CAPITAL CASE No. _____

IN THE

Supreme Court of the United States

JUAN RAMON MEZA SEGUNDO,
Petitioner
v.
LORIE DAVIS,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11265

United States Court of Appeals
Fifth Circuit
FILED
December 13, 2018
Lyle W. Cayce
Clerk

In re: JUAN RAMON MEZA SEGUNDO,

Movant

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consolidated with 18-70029

JUAN RAMON MEZA SEGUNDO

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 4:10-CV-970

Before CLEMENT, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Juan Segundo was sentenced to death for breaking into eleven-year-old Vanessa Villa's bedroom, raping, and strangling her. Segundo appeals the

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

district court's order treating his Rule 60(b) motion as a successive application for *habeas* relief and transferring it to this court. Finding his arguments unpersuasive, we AFFIRM.

FACTS AND PROCEEDINGS

A Texas jury convicted and sentenced Segundo to death for the capital murder of Vanessa Villa. Eventually Segundo filed a petition for federal *habeas* relief. The district court denied relief. This court denied a COA. *Segundo v. Davis*, 831 F.3d 345 (5th Cir. 2016). The Supreme Court denied Segundo's petition for *certiorari*. *Segundo v. Davis*, 137 S. Ct. 1068 (2017).

Segundo filed a motion for relief from judgment in the district court, pursuant to Federal Rule of Civil Procedure 60(b). The district court held that Segundo's motion constituted a successive *habeas* petition and transferred it to this court. In the alternative, the district court found that if Segundo's motion constituted a Rule 60(b)(6) motion, it would not be granted. It is this decision that Segundo appeals.

STANDARD OF REVIEW

"We review a district court's determination as to whether a Rule 60(b) motion constitutes a second-or-successive habeas petition *de novo*." *In re Edwards*, 865 F.3d 197, 202–03 (5th Cir. 2017) (*per curiam*).[1]

DISCUSSION

"Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Besides identifying such a non-merits-based mistake, a

[1] Both parties describe our *Edwards* holding as an unpublished order. Though we initially released it as an unpublished opinion, we designated it for publication shortly thereafter.

movant is required "to show extraordinary circumstances justifying the reopening of a final judgment." *Id.* at 535 (internal quotation omitted). But "[u]sing Rule 60(b) to present new claims for relief[,] . . . even claims couched in the language of a true Rule 60(b) motion[,] . . . circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* at 531. So, a "federal court examining a Rule 60(b) motion should determine whether it . . . presents a new habeas *claim* (an asserted federal basis for relief from a state court's judgment of conviction) . . . . If the Rule 60(b) motion does . . . then it should be treated as a second-or-successive habeas petition and subjected to AEDPA's limitation on such petitions." *Edwards*, 865 F.3d at 203–04 (internal quotations omitted).

The district court examined Segundo's claims and concluded that "[a]lthough Segundo's motion is couched in terms of Rule 60(b), it is actually a successive habeas petition" because it raises and extensively briefs various substantive claims related to ineffective assistance of counsel. On appeal, Segundo contends that the district court misconstrued his motion. He maintains that he has properly identified one non-merits-based defect in the integrity of the federal *habeas* proceedings—the use of an erroneous legal standard to deny him services guaranteed by 18 U.S.C. § 3599. All of the additional issues raised in his motion are, according to Segundo, "extraordinary circumstances" justifying the reopening of the proceedings.

This is a clever argument because if we accept it, it would allow *habeas* petitioners to shoehorn all of their merits-based arguments into a Rule 60(b) motion. And courts would be forced to delve into those arguments to evaluate whether they constitute "extraordinary circumstances." But neither our caselaw nor prudence support such an approach.

For example, *Gonzalez* approvingly notes that where a petitioner conceals merits-based claims behind straightforward, valid claims, "[v]irtually every Court of Appeals . . . has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." 545 U.S. at 530–32. And we have repeatedly applied this principle to identify all of the claims raised in a particular petition and classify that petition accordingly—as a Rule 60(b) motion or successive *habeas* petition. *See e.g.*, *In re Coleman*, 768 F.3d 367, 371–72 (5th Cir. 2014) (*per curiam*); *Runnels v. Davis*, No. 17-70031, 2018 WL 3913662, at *6–7 (5th Cir. Aug. 14, 2018); *In re Jasper*, 559 F. App'x 366, 371 (5th Cir. 2014).

The district court carefully demonstrated that several of the so-called "extraordinary circumstances" identified by Segundo were actually successive *habeas* claims. In particular, Segundo's motion briefly discusses the supposed non-merits-based defect remediable under Rule 60(b) and then extensively raises and relitigates ineffective assistance of counsel claims of various sorts. As the district court rightly observed, "[t]he motion . . . seeks to present new evidence and new theories of ineffective assistance of counsel that constitute new claims." Labeling these claims "extraordinary circumstances" does not conceal their true identity.

Segundo claims that the recent Supreme Court opinion in *Buck v. Davis* adopts an approach allowing petitioners to obtain review of claims that would otherwise be classified as successive by referring to them as "extraordinary circumstances." But *Buck* does no such thing. Instead it appears to stand only for the proposition that the "infusion of race as a factor for the jury" can be itself "extraordinary" in "nature." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). Indeed, Justice Thomas was correct to note that the opinion in *Buck* does not announce "any new principles of law[,] . . . leav[ing] untouched . . . established

principles governing . . . Rule 60(b)(6) motions." *Id*. at 786 (Thomas, J., dissenting).

Accordingly, we have continued to carefully police purported Rule 60(b) motions for signs that they are successive *habeas* petitions in disguise. *See e.g*., *Haynes v. Davis*, 733 F. App'x 766, 769 (5th Cir. 2018) ("[W]hile the viability of a petitioner's underlying constitutional claim may be tangentially relevant to the Rule 60(b) analysis, the Rule may not be used to attack the substance of the federal court's resolution of a claim *on the merits*." (internal citations and quotations omitted)).

For example, in *Preyor v. Davis* we considered a Rule 60(b) motion that was similar to Segundo's. 704 F. App'x 331 (5th Cir. 2017) (*per curiam*). Preyor, like Segundo, argued "that the fact that his motion identified a compelling . . . claim of [ineffective assistance of counsel] does not make the motion a successive petition, because it did so only to demonstrate why the court's equitable intervention is appropriate." *Id*. at 339. But because, as here, that "compelling" claim was the focus of the motion, and reopening the proceedings to relitigate it is the clear objective of the filing, we held that "reasonable jurists would not find debatable the . . . determination that [the] Rule 60 motion should be treated as a successive habeas petition." *Id*. at 340. We see no reason to stray from this approach and consequently affirm the district court.[2]

[2] The parties have briefed several additional issues related to the propriety of the district court's alternative holdings. But since the classification of Segundo's motion as a successive petition is jurisdictional, we need not discuss them.

CONCLUSION

For the foregoing reasons, the district court's decision to treat Segundo's Rule 60(b) motion as a successive *habeas* petition and transfer it for want of jurisdiction is AFFIRMED.[3,4]

[3] Because the district court's decision to transfer Segundo's motion for want of jurisdiction was proper, Segundo was free to seek authorization to proceed, as a successive petition. However, when this court scheduled briefing on that question, Segundo declined to proceed, indicating that he is "not seeking authorization to file a successive petition" and does not "anticipate filing a separate motion for authorization" as would be required. For this reason, the transferred petition has been abandoned and consequently the appeal is DISMISSED.

[4] The district court also transferred Segundo's motion for a stay of execution. However, the Texas Court of Criminal Appeals stayed Segundo's execution on October 5, 2018, mooting the issue before this court. Consequently, the motion for a stay is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JUAN RAMON MEZA SEGUNDO, *Petitioner,*	§	
V.	§	
	§	No. 4:10-CV-970-Y
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, *Respondent.*	§	(Death Penalty Case)

JUDGMENT

For the reasons set out in a memorandum opinion and order filed today, the successive habeas petition filed in this case, the pleading entitled "Petitioner's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)" (doc. 86), is **TRANSFERRED** to the United States Court of Appeals for the Fifth Circuit along with his "Motion for Stay of Execution Pending Consideration and Disposition of Rule 60(b) Motion" (doc. 94). Petitioner has previously been allowed to proceed in forma pauperis and this status is continued for purposes of appeal. (Order, doc. 8; Mem. Op. and Order, doc. 48, at 48.) The court **DENIES** a certificate of appealability.

SIGNED September 26, 2018.

Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/rs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JUAN RAMON MEZA SEGUNDO, *Petitioner,*	§	
V.	§	
	§	No. 4:10-CV-970-Y
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, *Respondent.*	§	(Death Penalty Case)

MEMORANDUM OPINION AND ORDER
TRANSFERRING SUCCESSIVE HABEAS PETITION

Counsel for death-row inmate Juan Ramon Meza Segundo again present motions involving complex procedural issues that make no practical difference. Regardless of how the procedural issues are resolved, Segundo has not shown an entitlement to any relief. But because this Court lacks jurisdiction over these motions, they are transferred in light of Segundo's pending execution date.

Petitioner Segundo, a Texas death-row inmate set for execution on October 10, 2018, has filed a document purporting to be a motion to alter or amend judgment under Rule 60(b) of the Federal Rules of Civil Procedure (Motion, doc. 86). Respondent Lorie Davis has filed her response in opposition (doc. 89), and Segundo has made his reply (doc. 91). On July 27, Segundo filed his related request to stay his execution (Stay Application, doc. 94). On August 17 Respondent filed her response (doc. 96.) and on August 28, Segundo made his reply (doc. 97).

Because Segundo's motion for relief under Rule 60(b) seeks to relitigate claims with new evidence, it is a successive petition that this Court lacks jurisdiction to consider and it must be transferred to the United States Court of Appeals for the Fifth Circuit along with Segundo's application to stay his execution.

I. BACKGROUND

Segundo was convicted and sentenced to death for committing a capital murder in the course of sexual assault. (Mem. Op. and Order Denying Relief, doc. 48, at 1.) In denying a certificate of appealability for this Court's prior judgment, the United States Court of Appeals for the Fifth Circuit set out the relevant history.

> In 1986, Segundo broke into eleven-year-old Vanessa Villa's bedroom, raped, and strangled her. He was not a suspect, however, until 2005 when a routine search of the Texas CODIS1 database matched his DNA with semen samples found at the crime scene. Following a jury trial, Segundo was convicted in Texas state court. On behalf of the defense, a clinical neuropsychologist, Dr. Alan Hopewell, evaluated Segundo and, at the punishment stage of trial, testified that his "extensive history of inhalant abuse" and his failure to have a "stimulating background upbringing" may have caused significant brain dysfunction. Dr. Hopewell opined, however, that Segundo's IQ tested at a 75 and that he was not intellectually disabled. *See Ex parte Hearn,* 310 S.W.3d 424, 430 (Tex. Crim. App. 2010) (explaining that "about 70" represents a "rough ceiling" for IQ levels, "above which a finding of mental retardation in the capital context is precluded"). Segundo was sentenced to death. His conviction and sentence were affirmed on direct review. *Segundo v. State,* 270 S.W.3d 79 (Tex. Crim. App. 2008).
>
> In his state habeas proceedings, Segundo raised thirteen claims for relief, including an *Atkins* claim. *See Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (prohibiting as "cruel and unusual

> punishment" the execution of intellectually disabled criminals). The state habeas court conducted an evidentiary hearing on his *Atkins* claim, and found that Segundo failed to satisfy either the intellectual functioning prong or the early onset prong required for intellectual disability under Texas law. The state habeas court noted that all the "experts agreed that [Segundo] did not manifest significant sub-average general intellectual functioning." The Texas Court of Criminal Appeals adopted the state habeas court's findings and denied Segundo's habeas petition. *Ex parte Segundo,* No. WR-70963-01, 2010 WL 4978402 (Tex. Crim. App. Dec. 8, 2010).

Segundo v. Davis, 831 F.3d 345, 348 (5th Cir. 2016) (footnotes omitted), *cert. denied,* 137 S. Ct. 1068 (2017).

Segundo's petition for writ of habeas corpus in this court (Petition, doc. 11) asserted seven grounds for federal habeas-corpus relief as follows:

1. He is intellectually disabled and exempt from execution under *Atkins v. Virginia;*

2. His trial counsel were ineffective in failing to investigate evidence that he was intellectually disabled;

3. The Texas death-penalty statute fails to require the prosecution to prove the lack of mitigating circumstances on the mitigation special issue;

4. The trial court deprived him of a fair trial and the right to present a complete defense when it denied Segundo's request to present "alternative perpetrator" evidence;

5. He was denied the right to an indictment charging the "special issue elements" of the death penalty;

6. He was denied due process by the lack of an instruction that the jurors need not agree on what was mitigating before finding a life sentence appropriate on the mitigation special issue; and

7. He was denied due process by the trial court's erroneous admission of an extraneous offense under the state rules of evidence.

(Mem. Op. and Order Denying Relief at 2-3.) Most relevant to the current motion, this Court denied his first claim for lack of merit, dismissed his second claim as procedurally barred and, in the alternative, denied it for lack of merit. (Mem. Op and Order Denying Relief at 6-21, 47.) Following the final conclusion of the original federal habeas proceedings, the state court set Segundo's execution for October 10, 2018. *See State v. Segundo,* No. 0974988D (Crim. Dist. Ct. No. 3, Tarrant County, Texas May 15, 2018).

II. MOTIONS

On May 18, 2018, Segundo filed the instant motion for relief from judgment, arguing that this Court's denial of funding under "18 U.S.C. § 3599 caused a defect in the integrity of his federal habeas corpus proceedings." (Mot. at 1.) Specifically, Segundo complains that he "may very well be intellectually disabled," but argues that "no court has reliably assessed" whether he is. (Mot. at 1, 59.) He argues that intervening Supreme Court opinions, including *Ayestas v. Davis,* 138 S. Ct. 1080, 1095 (2018)(abrogating prior Fifth Circuit standard for funding), authorize relief.

Segundo now requests that these proceedings be reopened "as of the time he filed his second request for funding" so that he can obtain funding for an expert evaluation of whether he is intellectually disabled, which he argues might support his denied claim that

his counsel was ineffective in failing to obtain and present such an expert evaluation at trial. (Mot. at 59-60.) Segundo also requests "that this Court grant him a stay of execution pending the Court's consideration and disposition of his Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)." (Stay Appl'n at 1.)

Respondent argues that Segundo's Rule 60(b)(6) motion is actually an impermissible successive habeas petition that this Court does not have jurisdiction to consider, but that even if this Court did have jurisdiction, Segundo has not presented extraordinary circumstances to warrant relief under Rule 60(b)(6). (Response, doc. 89, at 4-6, 18-31.) Respondent also argues that it would be futile to reopen these proceedings since the funding decision would be the same under *Ayestas*. (Response at 6-8, 31-43.) Respondent also asserts that this Court lacks jurisdiction to grant a stay, but that even if it had jurisdiction, the equitable factors do not favor granting a stay of execution. (Doc. 96 at 1-4.)

III. ANALYSIS

Segundo seeks relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure, which is "a catchall provision" that allows a court to grant relief from a final judgment for any reason that justifies relief. *In re Edwards,* 865 F.3d 197, 203 (5th Cir. 2017), *cert. denied sub nom. Edwards v. Davis,* 137 S. Ct. 909 (2017). "Because of the comparative leniency of Rule 60(b), petitioners

sometimes attempt to file what are in fact second or successive habeas petitions under the guise of Rule 60(b) motions." *Id.* This Court must first address the jurisdictional issue.

A. Jurisdiction

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limits the circumstances under which a state prisoner may file a successive application for federal habeas relief. *See* Pub. L. 104-132, 110 Stat. 1214 (1996). A petition is successive when it raises a claim that was or could have been raised in an earlier petition. *See Hardemon v. Quarterman,* 516 F.3d 272, 275 (5th Cir. 2008). A claim presented in a second or successive application under Section 2254 must be dismissed unless:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)
>
> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). That determination must be made by a three-judge panel of the Court of Appeals before Segundo may file his application in federal district court. *See id.* § 2244(b)(3).

As Segundo acknowledges, a previous habeas challenge to his conviction has been denied by this Court. (Mot. at 5-7); *Segundo v. Thaler,* No. 4:10-cv-970-Y (N.D. Tex. June 17, 2015), *COA denied,* 831 F.3d 345 (5th Cir. 2016), *cert. denied,* 137 S. Ct. 1068 (2017). The jurisdictional question is whether Segundo's motion seeks to advance one or more claims that were, or could have been, made in the earlier petition. *See Gonzalez,* 545 U.S. at 532; *In re Edwards,* 865 F.3d at 203. This distinguishes a motion made under Rule 60(b) from a successive petition under 28 U.S.C. § 2244(b).

1. STANDARD

In *Gonzalez*, the Supreme Court provided guidance on whether a motion filed under Rule 60(b) should be construed as a successive petition under § 2244.

> In some instances, a Rule 60(b) motion will contain one or more "claims." For example, it might straightforwardly assert that owing to "excusable neglect," Fed. Rule Civ. Proc. 60(b)(1), the movant's habeas petition had omitted a claim of constitutional error, and seek leave to present that claim. *Cf. Harris v. United States,* 367 F.3d 74, 80-81 (C.A.2 2004) (petitioner's Rule 60(b) motion sought relief from judgment because habeas counsel had failed to raise a Sixth Amendment claim). Similarly, a motion might seek leave to present "newly discovered evidence," Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied. *E.g., Rodwell v. Pepe,* 324 F.3d 66, 69 (C.A.1 2003). Or a motion might contend that a subsequent change in substantive law is a "reason justifying relief," Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim. *E.g., Dunlap v. Litscher,* 301 F.3d 873, 876 (C.A.7 2002). Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be

> treated accordingly. *E.g., Rodwell, supra,* at 71-72; *Dunlap, supra,* at 876.
>
> We think those holdings are correct. A habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a "habeas corpus application," at least similar enough that failing to subject it to the same requirements would be "inconsistent with" the statute. 28 U.S.C. § 2254 Rule 11.

545 U.S. at 530-31.

2. ANALYSIS

Segundo argues that intervening Supreme Court opinions and new evidence show a defect in the integrity of these proceedings in the decision to deny funding on his claim that trial counsel provided ineffective assistance in failing to properly investigate his claim of intellectual disability under *Atkins v. Virginia,* 536 U.S. 304 (2002). Specifically, Segundo argues that this Court applied the Fifth Circuit's "substantial need" test to deny funding and that because this test has been abrogated by the Supreme Court, the funding decision improperly prevented him from developing his claim. (Mot. at 1, 6-7.) He requests that the case be reopened to present new evidence to obtain funding for an expert evaluation of whether he is intellectually disabled. He reasons that such a finding of disability might show that his counsel was ineffective in failing to obtain and present such an expert opinion at trial. (Mot. at 18-19, 59-60.)

Segundo's motion complains about the effectiveness of all of his prior counsel, including his prior federal habeas counsel for

failing to notice and present evidence found in counsel's own files. (Mot. at 2, 21-22, 40-48.) "An argument that the petitioner's own counsel was ineffective in failing to present that evidence, we held, 'sounds in substance, not procedure.'" [*In re Coleman,* 768 F.3d at 371-72]). And if funding is granted, the new evidence thus obtained would, at best, seek to show that his ineffective assistance claim had merit. *See id.* at 372 n.17 ("A motion that asks the district court for an opportunity to offer facts that (in the petitioner's view) will prove that his conviction was constitutionally infirm raises a paradigmatic habeas claim." *Runnels v. Davis,* No. 17-70031, 2018 WL 3913662, at *6 (5th Cir. Aug. 14, 2018) (citation, internal quotation marks, and alterations omitted).

This presents a complaint similar to the one that Segundo made in his motion under Rules 59 and 60(b)(1) filed after this Court issued its judgment denying relief. In that motion, Segundo argued that "newly discovered evidence" showed the funding decision to be in error when it denied funding, in part, because Segundo had not shown that any of the experts had requested the sought information. Segundo alleged that evidence showing trial experts had requested the sought information from trial counsel had long been in the federal habeas attorneys' files but was overlooked by at least one of his federal habeas counsel. Therefore, he argued, the case should be reopened and funding granted. (New. Evid. Mot., doc. 56, at 2-3.) In denying the motion, this Court applied *In re Coleman,* 768 F.3d

367 (5th Cir. 2014), and held that even though the motion was filed under Rule 60(b), the *Gonzalez* standard required that the motion be construed as a successive habeas petition barred by § 2244(b)(2). (Order, doc. 70, at 9-10).

This Court observed that the petitioner in *In re Coleman* also argued that the original judgment denying habeas relief suffered from a defect in the integrity of the original habeas proceedings. Coleman complained that his original federal habeas counsel was ineffective in failing to discover and present additional evidence that would have supported his claim, but that allegation made the motion a substantive attack on the prior judgment rather than merely a procedural defect.

> Coleman argues that there was a defect in the integrity of her original habeas petition, namely that "the additional evidence from the four witnesses recently discovered and relevant to the 'kidnapping' issue was unavailable to this Court when it decided the claim previously, and the attached affidavits and the evidence contained therein are now available." Her counsel's failure to discover and present this evidence, she argues, indicated that they were constitutionally ineffective. This claim, however, is fundamentally substantive–she argues that the presence of new facts would have changed this court's original result. Moreover, Coleman does not allege that the court or prosecution prevented her from presenting such evidence, but rather argues that her own counsel was ineffective in failing to present such evidence. The Supreme Court has held that such an argument sounds in substance, not procedure. Nor is Coleman's alleged defect similar in kind to those highlighted by the Supreme Court as examples of procedural failures, such as statute-of-limitations or exhaustion rulings. As such, we AFFIRM the decision of the district court, and treat Coleman's petition as a second or subsequent habeas application.

(Order, doc. 70, at 9-10 (quoting 768 F.3d at 371–72) (footnotes omitted)).

In an apparent attempt to avoid this, Segundo argues that his prior counsel were encumbered by a conflict of interest that resulted in a defect in the integrity of the proceedings. (Mot. at 30-48.) Segundo relies on *Clark v. Davis,* 850 F.3d 770, 779-80 (5th Cir.), *cert. denied,* 138 S. Ct. 358 (2017). In that case, the asserted conflict was "intertwined" with Clark's arguments regarding the exception to procedural bar created in *Martinez. Id.* at 780. Because Clark's original federal habeas counsel had also represented him in the state habeas proceedings, he was unable to complain of his own ineffectiveness in order to bring a claim within the *Martinez* exception. Segundo presents no such conflict.

Segundo does not claim that his original federally appointed counsel Alexander Calhoun, or appointed co-counsel Paul Mansur, also represented him in state court. Segundo acknowledges, and the record plainly shows, that he was represented by a different attorney, Jack Strickland, in the state habeas proceedings. (Mot. at 37.) Segundo does not assert that Calhoun or Mansur had any connection with Strickland, had any involvement in Segundo's representation in the prior state-court proceedings, or were in any way ethically prohibited from complaining of the ineffective assistance of any of Segundo's prior attorneys. Therefore, Segundo has not shown anything like the conflict of interest presented in *Clark*.

Segundo's motion also asserts new facts and new theories to show that his prior counsel were ineffective. His motion presents a list of nine items showing that he was deprived of adequate representation, including three new complaints against trial counsel, two new complaints against state habeas counsel, and at least one new complaint against his prior federal habeas counsel. (Mot. at 2.) Importantly, for the first time in these federal habeas proceedings, Segundo has also accused his trial team of racial misconduct.

In his first enumerated item, Segundo complains that his "trial team used racially-charged and derogatory terms to refer to their client, including calling Mr. Segundo 'speedy Gonzalez,' a 'tard,' and a 'DUMB BASTARD'." (Mot. at 2.) This allegation injects a racial component that was not present in his petition before this Court, unlike *Buck* in which the racial complaint had been repeatedly presented and dismissed by the state and federal courts.[1] Therefore, Segundo has effectively presented new claims that have not been previously presented to any court.

Segundo seeks to reopen his case to present new evidence to advance his claim that trial counsel provided constitutionally ineffective assistance. Segundo argues that the relief he seeks is required because of the ineffectiveness of Segundo's prior federal

[1] Although Buck's original state habeas counsel failed to raise the issue, the Texas attorney general listed Buck in 2000 as one of the inmates entitled to a new trial because of expert testimony that was racially inappropriate. The failure of the state to comply with this announcement resulted in a petition for habeas relief filed in state court in 2002, and a petition in federal court in 2004. *See Buck,* 137 S. Ct. at 769-70.

habeas counsel in attempting to obtain funding to present this new expert evidence in support of this claim. Not only is this an argument that itself "sounds in substance, not procedure," *Coleman*, 768 F.3d at 372, but the motion seeks to obtain and present new evidence and arguments in support of a claim that this Court previously determined had no merit. The motion also seeks to present new evidence and new theories of ineffective assistance of counsel that constitute new claims. Although Segundo's motion is couched in terms of Rule 60(b), it is actually a successive habeas petition that the court of appeals has not authorized as required by 28 U.S.C. § 2244(b)(3). Therefore, this Court lacks jurisdiction to grant the relief requested.

3. TRANSFER

Because this Court is without jurisdiction to grant relief, it may either dismiss the motion for lack of jurisdiction, or it may transfer it to the court of appeals. *See In re Hartzog*, 444 F. App'x 63, 654 (5th Cir. 2011) (citing *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000)). "Normally transfer will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is time consuming and justice-defeating." *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990). These concerns are heightened when considering whether to stay an execution. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (discussing special concerns arising in capital proceedings leading up to an execution);

Hearn v. Thaler, No. 3:12-CV-2140-D, 2012 WL 2715653 (N.D. Tex., July 9, 2012) (Fitzwater, C.J.). The Court finds that it is in the interest of justice to transfer the motion to the court of appeals rather than dismiss.

4. APPLICATION TO STAY EXECUTION

In connection with his motion to obtain Rule 60(b) relief, Segundo has filed an application to stay his execution (Stay Appl'n, doc. 94.) This Court's jurisdiction to grant these motions relies upon jurisdiction to consider the motion to obtain Rule 60(b) relief. Because this Court lacks jurisdiction over the motion for Rule 60(b) relief, it lacks jurisdiction to rule on these motions as well. *See Hawkins v. Stephens,* No. 2:14-CV-314, 2015 WL 3882422, at *1 (S.D. Tex. June 17, 2015) (Ramos, J.), *appeal dismissed* (5th Cir. Feb. 29, 2016) (citing *United States v. Key,* 205 F.3d 773, 775 (5th Cir. 2000); *In re Sepulvado,* 707 F.3d at 552. It is in the interest of justice to transfer these motion to the Court of Appeals as well.

B. <u>Alternative Merits Analysis</u>

In the alternative, the Court finds that if Segundo's motion were properly made to seek relief within this Court's jurisdiction under Rule 60(b)(6) of the Federal Rules of Civil Procedure it would not be granted. To succeed on a Rule 60(b)(6) motion, the movant must show: (1) that the motion be made within a reasonable time; and (2) extraordinary circumstances exist that justify the reopening of

a final judgment. *Id.* (citing *Gonzalez v. Crosby,* 545 U.S. 524, 535 (2005)).

1. TIMELINESS

Although not conspicuously stated, Respondent asserts that Segundo's motion is untimely. (Resp., doc. 89, at 27-30.) Segundo's June 18, 2018 motion relies upon facts that predated his original federal habeas proceeding, and Supreme Court opinions that both pre-date and post-date the judgment denying relief, including *Ayestas v. Davis,* 138 S. Ct. 1080 (Mar. 21, 2018), *Moore v. Texas,* 137 S. Ct. 1039 (Mar. 28, 2017), *Buck v. Davis,* 137 S. Ct. 759 (Feb. 22, 2017), and *Hall v. Florida,* 572 U.S. 701 (2014).

To the extent that Segundo relies upon the timing of *Ayestas,* his motion was filed less than three months after that opinion and may be considered timely. To the extent that he relies upon the older opinions, his motion was not filed within a reasonable time. In light of the nature of these proceedings in review of the death penalty, however, this Court construes Segundo's motion as timely filed.

2. EXCEPTIONAL CIRCUMSTANCES

Segundo complains that this Court denied funding by applying the prior Fifth Circuit precedent that has been abrogated by the Supreme Court in *Ayestas.* But a "change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment" under Rule 60(b)(6). *Adams v. Thaler,* 679 F.3d 312, 319 (5th Cir. 2012) (quoting *Bailey*

v. Ryan Stevedoring Co., 894 F.2d 157, 160 (5th Cir.1990)). Therefore, even if the outcome would have been different under the *Ayestas* standard, that circumstance alone would not warrant relief.

In order to satisfy this requirement, Segundo's motion also asserts new facts and new theories to show that his prior counsel were ineffective, including significant new allegations of racial misconduct.[2] Segundo relies on *Buck v. Davis,* 137 S. Ct. 759 (2017), in support of his argument that these new allegations support relief under Rule 60(b)(6). (Mot. at 3, 9, 11, 12, 20-21, 28, 29, 49.) But as set out above, *supra* at 11-12, this racial complaint was not presented to this or any other Court before the instant motion. This contrasts sharply with the conduct of Buck, who had repeatedly presented the complaint to state and federal courts. Therefore, these are not circumstances that warrant equitable relief in a motion filed after all prior state and federal review has concluded and an execution has been set.

