion in *Hurst* disturbs this court’s prior analysis and holding. We are therefore bound to apply our precedent, under which there is no need for a jury to find the absence of sufficient mitigating circumstances beyond a reasonable doubt. In this light, jurists of reason would not find the district court’s resolution of this claim debatable.

## II. Appeal of the Denial of Evidentiary Hearings

The district court conducted an evidentiary hearing to determine whether Garcia can overcome the procedural bar that would otherwise preclude the presentation of claims that he did not exhaust in state courts. However, the court granted the State’s request to exclude from the evidentiary

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hearing Garcia's claims that trial counsel was ineffective for failing to object to the jury selection process and to the trial court's grant of the State's for-cause challenge to a particular veniremember. Garcia appeals the district court's denial of an evidentiary hearing as to these claims of ineffective assistance of counsel.<sup>3</sup> We review the district court's denial of an evidentiary hearing for abuse of discretion. *Hall v. Quarterman*, 534 F.3d 365, 367 (5th Cir. 2008). A district court does not abuse its discretion in denying an evidentiary hearing if "there is not 'a factual dispute which, if resolved in the prisoner's favor, would entitle him to relief.'" *Norman v. Stephens*, 817 F.3d 226, 235 (5th Cir. 2016) (alteration omitted) (quoting *Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000)).

**a. Trial Counsel's Agreement to Change Voir Dire Procedure**

During voir dire of veniremembers prior to Garcia's trial, defense counsel agreed to allow the State to examine a pool of potential jurors before having to decide on the use of peremptory challenges. In his federal habeas application, Garcia claimed that counsel's agreement to this procedure constituted ineffective assistance because it deprived him of the benefit of a state law requiring the State to exercise any peremptory challenge at the conclusion of each individual voir dire. The district court granted the State's motion to deny an evidentiary hearing as to this claim because it found that Garcia had failed to properly allege that counsel's decision prejudiced his defense.

On appeal, Garcia asserts that he was entitled to an evidentiary hearing regarding his claim that counsel was ineffective in agreeing to the change in voir dire procedure.<sup>4</sup> However, Garcia alleges no facts that could be

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<sup>3</sup> No COA is required to appeal the denial of an evidentiary hearing. *Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016).

<sup>4</sup> Garcia also complains of multiple other deficiencies in counsel's performance during voir dire and argues that they entitle him to an evidentiary hearing. However, he did not

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substantiated or revealed in an evidentiary hearing and that would permit a conclusion that, but for trial counsel's agreement to the changed procedure, Garcia would have obtained a different result at trial. *See Strickland*, 466 U.S. at 694. He therefore has not established a factual dispute that would entitle him to relief if resolved in his favor. Accordingly, the district court did not abuse its discretion in denying an evidentiary hearing on this claim. *See Norman*, 817 F.3d at 235.

**b. Trial Counsel's Failure to Object to the Trial Court's For-Cause Dismissal of a Particular Veniremember**

Garcia argues that trial counsel was ineffective in failing to object to the trial court's grant of the State's for-cause challenge to veniremember David Chmurzynski. In his juror questionnaire, Chmurzynski indicated that he was "an 8 on a scale of 1 to 10" in favor of the death penalty and that he believed in "an eye for an eye." During individual voir dire, in response to the prosecutor's questions, Chmurzynski expressed his belief that the death penalty is appropriate only "in some cases" and that "taking a life is probably the ultimate crime or ultimate evil . . . [e]specially if it's done . . . maliciously and willfully."

The prosecutor subsequently explained to Chmurzynski that some people who support the death penalty are "not sure they can sit over here and do it." He told Chmurzynski about an actual execution that took place the previous week, during which the person being executed "gasped three times for air in the middle of a sentence." The following colloquy between the prosecutor and Chmurzynski ensued:

[Q.] People come down and tell us, you know, that's maybe not a situation that's right for them. . . . That's why we ask the question. And I liken it to washing windows on a skyscraper. I know that

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raise these claims before the district court, and we therefore do not consider them. *See, e.g., Jefferson Cmty. Health Care Ctrs., Inc.*, 849 F.3d at 626.

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needs to be done, but me, personally, you can't get me up there. That's just something that I can't do.

A. Right.

Q. Have you thought about that? Serving on a case like that to make that decision?

A. I have.

Q. And what are your thoughts about whether you can participate?

A. I think it would be a difficult thing for me to do.

Q. That's fair. . . . You are certainly entitled to that. And I ask because I don't think it would be fair to me to say to you, too bad, get over there, anyway. I don't think it would be fair to you.

A. Right.

Q. And that's why I ask and I certainly don't want to put you in a position where that would compromise yourself.

A. Right.

Thereafter, the State challenged Chmurzynski for cause. Garcia's counsel responded, "The defense will remain silent," and the trial court granted the State's challenge. The trial court added, "For the record, the Court, sitting higher than the jurors, I have had an opportunity to view the jurors. This juror was extremely nervous. His hands were quivering. In response to the question whether or not he could assess the death penalty, his voice broke."

In his federal habeas application, Garcia contended that Chmurzynski was removed merely because he expressed reservations about the use of the death penalty and did not endorse its use in all cases, and he asserted that removal of a veniremember for these reasons is improper. Garcia claimed that trial counsel's failure to object to Chmurzynski's for-cause dismissal therefore constituted ineffective assistance. The district court granted the State's motion to deny an evidentiary hearing as to this claim because it found that Garcia had failed to properly allege that counsel's failure to object prejudiced his defense. On appeal, Garcia asserts that he was entitled to an evidentiary

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hearing regarding this claim. He contends that had trial counsel objected to Chmurzynski's dismissal, the prosecutor's for-cause challenge would not have prevailed.

"[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45 (1980). Whether a juror is excludable under this standard is a question of fact. *See Ortiz v. Quatterman*, 504 F.3d 492, 501 (5th Cir. 2007) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

Here, the colloquy between the prosecutor and Chmurzynski called the veniremember's ability to perform his duties in an impartial manner into question. The trial court's observations regarding Chmurzynski's demeanor reinforced the suggestion of partiality and led the court to conclude that Chmurzynski could not perform his duties as a juror in accordance with the law in deciding whether to impose the death penalty. Garcia argues that Chmurzynski's demeanor during voir dire "was entirely reasonable and within the range of normal behavior" in light of the prosecutor's vivid description of an execution. He asserts that at an evidentiary hearing, he would be able to develop evidence of trial counsel's knowledge of facts and law relevant to counsel's failure to object.

However, in light of the transcript and the trial court's sua sponte clarification of the basis for its ruling, we are unpersuaded that there is a reasonable probability that the trial court would have ruled differently on the State's challenge had Garcia's counsel objected. *See Strickland*, 466 U.S. at 694. Nor are we persuaded that there is a reasonable probability that a reviewing court would have overruled the trial court's resolution of this factual

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question had a challenge been preserved.<sup>5</sup> See *Witt*, 469 U.S. at 426 (“[D]eference must be paid to the trial judge who sees and hears the juror.”). Because an evidentiary hearing would not have affected Garcia’s failure to establish prejudice by counsel’s alleged error, the district court did not abuse its discretion in denying an evidentiary hearing on this claim. See *Norman*, 817 F.3d at 235.

### III. CONCLUSION

Garcia’s attorneys from the Arizona Federal Public Defender’s Office have done an admirable job of sifting through the record and seeking to raise the strongest challenges to Garcia’s conviction and sentence, but we cannot consider many of these challenges, as they were not raised before the district court. For the forgoing reasons, we conclude that Garcia has not made a substantial showing of the denial of a constitutional right and therefore deny his application for a COA, and we find no abuse of discretion in the district court’s denial of evidentiary hearings.



Certified as a true copy and issued  
as the mandate on Jul 21, 2017

Attest:

*Lyfe W. Cayce*  
Clerk, U.S. Court of Appeals, Fifth Circuit

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<sup>5</sup> In his brief on appeal, Garcia states in passing that “defense counsel did not question Chmurzynski to rehabilitate him to alleviate the trial court’s concerns.” He does not, however, further develop this contention, and he does not explain its significance and support it with relevant authority. We therefore do not consider it. See, e.g., *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 784 (5th Cir. 2017) (deeming a party’s challenge forfeited for inadequate briefing).



## **PSYCHOLOGICAL REPORT OF TRAUMA: JOSEPH CHRISTOPHER GARCIA**

### **PART I: INTRODUCTION AND SUMMARY OF CONCLUSIONS**

#### **A. Introduction and Referral Questions**

Joseph Christopher Garcia—nicknamed “George” by his family—was born on November 6, 1971, in San Antonio, Texas. He was the fourth child born to 19-year-old Juanita Frances Trevino, who was known as “Sophie.” Sophie had three children from her first marriage, but she left them and moved to New York with Joseph when he was a baby. There, Sophie married Louie Negron, and the two of them had a daughter, Arlene, on August 31, 1973. Louie had drug problems, and Sophie likewise developed addiction issues, fracturing their relationship. When Joseph was about nine years old, Sophie moved back with him to San Antonio to live with her mother, Frances, and her siblings, Sylvia and Frank, who had substance-abuse issues. Some months later, Louie and Arlene joined Sophie and Joseph in San Antonio. By that time, Arlene had been diagnosed with cancer, and Sophie’s failures to care for her children—including her sick daughter—attracted the attention of Texas’ child-welfare system. Louie and Sophie split up, and Arlene was sent by the child-welfare system back to New York, to her father’s care; she died at age eleven. Joseph was left in San Antonio, where he spent his mid-teenage years in and out of group homes and shelters.

In 1991, at the age of nineteen, Joseph married Debra Pavlicek. About one year later, he graduated from high school and joined the United States Coast Guard. In 1993, Joseph and Debra had a daughter, whom they named “Arlene” after Joseph’s deceased half-sister. Shortly thereafter, Joseph received an honorable discharge from the Coast Guard, and he, Debra, and Arlene returned to San Antonio. There, Joseph had a hard time finding employment and providing for his family, and his marriage to Debra deteriorated. On the night of February 2, 1996, Joseph went to a bar with his friend, Bobby Lugo, and Bobby’s coworker, Miguel Luna. Joseph killed Miguel, but maintained that Miguel had attacked him and that he (Joseph) had acted in self-defense. On November 7, 1996, a Bexar County jury convicted Joseph and sentenced him to 50 years in prison. Then, in February 2003, a Dallas County jury sentenced Joseph to death for the murder of Irving Police Department Officer Aubrey Hawkins.

I was asked by Mr. Garcia’s attorneys to evaluate his history of trauma. In particular, I was asked to evaluate Mr. Garcia’s history of childhood and adolescent maltreatment including neglect, physical abuse, emotional and psychological abuse, sexual abuse and other potentially traumatic experiences throughout Mr. Garcia’s life. The purpose of this evaluation was to identify the ways in which his exposure to trauma affected his development and to offer a trauma-informed explanation of his adult behavior. In particular, I was asked to evaluate the ways in which Mr. Garcia’s exposure to childhood trauma may have affected his behavior during the incident in which Mr. Garcia killed Mr. Luna in 1996.

Mr. Garcia’s history of trauma was not mentioned, even in passing, at his 1996 non-capital trial, despite its relevance to that case. While some key aspects of Mr. Garcia’s history of trauma were touched upon both at his capital trial and during his capital post-conviction proceedings, the details of this history were not adequately assessed either before or during

trial. Further, the myriad impacts of trauma on children's development were not explained at his capital trial, despite the extensive knowledge in the field of traumatic stress of the effects of trauma on development. If this had been done, then explanations of Mr. Garcia's childhood, adolescent, and young-adult behavior would have supported a number of significant mitigating factors in his capital case.

## **B. Summary of Conclusions**

Joseph Garcia experienced severe childhood traumatic neglect and abuse by his caretakers that spanned every stage of his infant, early childhood, school age and adolescent development. His trauma exposure is notable for the degree of traumatic neglect, exposure to death and abandonment, and direct physical violence he suffered. Before he reached the age of 14, Joseph had experienced and witnessed numerous traumatic events, including the following:

- Physical abuse by his mother severe enough to cause marks, burns, and head injury (*see* Part III Sec. B.2, p. 12);
- Exposure to his mother's drug use, including seeing her passed out while using heroin (*see* Part III Sec. B.1, p. 10);
- Abandonment of Joseph and his younger sister for days at a time, when Joseph was left to be her caretaker (*see* Part III Sec. B.4, p. 18);
- Abandonment of Joseph and his younger sister to the child welfare system while she was in the hospital (*see* Part III Sec. B.4, p. 18);
- Denial and lying to Joseph about the fact of his younger sister's terminal illness (*see* Part III Sec. B.9, p. 30);
- The death of his younger sister to that medical illness (*see* Part III Sec. B.9, p. 30);
- Permanent separation from his sister and her subsequent death at age 11 during this separation (*see* Part III Sec. B.4, p. 18, 30);
- Domestic violence toward his mother from his mother's boyfriends (*see* Part III Sec. B.5, p. 21);
- Incarceration of his mother (*see* Part III Sec. B.4, p. 18);
- Psychological abuse and neglect from his grandmother and maternal aunts and uncles, who functioned intermittently as his caretakers, but who would not take custody of him (*see* Part III Sec. B.6, p. 22);
- Sexual abuse by three adult male perpetrators, including completed anal rape (*see* Part III Sec. B.8, p. 26);
- Witnessing the murder of a homeless man (*see* Part III Sec. B.11, p. 35); and
- Chronic poverty (*see* Part III Sec. B.6, p. 23).

These forms of child maltreatment and neglect exposed Joseph to levels of indifference, physical pain, helplessness, anger, fear, and betrayal that would be objectively overwhelming for even the most stable adult. A child exposed to such extremity, as Joseph was, does not have the brain and behavioral capacities or the physical or interpersonal resources of an adult. Trauma this severe will have an indelible and negative impact on the development of a child. The health and psychiatric outcomes of child exposure to violence, neglect, and sexual abuse of the kind Joseph experienced are myriad and well established in both the medical and

psychological literature. These impacts and adaptations were recognized through extensive clinical and empirical research in the field of psychological traumatic stress at the time of Joseph's Bexar County trial in 1996.

Children who experience sexual abuse are at most risk for developing child-behavior problems and child- and adult-behavior psychiatric symptoms. Boys who are sexually abused by males experience unique traumatic burdens that increase their vulnerability to the negative developmental impacts of the sexual abuse. Sexual abuse of the kind Joseph endured has devastating effects on a boy's sense of safety, his developing sense of masculinity and sexuality, and his compensatory strategies for regulating his fear, shame, and vulnerability. Joseph's experiences of sexual abuse were not even identified or assessed while Joseph was under the care of Child Protective Services. Nor were his sexual traumas adequately assessed or integrated into any understanding of his behavior as an adolescent or as an adult in any setting. This failure to assess sexual trauma and to treat children and adolescents for its impacts is particularly common in boys, who are often seen as protected from such victimization by virtue of their gender. The assumption that boys cannot be victims of molestation and rape is inaccurate, and even those child protective services and in the mental health field are ignorant of the facts and the necessity of attending to sexual victimization in boys. Critically, nobody considered the effects of these traumas on the nature of Joseph's responses during the events that led to Joseph's conviction and imprisonment for murder in Bexar County in 1996.

Throughout his childhood, adolescence, and adulthood, Joseph's symptoms, adaptations, and behaviors typified those of a highly traumatized child. These included anxiety and hyperactivity prompted by intrusive memories of abuse and loss; hypervigilance for perceived danger; sad moods and repeated thoughts of wanting to die; profound mistrust of adults in power and a need for control to manage feelings of fear and helplessness; attachment and loyalty to his abusive and neglectful caretakers even while showing defiance towards them; and early drug dependence and poor academic and social functioning in school.

Joseph also experienced various forms of dissociation starting in childhood, which persisted into his adolescence and adulthood. As discussed later, one form of dissociation Joseph experienced was hallucinations of a boy who eventually became a voice inside Joseph's head. Joseph also experienced dissociation in the form of a discontinuation of conscious awareness of his actions and behavior when he was under extreme emotional stress. Joseph's state of mind, behaviors, and reactions on the night he killed Mr. Luna strongly suggest that he dissociated for periods of time during the events that precipitated Mr. Luna's death.

Throughout Joseph's adolescence and adulthood, his impairments were most evident in his difficulties with interpersonal relationships and in his inability to function in the potentially corrective environments of school, the military, work, and marriage. These experiences continuously elicited memories of his many childhood losses and betrayals and disrupted his attempts to function like his peers in these situations.

An individual who has experienced trauma continues to live and experience that trauma in the present day, long after the traumatic experiences may have terminated. The intrusion of past memories, feelings, bodily states, and behaviors involved in the survival of trauma is one of the

clearest signs of the power of the originating traumas. Like shrapnel, the psychological and behavioral remnants of trauma may re-surface slowly over time, but they may also be elicited immediately through contact with the reminders of the traumatic memory. The earlier in life trauma begins and the longer it lasts, the more severe the psychological and behavioral impacts of that trauma are likely to be, and the less likely it is that the child's innate resiliencies will be able to mitigate the impacts of such adversity. Joseph's relentless exposure to practically every possible form of childhood maltreatment and loss clearly contributed to his behavioral dysregulation as an adolescent and adult, as well as to the reactions and behaviors that led to his crimes.