Segundo has also not shown that the funding decision would be any different under *Ayestas.* In denying funding, this Court previously determined that Segundo had not shown how the sought funding would be capable of establishing ineffective assistance of counsel under *Strickland* and come within the exception to procedural bar under *Martinez* in light of the expert assistance obtained by trial

[2] New claims would generally be barred by the one-year statute of limitations period under 28 U.S.C. § 2244(d). Although it would appear to be futile to allow funding to develop any such new claims, no limitations defense to new claims has yet been asserted in these proceedings.

and state habeas counsel. Specifically, this Court held that merely presenting a new expert opinion that disagreed with the opinion of an expert at trial was not enough to show trial counsel to be ineffective. "There is no indication that the experts felt incapable of basing their conclusions on the information they obtained through their own testing and examinations. . . . Finally, it is unclear that, even had these materials been provided to experts, their evaluations of [the prisoner] would have differed." (Order, doc. 47, at 5 (quoting *Card v. Dugger,* 911 F.2d 1494, 1512 (11th Cir. 1990).)

In denying a COA on the dismissal of this claim, the court of appeals held that "reasonable jurists would not debate that Segundo failed to state a claim that would allow for merits review under *Martinez.*" *Segundo v. Davis,* 831 F.3d 345, 351 (5th Cir. 2016), *cert. denied,* 137 S. Ct. 1068 (2017). Specifically, there was no debatability in the determination that Segundo had not stated a claim of any potential merit that would warrant an evidentiary hearing and merits review.

> The record makes clear that Segundo's trial counsel obtained the services of a mitigation specialist, fact investigator, and two mental-health experts. These experts and specialists conducted multiple interviews with Segundo and his family, performed psychological evaluations, and reviewed medical records. Segundo claims that trial counsel failed to provide necessary social history, which would have changed the experts' conclusions that he is not intellectually disabled. But none of the experts retained by trial counsel indicated that they were missing information needed to form an accurate conclusion that Segundo is not intellectually disabled. "Counsel should

> be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so." *Smith v. Cockrell,* 311 F.3d 661, 676–77 (5th Cir. 2002), *overruled on other grounds by Tennard v. Dretke,* 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004); *see Turner v. Epps,* 412 Fed. Appx. 696, 704 (5th Cir. 2011) ("While counsel cannot completely abdicate a responsibility to conduct a pre-trial investigation simply by hiring an expert, counsel should be able to rely on that expert to alert counsel to additional needed information....").

Segundo, 831 F.3d at 352.

Segundo has not shown how this Court's stated reason for denying funding, that the sought funding was not capable of showing ineffective assistance of counsel, would differ under the new standard. In *Ayestas*, the Supreme Court recognized that the district court must determine that "funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default" under *Martinez*. *Id.* at 1094. As the Supreme Court explained, "Congress changed the verb from 'shall' to 'may,' and thus made it perfectly clear that determining whether funding is 'reasonably necessary' is a decision as to which district courts enjoy broad discretion." *Id.* (citing *Kingdomware Technologies, Inc. v. United States,* 136 S. Ct. 1969, 1977 (2016)). This involves practical considerations regarding the likelihood that funding will enable an applicant to prove her or his claim.

> A natural consideration informing the exercise of that discretion is the likelihood that the contemplated services will help the applicant win relief. After all, the

> proposed services must be "reasonably necessary" for the applicant's representation, and it would not be reasonable—in fact, it would be quite unreasonable—to think that services are necessary to the applicant's representation if, realistically speaking, they stand little hope of helping him win relief. Proper application of the "reasonably necessary" standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way.
>
> To be clear, a funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks. But the "reasonably necessary" test requires an assessment of the likely utility of the services requested, and § 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone.

Id. This is not an entirely new inquiry.

> These interpretive principles are consistent with the way in which § 3599's predecessors were read by the lower courts. *See, e.g., Alden, supra,* at 318–319 (explaining that it was "appropriate for the district court to satisfy itself that [the] defendant may have a plausible defense before granting the defendant's ... motion for psychiatric assistance to aid in that defense," and that it is not proper to use the funding statute to subsidize a " 'fishing expedition' "); *United States v. Hamlet,* 480 F.2d 556, 557 (C.A.5 1973) (per curiam) (upholding district court's refusal to fund psychiatric services based on the district court's conclusion that "the request for psychiatric services was ... lacking in merit" because there was "no serious possibility that appellant was legally insane at any time pertinent to the crimes committed"). This abundance of precedent shows courts have plenty of experience making the determinations that § 3599(f) contemplates.

Id. at 1094-95. Just as before, Segundo's current motion still does not set forth how the sought expert assistance could show that trial

counsel was ineffective. Instead, it appears to be another attempt to take the Court on a fishing expedition.

In sum, Segundo has not presented a procedural "defect" as required to obtain Rule 60(b) relief under *Gonzales.* The procedural ruling--the decision to deny funding--would be the same under the Supreme Court's new opinion in *Ayestas.* Therefore, even if Segundo's motion did not constitute a successive habeas petition by seeking to develop new evidence to attack this Court's prior determination that his claim had no merit, it fails to show that reopening this case would be anything but futile. His motion still fails to show that the sought funding is reasonably necessary for the development of a claim of ineffective assistance of trial counsel. Accordingly, if this motion were within the jurisdiction of this Court under Rule 60(b)(6), it would be **DENIED.**

IV.

Segundo's motion for relief under Rule 60(b) (doc. 86) is a successive application for habeas relief and is **TRANSFERRED** to the United States Court of Appeals for the Fifth Circuit along with the application to stay his execution (doc. 94). *See Henderson v. Haro,* 282 F.3d 862, 864 (5th Cir. 2002).

The Clerk of Court is **DIRECTED** to open for statistical purposes a new civil action (nature of suit 535 – death penalty habeas corpus – assigned to the same district judge) and to close it on the basis

of this order.

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. 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). Petitioner has previously been allowed to proceed in forma pauperis and this status is continued for purposes of appeal. (Order, doc. 8; Mem. Op. and Order, doc. 48, at 48.)

The motion for relief from judgment (doc. 86) and accompanying application for stay of execution (doc. 94) are **TRANSFERRED.**

SIGNED September 26, 2018.

Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/rs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Juan Ramon Meza Segundo,

Petitioner,

v.

Lorie Davis, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

Case No. 4:10-CV-0970-Y

DEATH PENALTY CASE

PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(B)

Execution Date: October 10, 2018

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PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)

I. Introduction

Juan Segundo may very well be intellectually disabled. But, due to the extraordinary circumstances of his case, no court has reliably assessed whether he meets the diagnostic criteria for intellectual disability. Mr. Segundo seeks relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) because the deprivation of services guaranteed by 18 U.S.C. § 3599 caused a defect in the integrity of his federal habeas corpus proceedings. For the reasons that follow, Mr. Segundo's case presents extraordinary circumstances that justify relief from judgment, and he requests that his federal proceedings be reopened.

This Court denied funding to Mr. Segundo to investigate his unexhausted claim that trial counsel were ineffective by failing to investigate intellectual disability, applying the "substantial need" standard that the Supreme Court recently rejected in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). Without this funding, Mr. Segundo was denied the opportunity to establish "cause" to excuse the procedural default of his claim. Thus, the deprivation of services under § 3599 based on the application of an incorrect standard caused a procedural defect in the federal proceedings.

This case is extraordinary for reasons beyond the incorrect standard applied to the funding requests. Mr. Segundo's right to adequate, professional, and conflict-free representation—rooted in the Sixth Amendment as well as § 3599—was undermined at every stage of litigation, including when:

1. The trial team used racially-charged and derogatory terms to refer to their client, including calling Mr. Segundo "speedy Gonzalez," a "tard," and a "DUMB BASTARD";

2. Trial counsel ignored multiple requests from their experts for important information to support Mr. Segundo's potential intellectual disability;

3. Trial counsel represented an alternative suspect in an extraneous murder that was presented at the punishment phase of Mr. Segundo's trial and informed law enforcement that he would advise the suspect whether to submit to a polygraph examination;

4. Mr. Segundo's state habeas counsel announced his intention to join the Tarrant County District Attorney's Office—the very office prosecuting Mr. Segundo's death sentence—while Mr. Segundo's state writ was still pending;

5. Mr. Segundo's trial counsel represented the state habeas judge in her DWI proceedings while the state habeas proceedings were ongoing;

6. Mr. Segundo's initial federal habeas counsel made misrepresentations to this Court regarding his failure to present numerous IQ scores that supported an intellectual disability diagnosis;

7. Mr. Segundo's counsel and the courts repeatedly made the incorrect assumption that Mr. Segundo's IQ scores of 75 and below did not qualify him for an intellectual disability diagnosis—an assumption that was rejected by the Supreme Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014);

8. Mr. Segundo's counsel and the courts repeatedly used the outdated and unscientific *Briseno* factors to assess Mr. Segundo's adaptive deficits—an approach that was rejected by the Supreme Court in *Moore v. Texas*, 137 S. Ct. 1039 (2017); and

9. Mr. Segundo was denied his right to a "fair opportunity" to litigate his potential intellectual disability claim when this Court applied an overly-burdensome standard, depriving him of necessary funding to investigate adaptive deficits despite Mr. Segundo's showing that he satisfied the initial threshold of an *Atkins* diagnosis with multiple qualifying IQ scores.

The result of these extraordinary circumstances is that Texas is now on the precipice of executing a potentially intellectually disabled person, having relied on an

outdated and unscientific standard to assess his abilities and failing to provide him with the adequate, professional, and conflict-free representation necessary to determine whether he is, in fact, ineligible for the death penalty under the well-accepted medical diagnostic framework. This poses an intolerable risk of injustice not only to Mr. Segundo but also serves to further undermine the public's confidence in the judicial process in Texas. *See Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (explaining that courts may consider a "wide range of factors" including "the risk of injustice to the parties and the risk of undermining the public's confidence in the judicial process"); *see also Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (recognizing the national consensus against executing the intellectually disabled, including evidence of "a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong"). Under the circumstances, this Court should reopen Mr. Segundo's judgment pursuant to Rule 60(b)(6) and remedy the procedural defect that currently undermines the integrity of the proceedings. Specifically, Mr. Segundo requests that his case be reopened as of February 25, 2015, the date when Mr. Segundo filed his second funding motion following this Court's denial of the first motion using the now-defunct "substantial need" standard.

II. Statement of the Case

A. Trial and Direct Appeal Proceedings

In 2005, Juan Ramon Meza Segundo was indicted in Tarrant County, Texas, for capital murder in connection with the 1986 death of Vanessa Villa. Mr. Segundo was connected to Ms. Villa's death through a DNA match from a CODIS search

conducted in 2005. *21R. 172–73.*[1] His trial commenced on December 8, 2006, and on December 14, 2006, the jury returned a verdict finding him guilty of capital murder. *C. 1049–51; 20R. 18*. On December 20, 2006, the jury answered the first special issue in the affirmative and second in the negative, and the trial court accordingly sentenced Mr. Segundo to death. *C. 1040–41, 1049–51; 29R. 67–70.*

On direct appeal, the Texas Court of Criminal Appeals affirmed Mr. Segundo's conviction and death sentence. *Segundo v. State*, 270 S.W.3d 79 (Tex. Crim. App. 2008). Mr. Segundo filed a Petition for Writ of Certiorari to the United States Supreme Court, which the Court denied on October 5, 2009. *Segundo v. Texas*, 130 S. Ct. 53 (2009).

B. State Habeas Proceedings

Following Mr. Segundo's death sentence, the trial court appointed Jack Strickland as Mr. Segundo's state habeas counsel. On October 17, 2008, Mr. Strickland filed an untimely state habeas application. *SHR. 2–89*. But the trial court entered an order finding good cause for the untimely filing, which the Court of Criminal Appeals adopted. *SHR. 101–15*.

The Tarrant County District Attorney's Office prepared proposed findings of fact and conclusions of law, recommending relief be denied, which the trial court adopted on October 5, 2010. *SHR. 559–83*. The Court of Criminal Appeals accepted

[1] In this motion, the official trial transcript shall be referred to as "R." followed by the page number. The clerk's record shall be referred to as "C." followed by the page number. For both the trial transcript and the clerk's record, the volume number shall precede the references. The state habeas record shall be referred to as "SHR." followed by the page number. The hearing on the state writ of habeas corpus shall be referred to as "Writ Hearing" followed by the page number.

the recommendation and denied Mr. Segundo's writ application two months later on December 8, 2010. *Ex parte Segundo*, No. WR-70,963-01 (Tex. Crim. App. Dec. 8, 2010).

C. Federal District Court Proceedings

Mr. Segundo received new habeas counsel for his federal petition. Represented by Paul Mansur and Alexander Calhoun, Mr. Segundo filed his initial federal habeas petition on December 8, 2011. (ECF Doc. 11, PageID 44). In his initial petition, Mr. Segundo raised a claim that he is intellectually disabled and therefore ineligible for the death penalty under *Atkins v. Virginia* (hereinafter "*Atkins* claim"), as well as an unexhausted claim that trial counsel were ineffective for failing to investigate intellectual disability (hereinafter "IAC *Atkins* claim"). Among other things, Mr. Segundo argued that none of the prior experts had appropriately assessed his deficits in adaptive functioning as all had wrongly focused on his adaptive strengths instead of deficits. *Id*. at 66–101. Because Mr. Segundo's IQ scores are consistent with intellectual disability, prior federal habeas counsel asserted that a "full assessment of adaptive behavior deficits [is] crucial to the diagnosis." *Id*. at 84–85.

1. First Funding Motion

After the Director's Response to the Petition was filed, but before Mr. Segundo filed his reply brief, federal habeas counsel filed the first motion for funds. (ECF Doc. 18, PageID 301). In it, counsel requested funds to hire a mitigation specialist to assist in investigating facts related to Mr. Segundo's *Atkins* and IAC *Atkins* claims, particularly with respect to adaptive deficits. *Id*. at 313. Counsel pointed out that the funds also would be used to investigate state habeas counsel's ineffectiveness for

failing to exhaust the IAC *Atkins* claim in order to show cause for the procedural default pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). *Id*. at 307, 315.

On July 16, 2012, five days after Mr. Segundo's reply brief was filed, this Court denied his request for funding. (ECF Doc. 21, PageID 419). This Court noted that the Fifth Circuit held that the *Martinez* procedural bar exception was not applicable to Texas cases, and concluded that Mr. Segundo had not demonstrated a "substantial need" for the funds. *Id*. 422–24.

2. Motion to Reconsider

On February 20, 2014, Mr. Segundo's counsel filed a motion to reconsider his original motion for funding in light of the recent Supreme Court decision *Trevino v. Thaler*, which held that the *Martinez* exception applies to Texas cases.[2] (ECF Doc. 38, PageID 613). Counsel argued that this Court's sole basis for denying funds—that Mr. Segundo failed to make a showing of "substantial need" on the basis that the IAC *Atkins* claim was defaulted—was no longer a barrier. *Id*. at 615. Under *Trevino*, Mr. Segundo need only show that his underlying ineffective assistance of trial counsel claim is substantial, i.e. that it has some merit, and that state habeas counsel was ineffective for failing to fully investigate the claim. *Id*. at 616.

On May 20, 2014, this Court denied the motion to reconsider. (ECF Doc. 44, PageID 669). This Court determined that Mr. Segundo failed to meet the substantial need test because he had merely shown disagreement between experts and failed to

[2] The parties also submitted additional briefing on the impact of *Trevino* on Mr. Segundo's case. (ECF Docs. 31–34).

show that any new information had been requested or would have changed any expert's opinion. *Id*. at 675–76.

3. Second Request for Funds

On February 25, 2015, counsel filed a second motion for funding, following the Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014). (ECF Doc. 45, PageID 678). In *Hall*, the Supreme Court emphasized the importance of evidence of adaptive functioning as "central to the framework followed by . . . professionals in diagnosing intellectual disability." *Id*. at 685. Mr. Segundo's counsel argued that Mr. Segundo, a person with an IQ score within the margin of error—at or below 75—"must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id*. at 686.

On June 17, 2015, this Court again denied funding, citing the now-erroneous standard that Mr. Segundo must show a "substantial need" for the services requested. (ECF Doc. 47, PageID 808–09). This Court concluded that *Hall* had no effect on the request for funds because it did not address the standards for ineffective assistance claims and Texas has never been a bright-line IQ-score state like Florida. *Id*. at 813. Furthermore, this Court found that Mr. Segundo had not demonstrated that previous experts asked for the information or that it would matter to them. *Id*. at 811–12.

4. Habeas Relief Denied

The same day that this Court denied the second motion for funds, it also denied relief and a certificate of appealabilty on the initial petition. (ECF Doc. 48, PageID 815).

D. Fifth Circuit Proceedings

Mr. Segundo filed a notice of appeal and, on April 13, 2016, filed an application for certificate of appealability raising one issue—that this Court erred by denying Mr. Segundo's IAC *Atkins* claim without granting a hearing to permit Mr. Segundo to establish cause and prejudice under *Martinez*. *Segundo v. Davis*, No. 16-70001 (5th Cir. April 13, 2016) (Brief in Support of COA at 28). The Fifth Circuit denied the application for certificate of appealability on July 28, 2016, holding that Mr. Segundo failed to show merit to the underlying ineffective assistance of counsel claim. *Segundo v. Davis*, 831 F.3d 345, 350–51 (5th Cir. 2016). Mr. Segundo petitioned for writ of certiorari to the Supreme Court, but was denied. *Segundo v. Davis*, No. 16-6622, 137 S. Ct. 1068 (Feb. 21, 2017).

On December 1, 2017, this Court entered an order substituting the Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Texas for Alexander Calhoun as lead counsel for Mr. Segundo. (ECF Doc. 82). On May 15, 2018, the State scheduled Mr. Segundo's execution for October 10, 2018.

III. Argument

A. Legal Standard

Mr. Segundo seeks relief from his judgment under Rule 60(b)(6) to remedy a defect in the integrity of the federal proceedings in this case, arising out of the improper denials of funding to investigate his IAC *Atkins* claim. This defect, and the numerous other extraordinary circumstances present in this case—including the animosity and racially-charged language used by his trial team to describe him, and the various conflicts of interest under which Mr. Segundo's counsel labored—tainted

Mr. Segundo's case. This Court should use its power under Rule 60(b) to reopen the case as of February 25, 2015, the date Mr. Segundo filed his second request for funding to investigate his federal habeas claims.

Rule 60(b)(6) allows a party to seek relief from a final judgment and request reopening of his case under a limited set of circumstances, including fraud, mistake, and newly discovered evidence. It also permits reopening when the movant shows "any other reason that justifies relief" from the operation of the judgment. FED. R. CIV. PROC. 60(b)(6). While the court must be cognizant of the interests of finality of the judgment, "[t]hat policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005); *see also Buck v. Davis*, 137 S. Ct. 759, 779 (2017) ("But the 'whole purpose' of Rule 60(b) 'is to make an exception to finality.'"); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981) ("By its very nature, the rule seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the incessant command of the courts' conscience that justice be done in light of all the facts.").

"The justice-function of the courts demands that [finality] must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause." *Id.* The central concern of Rule 60(b)(6) is that justice is done. *See Seven Elves*, 635 F.2d at 402; *Williams v. Thaler*, 602 F.3d 291, 311 (5th Cir. 2010)*; see also Klapprott v. United States*, 335 U.S. 601, 615 (1949); *Steverson v. Global Santa Fe Corp.*, 508 F.3d 300, 303 (5th Cir. 2007)

(Rule 60(b)(6) "is a means of accomplishing justice in exceptional circumstances."). Accordingly, Rule 60(b) is "liberally construed" and this Court is granted broad discretion to reopen the judgment to remedy injustice. *See Seven Elves*, 635 F.2d at 402; *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 23–34 (1995) (Rule 60(b) "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity.").

Rule 60(b) is not a substitute for an appeal, however. The movant should not "assert, or reassert, claims of error in the movant's state conviction." *Gonzalez*, 545 U.S. at 538. A proper Rule 60(b) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 532. Such a defect will usually concern "procedural failures." *In re Coleman*, 768 F.3d 367, 372 (5th Cir. 2014) (citing *Gonzalez*, 545 U.S. at 532 (denying reopening where the "argument sounds in substance, not procedure")). Therefore, to determine whether a Rule 60(b) motion is proper, the Court should ask whether the movant attempts to present a claim for relief. If not, the motion is properly considered under Rule 60(b). *See Gonzalez*, 545 U.S. at 533 ("When no 'claim' is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application. If neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules."); *United*

States v. Nkuku, 602 F. App'x 183, 185–86 (5th Cir. 2015) (per curiam) (Rule 60(b) motion "was not a successive habeas petition and therefore was within the district court's jurisdiction" because "motion did not contend that the district court erred on the merits of movant's claim, but instead asserted that the district court erred by failing to articulate its rationale for the summary dismissal of his Section 2255 motion").

A movant entitled to relief must "show extraordinary circumstances justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (internal quotation marks omitted). The court may consider a wide range of factors, including, in an appropriate case, the risk of injustice to the parties and even the risk of undermining the public's confidence in the judicial process. *See Buck*, 137 S. Ct. at 777–78.

The motion must be filed "within a reasonable time, unless good cause can be shown for the delay." *Clark v. Davis*, 850 F.3d 770, 780 (5th Cir. 2017) (citing Rule 60(c)(1); *In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004)). The timeliness of the motion turns on the "particular facts and circumstances of the case," including whether the opposing party is prejudiced by the delay and whether the moving party "had some good reason" for the delay. *Id.* Importantly, "[t]imeliness . . . is measured as of the point in time when the moving party has grounds to make a Rule 60(b) motion, regardless of the time that has elapsed since the entry of judgment." *Id.* (quoting *First RepublicBank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 120 (5th Cir. 1992)).

Ultimately, courts must examine the unique facts and "equities of the particular case." *Seven Elves, Inc.*, 635 F.2d at 401. The Supreme Court's fact-intensive assessment of Rule 60(b)(6) motions is instructive. In *Buck*, the Supreme Court considered eleven factors that justified reopening the judgment, including trial decisions made by Buck's counsel and new Supreme Court case law that affected potential procedural defects in Buck's case. 137 S. Ct. at 772. In *Gonzalez*, the Supreme Court examined both a change in decisional law and the distinctive facts of the case to determine whether the petitioner demonstrated extraordinary circumstances justifying relief. 545 U.S. at 537. The Supreme Court took a similar fact-intensive approach to revisit a default judgment of denaturalization of citizenship in *Klapprott v. United States*, 335 U.S. 601, 602–07 (1949). It carefully considered the circumstances that produced the default judgment, including the lack of funding to the petitioner. *Id.* at 614. After close scrutiny, the Court determined that the petitioner's allegations amounted to "facts 'justifying relief from the operation of the judgment.'" *Id.* at 614–15. Thus, rather than applying a single, rigid set of criteria, assessing Rule 60(b) motions requires holistic analysis of the facts and circumstances of each individual case to determine whether relief is warranted.

Here, Mr. Segundo demonstrates that this Court's application of the wrong legal standard to deny funding created a defect in the integrity of the proceedings. That defect, along with the numerous extraordinary circumstances present in this case, creates an unconscionable risk that Texas will execute an intellectually disabled defendant in violation of the Eighth Amendment as set out in *Atkins* and its progeny.

Accordingly, Mr. Segundo requests this Court reopen the case as of the date Mr. Segundo filed his second request for funding, following this Court's denial of the first motion using the overly burdensome "substantial need" standard.

B. The denial of funding for investigative, expert, and other services guaranteed by 18 U.S.C. § 3599 under the overly-burdensome "substantial need" standard caused a defect in the integrity of the proceedings.

Congress has enacted a statutory scheme designed to ensure that indigence does not preclude effective legal representation for individuals facing criminal penalties. The Criminal Justice Act generally provides indigent defendants with a right to such representation, in the form of counsel and services necessary to develop and prove a case. In a distinct provision, Congress has specified additional requirements for indigent individuals facing the death penalty. This capital provision, 18 U.S.C. § 3599, outlines specific requirements regarding counsel and funding for services across every phase of capital proceedings in federal court.

The specific guarantee of "representation" in the capital provision encompasses a right to counsel, along with "investigative, expert, or other services" that are "reasonably necessary for the representation" in the post-conviction phase. 18 U.S.C. § 3599(f). The Supreme Court has held that this statutory right to counsel "necessarily includes a right for that counsel *meaningfully to research and present* a defendant's habeas claims." *McFarland v. Scott*, 512 U.S. 849, 858 (1994) (emphasis added). "Where this opportunity is not afforded, '[a]pproving the execution of a defendant before his [petition] is decided on the merits would clearly be improper.'" *Id.* (quoting *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983)).

1. Mr. Segundo was denied funding to investigate his federal habeas claims because he failed to establish a "substantial need."

Mr. Segundo has yet to the have the opportunity to meaningfully investigate and develop his federal habeas claims. In his initial federal petition, Mr. Segundo argued, among other things, that his trial counsel were ineffective by failing to investigate intellectual disability. (ECF Doc. 11, PageID 66–101). The claim was not exhausted at the state habeas level.

In April 2012, Mr. Segundo sought funding from this Court, pursuant to § 3599, to investigate his IAC *Atkins* claim. (ECF Doc. 18). In the Motion for Appointment of Investigator-Mitigation Specialist to Assist in Development of Unexhausted Facts in Capital Post-Conviction Proceedings (hereinafter "first funding motion"), Mr. Segundo argued that the funding was "reasonably necessary" under § 3599 because his IAC *Atkins* claim had not been properly investigated. *Id.* at 302-03. Mr. Segundo reasoned that, in light of the recently released opinion *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), he ought to be given the opportunity to establish "cause" to excuse the procedural default of his claim based on state habeas counsel's failure to conduct an extra-record investigation before filing the state writ. *Id.* at 306. Based on the information that was available in the record—that is, information that was available absent funding for a proper investigation—Mr. Segundo noted that there was no indication that state habeas counsel engaged in *any* extra-record investigation, and that his trial team and state habeas counsel "actively resisted" federal counsel's attempt to collect the client files as part of federal counsel's initial, un-funded investigation. *Id.* at 303–04. Mr. Segundo requested the services of a specific

investigator and listed the tasks that she would undertake to properly investigate his claims, including interviewing friends, family members, teachers, and other witnesses, and collecting records that are key to supporting a claim for intellectual disability. *Id.* at 315–17. On July 16, 2012, this Court denied the request on the basis that Mr. Segundo had not shown a "substantial need" for the funding, noting that the *Martinez* exception did not apply to Texas cases. (ECF Doc. 21, PageID 423-24).

In February 2014, Mr. Segundo asked this Court to reconsider its denial of the first funding motion on the basis that the Supreme Court held in *Trevino v. Thaler*, 569 U.S. 413 (2013) that *Martinez* does, in fact, apply to Texas cases, and therefore, he was entitled to funding to investigate his unexhausted IAC *Atkins* claim. (ECF Doc. 38, PageID 613). In the Motion, Mr. Segundo argued that there was good reason to believe that further investigation would support his claim, considering that his IQ scores qualify him for an intellectual disability diagnosis and trial and state habeas counsel wholly failed to investigate his adaptive deficits. *Id.* at 619–23. This Court denied the request to reconsider on the basis that Mr. Segundo had failed to show "substantial need" for expert or investigative services to support "a viable constitutional claim that is not procedurally barred." (ECF Doc. 44, PageID 670–71). The Court further stated that Mr. Segundo "should show that the testifying experts would have changed their opinions if they had possessed the missing information." *Id.* at 697. Specifically, this Court found that Mr. Segundo had failed to show sufficient merit to the unexhausted IAC *Atkins* claim to warrant funding to investigate the claim. *Id.* at 677. As such, this Court denied Mr. Segundo's request

for funds because he could not prove that the information he needed funding to actually obtain would change the opinions of prior experts.

In February 2015, Mr. Segundo again requested funding to investigate his claim—this time in light of the Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), wherein the Court reaffirmed the principles espoused in *Atkins* and discussed the importance of conducting an adequate investigation into adaptive deficits. (ECF Doc. 45). This Court again denied the motion on the basis that Mr. Segundo failed to show a "substantial need" for the funding to support a viable constitutional claim that is not procedurally defaulted, and further held that the *Hall* opinion "does not affect the way *Atkins* claims are resolved in Texas."[3] (ECF Doc. 47, PageID 809, 811, 813). This Court stated that Mr. Segundo "*must* show that the expert requested the information *and* the information would have made a difference to the expert's opinion." *Id.* at 810 (emphasis added).[4] On the same day, the Court denied relief on Mr. Segundo's ineffective assistance of counsel claim. (ECF Doc. 48). Under *Martinez* and *Trevino*, that default could have been excused, but without funding for additional investigation and experts, federal habeas counsel was unable

[3] This Court read the *Hall* decision as being premised on the fact that the Florida statute prohibited a finding of intellectual disability if the defendant's IQ was above 70, and distinguished Texas cases on that basis. *See* (ECF Doc. 47, PageID 813) ("In *Hall* the Supreme Court found that a Florida statute violated the Eighth Amendment because it prohibited inquiry into the other two elements of intellectual disability under *Atkins* if the prisoner's IQ was above 70. . . . Texas law contains no such prohibition."). However, the Supreme Court made clear in *Hall* that the 70 IQ hard cutoff was not a statutory requirement, but rather the Florida courts' flawed interpretation of the statute. *See Hall*, 134 S. Ct. at 1994 ("On its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case. . . . But the Florida Supreme Court has interpreted the provisions more narrowly."). Similarly, though not framing it as a per se cutoff, the courts have effectively applied a hard cutoff of 70 to Mr. Segundo's case. *See SHR* at 580.

[4] Counsel later discovered that previous experts had in fact requested the information on three separate occasions. *See infra* pp. 28–30.

to meaningfully investigate and develop the claim to overcome the procedural default. The Court also denied Mr. Segundo's standalone *Atkins* claim, despite the fact that no one has ever investigated Mr. Segundo's adaptive deficits.

2. In *Ayestas*, the Supreme Court rejected the standard this Court used to deny funding to Mr. Segundo.

On March 21, 2018, the Supreme Court issued *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), in which it struck down the Fifth Circuit's interpretation of the "reasonably necessary" standard for purposes of assessing funding requests pursuant to § 3599—the same standard this Court applied to deny funding to Mr. Segundo. Prior to *Ayestas*, the Fifth Circuit held that funds are "reasonably necessary" under § 3599 when the petitioner shows a "substantial need" for funds to investigate "a viable constitutional claim that is not procedurally barred." *Id.* at 1088, 1092. The Supreme Court rejected this standard as overly burdensome. *Id.* at 1095.

In *Ayestas*, the petitioner filed a federal habeas petition alleging, for the first time, that his right to effective assistance of counsel was violated when his attorneys failed to investigate certain mitigating evidence. *Id.* at 1087. To develop these claims, he sought funding from the district court under Section 3599(f), asserting that the funds could establish that trial and state habeas counsel were ineffective. *Id.* The district court denied the funding request, concluding that he failed to show a "substantial need" for the funds and that his new IAC claim was precluded by procedural default. *Id.* at 1088. The court likewise denied a certificate of appealability. *Id.*

In reversing the Fifth Circuit, the Supreme Court held that a petitioner need only establish that he has a potentially credible claim for relief in order to be eligible for funding. The Court reached this conclusion by determining that "reasonably necessary" must mean something less than "essential" or "absolutely necessary." *Id.* at 1093. Rather, the standard asks "whether a reasonable attorney would regard the services as *sufficiently important*[.]" *Id.* (emphasis added). The Court pointed out that, especially after its decision in *Trevino*, the Fifth Circuit's rule was too restrictive. *Id.* Because habeas petitioners can overcome procedural default by establishing that state habeas counsel were ineffective, funding should be granted to allow investigation of claims that stand a "credible chance" of meeting the *Trevino* standard. *Id.* at 1094. However, an applicant "must not be expected to *prove* that he will win relief if given the services he seeks," as the "substantial need" test would suggest. *Id*. (emphasis in original).

Like in *Ayestas*, Mr. Segundo raised an unexhausted claim that he received ineffective assistance of trial counsel, arising from counsel's investigation of mitigation evidence—in particular, evidence of Mr. Segundo's intellectual disability. To develop his claims, Mr. Segundo filed multiple requests for funding under 18 U.S.C. § 3599(f) with this Court, arguing the potential merit of his ineffective assistance of counsel claim, his plan to use a specific mitigation specialist and the tasks she would undertake to uncover useful and admissible evidence, and the prospect of establishing "cause" to excuse procedural default under *Martinez* and *Trevino* based on state habeas counsel's failure to complete a reasonable extra-record

investigation. This Court denied Mr. Segundo's requests for funds, employing the "substantial need" standard that was explicitly rejected in *Ayestas.* Mr. Segundo is not required to prove his claim before receiving funds to investigate. *Compare* (ECF Doc. 47, PageID 810) (stating Mr. Segundo "*must* show that the expert requested the information *and* the information would have made a difference to the expert's opinion") (emphasis added), *with Ayestas*, 138 S. Ct. at 1094 (noting "a funding applicant must not be expected to *prove* that he will be able to win relief") (emphasis in original). This Court's ruling to the contrary created a procedural defect.

3. Mr. Segundo's 60(b) motion is timely filed, as the defect in the proceedings was only made actionable upon the ruling in *Ayestas*.

Considering the particular facts and circumstances of this case, Mr. Segundo's Rule 60(b) motion is timely filed. The timeliness of the motion is measured from the point when the grounds for the motion come into existence. *See Clark*, 850 F.3d at 780. Although Mr. Segundo's funding requests were denied by this Court in 2012, 2014, and 2015, the actual basis for Mr. Segundo's motion did not exist until the Supreme Court issued the *Ayestas* opinion on March 21, 2018.

The Fifth Circuit's reasoning in *Clark* is instructive on this issue. There, the petitioner filed a Rule 60(b) motion in September 2014, alleging that, because the same counsel represented him in state and federal habeas proceedings, there was a conflict of interest that prevented counsel from effectively litigating *Martinez* and *Trevino* issues. *Id.* at 781. Clark argued that the relevant date for determining the timeliness of his motion was the date the federal district court permitted new, conflict-free counsel to be substituted, which was May 2014. *Id.* at 782. The Fifth

Circuit rejected Clark's reasoning and concluded that because "[t]he contention that a conflict of interest may arise when state habeas counsel in Texas is also federal habeas counsel flows from *Trevino*[,] . . . the touchstone for Clark's Rule 60(b) motion . . . came into existence on . . . the date of the *Trevino* decision." *Id.* at 781. In other words, because Clark's conflict of interest defect did not become actionable under Rule 60(b) until the release of the *Trevino* opinion applying *Martinez* to Texas cases, the timeliness of Clark's motion must be measured from the date of that opinion.

Likewise, because Mr. Segundo's contention that this Court's denial of funding under § 3599 created a defect in the integrity of the proceedings flows from *Ayestas*, the touchstone of the motion did not come into existence until the date the opinion was released—on March 21, 2018. Therefore, Mr. Segundo has "some good reason" for any perceived delay, and promptly presents his motion to this Court within a reasonable time after the release of the *Ayestas* decision. *See Clark*, 850 F.3d at 780 (finding the court should consider whether the movant "has some good reason" for the delay).

C. Through every stage of his proceedings, Mr. Segundo has been denied adequate, professional, and conflict-free representation, resulting in extraordinary circumstances that compel relief under Rule 60(b)(6).

Although a change in decisional law *alone* is not sufficient to support reopening a judgment under Rule 60(b), it may be one of several factors that warrant doing so. *See Buck*, 137 S. Ct. at 772 (considering eleven factors that justified reopening the judgment, including new Supreme Court case law that affected potential procedural

defects in Buck's case); *Agostini v. Felton*, 521 U.S. 203, 239 (1997) ("Intervening developments in the law *by themselves* rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." (emphasis added)). In Mr. Segundo's case, the deprivation of funding in violation of *Ayestas* is particularly troubling considering the extraordinary circumstances that exist.

"Tard," "Dumb Bastard," "Speedy Gonzalez"

These words were used to describe Mr. Segundo by the trial team sworn to advocate for his best interest. Moreover, Mr. Segundo's lead trial counsel, Mark Daniel, operated under a conflict of interest at trial by representing an alternate suspect for an extraneous murder that was introduced at Mr. Segundo's punishment phase. Absorbed by their own prejudice and conflicts of interest, Mr. Segundo's trial lawyers failed to investigate an obvious *Atkins* claim.

Mr. Segundo fared no better in later state proceedings, where his counsel's conduct continued to be extraordinary for all the wrong reasons. Bafflingly, his state habeas attorney put on evidence that attempted to *contradict* the *Atkins* claim raised in the briefing and was contrary to accepted medical standards. Perhaps this is not surprising when considering that while still representing Mr. Segundo, he announced his intention to join the very office attempting to uphold the death sentence against Mr. Segundo. This action was taken without advising Mr. Segundo and providing him with the opportunity to obtain conflict-free counsel.

Finally, federal habeas counsel overlooked compelling evidence of Mr. Segundo's intellectual disability claims, some of which this Court specifically

recognized as necessary for the claim, and—through misrepresentations to this Court—created a conflict that marred Mr. Segundo's federal proceedings.

These extraordinary circumstances create an unacceptable risk that an intellectually disabled person will be executed.

1. The trial team's offensive and derogatory descriptions of Mr. Segundo are shocking.

Mr. Segundo was represented at trial by Mark Daniel and Wes Ball. They retained Dr. Kelly Goodness, first to conduct psychological testing of Mr. Segundo, then to function as a mitigation specialist. The trio displayed extraordinary contempt for Mr. Segundo, describing him with offensive and derogatory terms—ones that showed extreme insensitivity to their client's potential disability and referenced offensive racial stereotypes. This ultimately left a potentially intellectually disabled person facing the very real possibility of execution.

a. The trial team mocked Mr. Segundo as a "DUMB BASTARD" and "Tard," among other offensive statements.

Dr. Goodness was brought on to the case and began meeting with Mr. Segundo in March 2006, nine months before trial. At that time, trial counsel wanted her assistance to convince Mr. Segundo to plead guilty. Yet, there was no indication that Mr. Segundo had any interest in a plea deal.

During one attempt to persuade Mr. Segundo to plead guilty in a trial team meeting at the courthouse, fact investigator Danny LaRue noted that Mr. Segundo became upset, retreated to the holdover cell, and, oddly, hid behind the toilet. (Ex. 1 at 2). Mr. Segundo's peculiar retreat to the holdover cell ostensibly stemmed from his confusion regarding his own trial team's attempt to persuade him to plead guilty and

his inability to understand the concept of DNA evidence. In an April 10, 2006, email to trial counsel, Dr. Goodness recounted a recent meeting with Mr. Segundo: "He said that a paper was 'waved at' him as one of you 'kept saying DNA, DNA.' Said he wasn't told what that 'meant.'" (Ex. 2). Discussing a potential meeting with Mr. Segundo at which the team would review the evidence with the client, Dr. Goodness acknowledged Mr. Segundo's difficulty grasping the concepts and suggested, "We should do so in a manner he can understand." *Id*. By that point, it was clear that Mr. Segundo had no concept of DNA or how it could affect his case. *See Atkins*, 536 U.S. at 320–21 (intellectually disabled defendants "may be less able to give meaningful assistance to their counsel and are typically poor witnesses"). Daniel even expressed his "concern ab[ou]t our fundamental ability to communicate with this guy." (Ex. 3).

But the signs of Mr. Segundo's intellectual disability were lost on the trial team. As their unfounded plans for a plea deal slipped away, the team's frustration with their client escalated. Following a meeting with Mr. Segundo on April 25, 2006, Daniel emailed Dr. Goodness, "IF THERE IS SOME MEDICATION ON THE MARKET THAT CAN MAKE THAT DUMB BASTARD JUST A SLIGHT BIT SMARTER, GET HIM STARTED ON IT IMMEDIATELY." (Ex. 4) (capitalization in original). The team's frustration then turned to sarcasm, with multiple jokes at the expense of Mr. Segundo and the intellectually disabled. That same day, Ball quipped:

> I just got a scholarly article in the mail from a new forensic organization, the Segundo Foundation. The article is entitled "DNA, the New Junk Science." . . . I can say the author does not appear to be a retard.

(Ex. 5). Dr. Goodness later made a reference to the Ruben Cantu case, and when Ball did not understand the reference, he responded, "Okay, I am retarded, what is a 'Cantu'?" (Ex. 6).

Counsel's tasteless jokes aside, the fact was that Dr. Goodness had administered a WAIS-III exam to Mr. Segundo during one of their first meetings in early March 2006 and he scored a 75—a score that the medical community and the courts consider to be qualifying for an intellectual disability diagnosis. *See* (Ex. 7 at 1). Dr. Goodness returned to test Mr. Segundo again in July 2006, this time administering a Repeatable Battery for the Assessment of Neuropsychological Status (RBANS). On the RBANS, Mr. Segundo scored in the 0.4 percentile, "meaning that less than one-half a percentage of the standardization sample scored lower than did Mr. Segundo." *Id.*

Despite the fact that Mr. Segundo's IQ score was in the qualifying range for an intellectual disability diagnosis, Dr. Goodness failed to recognize the implications. According to Dr. Goodness, the "standard error range for this [75 IQ] score places his Full Scale IQ between *71 and 80* (borderline to low average) *which also falls above the mentally retarded range*." *Id.* (emphasis added). Dr. Goodness wrongly concluded that Mr. Segundo could not qualify as intellectually disabled with an IQ score of 75 and thus never proceeded to conduct an adaptive deficits evaluation. Instead, she viewed a score of 75 as ruling out the possibility of intellectual disability.

But the Diagnostic and Statistical Manual of Mental Disorders (DSM) has long explained that IQ scores generally involve a standard error range of five points. *See*

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 28 (rev. 3d ed. 1987) ("Since any measurement is fallible, an IQ score is generally thought to involve an error of measurement of *approximately five points*; hence, an IQ of 70 is considered to represent a band or zone of 65 to 75. Treating the IQ with flexibility permits inclusion in the Mental Retardation category of people with IQs *somewhat higher than 70 who exhibit significant deficits in adaptive behavior*.") (emphasis added); *e.g.*, *Hall*, 134 S. Ct. at 1999 (citing with approval the 1987 DSM explanation of standard error range in IQ scores); *see also Atkins*, 536 U.S. at 309 n.5 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition."). It is unclear why Dr. Goodness properly added five points on the high end (to reach a score of 80), but only subtracted *four* points on the low end (to reach a score of 71). As the medical literature makes clear, a score of 75 placed Mr. Segundo within the standard error range of an IQ of 70.

b. The trial team ignored multiple requests from the defense experts for a social history report for Mr. Segundo, which was important to an adaptive deficits analysis.

In this Court's denial of Mr. Segundo's request for funding, it noted that none of the previous experts had requested a social history. (ECF Doc. 44, PageID 673). Trial counsel's file reveals that to be inaccurate. In fact, experts made three separate requests for a social history report.

On the suggestion from Dr. Goodness, trial counsel hired Dr. Alan Hopewell, a military neuropsychologist, to do a neuropsychological evaluation of Mr. Segundo. *See* (Ex. 7 at 3). Dr. Goodness acted as a liaison between trial counsel and Dr. Hopewell.

On July 12, 2006, Dr. Goodness emailed Daniel on Dr. Hopewell's behalf and informed him that Dr. Hopewell would need a comprehensive social history report that summarized Mr. Segundo's background, any medical records, evaluations, or records substantiating injuries. (Ex. 8). In response, Daniel informed Goodness that, "AT THIS STAGE…WE REALLY DO NOT HAVE SOCIAL HISTORY RPT [shorthand for report], MED RECORDS [shorthand for medical records] TRC [shorthand for Texas Rehabilitation Commission] TESTING OR ANYTHING OF THE SORT . . . ." *Id.* (emphasis in original).

On July 14, 2006, Dr. Hopewell's office manager sent a letter to Daniel specifically requesting that Mr. Segundo's social history, medical records, and Texas rehabilitation records be provided before Dr. Hopewell conducted his assessment of Mr. Segundo. (Ex. 9). But, as previously stated by Daniel in the email to Dr. Goodness, counsel failed to investigate and create a social history.

Dr. Goodness also requested a social history report from Mr. Segundo's first mitigation specialist, Shelli Schade, after Dr. Goodness took over her role as the mitigation specialist. Trial counsel initially hired Shelli Schade as a mitigation specialist but, in December 2005, Daniel ordered Schade to stop her mitigation investigation with no explanation. (Ex. 10) (Schade emailed Dr. Goodness, "For several months beginning in December, 2005 I was asked by Mark Daniel to hold off on any visits/investigation/work until further notice."). Schade decided to leave Mr. Segundo's trial team on August 30, 2006, and trial counsel asked Dr. Goodness to step in. *Id*.

Approximately one month before the start of jury selection, Dr. Goodness requested "all of Schade's notes, records, reports (*especially the social history*) etc., some idea about what has been done and what needs to be done, and . . . the various trial dates." *Id.* (emphasis added). Schade responded that the trial team never retained a private investigator to help her investigation. *Id.* This was especially troubling considering she "[had her private investigator] make initial contact with folks (outside of family) before [she] talk[ed] to them." *Id.* Schade bluntly said that "no fact investigation ha[d] been done," and that "there [was] no social history." *Id.* It seems that the only mitigation work Schade completed was contacting Mr. Segundo's wife and family "but there [were] no notes from those visits." *Id.* Apparently Schade was under the impression that Mr. Segundo's family spoke "very thick Vietnamese" and were "hard to understand." *Id.* Notably, Mr. Segundo's wife and her family are from the Philippines. They do not speak Vietnamese. Despite learning that Schade had failed to create a social history report, there is no indication that Dr. Goodness attempted to do so once taking on the role as mitigation specialist.

Even with three separate requests, a social history report was never completed. This was crucial to Mr. Segundo's intellectual disability claim.

c. Dr. Goodness's standard for determining whether "speedy Gonzalez," as she called Mr. Segundo, belonged in the "tard yard" was inconsistent with the diagnostic framework used in the medical community.

In an email after his meeting with Mr. Segundo, Dr. Hopewell expressed concern that Mr. Segundo was not shackled during their initial meeting. (Ex. 11). Forwarding Dr. Hopewell's email to trial counsel, Dr. Goodness stated, "[W]hy army

man wanted *speedy Gonzalez* in chains is perplexing though funny as hell[.]" *Id.* (emphasis added).

The Supreme Court has specifically condemned racial stereotyping in the justice system, stating that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Buck*, 137 S. Ct. at 778 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). It "poisons public confidence in the judicial process" and "injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'" *Id.* (quoting *Rose*, 443 U.S. at 555). Yet here, Dr. Goodness used racially-charged language in referencing her client Mr. Segundo as "speedy Gonzalez."

Moreover, it was not simply offensive language that Dr. Goodness used; her racial stereotyping permeated her assessment of Mr. Segundo. Dr. Goodness asserted that Mr. Segundo's poor verbal abilities could be explained by a language barrier that she only assumed existed. Following her assessment, Dr. Goodness concluded that Mr. Segundo's 75 IQ on the WAIS-III "actually underestimates his true IQ." (Ex. 7 at 1). Dr. Goodness based this conclusion on her assertion that "[i]ndividuals who do not grow up with only English as their first language often go on to score lower on American IQ tests than would otherwise be the case if they were a monolingual speaker." *Id.* Dr. Goodness assumed that Mr. Segundo grew up in a home where "an admixture of English and Spanish were taught to him as his first language and both languages were intermingled and used to communicate in his early home life." *Id.* Of course, this type of IQ score manipulation was expressly rejected by the Supreme

Court in *Hall* and *Moore*. *See Moore*, 137 S. Ct. at 1049 ("But the presence of other sources of imprecision in administering the test to a particular individual cannot *narrow* the test-specific standard-error range.") (emphasis in original) (internal citations omitted). But, more importantly, there is no indication that that Dr. Goodness or anyone else on the trial team did enough investigation to know whether Mr. Segundo had language issues that may affect his IQ score. In fact, the RBANS administered by Dr. Goodness showed that Mr. Segundo's best score was actually "Language." (Ex. 12).

Dr. Goodness's commentary was not limited to racial stereotyping. Though a licensed mental health professional, she repeatedly referred to the intellectually disabled as "tards." For example, after his meeting with Mr. Segundo, Dr. Hopewell emailed Dr. Goodness and reported that Mr. Segundo was confused by the visit and repeatedly answered Dr. Hopewell's questions with, "I already told that to Dr[.] Goodness." (Ex. 13). Dr. Goodness responded by "hyperventilating with laughter," *id*, and, though armed with no information regarding his adaptive deficits, said that Mr. Segundo "is not a *tard* and *does not belong in the tard yard*," (Ex. 14) (emphasis added).

Inexplicably, trial counsel not only joined in her disparaging remarks but kept her on the case as both the psychological expert and later as the mitigation specialist. This repulsive behavior constitutes an extraordinary circumstance warranting relief. *See Buck*, 137 S. Ct. at 778 (finding extraordinary circumstances based on evidence of racial animus); *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) ("The duty

to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against . . . racial discrimination . . . .").

2. Numerous conflicts of interest tainted every stage of Mr. Segundo's litigation.

Mr. Segundo's counsel at all phases of the proceedings have suffered from significant, distinct conflicts of interest that prevented Mr. Segundo from developing his case. Mr. Segundo's trial counsel represented the alternate suspect in an extraneous murder presented at the punishment phase of Mr. Segundo's trial and advised that suspect on whether to take a polygraph test; his state habeas counsel announced his return to the Tarrant County District Attorney's Office while still litigating Mr. Segundo's initial state habeas application; and his federal counsel failed to include numerous qualifying IQ scores in his intellectual disability claims at the federal level, attempted to prevent the introduction of those scores, and then later misled this Court about the circumstances of his failure to include the scores. Finally, the state habeas judge retained Mr. Segundo's trial counsel in her defense against DWI charges while Mr. Segundo's habeas application was still pending before her. The conflicts of interest not only undermine the legal integrity of the proceedings, but also the public's confidence in the resolution of this death penalty case.

a. Mr. Segundo has a right to conflict-free counsel.

A fundamental canon of professional responsibility is that counsel must loyally represent his client and avoid conflicts of interest. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("In those circumstances [when counsel is burdened by a conflict

of interest], counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties."); *see also Town of Newton v. Rumery*, 480 U.S. 386, 413 (1987) (recognizing "the general and fundamental rule that a lawyer should exercise independent professional judgment on behalf of a client" and noting that "[e]very attorney should avoid situations in which he is representing potentially conflicting interests."). The Supreme Court has long recognized that the Sixth Amendment includes a right to loyal and conflict-free counsel. *See Strickland*, 466 U.S. at 688 ("Representation of a criminal defendant entails certain basic duties [including] . . . a duty of loyalty, a duty to avoid conflicts of interest."). A conflict of interest is particularly troublesome because of the difficulty of identifying its effect on the proceedings. "[T]he evil . . . is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Id.* at 710. As a result, the courts have gone so far as to presume prejudice under certain circumstances because "it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client." *Id.*

This right to conflict-free counsel extends to habeas proceedings. Under 18 U.S.C. § 3599, a petitioner has the right to quality legal counsel in habeas proceedings. The statute reflects a Congressional determination "that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'" *McFarland v. Scott*, 512 U.S. 849, 855 (1994) (quoting 21 U.S.C. § 848(q)(7) (amended)). The Supreme Court has held that a federal court must "ensure that the defendant's

statutory right to counsel [i]s satisfied throughout the litigation." *Martel v. Clair*, 565 U.S. 648, 661 (2012). While federal counsel's ordinary "excusable neglect" will not be a basis for equitable relief, the Court has held that counsel's violation of fundamental canons of professional responsibility, including conflicts of interest, constitutes "extraordinary circumstances," especially when the violation results in the client losing "what is likely his single opportunity for federal habeas review." *See Holland v. Florida*, 660 U.S. 631, 652 (2010) (discussing "extraordinary circumstances" in the context of equitable tolling).

Counsel may encounter a conflict in any number of ways. The most obvious is when counsel represents opposing parties in the same litigation. *See* Tex. Disc. Rules of Prof. Conduct, Rule 1.06(a) (hereinafter "Tex. Rule") ("A lawyer shall not represent opposing parties to the same litigation"); ABA Model Rules of Prof. Conduct, Rule 1.7(a)(1) (hereinafter "ABA Rule") ("a lawyer shall not represent a client if . . . the representation of one client will be directly adverse to another client."). Even if two clients are not opposing parties to the *same* litigation, a conflict may arise if a lawyer's representation of one client "involves a substantially related matter" in which the client's interests are, or reasonably appear to be, "materially and directly adverse" to another client's interests. Tex. Rule 1.06(b)(1)–(2); *see also* ABA Rule 1.7(a)(2). A conflict may also arise when a client's interests become, or reasonably appear to become, adverse to the lawyer's interests. Tex. Rule 1.06(a)(2); ABA Rule 1.7(a)(2). The lawyer's duty extends to former clients as well. "A lawyer who personally has formerly represented a client in a matter shall not thereafter represent another

person in a matter adverse to the former client . . . if it is the same or a substantially related matter." Tex. Rule 1.09(a)(3); ABA Rule 1.9. However, a client may give informed consent to waive a conflict of interest. Tex. Rule 1.06(c), 1.09; ABA Rule 1.7(b), 1.9.

Counsel has a clear duty to avoid such conflicts. When counsel fails to do so, a petitioner's complaint of a conflict of interest is properly brought in a Rule 60(b) motion. *Clark*, 850 F.3d at 779-80 ("To the extent that Clark's Rule 60(b)(6) motion attacks not the substance of the federal court's resolution of the claim of the merits, but asserts that [attorney] Henry ['who served as both state and federal habeas counsel'] had a conflict of interest that resulted in a defect in the integrity of the proceedings, the motion is not an impermissible successive petition.").

b. Trial counsel operated under a conflict of interest when he represented an alternative suspect in an extraneous murder presented at the punishment phase of Mr. Segundo's trial.

During the punishment phase of Mr. Segundo's trial, the jury heard that Mr. Segundo's DNA was consistent with semen found on an oral swab taken from Francis Williams, a prostitute found dead near a Fort Worth truck stop in November of 1994. *24 R. 33-58*. Although there was no other evidence linking Mr. Segundo to Williams' death, the extraneous murder accusation went largely unchallenged before the jury. Counsel's failure to challenge the evidence may be explained by Daniel's unique familiarity with the Williams case—namely, that he represented an alternative suspect during the Fort Worth Police Department's original investigation into the

case in the mid-1990s and informed law enforcement that he would advise the suspect whether to submit to a polygraph examination.[5]

On November 15, 1994, a trucker found Williams unclothed in a ditch along a heavily traveled road in Fort Worth, not far from a truck stop. (Ex. 15). Williams had a long history of prostitution, with over 50 arrests on her record. *Id.* FWPD Detective T. W. Boetcher developed information through an informant referred to as "Jimmy Black" (real name Michael Cornet Robinson), that implicated brothers Dayrun Hunt and Devin Gardner in Williams' death. (Ex. 16 at 2). Specifically, Det. Boetcher learned that (1) Williams was last seen in Gardner's pickup truck, (2) Gardner, his brother Dayrun Hunt, Willie (last name unknown), and Jimmy Black were with Williams the night of her murder, and (3) Willie assaulted Williams on the night of her murder. (Ex. 17 at 7–8; Ex. 18 at 1). Det. Boetcher interviewed Gardner in early 1995, but Gardner claimed only that he heard from his brother that a white truck driver had killed Williams. (Ex. 17 at 9; Ex. 18 at 2).

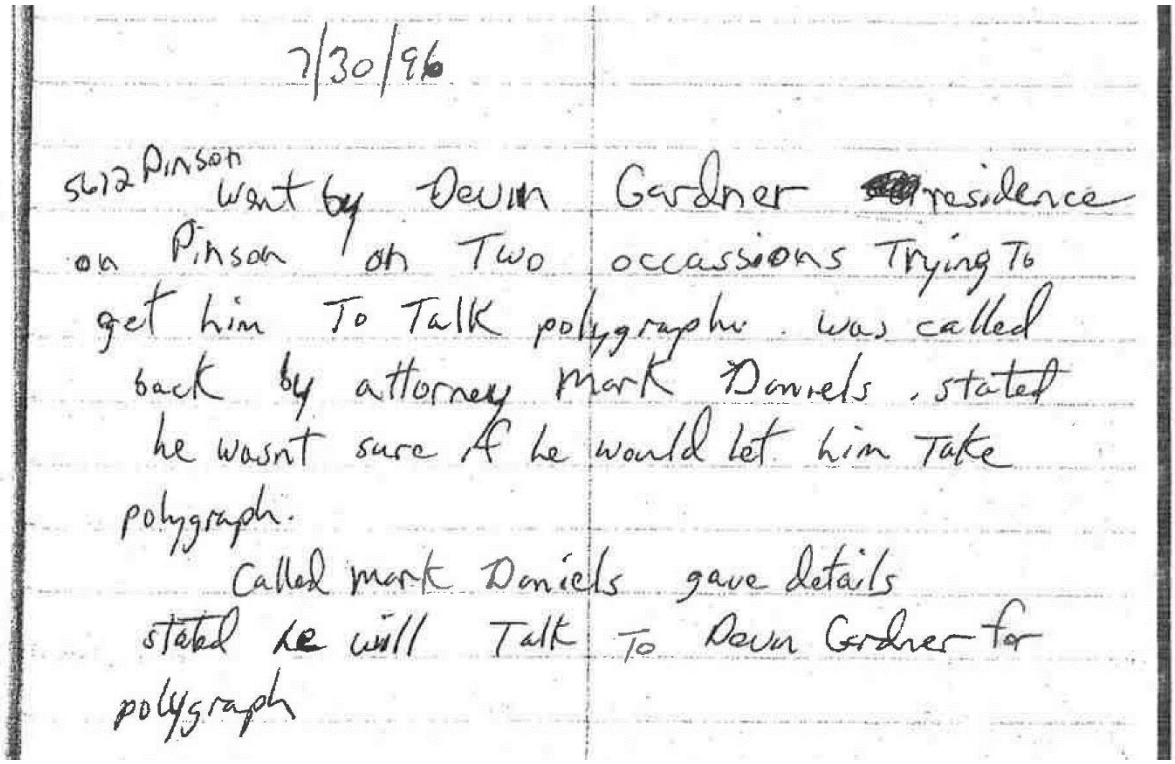
Det. Boetcher later tried to locate Gardner again in attempt to administer a polygraph examination. FWPD's case report indicates that Det. Boetcher was advised by Gardner's attorney, Mark Daniel—who would later become Mr. Segundo's trial counsel—that he may not make Gardner available for a polygraph:

[5] Ultimately, it appears that the suspect chose not to submit to a polygraph examination.