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C. In this and in other ways discussed later, past trauma continues to be lived and experienced in the present-day, often through sensations and emotions felt in the body, and long after the traumatic experiences may have terminated. The intrusion of past memories, feelings, bodily states, and behaviors involved in the survival of trauma is one of the most robust markers of the power of the earlier trauma. Like shrapnel, the psychological and behavioral remnants of trauma may re-surface slowly over time, but they may also come out immediately through contact with the reminders of the memory.....	38
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## **PART II: QUALIFICATIONS AND REFERRAL SUMMARY**

### **A. Qualifications**

1. I am a clinical psychologist licensed to practice in the State of North Carolina (License Number 2638). I specialize in the assessment and treatment of the impact of traumatic life experiences, including childhood sexual and physical abuse, adult rape, military sexual trauma, and exposure to combat.
2. The study and treatment of complex adaptations to physical and sexual abuse in adults and children, in both the civilian and military population, has been the focus of my clinical practice, as well as my research and teaching, for the past seventeen years. Until 2012, I worked for the Department of Veteran Affairs Medical Center in Durham, North Carolina, where I treated veterans who had experienced combat, physical and sexual abuse in childhood, and rape in the military.
3. At the Durham VA Medical Center, I developed and directed the Male Military Sexual Trauma Program, which today is the leading comprehensive outpatient program in the nation devoted to understanding and treating the effects of childhood sexual abuse and military rape on males. I was the lead psychologist in the Durham VA Medical Center's Comprehensive Women's Health Program, and I treated female veterans who had experienced military rape and/or who had combat-related Posttraumatic Stress Disorder (PTSD).
4. I recently left the VA to provide full-time consultation in criminal cases, providing expert assessment and testimony for both defense attorneys and prosecutors on the effects of rape, domestic violence, and childhood trauma.
5. I have given invited lectures on physical and sexual trauma nationally, and I have provided consultation across the country within the VA system on the particular effects of sexual abuse on males. I have also lectured on the behavior and dynamics of rapists and sexual perpetrators. I am an active member in good standing of the International Society For Traumatic Stress Studies, where I have presented papers and chaired symposia on the effects of traumatic experiences on children's development and subsequent adult behavior. I have extensive experience teaching and supervising post-doctoral fellows and psychology residents in the assessment and treatment of the various psychological impacts of traumatic life experiences.
6. A complete copy of my curriculum vitae is attached hereto as Attachment A.

### **B. Basis for Opinion**

1. I conducted an extended assessment with Joseph Garcia for approximately 17 hours over the course of two days on September 25-26, 2017, at the Polunsky Unit

in Livingston, TX. We met face-to-face in an interview room. Mr. Garcia's ankles were shackled, but he was not otherwise restrained during our interviews.

2. I used The Life Events Checklist (LEC-5, Weathers, Blake, Schnurr, et al., 2015) as a guide to discussion of potential traumatic life events.
3. In addition to my interviews, I relied on the following sources as bases for my opinions:

**Trial Testimony**

- Bexar County Transcript, 11/06/1996
- Bexar County Transcript, 11/07/1996
- Dallas County Transcript, R.T. Vol. 53 of 76, 02/11/2003: Testimony of Virginia Nerone
- Dallas County Transcript, R.T. Vol. 54 of 76, 02/12/2003: Testimony of Elizabeth Venecia
- Dallas County Transcript, R.T. Vol. 55 of 76, 02/12/2003: Testimony of Debra Garcia Garza, Dr. Judy Stonedale, and Martha Pavlicek
- Dallas County Transcript, R.T. Vol. 56 of 76, 02/13/2003: Testimony of Dr. Gilda Kessner

**Dallas County Trial Exhibits**

- CPS records: Dallas County R.R. Vol. 71
- CPS records: Dallas County R.R. Vol. 72
- CPS records: Dallas County R.R. Vol. 73
- CPS records: Dallas County R.R. Vol. 74
- CPS records: Dallas County R.R. Vol. 75

**Military Records**

- Coast Guard Records

**Expert declaration**

- Toni Knox (mitigation expert) declaration
  1. Psychosocial history by Toni Knox
  2. Timeline by Toni Knox
  3. Family tree by Toni Knox

**Family interview**

- Linda Singer (maternal cousin) interview with Toni Knox

**Medical and school records**

- TDCJ medical
- San Antonio Independent School District
- Windham School District

**Summary of Bexar County case**

- San Antonio Police Department Summary Report
- Summary of Bexar County case by current counsel

**Declarations**

- Declaration of Linda Alvarado, 06/07/2018
- Declaration of Robert Barrientez, 02/01/2018



- Declaration of Nancy Elizondo, 06/07/2018
- Declaration of Brigitte Garza, 01/24/2018
- Declaration of Carmen Leon, 06/13/2018
- Declaration of Bobby Lugo, 04/10/2018
- Declaration of Jose Luis Martinez, 05/23/2018
- Declaration of Ida Salinas, 06/07/2018
- Declaration of Frank Trevino, 06/06/2018

**Additional Documents**

- *A Cry in the Wilderness*
- Witness List
- Partial summary of CPS records

**PART III. TRAUMATIC LIFE EVENTS ACROSS JOSEPH'S DEVELOPMENT**

**A. Psychosocial History and the Intergenerational Transmission of Trauma**

1. The intergenerational transmission of trauma is complex and various in its pathways. The variety of ways in which trauma and its impacts get repeated across generations, however, is a robust and empirically recognized phenomenon in the field of psychological trauma. Studies show that intergenerational trauma transmission affects not only parenting behavior, but the neurobiology and genetics of subsequent generations of children born to parents with significant histories of trauma, as was the case with Joseph and his mother.
2. Federal habeas mitigation investigator Toni Knox produced a psychosocial history of Joseph and his family in 2008. This history included a family genogram, a timeline of the main events in Joseph's life, the names and dates of Joseph's residential placements, his legal history, and a summary of the various psychological evaluations done on Mr. Garcia to that date. Thus, these areas will not be elaborated in such detail in this report.
3. As well, the mitigation report described his mother's and uncles' exposure to childhood maltreatment and neglect under the care of Joseph's grandmother, Frances Trevino, who became Joseph's caretaker as well. Joseph's mother and her siblings witnessed domestic violence and experienced verbal and physical abuse as children from both Frances and from their father, Frank Ayala.<sup>1</sup> By way of summarizing this physical abuse, one of Joseph's uncles stated, "I think things were generally okay, except when my father and mother were punching us."<sup>2</sup>

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<sup>1</sup> See, e.g., FPD 3066 (Knox psychosocial history); FPD 1942 (CPS records reflecting mistreatment of Joseph's mother when she was a child).

<sup>2</sup> Decl. of Frank Trevino (June 6, 2018), at ¶ 6.

4. Thus, Joseph inherited the genetic, biological, behavioral, and emotional legacy of the impacts of trauma on at least two previous generations of his family. Family members in both his grandparents' generation and in his parents' generation experienced the negative effects of sexual abuse, substance abuse, and exposure to violence. This impacted not only their genetic and biological functioning, but their basic capacities to nurture, protect, and foster the normative development of their own children
5. Therefore, Joseph's exposure to trauma and neglect, as well as the unfortunate trajectory of his life, must be considered together with the lives of the generations who experienced such similar adversities before him.
6. The following section describes experiences across Joseph's life and development that fit the criteria for experiences considered psychologically traumatic by the Diagnostic and Statistical Manual (DSM) standards and that are consistent with knowledge in the field of psychological trauma. This knowledge was available to Joseph's Bexar County legal team in 1996. While there have been developments in the understanding of the underlying neurobiological processes of trauma since 1996, and more research confirming some of the relationships between trauma and adverse outcomes, much was known about the impact of trauma in the mid- and late 1990s.
7. These events are described in roughly chronological order across his development and as discrete events. However, it is critical to keep in mind that many of these traumatic experiences co-occurred and persisted across multiple stages of Joseph's development.
8. Therefore, the totality of Joseph's traumatic exposure was far more damaging than the sum of its parts.

## **B. Traumatic Experiences**

1. Exposure to Caretaker, Parental, and Familial Substance Abuse
  - a. Joseph's childhood is notable for the degree to which he was directly impacted by the devastating effects of his mother's and other relatives' drug addictions on their caretaking abilities.<sup>3</sup> On a regular basis, Joseph's safety, his physical, emotional, and psychological needs and whether he got any of these needs met

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<sup>3</sup> See, e.g., Decl. of Nancy Elizondo-Powell (June 7, 2018), at ¶¶ 7–14 (describing Sophie's and others' addictions and effects on Joseph in San Antonio); Decl. of Carmen Leon (June 13, 2018), at ¶¶ 6–12 (describing Joseph's mother's and stepfather's addictions and effects on children); Trevino Decl. at ¶¶ 7, 10–17 (discussing Sylvia's and Sophie's addictions and their impact on Joseph); see also, e.g., FPD 3080 (Knox psychosocial history detailing substance abuse in family); FPD 2672 (CPS records noting Joseph's relatives' "lack of involvement in his life" and "unwillingness to care for him").

depended on whether his caretakers were high, seeking a high, or coming down off a high.

- b. This uncertainty and instability in caretaker availability is at the core of the kind of traumatic neglect caused by Joseph's mother and his father figures.
- c. Joseph recalled watching his mother and Louie Negron, her then-husband and the father of Joseph's sister Arlene, smoking marijuana and doing cocaine with their friends when he was a very young child.<sup>4</sup> When he was around 11 or 12 years old, he got home from school one day to find Papo Calo, his mother's boyfriend with whom she lived after Louie returned to New York, injecting heroin into his mother's vein; his mother fell instantly into such a stupor he feared she might be dead.<sup>5</sup>
- d. Joseph described knowing every sign in his mother's behavior that signaled when she was high or needing to get high, and which drug her mood and behavior was connected to.<sup>6</sup> For instance, he described that when his mother had heroin, she became "calm, easy and mellow," and that when she was using cocaine, she became talkative and happy. He showed me a picture of his mother shortly before her death and stated, "I can tell she's high in this picture," and he proceeded to describe the features that indicated she had been using. He described how her face changed when she was high and just about to become violent with him. He said, "I could tell, that wasn't her normal face." He described accompanying his mother to methadone clinics.
- e. In other words, Joseph became acutely knowledgeable about the ways in which drugs altered the moods, attentiveness, and level of dangerousness of his mother and her boyfriends. He learned to shape his behavior and alter his needs accordingly, in order to ensure his safety and to try to get his needs met.
- f. In this way, parental and caretaker addiction skews a child's development. The child interacts with and attempts to anticipate the behavior of adults under the influence of an unpredictable and irrational substance, rather than learning the interpersonal skills that are effective in interactions with adults and caretakers who are not under the influence of drugs.
- g. For example, Joseph's uncle Frank, who often took the part of older brother and mentor to Joseph, smoked marijuana regularly and was addicted to cocaine.<sup>7</sup> His

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<sup>4</sup> See, e.g., Leon Decl. at ¶¶ 6–7, 21 (describing Louie's and Sophie's addictions); FPD 1996 (CPS records noting report of Louie's and Sophie's drug use).

<sup>5</sup> See Elizondo-Powell Decl. at ¶ 13 (discussing Papo Calo's relationship with Sophie and his drug use).

<sup>6</sup> See *id.* at ¶ 24 (highlighting Joseph's exposure to Sophie's drug use).

<sup>7</sup> See *id.* at ¶ 22 (describing Frank's cocaine habit); Trevino Decl. at ¶ 1 (describing Joseph as "a little brother").

aunt Sylvia was also addicted to cocaine and sometimes erupted violently towards Joseph or left him in charge of her children when she disappeared.<sup>8</sup> Joseph offered numerous memories of their behaviors during his childhood that showed impaired caretaking behavior attributable, at least in part, to the effect of substances.

- h. Most of Joseph's addicted caretakers violated their caretaking role by being unable to regulate their own impaired behavior. Moreover, they modeled impaired behavior and introduced Joseph to drug use as a normal part of daily life. They even enabled and condoned his substance use. For example, Joseph started smoking marijuana when he was around 11 years old and when Joseph was with his uncle Frank, he smoked marijuana almost daily with his uncle's approval and encouragement.<sup>9</sup>
- i. Joseph recalled that his mother knew that he began smoking marijuana around age 11, because she caught him with a bag of her and Papo Calo's marijuana.<sup>10</sup> She never punished or reprimanded him for this. In fact, she assisted him in hiding the fact that he had taken Papo's drugs. As well, his mother invited Joseph to smoke marijuana with her and a girlfriend of hers when he was 13 years old, and he recalled that when he went to live with his mother in Georgia before her death, she invited him to smoke marijuana with her.

## 2. Physical Abuse, Harsh Discipline, and Exposure to Family Violence

- a. Joseph's mother, Sophie, was described by one of her siblings and by family friends as having a temper that worsened because of her drug use.<sup>11</sup> Her brother, Frank, described that she would "throw tantrums [and] go into sudden rages" and that "she had no control."<sup>12</sup> As a result, Joseph was cruelly and dangerously physically abused by his mother.<sup>13</sup> Not all parents who abuse substances also physically abuse their children. However, parental substance abuse has been shown to significantly increase the risk of the risk of physical child maltreatment. (Wells 2009; Dube 2001a) The mood dysregulation caused by the substances, as well as the seeking, craving, and withdrawal cycle experienced

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<sup>8</sup> See, e.g., Elizondo-Powell Decl. at ¶¶ 19–21 (describing Sylvia's addiction issues); Trevino Decl. at ¶ 7 (noting that Sylvia made others watch her children when she needed "a fix"); FPD 1561–62 (Nerone testimony regarding Sylvia's treatment of Joseph).

<sup>9</sup> See, e.g., Trevino Decl. at ¶ 15; FPD 2068, 2107 (CPS records noting Frank's history of smoking marijuana with Joseph).

<sup>10</sup> See, e.g., FPD 3080 (Knox psychosocial history stating that Joseph and Sophie lived with a drug dealer and were surrounded by drugs).

<sup>11</sup> See, e.g., Leon Decl. at ¶¶ 10–12.

<sup>12</sup> Trevino Decl. at ¶ 10.

<sup>13</sup> See e.g., FPD 1994 (CPS records noting reports that Sophie used belt to hit Joseph); Leon Decl. at ¶¶ 11–12.

by an addicted parent, disrupt that parent's capacity to tolerate the stress and demands of managing a child's behavior and attending to the child's needs. The addicted parent is then more likely to turn to physical violence to manage the child.

- b. Joseph's mother began physically abusing him when he was a young child. She got angry at Joseph for behaviors typical of children his age—being noisy, active, accidentally ruining household items, not obeying, etc. Joseph described that his mother would quickly fly into a rage about something and would hit him with a belt or other objects all over his body, including his face and legs.<sup>14</sup> She would grab him by his hair to drag or restrain him, and would hit him so hard that he got welts and bruises. Joseph never knew how many times she would hit him once she began, and he described the pain as often unbearable.
- c. One of Joseph's worst memories of his mother's violence occurred when he was around 7 years old. They lived in New York at the time. He recalled that his younger sister, Arlene, had done something that he feared would bring on his mother's wrath. He didn't want Arlene to get hit, so he took the blame for her. His mother predictably did become enraged. He recalled that he ran down the hall to escape his mother and found himself cornered in her bedroom. She got a belt from her closet. He recalled that it had several thin straps of leather. She began beating him all over his body including on his back, legs, arms and face. Because the belt was thin, it hurt even more than the usual belts she beat him with. He remembered cowering on her bed, covering his head and begging her to stop. He distinctly remembered realizing that she wasn't going to stop, however, and recalled feeling, for the first time, a surge of anger because he was taking a beating for Arlene. He also thought that his mother would never have beat Arlene as hard as she was beating him in this moment. Joseph recalled wanting to make his mother feel the pain she was causing him, so he held up his hand to try to catch the belt and stop her. This was the first time he'd ever tried to fight back during a beating.
- d. At this point, he recalled his mother's face contorted into a look of rage he had not seen before. She grabbed him by the hair and dragged him into the kitchen, while saying, "Oh, so you think you're man enough to hit me now?" She turned on the gas stove and grabbed both his wrists and held his hands over the flames while saying, "Don't you ever raise your hand to me again or I'll kill you. I'll take you out of this world."
- e. Joseph remembers feeling terrified and struggling to pull his hands back from the flames, but his mother was too strong. He recalled being overwhelmed by the pain of his burning hands. When she let go of him, he recalled falling

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<sup>14</sup> See e.g., FPD 1994 (CPS records stating that Sophie hit Joseph with belt); Decl. of Margarita Laboy (July 21, 2018), at ¶ 7 (Sophie was "incredibly harsh" to Joseph).

against the kitchen wall and suddenly feeling a crack on his head. He didn't know what caused the crack, but he was physically stunned and slid down the wall to the floor. He recalled putting his hands to his head, and recalled looking down and seeing blood. He also recalled looking up at his mother who was brandishing a yellow broomstick at his face. He recalled feeling disbelief and wondering if she had really just hit him with that broomstick.<sup>15</sup>

- f. He also recalled that he saw her lips moving and that she was still angry, but that he couldn't hear her. He became even more terrified that he could not hear anything his mother was saying. He recalled telling her repeatedly that he couldn't hear her. His mother's rage suddenly seemed to disappear. He stated, "Just like that, she switched." He had seen this "switch" in her affect many times before. His mother brought him into the bathroom, took off all of his clothes and got in the tub with him where she cleaned the blood off him and bathed him. Joseph recalled seeing the water come out of the tap into the tub, but not being able to hear it. He also recalled that his mother kept him out of school for a week because his hands were so badly burned that the wounds were visible.
- g. Joseph was tearful while revisiting this memory. Until fully describing this memory during our assessment, he had not grasped the reality of the potential lethality of his mother's abuse. He stated that he now realizes, "She could have killed me that day. My mother could have killed me." This realization then brought on conflicted feelings of anger and guilt. He stated, "I was supposed to protect my mother," a belief discussed more later in this report. He could not reconcile his belief that his job was to protect his mother with his realization that she did not feel the same about him. Not only was she unwilling to protect her son, but, when in a rage, she was actually willing to kill him.
- h. Joseph described being extremely fearful of his mother's sudden rages and her beatings.<sup>16</sup> He recalled that Louie would sometimes intervene to stop his mother because she was "went too far."<sup>17</sup> He also feared for his little sister Arlene's safety and often felt compelled to take the blame for things that she had done in order to protect her from his mother's fury.
- i. Sometimes, Arlene used this to her advantage. For example, Joseph described how Arlene sometimes used his mother's beatings as a threat to get Joseph not to tell on her when she had done something, knowing that she would be believed, while Joseph would get blamed. For example, Joseph described Arlene pushing him out of a second-story window when they lived in NY. He

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<sup>15</sup> FPD 1720 (Stonedale testimony that Sophie hit Joseph over head with a broomstick).