July 30, 1996

Went by Devin Gardner's trying to locate him for polygraph, received call from Attorney Mark Daniels who stated he wasn't sure if Devin Gardner would take polygraph at this time.

(Ex. 17 at 9).[6] This conversation was similarly memorialized in Det. Boetcher's investigation notebook:



7/30/96

5612 Pinson went by Devin Gardner residence on Pinson on Two occassions Trying To get him To Talk polygraphw. was called back by attorney Mark Daniels. stated he wasnt sure if he would let him Take polygraph.

Called mark Daniels gave details stated he will Talk To Devin Gardner for polygraph

[6] While it is unclear who drew the brackets around this July 30, 1996, entry, there is reason to believe that trial counsel were aware of the conflict given that this document was located in trial counsel's own files. Current counsel also notes that Det. Boetcher names Gardner's attorney as "Mark Daniels" instead of "Mark Daniel." Based on the location of the case (Fort Worth) and the nature of the case (criminal), undersigned counsel believes it likely that Det. Boetcher was referring to the same Mark Daniel that represented Mr. Segundo at trial.

(Ex. 18 at 4). Daniel effectively ended the investigation into Devin Gardner, as there are no other entries in Det. Boetcher's notes until February 2006, when a DNA hit for the semen on Williams' oral swab returned to Mr. Segundo. (Ex. 17 at 9).

Although Daniel later dropped Gardner as a client, *see* Ex. 18 at 4, he continued to owe Gardner a duty of loyalty with regard to the information he learned in confidence as Gardner's attorney during the Williams investigation. That duty to Gardner would impede Daniel's ability to zealously represent Mr. Segundo. *See United States v. Carpenter*, 769 F.2d 258, 263 (5th Cir. 1985) ("A conflict [of interest] exists when defense counsel places himself in a position conducive to divided loyalties."). Although it is impossible to know what Daniel learned from Gardner, Daniel indicated he was in the position to advise Gardner whether to submit to a polygraph examination regarding the murder. *See United States v. Infante*, 404 F.3d 376, 392 (5th Cir. 2005) (finding conflict of interest when defendant's attorney had represented witnesses against the defendant even though the attorney denied having any relevant confidential information from his former clients). When Daniel accepted Mr. Segundo's case and learned that the District Attorney's Office intended to introduce the Williams murder as an extraneous offense, Daniel had a conflict of interest between the loyalty he owed to his former client (Gardner) and his current client (Mr. Segundo) in a substantially related matter (the Williams murder investigation). Tex. Rule 1.06(b)(1)-(2), 1.09(a)(3); *see also* ABA Rule 1.7(a)(2), 1.9.

c. State habeas counsel operated under a conflict of interest when he continued to represent Mr. Segundo in his state writ proceedings after announcing his intention to join the District Attorney's Office.

In another conflict, while waiting on the state habeas court's recommendation on Mr. Segundo's application, Jack Strickland committed to work at the Tarrant County District Attorney's Office, the office that prosecuted Mr. Segundo and with which Strickland had long-standing connections. *See* Martha Deller, *Area Defense Attorney will Join DA's Office*, FT. WORTH STAR TELEGRAM, May 22, 2010, at B1. Strickland was due to return there in January 2011, to coincide with the retirement of criminal division chief Alan Levy—the prosecutor who pursued the death penalty in Mr. Segundo's trial. *See id*. Levy had been contemplating retirement for some time: "Shannon [the District Attorney at the time] said that about the same time, he began hearing that Strickland might be interested in rejoining the office[.]" *Id*. Strickland was a "longtime friend and former co-worker" of District Attorney Joe Shannon, who took office in May 2009. *Id*. Shannon had even been Strickland's roommate after Shannon's divorce. Eric Griffey, *Cut from the Same Cloth*, FORT WORTH WEEKLY, July 15, 2009, *available at* https://www.fwweekly.com/2009/07/15/cut-from-the-same-cloth/.

Several months after announcing his move to the District Attorney's Office, Strickland filed a motion with this Court noting that he would be unable to represent Mr. Segundo through his federal habeas proceedings because he was set to begin his new employment as a prosecutor on January 14, 2011. (ECF Doc. 1, PageID 2). This Court appointed Alexander Calhoun to represent Mr. Segundo on March 15, 2011.

(ECF Doc. 3). During the time between accepting employment with the District Attorney's Office and withdrawing from Mr. Segundo's case, Strickland did not alert Mr. Segundo or the state courts to this conflict and did not give Mr. Segundo the opportunity to obtain conflict-free counsel. Moreover, while Strickland was busy

negotiating his new employment as a prosecutor, he failed to object to the district court's findings of fact and conclusions of law, which recommended denying Mr. Segundo relief.

Thus, at the time that Strickland was ethically bound to represent Mr. Segundo, he was also seeking employment with the very office that prosecuted Mr. Segundo and indeed seeking to replace the very prosecutor who put Mr. Segundo on death row.

d. The state habeas judge retained Mr. Segundo's trial counsel in her defense against DWI charges while Mr. Segundo's state writ was still pending before her.

Strickland filed Mr. Segundo's initial application on October 17, 2008. *SHR. 2–89.* Three weeks later, on November 8, 2008, the state habeas judge, Elizabeth Berry, was arrested in nearby Johnson County on suspicion of driving while intoxicated. Scott Gordon, *Tarrant County Judge Arrested on DWI Charge*, NBC DFW 5 (Nov. 11, 2008), https://www.nbcdfw.com/news/local/Police-Tarrant-County-Judge-

Was-Driving-Drunk.html; *State judge stopped for speeding, charged with DWI*, HOUSTON CHRON. (Nov. 17, 2008), https://www.chron.com/news/houston-texas/article/State-judge-stopped-for-speeding-charged-with-DWI-1785798.php. After stopping Judge Berry for driving 92 mph in a 65 mph speed zone, officers observed empty beer cans in the vehicle and smelled alcohol on her breath. She was reportedly uncooperative and refused to submit to a field sobriety test or Breathalyzer, so authorities eventually took a blood test. *Id.* Judge Berry retained "prominent defense lawyer Mark Daniel," and referred all media inquiries to him. Shortly after the arrest, Daniel released a written statement on the matter:

> Judge Berry is a very highly respected judge. We are presently doing our own investigation. It is my belief that this matter will likely be determined to be unfounded.

Id. Judge Berry was formally charged with DWI a few days later. Daniel again took to the media: "It doesn't come as a surprise that [Johnson County Attorney Bill Moore] filed the case. We're more than prepared to defend against it." *Id.*; *see also* Martha Deller, *Fort Worth state judge charged in DWI case*, FT. WORTH STAR-TELEGRAM (Nov. 17, 2008), http://www.star-telegram.com/latest-news/article3823483.html.

While Mr. Segundo's own trial counsel publicly investigated and defended the state habeas judge's DWI case, Mr. Segundo's state habeas litigation carried on. In September 2009, Judge Berry ordered a hearing on Mr. Segundo's *Atkins* claim to be held in December.

By October 2009, Daniel secured a dismissal of Judge Berry's charge. *Lab: Texas judge in dismissed DWI was legally intoxicated*, BEAUMONT ENTERPRISE via THE ASSOCIATED PRESS (Aug. 10, 2009),

https://www.beaumontenterprise.com/news/article/Lab-Texas-judge-in-dismissed-DWI-was-legally-743699.php. On December 9th, the *Atkins* hearing was held over the course of a single day, and state habeas counsel called only one witness. There was no further substantive litigation following the hearing, and Judge Berry recommended that relief be denied on October 5, 2010. *See Ex parte Segundo*, No. WR-70,963-01 (Tex. Crim. App. Dec. 8, 2010).

e. Initial federal habeas counsel operated under a conflict of interest when he misled this Court about his failure to present numerous qualifying IQ scores.

If trial and state habeas counsel conflict were not egregious enough, prior federal habeas counsel, Alexander Calhoun, created a conflict of interest by making misrepresentations to this Court about his own performance. As Mr. Calhoun was Mr. Segundo's only counsel on appeal, this conflict followed Mr. Segundo's case through the Fifth Circuit and Supreme Court.

Following this Court's denial of relief on the initial petition, Paul Mansur was replaced by Burke Butler as co-counsel on Mr. Segundo's case and Alexander Calhoun remained lead counsel. After she was appointed, Butler discovered additional IQ scores and documents that supported Mr. Segundo's *Atkins* and IAC *Atkins* claims. This evidence was presented to this Court through two post-judgment motions filed by Calhoun and Butler. But, when asked by this Court to explain why the evidence was not discovered pre-judgment, Calhoun misrepresented his and Mansur's conduct and claimed that he and Mansur did not have access to the evidence discovered by Butler, placing the blame on Butler for the oversight. Statements from Mansur and Butler directly contradict Calhoun's statement to this Court. However, after Calhoun

made these misrepresentations to the Court, Butler was terminated from the case and Calhoun proceeded on appeal as solo counsel for Mr. Segundo.

i. Initial federal counsel did not present qualifying IQ scores from TDCJ records or evidence that prior experts *did* in fact request a social history, both of which were available in Mr. Segundo's file.

Mr. Segundo was initially represented by Paul Mansur and Alexander Calhoun on his federal petition. Shortly after this Court denied relief, Paul Mansur asked to be relieved from the case and replaced by Burke Butler. (ECF Doc. 51). Butler, an attorney with the Texas Defender Service (TDS), was conditionally appointed on July 9, 2015, with this Court noting that it had not appointed TDS and that Mr. Segundo's other attorney, Alexander Calhoun, was to retain primary control of representing Mr. Segundo. (ECF Doc. 54, PageID 887–88).

Eight days after Butler was appointed as co-counsel, she discovered additional material on the TDS server that had not been presented to this Court. As a result, counsel filed a post-judgment motion under Federal Rules of Civil Procedure 59 and 60(b)(1) asking the Court for leave to consider newly discovered evidence. (ECF Doc. 56, PageID 898). Specifically, Butler found TDCJ records documenting that Mr. Segundo had received IQ scores of 60, 66, 70, and 71. *Id*. The motion explained that these scores had been missed due to a computer glitch between the TDS server and Mansur's computer. *Id*. at 900. Butler later also discovered evidence that prior mental health experts had requested a social history report for Mr. Segundo. (ECF Doc. 62, PageID 984).

Mr. Segundo's previous counsel, Paul Mansur, was also a TDS attorney but he worked remotely and thus kept files on his home computer. (ECF Doc. 56, PageID 898). Through some error, the files synchronized to Mansur's home computer from the TDS server did not include these TDCJ records and IQ scores. *Id*. These IQ scores were relevant to Mr. Segundo's *Atkins* claim and his claim that trial counsel were ineffective for failing to further investigate intellectual disability. *Id*. at 902. In the post-judgment motion to this Court, counsel also noted that "[b]ecause counsel was in possession of the newly discovered IQ scores in their file and did not timely present it to the Court, they face a conflict of interest . . . therefore, counsel need to locate conflict-free counsel who can advise Mr. Segundo about the conflict." *Id*. at 899, n. 2.

ii. Calhoun created a conflict by misrepresenting his actions to the Court.

In response to counsel's first 60(b) motion, this Court entered an *ex parte* order directing lead counsel Alexander Calhoun to explain why he did not review the records Butler found following her appointment. (Ex. 19 at ¶ 20) (Affidavit of Burke M. Butler). The order also directed counsel to explain the methods used to obtain, store, and review records for Mr. Segundo's case. *Id*.

On August 7, 2015, a supplemental post-judgment motion under Federal Rules of Civil Procedure 59 and 60(b)(1) was filed, which informed the court that since filing the original post-judgment motion on July 19th, more pertinent information on the TDS server that failed to synchronize with Mansur's computer was discovered. (ECF Doc. 62, PageID 983). Specifically, (1) correspondence from and on behalf of Dr. Hopewell, the neuropsychologist who testified during the punishment phase of Mr.

Segundo's trial, requesting a social history for Mr. Segundo; (2) Windham School District records that indicate Mr. Segundo had an IQ score of 60 and performed on a third or fourth grade level; and (3) TDCJ records showing Mr. Segundo had IQ scores of 60, 70, and 71. *Id.* at 984–86. The motion argued that this evidence was especially relevant because it showed that a prior expert had in fact asked for the very information that federal habeas counsel were requesting funds to investigate. *Id.* at 988.

While Butler and Calhoun both worked on this motion, Butler wrote the first draft. (Ex. 19 at ¶ 16). Before filing, Calhoun removed a footnote which explained that the first 60(b) Motion wrongly stated that Mansur did not have access to the full file. *Id.* at ¶ 17. Butler had learned that Mansur did in fact have "access" to the full file on the TDS server but was not aware that the file synched onto his personal computer was incomplete. *Id.* at ¶ 14. Calhoun removed this explanation from the supplemental motion. *Id.* at ¶ 17. Butler asked Calhoun about the removed footnote, and he stated it was removed by mistake. *Id.* at ¶ 19. The Court was eventually informed that Mansur did in fact have access to the full file in Mr. Segundo's Reply to the Attorney General's Response to the Rule 60(b) Motion. (ECF Doc. 64, PageID 1031, n.1).

Meanwhile, Calhoun filed a response to the court's *ex parte* order. In it, Calhoun asserted that Mansur had informed Calhoun that Mansur had access to an incomplete file. Calhoun claimed Mansur's statements conflicted with assertions made by Butler in filings to the court. Calhoun indicated that he believed Mansur

over Butler. (Ex. 19 at ¶ 20). Calhoun also had apparently not yet determined whether he himself had the full file. *Id*.

A copy of this statement was provided to Mansur who, in an email to Butler on August 18, 2015, stated that Calhoun's statement to the Court contained "inaccuracies in it regarding what I told Alex about the files." (Ex. 21). Mansur had always had access to the full file via Dropbox and TDS's VPN server. *Id*. Therefore, the statement Calhoun provided to the Court was not correct. (Ex. 19 at ¶ 22).

Calhoun later filed an amended response to the Court. *Id*. at ¶ 23. This time, Calhoun again falsely reported that Mansur had access to an incomplete file. *Id*. This statement does not comport with Mansur's email communication to Butler nor information provided to Calhoun. Calhoun left the Court with the impression that Butler had given the Court misleading information about whether Mansur ever had access to the documents she discovered. In fact, counsel had access to the full file and simply neglected to present highly relevant evidence for the *Atkins* claim. *See* (Ex. 19 at ¶ 24).

Beyond the computer issue, Butler also learned that the late-discovered IQ scores were in Mansur's possession from the beginning, as they were contained in the Clerk's Record. Mr. Segundo's electronic case file had not contained Volume 3 of the Clerk's Record. *Id*. at ¶ 25. Mansur possessed the hard copy of the trial record at his home and sent it to Butler in August of 2015 to enable her to supplement the record before the Court. *Id*. at ¶ 26. When it arrived, Butler learned that the TDCJ records that contained many of the IQ scores submitted in the post-judgment motions were

in that record. *Id*. at ¶ 27. Therefore, at least Mansur unequivocally had access to this information. *Id*.

Butler included this information—that the IQ scores were available in the Clerk's Record—in her draft of the Reply to the Attorney General's Response to the Rule 60(b) Motion. *Id*. at ¶ 28. Days later, Calhoun filed the Reply and removed Butler's explanation that the IQ scores were available in the Clerk's Record. *Id*. at ¶ 32.

iii. Butler was removed from the case and Calhoun went on to represent Mr. Segundo before the Fifth Circuit with this conflict.

On December 7, 2015, this Court both denied the Rule 60(b) Motions and removed Butler as counsel. (ECF Docs. 69, 70). This Court reasoned that the records before it did not show that Mansur "had reason to expect that TDS had created multiple versions of the electronic record and the one he was provided was incomplete" but that Butler was the one attorney who had full access to the record. (ECF Doc. 69, PageID 1066). The Court also noted that Butler had begun working on Mr. Segundo's case before she was appointed and had assisted Mansur in drafting the motion to reconsider the Court's denial of funding. *Id*. at 1069. Therefore, this Court concluded that she was the attorney who had access to the full file but did not disclose this to Mansur or Calhoun. *Id*. at 1070–71.

One month after the Court denied relief on the post-judgment motions and removed Butler from the case, Paul Mansur, Mr. Segundo's former federal habeas attorney and co-counsel of Calhoun, filed a Notice of Record Clarification. (ECF Doc. 71, PageID 1086). In it, Mansur explained his perspective on the file management

issue that had resulted in Butler's termination from the case. Mansur explained that, unlike Calhoun, he never possessed or reviewed the physical files obtained from trial and state habeas counsel. *Id.* at 1087. Rather, someone at the TDS office in Austin scanned in the file and gave Mansur access via Dropbox, an online file storage website. *Id.* He accessed and reviewed the files from that website. *Id.* Mansur was "reasonably certain" that he reviewed the entirety of trial and state habeas counsels' files before filing the federal petition for Mr. Segundo. *Id.*

After Mr. Segundo's petition was filed, TDS informed Mansur that he could no longer store client files on his computer and must use the TDS server, which he could access remotely through a VPN. *Id.* To accommodate Mansur's remote location from the main TDS office, and the slow VPN connection, the TDS server was set up to "sync" with Mansur's computer—thus, Mansur could access files from his own personal computer and was not required to use the slow VPN to access the TDS server. *Id.* Mansur later learned that, due to some error, not all of Mr. Segundo's files had synchronized with his computer, including the IQ scores discovered by Butler. *Id.* Mansur was operating under the assumption that, after the petition was filed and he was no longer using Dropbox, all of the files were on his personal computer through the TDS "sync" system. *Id.* That assumption was incorrect. However, Mansur always had access to the complete file on Dropbox and had access when the petition was filed in this case. *Id.*

Mansur also explained that, though he asked Butler to aid him in preparing motions in Mr. Segundo's case prior to her appointment replacing him, he never asked

and did not expect her to review the entire file at that time. *Id*. at 1088. Butler had no way of knowing that his computer did not contain the complete file; furthermore, Mansur did in fact have access to the complete file through Dropbox. *Id*. It just was not on his personal computer. *Id*. Mansur assumed responsibility for this error. *Id*. at 1089.

Mansur's explanation conflicts with that provided to this Court by Calhoun, which placed the blame at Butler's feet for the file storage debacle. Unlike Calhoun's account, Mansur admitted that he always had access to the complete file and that he and Butler were unaware of the issue between the TDS server and Mansur's computer. However, Butler had already been removed from the case and Calhoun permitted to proceed as solo counsel. Moreover, this statement pointed out that Calhoun was the first and only attorney to have full access to the hard files provided by prior counsel.

The same day that Mansur filed his notice of record clarification, Calhoun filed a notice of appeal. (ECF Doc. 72). On April 13, 2016, Calhoun officially filed an application for certificate of appealability raising one issue—that the district court erred by denying Mr. Segundo's IAC *Atkins* claim without granting a hearing to permit Mr. Segundo to establish cause and prejudice under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). *Segundo v. Davis*, No. 16-70001 (5th Cir. April 13, 2016) (Brief in Support of COA at 28). Calhoun did not appeal the funding order and did not appeal the denial of the post-judgment motions. In fact, Calhoun drew no attention to the file access issue or his own statements to the Court about that incident. In the

application for COA, Calhoun only referenced that post-judgment motions were filed in the procedural background and did not give any explanation of their contents. The only other mention of the post-judgment motions and the late-discovered IQ scores and requests from psychological experts for a social history was left in a footnote. *Id.* at 42 n.8.

The attorney left to represent Mr. Segundo on appeal had a conflict of interest that was not revealed to the Fifth Circuit—that he had misled the district court about his own failures in reviewing the client's file and as a result, the only other attorney on the case was removed. Calhoun did not appeal any of the funding or post-judgment motions. The extraordinary circumstance here is not that Calhoun missed relevant information in the file. *See Gonzalez*, 545 U.S. at 532 n.5 ("We note that an attack based on the movant's own conduct, or his habeas counsel's omissions, see, e.g.,, supra, at 2647, ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably."). Rather the extraordinary circumstance is that counsel's omission led to counsel creating a conflict of interest by misrepresenting his actions to the Court. Furthermore, counsel's misrepresentations resulted in conflicted counsel being solo counsel on Mr. Segundo's appeal before the Fifth Circuit and failing to appeal the post-judgment motions or any issues that would draw attention to counsel's errors at the district court level.

3. The deprivation of adequate, professional, and conflict-free representation, combined with significant changes in Supreme Court law, create an unacceptable risk that an intellectually disabled person will be executed.

At the trial and state habeas levels, Mr. Segundo's counsel failed to conduct even a basic investigation into Mr. Segundo's adaptive deficits—something they should have done under prevailing professional norms. Moreover, federal habeas counsel was unable to secure funding for such an investigation and, after creating a conflict, failed to raise the issue on appeal. But, the facts of this case show that it is very possible that Mr. Segundo is intellectually disabled and thus ineligible for execution. Under recent and intervening Supreme Court standards, Mr. Segundo is entitled to a full intellectual disability investigation pursuant to the standard medical norms. *See Buck*, 137 S. Ct. at 772 (considering eleven factors that justified reopening the judgment, including new Supreme Court case law). Such an investigation has not yet happened in this case, making it is impossible to rule out intellectual disability. Executing Mr. Segundo absent a complete investigation of his adaptive deficits would be contrary to Supreme Court law and to public interest in fair judicial proceedings.

a. Under *Hall* and *Moore*, Mr. Segundo's adaptive deficits must be investigated according to prevailing medical norms to preclude the risk of executing an intellectually disabled person.

To prove intellectual disability, a defendant must establish (1) significantly sub-average intellectual functioning, (2) deficits in adaptive functioning, and (3) the onset of these deficits during the developmental period. *See Atkins*, 536 U.S. at 308 n.3. While the *Atkins* Court left the precise definition of intellectual disability up to the states, it noted that the first prong is typically defined as an IQ score two standard

deviations below the mean—approximately 70—with a standard error of measurement of about five points in either direction. *See id.* at 309 n.5, 317.

In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Supreme Court revisited the standard for intellectual ability and stressed the importance of providing a "fair opportunity" to litigate an *Atkins* claim. Focusing on prong one (intellectual functioning), the Court rejected Florida's practice of requiring a defendant to show a 70 or below IQ score to prove intellectual disability. The Court explained that, while *Atkins* allowed the states to define intellectual disability, it did not grant the states "unfettered discretion." *Id.* at 1998. Rather, the states' assessment of ID claims must be informed by the opinions of the medical community. *Id.* It is widely accepted in the medical community that IQ is best understood as a range, and that the standard error of measurement of five points in either direction allows a defendant to meet prong one so long as his score is 75 or below. *Id.* at 1996. "A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability." *Id.* at 2001.

The Court acknowledged the death penalty as "the gravest sentence our society may impose," and concluded that "[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Id.* at 2001. To ensure a fair opportunity to litigate the claim, the Court held that once a defendant makes a sufficient showing of "significantly sub-average intelligence"—that is, a qualifying IQ score when taking into consideration the standard error of measurement—the court *must* move on to the second prong to determine whether the

petitioner has shown adaptive deficits as defined by the current scientific standards. *Id*. ("This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.").

Recently, in *Moore v. Texas*, 137 S. Ct. 1039 (2017), the Supreme Court yet again revisited the standard for intellectual disability, this time focusing on prong two (adaptive deficits). The Court reaffirmed the holdings in *Hall* that the state court must take the standard error of measurement[7] into account when assessing prong one and that once a defendant makes a showing of a qualifying IQ score, the state court must move on to assess adaptive deficits. *Id.* at 1049–50. With regard to adaptive deficits, the Court invalidated the so-called *Briseno* factors used in Texas cases, and stressed the importance of relying on the current expertise of the medical community. *Briseno* required that adaptive deficits be "related" to intellectual-functioning deficits and set out seven factors for courts to use in assessing intellectual disability claims, such as whether lay persons recognized the individual as intellectually disabled and whether the person could lie. *Id*. Using these factors, the

[7] The Court further clarified that it would be improper to adjust the standard error of measurement on an individual IQ test based on perceived "sources of imprecision" that existed at the time of the test. *Id.* at 1049 ("the presence of other sources of imprecision in administering the test to a particular individual cannot *narrow* the test-specific standard-error range.") (internal citations omitted) (emphasis in original). In other words, the standard error of measurement in an IQ score is intended to take into account any possible factors that may have affected the precision of that score and those interpreting the score should not raise it based on individual factors that may have been present in the test-taker or the test-taking environment. Indeed, the majority expressly rejected the State's and dissent's argument to the contrary. *Id.*

Texas Court of Criminal Appeals (CCA) declined to grant relief to Bobby Moore because of what he *could* do—mow lawns and play pool for money—and overlooked his adaptive deficits. *Id.* But the CCA's test was based upon "lay perceptions of intellectual disability" and stereotypes of what an intellectually disabled person looks like. *See id.* at 1051. An adaptive deficits analysis should focus on what a person *cannot* do. *Id.* The Court labeled the *Briseno* factors as "an invention of the [CCA] untied to any acknowledged source[,] . . . [n]ot aligned with the medical community's information, and drawing no strength from our precedent," and plainly stated that "the *Briseno* factors create an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 1044 (quoting *Hall*, 134 S. Ct. at 1990).

Under *Hall* and *Moore*, if a defendant establishes an IQ within the range of error for intellectual disability, then (1) the court is required to consider adaptive deficits, and (2) the court must consider the adaptive deficits according to modern medical standards. *Moore*, and its affirmation of the principles in *Hall*, expose the errors in this Court's resolution of Mr. Segundo's claim that trial counsel were ineffective by failing to investigate intellectual disability. Once Mr. Segundo made his strong showing that his multiple qualifying IQ scores satisfied prong one of *Atkins*, the Court was *required* to move on to an analysis of prong two adaptive deficits. If Mr. Segundo is to be given a "fair opportunity" to show that he is intellectually disabled, as promised in *Hall*, he must also be granted the funding "reasonably necessary" to investigate prong two adaptive deficits—particularly when prior defense teams failed to conduct such an investigation.

b. Mr. Segundo's state habeas proceedings were pervasively tainted by the *Briseno* factors.

At the state habeas level, defense expert Dr. Stephen Thorne opined that Mr. Segundo is not intellectually disabled after meeting with Mr. Segundo only one time, administering the WAIS-IV test, and reviewing trial transcripts, MHMR and TDCJ records, and the flawed reports from Dr. Hopewell and Dr. Goodness. *Writ Hearing* at 2 R. 18, 51. The WAIS-IV, a modernized version of the test given to Mr. Segundo before trial, revealed that Mr. Segundo had an IQ score of 72. *Id.* at 51. Despite yet another qualifying IQ score, neither Mr. Segundo's attorney nor Dr. Thorne conducted an appropriate adaptive deficits investigation before concluding that Mr. Segundo is not intellectually disabled. Instead, Dr. Thorne relied on the *Briseno* factors as applied to Mr. Segundo's self-report, in clear conflict with *Moore*. None of the experts followed prevailing medical norms by investigating Mr. Segundo's adaptive *deficits*. They focused on what he *could* do.

i. The defense team failed to conduct an appropriate adaptive-deficits investigation, instead focusing on Mr. Segundo's perceived adaptive strengths based on a single interview.

Although the state habeas court set an evidentiary hearing to resolve the issues related to the *Atkins* claim in Mr. Segundo's briefing, Mr. Segundo's attorney, Jack Strickland, only retained an expert to evaluate Mr. Segundo after the hearing was set. *Writ Hearing* at 2 R. 15–17. That expert, Dr. Thorne, ultimately testified that Mr. Segundo's IQ score of 72 did not meet the first prong of the intellectual disability standard, that Mr. Segundo had no significant deficits in adaptive functioning, and that there was no evidence of any disability manifesting before Mr.

Segundo turned 18 years old. *Writ Hearing* at 2 R. 61. Dr. Thorne's "assessment," was primarily based on his single interview with Mr. Segundo and review of the trial file. *Id*. at 18.

In line with *Briseno*, Dr. Thorne found it persuasive that Mr. Segundo had "never before" been identified as mentally retarded. *Cf. Moore*, 137 S. Ct. at 1051 (rejecting the CCA factor considering whether a person's family, friends, teachers, and authorities considered him to be mentally retarded). Dr. Thorne did not mention that the TDCJ records also showed Mr. Segundo had IQ scores of 66, 70, and 71. *Writ Hearing* at 2 R. 24.

Like Dr. Goodness, Dr. Thorne suffered from the false impression that a 75 IQ score is simply too high for an intellectual disability diagnosis. *Id*. at 29. Further, he testified that the IQ score factor is given the most weight in an intellectual disability diagnosis, above adaptive deficits and onset before age 18. *Id*. at 52; *see Hall*, 134 S. Ct. at 2001. With that in mind, Dr. Thorne went on to say that he found no evidence of any onset before age 18 in Mr. Segundo's case; of course, the records he reviewed were made in anticipation of trial and trial counsel had stopped any intellectual disability investigation once Dr. Goodness reported that an IQ of 75 was too high. *See id*. at 53. Dr. Thorne noted that he saw no indication that Mr. Segundo was in special education, but Dr. Thorne possessed no education records. *See id*. Instead, he relied extensively on Mr. Segundo's self-report. *Id*.

Based on this self-report, Dr. Thorne concluded that someone like Mr. Segundo who knows to be polite in social settings or to jail guards, has held simple jobs like

paper folding and lawn-mowing, and remembered to bring a laptop when shopping with his wife so he could watch a movie while he waited, could not be intellectually disabled. *Id*. at 56–58, 69; *cf*. *Moore*, 137 S. Ct. at 1050 (noting that strengths developed in prison should not be used in evaluating adaptive deficits); *Briseno*, 135 S.W. at 8 (listing as a factor whether the person has "formulated plans and carried them through"). And despite the fact that he "never quite understood it," Dr. Thorne found it relevant that Mr. Segundo participated in a music group in church. *Id*. at 70–71.

In his testimony, Dr. Thorne properly relayed the criteria for intellectual disability but demonstrated an overall incorrect theory—using hard IQ cut-offs, conducting an adaptive deficits evaluation based primarily on self-report, and deciding no pre-18 onset without a proper investigation into Mr. Segundo's pre-18 life. Therefore, he inaccurately testified—for the defense—that Mr. Segundo's IQ of 72 was simply too high and Mr. Segundo seemed nice enough to not be intellectually disabled. He relied on the stereotypes perpetuated in *Briseno* and struck down by *Moore*.

ii. The State's expert likewise focused on Mr. Segundo's adaptive strengths and conducted his evaluation according to the *Briseno* factors.

The State called Dr. Randall Price, a forensic psychologist at the state habeas hearing. Dr. Price had evaluated Mr. Segundo before trial but did not testify at trial and did not re-evaluate Mr. Segundo prior to the hearing. *Id*. at 75, 77. Notably, when Dr. Price evaluated Mr. Segundo, intellectual disability was not "the focus" of the evaluation. *Id*. at 79.

Dr. Price gave Mr. Segundo the Reynolds Intellectual Assessment and scored Mr. Segundo's IQ at 86. *Id*. at 84. Both Dr. Thorne and Dr. Price agreed that the Reynolds test overestimates intelligence and that the WAIS-III and WAIS-IV are more reliable. *Id*. at 83, 85. Beyond the inflated IQ score, Dr. Price's adaptive functioning opinion, based on records and anecdotal evidence, was infected by the debunked *Briseno* factors. *See id*. at 87–88.

First, Dr. Price noted that Mr. Segundo's crime of conviction must have involved "goal-directed" thinking and planning. *Id*. at 89; *cf*. *Briseno*, 135 S.W.3d at 8 ("[D]id the commission of that offense require forethought, planning, and complex execution of purpose?"). Dr. Price also considered the story of Mr. Segundo bringing a laptop to the mall to avoid boredom while his wife was shopping to be evidence of planning and goal-directed behavior, which, according to Dr. Price, is inconsistent with adaptive deficits. *Id*. at 90; *cf*. *Briseno*, 135 S.W.3d at 8. Dr. Price focused his evaluation on the things Mr. Segundo *could* do and paid no attention to things Mr. Segundo *could not* do. For example, Mr. Segundo had a driver's license, went to church, and tried to give parenting advice to the son he was estranged from for eighteen years. *Id*. at 90-91; *cf*. *Moore*, 137 S. Ct. at 1050 ("But the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.") (emphasis in original). Dr. Price paid no mind to any functions Mr. Segundo lacked.

Furthermore, Dr. Price considered—and specifically quoted—the *Briseno* factor of leadership. *Id*. at 92; *see Briseno*, 135 S.W.3d at 8 ("Does his conduct show leadership or does it show that he is led around by others?"). Because Mr. Segundo

paid bills and maintained a home, Dr. Price opined that he could not be intellectually disabled. *Id*. at 92. Of course, Dr. Price never spoke to Mr. Segundo's wife or ascertained how much of the household responsibilities were actually handled by Mr. Segundo. At trial, Edgardo Fernando, a friend of Mr. Segundo and Mr. Segundo's wife, testified that Mr. Segundo's wife mostly tells him what to do and Mr. Segundo lets her make the decisions. *28 R. 144*. But Dr. Price relied on Mr. Segundo's self-report while admitting that the accuracy of self-report was a concern. *Writ Hearing* at 2 R. 110.

Finally, Dr. Price's rather astounding analogy for adaptive deficits establishes exactly how much he focused his evaluation on adaptive strengths, in direct contradiction of the medical standards at the time:

> [Prosecutor:] Would you agree with me—and this may be oversimplified—that if somebody suffered the loss of a leg, outfitted with a prosthesis, and learned to walk and maybe even job, drive a car with that artificial limb, that they would still suffer from a disability, but they learned to cope with that, irrespective of that loss, to a greater or lesser degree, depending on the individual?
>
> [Dr. Price:] Some would even say if they were able to do those things, *it wouldn't be a disability*.
>
> [Prosecutor:] Would you agree with that proposition?
>
> [Dr. Price:] I wouldn't disagree with it.
>
> [Prosecutor:] Wouldn't disagree or would agree with it?
>
> [Dr. Price:] I wouldn't disagree with it. It's a disability when it prevents you from doing something. If you can do something anyway in spite of a handicap, it's not a disability.

(113) (emphasis added). According to Dr. Price, a person missing a limb is not disabled as long as they can still get by with a prosthesis. He focuses on what a person can do—not on the obvious disability. *Cf. Moore*, 137 S. Ct. at 1050 (noting *Briseno* factors were incorrect according to the medical community at the time they were created).

Beyond Dr. Price's testimony, the *Briseno* factors tainted the entire state habeas proceeding. Before testimony even began, the defense entered the *Briseno* opinion into evidence as an exhibit, as well as Texas Health and Safety Code § 591.003(13), which codified the *Briseno* factors. *Writ Hearing* at 2 R. 9. During argument, the State argued that Mr. Segundo does not qualify as intellectually disabled under *Briseno* because of his adaptive strengths, such as possessing a driver's license and running a "landscaping business," which consisted of mowing lawns. *Id*. at 120–21. As for the defense argument, Strickland—after putting on evidence contrary to the *Atkins* claim he had raised in his brief—merely asked for more time to do another IQ test. *Id*. at 120.

In the state habeas court's findings of fact and conclusions of law, adopted from the State's proposed findings, it determined that Mr. Segundo possessed "high adaptive functioning" and "functions at such a high level" that it counteracts any "small deficits in intelligence below the normal threshold of retardation." *SHR* at 580. The trial court's determination was based on the testimony of Dr. Price and Dr. Thorne—testimony in which both focused adaptive strengths, rather than deficits. *See id*. State habeas counsel did not file any objections to these findings.

c. Mr. Segundo has been deprived of a fair opportunity to investigate and litigate his intellectual disability claim.

Mr. Segundo has established multiple qualifying IQ scores for his *Atkins* claim. But because of errors by prior counsel and a lack of funding, he has never been able to properly investigate prong two—adaptive deficits. Once Mr. Segundo made his strong showing that his multiple qualifying IQ scores satisfied prong one of *Atkins*, the Court was *required* to move on to an analysis of prong two. If Mr. Segundo is to be given a "fair opportunity" to show that he is intellectually disabled, as promised in *Hall*, he must also be granted the funding "reasonably necessary" under *Ayestas* to investigate prong two adaptive deficits. The Court's deprivation of such funding, while applying the wrong legal standard, denied Mr. Segundo that "fair opportunity" and created an unacceptable risk that an intellectually disabled person will be executed.

Mr. Segundo may very well be intellectually disabled. The courts cannot decide the issue absent a correct adaptive deficits investigation. Accordingly, Mr. Segundo requests this Court grant his 60(b) motion to reopen the proceedings to apply the correct funding standard as of the time he filed his second request for funding.

CONCLUSION AND PRAYER FOR RELIEF

This Court's denial of funds to litigate Mr. Segundo's unexhausted IAC *Atkins* claim under the incorrect and overly-burdensome legal standard created a procedural defect in the proceedings. This defect was exacerbated by the deprivation of adequate, professional, and conflict-free counsel through every stage of litigation, and has resulted in a case that is truly extraordinary. This confluence of factors creates an

unacceptable risk that the State of Texas will unjustly execute a potentially intellectually disabled person and undermines any confidence in the outcome of these proceedings. Mr. Segundo does not attempt to raise new claims in this Motion and likewise does not attack this Court's substantive ruling on the existing claims. Rather, in light of the procedural irregularities and extraordinary circumstances that this case presents, Mr. Segundo requests this Court exercise its power under Rule 60(b) and reopen the proceedings as of the time Mr. Segundo filed his second funding motion to ensure that justice is done.

Respectfully submitted,

/s/ *Jessica Graf*
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Capital Habeas Unit
Office of Federal Public Defender
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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2018, I electronically filed the foregoing document with the Clerk of the United States District Court for the Northern District of Texas, Fort Worth Division by using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the Court's CM/ECF system.

/s/ *Jessica Graf*
Jessica Graf

CERTIFICATE OF CONFERENCE

I hereby certify that on May 17, 2018, undersigned counsel of record for Mr. Segundo communicated with Stephen M. Hoffman, counsel for the Director, who stated the Director is opposed to this motion.

/s/ *Jessica Graf*
Jessica Graf

M E M O R A N D U M

TO: Mark Daniel, Attorney

FROM: Danny LaRue, Investigator

DATE: October 24, 2006

RE: State of Texas vs. Juan Segundo

SUBJECT: 2/3/06 Conference at Criminal District Court #4 courtroom with defendant Juan Segundo, you, Attorney Wes Ball, Mitigation Expert, Shelly Schade and myself.

Upon review and evaluation of the case file you supplied last November, 2005, I came to a conclusion that our client/defendant, might possibly be involved with numerous unsolved crimes, ie. murders. I took it upon myself to contact my resources within the Fort Worth Police Department (FWPD) Homicide Section regarding their ongoing investigations pertaining to Mr. Segundo.

On 1/20/06 I went to the FWPD Homicide office and met with Sgt. David Thornton, who supervises the ten homicide detectives, including Det. Manny Reyes who has filed this case and related ones.

Due to my past personal experiences involving serial killers, I asked Sgt. Thornton, if his office/command was in the process of investigating other offenses regarding Juan Segundo. He replied that "yes we are looking at him on many other sex related murder cases through DNA testing." I asked Thornton <u>if</u> Segundo supplied information which might solve one or more unsolved such cases, would he, in his position, be opposed to Segundo receiving a life sentence rather than the death sentence in a trial proceeding. His response was "No" but he went on to state that he could not speak for the District Attorney's prosecutor, Alan Levy. Thornton further stated that Levy was not happy or trusted any of Det. Manny's Reyes' investigations and that he (Thornton) and the FWPD Homicide office was not happy with Alan Levy regarding the cooperation of such cases and the prosection of same.

Upon conclusion of my office conference with Thornton, I proceeded to the Tarrant County Jail and discussed these issues with Juan Segundo. He was very adamant in his denial of not committing any murders. I related to Segundo of the scientific evidence connecting him through DNA to two murders.

On 1/26/06 I relayed to you the details of my conferences with Sgt. Thornton and Segundo. You advised that you would consult with Alan

Levy regarding same. A few days later, you contacted me by telephone and advised that Levy was opposed to Thornton's position, but that he would have to take it under consideration if Segundo provided details of other unsolved murders.

On 2/3/06 you, Attorney Ball, Shelly Schade and myself had a conference with Juan Segundo in the courtroom of CDC#4. We were surrounded by court bailiffs for security reasons. You, Ball and Schade expressed your concerns to Segundo regarding our defense strategy and relayed to him my conversations with Thornton and your conversation with Levy pertaining to the matter of possible unresolved murders which he may have committed. During this meeting, we all (you, Ball, Schade and myself) expressed the importance of the possibility of a sentence less than the death penalty. Segundo sat quietly and seemed to have listened to our concerns. After more than an hour of our discussions regarding a possible plea agreement with the State, he abruptly stood up from his chair and stated "Fuck all of you; you're all fired and I have nothing to talk to any of you about. They are framing me and none of you understand that. They're doing it to me because I'm Hispanic. I didn't do these two murders or any others." He stormed out of the court room and returned to the court's holding cell.

As we discussed Segundo's behavior, I decided to approach him as he hid behind the toilet area of the cell. I confronted Segundo suggesting that his temper and rage against his defense team was unacceptable. Further, it was critical that he work with his defense team to ensure the best outcome. He returned to our meeting voluntarily and denied his involvement in the case he is charged, as well as any other cases that DNA might implicate him. Further he stated, "I'm a victim of race discrimination because I am Hispanic. Yall, the judge and jury will make sure I die for things I didn't do because I'm Mexican."

NOTE: Weeks following the above referenced meeting with Segundo, our defense team learned that an additional (third) murder implicated Segundo through DNA evidence.

Danny LaRue, Investigator

From: Dr. Kelly R. Goodness <goodness@sprintmail.com>
To: wes@ballhase.com; mgd1016@aol.com
Sent: Mon, 10 Apr 2006 08:21:17 -0600
Subject: Segundo

The earliest I can get there is 9:30 given I have an appointment earlier. Laurie will set it with the jail if this time works for the two of you. We will meet on the 3rd level in an interview room by booking.

He said that a paper was "waved at" him as one of you "kept saying DNA, DNA". Said he wasn't told what that "meant" He said that Shelley has told him that someone identified his car/a car and he was not told why he should care about that. I think the meeting will be most productive if we are prepared to go through each piece of evidence currently known to the defense, its implication, and require him to provide a response/ suggested defense to the information. We should do so in a manner he can understand as evidenced by his ability to accurately paraphrase each point including its implication and likely effect on a jury. Cheers-kg

Kelly R. Goodness, Ph.D.
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Fax: (817) 379-0320 because
www.drgoodness.com

From: mgd1016@aol.com [mailto:mgd1016@aol.com]
Sent: Monday, April 10, 2006 7:53 AM
To: goodness@sprintmail.com; wes@ballhase.com
Subject: Re: Segundo

KELLY, THANKS...IT IS ON MY CALENDER AND 930AM DOES WORK FOR ME...I WILL BRING MY ENTIRE FILE AND BE PREPARED TO REVIEW THE EVIDENCE CAREFULLY....FOR YOUR BENEFIT, I DO NOT HAVE ANY RECOLLECTION WHATSOEVER ABT ANY PAPER BEING WAIVED AT HIM AT OUR LAST SUMMIT CONFERENCE...THAT SIMPLY DID NOT HAPPEN...ADDITIONALLY, THERE WAS NO DISCUSSION RE HIS CAR OR HIS CAR BEING IDENTIFIED IN ANY OF THE CASES....THAT INFORMATION HAS NEVER BEEN MADE KNOWN TO ME NOR IS IT IN THE MATERIALS WE HAVE.... FOR HIM TO RAISE THOSE TWO POINTS, WHICH REALLY HAVE NO BASIS, GIVES ME CONCERN ABT OUR FUNDAMENTAL ABILITY TO COMMUNICATE WITH THIS GUY...NONETHELESS, LET'S GIVE THIS ONE MORE STAB....THANKS FOR YOUR EFFORTS. MARK G. DANIEL

From: mgd1016@aol.com [mailto:mgd1016@aol.com]
Sent: Tuesday, April 25, 2006 4:48 PM
To: goodness@sprintmail.com; Wes Ball
Subject: segundo

KELLY,
VERY PRODUCTIVE MORNING....GLAD TO BE A PART OF IT....IF THERE IS SOME MEDICATION ON THE MARKET THAT CAN MAKE THAT DUMB BASTARD JUST A SLIGHT BIT SMARTER, GET HIM STARTED ON IT IMMEDIATELY.

MARK G. DANIEL

From: Wes Ball [mailto:wes@ballhase.com]
Sent: Tuesday, April 25, 2006 3:52 PM
To: mgd1016@aol.com
Cc: Dr. Kelly R. Goodness
Subject: RE: segundo

Mark –

I just got a scholarly article in the mail from a new forensic organization, the Segundo Foundation. The article is entitled "DNA, the New Junk Science." I have only read a little of it so far, but I can say the author does not appear to be a retard.

Wes

The current poster boy for executing the “innocent” that all of my death penalty guys are likening themselves to. He was recently executed in Texas. One recent article:
Prosecutor Owns Up to Going After Innocent Man

Ruben Cantu, 18 years old, was convicted of capital murder in San Antonio in 1985 and executed in 1993. Many people - including Sam Millsap, Bexar Co. district attorney at the time of Cantu's conviction - now believe that Cantu was innocent. A 2005 article in the Houston Chronicle led the current DA, Susan Reed, to open an investigation. However, her tactics - including threatening to charge one of the recanting witnesses with "murder by perjury" - have led all the witnesses to hire attorneys and clam up. And it is now unclear whether any real investigation will take place.

Wrongful convictions in capital cases are, unfortunately, not unusual. The Death Penalty Information Center (www.deathpenaltyinfo.org) lists 123 cases since 1973 in which convicted inmates have been released from death row because of innocence. What is very unusual is a prosecutor who takes full - and personal - responsibility for the mistake.

Sam Millsap has done just that. Last weekend, speaking at the Faces of Wrongful Conviction conference at UCLA, Millsap introduced himself to the audience of mostly criminal defense attorneys and activists as the man "who is at least partially responsible for the execution of the 1st innocent man in the State of Texas." (Millsap later qualified his comment by conceding that Cantu is the first innocent person executed in Texas that we know about.) He then accepted full responsibility for the mistake:
"What I accept responsibility for was that I made the decision to prosecute [the Cantu] case as a death penalty case. That was a mistake.
That was a serious mistake."

Millsap described the effect of learning about the evidence pointing to Cantu's innocence from the Houston Chronicle reporter as "painful beyond description." He says he is speaking out in the hope that other prosecutors who have made similar mistakes will have the courage to review their possibly flawed decisions. At the time of Cantu's trial, Millsap felt that "the only thing a defendant is entitled to is a fair trial." But he believes that Cantu received a fair trial. So the fact that Texas executed an innocent person (who, it happens, was a juvenile at the time of his alleged crime) has led Millsap to conclude that what we owe all the citizens of Texas is more than merely a fair trial. We need to ensure that the execution of an innocent person cannot happen again.

(source: Austin Chronicle)

From: Wes Ball [mailto:wes@ballhase.com]
Sent: Tuesday, April 25, 2006 5:36 PM
To: Dr. Kelly R. Goodness
Subject: RE: segundo

Ok, I am retarded, what is a “Cantu”?

Dr. Goodness & Associates
A Clinical and Forensic Psychology Practice

121 Olive Street
Keller, Texas 76248

(817) 379-4663
Facsimile (817) 379-0320

July 11, 2006

Wes Ball
Attorney at Law
BALL & HASE, P.C.
4025 Woodland Park Boulevard, Suite 100
Arlington, Texas 76103

Mark Daniel
Attorney at Law
EVANS, GANDY, DANIEL & MOORE
115 West 2nd Street, Suite 202
Fort Worth, Texas 76102

Re: Juan Segundo; Cause No.: 0974988

Gentlemen:

As you requested, I am enclosing the results of Mr. Segundo's intellectual testing. The results of his test show that Mr. Segundo's Full Scale IQ was measured as 75 which falls within the borderline range of intellectual functioning. The standard error range (at a 95% confidence interval) for this score places his Full Scale IQ between 71 and 80 (borderline to low average) which also falls above the mentally retarded range. I believe that this score actually underestimates his true IQ. His verbal IQ was measured at 70 (borderline range) and his performance IQ was measured at 85 (low average). His performance IQ may be the best estimate of his true IQ. Mr. Segundo reported that an admixture of English and Spanish was taught to him as his first language and both languages were intermingled and used to communicate in his early home life. Individuals who do not grow up with only English as their first language often go on to score lower on American IQ tests than would otherwise be the case if they were a monolingual speaker. Still, the language issue may not be the only reason his verbal IQ is significantly below his performance IQ.

Mr. Segundo is not a reliable historian and, thus, the reliability of some evaluation results is uncertain. Indeed, he has provided this examiner with at least some inaccurate information from one interview to the next. For example, in an early interview, he reported a loss of consciousness when he was hit in the head as a youth. He denied ever losing

consciousness when interviewed again this month in July 2006. Likewise, he denied knowing how he came to have a prominent scar from his forehead down to his chin when asked in March. He claimed it happened when he was a kid and he did not know how he got it. Yet, in July, he indicated that the scar came from a fight and his mug shot in 1995 clearly showed that he was scar free at that time.

Even if we discount Mr. Segundo's self-report, the sort of rough life style he has had often exposes such individuals to a variety of head injuries that they may not realize are significant. Head injuries can come from bar fights, automobile accidents, domestic abuse, job-related accidents such as chemical exposure, and the list goes on. Mr. Segundo reported that he once had a job cleaning out chemical tanks wherein he had to don a rain suit and respirator, yet still injured himself when "the tester didn't work." He reported that this injury left him on Worker's Compensation for quite some time. This means that there are Worker's Compensation records that may include neuropsychological records made during that time period. You may wish to insure that whoever is in charge of reviewing or obtaining records secures related information. Mr. Segundo advised me that he believes that he did some testing similar to what I had given him when he was evaluated in Cleburne by the Texas Rehabilitation Commission's doctor. Typically, Texas Rehabilitation Commission (which is now called Department of Assistive and Rehabilitative Services – Vocational Rehabilitation Division) customarily sends individuals to psychologists for psychological or neuropsychological testing. The results of these evaluations, which would have been from prior to his capital murder charges, may be the best sort of evaluation information that can be obtained in this case. Currently, Mr. Segundo appears to be depressed and is either responding more slowly and less thoroughly due to his depression (which is what he states is the problem) or he is not fully applying himself during testing. A third alternative is that his depression is exacerbating neurological deficits that have been present due to some form of brain injury. Whatever the case may be, records from TRC and/or Worker's Compensation should help ferret out reality.

Given the difference between Mr. Segundo's Verbal IQ and Performance IQ and given his self-reported history, I elected to administer the Repeatable Battery for the Assessment of Neuropsychological Status (RBANS) this month. The results of the RBANS differed significantly from the results of the WAIS-III. The two tests do not measure all of the same domains, but there is some overlap between the instruments. Mr. Segundo scored significantly lower on immediate memory tasks as measured by the RBANS. Likewise, his visiospatial abilities were measured in the deficit range on the RBANS yet measured in the average range with the WAIS-III. Mr. Segundo's total score on the RBANS was 60, which falls in the less than one percentile range. In fact, it is at the .4 percentile range meaning that less than one-half a percentage of the standardization sample scored lower than did Mr. Segundo.

To sum up all of this information, Mr. Segundo's test results may be indicative of neuropsychological deficits from unknown origins. The question now is whether or not

you would like to pursue this information. Given the particular case facts, I fear that confirming neuropsychological deficits may be more hurtful than helpful to his defense and would therefore be poor strategy. Individuals with neuropsychological deficits can pose a significantly higher risk of future dangerousness and I have no doubt that such would be the State's argument if the defense introduces testimony about such deficits.

The functional meaning of the deficits that Mr. Segundo *may have* would not negate his understanding of the actions which he stands accused of. Such deficits could potentially result in his not understanding spoken language *as well as* others, especially complex language. This does not mean that he cannot understand complex information such as the meaning of DNA, his rights, or his attorneys' advice. It simply means that communicating with Mr. Segundo may require more effort and time on others' parts than is usually the case with the average person and he will be less adept at thinking through problems. He may have difficulty keeping information in his head in a manner that would allow him to simultaneously consider the pros and cons of several alternative decisions or behaviors, etc. If real, these deficits may have a bearing on his ability to sustain his attention and recall information after a delay. Please note that the language I have used includes the words "may have difficulty" rather than an inability to do the tasks or skills described.

If you would like to proceed with further evaluation of Mr. Segundo's neuropsychology, a full neuropsychological evaluation would be required. A neuropsychological evaluation only needs to be obtained if you wish to pursue offering brain damage as a mitigating factor. Otherwise, pursuing this issue would be a waste of defense resources. If you would like a neuropsychologist to evaluate the defendant, I recommend Alan Hopewell, Ph.D., who can be reached at (817) 707-6304. Mr. Ball is familiar with Dr. Hopewell as we have worked together on a previous case. I would be happy to provide Dr. Hopewell with information if you so desire.

As I have advised, I do not believe that Mr. Segundo suffers from a major mental illness. My multiple interviews and evaluation did not uncover any suggestion of psychosis and depression appears to be more of a recent (and appropriate) phenomenon than a longstanding issue. It appears likely that Mr. Segundo has had at least a significant alcohol problem and may have had significant drug abuse problems as well. Mr. Segundo certainly qualifies for a diagnosis of Antisocial Personality Disorder. Without a review of his life history, pen packets, and other records, I cannot address what he score he may obtain on a psychopathy measure. I would anticipate that it would be a high score. Mr. Segundo may also qualify for a diagnosis regarding the sexual abuse of children and adults, but I would need more information in order to address these issues.

At this point, I have done all that I could to assist Mr. Segundo in processing his options. I have conducted the intellectual assessment requested and have conducted some neuropsychological testing with Mr. Segundo. I have ruled out a major mental illness and have advised you regarding the likely outcome of pursuing further neuropsychological evaluation. It is my understanding that another individual has done the mitigation

investigation in this case. Should you require assistance via trial consulting, additional mitigation assistance, or consultation, please let me know. I anticipate that the State will call mental health professionals to testify about dangerousness issues whether or not they are allowed to evaluate the defendant. I would be happy to consult in trial in order to assist you in their cross-examination or other matters. Please let me know if this is of interest and whether or not I should keep this case open in my files. We like to close files as soon as we know that our work has been done in a case. Please also let me know if you have any questions or concerns. It is always a pleasure to work with you both and I wish you both good luck in litigating this challenging case.

Regards,

Kelly R. Goodness, Ph.D.

Kelly R. Goodness, Ph.D.
Clinical and Forensic Psychologist
License #3-1223

KG/lac

Enclosures (1)

From: mgd1016@aol.com [mailto:mgd1016@aol.com]
Sent: Wednesday, July 12, 2006 12:43 PM
To: goodness@sprintmail.com
Subject: Re: Segundo

KELLI, I WOULD LIKE YOU INVOLVED AT THIS STAGE...WE REALLY DO NOT HAVE SOCIAL HISTORY RPT, MED RECORDS TRC TESTING OR ANYTHING OF THE SORT....I WILL VISIT W HIM ABOUT WHAT IS AVAILABLE.....THANKS, MARK DANIEL

-----Original Message-----
From: goodness@sprintmail.com
To: mgd1016@aol.com; wes@ballhase.com
Sent: Wed, 12 Jul 2006 11:44 AM
Subject: RE: Segundo
You are most welcome. I will have him call you and I would be happy to advise him about what is needed if you like. He will need a comprehensive Social History Report that summarizes Segundo's background, copies of any medical records, TRC testing, evaluations, or records substantiating injuries, but will not need offense related information to start. -kg

C. ALAN HOPEWELL, PH.D.
Neuropsychological & Psychological Testing
Family Group and Individual Therapy

3704 Mattison Avenue
Fort Worth, Texas 76107

817/732-8441
By Appointment Only

July 14, 2006

Mark Daniel
Attorney at Law
FAX #817/332-2763

ATTN: Terry

Dear Terry:

As per our conversation yesterday, I am enclosing a copy of Dr. Hopewell's CV. Also, for documentation, I need to again state the stipulations of Dr. Hopewell's participation in this evaluation. He is available to us on a very limited basis, normally Saturdays and occasionally on Fridays, so he would not be available for meetings, discussions and depositions. He is willing to provide the assessment and report.

Before I am allowed to schedule this type of evaluation, I do have to ask for payment or an order signed by the judge. The fee for this which includes evaluation of records, psychological/neuropsychological testing and report is $3500.00.