<sup>16</sup> Leon Decl. at ¶ 8 (noting Sophie's "serious temper"); Trevino Decl. at ¶ 10 (noting Sophie's "tantrums" and "sudden rages").

<sup>17</sup> Leon Decl. at ¶ 12.

fell hard on his back and they both knew that she had done something wrong. But instead of apologizing, Arlene threatened Joseph to keep quiet about what she had done, because otherwise she would call their mother over immediately and make it look like Joseph had left the house when he shouldn't have. Joseph was so frightened of getting beaten for being outside that he kept quiet and did not tell his mother about Arlene's aggression.

- j. Presently, the dynamics of Joseph's relationships with Arlene and his mother continue to affect Joseph. On the one hand, Joseph remains proud of functioning as Arlene's protector<sup>18</sup> against their abusive mother, and he feels that he was mostly successful at this. It is a positive part of his identity. On the other hand, he also feels intensely angry and betrayed by his mother for holding him responsible for things he didn't do and for treating Arlene differently than him. Arlene's fatal disease helps Joseph justify his mother's favoritism of Arlene and her violent abuse of him. He believes that his mother controlled her violence towards Arlene because Arlene was already vulnerable and because she was going to die. He explains his mother's scapegoating of him with her violence as a manifestation of her frustration and helplessness in the face of Arlene's illness.
- k. In addition to physical abuse by his mother, Joseph was treated harshly by other family members. Both his maternal grandmother and Louie's mother punished him physically and withheld physical affection. Joseph recalled Louie's mother loved Arlene. She held Arlene on her lap and gave her a birthday party, for example. Joseph's predominant memory of her treatment of him, however, involved being rapped on the back of the head for speaking English, rather than Spanish, in the household.
- l. Joseph's maternal grandmother, with whom he lived on and off in San Antonio after the age 9 or so, was not only emotionally harsh, but also physically harsh. One of his most demoralizing memories involves her physically abusing him. Shortly after his mother abandoned him at his grandmother's house for the first time, his mother showed back up briefly. He recalled that his mother began beating him for something. His mother was whipping him hard with a belt all over his body, including his arms and face, when his grandmother came in and said, "Sophia, Sophia, what are you doing? You shouldn't hit him like that," at which point she took the belt from his mother. Joseph was enormously relieved and believed his grandmother had come in to save him. Instead, his grandmother began beating him with the belt on his buttocks and the back of his legs, while telling his mother that this was how she should hit him. Joseph felt utterly shocked, hurt, and betrayed by this new grandmother, whom he barely knew, but whom he immediately understood would not be providing him with a safe place to live. In Joseph's memory, this dual beating by his mother and

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<sup>18</sup> See, e.g., FPD 1558 (Nerone testimony).

grandmother made him realize that, although he had hoped that moving to San Antonio might mean his life would get better, that hope was gone. He felt like there was no safe place left for him.

- m. As a child and an adolescent, Joseph was surrounded by adult violence and hostile acts whenever he spent time in his family and extended family. As described later, Joseph's grandfather had two families—one with his wife and another with his mistress, Joseph's grandmother Frances Trevino.<sup>19</sup> Arguments broke out frequently between his grandfather's two families, as well as between Joseph's mother and her siblings or their boyfriends.<sup>20</sup> Joseph was also physically assaulted by his mother's boyfriend, Papo Calo. As well, he was attacked around age 17 by his aunt Sylvia, who hit him with a can and a stick when he refused to take care of her children while she left on a drug binge. In short, throughout his childhood and early adolescence, Joseph's physical safety was never guaranteed, and was often threatened most when he was in the care of adults in his family.

### 3. Psychological Abuse & Abandonment by "Father," Louie Negron

- a. Louie Negron was married to Joseph's mother for some time and was the father of Joseph's younger sister, Arlene. He was a heroin addict and a heavy drinker throughout Joseph's life. From his earliest memory, while living in New York with his mother and Arlene, Joseph believed Louie was his father.<sup>21</sup> Moreover, Joseph experienced Louie as a good father, and his idealization of Louie persists, in part, to this day. This is largely due to the fact that he does not recall Louie beating him the same way his mother beat him. He also recalled Louie intervening on his behalf sometimes when his mother's violence towards him would get out of control.<sup>22</sup> However, despite Joseph's attempts to idealize Louie and to hold him up as the ideal parent, there are significant indications that Louie also emotionally and physically abused and neglected Joseph.
- b. One example of Louie's cruelty can be seen in Joseph's memory of how Louie "taught" Joseph not to open the door to strangers when they lived in New York. Joseph recalled that he was very young. The lesson began with Louie telling Joseph not to open the door. Louie then he went outside, knocked on the door, and demanded that Joseph open the door. Terrified to disobey an adult's orders and risk a beating, Joseph opened the door. He recalled being stunned and hurt when Louie became angry with him and hit him on the top of his head with his fist. Louie then told Joseph not to open the door no matter what. Louie went

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<sup>19</sup> See Dec of Ida Salinas (June 7, 2018), at ¶¶ 2–3; Trevino Decl. at ¶ 3.

<sup>20</sup> See, e.g., Elizondo-Powell Decl. at ¶ 8; Salinas Decl. at ¶¶ 14–21.

<sup>21</sup> See, e.g., Leon Decl. at ¶ 13; Trevino Decl. at ¶ 13; see also FPD 3068–69 (Knox psychosocial history on Joseph's paternal history).

<sup>22</sup> Leon Decl. at ¶ 12.



outside, knocked on the door, and began talking in the voice of one of their neighbors. Joseph knew this neighbor, Max. "Max" told Joseph that his mother had been in an accident and that he had better open the door quickly if he wanted to help his mother. Joseph opened the door to discover it was Louie. Once again, Louie became enraged at him and hit him again. Joseph described his feelings of confusion and disbelief. Louie had never hit him before, and now he was hurt and could not figure out what to do to keep Louie from hitting him again. Once again, Louie instructed him not to open the door under any circumstances and went outside. When Louie knocked and told him to let him in, Joseph refused. Eventually, Louie told Joseph that the game was over and to let him in. Joseph continued to refuse. He recalled Louie insisting, trying to get Joseph to change his mind and open the door. He started to cuss at Joseph and he recalled Louie standing below the fire escape yelling, "Open the fucking door right now!" But Joseph believed Louie was trying to trick him again and was too terrified to open the door. Then, Louie promised not to hit Joseph again at which point, Joseph agreed to open the door. When Louie got inside, he beat Joseph badly.

- c. Joseph recalled that this experience with Louie marked a turning point in his in his sense of safety with Louie and in the Negron house. The man who had, at times, seemed to be a refuge from his mother's abuse was no longer a trustworthy person. He began to notice that Louie paid far more attention to Arlene than he did to Joseph, and that Louie seemed to like her better. He also noticed that he did not share Louie's last name and wondered why, though because of his mother's temper, and her silence on the issue, he was too afraid to ask.
- d. When Joseph was around 9 years old, Sophie returned to San Antonio with Joseph, and Louie and Arlene followed. After some time, Louie returned to New York, and eventually Arlene went to join him. After Arlene returned to New York to be in Louie's custody and Joseph was separated from her, Joseph clearly and repeatedly made it known to his social worker, his mother, and a school psychologist that he loved Louie and wanted to be reunited with him. The CPS record stated that Joseph "recalled learning that his father who had been contacted in New York, had only requested that Arlene be placed with him."<sup>23</sup> Joseph's perception that Louie did not want him and only cared about Arlene's well-being reinforced his feelings of being unloved and abandoned by his caretakers.
- e. Joseph also described his perception of Louie's treatment of him the day he and his mother arrived at Louie's house after Arlene's death. Joseph recalled that his mother made him knock at Louie's door. When Louie opened the door, he said nothing to Joseph, just looked past him and asked, "Where is your mother?"

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<sup>23</sup> FDP 2048 (CPS records).

Joseph recalled that Louie was “cold,” and seemed to act as if he didn’t know Joseph at all. He felt stunned and hurt that Louie hadn’t hugged him or offered him any words of comfort about the death of Arlene.

#### 4. Severe Parental Neglect & Abandonment

- a. Joseph’s mother Sophie had a history of abandoning her children. Prior to her involvement with Louie Negron, she had been married and had had three children with a man who was not Joseph’s father. She abandoned her husband and her children before Joseph’s birth. She even tried to keep those children a secret from Joseph.<sup>24</sup>
- b. Joseph’s own experiences of his mother’s and other caretakers’ neglect and abandonment were so extreme and chronic that they had a profound effect on his coping adaptations and how he viewed himself, other people, and the world. His mother’s abandonments came to CPS’s attention for the first time when Joseph was 9 years old. When Arlene was ready to be discharged from a hospitalization due to her illness, Sophie never came to pick Arlene up. Arlene was eventually discharged to her mother’s care.<sup>25</sup> CPS eventually took custody of Joseph and Arlene after Sophie abandoned them at her friend’s house. They were placed in separate foster care homes and never lived together again after this. For Joseph, this was the start of almost a decade of familial instability, displacement, and repeated losses that consumed him physically, mentally and emotionally and overwhelmed his capacities to cope.
- c. Several months later, his mother left Joseph and Arlene with a friend and never returned.<sup>26</sup> Starting at age 14, Joseph was placed in group homes for much of the remainder of his adolescence. Despite the repeated efforts of CPS caseworkers to engage his mother and extended family members in his care, none of Joseph’s relatives were willing to take custody of Joseph again.<sup>27</sup> His mother was incarcerated for prostitution during this period of time, and his grandmother moved without telling CPS where she had gone because she was tired of people contacting her and she didn’t want to be “bothered anymore.”<sup>28</sup> DHS therefore took permanent custody of Joseph when he was 15 years old.<sup>29</sup>
- d. During our assessment, Joseph described some of the particulars of his daily life with his mother, which, aside from her early physical abuse, indicated

<sup>24</sup> FPD 3071 (Knox psychosocial history noting that Joseph did not learn of his half-siblings for years).

<sup>25</sup> *Id.*, FPD 1946-47 (CPS records).

<sup>26</sup> FPD 1954 (CPS records stating that Sophie abandoned her children at a friend’s home, “saying that she was going to . . . the grocery store” but not returning, and that “she is still missing”).

<sup>27</sup> *See, e.g.*, Elizondo-Powell Decl. at ¶ 14; Trevino Decl. at ¶ 16.

<sup>28</sup> FPD 2042 (CPS records); FPD 3095-96 (Knox Mitigation timeline)

<sup>29</sup> FPD 2443-48 (CPS records).

significant emotional and psychological abuse as part of her traumatic neglect. This form of traumatic neglect was not adequately described in his CPS records. Joseph's CPS worker, who attempted to work with his mother to help her become more engaged in his care, highlighted her addiction as the reason for her inconsistencies and abandonment. The CPS worker failed to account for the level of emotional indifference that marked her behavior even when she was not high or consumed by her addiction. Nor did this CPS worker account for the physical violence Joseph's mother used to punish Joseph when she was parenting him.<sup>30</sup> Joseph's experiences living with his mother offer a glimpse into the physical and psychological adversities that shaped his daily existence.

- e. Joseph recalled problems predating the worsening of his mother's addictions. When he lived in New York with his mother, Arlene, and Louie, the family sometimes did not have enough food or furniture in the apartment.
- f. Further, Sophie wouldn't allow Joseph and Arlene to have toys, and when they did get toys from other relatives, his mother inevitably took them away. Often, the toys would just disappear without Joseph or Arlene knowing why or where they went. Similarly, Joseph recalled his mother making him and Arlene give all of their Halloween candy to her after she promised to give him pieces as a reward for good behavior. However, his mother never gave either of them pieces of their candy for any reason. He said, "We never saw that candy it again."
- g. Because of his mother's and Louie's drug abuse (described below), Joseph described numerous instances of being left in charge of Arlene at an age when he was neither physically nor cognitively capable of this responsibility.<sup>31</sup> For instance, he described almost starting a house fire after attempting to cook himself and Arlene breakfast on the stove while his mother and Louie slept off a hangover.
- h. His most traumatic memory of neglect involved the day Arlene's illness reached a critical level. It was morning and when Arlene woke up, she called out to him that she couldn't get out of bed. He didn't believe her at first, but she kept crying and saying she couldn't move.<sup>32</sup> Eventually, Joseph grasped that there was something terribly wrong with his sister and panicked. He doesn't remember where his mother and Louie were at the time. He did remember, however, that at one point during this crisis, they tricked him into going to the

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<sup>30</sup> See, e.g., FDP 2006 (CPS records with caseworker's impressions of Sophie and Joseph's relationship).

<sup>31</sup> See, e.g., FPD 2566 (CPS records with reports of Joseph's daily care routing for sister); Trevino Decl. at ¶ 14.

<sup>32</sup> See FPD 2566 (CPS records noting Arlene's loss of use of legs); Elizondo-Powell Decl. at ¶ 9 (describing Arlene's deteriorating condition).

corner store to get them a pack of cigarettes. While Joseph was at the store, they took Arlene and left. Joseph didn't know where they had gone or when they would be back. He did not recall his grandmother or anyone in his mother's family coming to reassure him, comfort him, or tell him what was happening. He recalled sitting alone on the couch until 1 a.m. before they returned and he was told that they had taken his sister to the hospital.

- i. While the literal acts of physical abandonment by his mother are too numerous to detail,<sup>33</sup> several stand out in his memory as particularly traumatic. He described the period when he and his mother moved from New York to San Antonio as one of the most frightening. He recalled that he was separated from Arlene; he knew nobody and had no stable place to live. At another point, he recalled, returning to an apartment after school but everything in their apartment was gone. He said, "The TV, the lamp, pictures.... I had no idea where she went or if she [his mother] was ever coming back." He recalled that his mind was plagued with worries. He said, "I'd get scared. I'd think, what if she doesn't come back? Is she going to come back? I'd see the food getting low..." He didn't know how to take care of himself. Another memory typifies his neglect and anxiety over how to care for himself. He recalled that while he was able to eat breakfast and lunch at school, he was on his own to feed himself dinner. His mother would not be there to cook or feed him. He described that he would turn on the stove, put hot dogs on a fork, and cook them over the flame. He recalled that he burned many forks this way.
- j. His mother's disappearances induced a state of loneliness in Joseph that became overwhelming and that continued to function as a trigger to these traumatic abandonments throughout his life. He stated, "I needed company. I felt so lonely." He has memories of sometimes begging her to take him with her when she left.
- k. At times, Joseph became so emotionally overwhelmed with loneliness, worry, and desperation during his mother's abandonments that he simply couldn't tolerate being alone any longer and wished he could die. At these times, Joseph described a separation between his sense of who he was and the outside world—a form of dissociation.<sup>34</sup> More specifically, Joseph described seeing a boy who wasn't actually there and who didn't exist.<sup>35</sup> This first occurred when he was around 10 years old, living on Theo Street in San Antonio. He recalled that he was back living with his mother; she had disappeared and had been gone

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<sup>33</sup> See, e.g., *id.* at ¶ 11; FPD 1954, 2249 (CPS records describing instances of abandonment and noting frequent neglect, including abandonment); FPD 3071–72, 3086 (Knox social history describing Sophie's abandonment of Joseph).

<sup>34</sup> The phenomenon of dissociation will be described in further detail in Part IV of this report.

<sup>35</sup> See, e.g., FPD 3132–33 (TDCJ medical records from 1998 finding Joseph "dissociative" and describing his dissociative episodes starting at age 10).

already for several days. He was sitting outside on the back step, looking across a yard to a shed when he saw a child his age walking toward him. The child was dressed in jeans and a shirt. He looked like Joseph, and Joseph wondered if it was himself. He recalled that the child smiled at him, then disappeared after a few minutes.

- l. Joseph recalled being intensely frightened by this vision, which he thought might be a ghost. He also recalled thinking that he might be going crazy. At the same time, the boy he'd seen seemed to soothe his feelings of loneliness. He recalled that he started to wait for the boy to appear, and that when he did, he began to talk to the boy in his mind and thought that the boy spoke back to him. He reported that the boy called himself "Child," and told Joseph, "I am here for you."
- m. Joseph reported that his relationship to "Child" remained a vivid, visual experience during that period of time and that because of his the desperate uncertainty of his life, Arlene's illness and his grandfather's recent death, he was preoccupied with death, dying, and whether he was going to die.<sup>36</sup> He felt that the boy offered him guidance on this, but seemed to become a scary representation of his own suicidal despair. He recalled the boy telling him that in order to understand death, "you have to experience it."
- n. Eventually, the dissociative experience of "Child" became a voice inside of Joseph that spoke to him. Joseph reported that he would occasionally have a visual hallucination of "Child" or that "Child" would "be there in stressful moments when I needed help." According to Joseph, "Child" "would appear, or it would be just his voice."
- o. Joseph described that most often, and especially after he began living in residential programs, Joseph experienced "Child" as his protector. He explained, "Child would tell me, 'be careful with this person or that person.' He'd help me with my awareness, who to look out for, who to stay away from." Essentially, this dissociative experience functioned as a form of hypervigilance, a pervasive posttraumatic symptom.
- p. However, as is typical in cases of this type of dissociation, Joseph also felt ambivalence toward this part of himself. He felt angry at this voice for making him feel so mistrustful and for keeping him isolated from other people. He longed to connect and feel safe with others, but was unable to reconcile this desire with the voice of his fears and hypervigilance. He also described that his use of marijuana often functioned to suppress this voice. He said, "When I started smoking pot, it nullified it. I didn't see or hear Child much after that. I liked that, because I didn't like him always commenting on things."

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<sup>36</sup> Joseph's grandfather Frank Ayala passed away in 1981. *See* FPD 1998 (CPS records).