Before the assessment Dr. Hopewell requests that he be given:

Social History
Medical Records
Texas Rehabilitation Records

Thank you so much for your help. Please call me if you need any further information.

Sincerely,

Melody Moore

Melody Moore
Office Manager

/mm

Enclosure - CV

The file that I turned over to Wes Ball is all that I have on Juan. I have tried to locate records but as you know after 20 years, most records have been long destroyed. I have requested any new discovery that has been turned over to the attorneys but have not been notified of any new discovery in 2006. For several months beginning in December, 2005 I was asked by Mark Daniel to hold off on any visits/investigation/work until further notice. In approximately March/April of this year I was told that there was a P.I. that would be assisting me. He was never able to assist in the case and I was under the impression that Bruce is now the investigator.

I have made contact with Juan's wife and family but there are no notes from those visits. They speak very thick Vietnamese and are hard to understand. Juan does have a brother in California but I have not spoken to him. We obviously work our cases differently and I have my P.I. make initial contact with folks (outside of family) before I talk to them. To my knowledge, no fact investigation has been done. I will go thru my files on Wes and Mark to see if there is further communication I can forward to you and will go thru my computer files for any additional letters to Juan. If I locate any new information , I will forward at that time. There is no social history, as I typically do a timeline and provide social history information to the experts so to avoid having my report recovered in a Daubert Hearing. I rarely put anything in writing that can possibly harm my client so that may be why you have not found the information you are looking for.

If you need anything else, please let me know-
sh

Forensic Social Work Consultants, Inc.
Shelli S. Schade, CSMS, LMSW, DAPA
P.O. Box 852550
Mesquite, TX 75185-2550
shellischade@sbcglobal.net
(972) 288-8108
(972) 692-6826 fax
(214) 354-8145 cell

----- Original Message -----
From: Dr. Kelly R. Goodness
To: CSMS LMSW DAPA Shelli S. Schade
Sent: Thursday, September 14, 2006 11:40 AM
Subject: Segundo, Jaun

Shelli,

I have been retained to complete the mitigation work for Mr. Segundo's case. As you know, he goes to trial next month and therefore time is of the essence. I would very much appreciate your assistance in orienting me to your file and helping me understand where the case stands so that I do not waste time duplicating work that you have already done. In short, I would really appreciate your help in determining what direction to go in and who/what needs follow up.

I would very much appreciate your forwarding me any remaining information you might have. Though some of your letters were in the files, I do not think all of them were (or example, your letters to Jaun). Some of the other specific information that I really need, but did not locate in your file include any reports (especially interview summaries and social history) or correspondence you have authored regarding this

case be it to the attorneys, the defendant, collaterals, etc. I could not locate a list of collaterals in your files or figure out what was left to be done. I need to know who you have interviewed, what the interviews revealed and who is left to be interviewed. Did you perhaps create a genogram?

Please feel free to forward electronic files (i.e., e-mails, word processed documents, etc.) via e-mail as that is the quickest and easiest way to share information. Should you have time to orient me today, I am in my office. My contact details are below. I am thanking you in advance for your swift assistance in helping me to sort out where to begin in this pressing matter. -- KG

Kelly R. Goodness, Ph.D.
Clinical and Forensic Psychology
121 Olive Street
Keller, Texas 76248
Office: (817) 379-4663 (GOOD)
Fax: (817) 379-0320

www.drgoodness.com

-----Original Message-----
From: goodness@sprintmail.com
To: wes@ballhase.com; mgd1016@aol.com
Sent: Sat, 5 Aug 2006 6:25 PM
Subject: FW: Segundo

I loved this story!!! However,
I wish dr h would have called me from the jail.. Do you want him to go back?
...
If he will? why army man wanted speedy Gonzalez in chains is perplexing
though
funny as all hell

-----Original Message-----
From: "Alan Hopewell"<a.hopewell@charter.net>
Sent: 8/5/06 1:32:43 PM
To: "Kelly Goodness"<goodness@sprintmail.com>
Subject: Segundo

Kelly:
Canceled all other pts ,d drove up last night specificaly to see Segundo.
Then
took an hour to get the specialty tests to be able to take to the "downtown
taxp)or condo". Then it tooktwo hours of sitting as they claimed the judge
order had never been transmitted, although I had my copy. It was now one
pm.
He was brought down with two guards, but no chains. Then, I tried in vain
for
an hour toi get him to cooperate. He claimed daniels never informed him of
the
exam and answered EVERY question with "I already told that to Dr Goodness,"
even
as to whether he was right or left handed. I finally left at 3, not having a
single datum from him other than name. Have to go back to Ft Hood.
BTW, I am really enjoying it.precisely since it is a challenge.
Good luck with this guy. He is a spook
C. Alan Hopewell, Ph.D., MP, ABPP
American Board of Clinical Neuropsychology
Prescribing Medical Psychologist

RBANS™ Record Form A

Repeatable Battery for the Assessment of Neuropsychological Status

Christopher Randolph

Name Segundo, Jaime Age 43 Sex M Education Level _____

Examiner _____ Date of Testing _____ Ethnicity _____

Observations: _____

MB due in part to depression

	Immediate Memory	Visuospatial/ Constructional	Language	Attention	Delayed Memory	Total Scale
Index Score	53	69	85	53	81	60
Confidence Interval ___%						
Percentile	.1	2	16	.1	10	.4

Index Score	Percentile Rank	Total Scale Index Score
160	>99.9	160
155	>99.9	155
150	>99.9	150
145	99.9	145
140	99.6	140
135	99	135
130	98	130
125	95	125
120	91	120
115	84	115
110	75	110
105	63	105
100	50	100
95	37	95
90	25	90
85	16	85
80	9	80
75	5	75
70	2	70
65	1	65
60	0.4	60
55	0.1	55
50	<0.1	50
45	<0.1	45
40	<0.1	40

ISBN 015416603-0

8 9 10 11 12 BCDE

0154166030

On 8/5/06 7:41 PM, "Dr. Goodness" <goodness@sprintmail.com> wrote:

> What can I ssay? Once a guy has experienced time with me, tis hard to
> want anybody else!
>
> I will ask the attys what they want to do. Did'they get a ct order lg
> enough to go back? Or do we need more? Did you press for the social hx
> and did they give it to you?
> More rebound from the abolishonist social workers doing these -was
> pressed to jump in on a case in dallas that goes to trial in 2 months.
> Nothing had been done in terms of investigation , but dr Crowder was
> retained along with a neuropsychologist who thought he might be retarded based on her testing ...
> Which did not include effort meas
> When she stops jacking around (iq previously was 97) .. Might ask you
> to testify about drugs ice' meth. U game?
>
> Signed,
> still laughing in Louisiana
> -----Original Message-----
> From: "Alan Hopewell"<a.hopewell@charter.net>
> Sent: 8/5/06 5:07:20 PM
> To: "Kelly Goodness"<goodness@sprintmail.com>
> Subject: Re: Segundo
>
> On 8/5/06 5:16 PM, "Dr. Goodness" <goodness@sprintmail.com> wrote:
>
>> Hold on a minute ... I am hyperventilating with laughter ...
>>
>> -----Original Message-----
>> From: "Alan Hopewell"<a.hopewell@charter.net>
>> Sent: 8/5/06 1:32:43 PM
>> To: "Kelly Goodness"<goodness@sprintmail.com>
>> Subject: Segundo
>> Kelly:
>> Canceled all other pts ,d drove up last night specificaly to see Segundo.
>> Then took an hour to get the specialty tests to be able to take to
>> the "downtown taxp)or condo". Then it tooktwo hours of sitting as they claimed
>> the judge order had never been transmitted, although I had my copy. It was
>> now one pm. He was brought down with two guards, but no chains.
>> Then, I tried in vain for an hour toi get him to cooperate. He
>> claimed daniels never informed him of the exam and answered EVERY
>> question with "I already told that to Dr Goodness," even as to
>> whether he was right or left handed. I finally left at 3, not having
>> a single datum from him other than name. Have to go back to Ft Hood.
>> BTW, I am really enjoying it.precisely since it is a challenge.
>> Good luck with this guy. He is a spook
>> C. Alan Hopewell, Ph.D., MP, ABPP
>> American Board of Clinical Neuropsychology

>> Prescribing Medical Psychologist
>>
>>
>
>
> I did find out he was born in CA. That was about it. He was not laughing;
> guess if I had asked he would have told me he had already done so with you.

From: "Dr. Kelly Goodness" <goodness@sprintmail.com>
Date: Sun, 6 Aug 2006 16:29:47 -0500 (GMT-05:00) To:Alan Hopewell <a.hopewell@charter.net>
Subject: Re: Segundo

>I keep asking for info, but get zip; nada; gar nichts. He is stupid,
>but not retarded, I do not think. Plus, with what he did with me, he
>pooched himself as I would have to say any 'retard" scores could be
>based upon noncompliance rather than inherent low IQ

So long as you keep asking for it so that my goals are met as it is always all about me... unless it is about you and the CHALLENGES you set up for yourself. BTW: I am really glad you are enjoying your new role. I admire that you went and made what you wanted happen. Goes with no regrets.

No question he is not a tard and does not belong in the tard yard. More concerned about whether one of his victim's last acts might have been to woop the crap out of his head while she tried to cut him from forehead to chin ... uh humph ... I mean more concerned that the lad has sustained some unfortunate head injury ....

BTW: why were you expecting and wanting him in Chains Rambo? I never have him cuffed, chained, watched, or drugged:) .... men ....

Mark Daniel said it is all his fault and he thought the 2 of you were going together. Said to assure you that you would get paid for your time and please reschedule w/him.

Also let me know about my q about the other case.... I think I have other work for you as well.... very busy now - kg

Kelly R. Goodness, Ph.D.

Dr. Goodness & Associates

A Clinical and Forensic Psychology Practice

121 Olive Street

Keller, Texas 76248

(817) 379-4663
www.drgoodness.com

DETECTIVE T. W. Boetcher #1795

SUBJECT SOLVED HOMICIDE DATE 10-03-96

VICTIM'S NAME: WILLIAMS, FRANCIS

DATE OF OCCURRENCE: November 15, 1994

LOCATION: 2450 Cold Springs Road

SERVICE NO: 94633212

WEAPON USED: Manual Strangulation

CAUSE OF DEATH: Strangulation

SUSPECTS: None

ORIGINAL INVESTIGATOR: Detective T. W. Boetcher ID 1795

NARRATIVE

On Tuesday, November 15, 1994, at 1000 hours, Francis Williams was found at 2450 Cold Springs Road. It had rained for a period of time before her death. Francis Williams was found naked lying face down in a drainage ditch along a heavily traveled road. During the time Francis Williams was found deceased, Detective Thornton was also investigating an additional prostitute that was killed and died of strangulation approximately one mile from where Francis was found. Francis Williams' assailant had taken white spray paint and spray painted KKK on her buttocks area.

At the completion of an autopsy, it was found that Francis Williams died of manual strangulation and there was semen in her oral cavity, along with some blood. Francis Williams was a known prostitute and had been arrested approximately fifty (50) times in the past for prostitution. Francis Williams frequented E. Lancaster and the Riverside area where she prostituted for crack cocaine or money. Francis Williams had been released from jail the day before she was found deceased.

FORT WORTH
Fort Worth Police Department
Special Services Bureau
Homicide Unit
817-877-8225

UNSOLVED HOMICIDE INVESTIGATION INFORMATION

VICTIM: Francis Williams
OFFENSE LOCATION: 2450 Cold Springs Road
DATE OF OFFENSE: 11-15-1994
SERVICE NUMBER: 94633212
DETECTIVE: Boetcher
CAUSE OF DEATH: Manual Strangulation

SUMMARY: A truck driver that worked in the area found the victim nude in a ditch alongside the road. The victim had "KKK" painted in white letters on her buttocks. She was a known prostitute.

EXISTING SUSPECTS: No

DNA AVAILABLE: YES__X___ NO_____
DNA PROCESSED YES__X___ NO_____ YEAR__1995___ CODIS_____
RESULTS:

LATENT PRINTS OF VALUE: YES_____ NO__X___ AFIS_____

WEAPON TYPE: Manual

FIREARM EVIDENCE AVAILABLE: YES_____ NO__X___
FIREARM EVIDENCE PROCESSED: YES____ NO__X__ NIBIN_____

POLYGRAPH: NUMBER__0___ NUMBER DECEPTION_____

VICAP: YES__X___ NO_____

KNOWN WITNESS TO OFFENSE: YES_____ NO__X___

PHOTOSPREAD/ LINEUP: YES____ NO_X____

ADDITIONAL WITNESS COMMENTS:

Detective Boetcher checked with several prostitute that frequent E. Lancaster, along with Vice, in an attempt to determine if any information could be developed into the death of Francis Williams. Detective Boetcher learned that Francis Williams may have been last seen with an Hispanic male, a rumor from a Mary Hall, who is a known prostitute was that Francis stole a large amount of money from the Hispanic male and this was why she was killed. Detective Boetcher was unable to verify this rumor. Detective Boetcher had the Crime Lab run a DNA on Francis Williams semenal fluids to see if there was any comparison to Detective Thornton's murder or additional murders that were being investigation in Richardson, Texas and Dallas, Texas. The DNA collected did not match that of Francis Williams.

Detective Boetcher did develop information through a Jimmy Black who stated that two friends of his he believed were responsible for Francis Williams' death. After checking the fingerprints of Jimmy Black, he was identified as Michael Cornet Robinson. The fact that he lied on his deposition tainted his credibility. Detective Boetcher interviewed Devin Gardner, a Black male, 062677 and Day run Hunt who Michael Cornet Robinson implicated in Francis Williams' death. Both of the subjects denied any involvement and stated they did not know Francis Williams or any information pertaining to her death.

Detective Boetcher filled out an FBI/Vicap report placing Francis Williams in the national computer for unsolved homicides, along with the fact that a DNA sample is available. At this time, Detective Boetcher has no additional workable leads pertaining to Francis Williams' death. It appeared that she might have been picked up by someone in a tractor trailer rig and deposited in the drainage ditch where she was found.

ADDITIONAL INVESTIGATION RECOMMENDED:

1. **Compare Michael Robinson's DNA to specimen from victim.**
2. **Compare Troy Washington's DNA to specimen from victim.**
3. **Devin Gardner is listed in the suspect section. Gardner is deceased according to ME Record #984443T. (How good of a suspect was he?)**
4. **Enter DNA into CODIS.**

REVIEWED BY: R A Gallemore Jr. **DATE** 10-07-02

BKNO _____ CID# 0142726

Reporting Officer TW BOETCHER ID# 1795 Division _____

Supervisor _____ Rank _____ ID# _____

Property Disposition Requested _____

CASE REPORT

Felony ( ) State Jail ( ) Misdemeanor ( )

Offense: CAPITAL MURDER Offense# 94633212 Lab# _____

Defendant JUAN MESA SEGUNDO Race H Sex M Age 43 DOB [redacted]

DL# _____ SS# [redacted] Height 506 Weight 130 Eye BLK Hair BRO

Address [redacted] City CLEBURNE State TEXAS

Filing Agency FORT WORTH Agency Code 12 Arresting Agency FORT WORTH

Investigator TW BOETCHER ID# 1795 Phone# 817 3924342

Offense Date 11/15/94 Arrest Date 020706 Custody Agency FORT WORTH

Complainant/Injured Party FRANCIS WILLIAMS Phone# UNKNOWN

Address [redacted] FORT WORTH,TEXAS Zip Code _____ Bus.# _____

Co-Defendants Arrest Date/D.A. Case#

1. _____ /or No Arrest/Warrant Outstanding( ) Juvenile ( )

2. _____ /or No Arrest/Warrant Outstanding( ) Juvenile ( )

3. _____ /or No Arrest/Warrant Outstanding( ) Juvenile ( )

FOR D.A. OFFICE USE ONLY

P/C Determined Yes( )No( )

Filing Attorney _____ Atty. Code# _____

Filing Date _____ Bond Amount _____

_____Case Accepted _____Case Rejected

_____Case Not Filed-Additional Investigation Required

IC___PR___SB___CB___

Writ___ Due:_____

CID#_____

CASE#_____

DOMESTIC ____

GANG RELATED ____

DWI ACC/INJ ____

PUB/PRI/SEC SCHL ____

DA-552 GPC-1307 REV. 9/97

SUPPLEMENTARY REPORT
FORT WORTH POLICE DEPARTMENT

COMPLAINANT LAST	FIRST	DEFENDANT LAST	FIRST	OFFENSE	PAGE
WILLIAMS, FRANCIS		SEGUNDO JUAN MESA		94633212	1

SUMMARY

Francis Williams was found in a drainage ditch on November 15, 1994. She was naked and her corpse was pushed off the road into a drainage ditch. The suspect in this offense used white spray paint and painted "KKK "on her naked buttocks. The area she was discarded is not heavily traveled and the area businesses are involved in the trucking industry .She was found by a passerby who contacted the police.

Detective Boetcher investigated this offense until July 1996, her information was placed in the VICAP computer because it was believed a trucker may have committed this offense, the case went unsolved.

The medical examiners office performed a sexual assault kit on the complainant at the time of her autopsy, there was DNA evidence collected.

As a course of action the DNA evidence was compared to Juan Mesa Segundo HM [redacted] he was in the county jail on two unrelated homicide. Detective Boetcher was advised February 3, 2006 that the DNA evidence collected showed Juan Mesa Segundo as the contributor of the DNA evidence.

Detective filed out the necessary paper work to add the additional murder to his record.

Detective Boetcher went to interview Juan Segundo and he refused to come out of cell, this attempt was on February 09, 2006 at 1200 hours .He requested that I call his attorney Mark Daniels.

SUPPLEMENTARY REPORT
FORT WORTH POLICE DEPARTMENT

COMPLAINANT LAST	FIRST	DEFENDANT LAST	FIRST	OFFENSE	PAGE
WILLIAMS, FRANCIS		SEGUNDO JUAN MESA		94633212	1

WITNESSES

1. Harry Martin
   [redacted]

2. Crime Scene Officer B.R Patterson
   350 W Belknap Street
   Fort Worth, Texas

3. Officer W.C, McGowan ID 1377
   350 W Belknap St
   Forth Texas

4 Detective T.W. Boetcher ID 1795
   350 W Belknap Street
   Fort Worth, Texas
   817 3924342

5 Emma Williams
   [redacted]
   Mother

6. Jo Williams
   [redacted]
   Brother

SUPPLEMENTARY REPORT
FORT WORTH POLICE DEPARTMENT

COMPLAINANT LAST	FIRST	DEFENDANT LAST	FIRST	OFFENSE	PAGE
WILLIAMS, FRANCIS		SEGUNDO JUAN MESA		94633212	1

DETAILS

Tuesday, November 15, 1994

Harry Martin who was driving down 2450 Cold Springs Road. , he located a black female naked in the drainage ditch. . He contacted the Fort Worth Police Department and reported what he found.

Tuesday, November 15, 1994

Fort Worth Officer WC McGowan 1377 was dispatched to 2400 Cold Springs Road reference to a deceased person. Detective TW Boetcher assigned to the Fort Worth Homicide Unit was requested to make the scene .Detective arrived on the scene along with Detective Curt Brannon who arrived to assist. Upon arrival detective observed that the location was about two blocks from a trucking area. The street wasn't a heavy traffic area. The body was that of a middle age black female. She was naked and the actors had spray painted KKK on her buttocks. Detective looked around the area for evidence a wig was located in the grass a block to the north along with a vest.

Crime Scene Officer BR Patterson arrived on the scene and conducted the crime scene investigation.

Tuesday, November 15, 1994 1050 Hours
Steve Rodgers from the medical examiners office arrived on the scene and collected the body of the deceased person; he also bagged her hands for evidence.

Tuesday November 15, 1994

Olive Jack with the medical examiners office identified the body of the deceased female as Francis Williams black female born [redacted]. Doctor Krouse performed an autopsy on the victim and determined she died from manual strangulation.

Tuesday November 15, 1994

Detective Boetcher met with Emma Williams, Jo Williams and Diane Williams they stated she left Sunday two days before .They seen her driving a red pickup with

SUPPLEMENTARY REPORT
FORT WORTH POLICE DEPARTMENT

COMPLAINANT LAST	FIRST	DEFENDANT LAST	FIRST	OFFENSE	PAGE
WILLIAMS, FRANCIS		SEGUNDO JUAN MESA		94633212	1

DETAILS

Tinted windows .They stated she used to be with Hispanic males and she passed by the house around 2 P.M. and blew the horn. Diane stated Francis was arrested a few days before and just got out of jail on Sunday. She stated Francis walked around on E Lancaster.

Detective Boetcher checked in the areas where prostitute are known to work looking to see if anyone seen a red Silverado pickup that frequented the area.

Wednesday November 16, 1994

Bruce Macabee was working at Texas Tire Connection at 2633 Warfield .He stated that he observed a vehicle stop and throw a garbage bag out from his vehicle .He stopped and looked in the bag and found female clothing . He then contacted the Police Department .He stat4ed that the person discarded the cloths on November 15, 1994 at about 1745 hours. Detective made arrangements for crime scene to collect the clothing.

November 19, 1994

Detective Boetcher met with the family members to go over Francis case. Detective wanted to show them pictures of clothing and ask if the cloths were Francis's. They couldn't decide but stated she did wear a wig.

November 19, 1994

Detective Boetcher went by Circle K where prostitutes are known to hang and spoke to a Barbera Moore she stated that Francis was there Monday night at 9P.M. She was wearing black boots and a green dress. Elaine Gayine from the circle K asked Detective if the victim had KKK painted on her head, when asked why she stated that some of the truckers were talking about it on the CB.

SUPPLEMENTARY REPORT
FORT WORTH POLICE DEPARTMENT

COMPLAINANT LAST	FIRST	DEFENDANT LAST	FIRST	OFFENSE	PAGE
WILLIAMS, FRANCIS		SEGUNDO JUAN MESA		94633212	1

November 21, 1994

Detective called Alice Watts at the crime lab and asked if the sexual assault kit came back from the medicals examiners office .Wanted Thornton case on Mellissa Badillo to be compared to see if have a common actor .

November 21, 1994

Fort Worth Officer Redwan called and stated that that he talked to Mary Hall an older prostitute who stated that a male named Gary hangs around E Lancaster and tricks with the girls and drives a red truck.

November 22, 1994 at approximately 1140 hours

Detective learned that Dade County in Florida had three murders by truck stops, the victims had been strangled and the last victim had writing on her body. The writing was to the effect of see if U can catch me N.Y.R...

November 23, 1994 at approximately 0930

Detective Boetcher located Mary Nell she stated she last saw Francis was Monday afternoon behind Windsor Hotel on E Lancaster this was the day before she was found deceased.

November 26, 1994

Detective Boetcher working on leads on this case spoke to Jimmy Black, detective was looking for a red pick up, Jimmy Black stated that he knew of a red truck that a man named Devin used to drive .He put together that truck was connected to the victim,

SUPPLEMENTARY REPORT
FORT WORTH POLICE DEPARTMENT

COMPLAINANT LAST	FIRST	DEFENDANT LAST	FIRST	OFFENSE	PAGE
WILLIAMS, FRANCIS		SEGUNDO JUAN MESA		94633212	1

DETAILS

Jimmy commented on victim buttocks being painted .Jimmy said Dayrun was getting oral sex from the victim and things got out of hand .Jimmy refused to say anything else.

November 26, 1994

Detective Boetcher working on leads on this case spoke to Jimmy Black, detective was looking for a red pick up, Jimmy Black stated that he knew of a red truck that a man named Devin used to drive .He put together that truck was connected to the victim, jimmy commented on victim buttocks being painted .Jimmy said Dayrun was getting oral sex from the victim and things got out of hand .Jimmy refused to say anything else.

November 28, 1994

Detective tried to contact Linda Campbell with the Star Telegram to see if information on victim having writing was in the paper.

November 28, 1994

Detective tried to contact Linda Campbell with the Star Telegram to see if information on victim having writing was in the paper.

November 29, 1994

Fort Worth Officer Conner located Jimmy Black he was brought to the detective office .At first he didn't want to get involved finally gave deposition on what he knew .Jimmy Black said it was officer Conner who thought it was Darwin's truck so it left that alone. Jimmy said it was Derrick Smith, Willie Dayrun and himself behind Rest Inn. Girl walked up and gave Dayrun oral sex .She stopped and walked off, she came back and Willie started hurting her .Next day Willie said he killed that girl and put white stuff on her ass. Black said it was painted on her ass .For additional information see enclosed deposition from Jimmy Black.

SUPPLEMENTARY REPORT
FORT WORTH POLICE DEPARTMENT

COMPLAINANT LAST	FIRST	DEFENDANT LAST	FIRST	OFFENSE	PAGE
WILLIAMS, FRANCIS		SEGUNDO JUAN MESA		94633212	1

DETAILS

November 30, 1994

Detective Boetcher called the crime lab and spoke to Connie; she stated that the oral swab was positive for DNA.

November 28, 1994

Detective Boetcher called FBI learned that Dallas had two female prostitutes that were strangled one in Carrolton and one in Richardson, Texas. Was told that they had suspect in custody and one victim was found by a truck weigh station .Both girls were partially dressed.

December 01, 1994 at Approximately 1615 Hours

Dayrun Hunt was interviewed, he stated that Francis hung around Mary and the last time he saw Francis was a month ago on E Lancaster .He stated that Mary told him Francis was killed he denied Francis ever having sex with him or sucking his penis.Devin Gardner is Dayrun 's brother .

December 08, 1994

Called crime lab asked them to check the cloths that were found for DNA to order DNA on clothes.

December 21, 1994

Connie in crime lab stated there is a small blood sample on the cloths that was recovered, but the crime lab wasn't doing any DNA work right now... The DNA was ordered and the crime lab stated they were now processing the evidence.

SUPPLEMENTARY REPORT
FORT WORTH POLICE DEPARTMENT

COMPLAINANT LAST	FIRST	DEFENDANT LAST	FIRST	OFFENSE	PAGE
WILLIAMS, FRANCIS		SEGUNDO JUAN MESA		94633212	1

DETAILS

January 10, 1995 0830

Jamie King stated that she talked to Alise Watts who was doing the evidence on the cloths ,Alise stated the blood type on the cloths don't match the victim . Alise Watts stated that Melissa Badillo and Francis Williams didn't have the same DNA match.

March 02, 1995

Devin Gardner stated anything he heard of murders was a white truck killed her and threw dope on her .Devin said he heard this from Dayrun.

July 30, 1996

Went by Devin Gardner's trying to locate him for polygraph, received call from Attorney Mark Daniels who stated he wasn't sure if Devin Gardner would take polygraph at this time.

February 02, 2006

Detective Boetcher was advised by Sgt Thornton that the DNA evidence that was requested came back To a Juan Segunda who was in custody for two other homicides.

February 09, 2006

Detective went to the County Jail and spoke with Juan Segunda he wouldn't come out of cell and wanted his attorney .He was shown a photo of the victim and he just laid down on his bed.

Detective went to [redacted] and met with Emma Williams she was told about the developments on her daughter's death.

Segundo v. Davis
No. 4:10-CV-0970-Y

Petitioner's Motion for Relief from Judgement Pursuant to Federal Rule of Civil Procedure 60(b)

Exhibit 18

Excerpts from Homicide Detective T.W. Boetcher's Investigation Notebook

out of hand. Jimmy said Thats how girl got her ass pointed, Jimmy said dam not saying anything else

Dayrun Hunt BM arrested 11/24/94 for Cocaine

Jimmy Black
Dayrun Hunt 0419894
Devin Gardner
in the Truck
Jimmy said girl in back of Truck with Dayrun.

Dillards Hulen Mall

11/25/94
called Linda Campbell
Star Telegram. 390 7867 Trying To
find article

3/2/95 1130

Devin Gardner. 5612 Pinson Fort worth

Devin Gardner. stated only thing he heard of murder was white Trick killed Francis and threw some dope on her he heard this from Dayrun. Dayrun said he heard this from some of the dope fein,

Arlington - dont know address in Arlington
Pager 620 2826

dont know Willie Gus by name

dont mind Taking polygraph.

also heard rumor Mary Hull set Francis up, had Francis met her then she was Killed.

6/19/95 0840
sent ROCIC package To FBI
To enter Francis Williams on Federal information system for unsolved homicides.

7/28/95
Received information on Patrick Gobbe wasn't in Texas at Time of Nov 14 Nov 15 from Tennessee.
See item 17 in black book C

7/29/95 1100
Talked To (Creek) Robert Gardner wanted him To have Kevin Call see, if he would Take polygraph stated he would call back.
Robert Gardner 446 7376
Kevin lives with girlfriend unknown address or phone

4/30/96 0900

Jamie King called crime lab said Robin Hobbs seminal fluid dont match Francis Williams on DNA

7/30/96

5612 Pinson went by Devin Gardner residence on Pinson on Two occassions Trying To get him To Talk polygraphw. was called back by attorney Mark Daniels. stated he wasnt sure if he would let him Take polygraph.