5. Witnessing Domestic Violence Toward Mother

- a. Joseph grew up in household environments where yelling, screaming, pushing, and hitting were the norm. While he does not have explicit memory of witnessing violence between his mother and Louie, Louie's sister Carmen Leon described Joseph's mother's relationship with Louie as "explosive."<sup>37</sup>
- b. Starting at age 9 or so, while living with his maternal grandmother in San Antonio, he witnessed frequent verbal abuse between family members. He described his aunt Sylvia as one of the most combative of the family members. He described witnessing a physical fight between Sylvia and his mother, which he thought was about their boyfriends.<sup>38</sup> He also described Sylvia hitting him with a can and a stick when he was around 17 years old after he refused to take care of her kids so that she could go on a drug binge.<sup>39</sup>
- c. When Joseph was about 11 years old, he witnessed an instance of terrifying violence towards his mother by Papo Calo.<sup>40</sup> Joseph recalled that he was sleeping one night when he heard his mother calling out for him. He heard her cries and the sounds of her being slapped. When he peeked into their bedroom door, he saw his mother's face was bloody and that she was lying over the bed, while Papo had her in a chokehold. He described running to get a bat from his room, re-entering the room and hitting Papo across the knees with the bat hard enough to make Papo fall to the floor. He then recalled raising the bat above his head, ready to hit Papo again, when his mother cried out for him not to hurt Papo. Joseph ran to the kitchen to get a knife, but Papo left the apartment on his knees. Joseph then took all of Papo's clothes and threw them outside over the balcony. He stated that he slept with his mother that night out of fear, and to protect her. He was afraid to go to school the next day, but he went anyway. When he returned home, he saw Papo sitting at the kitchen table. His mother had made Papo a sandwich. He recalled feeling confused and afraid for his mother; he also felt that she was putting herself in real danger whenever she was with Papo. Joseph recalled understanding that Papo was going to take his mother away from him and that there was nothing he could do to stop him. He described feeling very abandoned and alone.

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<sup>37</sup> Leon Decl. at ¶ 8.

<sup>38</sup> See, e.g., Elizondo-Powell Decl. at ¶ 8 (describing a fight between Sophie and Sylvia); FPD 1563 (Nerone testimony describing fights).

<sup>39</sup> Trevino Decl. at ¶ 7 (noting that Sylvia left her children when in need of drugs).

<sup>40</sup> Cf. Elizondo-Powell Decl. at ¶ 13 (recalling that Papo Calo had previously stabbed someone); FPD 1610 (Venecia testimony on Papo Calo's history of violent crime).

- d. Witnessing his mother come to harm and fearing she might be killed and he'd be left utterly alone in the world contributed significantly to Joseph's belief that he was supposed to be his mother's protector.
6. Exposure to Verbal Abuse, Emotional Abuse, and Neglect from Grandmother, Aunt, and Extended Family
- a. Unfortunately, Joseph was not rescued from the traumatic neglect he suffered in his mother's care when he was in his grandmother's care. Joseph reported that, as far as he recalled, he had never met his maternal grandmother before his mother dropped him at her house in San Antonio for the first time when he was 8 or 9 years old. He found himself suddenly living in a household of strangers—uncles, an aunt, and his grandfather, all of whom were older than Joseph was. His aunt Sylvia's daughter, Katt, was the only relative close to his age. His grandmother, Frances, had little patience or resources to deal with another child,<sup>41</sup> and his uncles and aunt, who were struggling with addictions and their own dysfunction, were even less equipped to take on the role of caretaking Joseph. One of his aunt's friends stated, "Sylvia [Joseph's aunt] just had no interest in taking care of him."<sup>42</sup>
  - b. His grandmother lived in poor conditions compared with how he lived in New York. He said, "It was a shock." He said, despite his grandmother's attempts to clean, the houses and apartments she lived in were roach-filled, old, and worn out.<sup>43</sup> He recalled his grandmother sweeping the stained rug and spraying Raid all around the house. She moved frequently from one dilapidated place to another.<sup>44</sup> At times, she moved in with her oldest son. Joseph had no bedroom and no bed. He had to sleep with his grandmother. He described having no room in the bed and that he slept "underneath" her. Joseph recalled that they were so poor that he had no clothes, except those that came from a thrift store. He had to wash his own clothes by hand, and he sometimes went for a week or more wearing dirty pants.<sup>45</sup>
  - c. Joseph stated that although his grandfather did not appear to support his grandmother financially, her living conditions worsened after he died.<sup>46</sup> Joseph recalled not being fed enough food and sometimes went hungry. He remembered realizing that he'd better learn to find ways to buy his own bread and bologna so he could eat.

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<sup>41</sup> Elizondo-Powell Decl. at ¶ 14.

<sup>42</sup> *Id.*

<sup>43</sup> FPD 1673–74 (Garza testimony describing filthy conditions at grandmother's house).

<sup>44</sup> *See, e.g.*, Elizondo-Powell Decl. at ¶ 6; Salinas Decl. at ¶ 10.

<sup>45</sup> FPD 2206, 2249 (CPS records noting chronic poverty in household).

<sup>46</sup> Elizondo-Powell Decl. at ¶ 5.

- d. Joseph described that at his grandmother's house, he often witnessed verbal fights and sometimes physical fights break out between his grandmother and his aunt Sylvia. There was constant strife and tension between the family members. Whenever his mother showed up, he witnessed fights between his mother and his aunt Sylvia, as well as between his grandmother and his mother.<sup>47</sup> A CPS worker noted that "a definite antagonism exists between Ms. Garcia and her mother."<sup>48</sup> Verbal abuse, expressed anger, and violence were the norm in this household.
- e. Joseph perceived that most of the fights between his aunt Sylvia and his grandmother, and between his grandmother, Sylvia, and his own mother, were about his unwanted presence in the house.<sup>49</sup> He overheard them arguing in Spanish (which they thought he could not understand) about his mother and how ungrateful she was to leave Joseph with them and not pay for him. They described her in disparaging ways and said hurtful things about his mother that he had never heard before. They constantly complained that he ate too much and took up space they didn't have. He perceived that he and his mother were the source of the family's unhappiness, and that he, in particular, was an unwanted burden to his aunt and grandmother.
- f. One of his most vivid and painful memories of their rejection and ostracism came from his grandfather, Frank "Pancho" Ayala. Though grandfather had another family—a wife and children—with whom he lived most of the time, he visited Joseph's grandmother frequently, and was clearly an important presence in the house.<sup>50</sup>
- g. Joseph reported that when he arrived in San Antonio, his grandfather did not speak to him or even acknowledge his existence in the house. His grandfather came to the house every day around 6 p.m. and stayed until 10 p.m., at which time he returned to his wife and other family.<sup>51</sup> Joseph observed that his grandfather talked to his uncles Frank and John and often gave them money. He also gave money to Sylvia's daughter, Katt. Joseph described one day realizing that perhaps he wasn't getting anything from his grandfather because he wasn't asking, and he hesitantly asked his grandfather for a quarter. He recalled that his grandfather's responded by saying, "Why would I give a piece of trash like you my money?"
- h. This was the first time his grandfather had acknowledged his presence in the house, and Joseph recalled feeling deeply ashamed by what his grandfather said.

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<sup>47</sup> FPD 1563 (Nerone testimony describing fighting in family).

<sup>48</sup> FDP 1953 (CPS records).

<sup>49</sup> FPD 3070 (Knox psychosocial history noting grandmother's resentment toward Joseph).

<sup>50</sup> Trevino Decl. at ¶¶ 3–4.

<sup>51</sup> *Id.* at ¶ 3; Salinas Decl. at ¶ 6.



He immediately fled from the house and went to a nearby park, where he stayed until his grandfather left. Joseph continued to avoid being at his grandmother's house whenever his grandfather was there, which meant spending hours in the park. No one in the house seemed to notice or care that he was gone. He began to collect bottles to return in order to buy bread and bologna so he would have enough to eat.

- i. The active indifference, physical neglect, and emotional neglect Joseph endured while staying at his grandmother's house was all the more traumatic for him because he had been abandoned there by his mother and was dependent on these family members to take care of him. Thus, for Joseph, dependency and trust in caretaking adults became associated with shame, feeling unwanted, and feeling like he was an outsider and a burden. These emotional and cognitive templates about his identity and his belief in his negative impact on others followed Joseph into his experiences in the youth residential system, where these feelings and traumatic memories were repeatedly triggered.

7. Maternal Sexual Boundary Violations & Exposure to Caretaker and Adult Sexual Activity

- a. Joseph experienced a number of boundary violations that exposed him to not only to the adult sexual needs, desires, and behaviors of the adult males in his life, but to his mother's sexual needs as well.

- i. Sexual Boundary Violations by Mother

- (1) Joseph's mother used to bathe Joseph by getting in the tub naked with him. She did this until he was about 10 years old, according to Joseph. Although he did not recall his mother ever beating him while in the tub, she did use the baths and his cleanliness as a way to control him and as a reason for a beating. For example, if she had just bathed him, she'd tell Joseph he'd better not get dirty or else he'd get a beating.
- (2) Mostly, however, Joseph recalled that sitting in the bath naked with his mother was one of the only situations in which she was be reliably calm and did not fly into rages.<sup>52</sup> He described that his mother washed him attentively from head to toe, including his genitals.
- (3) Joseph reported, however, that as he got older, he started to see his mother's body as a woman's body with breasts, vagina, etc. He stated, "I wasn't looking at her like my mother anymore." He wondered whether the girls he had started to like had bodies like his mother. His mother did

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<sup>52</sup> See, e.g., Leon Decl. at ¶ 8 (noting Sophie's "serious temper"); Trevino Decl. at ¶ 10 (remarking on Sophie's "sudden rages").

not initiate creating a more appropriate boundary, and eventually, Joseph became so uncomfortable with her bathing him that he told her that he wanted to bathe himself. She allowed this, but only after she insisted on observing him bathing from outside the tub to make sure he was washing himself properly.

- (4) While Joseph did not view his mother's method of bathing him or her emotional intimacy during these baths as problematic, it was precisely this combination of her intrusive physical contact with her rare and much-needed gentle emotional contact that made this experience a violation of Joseph's needs.
- (5) Joseph was exposed, as well, to his mother's prostitution. His mother was charged with prostitution multiple times, including when he was 14 years old.<sup>53</sup> He witnessed numerous men and "boyfriends" come in and out of wherever they were staying to have sex with his mother.<sup>54</sup> She would get paid in money or drugs. He described overhearing her having sex, and he knew what was happening because she was a "screamer" during sex. He also described walking into the house one day and finding his mother on her knees giving a man a blowjob.

ii. Precocious Exposure to Sexual Activity with Louie Negrón

- (1) Joseph described his first significant exposure to pornography as having occurred one night when he was around 8 or 9 years old. Louie and his mother's friends often got high on cocaine and marijuana in their apartment. His mother and Louie, though they expected him to stay in his room, were too preoccupied to monitor him. Joseph was curious; he watched the adults getting high, and he noticed that all the men picked up something that looked like a suitcase, went into his parents' bedroom, and shut the door. Joseph described hiding under the bed in their room one night to see what was happening behind that door. He discovered that the men were watching porn movies, though he didn't have a name for them at the time. Joseph described being privy to explicit and graphic scenes of sexual activity and intercourse.
- (2) He described witnessing these pornographic films as the start of a kind of "training in sex." He was captivated by what he saw, and recalled that after seeing the films, he felt strongly that he wanted to start experimenting with some of the things he saw in the films with girls his

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<sup>53</sup> See, e.g., FPD 1613–14 (Venecia testimony regarding Sophie's prostitution charges); FPD1995–98 (CPS records noting prostitution arrests).

<sup>54</sup> Elizondo-Powell Decl. at ¶ 12 (recalling that "there were a lot of guys going into and out of [Sophie's] house," both for drugs and relations).

own age. He stated that he felt that he needed to learn how to do the things he saw the adults doing.

## 8. Rape & Sexual Molestation

- a. Joseph's life as an abuse and neglected boy also left him highly vulnerable to sexual predators. In fact, Joseph was multiply sexually abused as a child, by strangers as well as by people within and known to the family. His first period of vulnerability started when he was as young as 9 years old, and some instances of the sexual abuse he endured are detailed below.
- b. Male Neighbor: Joseph was also lured in and sexually molested by a sexual predator in his grandmother's housing development in San Antonio. He remembers this incident occurred soon after his grandmother picked him up from the children's shelter after his mother's first prolonged abandonment. Louie had taken Arlene back to New York, and so Joseph was separated from his sister. His grandmother's housing was unstable due to lack of money, and Joseph recalled moving from one place to another with her. In one particular housing development in San Antonio, he recalled playing in the street with other kids when he heard someone calling from behind him. Joseph looked and saw a friendly-looking Hispanic man in his mid-20's holding out a colored piece of paper and gesturing to him. Joseph recalled thinking the man was confused about something and wanted Joseph to come explain it to him. He wasn't sure if the man meant for Joseph to come help him, so, according to Joseph, "I pointed to myself and he nodded his head to say yes. I looked back and the guy waves at me once more and walks back into the unit leaving the door open. I walked over to the door and looked in and saw the guy looked at me and smiled. He encouraged me to come in and asked me if I want something to drink or some popsicles. At this time he was sitting on the bed and seemed really nice."
- c. Joseph went on to describe how the man's freezer was full of ice cream and popsicles and that Joseph was so hungry that he recalled wanting to eat all of them. During this time, the man had locked the door without Joseph's knowledge. The man then came up behind Joseph and began kissing Joseph on his neck in a "tender way." Joseph recalled being able to feel the man's erection pressed against him. He stated, "I froze. I was scared. I didn't know what to do. I knew what he wanted," but Joseph froze and recalled that he "allowed" the man to complete his sexual acts. Joseph's memory for this part of the molestation retains the painful recollection of his helplessness and passivity rather than what sexual acts the man did to him. At some point, Joseph recalled that he was able to slip out of the man's grasp and run for the door.
- d. The next thing he remembered, he was able to unlock the door and get away. He ran to his grandmother's apartment and recalled that he immediately got high to manage his distress over the sexual assault. He reported that he was too scared to leave her apartment until they moved from that apartment complex. He was

plagued with fear that the man would come to his grandmother's apartment when she was at work. He suffered from repeated intrusive images of the man's face in his mind, which he recalled as "sad." Joseph managed his distress and intrusive memories of the perpetrator's sexual violations by dissociating. Joseph described how a part of his mind, which he experienced as a real voice and presence of someone else, would try to convince him that the perpetrator wasn't so bad, and that this man who had done these things to him was just a lonely person. Joseph explained that this part of his mind "would defend the guy... would say that the guy was alright and good."

- e. Joseph experienced intense self-blame as a result of this man's sexual predation. It highlighted Joseph's increasing helplessness at the hands of not only adults in his family, but of strangers as well. Though he was terrified that the man might come for him again, he could not tell anyone about it. He didn't know if he could trust his grandmother, who had already beaten him and failed to protect him from his grandfather's emotional abuse and his uncle's attempted sexual assaults. He also felt that he was a burden to his grandmother and that telling her would just mean that he was more trouble.
- f. After this incident, Joseph's trust in people was more severely damaged. He stated, "I just did not know who was who and what was what." He described that this sexual abuse reinforced a feeling of intense loneliness and that he began trying to fill that loneliness with physical contact. He said, "I started looking at all my other options. Even to the point that I would consider and even have sexual relations with other people male or female, just to feel accepted and loved."
- g. Older Brother of Friend: After the sexual assault by the man in his grandmother's housing development, Joseph was increasingly vulnerable to sexual boundary violations by other perpetrators. During the period of his mother's frequent and prolonged abandonments, when he was between 10 and 12 years old, Joseph was molested by Teddy Aceves, the adult brother of Joseph's friend, Mark Aceves.
- h. Joseph described spending much of his time at Mark and his sister Tisha's house. According to Joseph, the Aceves children were given their own apartment where they stayed without any regular adult supervision. Teddy had just returned from the military and, according to Joseph, everyone looked up to him. One night, when he was sleeping on their couch, Joseph woke to find Teddy rubbing Joseph's penis and "playing with [me]." It was dark, but he could see Teddy kneeling beside the couch, "not looking at me," and masturbating himself. Joseph recalled feeling confused and uncertain of what to do. He liked and admired Teddy, and thought maybe Teddy was being affectionate and doing this because he liked Joseph. However, Joseph said, "I knew he shouldn't be doing this." Joseph was afraid that if he told Teddy to stop, Teddy wouldn't like him anymore. He was also afraid that Mark and Tisha

would wake up and see what was happening. Instead, Joseph told Teddy that he heard Mark and Tisha coming, which made Teddy stop. He recalled that after this, Teddy just went back to bed. He never acknowledged what he had done to Joseph in the middle of the night, and Joseph found himself confused and uncertain about Teddy's feelings for him.

- i. Joseph believed that Teddy wouldn't do this again, but Teddy molested Joseph a second time in the same way. He described, again, waking in the middle of the night to Teddy fondling and "playing with him." He recalled that he wasn't sure if he should just "lie there" and pretend it wasn't happening, but then Joseph decided that Teddy was being "sneaky" about this, so he stopped him. He recalled Teddy trying to calm him down, and telling Joseph, "No, it's okay, it's okay," but Joseph reported that he told Teddy he needed to stop, and that Teddy did. After Teddy's molestations, Joseph felt confused and betrayed. He said his mind became preoccupied with why Teddy would do this to him, but he never felt he understood it.
- j. Brother of Mother's Boyfriend: Joseph's exposure to predatory adults increased as his mother's abandonments persisted. He suffered penetrative rape when he was about 12 years old by the brother of Papo Calo, his mother's boyfriend.<sup>55</sup> Joseph's mother had abandoned him in New York with Calo's family shortly after she and Joseph had visited Louie to acknowledge the death of his sister, Arlene. He had no idea where his mother had gone or when she would be back. He knew no one in New York except for Louie, who did not take him in. Joseph was not enrolled in school, had no friends or family, and knew no one.
- k. Joseph slept in a room with Calo's younger brother, who was around 19 years old. Joseph used the bottom of a bunk bed. Joseph described that about two weeks after he got there, Calo's brother came into the room one night and locked the door. He put a porn magazine on the top bunk, stood facing Joseph's bunk and began to masturbate. Joseph recalled freezing in fear, not knowing what to do or what was happening. In a later incident, Joseph described that Calo's brother sat down on Joseph's bunk said something like, "What's up?" and told him to move over. When Joseph didn't move, the man flipped Joseph over face-down and pulled Joseph's pants down. He then got on top of Joseph and put his penis in Joseph's anus. Joseph recalled how he smelled this man's sweat, how he forced himself into Joseph and how much it hurt. He recalled grunting in pain as the man pumped and ejaculated in him. Joseph recalled being unable to speak, and that Calo's brother then got off him and left the room. He recalled having to "clean himself up." He had ejaculate running down his legs and described feeling disgusting, "like I'd just taken a shit."