Called mark Daniels gave details stated he will Talk To Devin Gardner for polygraph

Called mark Daniels office said that he droped Devin Gardner as client went by address once again left card-

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JUAN MEZA SEGUNDO,	§	
	§	
Petitioner	§	
	§	
v.	§	
	§	4:10 - CV - 970 - Y
RICK THALER, Director,	§	
Texas Department of Criminal Justice -	§	
Correctional Institutional Division	§	**DEATH PENALTY CASE**
	§	
Respondent	§	

Motion for Appointment of Investigator - Mitigation Specialist to Assist in Development of Unexhausted Facts in Capital Post-Conviction Proceedings

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, Alexander L. Calhoun and Paul Mansur, appointed counsel for Petitioner JUAN M. SEGUNDO, and file this Motion pursuant to 18 U.S.C. Secs. 3006A and 3599 requesting the Court appoint LAURA TANSEY to serve as investigator – Mitigation-Specialist to assist in the development of issues in support of cause for procedural default in this case, and facts of the underlying merits of his claims, in this post-conviction writ of habeas corpus, and would show the Court:

I

Petitioner has been sentenced to death *State of Texas v. Juan M . Segundo*, No.

0974988-D, in the Tarrant County District Court Number 3 following his conviction on a "cold case" dating from a homicide which occurred in 1986. Petitioner's conviction and sentence of death were affirmed on direct appeal by the Texas Court of Criminal Appeals in *Segundo v State*, 270 S.W.3d 79 (Tex. Cr. App., 2008) Petitioner's post-conviction writ of habeas corpus was denied. *Ex parte Juan M. Segundo*, WR 70-963-01 (Tex.Cr.App. December 8, 2010).

Petitioner filed an application for post-conviction writ of habeas corpus in this Court on February 8, 2011 (Docket Entry Number 11). Respondent filed his response on his Answer and Brief in Support on March 12, 2012. (Docket Entry No. 14). This case is presently before the Court pending a filing of Petitioner's Response/Reply to Petitioner's Answer and Brief in Support. (Docket Entry No. 14).

II.

Petitioner was represented in his state post-conviction proceedings by Jack Strickland, an attorney licenced to practice law in the State of Texas. During Strickland's preparation and Petitioner's state post-application writ of habeas corpus, Strickland sought and obtained employment in the Tarrant County District Attorney's Office, the same prosecutor's office which had prosecuted and obtained a death sentence against Petitioner. As part of his representation, Strickland retained the services of a novice attorney, Harmony Schuerman, to review the appellate record and document possible claims. Strickland raised thirteen claims in the post-conviction writ of habeas corpus; the first issues, a claim under *Atkins v.*

Virginia, 536 U.S. 304 (2002), was not litigated in trial proceedings, but was discernable from the trial record based on testimony and evidence of Appellant's low IQ; the remaining claims were record-based claims largely cribbed from the direct appeal brief; two-related , a lethal injection challenge, are not cognizable on post-conviction review.

The state habeas record reflects Strickland did not request from the state habeas court funds for the assistance of a fact investigator or mitigation specialist, nor does the undersigned counsel's review of Strickland's file reflect that Strickland utilized an fact-investigator or mitigation specialist. Records of payments made by the Tarrant County Auditor/Treasurer also reflects to apparent expenses for investigators or mitigation specialists during the state post-conviction proceedings. Review of Strickland's files, along with the Tarrant County Auditor/Treasurer's payment records reflect that Strickland did not employ any psychiatric/psychological or other expert assistance during the pre-filing investigation of the claims in Petitioner's state post-conviction writ. A single psychological expert was appointed by the court only after the state habeas court set the case for an evidentiary hearing on the *Atkins* claim. Review of Strickland's and Schuerman's billing records from the attorney files reflect the attorney hours were entirely devoted to record review and drafting of the post-conviction writ application; there are no itemizations for factual investigation. Strickland's attorney files contain no notes relating to witness interviews with Petitioner's family members, friends, acquaintances, or other potential witnesses or sources of information. There are no notes relating to consultation with any experts during the

investigatory/pre–filing phase of the writ.

III.

In the period preceding the filing of the federal writ application, state writ counsel, as well as state trial counsel and their lead trial psychological expert actively resisted the undersigned counsel's attempt to investigate the basis of the writ by withholding the client files until the threatened intervention by this Court. *See*, *Motion to Compel Release of Trial and Post-Conviction Writ Attorneys' Legal File* (Docket Entry 10). Trial and state writ counsel's intransigence in releasing the files substantially interfered with Petitioner's ability to evaluate the quality of trial and post-conviction representation and to prepare the federal post-conviction writ application.

IV.

The American Bar Association has specifically promulgated *Guidelines for the Appointment of Performance of Defense Counsel in Death Penalty Cases* (Feb. 2003), available in 31 Hofstra Law Rev. 913 (2003). These Guidelines, even if not inexorable commands, establish the basic general standards of practice on which guide representation at the trial, appellate, *and post-conviction* stages of capital proceedings. *See*, *Wiggins v. Smith*, 539 U. S. 510, 524 (2003) (noting that court has "long referred" to "the standards for capital defense work articulated by the American Bar Association (ABA) . . . as guides to determining what is reasonable."). Factual investigation apart from the appellate record has long been a key practice of capital post-conviction writ representation, well prior to the

publication of the ABA's 2003 Guidelines. And this is well-established in Texas, which precludes record-based claims in post-conviction proceedings. *Ex parte Gardner,* 959 S.W.2d 189, 198-200 (Tex. Cr. App. 1998). Extra-record factual investigation and development is the crux of post-conviction representation.

The Guidelines specifically include provisions addressing and guiding post-conviction representation. Guideline 10.15.1 admonishes post-conviction counsel to undertake a thorough *factual* investigation,[1] and incorporates Guideline 10.7, which expressly proscribes counsel's duties of a factual investigation at all stages of capital proceedings.[2] Guideline 4.1 proscribes the use of expert investigative and other assistance by capital counsel through all levels of the proceedings, acknowledging that the investigation of post-conviction claims will frequently involve time commitments which cannot be handled by counsel alone, and will involve factual issues for which counsel lacks sufficient expertise.

Texas statutory authority relating to capital post-conviction representation mirrors the recognition of the necessity of investigators and experts. Article 11.071 has consistently provided for the funding of for investigative and expert assistance in the investigation and development of post-conviction claims, providing counsel the option of seeking financial

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[1] Guideline 10.15.1(E)(1) obligates post-conviction counsel to "fully discharge the ongoing obligation imposed by the [ ] Guidelines, including the obligation[ ] to . .. continue an aggressive investigation of all aspects of the case.

[2] Guideline 10.7(A) provides in pertinent part that "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty."

assistance before hand, or by seeking reimbursement afterward. *See*, Tex.Code Crim.Pro. Art. 11.071, Sec. 3(b), (d).

What established Texas, and national practice make irrefutably make clear, is that post-conviction capital representation cannot be meaningfully accomplished by merely reviewing the trial record and asserting claims gleaned from its pages.

V.

In *McFarland v. Scott*, 512 U.S. 849 (1994), a case addressing the statutory right to federal post-conviction counsel under the predacessor statute to the current one, the United States Supreme Court explained that in addition to counsel, "[t]he services of investigators and other experts may be critical in the pre-application phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified. *Id*., at 855.

The standard for providing investigative or expert assistance is whether such assistance is "reasonably necessary." 18 U.S.C. Sec. 3599 (f) ("Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant . . ."). *See also*, *Fuller v. Johnson* 114 F.3d 491, 502 (5th Cir. 1997) (addressing predecessor statute 18 U.S.C. Sec. 848(q)).

The standard practice within the Fifth Circuit has been to deny investigative resources in federal court to claims which are subject to procedural default, either because they are

raised for the first time in federal court proceedings, or because the petitioner wishes to present additional facts in state court which were not presented in state court. *Riley v. State*, 362 F.3d 302, 307 - 308 (5th Cir. 2004). Thus, the denial of investigative funding has been inextricably tied to the issue of procedural default. *See*, *Fuller*, 114 F.3d at 502. The Fifth Circuit has rejected deficient investigation by state post-conviction counsel as sufficient "cause" to excuse procedural default. *See*, e.g., *Cantu v. Thaler*, 632 F.3d 157, 166 (5th Cir. 2011).

The United States Supreme Court's recent decision in *Martinez v. Ryan*, 566 U. S. ____, No. 10 - 1001 (2012) undermines the Fifth Circuit's blanket rejection of post-conviction counsel's conduct as cause to exclude prejudice.

Martinez arises from a situation in which state habeas counsel failed to raise a potentially meritorious claim of ineffective assistance of trial counsel. During the courts of Martinez's direct appeal from his sexual assault conviction, appellate counsel, assuming the role of post-conviction counsel, filed a notice with the state court that Martinez lacked any post-conviction issues, an action which resulted in the waiver of any post-conviction claims subsequently raised in state post-conviction proceedings. *Id*., 566 U.S. at ___, slip op. at 2 - 3. Subsequent state post-conviction counsel attempted to raise a claim relating to ineffective assistance of counsel, which was rejected by the state court on procedural grounds, concluding that the claim could have been raised in a preceding writ e,.g., the one waived by appellate counsel. *Id*., 566 U.S. at ___, slip op. at 3

Martinez re-asserted the unexhausted ineffective assistance of trial claim in federal court, asserting his initial post-conviction counsel's deficient performance in failing to investigate and discover the claim as cause for the default, but the Ninth Circuit Court of Appeals rejected the claim on procedural default grounds, concluding that state writ attorney ineffectiveness did not constitute "cause" to excuse procedural default in state court. *Id*., 566 U.S. at ___, slip op. at 4 - 5.

The Supreme Court granted certiorari on the case to address whether deficient conduct by state post-conviction counsel which results in procedural default of a claim can ever provide sufficient "cause" under *Coleman v. Thompson*, 501 U.S. 722 (1991) to excuse the failure to exhaust the claim in state court proceedings.

The Court acknowledged that while the *right* to state post-conviction counsel was not constitutionally guaranteed, in circumstances, such as *Martinez*, in which claims of ineffective assistance of counsel could not be meaningfully raised in post-conviction proceedings, equitable principles imposed on federal courts the recognition that "effective" post-conviction counsel was necessary to develop and present such claims, otherwise a petitioner could be totally precluded from raising certain constitutional claims in state court proceedings. Under these circumstances, state post-conviction counsel's deficient conduct could constitute cause for procedural default under *Coleman*. *Martinez*., 566 U.S. at ___, slip op. at 5 - 6.

As justification for deficient counsel serving as "cause", the Court recognized that

state post-conviction proceedings, will, for certain types of claims, be the first and only manner in which state court's could meaningfully address a constitutional violation, in essence rendering the post-conviction proceeding the equivalent of a direct appeal. *Id*., 566 U.S. at ___, slip op. at 4 - 5. A key example of this type of claim is ineffective assistance of trial counsel, a claim which is predicated on facts which are typically unavailable from a review of the trial record, and hence, precluded from an appellate record. *Id*., 566 U.S. at ___, slip op. at 8 - 9. Developing a claim of ineffective assistance "often require[s] investigative work;" typically it depends upon "an effective attorney" to "develop the evidentiary basis of the claim" and "often depend on evidence outside the trial record." *Id*., 566 U.S. at ___, slip op. at 8, 9, 10.

Based on the necessity of extra-record factual development, contingent upon the skills of a diligent attorney, the Court recognized that an effective attorney in developing this type of post-conviction claim is a necessary predicate to developing and presenting such a claim. An inflexible application of procedural default principles in federal would be equitably unfair where the state court's provided either no mechanism to develop such claims, or where the attorney necessary to develop the cliam was "ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984)." *Martinez*, 566 U.S. at ___, slip op. at 11.

Thus, a petitioner could establish cause for procedural default by demonstrating that initial state post-conviction counsel failed to raise a state claim of ineffective assistance of trial counsel due to post-conviction counsel's own failure to meet the *Strickland* standard for

performance (which amounts to cause), and that the underlying substantive claim has merit (which establishes "prejudice"). *Id*., 566 U.S. at ___, slip op. at 11 - 14. The Court remanded the case to the district court to determine whether Martinez could demonstrate both the merits of the underlying claim, as well as cause resulting from post-conviction counsel's conduct. *Id*., 566 U.S. at ___, slip op. at 15.

While the Court majority recognized an equitable basis for ensuring competent, or "effective" post-conviction counsel for the purpose of raising claims of ineffective assistance of trial counsel, *Id*., 566 U.S. at ___, slip op. at 14, Justice Scalia recognized in his dissent the full scope of *Martinez's* logical extent. *Martinez*, by its own rationale, cannot be limited to ineffective assistance of trial counsel claims. *Id*., 566 U.S. at ___, dissenting op. at 2 (Scalia, joined by Thomas, J., dissenting). The equitable footing on which *Martinez* is based rests on the fact that certain types of claims – ineffective assistance of trial counsel being a paramount example – require extra-record factual development by a competent attorney, and cannot be resolved based on a review of the appellate record alone. Such claims can only be raised by competent post-conviction counsel, that is, counsel which is functioning in the manner of post-conviction, as opposed to appellate counsel. It is a logical, if not necessary application of *Martinez* that effective post-conviction counsel is required for those claims which are contingent upon extra-record factual investigation. In jurisdictions such as Texas, if the claim can be resolved purely by recourse to the appellate record, it cannot be raised in a post-conviction writ. *Ex parte Nelson*, 137 S.W.3d 666, 667

(Tex.Cr.App. 2004) ("We have said countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal."). Post-conviction litigation is limited to constitutional violations, the *facts* of which cannot be determined from the state appellate record. In this vein, the distinction between a claim based on a *Strickland* violation as opposed to a violation of *Napue*[3] or *Brady*[4] is illusory; none of these claims can be meaningfully developed and presented without post-conviction counsel's extra-record factual investigation of the case.

Read in conjunction with *McFarland*, *Martinez* underscores the necessity of investigative assistance in *federal* post-conviction proceedings, not simply in cases in which the right to an evidentiary hearing has been indisputably demonstrated, but in cases in which investigative assistance is necessary to establish cause and prejudice. The District Court for the Northern District, albeit in an unpublished order, recognized over a decade ago that investigative assistance is necessary to develop the factual basis for both substantive issues, as well as procedural issues necessary to establish "cause" for procedural default. *Patterson v. Johnson*, 3:99-CV-0808-G. (N.D. Tex. – Dallas Div. Aug 31, 2000). In granting *Patterson* investigative fees, the District Court explained, in light of *McFarland*, that investigative assistance may be necessary to clearly establish and plead the basis of the claim, as well as develop any "cause" to excuse procedural default:

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[3] *Napue v. Illinois*, 360 U.S. 264 (1959) (false testimony by Government witness).

[4] *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution withheld materially favorable evidence).

> . . . as Patterson points out, for the district court to adopt such a holding would place him in a difficult, if not impossible, predicament. In order to obtain relief in a federal post-conviction proceeding, Patterson must allege facts which, if true, would entitle him to relief. Without investigative funds to help identify promising habeas corpus claims, Patterson's counsel may not be able to marshal the facts needed to make a good-faith allegation of a federal constitutional violation. *Even if he could allege facts which, if true, would establish "cause" for the procedural default, without investigative funds at the pre-application stage, Patterson may be unable to show a constitutional violation with sufficient particularity (and perforce, would be unable to show "prejudice").* As the Supreme Court noted in McFarland v. Scott . . . the investigative resources provided under 28 U.S.C. § 848 (q)(9) "may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." Ultimately, the court concludes that it makes little sense to force Patterson to first try to make a good faith claim of a constitutional violation before supplying him with the resources to investigate this claim's factual basis and validity. *This is especially true of a claim that may have been procedurally defaulted in the state post-conviction forum, for which Patterson must also allege and prove not just "cause" for the procedural default, but "prejudice" as well.* If Patterson is to make the requisite allegation of constitutional deficiency and consequent "prejudice" in his petition, he should be allowed to investigate and develop the full extent of the mitigating evidence that trial counsel allegedly failed to investigate and produce at his trial. It is for this purpose that he seeks federal investigatory funds."

Ibid. (Emphasis added).

While preceding *Martinez* by over a decade, the Northern District's ruling in *Patterson* accurately foresaw and *Martinez's* holding as consistent with *McFarland*'s/ 18 U.S.C. Sec. 3599 (f). Where investigative assistance may be useful, if not critical in establishing facts necessary to establish "cause" under *Martinez*, they are "reasonably necessary" under Sec. 3599(f).

VI.

The limitations from litigating an ineffective assistance of trial counsel claim on direct appeal are indistinguishable from those under *Atkins v. Virginia*, 536 U.S. 304 (2002). A finding of mental retardation is contingent not solely upon an individual's low IQ scores (which may or may not be apparent in the trial record) , but also upon a broader inquiry of the individual's mental limitations in dealing with the requirements of everyday life, i.e., his adaptive deficits. *See*, *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 442 n.9 (1985) ("adaptive deficits" are "limitations on general ability to meet the standards of maturation, learning, personal independence, and social responsibility expected for an individual's age level and cultural group."). In fact, the inquiry into mental retardation has moved away from its focus upon an IQ score, regarding the IQ score as merely, a predicate indicator of sub-average intellectual functioning, and places considerable emphasis upon an individuals' adaptive deficits. For a diagnosis of mental retardation, the American Association for Mental Retardation requires that there be "significant limitations ...in adaptive behavior as expressed in conceptual, social, and practical skills." AAMR Manual, at 1 (2002 ed). "Significance" can be established by the limitations in one of the three domains. AAMR Manual, at 74, 77-78. The AAMR manual provides examples of "representative skills" in each of the three domains. Representative conceptual skills are "language, reading and writing, money concepts, and self-direction." *Id.*, at 82. Representative social skills are "interpersonal, responsibility, self-esteem, gullibility, naivete, follows rules, obeys laws, avoids victimization." Id. Representative practical skills are "activities of daily living, instrumental activities of daily living, occupational skills, and maintains safe environments." *Id.*

The American Psychiatric Association's definition of mental retardation also requires that an individual exhibit "significant limitations" in at least two of the following eleven domains: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, health, safety, functional academics, leisure, and work. Diagnostic and Statistical manual of Mental Disorders, Text Revision("DSM-IV-TR"), 41 - 42 (4th Ed. 2000).

As with all mental health issues, social history data is a critical component of an accurate assessment of mental retardation. The inquiry into an individual's adaptive deficits is contingent upon a thorough factual investigation of individual, an investigation which requires comprehensive in-person interviews with all individuals who might possibly have relevant information regarding the deficits, including an individual's spouse, family, friends, acquaintances, employers, and the like. It is only through a social history investigation that an individual's adaptive functioning can be assessed. The individual's functioning must be examined in the context of the different developmental periods: infancy and early childhood, childhood and early adolescence, late adolescence, and adulthood. See 2002 AAMR Manual, at 75.

The inquiry into an individual's abilities and deficits is a highly specialized inquiry, one which cannot be assessed by cursory, rote, or check list questioning. Rather, the investigation must be conducted by an individual with sufficient training and expertise to ask the proper pertinent questions and follow up. Counsel are typically unqualified to conduct this inquiry on their own. In the case at bar, Petitioner would show under *Martinez* that Strickland and his assistant did not conduct this necessary inquiry into Petitioner's adaptive deficits as a part of the development and litigation of the *Atkins* claim. Strickland or his

assistant did not conduct this inquiry even after the state habeas court set the case for a hearing on the *Atkins* claim. In sum, an inquiry into Petitioner's adaptive functioning has not been conducted in Petitioner's case in state court proceedings, and was not a part of the litigation of the *Atkins* litigation in state court. Absent this investigation, it cannot be said that Petitioner*'s Atkins* claim was litigated by counsel having a full knowledge of the facts relevant to his claim. *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Cr. App. 1990) ("It is evident that a criminal defense lawyer must have a firm command of the facts of the case as well as governing law before he can render reasonably effective assistance of counsel . . . A natural consequence of this notion is that counsel has the responsibility to seek out and interview potential witnesses.") Counsel's own ignorance of potential facts would subsequently undermine his competent litigation of the *Atkins* claim by failing to provide relevant data to the expert. *Cf.*, *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997) (counsel ineffective, in part from failure to provide expert with relevant data to support defensive theory); *Commonwealth v. Alvarez*, 740 N.E.2d 610 (Mass. 2000) (counsel failed to obtain medical records and provide them to defense psychologist); *and*, *In re Sixto*, 774 P.2d 164 (Cal. 1989) (counsel failed to provide information relating to drug use to defense experts).

In light of the foregoing, Petitioner would seek this Court's authorization to retain the services of an investigator / mitigation specialist. At a minimum, Petitioner anticipates that state habeas counsel's lack of factual investigation detrimentally affected his presentation of the *Atkins* claim in state post-conviction proceedings.

Petitioner proposes retaining the services of LAURA TANSEY to serve in this capacity and Ms. Tansey's qualifications are set out in her curriculum vitae, which is attached to this motion as Exhibit A and referred to as if fully incorporated herein. Ms. Tansey, who is also a licenced attorney, has experience in the capacity as a mitigation investigator in the factual investigation and development of an *Atkins* claim, and possesses specialized knowledge, training and experience relating to the factual inquiry and evaluation of a individuals' adaptive functioning. Ms. Tansey's services are billed at $ 120 per hour.

Petitioner's family are believed to reside in the Keene/North Texas area, but a brother is believed to reside in Southern California. Petitioner's spouse was born in the Republic of the Phillippines, and is a native speaker of Tagalog. Many of Petitioner's friends and acquaintances are also native speakers of Tagalog. It will be necessary to interview these witnesses with the assistance of an individual who speaks Tagalog, most likely an interpreter. Further, it will be necessary to personally meet with and interview Petitioner's biological relatives, at least one of whom live in Southern California. These interviews can best be accomplished by an individual who has the time and training to conduct mitigation-related interviews.

As noted previously, an adequate investigation into an individuals' background is a complex and time-consuming process, and will typically involve the following: several in-depth interviews with the client, interviews with a wide variety of life-history witnesses (family members, friends, teachers, employers), and collection of reliable, objective documentation about

the client and his or her family (school, medical, mental health, employment records). See, e.g. Welsh S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 2 U. Ill. L. Rev. 323 (1993); Arlene Bowers Andrews, Social Work Expert Testimony Regarding Mitigation in Capital Sentencing Proceedings, Soc. Work 36 (Sept. 1991); Russell Stetler, Mitigation Evidence in Capital Cases, The Champion, Jan./Feb. 1999, at 35-40. *Accord*, aba Guidelines, Guideline 10.7, Commentary, at 80-84 (February 2003). Based on the anticipated effort in locating, traveling to, and meeting with witnesses and collecting relevant documents, Petitioner anticipates that the investigation contemplated will require at a minimum 100 hours. Petitioner would emphasize that based on his review of state habeas counsel's records, this inquiry was not conducted at the state court level, *see*, *Martinez*, supra, which is precisely why it is necessary in federal post-conviction proceedings.

Prayer

WHEREFORE, premises considered, Petitioner respectfully requests that the Court appoint or authorize funds to retain LAURA TANSEY in this matter and authorize the initial expenditures in the investigation of this case in the amount of $ 12,000.00.

Respectfully Submitted,

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By: /s/ Alexander L. Calhoun
Alexander L. Calhoun
Member of the Bar of this Court

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By: /s/ Paul E. Mansur
Paul E. Mansur
Member of the Bar of this Court

Attorneys for Petitioner,
Juan Meza Segundo

Certificate of Conference

I certify that on April 27, 2012, I attempted to confer d with opposing counsel on the matters raised in the foregoing motion but opposing counsel was unavailable. On April 30, opposing counsel contacted me and advised that Respondent OPPOSES the relief sought in this motion.

/s/ Alex Calhoun
Alex Calhoun

Certificate of Service

I certify that on April 30, 2012, I served by email, a true and correct copy of the motion to release habeas record upon opposing counsel at the following address via ECM/EF:

Greg Abbott
attn: Thomas Jones
Texas Attorney General
Postconviction Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548

/s/ Alex Calhoun
Alex Calhoun

Exhibit A

Curriculum Vitae of Laura Tansey

Laura L. Tansey

P.O. Box 925416 • Houston, TX 77292 • (512) 299-2163 (mobile) • lltansey@gmail.com

PROFESSIONAL EXPERIENCE

Attorney at Law in Private Practice
September 2007 – present

- Provide direct representation to clients charged with capital murder and under a sentence of death with a focus on developing mitigation evidence
- Specialize in developing mitigation evidence in cases of Spanish-speaking clients

Reprieve, London, England
Legal Volunteer, May 2007 – August 2007

- Drafted motions and performed researched as part of legal team representing dozens of Guantánamo Bay detainees.
- Conducted research and wrote paper comparing approaches to mitigation in death penalty cases in India and the United States

State Bar of Texas, Texas Lawyers Care, Austin, Texas
Texas Access to Justice Commission
Assistant Director, March 2006 - April 2006, June 2006 – April 2007

- Awarded "Employee of the Quarter" April 2006

State Bar of Texas, Texas Lawyers Care, Austin, Texas
Texas Access to Justice Commission
Acting Director, November 2005 - January 2006, April 2006 - June 2006

- Oversaw the development and implementation of initiatives designed to expand civil access to justice in Texas
- Worked closely with State Bar leadership, Commissioners, and Supreme Court of Texas Justices to fulfill the goals of a 5-year strategic plan to enhance the quality of justice in civil legal matters
- Supervised staff of 5 attorneys and administrative personnel

State Bar of Texas, Texas Lawyers Care, Austin, Texas
Texas Access to Justice Commission
Program Attorney, September 2003 - October 2005

- Provided administrative support for the statewide delivery of legal services
- Instituted policies and initiatives to enhance the quality and quantity of legal services available to low-income Texans
- Spearheaded Katrina Disaster Relief efforts for the Louisiana State Bar, which brought together key leaders in the private, government, and nonprofit communities to create an organized disaster relief legal response

Political Asylum Project of Austin, Austin, Texas
Coordinating Attorney, Asylum Seekers Assistance Program, September 2002 - August 2003

- Managed caseload of over 35 asylum cases, and other related immigration matters involving asylees and refugees
- Participated in community education and outreach activities regarding asylum, refugee, and related immigration issues
- Served as instructor for the Austin Police Department during its 2003 TCLEOSE (Texas Commission on Law Enforcement Officers Standards and Education) training on working with the immigrant community

Political Asylum Project of Austin, Austin, Texas
Law clerk, June 2000 - May 2001, September 2001 - July 2002

- Interviewed asylum seekers and prepared asylum applications; completed necessary follow-up, including legal brief writing
- Transitioned the Cuban Detention Project to this organization
- Conducted rights presentations to INS detainees
- Monitored the progress of Honduran Temporary Protected Status cases and conducted necessary follow-up with INS

Inter-American Commission on Human Rights
Co-author of amicus brief, January - June 2002

- Co-wrote legal brief which examined due process rights during deportation proceedings in Argentina

Programa de Justicia, USAID with Checchi and Co. Consulting, Inc., Guatemala
Intern, June - August 2001

- Designed and executed study on the need for Mayan language interpreters in the Courts
- Analyzed data received from interviews with judges, interpreters, and other judicial administrators and wrote final report

OTHER EXPERIENCE

Central Texas Immigrant Worker Rights Center, Austin, Texas
Volunteer Attorney, March 2004 – December 2006

- Provide legal assistance in recovering immigrants' unpaid wages

Austin Human Rights Commission, Austin, Texas
Commissioner, April 2004 – September 2006

- Worked with fellow Commissioners to promote and enforce fair treatment of all Austin residents in the area of employment, housing, and public accommodations

Election Protection, Houston, Texas
Legal Volunteer, Fall, 2004

- Documented and rectified voting problems on Election Day, addressing the systemic neglect and/or obstruction of voting rights in African American and Latino communities

World Food Programme, Food Aid Organization of the U.N., Rome, Italy
Intern for Office of Latin America and the Caribbean, August - December 1998

- Assisted in the preparation of monthly reports and maintained records on program's response to Hurricane Mitch
- Participated in evaluation of agricultural development projects vis-à-vis U.N. standards

Fulbright scholar, Huancayo, Peru
Topic: rural development policy, 1995 - 1996

- Investigated effects of non-governmental organizations and government agencies on rural development, specifically as applied to animal husbandry projects

EDUCATION

The University of Texas School of Law, Austin, Texas
Doctor of Jurisprudence, May 2002

- Texas Law Fellow

- Equal Justice America Law Student Fellowship

Cornell University, Ithaca, New York
Master of Regional Planning, May 2002
- Sage Fellow

The University of Texas at Austin, Austin, Texas
Bachelor of Arts in Latin American Studies with High Honors, May 1995
- Phi Beta Kappa
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LICENSES **State Bar of Texas**

LANGUAGES Fluent in Spanish. Proficient in Portuguese and Italian. Studied Mam (a Mayan language).