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<sup>55</sup> FPD 3073, 3086 (Knox psychosocial history noting sexual molestation).

- l. Joseph said that Calo's brother never acknowledged what he'd done and acted as if nothing had happened. His mind was racing about who he could tell to protect him from Calo's brother, but he could think of no one. He didn't know this family. His mother was gone, and he didn't know how to reach her. Further, not only was he terrified of Calo's brother now, he had already seen Papo's violence toward his mother and was afraid of what Papo might do to him if he told on Papo's brother. He therefore told no one what had happened.
- m. He recalled that after this, he was preoccupied with the terror that Calo's brother might rape him again. He had had nowhere to go, but tried not to be in the house. He snuck into the school across the street during the day just to get away from him, until he was caught and told he didn't belong at that school. Joseph had difficulty sleeping; he remained vigilant so he knew when the brother was in the house, and he said he tried to "stink up the room" with his athlete's foot so that his brother would not want to come in the room.
- n. However, Papo's brother attempted to rape him a second time a week or so later. Joseph described that he was sitting on the couch when the brother came home, grabbed him and said, "Let's go into the room." Joseph knew what this meant and immediately began to resist. When he said, "No, I don't want to," Calo's brother slapped him hard in the face. Joseph recalled that it hurt a lot and recalled thinking that the brother was doing this again because Joseph hadn't told him that he didn't like it the first time. Joseph described running into the kitchen and grabbing a knife, but Calo's brother chased and caught him, shook the knife out of his hand, hit him again so hard that he fell to the ground, and then sat on Joseph's back. At this point, Joseph recalled that Calo's brother threatened to, but did not, rape him. He recalled that he let him up, and said, "You need to get out of this house." Joseph said that he got up and fled the house. He didn't bother to get any of his belongings. He recalled that he found a phone, called his grandmother, crying hard, and said, "I need to leave. I can't stay here anymore." She did not ask what had happened, but told him to go wait at the airport.
- o. Connally Unit Cellmate: Joseph described another attempted rape that occurred when he was around 27 or 28 years old and incarcerated at the Connally Unit in Karnes County, Texas. He reported that he had not lived with this cellmate long, and that the attempt occurred when the lights were off. He and his cellmate were preparing for a cell check. Joseph recalled that he was bending over his locker trying to get his belongings when his cell mate came up behind him, pushed him into a corner face-first, put his penis against him and "started pumping." Joseph described fighting the man off. The man seemed to back down, and then, Joseph described, he jumped on Joseph a second time, threw a punch at Joseph's face that hit him in the eye. At this point, Joseph recalled thinking, "Oh my god, he's really trying to rape me," and in response Joseph began hitting and kicking the man.

- p. The lasting impacts of these sexual assaults, as well as the ways in which their acute and chronic effects likely impinged upon Mr. Garcia's reactions during the 1996 attack on Mr. Luna, will be discussed in Part IV of this report.

## 9. Losses and Deaths in the Context of Family Secrecy

### a. Illness and Death of Younger Sister, Arlene

- i. As noted earlier, Joseph's younger sister Arlene was diagnosed with cancer as a child and, while she was ill, was returned to her father's custody in New York while Joseph remained in San Antonio. Joseph's child mental health records and CPS records discuss the impact of Arlene's physical illness, decline, and death on Joseph. He is noted as having been sad, angry, worried, and depressed about her illness and their separation while she was alive.
- ii. The records continue to note Joseph's anger and sadness after Arlene's death. However, Joseph's behaviors and symptoms are not identified as part of the bereavement process of a child who lost a sibling to whom he was very attached, and as such his records lack important context for understanding Joseph's trajectory after Arlene's death.
- iii. The impact on Joseph of growing up with a terminally ill sibling was, on its own, significant. That impact is complicated by the fact that he and his sister grew up in a dangerous, violent and neglectful household where Joseph could not depend on his parents or grandparents to provide for his basic needs. Part of that neglect included his mother's secrecy and his family's silence and denial which resulted in Joseph being completely unprepared for Arlene's inevitable death. The fact that the adults in his family knew something that he didn't about Arlene and still did nothing to help him cope with her death only compounded the impact of Arlene's death on Joseph. Such complexities profoundly disrupted his grieving process.
- iv. The physical abuse and parental neglect that Joseph and Arlene suffered together, even if to somewhat different degrees, created an intense survival bond between them. Akin to the ways in which soldiers in combat describe traumatic bonding, Joseph described an enduring connection to Arlene forged from their shared hardships. He described that throughout his childhood, his sister was his best friend.
- v. He noticed that his mother did not seem to physically assault Arlene as much as she did him, and that his "grandmother" Negron, Louie's mother, doted on Arlene and that she was the favored child. However, Joseph was never told that she terminally ill. Thus, Joseph grew up with an acute sense of responsibility for Arlene, without any understanding of why she required such protection or why she received so much more positive attention than he did.
- vi. As is typical for older siblings, and boys in particular, Joseph was told by his mother that he was in charge of his sister's safety and well-being. For example, Joseph described being told that he and Arlene did not need toys

- because they had each other to play with. His mother told him that his sister was the most important thing in his life.
- vii. Because of his mother's inattention, her frequent disappearances, and her violence, Joseph also understood his purpose in life was to be Arlene's protector. He related a memory in which his mother prompted him to beat up a friend of his named "Pepito" after his friend threw a snowball at Arlene. Joseph was nicknamed "George" by his family, and he recalled his mother yelling out the window, "George, kick his ass!" He recalled wrestling with Pepito, pulling his hair and telling him never to touch Arlene again. Joseph explained that he had been friends with Pepito for a long time, and that they "did everything together," but that after this minor incident, "It was over for me. I knew it was my job to protect Arlene and to be with her."
- viii. Joseph related a traumatic memory of a time when he was around 6 years old and playing "follow the leader" with his friends. He led his friends to jump off a drop and Arlene followed. He recalled that she landed "sprawled out" and that he started screaming in terror for his sister. Joseph was terrified to see his sister in this state; she was rushed to the hospital. He reported that he was not only terrified of his mother's imminent rage over his failure to prevent his sister from harm, but he also felt intensely guilty and responsible because he hadn't foreseen his sister's willingness to follow him, he hadn't protected her, and she had been seriously hurt as a result.
- ix. It was therefore both physically and psychologically overwhelming when, as Arlene became more and more ill and impaired, Joseph was still expected to take care of her. His most enduring traumatic memory of her involves the failure of his identity as protector. As described earlier, one day when he was around 10 years old and living in San Antonio, Joseph was in charge of Arlene when she suddenly yelled that she could not move or walk. When Joseph realized that she was serious, he panicked. Joseph had immediate, intrusive memories of her fall after jumping off the concrete wall. He thought her current state must be the result of the long-term effects of this fall, and he felt unbearably guilty that he had caused her current paralysis. He stated, "I was sure it was my fault, that I had caused this." As described above, this terrifying incident was followed by his mother and Louie deceiving Joseph by sending him to the store, so that he returned to an empty house where he sat for hours alone, with no idea what was happening to Arlene. When his mother returned hours later, he recalled that she told him, "Arlene is very sick and is not coming back."
- x. Thus, because nobody in his family told him that Arlene had cancer, Joseph believed starting around age 10 that he had caused her physical decline and ultimately her death. He was plagued with self-recriminating questions and explained, "I brooded on it for years. What if she hadn't jumped off that platform? What if I'd been more aware? What was I doing?" Why couldn't it have been me?"
- xi. Even after Arlene herself told Joseph that she was going to die, he could not grasp that he hadn't failed her in some way that led to her death. His self-blame became part of his denial and inability to cope with her imminent



loss. He stated, “I didn’t want to hear this [that she was going to die]. She’s all I got.” Arlene ultimately died in March 1984, when Joseph was 12 years old.

- xii. When asked if Joseph told his counselors or the social workers he encountered in his residential placements that he believed his sister had died because of his failure to protect her from jumping off the platform, he said he didn’t. He explained, “I believed they didn’t care. Anyway, what would it change if I had? Were they going to bring Arlene back?”
- xiii. Joseph’s love and concern for Arlene was inextricably tied to his identity as her protector and caretaker from the kinds of neglect and abuses they suffered together. For children in maltreating families, siblings’ failure to protect each other is inevitable and often causes them lifelong guilt. However, Joseph’s guilt, grief, and self-recrimination were compounded by his failure to understand the true reasons for Arlene’s death.

10. Exposure to Emotional Abuse & Exploitation in Residential Group Homes & Institutions

- a. Between the age of 15 and 18, Joseph was repeatedly moved from one residential placement and group home to another. By the time he ran away from his last one, he had been moved at least seven times.<sup>56</sup> There is ample documentation on Joseph’s difficulties managing this chaos and instability. For example, CPS records note that while Joseph often started out doing well in a certain placement, he eventually showed his distress over his anticipation of further rejection and being moved again by having frequent behavioral issues, difficulties with staff, and problems with other students in group homes.<sup>57</sup> This pattern became self-defeating and self-fulfilling, which is not unusual for children who get placed in numerous residential settings.
- b. In addition, several experiences that Joseph described in his placements were significantly traumatizing to him above and beyond the instability and moves from one program to another. The first occurred when a counselor named Robert Ellis at Darden Hill Ranch, a residential group home, took a particular interest in Joseph and befriended him. Joseph described that he liked Robert, and said Robert was very encouraging of him. He recalled that Robert, who was in his mid-20’s and married, would play basketball with him and a few other boys. Joseph began to become attached to Robert and hoped that Robert would adopt him. During this period of time, Joseph said he had a habit of calling everyone “Maynard” as a joke. He said that one day he called Robert by this name and suddenly, Robert became enraged, collared him up against a wall, and screamed in his face, “Don’t fucking call me Maynard!” Joseph was shocked

<sup>56</sup> FPD 1817–20 (Kessner testimony); FPD 2127 (CPS records listing transfers).

<sup>57</sup> See, e.g., FPD 1996–97, 2022, 2085, 2089 (CPS records documenting Joseph’s behavioral difficulties).

and devastated. He was unable to tolerate the feelings of hurt and betrayal he felt after trusting this counselor, and thereafter became more mistrustful, angry and belligerent with all of the staff.

- c. In another incident at Darden Hill Ranch, Joseph was caught with a \$10 bag of marijuana. He was using marijuana habitually to help reduce his feelings of abandonment, and to calm his anxiety, fear, and hypervigilance in these settings. He was eventually removed from the group home because of this incident. Before his removal, though, Joseph had to cooperate with the police to uncover the kids who were dealing the marijuana. Joseph reported that he felt frightened and coerced into this cooperation.<sup>58</sup> He reported that, at the time, he was led to believe that he would go to jail if he didn't cooperate.<sup>59</sup> He also described how the undercover policeman took him to the park where the sting was to occur and told Joseph that this was a dangerous situation. He then threatened Joseph and told him that if he blew the policeman's cover, the policeman would "shoot me and shoot everyone else." Joseph reported that he made this threat real by showing Joseph the gun he was carrying.
- d. Joseph said he was terrified as he approached the kids, and after it was over, he felt especially angry and used by the group home parent, Charlie, who had seemingly approved of this plan.
- e. Perhaps the most significant disruption to Joseph's progress in residential placement, however, was the loss of his case's social worker, Elizabeth Venecia, and his reassignment to a series of other caseworkers after she left. This occurred after his mother failed to make any progress in regaining custody of Joseph and the State was awarded custody. While a change in caseworker is often required when children enter one level of care and have to transition to another level of care, nevertheless, such institutional practices are especially harmful for traumatized children whose capacities for trust and building attachments are severely compromised. The loss of a caseworker is often the tipping point toward failure for children like Joseph.
- f. In Joseph's case, Elizabeth Venecia was the first caretaking adult who had *ever* interacted with him in a way that was consistent, physically and emotionally non-violent, and respectful.<sup>60</sup> She demonstrated a steady interest in his well-being over the course of a full year—an experience of consistent caretaking that was virtually unknown to Joseph up to that point in his life, and which was very emotionally powerful to him. Joseph said that he had desperately wanted to be placed in a foster family, not a group home, but that he began to wish that

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<sup>58</sup> FPD 2055, 2059 (CPS records documenting Joseph's work with narcotics agent to identify school-aged drug dealers).

<sup>59</sup> FPD 2059 (CPS records noting that Joseph reported he felt coerced into helping).

<sup>60</sup> See FPD 1650 (Venecia testimony regarding Venecia's work with Joseph).

Elizabeth herself would adopt him. He recalled that he never told Elizabeth this, but said, “I thought it would be obvious.” Thus, when he was told that she would be leaving him and that he would be assigned to a different caseworker, his helplessness to prevent this loss elicited memories, emotions, and behavioral responses at the same level of painful intensity as numerous past losses and abandonments, the worst of which was the loss of his sister, Arlene. Ms. Venecia noted that Joseph “didn’t understand why I would do this to him.”<sup>61</sup>

- g. Children like Joseph whose trauma histories involve repeated abandonments have extremely tenuous skills in attachment and often cannot tolerate the loss of a caseworker that they have just begun to trust without significant trauma-informed care. Joseph received no such care in helping to separate past traumas from the present or in helping him to transition to a new case worker.
- h. Unfortunately, after his first year in DHS custody and under Elizabeth’s care, he was assigned to a new counselor. At this point, DHS determined that Joseph was “a good kid who need[ed] a firm hand once in awhile [sic], but who [did] not require therapy anymore.”<sup>62</sup> Thus, not only did Joseph lose his attachment to his caseworker, he lost access to any kind of treatment that might have helped him work through the ramifications of this loss. Ms. Venecia’s notes summarized what Joseph would have to contend with as a result of this transition: “The end of hopes he had placed on his mother in working to get him back, (2) A new place to live, (3) New school, (4) New friends, (5) New caretakers, (6) New caseworker, (7) Learning to deal (accepting) with being in care until he is 18 years old, (8) More than likely seeing his family in a different manner, etc.”<sup>63</sup>
- i. Even the most resourced, skillful, and resilient young person would founder when faced with the sheer number of losses, transitions, and social demands Joseph was suddenly placed under. An adolescent with a history of neglect, abuse, and abandonment as severe as Joseph’s is almost guaranteed to show significant behavioral distress, compounding the negative effects of such losses and making the failure to adjust to new group homes likely.
- j. Joseph’s behavioral difficulties—hyperactivity, guardedness, and defensiveness<sup>64</sup>—and his failure to succeed in the various residential settings into which he was placed must be understood in context. He was completely dependent on the social-service system for his care as an adolescent, and he was unable to recover from the massive losses imposed on him by that system.

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<sup>61</sup> FPD 2057 (CPS records).

<sup>62</sup> FPD 2055 (CPS records).

<sup>63</sup> FPD 2053 (CPS records).

<sup>64</sup> See, e.g., FPD 2093, 2106, 2112–13 (CPS records documenting instances and periods of behavioral issues).

## 11. Witnessing Murder

- a. During the period when his mother abandoned him in New York, Joseph—then 12 years old—spent many hours wandering in the streets. During that time, he witnessed a man being murdered.<sup>65</sup> Joseph recalled seeing a Hispanic man chase and gun down a black man. In the ensuing scene, he described seeing the black man get shot and then get hit by a car. He reported that he watched, terrified and helpless, as the Hispanic man then stood over the black man, who was face-down in the street. The Hispanic man ordered the black man to turn over and look at him, and then he shot the black man in the head.
- b. According to Joseph, the Hispanic man then saw Joseph standing nearby and “looked [Joseph] right in the eye.” Joseph took this memory of the Hispanic man’s gaze as a warning to keep quiet about what he’d witnessed. While Joseph described vivid, graphic memories of this whole traumatic experience, perhaps the most notable is the meaning Joseph took from his vivid memory of the Hispanic man looking at him. Joseph felt that witnessing this act of violence tied him somehow to the Hispanic man. Joseph’s experience speaks to his feeling of exposure and vulnerability during an event that did not threaten him directly. The phenomenon of being traumatized by witnessing a violence or death is a well-recognized pathway to posttraumatic symptoms. (Terr, L., 1990; LEC-5, Whethers, et. al., 2015)

## 12. Death of Mother from AIDS

- a. When Joseph was 22 years old, his mother died of AIDS. She lived in Georgia at the time, but before her death, she made one last trip to San Antonio.<sup>66</sup> Joseph described the pain of seeing his mother so ill. She had lost weight, had lost all of her teeth, and was constantly wiping blood from her gums. By this time, Joseph and his wife had had a daughter, whom they had named after Joseph’s sister. One of the most painful memories he has occurred when his mother, holding his daughter Arlene, said, “She looks just like Arlene [his deceased sister].” Joseph described that seeing his mother holding the baby and her words caused him to suddenly bolt from the house. He ran to the back yard and drop to his knees, crying. He said he knew with certainty that his mother would die. He said, “I could see it,” and he was overwhelmed with grief. He was not aware at the time that this scene re-enacted his experience of seeing his sister and knowing that she would die.

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<sup>65</sup> FPD 3073 (Knox psychosocial history describing witnessing of murder).

<sup>66</sup> Trevino Decl. at ¶ 17; FPD 1569–71 (Nerone testimony regarding Sophie’s final visit to San Antonio before her death).

- b. Another aspect of his mother's death complicated Joseph's grief. He wanted to apologize to his mother for an incident in which he became enraged at her after she abandoned him at a movie theatre. In this instance, Joseph was around 18 years old and felt that he had grown up; he believed that he no longer felt the same fears and distress he felt around his mother in childhood. His mother and her boyfriend dropped Joseph off to see a movie one afternoon. She told Joseph she would return after the movie was over to pick him up. When she did not come, Joseph began to feel his old fears and was flooded with memories of her past drug use and abandonments. His mother did not show up for hours, until well after it had gotten dark, to pick him up. Joseph could not contain his feelings of anger, disappointment, and betrayal. He yelled at his mother and expressed the feelings he had tried to shield her from for years. At the same time, Joseph experienced intense guilt and fear for showing his mother what he felt was his disrespect. This memory of his angry outburst at his mother continued to cause Joseph guilt, and he did not want her to die thinking he didn't love her.
- c. He had been hoping that his mother would, likewise, acknowledge and apologize for her lifelong abuse and neglect of Joseph. He stated that, while she did acknowledge her abandonments of Joseph and how her choice in men affected him, she did not apologize for it. She also denied any responsibility for her violence towards him. When he tried to explain to her how this affected him, she simply said, "I'm sorry that you feel that way." Joseph had never told his mother about having been raped as a child or about witnessing the kind of street violence he had seen when he was in New York. She had never been someone in whom he could confide his feelings of vulnerability or his troubles.
- d. Joseph described that he felt worse after this last meeting with his mother. He said that even as she was dying, "My mother was the person she'd always been." He described her as materialistic, strong-willed, and unapologetic.

### 13. Assaults with Knives

- a. Twice in his life, Joseph was threatened or attacked with a knife. The first occurred when he was around 12 years old. Joseph was with his friend, who stole a bike, and they got caught by the bike's owner and the owner's friend. One of those older boys held a knife to Joseph's neck. Joseph recalled that he was terrified and started to cry, and the boy let him go.
- b. The second knife attack occurred when he was 24 years old, two months before the incident that led to Mr. Luna's death. Joseph reported that he was at a party with his friend, Bobby, who started dancing with a young girl whose father was at the party. During the party, the girl's father and several other older men suddenly jumped Joseph and Bobby. Joseph remembers a lot of men hitting him

and kicking him in the legs when suddenly, someone stabbed Joseph in the leg.<sup>67</sup> Joseph recalled this stabbing caused him to feel “mortal fear.” This attack was pivotal in triggering his past experiences of violent abuse in childhood, and in exacerbating his feelings of physical vulnerability to attack.

- c. Joseph reported that prior to this attack, he owned a knife, but that he kept it at home and that he used it as his “meditation ball.” He described being soothed and mesmerized by the clicking sound of the blade opening and closing. However, after this attack, he began wearing the knife on his belt. He then began to practice removing it quickly from his belt. He described that he became “fixated” on practicing this move, but numb to any feelings he had of being afraid or overly concerned and watchful for his safety. This type of dissociation will be further described in Part IV of this report.

#### **PART IV: IMMEDIATE AND LONG-TERM IMPACTS OF REPEATED CHILDHOOD ABUSE & EXPOSURE TO VIOLENCE**

- A. With childhood maltreatment as pervasive as Joseph’s, traumatic events occur repeatedly within the fabric of daily life, both inside and outside the family context. The multiplicity and chronicity of these adversities make children increasingly vulnerable to further trauma exposure throughout their lifetime.
  1. The adaptations made by the child’s brain and behavior to accommodate and survive these experiences shapes each subsequent phase of his or her development, often skewing or stunting the child’s trajectory cognitively, socially, and behaviorally. This is similar to how a young tree survives the close proximity of a barbed wire fence by incorporating its barbs into its trunk. While the tree survives, the wire is inextricably embedded in the tree’s shape and alters the direction the tree’s growth takes thereafter.
  2. In this and in other ways discussed later, past trauma continues to be lived and experienced in the present-day, often through sensations and emotions felt in the body, and long after the traumatic experiences may have terminated. The intrusion of past memories, feelings, bodily states, and behaviors involved in the survival of trauma is one of the most robust markers of the power of the earlier trauma. Like shrapnel, the psychological and behavioral remnants of trauma may re-surface slowly over time, but they may also come out immediately through contact with the reminders of the memory.
  3. The following information describes relevant perspectives on trauma and traumatic impact, which are necessary to understanding Joseph’s development and behaviors.

#### **B. The Multiple Negative Outcomes of Adverse Childhood Experiences (“ACEs”)**

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<sup>67</sup> Trevino Decl. at ¶ 18 (describing stab wound).

1. Numerous long-term studies offer reliable evidence that childhood maltreatment and exposure to abuse, caretaking neglect, loss, community violence, war and other extreme hardships have lifelong effects on children's development and negative impacts on their adjustment in numerous aspects of their adult functioning. (E.g., Pynoos, 1993, 1995; Solomon, 1995) These impacts have been studied since the mid-1980s. These experiences, now helpfully conceptualized as Adverse Childhood Experiences ("ACEs"), have been studied longitudinally in large samples of children and adults since the 1990s.
2. ACEs such as poverty, child maltreatment, growing up with impaired caregivers, and exposure to domestic and community violence, have quantifiable and damaging medical, psychiatric, economic, and behavioral outcomes for children. These damaging effects persist into adulthood. Exposure to these commonly overlapping experiences of adversity substantially increases a child's risk for subsequent trauma, serious life-long medical and psychiatric illness, and severe behavioral impairment. (Anda et al., 1998; Edwards, et. al., 2003)
3. Further, the literature on ACEs clearly shows a "dose-response" effect. There is a threshold for the number of adverse experiences a child can experience before the resulting impairments become inescapable. For example, the prevalence of lifetime impulse-control disorders in children experiencing four or more ACEs is over 50%. Only 10% of children who experience no adverse life events are diagnosed with impulse-control disorders. (Chapman, Dube, & Anda, 2007; Copland, Keeler, Angold, & Costello, 2007)
4. There are also particularly toxic combinations of traumatic exposures that exponentially magnify the level of distress a child feels. For example, parental substance abuse in conjunction with parental mental illness makes boys more than eight times more likely to experience multiple co-morbid mental health problems in adulthood, relative to just one of those adverse experiences, or to a different combination of ACEs. (F. Putnam, Harris, Lieberman, K. Putnam, & Amaya-Jackson, 2015)
5. Further, studies are beginning to show that there are "sensitive periods" in a child's brain development. If certain kinds of trauma exposures occur during those "sensitive periods," the effects of that trauma not only worsen psychiatric outcomes, but actually alter the child's brain structures more than they would if they occurred at another time. (Teicher, M. et. al, 2017; Thome, J., et. al, 2017)
6. ACE studies indicate that 62% of children experienced 1 type of adverse event in childhood; 23% experience 2 or more types of trauma. But only 3% of children experience five or more ACEs. The number and types of trauma the Joseph experienced in childhood and adolescence put him in the highest trauma category. A certain of dosage of trauma strongly predicts the kinds of psychological, emotional, and behavioral impairments that Joseph demonstrated throughout his

life. Joseph experienced far more than that dosage of trauma—and his life trajectory reflects the enduring effects of that trauma.

C. The Neurobiological Impacts of Prolonged Childhood Maltreatment and Neglect

1. At the time of Joseph's 1996 trial in Bexar County, much was known about the perceptual organization of traumatic experience and the neurobiology correlated with these phenomenon. Research on memory for traumatic events dating back to the 1940s has posited the central role of the neurobiological processes in the brain that dictate attention, arousal, and memory consolidation. (van der Kolk, 1996)
2. Healthy child development depends on a number of interconnected biological and psychological processes. The neural bases of such processes are increasingly well understood in the empirical literature on the neurobiological impact of trauma exposure on children's development. (De Bellis et al., 2003; Teicher et al., 2003; van der Kolk, 2005)
3. The brain of a developing child is a highly plastic organ that is shaped in many important ways by the interpersonal environment in which it develops. The most important interpersonal environment typically occurs between the mother and child in the first years of life. A child who grows up with a primary caretaker who provides him with an environment in which he has frequent interactions of reciprocity, mirroring, and safe, instructive stimulation will develop increasingly dense neural circuitry in his frontal lobes, the part of the brain involved in planning functions and impulse control. These interactions, such as (1) attuned responses to child's cries and facial expressions, (2) cuddles, (3) expressive vocalizations, and (4) interactive play, are typically part of the ordinary caretaking responses a parent will offer a child. (Schor, 1994; DeBellis, 1999; Solomon, M. & Siegal, D. 2003)
4. Ideally, these interactions continue into early childhood and include caretaker corrective responses to the growing child's increased repertoire of behaviors and emotions. Through these interactions, the child develops behavioral awareness of his emotions and impulses, as well as the capacity to verbalize, contain, re-direct, and alter emotions and impulses. This developmental process in the brain drives social development. (Schor, 1994)
5. However, when a child is raised by impaired caretakers who intentionally or unintentionally neglect these interactions, the child doesn't get the interactions he needs to develop these critical neural capacities and awareness. The same is true for a child who experiences abandonment, loss and caretaker physical or emotional violence, as Joseph did. Such a child's brain develops differently than the brain of a child raised by a non-impaired caretaker.
6. When the child instead experiences violence and psychological or physical endangerment from the caretaker, immediate changes in a child's brain neurochemistry and behavior occur. Under threat, children and adults alike are



“hard wired” to respond immediately with either the “fight/flight” or “tonic immobility” response. These responses are meant to increase the chance of physical and psychological survival in the face of a threat, and Joseph responded in these ways to the various forms of abuse he encountered. For example, he described automatic “flight” behavior when he ran in terror from his mother, even though this led to a worse beating. He described tonic immobility, though he did not use that term, when he was unable to move or speak when he was being sexually assaulted. Further, Joseph described involuntary “fight” behaviors when he, for example, grabbed the belt from his mother as a child and when he screamed at her in rage after she abandoned him at the movie theatre.

7. During these responses, Joseph’s brain was reacting in ways that are increasingly well understood. These developments in understanding the brain began in the mid-1990s, with the ability to study the brain with such instruments as the fMRI machine. (van der Kolk et. al., 1996) The limbic system in the brain is dedicated to organizing and regulating self-protective behavior. For example, limbic structures like the amygdala are responsible for detecting threats, stimulating fear, and activating the appropriate physical responses to threats, such as fleeing, fighting, or freezing. (van der Kolk, 1996, 2003)
8. In traumatic situations, guided by the massive influx of stress hormones from the Hypothalamic-Pituitary-Adrenal axis in the brain, the amygdala and limbic appraisal system bypass the “higher” cortical areas of the brain. These “higher” cortical areas are responsible for processing, judging and discriminating information about the safety or danger of the environment and the stimuli within that environment. These higher cortical areas, which include the frontal lobes, slow down survival responses, and are therefore bypassed or de-activated when under threat.
9. Typically, brain functions integrate “high road” (higher cortical) and “low road” (limbic) pathways when not under extreme stress. However, children who have experienced a traumatic event and who show posttraumatic symptoms, such as Joseph did, show differences in their brain activity. Their brains show an over-activation of “low road” limbic brain structures and inactivity in “high road” cortical pathways. This is true even in non-stressful situations. (De Bellis, 2003; Teicher et al., 2003; Morey et al., 2015)
10. The low-road limbic pathways magnify fear and increase a child’s perceptions of threat. Thus, the brain of a traumatized child and adult sees danger all around, even when it may not be present.
11. This heightened perception of danger causes the child’s neurobehavioral system to turn on self-defense responses, whether planned or impulsive. At the same time, the perception of danger shuts down the parts of the child’s brain that would help the child evaluate his environment more accurately and discriminate when and where such defensive reactions are in fact needed.

12. As a result of trauma, then, the discriminatory brain functions stop working in balance with the defensive parts of the brain. When this occurs, children and adults have no brakes on their intense emotional reactions.
13. Children and adolescents whose brain are constantly re-routed by their traumatic experiences into “low-road” brain pathways often seem impulsive, excessively defensive or oppositional, hyperactive, or disorganized, even in relatively safe situations and relationships. This is so, despite the negative consequences of such behaviors. Joseph’s residential history is replete with examples of such behaviors. For example, at his first placement at The Bridge, Joseph got in trouble for “horseplay” with his peers, talking back to staff, hiding a knife in his room, straying from the group, and unscrewing a lightbulb.<sup>68</sup> Joseph thus exhibited the impulsivity, oppositionality, disorganization, and so on generally seen with children whose brains have been altered by trauma. Though he had initial periods of positive adjustment at some of his placements, Joseph struggled with similar behaviors throughout his years in residential placements and was described by Phoenix House as an adolescent who “was wearing out his welcome rapidly.”<sup>69</sup>
14. It is not unusual for children with trauma-related symptoms and adaptations to have lower-than-expected grades or test scores. This occurs because of trauma reactions can disrupt the children’s attention and ability to learn new information. Psychological testing of Joseph conducted when he was 14 years old by Dr. Patricia Kehoe showed that, although he scored in the “Average” range of intelligence, he was reading at the 4<sup>th</sup> grade level as he was about to enter 9<sup>th</sup> grade. He received below-average scores on attention, and was well below average on tests of language-related comprehension.<sup>70</sup>
15. Children whose brains are shaped by traumatic experiences also often behave problematically at school, as Joseph did. He was described in middle school as being non-compliant with his teachers’ requests; it was further noted that he did not cooperate with others and that he was easily discouraged by setbacks.<sup>71</sup> Such behaviors are not surprising, given the trauma he endured starting from a young age, the lack of safety he experienced in his mother’s care and his subsequent mistrust that adults had his best interests in mind.
16. Further, children with brains shaped by trauma are frequently diagnosed with ADHD and other externalizing disorders; such disorders have symptoms that overlap with the symptoms of trauma-related diagnoses. (Lansford et al., 2002) Though Joseph was never formally diagnosed with any of these disorders,

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<sup>68</sup> See, e.g., FDP 2006 (CPS records).

<sup>69</sup> FDP 2119 (CPS records).

<sup>70</sup> FDP 2670–74 (CPS records of psychological report by Dr. Patricia Kehoe).

<sup>71</sup> FDP 2634 (CPS records of school assessment).

psychological reports at age 14 and 15 describe many of these externalizing symptoms. For example, Dr. Kehoe stated that Joseph had a tendency to “defend himself from further pain and rejection by distancing himself as quickly as possible whenever there is ever any hint of rejection” and that one of the ways he did this was to “project blame onto the environment.”<sup>72</sup> Another psychologist, Dr. William Erwin, stated, “Joseph has only limited emotional resources to deal with stress in his life. Therefore, it is likely that he is going to act out his feelings rather directly when he is in a stressful or emotionally laden situation.”<sup>73</sup>

17. Dr. Erwin further described Joseph as “potentially anxious and impulsive” and concluded that he was “lacking in trust that is necessary to develop more than a superficial relationship with significant others in his environment.”<sup>74</sup> These emotional and behavioral problems were never adequately identified as a function of Joseph’s childhood maltreatment and abandonment, but they continued to affect Joseph throughout his adolescence and adulthood.

#### D. The Unique Impacts of Sexual Abuse on Males

##### 1. Disclosure and Minimization of History of Sexual Abuse

- a. Clinical and empirical literature clearly demonstrates that the incidence of sexual abuse of boys and men is underreported. This is due, in great part, to males’ reluctance to disclose such information. The failure of men to disclose sexual abuse is ubiquitous across medical, mental health, correctional, and family settings. Further, both clinical experience and research literature show that there are important gender differences in how such questions must be asked in order to elicit accurate information. Men are more likely to disclose experiences of sexual victimization if asked behaviorally specific questions that forgo labels such as “rape,” “molestation,” and “sexual abuse,” because all of these terms are associated with victimhood, weakness, vulnerability and a failure of masculinity.
- b. Even with the most informed assessment techniques, however, it is still unlikely that a male victim will disclose sexual abuse. Or, if he does, it is likely that he will only offer and be asked about only the fact of sexual abuse having occurred, and that he will be discouraged from or unable to talk about the details. With Joseph, there was both a pervasive failure to identify his experiences of sexual abuse and to properly assess their impact.
- c. It is difficult to understand how, given Joseph’s extensive contact with Child Protective Services as both as a child and as an adolescent, CPS did not properly assess for or identify his history of sexual abuse. This failure is especially

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<sup>72</sup> FDP 2672 (CPS records of psychological report by Dr. Patricia Kehoe).

<sup>73</sup> FPD 2534 (CPS records of psychological evaluation by Dr. William Erwin).

<sup>74</sup> *Id.*

concerning in light of the fact that other victims of sexual abuse had been identified in his family, including two of his half-sisters.<sup>75</sup> The assumption that boys are not victims of sexual abuse permeates even the agencies that are meant to protect children like Joseph.

- d. Although the fact of Joseph's sexual abuse was touched upon at later phases of his capital legal proceedings, the details of his history of abuse and its enduring impact on his behavior were inadequately explained. The reasons for this will be discussed more fully in the next section of the report which describes how sexual abuse in boys leaves them with a legacy of shame and confusion that differs from that of female victims. Joseph, in fact, left his experiences of rape and sexual molestation out of his memoir altogether. In my opinion, given Joseph's vulnerability, his exposure to multiple unsafe adults, his sexual reactivity in childhood, and his dissociative capacities, it is likely that Joseph experienced more instances of sexual abuse than he is able to recall.
- e. The minimization of the existence and negative impact of sexual abuse of boys, and the failure to assess and treat these impacts, pervades social service organizations and mental health services. This oversight reinforces the tendency of male victims to minimize their disclosure in such settings. The pervasive minimization is consistent with my extensive experience in a VA hospital setting treating male veterans raped in the military, and with my clinical experience treating sexually abused boys in a community mental health setting. Men remain silent for decades, if not lifetimes, because of mistrust and the expectation that they will be blamed and misunderstood as weak, defective, or possibly homosexual. Most abused men find themselves tremendously emotionally dysregulated by their memories.

## 2. Concerns about Masculinity and Confusion over Sexual Orientation

- a. When another male rapes or molests a boy, the boy is very often left with fear and confusion around his developing sense of masculinity and/or his sexual orientation.
- b. Narrow definitions of what's considered "real" and "valued" masculine behavior often exclude the possibility of being victimized. Male sexual abuse victims are therefore confronted with the dilemma of deciding either that they are "weak" and defective as a male, or that what happened to them wasn't really a significant violation, neither of which holds true to their emotional experience. They may feel vulnerable in their bodies and become vigilant to eradicate any signs of what they might consider femininity; they may also feel shame for the ways in which their bodies do not conform to masculine norms. Joseph, for example, describes a great deal of discomfort and shame about the shape of his chest, believing that he looks like he has "breasts." This shame is so distressing that he is hesitant to take off his shirt around other men. At one point, when

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<sup>75</sup> FDP 1995 (CPS records noting sexual abuse of half-siblings Carol and Debbie Garcia).

Joseph was 16, he even asked a CPS worker about the possibility cover corrective surgery.<sup>76</sup>

- c. Further, the myths that men who sexually abuse male children are homosexuals rather than sexual predators, and that rape is an expression of homosexual desire rather than a crime involving power and control, continue to inform our cultural beliefs. This was especially true in past eras, including the one in which Joseph grew up. In a culture that continues to fear and condemn homosexuality, the insinuation that the male victim may be gay, may have “asked for it” because he was secretly gay, or that the abuse turned him into a homosexual can cause extreme levels of confusion and distress and can contribute significantly to male victims remaining silent about the abuse they suffered.
- d. Accusations by friends and family of being “gay,” therefore, function to trigger intrusive memories of past sexual abuse in male survivors, and can precipitate a great deal of dysregulated behavior. Joseph’s ex-wife, Debra, in the midst of their marital dissolution, asked Joseph if he was gay; Joseph had been fired because of he was spending too much time with his best friend, “Pep,” instead of working. Debra’s insinuation that Joseph’s connection with his friend was sexual felt like a devastating betrayal to Joseph and exacerbated his feelings of anger towards her. He was unaware of the degree to which he was also triggered to the fear, shame, and helplessness he felt after his childhood sexual assaults and the degree to which these feelings would inform and undermine his coping within his marriage.
- e. These myths that conflate male rape with homosexuality may also contribute to hypersexual or hyper-masculine behaviors in the male survivor, such as compulsive sexual promiscuity or engaging in homosexual contact while identifying as heterosexual. While Joseph has gained some insight and awareness of how his history of sexual abuse has influenced his interpersonal and sexual behavior, he still finds it difficult to cope with the shame and feelings of helplessness, and still attempts to avoid his thoughts and feelings about it.
- f. Joseph described sexually reactive behaviors throughout his childhood. These are behaviors where children engage in adult sexual activity with other children because they have been precociously sexually stimulated by adults and because they are “shown” how to engage in these behaviors through their abuse. The children act out behaviors without a full understanding of their meaning and often without a sense of doing anything unusual or “wrong.” Joseph described engaging in sexual behavior with his cousin Katt (Sylvia’s daughter) from early childhood until the time he married at age 19. He was also cited, in his residential placements, as acting out inappropriate sexual gestures and making sexualized comments towards girls.<sup>77</sup> Further, Joseph described feeling a great deal of confusion and regret about sexual encounters he had with male friends

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<sup>76</sup> FDP 2078 (CPS records regarding request regarding potential chest surgery).

<sup>77</sup> See, e.g., FPD 2013, 2111–12, 2286 (CPS records noting sexually inappropriate comments and behavior).

as a child after he was molested by the man in his grandmother's neighborhood. He described feeling desperately lonely, wanting to be loved and finding comfort in the physical contact of his friends. He described how he would sleep with one particular friend, just for company when Joseph's mother left for days at a time. He also described feeling deeply confused by Teddy Aceves's molestation and feeling that it might be a sign of Teddy's caring about him. Joseph stated that after the rape by Papo Calo's brother, he became highly avoidant of physical contact with males, and instead found himself engaging in numerous sexual encounters with women. He reported that at one point in his marriage, he cheated on Debra.<sup>78</sup> Male survivors of sexual abuse may struggle with fidelity, not only as part of their attachment dysregulation and fear of intimacy (discussed below), but because of compulsive attempts to address ongoing trauma-based concerns about their masculinity.

- g. As discussed above, Joseph's multiple experiences of sexual victimization as a child and adolescent, and his avoidance of full disclosure of the extent of this sexual abuse is not unusual. The lifelong psychological and behavioral impacts, which affected Joseph's sense of masculinity, sexual identity, and safety, and which imparted a sense of shame and stigma, warrant serious consideration in Joseph's developmental trajectory and behavior throughout his life.

#### E. Traumatic Grief

1. Starting in the 1990s, the field of traumatic stress recognized the impact of catastrophic losses on the grieving process in both adults and children, and began to differentiate uncomplicated bereavement from grief that mirrored many of the symptoms of Posttraumatic Stress Disorder. The recognition of traumatic grief, the latter phenomenon, as a distinct psychological category of grieving was not formalized until the early 2000s. However, much was recognized in the 1980s and early 1990s about the traumatic impact of loss on children, and the need to assist children in processing the impact of loss at a developmental level appropriate to the child's age and capacity for understanding. (Balk, 1981; Davies, 1985; Davies, 1991; Cohen, Deblinger, Mannarino, 2006; NCTSN.org, 2009.)
2. The imprint of Arlene's death on Joseph's life has been indelible and traumatic. While the death of a sibling at Joseph's age is likely to have an enormous impact on any child, uncomplicated bereavement allows children to accept the loss over time and continue their developmental course while integrating this loss into their life. Traumatic grief, however, disrupts this process and creates a vivid emotional re-experiencing of the death and loss in a number of ways that skew the child's developing identity, beliefs, and relationships. This collateral damage to the child's developmental trajectory creates a negative impact over time that is even greater than the loss itself.

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<sup>78</sup> See FPD 1701 (Garza testimony regarding Joseph's infidelity).

3. Children who demonstrate markers of traumatic grief experience intrusive reminders of the loved one's death at three levels: (1) reminders of the circumstances of the death; (2) reminders of the loss and absence of the deceased; and (3) reminders of the changes in their life associated with that death. In traumatic, as opposed to uncomplicated, bereavement, these reminders remain vivid, visual, emotionally visceral, and disruptive over a long period of time. They change an affected child's expectancies and ability to cope with everyday challenges. In an attempt to cope with these experiences, the child disengages from developmental tasks that could help him recover from his grief, such as forming new friendships and learning at school. In so doing, the child creates a self-perpetuating downward spiral that reinforces the pain of the loss of the loved one. (Pynoos, 1993; 1995; Cohen, et. al, 2006; Brown, et. al., 2008)
4. Joseph's record strongly suggests that he was experiencing traumatic grief after Arlene's death. Markers of his traumatic grief, as well as of his downward spiral, are evident in the record in descriptions of his mood and behavior not just immediately after Arlene's death, but in the overall trajectory of his development thereafter. To Dr. Kehoe, over two years after Arlene's death, he described feeling "hatred to lots of people" and that he felt "real angry" and "wants to fight." When asked about where he would like to be placed in the future, Joseph stated, "I'd like to be in heaven...."<sup>79</sup> At his residential placements, when Joseph spoke to staff about his sister's death, he often expressed guilt. He was noted as asking questions such as "why she died and not him, why he was healthy and she was not."<sup>80</sup> In 1987, at the Darden Hill residential placement, Joseph's therapist noted, "it is clear he has unresolved feelings about the death of his sister and that he had been coping with this grief by smoking marijuana. At the MMHR group home, it was noted that Joseph "does talk about deceased sister who was maybe the only person who deeply cared about him and he for her"; he even wanted to visit her grave in New York.<sup>81</sup> His grief over her death was noted as a stressor in a mental-health diagnostic profile, years after Arlene's death.<sup>82</sup>
5. Joseph's traumatic bonding with his terminally ill sister was described in Part II above. His love for her was indistinguishable from the identity he developed as her caretaker, protector, and best friend. Joseph described being unable to accept Arlene's impending death, even after she told him she was going to die. He was terrified of losing the only safe person in his life, his closest friend and ally in surviving their abusive and neglectful home life. In addition to the denial and secrecy surrounding her illness, he was helplessly separated from her when she died

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<sup>79</sup> FDP 2672 (CPS records of psychological report by Dr. Patricia Kehoe).

<sup>80</sup> FDP 2290 (CPS records from Bexar County Mental Health Mental Retardation Center).

<sup>81</sup> FDP 2242 (CPS records).

<sup>82</sup> FDP 2260 (CPS records).

and missed her funeral because his mother could not be located to be informed of her daughter's death.<sup>83</sup>

6. As described in Part II, Joseph described feeling guilty and responsible for his sister's death. Even after he learned the medical reasons for her death, and even as he grew old enough to put such information into perspective, Joseph had difficulty changing this belief. At times, his feelings of guilt and responsibility caused him to wish he had died rather than Arlene, in the way that combat veterans experience survivor's guilt after they survive a firefight when their comrades did not. Unfortunately, whether well-intentioned or not, Joseph's caseworker, Elizabeth Venecia, inadvertently exacerbated Joseph's survivor guilt by telling him that he needed to remember what a positive attitude his sister maintained, stating, "Remember this Joseph, when you feel that things couldn't be any worse for you."<sup>84</sup>
7. For years after Arlene's death, Joseph was preoccupied with her loss, memories of her life, his family's denial and secrecy about her illness, and his anger at his mother's neglect. As described above, he was plagued with questions and "what ifs" (e.g., "What if Arlene hadn't jumped off that platform after me? What if I'd been more aware? "Why couldn't it have been me?"). None of these traumatic thoughts and emotions was adequately identified or addressed in the residential and group homes into which Joseph was placed after Arlene died. Instead, the focus and identified problems for which Joseph received staff attention had to do with his oppositionality and unwillingness to follow rules.<sup>85</sup> It is not surprising, therefore, that when he found that marijuana soothed some of his intrusive preoccupation with Arlene's loss, he then became more dependent on it to manage his traumatic grief.
8. Treatment protocols for traumatic grief in children clearly recognize the need to address children's anger after the death of a loved one. The protocols also specify the importance of assisting children in re-engaging in their normal developmental tasks, while integrating the loss into their understanding of life. Far from receiving any kind of appropriate treatment, Joseph was instead faced with relentless crises; the crises began with his irrevocable separation from Arlene once she was sent to New York and continued through his rape, his witnessing a murder, and his multiple group home placements. The grief and loss of Arlene's death was continuously re-kindled and exacerbated by the traumatic conditions he experienced after her death.
9. Joseph's mother died from AIDS when he was raising an infant daughter, whom he had named after his sister Arlene. His mother's passing revived his grief over

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<sup>83</sup> FPD 2048, 2072 (CPS records describing separation of Joseph and Arlene and Joseph's inability to attend Arlene's funeral); Leon Decl. at ¶ 20 (noting that Louie's family could not find Sophie to notify her of Arlene's funeral).

<sup>84</sup> FPD 2176 (CPS records of October 1986 letter from Venecia to Joseph).

<sup>85</sup> See, e.g., FDP 2058-60, 2064-66 (CPS records demonstrating staff's focus on behavioral problems).



Arlene's death. He described feeling so overcome with confusion and distress at seeing his mother holding Arlene that he impulsively fled and, recalled falling to his knees in grief.

10. There is no evidence in the trauma literature to suggest that traumatic grief of the complexity that Joseph suffered resolves over time without intentional, trauma-informed treatment. Joseph has never received such treatment.

#### F. Substance Abuse & Its Interaction with Trauma Exposure

1. Children who are exposed to trauma and left to cope on their own with the intolerable physical and emotional impacts of parental neglect and maltreatment, as Joseph was, will necessarily find ways to numb, avoid, and otherwise manage the biological and emotional dysregulations that occur as a result of the trauma.
2. Repeated episodes of exposure to violence means chronic hyperarousal and a massive influx of stress hormones. Such effects cause the nervous system to lose, or never fully develop, the ability to calm itself down. It also disrupts the brain's ability, at times, to suppress unnecessary fear reactions, and unwanted numbing responses to emotional situations. (Friedman & Pittman, 2007; van der Kolk, 1994)
3. In the non-traumatized brain, after a period of danger is over, the brain will signal the body to begin suppressing the survival response and return to its normal state. In the chronically traumatized brain, however, the initial fear and survival reactions persist, making it more and more difficult for the brain and the neurobiological system to calm itself and return to its baseline. (Morey et. al., 2015; Friedman & Pittman, 2007)
4. As discussed above, children and adolescents under this kind of stress over a prolonged period of time may look hyperactive, have poor concentration, and act impulsively. They may be unable to adjust to environments without high amounts of stimulation.
5. Alternatively, trauma survivors may be easily over-stimulated by normal environments or may be bothered by posttraumatic symptoms that keep them anxious, hyperaroused, and hypervigilant all the time. They may intentionally or automatically numb their emotions, avoid both their emotions and situations that evoke emotion, or dissociate in an attempt to reduce the unpleasant feelings elicited by their environment. These dysregulated emotional, physical, and cognitive responses lead many children and adolescents exposed to trauma to seek relief in substances, starting at a very young age.
6. Joseph started smoking marijuana regularly around 11 years old. He described experiencing the powerful effects of marijuana, which helped reduce his feelings of abandonment, and calmed his anxiety, fear, and hypervigilance. He recalled that the first time he got high, he felt an immediate decrease in the emotions and

physiological impacts of the kinds of traumatic stress he'd been living under since early childhood. He also noted that, after he was separated from Arlene and also after she died, the marijuana decreased the intrusive traumatic memories and feelings he experienced about her. He stated, "I stopped thinking. My thought process was for the now. It freed me from all that thinking about Arlene." He identified the start of his hypervigilance with when he was placed in residential group homes. He reported that being among strange kids and staff induced a level of fear, mistrust and threat he could barely cope with. He reported that getting high helped calm these responses and stated, "If I wasn't high, my mind was constantly worried about what's coming at me and how I was going to deal with it."

7. Marijuana also had a specific impact on the dissociative aspects of Joseph's hypervigilance. As described above, Joseph heard the voice of a dissociative part he labeled "Child" in his head, particularly when he felt fearful and threatened. He increasingly experienced antagonism towards this voice because he felt that it kept him isolated from other people, especially his peers. He reported that smoking marijuana made "Child" disappear, and that he was then able to engage with other kids and adults. He said that when he was high, "conversation with other people was different. I felt a regular camaraderie. I could play [for example] Dungeons & Dragons with Mark and Teddy."
8. If the child's family models substance abuse as a normal way to manage dysregulated emotions and behaviors and also makes substances readily available to the child, it is nearly impossible for the traumatized child to resist such powerful learning and reinforcement. Nearly every adult or family member who functioned as a role model for Joseph modeled substance abuse as a coping mechanism: from his mother and Louie's heroin addictions to his Uncle Frank's marijuana use and cocaine addiction and his aunt Sylvia's polysubstance abuse, Joseph was surrounded by drug use and the resulting behaviors that go along with addiction. A family friend stated, "Because of all of the drug use in the family, the kids grew up knowing a lot about drugs."<sup>86</sup> These adults sometimes made substances available to Joseph. It is therefore, not surprising that he ended up trying those substances.
9. Joseph described that around 10 or 11, he stole a stash of his mother's boyfriend's marijuana, which mother allowed him to keep and smoke. He reported that he was unable to smoke marijuana regularly until his Uncle Frank. Joseph was around 11 years old when his Uncle Frank allowed him to smoke marijuana almost daily with him. As well, Joseph recalled getting high with his mother starting at age 13. He recalled living at his grandmother's house when his mother showed up with a female friend. At his mother's request, the friend gave Joseph a joint and both of the adults smoked it with Joseph. Joseph's mother subsequently smoked marijuana with him at different times in his life. The last time he smoked with his mother was when he lived with her in Georgia as a young adult.

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<sup>86</sup> Elizondo-Powell Decl. at ¶ 24.

10. Alcohol use and abuse was also a “normal” part of his familial upbringing, and Joseph began to drink at about the same age he started to smoke marijuana.<sup>87</sup> Alcohol, however, did not inhibit his intrusive traumatic memories as well as marijuana did.
11. Remarkably, although Joseph was dependent on marijuana, he avoided addiction to the other drugs that devastated his family, such as heroin and cocaine. Joseph explained that, although he did use cocaine occasionally, he intentionally avoided drugs such as heroin and crack, in part because of the impact these drugs had on his life as a result of his mother’s, his aunt’s, and his uncle’s addictions. In addition to his mother’s drug addictions, he reported that his aunt Sylvia and his uncle Frank were addicted to cocaine.<sup>88</sup> According to a maternal relative, Sylvia died of a drug overdose.<sup>89</sup>
12. Joseph also described that some drugs exacerbated rather than calmed his trauma symptoms and reactions. For example, he said that he had tried cocaine several times in his life, but he didn’t like the feeling it gave him. He described that cocaine, “shut him down and made him feel paranoid.” In other words, it increased his trauma-related cognitive dysregulation—symptoms he was attempting to remedy, not exacerbate, with his drug use.
13. Joseph’s familial and genetic inheritance alone functioned as a powerful risk factor for his own substance abuse. Add to this Joseph’s trauma history, and it is not difficult to see how the physiologic and behavioral cards were loaded for Joseph to become dependent on marijuana use to manage the impact of his trauma symptoms on his daily life.

#### G. Dissociation

1. Dissociation is an automatic mental and physical response initially evoked by overwhelming terror, pain, and helplessness; that overwhelming feeling results in disconnections between aspects of a person’s behavior, thinking, and awareness. Dissociative phenomena can range from emotional or physical numbing during a traumatic event, to “blacking out,” or losing awareness for periods of time. Other forms of dissociation result in a feeling that the outside world is not real, that the body is not part of the self, or that the self is fragmented from other aspects of identity.

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<sup>87</sup> See, e.g., FPD 3137 (TDCJ medical records documenting reported substance-abuse history).

<sup>88</sup> See, e.g., Elizondo-Powell Decl. at ¶¶ 19–22.

<sup>89</sup> FPD 1574 (Nerone testimony that Sylvia died of a heart attack induced by a drug overdose); see also, e.g., Elizondo-Powell Decl. at ¶ 25.

2. Typically, these functions are integrated and work seamlessly together during our waking state. Thus, we are able to cut our finger, feel the pain, appraise the seriousness of the cut with our brains, get a band aid, etc. During dissociative responses, one or more of these aspects shuts down, fragments, or operates independently or in a discontinuous way from the other functions. For example, a dissociative response to a cut finger might involve not feeling the pain past the time when shock would have worn off; another dissociative response might involve seeing blood, feeling panic and losing awareness of what happens next, even as we get up and find a band aid. Alternatively, we might see blood and later find that we've been to the hospital to get stitches, but that we cannot recall anything after the moment of seeing the blood.
3. Dissociations of consciousness, as the final example above illustrates, interfere with both the formation and retrieval of memory. One of the central features of dissociation of consciousness is that the dissociating person is unaware that dissociation is occurring.
4. Dissociation, which alters or shuts down mental awareness, can be a traumatic adaption. Such traumatic adaptations lie at the other end of the cognitive spectrum from hypervigilance, but the different types of adaptations often interact and exacerbate each other's onset. This is clear in Joseph's case. Beginning in his childhood Joseph described lapsing into dissociative states when triggered by states of heightened states of fear, helplessness, or abandonment. His description of seeing Child and hearing Child's voice telling him not to trust this or that person, for example when he was attempting to manage his fear in the group-home setting, is one manifestation of this interaction between hypervigilance and dissociation.
5. At other times, Joseph described losing control of some aspects of his senses or his actions, even though he retained some awareness of what was happening. He described a number of dissociative behaviors where he felt like he'd been overtaken by impulse; at those times, his focus had narrowed to shut out everything but his actions. Even the potential impact of his actions was shut out. Suddenly grabbing the belt from his mother during a beating, or screaming at his mother after she abandoned him at the movie theatre, are examples of these types traumatic dissociation. Joseph's description of how he responded during the attempted rape by his cellmate is another such example. In these cases, in my opinion, Joseph's description of acting automatically while having no awareness of his body, of any sensory information about his surroundings, or of the impact of his actions typifies these dissociative responses. The neurobiological processes that underlie these responses will be discussed further in Part IV of this report.

#### H. Dissociation During the Events Surrounding Mr. Luna's Death

1. Joseph's description of his state of mind, behaviors, and reactions on the night he killed Mr. Luna strongly suggest that he dissociated for periods of time during these events. My assessment focused on his perceptions of threat: whether or not he

perceived he might be killed, at what point during the situation this realization occurred to him, and how he coped with those moments. His description to me indicated far less bravado and far more disorganization and terror than his public account of the incident suggests.

2. Joseph described feeling threatened by Mr. Luna, whom Joseph described as drunk and belligerent; Joseph said Mr. Luna did not respond to his verbal attempts to calm and appease him. Though Joseph had no awareness of this at the time, Mr. Luna's threatening behaviors—all reminiscent of his mother's behavior leading up to her instances of violence towards him—functioned to ignite Joseph's perception not just of threat, but of traumatic fear, helplessness, anger, and potentially life-threatening danger.
3. In addition, the fact that the threatening person was a male who was unwilling to respond to reason very likely triggered associations and memories not only of his recent knife attack, but of his experiences of sexual assault by the men in his childhood. As Mr. Luna's behavior became more erratic, Joseph's fear and hypervigilance increased.
4. Joseph recalled clearly that Mr. Luna suddenly jumped on top of him while he was in the driver's seat, pinned his head and hand down, and began punching and choking him.
5. After this point, Joseph described only fragmented memories of what occurred, which indicated to me that the choking and physical assault on his face triggered this change in mental state. Joseph said, "He choked me out. I tried to get his pinkie off my neck. I saw blood on my shirt. If it wasn't for the knife, he would have killed me." Joseph recalled Mr. Luna pacing back and forth in back of the car, and that Mr. Luna had the car keys.
6. Many of Joseph's worst traumas in childhood and the methods of most of his perpetrators involved a "second time" attack after the initial instance of violence. It was apparent in my assessment that Joseph clearly blamed himself for precipitating these second assaults by not responding with more definitive self-defense during the first ones. For example, Joseph's failure to wrest the belt from his mother as a child resulted in her worse torture; she held his hands over an open flame and then hit him over the head with a broom. When he was initially raped by Papo Calo's brother, Joseph froze, which he assumed the man interpreted as consent. When Calo's brother attacked him a second time, Joseph believed that he had brought this about by not reacting against the perpetrator during or after the initial rape. Joseph further believed that fighting back by grabbing a knife deterred Calo's brother from raping him a second time. Such second-guessing and self-blame of one's behavior in the moments prior to and during a traumatic event, and the resolution to act with definitive and swift self-protection if the situation presents itself in the future, is an extremely common adaptation of trauma survivors. This phenomenon, known as

behavioral self-blame, reduces the trauma survivor's feelings of powerlessness and vulnerability to future violations.

7. I have no doubt from my assessment that Joseph perceived his life to be in danger from Mr. Luna. I also have no doubt that this perception triggered a cascade of automatic physical, emotional, and behavioral memories to past life-threatening, terrifying, enraging, and helplessness-inducing traumas stretching all the way back to Joseph's childhood.
8. Further, Joseph's repertoire of potential responses to Mr. Luna's actions were highly influenced by perceptions and behaviors Joseph had during his childhood experiences of overwhelming danger and helplessness. For example, he had learned to be hypervigilant for signs that his mother might suddenly become dangerous, resulting in extreme arousal and alarm that affected his brain and his body. Similarly, Joseph became hypervigilant and hyperaroused as his interactions with Mr. Luna continued. Once the danger escalated for him as a child, Joseph tried to interact with his mother to appease or calm her down. Joseph described doing the same with Mr. Luna. Joseph described, at times, involuntary fight/flight/freeze reactions during many instances of his mother's abuse and during his experiences of sexual abuse that entailed either verbal or physical self-defensive aggression. He described similar reactions during Mr. Luna's attack.

## I. Attachment Dysregulation, and Impairment in Adult Interpersonal Relationships

### 1. Occupational Impairment

- a. As a young adult, Joseph was triggered repeatedly to his traumatic past when he entered new work environments, including his service in the Coast Guard. As it does with many survivors of childhood trauma, the military's demand for subservience to authority constantly re-triggered Joseph's trauma reactions. Unbeknownst to him, the displays of hierarchy, rank, and authority integral to military training served to elicit increasingly strong feelings of anger, mistrust, and loss of control—all feelings closely tied to his early experiences of maltreatment. While records indicate that he was able to successfully manage these responses during basic training, he became increasingly alienated by the continued displays of power from higher-ranking shipmen and officers. He described feeling extremely disrespected by being called, "Boot," rather than by his last name, for example. He expected that after basic training, he would feel accepted; instead, he felt like an outsider, which triggered strong traumatic emotions associated with his experiences in his grandmother's household and in the group homes. He stated, "It was supposed to end after boot camp—all the ribbing, the rules and regulations." When it didn't, Joseph had few skills to manage his feelings of anger and disappointment. He got into power struggles with his superiors and peers, contributing to his early discharge.

### 2. Marriage to Debra Pavlicek

- a. As might be expected, Joseph's attempts at forming intimate relationships also bore the imprint of some of the most salient aspects of his childhood and adolescent trauma. His mother had been the source of his deepest experiences of loss, abandonment and betrayal. His love for his sister was inextricably tied to traumatic grief and loss. He, therefore, entered his first attempt at a monogamous intimate relationship with Debra with extremely strong needs for attachment and security, but with the trauma-based expectations of abandonment and betrayal.
- b. Joseph reported that he met Debra at age 15, while living in a group home. Joseph quickly became attached to Debra and stated that he fell in love with her after they exchanged numerous letters. He saw Debra as "virtuous" and "wholehearted." He perceived that she came from a stable, loving family, of which he longed to be part, especially after his negative experiences in residential and group homes. When they married, Joseph was 19 years old. He continued to have idealized and unrealistic ideas of creating the family he always wanted to live in and saw marriage to Debra as the way to do this. He explained that he entered the marriage with the belief that he "was going to be the father [he] didn't have"; one of his strongest reasons for his attraction to Debra was that he believed "she would make a great mother." He stated, "I was trying to pick the right mother [for our future child]." Joseph entered into his marriage with only his traumatic maltreatment and losses as templates for his future, and without any awareness that he still needed a mother himself.
- c. Joseph worked hard to perform the role of provider, though all of his real experiences up to this point involved attempting to survive on his own. Nearly all of his functional life and relational skills focused solely on survival up to that point. His traumatic childhood and adolescence left him with extreme deficits in trust and appropriate help-seeking. He was therefore chronically unable to communicate his difficulties to anyone, or to trust that those in positions of authority or who were able to help had his best interests in mind. Joseph summarized this dilemma most succinctly when he described being unable to tell anyone about being molested by the man with the popsicles. He said, "Left to my own devices at a young age, without child rearing or supervision...who could I trust but myself? Who could I rely upon but myself?" His sexual abuse-related insecurities about his masculinity only heightened his belief that he should "take control of [his] own life." This belief that he was in control of his life and his body was a belief that reduced his feelings of helplessness and vulnerability and helped him manage the impact of his past traumatic experiences.

- d. Therefore, although he entered his marriage with good intentions, Joseph was completely unprepared for the ways in which his trauma history would affect his ability to create a stable family. Even at the beginning of the relationship, Joseph did not tell Debra about his marijuana habit. He reported, “I figured, if she did find out, I would have banked credit with her by being a good father and husband,” and that she would forgive him. He began to drink more as he attempted to cut back on his marijuana use, but he didn’t tell Debra about his constant internal emotional distress or marijuana’s role in quelling this. Nor was Joseph able to tell Debra as his plans for a career in the Coast Guard began to unravel. Joseph did not see his basic mistrust of being in an intimate relationship as problematic, and he believed that if he could just provide for Debra, then his marriage would be fine. The birth of their daughter Arlene only exacerbated his unresolved grief over his sister Arlene’s death and increased their financial difficulties. Instead of healing the past, Arlene’s birth, and all of the responsibilities that went with it, heightened Joseph’s feelings that he was losing control of the family life he wanted to create.
- e. As their financial problems increased, Joseph found himself in situations that re-enacted his past traumatic neglect. Though unaware of it, he was increasingly triggered to these past experiences, and he responded with his only known repertoire of trauma-based survival behaviors. He described feeling like an outsider in his marriage and in Debra’s family. He felt “trapped by having to move in with his mother-in-law due to their finances. This situation re-enacted his early life with his grandmother. He felt angry and exploited when his mother-in-law demanded they pay rent. He and Debra began arguing about bills and Joseph resorted to selling scrap pallets for food, which re-enacted his feeling of being an unwanted burden in his grandmother’s house, and the level of desperation he felt in his childhood during the periods of his mother’s abandonment.
- f. Joseph reported that he felt increasingly “desperate” and that as his feelings of desperation increased, his fear of abandonment also increased, prompting him to feel both dependent and helpless. He stated, “My love for Debra and Arlene and my feelings of protection for them got stronger,” while his ability to provide for and protect them got increasingly less stable. This combination of need and helplessness functioned as a powerful trigger and re-enactment of his childhood neglect.
- g. When Debra discovered that Joseph was smoking and selling marijuana, she reacted by locking him out of the house. Joseph was shocked. Despite his internal anxiety and turmoil, he believed that he and Debra were “doing fine” and that their relationship was not at risk. He felt extremely betrayed and angry that Debra didn’t understand he was attempting to provide for her and Arlene.



He stated, “Everything I had been doing was for her and for the baby. I wanted to control my life. I wanted to do everything for them without giving them any concern.” He precipitated even further damage to the relationship and eventual abandonment when, during this initial argument, he told Debra that if she left the apartment, the relationship was over and never to talk to him again. When Debra did walk out the door, he stated, “I cut off completely.” During the ensuing 2-year period, Joseph described feeling angry at Debra and being unable to recover from their break up, even though they had periods in which they attempted to reconcile.

- h. Not surprisingly, Joseph had no experience, interpersonal skills, or familial modeling to tolerate conflict and disagreement without re-enacting the traumatic abandonments he had experienced by his mother and the emotional loss of love he experienced when his sister died. While he and Debra attempted to repair their relationship, Joseph was never truly able to recover from hurt, anger, and mistrustful feelings, nor was he ever able to truly let go of his attachment to Debra. Thus, this relationship became an ongoing re-enactment of his earlier maternal traumatic bonds.

## **PART V. CONCLUSIONS**

### **A. Summary of Traumatic Exposures across Joseph’s Development**

1. Joseph’s trauma history stands out for the extreme degree of caretaker neglect, abandonment, and violence he experienced. The pervasive neglect by his caretakers spanned his infant, early childhood, school age, and adolescent development.
2. His mother’s addictions, her caretaking impairment, her emotional indifference, her literal physical abandonment, and her abdication of responsibility for Joseph and his needs exposed Joseph to numerous other traumatic experiences. The most significant of these traumatic experiences were severe physical abuse, the death of his little sister from illness after his mother abandoned her, being left alone in houses and apartments for days at a time to take feed and care of himself when he was unable to do so, and multiple instances of sexual abuse.
3. Joseph’s development and behavior throughout his life show posttraumatic adaptations and symptoms typical of the kinds of trauma exposure described above. It is notable, however, that despite the severity of his exposure to trauma and adversity, Joseph’s problematic behaviors did not result in his involvement in the juvenile justice system or the adult legal system prior to the charges he faced for Mr. Luna’s death. Instead, like many trauma survivors, Joseph’s impairments were most evident in his interpersonal functioning and in the potentially corrective environments of school, the military, work and marriage.

B. Summary of Known Impacts of Trauma on Development

1. If child abuse and exposure to violence does not result in a child's death, the child's survival will be indelibly shaped by a series of psychological, biological, and behavioral accommodations and adaptations. These impacts and adaptations were well-established at the time of Joseph's trial in 1996.
2. The health and psychiatric effects of child exposure to violence and neglect of the kind Joseph experienced are myriad and well established in both the medical and psychological literature. The extensive research on Adverse Childhood Experiences (ACES), for example, would readily have identified Joseph as a child at high risk for adult behavioral and psychiatric problems as a result of the kinds of adversities he faced.
3. Functional and emotional caretaker neglect of the types Joseph experienced is a pernicious form of abuse; it creates a psychological bind in which the child is both dependent upon, but unable to rely upon, his caretakers for safety, solace, and protection. Traumatic experiences of the kind Joseph experienced necessitate adaptations on the part of the developing child, which embed themselves in the child's behavior, his emotions, his beliefs about the world, and his expectations of others. (Janoff-Bulman & Frieze, 1992; van der Kolk et. al, 1996; Roth & Batson, 2002)
4. Children who experience sexual abuse are at most risk for developing child behavior problems and child- and adult-behavior psychiatric symptoms. Boys sexually abused by males experience unique traumatic burdens that increase their vulnerability to its negative developmental impacts. Without treatment and supportive intervention, sexual abuses of the kind of Joseph endured have devastating effects on a boy's sense of safety, his developing sense of masculinity and sexuality, and his compensatory strategies for regulating his fear, shame, and vulnerability.
5. The neurobiological substrates and brain structures of a traumatized child are changed when exposed to trauma. In the non-traumatized brain, after a period of danger is over, the brain will signal the body to begin to suppressing the fear response and return to its normal state. In the chronically traumatized brain, however, the initial fear reaction persists, and it becomes more and more difficult to calm the fear and associated defensive responses.
6. It is therefore not uncommon to see disruptive externalizing behaviors in traumatized children and adolescents, reflecting their brains' adaptation to danger. The brain pathways that expedite "low road" limbic responses are over-used and respond to lower and lower thresholds of threat. Joseph's behavioral problems as an adolescent in the various group homes he was placed in typify these responses.

7. Innate temperament, genetic, and biologic vulnerabilities can interact with trauma in such a way as to compound the developmental damage trauma sets in motion. The earlier in life trauma begins and the longer it lasts, the more severe the psychological and behavioral impacts of that trauma are likely to be, and the less likely it is that the child's innate resiliencies will be able to mitigate the impacts of such adversity.
8. A robust example of this dose-response and synergistic model of trauma can be seen in Joseph's life. This is particularly true as he attempted to engage in adult environments like the Coast Guard, and life tasks, such as marriage and fatherhood, which he believed would offer refuge from the impacts of his traumatic childhood. While Joseph was able to initially succeed and demonstrate his strengths in these environments and relationships, he was unaware of the degree to which past trauma could be re-evoked by these life experiences.
9. While Joseph did have contact with Child Protective Services and was placed in residential treatment starting at age 14, there were numerous years prior to this in which he was forgotten and left to the untenable conditions of his family abuse and neglect. As well, once he entered the residential treatment system, the limitations of the system in turnover of caseworkers and the failure to offer trauma-informed interventions only served to elicit Joseph's distressed and survival-oriented trauma behaviors and to exacerbate the impacts of Joseph's childhood abuse.
10. Trauma of the severity that Joseph experienced cannot be overlooked or ignored when considering the lifetime behaviors of such an individual. Though many of these behaviors are problematic and cannot be condoned, the shaping influence of trauma is pervasive and occurs at every level of a child's development. His body, brain, social skills, identity and his emotional regulatory capacities respond to and attempt to manage the impact of trauma throughout his lifetime.
11. Joseph's exposure to severe parental violence and violation must be integrated into any understanding of his adult behavior, and particularly into his actions on the night of Mr. Luna's death. When viewed in this context, his first-time and excessive violence can be seen as an extension of adaptations and reactions to the extreme poverty, neglect, pain, danger, betrayal, and absence of respect for one's humanity that were originally and perpetually enacted by his caretakers. Because the impacts of Joseph's traumas were never treated, his traumatic childhood and adolescence continued to actively impinge upon his perceptions, emotions, and behavior.
12. The explanations of trauma offered in this report are not meant to excuse Joseph's actions, nor are they intended to minimize the pain his behavior has caused others. Rather, they are intended to help explain the ways in which severe childhood maltreatment of the kind Joseph endured has an active, ongoing impact on Joseph's development and behaviors throughout his life.

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13. These opinions and conclusions are consistent with current knowledge in the field about the various and complex impacts of psychological trauma. These opinions are offered with a reasonable degree of psychological certainty based on the documentation I reviewed and my personal assessment of Joseph Garcia and may be subject to modification in light of new information provided.

*Victoria Reynolds, Ph.D.*

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Victoria Reynolds, Ph.D.

September 11, 2018

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