PRESENTATIONS
- Speaker, "Access to Justice: Status of Legal Services to the Poor in Texas," Matagorda County Bar Association, Bay City, Texas, November 2006
- Speaker, "Access to Justice: Status of Legal Services to the Poor in Texas," Wichita County Bar Association, Wichita Falls, Texas, November 2006
- Speaker, "Access to Justice: Status of Legal Services to the Poor in Texas," Midland County Bar Association, Midland, Texas, November 2006
- Speaker/Panel Member, "Organizing a Student Loan Repayment Assistance Program at Law Schools," National Lawyer's Guild: Law for the People Convention, Austin, Texas, October 2006
- Speaker, "Access to Justice: Status of Legal Services to the Poor in Texas," Galveston Young Lawyers Association, Galveston, Texas, October 2006
- Speaker, "Access to Justice: Status of Legal Services to the Poor in Texas," Mexican American Bar Association, El Paso, Texas, September 2006
- Speaker, "Incentives for doing Pro Bono in Texas," Pro Bono Coordinators Retreat, State Bar of Texas, Austin, Texas, September 2006
- Speaker, "Access to Justice: Status of Legal Services to the Poor in Texas," Jefferson County Bar Association, Beaumont, Texas, July 2006
- Speaker, "Access to Justice Update: Overview of Legal Services to the Poor in Texas," Smith County Bar Association, Tyler, Texas, May 2006
- Speaker/Panel Member, "The Legal Community's Efforts to Help Victims of National Disasters: What Have We Learned from September 11 and the Gulf Coast Hurricanes," 2006 Equal Justice Conference, Philadelphia, Penn., March 2006
- Speaker, "Access to Justice: Status of Legal Services to the Poor in Texas," Texarkana Bar Association, Texarkana, February, July 2006
- Speaker, "Access to Justice Update: Overview of Legal Services to the Poor in Texas," Kerr County Bar Association, Kerrville, Texas, January 2006
- Speaker, "Incentives for doing Pro Bono in Texas," Pro Bono Coordinators Retreat, State Bar of Texas, Austin, Texas, September 2005
- Speaker, "Access to Justice: Status of Legal Services Delivery in Texas," Local Bar Leaders Conference, The Woodlands, Texas, July 2005
- Speaker, "Access to Justice: Overview of Legal Services to the Poor in Texas," Local Bar Leaders Conference, Las Colinas, Texas, July 2005
- Speaker, welcoming remarks, "The Nuts and Bolts of Removal Defense: How to Successfully Represent Your Clients in Immigration Court," sponsored by the South Texas Pro Bono Asylum Representation Project, South Padre Island, Texas, February 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JUAN MEZA SEGUNDO,	§	
	§	
Petitioner	§	
	§	
v.	§	
	§	4:10 - CV - 970 - Y
RICK THALER, Director,	§	
Texas Department of Criminal Justice -	§	
Correctional Institutional Division	§	**DEATH PENALTY CASE**
	§	
Respondent	§	

ORDER

Motion for Appointment of Investigator - Mitigation Specialist to Assist in Development of Unexhausted Facts in Capital Post-Conviction Proceedings

On the ___ day of April 2012, this Court considered Petitoner, Juan Meza Segundo's Motion for Appointment of Investigator-Mitigation Specialist to Assist in Development of Unexhausted Facts in Capital Post-Conviction Proceedings, in which Petitioner requests this Court to authorize the expenditure of funds to retain the services of a mitigation specialist to assist in the development of the underlying merits of Petitioner's *Atkins v. Virginia* claim as well as to establish facts which would be sufficient to prove that state writ counsel rendered ineffective assistance of counsel in the development of the *Atkins* claim, establishing cause for any procedural default in light of *Martinez v. Ryan*, 566 U. S. ____, No. 10 - 1001 (2012). On consideration of the law and facts in this case, Petitioner's request is hereby GRANTED.

IT IS THEREFORE ORDERED, that Petitioner shall have leave to retain the services of Laura Tansey as a mitigation specialists and that Ms. Tansey will be compensated for her services as a mitigation specialist up to $12,000.00 (Twelve Thousand Dollars).

IT IS FURTHER ORDERED, that Petitioner may, upon a showing of substantial need, request additional funds for investigation when the current funds have been exhausted.

_____
Terry Means
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JUAN RAMON MEZA SEGUNDO, *Petitioner,*	§	
V.	§	
	§	No. 4:10-CV-970-Y
RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division, *Respondent.*	§	(Death Penalty Case)

ORDER DENYING MOTION FOR FUNDS

On April 30, 2012, Petitioner filed a post-petition motion for appointment and funding of a mitigation investigator (Motion, doc. 18). Respondent has filed a response in opposition (doc. 19). For the reasons set out below, the motion is denied.

I

Petitioner was convicted and sentenced to death in 2006 for the 1986 rape and murder of eleven-year-old Vanessa Villa. *Segundo v. State*, 270 S.W.3d 79, 83 (Tex. Crim. App. 2008), *cert. denied*, ___ U.S. _____, 130 S.Ct. 53 (2009).[1] His conviction and sentence were upheld by the Texas Court of Criminal Appeals ("TCCA") on direct appeal. *Id.* Petitioner filed a postconviction habeas-corpus petition in the trial court, which held an evidentiary hearing and entered findings of fact and conclusions of law that relief be denied. *See*

[1]At trial, Petitioner's attorneys presented evidence in the punishment stage of his deprived, abusive, and tragic childhood, along with evidence of brain dysfunction that did not reach the level of mental retardation. *Id.*, at 84-85. Petitioner's attorney also presented evidence showing that he had turned his life around since the offense. *Id.*, at 85.

Ex parte Segundo, No. WR-70963-01, 2010 WL 4978402 at *1 (Tex. Crim. App. 2010). The TCCA adopted these findings and denied postconviction habeas relief on December 8, 2010. *Id.*

In this court, Petitioner's motion for appointment of federal habeas counsel was granted on March 15, 2011 (doc. 3), and co-counsel was appointed on April 20 (doc. 6). Petitioner filed his petition for federal habeas relief in this court on December 8 (doc. 11). On March 20, 2012, the United States Supreme Court issued its opinion in *Martinez v. Ryan*, 566 U.S. ____, 132 S.Ct. 1309 (2012), creating a limited exception to procedural bar for ineffective-assistance-of-counsel claims that were not exhausted due to the ineffective assistance of state habeas counsel. Relying on this new opinion, Petitioner filed his "Motion for Appointment of Investigator--Mitigation Specialist to Assist in Development of Unexhausted Facts in Capital Post-Conviction Proceedings" (doc. 18) on April 30.

II

Petitioner seeks funds to hire a licensed attorney as a mitigation investigator at the rate of $120 per hour for a total estimated cost of $12,000.00. (Mot. at 16-17.) A full mitigation investigation is sought, in part, to show that trial counsel was ineffective for relying upon two defense mitigation investigators that failed to provide an adequate social history to the defense mental-health experts to show the adaptive-deficits prong of his mental-retardation claim. Petitioner acknowledges that this claim

is unexhausted, subject to procedural default, and that Circuit precedent prior to *Martinez* would not allow funding of procedurally barred claims. (Mot. at 6-7 (citing *Riley v. Dretke*, 362 F.3d 302, 307-08 (5th Cir. 2004), and *Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir. 1997).) He argues that the exception to procedural bar created in *Martinez* allows the Court to consider this claim and authorize federal funding because state habeas counsel failed to develop the factual basis for his mental-retardation claim in state court. (Mot. at 7-10.) Respondent argues that the request for funding should be denied because the exception to procedural bar set forth in *Martinez v. Ryan* does not apply to Texas cases, and even if it did, that Petitioner has not made a showing that the underlying claim is substantial. (Resp. at 7-10.)

III

A district court has broad discretion to grant funding up to $7,500 for expert and investigative services on behalf of a petitioner if the Court determines that the services are reasonably necessary for his representation. *See* 18 U.S.C. § 3599(f). Beyond that amount, the applicant must also show that the excess funding is "necessary to provide fair compensation for services of an unusual character or duration" and receive approval from the chief judge of the circuit. 18 U.S.C. § 3599(g)(2). The present application seeks leave of court to exceed funding at this presumptive limit.

A habeas petitioner is entitled to funding if he makes a showing of substantial need for expert or investigative services, and the district court abuses its discretion in denying funding when such a need is shown. *See Powers v. Epps*, 2009 WL 901896, at *2 (S.D. Miss. Mar. 31, 2009)(citing *Riley*, 362 F.3d at 307 construing prior version of section 3599).[2] A substantial need is not shown (a) when a petitioner fails to demonstrate that his funding request would support a viable constitutional claim that is not procedurally barred, (b) when the sought assistance would only support a meritless claim, or (c) when the sought assistance would only supplement prior evidence. *See Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005).

Claims are procedurally barred if they are unexhausted and the state court would now find them barred. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). Texas law precludes successive habeas claims except in narrow circumstances. *See* Tex.Code Crim. Proc. Ann. art. 11.071 § 5 (Vernon Supp. 2005). Under § 5, unless a petitioner presents a factual or legal basis for a claim that was previously unavailable or shows by a preponderance of the evidence that, but for a violation of the United States Constitution, no rational juror would have found for the State, petitioner is procedurally barred from returning to the Texas courts to exhaust his claims. *Id.; Beazley v. Johnson*, 242 F.3d 248, 264 (5th Cir. 2001). Therefore,

[2]Pursuant to the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub.L. No. 109-177, 120 Stat. 192 (2006), the provisions of 21 U.S.C. § 849(q)(9) were replaced with identical provisions now set forth in 18 U.S.C. § 3599(f).

an application for funding to investigate an unexhausted claim should show that it would not be barred by this state law, or that there is a reasonable probability that further investigation will establish an exception to procedural bar.

The Supreme Court in *Coleman* established two exceptions.

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

Coleman, 501 U.S. at 750. The "fundamental miscarriage of justice" exception allows the federal court to reach a claim when the constitutional violation has probably resulted in the conviction of one who is actually innocent. *Id.* at 748 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

The Court in *Martinez* modified *Coleman* to create another exception to procedural bar.

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

132 S.Ct. at 1320. On June 28, 2012, the United States Court of Appeals for the Fifth Circuit determined that this exception to procedural bar does not apply to Texas cases because Texas does not prohibit ineffective-assistance-of-counsel claims from being brought

in the direct appeal.[3] *Ibarra v. Thaler*,___F.3d___, 2012 WL 262050 at *4.

Petitioner does not attempt to show the sort of "cause and prejudice" or "manifest injustice" authorized by *Coleman*, but relies entirely on the exception created in *Martinez*. Since this exception does not apply to his case, he has not identified any exception that justifies further investigation of this unexhausted and procedurally barred claim.

Petitioner has not made the minimum showing required for funding under 18 U.S.C. § 3599(f), much less the additional showing required for funding in excess of $7,500 under 18 U.S.C. § 3599(g)(2). Petitioner's opposed motion to appoint an investigator (Motion, doc. 18) is **DENIED**.

SIGNED July 16, 2012.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/rs

[3]In Texas, the postconviction habeas proceedings brought under article 11.071 of the Texas Code of Criminal Procedure are the collateral proceedings to review a capital conviction and death sentence. The phrase "initial-review collateral proceeding" as used in *Martinez*, however, "is a specifically defined term referring to states like Arizona in which a defendant is prevented from raising counsel's ineffectiveness until he pursues collateral relief (normally bereft of a right to counsel)." *Ibarra*, 2012 WL 262050 at *2.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION**

JUAN RAMON MEZA SEGUNDO,	§	
	§	
Petitioner,	§	
	§	
	§	
-v-	§	**NO. 4:10-cv-970-Y**
	§	
	§	
	§	
WILLIAM STEPHENS,	§	
Director, Texas Department of Criminal	§	
Justice, Correctional Institutions Division	§	**CAPITAL CASE**
	§	
Respondent.	§	

PETITIONER'S MOTION FOR RECONSIDERATION OF THE MOTION FOR APPOINTMENT OF AN INVESTIGATOR/MITIGATION SPECIALIST

NOW COMES Petitioner, Juan Ramon Meza Segundo ("Mr. Segundo"), and requests that this Court reconsider its ruling denying his previously filed motion for appointment of an investigator/mitigation specialist in accordance with 18 U.S.C. § 3599. An investigator is necessary for Mr. Segundo to develop facts in support of his unexhausted ineffective assistance of trial counsel claim. Because the legal basis for the Court's denial of Mr. Segundo's request has been abrogated by the Supreme Court's recent decision in *Trevino v. Thaler*, 133 U.S. 1911 (2013), Mr. Segundo respectfully requests reconsideration.

I. Background.

Mr. Segundo is challenging his conviction and death sentence in the instant federal habeas corpus proceeding. *See Petition for Writ of Habeas Corpus by a Person in State Custody.* (Doc. No. 11). He was convicted and sentenced to death on December 20, 2006. The Texas Court of Criminal Appeals affirmed. *Segundo v. State,* 270 S.W.3d 79 (Tex.Crim.App. 2008),

cert. denied 130 S. Ct. 53 (2009). Mr. Segundo then unsuccessfully sought state habeas relief, raising a single extra-record claim that, in accordance with *Atkins v. Virginia*, 536 U.S. 304 (2002), he was ineligible for execution because he was intellectually disabled (the "*Atkins* claim"). *Ex parte Segundo*, WR-70,953-01 (Tex.Crim.App., Dec. 8, 2010). In federal court, in addition to the claims he presented in state court, including the *Atkins* claim, Mr. Segundo raised an unexhausted claim of ineffective assistance of trial counsel for failing to investigate fully and adequately evidence relating to Mr. Segundo's intellectual disability and other mitigating evidence (the "IATC claim"). *See Petition for Writ of Habeas Corpus by a Person in State Custody*, at 58-70; *Respondent Thaler's Answer with Brief in Support*, at 2-3, 34-36 (urging that the IATC claim was unexhausted and, for that reason, procedurally defaulted). (Doc. No. 14).

To develop the facts for the IATC claim, Mr. Segundo asked this Court to provide funding under 18 U.S.C. § 3599(f) for a mitigation investigator. *See Motion for Appointment of Investigator-Mitigation Specialist to Assist in Development of Unexhausted Facts in Capital Post-Conviction Proceedings.* (Doc. No. 18). In particular, Mr. Segundo asserted that in light of the then-recent case of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), his pursuit of the IATC claim, to the extent it was procedurally defaulted through unexhaustion, was not futile and that, therefore, his need for investigative assistance was necessary because he would likely be able to demonstrate cause and prejudice under *Martinez*. *Id*. at 6-15. This Court denied the request, solely on the ground that *Martinez*'s new approach for excusing a procedural default was categorically inapplicable to Texas cases. *Order Denying Motion for Funds*, at 5-6 (citing *Ibarra* v. *Thaler*, 687 F.3d 222 (5th Cir. 2012)). (Doc. No. 18). Nevertheless, without necessary resources to investigate cause and prejudice and the underlying merits of the IATC claim, Mr. Segundo filed a response to Respondent's answer and motion for summary judgment. *See*

Petitioner, Juan Meza Segundo's Reply and Opposition to Respondent's Answer and Motion for Summary Judgment. (Doc. No. 20). As part of this response, Mr. Segundo again urged this Court to grant funding to assist in the development of the IATC claim, to show that both trial and state habeas counsel deficiently failed to compile a social history that would show him to be intellectually disabled. *Id*. at 56 n.7 ("State post-conviction writ counsel's abjuration of his obligation to conduct even a minimal investigation highlights, in light of the Supreme Court's recent recognition in *Martinez*, the need for this Court to grant the pending Motion for appointment of an investigator-mitigation specialist . . . ."); *id*. at 58 (urging the Court to "grant the pending motion seeking the appointment of a[] mitigation investigator").

Subsequently, the United States Supreme Court explicitly overruled the then-binding Fifth Circuit law upon which this Court relied, now holding that the *Martinez* cause-and-prejudice framework applied in Texas. *See Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013). In the wake of *Trevino*, the parties submitted supplemental briefing concerning the effect of *Martinez* and *Trevino* on the issues in this case. *See Respondent Stephens's Response to this Court's Order of June 18, 2013, Regarding the Applicability to this Litigation of* Trevino v. Thaler, *133 S. Ct. 1911 (2013)* [hereinafter *Respondent's Post*-Trevino *Brief*]; *Petitioner's Supplemental Briefing on the Effect of* Martinez v. Ryan *and* Trevino v. Thaler *on the Issues in this Case.* (Doc. Nos. 33 & 34).

II. *Trevino* expressly abrogated the sole legal basis upon which this Court denied Mr. Segundo's previous request for investigative funds.

This case involves an unexhausted IATC claim. Thus, assuming Respondent is correct that there is no state remedy and that the claim, therefore, is procedurally defaulted, Mr. Segundo must establish cause-and-prejudice under *Martinez*/*Trevino* in order for this Court to adjudicate the IATC claim on the merits. Specifically, he "must show that (1) his underlying claim[] of

ineffective assistance of trial counsel [is] 'substantial,' meaning that he 'must demonstrate that the [claim has] some merit,' and (2) his initial state habeas counsel was ineffective in failing to [investigate] th[e] claim[fully] in his first state habeas application." *Preyor v. Stephens*, 537 Fed.Appx. 412, 421 (5th Cir. 2013) (quoting *Martinez v. Ryan*, 132 S. Ct. at 1318, and citing *Trevino v. Thaler*, 133 S. Ct. at 1921). Undoubtedly, to assess both prongs of the *Trevino* inquiry—(1) "substantiality" and (2) "habeas-counsel-ineffectiveness"—this Court will need to consider extra-record evidence. *See Martinez*, 132 S. Ct. at 1317. This is "a particular species of ineffectiveness claim that depends on time-consuming investigation of personal background and other mitigating circumstances." *Trevino*, 133 S. Ct. at 1923 (Roberts, C.J., dissenting) (citing maj. op at 1919). *See also Massaro v. United States*, 538 U.S. 500, 506 (2003) (observing that "developing the facts [is] necessary to determining the adequacy of representation"); *United States v. Rivas-Lopez*, 678 F.3d 363, 358 (5th Cir. 2012) ("To determine both deficiency and prejudice, we would benefit from additional facts that should be determined at an evidentiary hearing"). This Court cannot dispose of this claim—and the prerequisite *Trevino*-cause arguments—without fact development, because doing so "would be engaging in speculation . . . as to whether defense counsel performed unreasonably[.]" *United States v. Culverhouse*, 507 F.3d 349, 355 (5th Cir. 2008).

In this case, the existing record is not fully developed, much less dispositive, to this Court's inquiry into the merits of Mr. Segundo's IATC claim, or his argument that his state habeas lawyer was ineffective. In his first funding motion, Mr. Segundo explained why § 3599 entitled him to reasonably necessary resources for developing the factual basis of his IATC claim, even though that claim ostensibly was procedurally defaulted. *See Motion for Appointment of Investigator-Mitigation Specialist to Assist in Development of Unexhausted*

Facts in Capital Post-Conviction Proceedings, at 6-7 (arguing that *Martinez* abrogated the Fifth Circuit's practice of refusing to fund the investigation of procedurally defaulted claims); *id*. at 11-12 (explaining that investigative services are approved for purposes of litigating issues of "cause and prejudice").

This Court did not address Mr. Segundo's arguments concerning the necessity of investigative assistance but, instead, rejected his funding request solely based on then-binding Fifth Circuit precedent holding *Martinez* categorically inapplicable in Texas. *See Order Denying Motion for Funds*, at 5-6. Because *Trevino* explicitly overruled that then-controlling precedent, this Court's denial of Mr. Segundo's previous funding request must be reconsidered.

III. Mr. Segundo has a statutory right under 18 U.S.C. § 3599(f) to the provision of ancillary services in order to conduct an investigation to establish cause and prejudice for default and to establish the merits of his underlying IAC claims.

The federal habeas statute authorizes the district courts to grant funds for investigative and other expert services in the course of federal post-conviction litigation. 18 U.S.C. § 3599(f). In *McFarland v. Scott*, 512 U.S. 849 (1994), a case addressing the statutory right to federal post-conviction counsel under the predecessor funding provision, the Supreme Court of the United States explained that, in addition to counsel, "[t]he services of investigators and other experts may be critical in the pre-application phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *Id*. at 855. "[E]stablished habeas corpus and death penalty precedent suggests that Congress intended to provide prisoners with 'all resources needed to discover, plead, develop, and present evidence determinative of their "colorable" constitutional claims . . . [because] [t]he determination of a habeas claim often depends on the full development of factual issues, and experts play an important role in the fact-finding process.'" *Patrick v. Johnson*, 48 F. Supp. 2d 645, 646 (N.D. Tex. 1999) (citation

omitted). The standard for providing investigative or expert assistance is whether such assistance is "reasonably necessary." 18 U.S.C. § 3599(f) ("Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant . . ."). *See also Fuller v. Johnson* 114 F.3d 491, 502 (5th Cir. 1997) (addressing requirements of predecessor funding statute 21 U.S.C. § 848(q)).

Prior to *Martinez* and *Trevino*, courts in the Fifth Circuit routinely denied investigative resources to procedurally defaulted and unexhausted claims because any proposed investigation of such claims would be futile, both in federal court through application of a procedural bar or in state court if the petitioner were allowed to return to exhaust the claims. *See Smith v. Dretke*, 422 F.3d 269, 288-89 (5th Cir. 2005); *Riley v. Dretke*, 362 F.3d 302, 307-08 (5th Cir. 2004); *Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir. 1997). Additionally, the Fifth Circuit had consistently rejected the argument that deficient investigation by state post-conviction counsel could constitute sufficient cause to excuse procedural default. *See Cantu v. Thaler*, 632 F.3d 157, 166 (5th Cir. 2011). *Martinez* and *Trevino* overruled the Fifth Circuit's precedent relating to cause and prejudice, and, by extension, these cases have pulled the rug out from the precedent relating to funding. In other words, petitioners who allege IATC claims that were defaulted in state court because of ineffective assistance of state habeas counsel may now excuse the default and obtain merits review of the underlying claims. *See Trevino v. Thaler*, 133 S. Ct. at 1921; *Martinez v. Ryan*, 132 S. Ct. at 1318-19. Thus, contrary to the Fifth Circuit's reasoning, a petitioner's efforts to investigate defaulted IATC claims are no longer futile; instead, such efforts may give rise to reasonably necessary requests for ancillary services as contemplated by the

Supreme Court in *McFarland*. *See Patterson v. Johnson*, 3:99-CV-0808-G, 2000 U.S. Dist. LEXIS 12694, at *5-*6 (N.D. Tex., Aug. 31, 2000) (not designated for publication) (holding that investigative services are generally reasonably necessary in order to establish the factual predicate needed to prove cause and prejudice).

IV. Mr. Segundo's underlying IATC claim, which asserts that trial counsel failed to investigate mitigating evidence, particularly that necessary to support an *Atkins* claim, has at least some merit. However, in order to establish entitlement to relief under this claim, Mr. Segundo must retain a qualified investigator to compile a comprehensive social history of Mr. Segundo's life and background.

In assessing an *Atkins* claim, a court should rely on the definitions set out by the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the American Psychiatric Association ("APA"). *See Ex parte Briseno*, 135 S.W.3d 1, 5-8, 14 (Tex.Crim.App. 2004). Each organization recognizes that mental retardation is a disability characterized by (1) "significantly subaverage" (APA) or "significant limitations" in (AAIDD) intellectual functioning (prong 1), (2) accompanied by "significant limitations" in adaptive behavior (prong 2), (3) the onset of which occurs in the developmental period, typically defined as prior to the age of 18 (prong 3). *See* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (11th ed. 2010); APA, *Diagnostic and Statistical Manual of Mental Disorders* 41 (Text Revision, 4th ed. 2000).[1] *See generally Briseno*, 135 S.W.3d, at 7. Mr. Segundo's IATC claim is premised on trial counsels' failure to investigate mitigating evidence. *See Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003); *Strickland v. Washington*, 466 U.S. 668, 691 (1984). In particular, counsel failed to compile a comprehensive social history of Mr. Segundo's life and background prior to retaining expert assistance to test

[1] The APA recently issued the latest version of the Diagnostic and Statistical Manual of Mental Disorders—the DSM-5. Because the *Atkins* hearing in this case occurred in 2009, reference in this motion will be to the DSM-IV-TR, which set forth the prevailing norms of practice at that time, unless otherwise specified.

Mr. Segundo for intellectual disability. As a result, there was insufficient data upon which a determination could be made concerning prong 2 (limitations in adaptive behavior) and prong 3 (onset), and counsel could not reasonably conclude that Mr. Segundo was not intellectually disabled and categorically ineligible for execution.[2] State habeas counsel compounded this error by failing to undertake the requisite investigation and, as a result, presented a fatally flawed case during state habeas proceedings. A comprehensive investigation was necessary under prevailing norms, particularly because Mr. Segundo had qualifying scores on two IQ tests (a WAIS-III score of 75 and a WAIS-IV score of 72).[3] *See Petition for Writ of Habeas Corpus by a Person in State Custody*, at 58-70 ("[T]rial counsel failed to conduct a timely mitigation investigation, particularly one that would have explored his mental retardation and his adaptive behavior. . . . No life history, much less interviews with relevant witnesses had occurred. As a result, the psychologist was unequipped to make a diagnosis of mental retardation."); *Petitioner, Juan Meza Segundo's Reply and Opposition to Respondent's Answer and Motion for Summary Judgment*, at 52-58 ("In short, the development of evidence of a defendant's adaptive functioning through a thorough investigation, including the location and interviewing of eye-witnesses with first-hand knowledge of the defendant is consistent with the in-depth investigation into a petitioner's background compelled by *Wiggins*[], particularly where counsel has already adopted the strategy of presenting a mental retardation defense."); *Petitioner's Supplemental Briefing on the Effect of*

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[2] Moreover, counsel did not purport to exclude this possibility; instead, it is apparent that they wanted to pursue an *Atkins* defense because they requested a jury instruction at punishment, which the court refused because of the lack of evidence. *28R. 274-75.*

[3] In conjunction with this motion, Mr. Segundo has recently filed Petitioner's Motion to Expand the Record with the Declaration of Stephen Greenspan, Ph.D. Dr. Greenspan's declaration demonstrates that the psychologists who evaluated Mr. Segundo for intellectual disability (Kelly R. Goodness, Ph.D., and C. Alan Hopewell, Ph.D., for the defense at trial; Stephen A. Thorne, Ph.D., for the defense in state habeas; and Jack Randall Price, Ph.D., for the State at trial and in state habeas) failed to comply with prevailing norms at the time of their evaluations and used flawed methodology. The motion to expand also demonstrates that the underlying IATC claim has merit in that a comprehensive investigation was necessary to evaluate adaptive behavior and onset and remains necessary now in these federal habeas proceedings. *Petitioner's Motion to Expand the Record with the Declaration of Stephen Greenspan, Ph.D.*, at 10-16.

Martinez v. Ryan *and* Trevino v. Thaler *on the Issues in this Case*, at 22-25 ("[T]rial counsel rendered ineffective assistance of counsel by failing to adequately investigate and develop a claim under *Atkins v. Virginia* that Mr. Segundo was mentally retarded . . . ."). The evidence detailed in this case at the very least makes out a *prima facia* case of ineffective assistance of counsel at both the trial and state habeas levels.

However, the task of proving entitlement to relief remains to be accomplished. To do this, Mr. Segundo requires the services of a qualified mitigation specialist with expertise in conducting an *Atkins* investigation. Prevailing professional norms require that a defense team have a mitigation specialist at all stages in capital litigation, which includes federal post-conviction proceedings. The Texas Guidelines and Standards for Texas Capital Counsel sets out the comprehensive nature of the investigation required of post-conviction counsel and admonishes that counsel may not rely on the previously compiled record and must conduct a full and independent investigation. *See* State Bar of Texas: 2006 Guidelines and Standards for Texas Capital Counsel, Guideline 12.2.B.1.b.[4] Importantly, counsel should seek the services of a trained mitigation specialist. *Id*. at Guideline 12.2.B.5.c. Correspondingly, counsel is strongly discouraged from relying upon "his or her own observations of the capital client's mental status," and must seek to include at least one person on the defense team, typically the mitigation specialist, who is "qualified to screen for mental or psychological disorders or defects and recommend further investigation of the client if necessary." *Id*. at Guideline 12.2.B.5.b. The mitigation specialist must have the ability to

> (i.) compile a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation, interviews, and collection of documents; (ii.) analyze the significance of the information in terms of impact on development, including effect on personality and behavior; (iii.) find mitigating

[4] The Texas Guidelines can be found at the following website address: www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/TexasCapital Guidelines.pdf.

> themes in the client's life history; (iv.) identify the need for assistance from mental health experts; (v.) assist in locating appropriate experts; (vi.) provide social history information to experts to enable them to conduct competent and reliable evaluations; and (vii.) work with the defense team and experts to develop a comprehensive and cohesive case in mitigation that could have been presented at trial.

Id. at Guideline 12.2.B.5.c. In the *Atkins* context, the service of a trained and qualified mitigation specialist is essential in order to develop a comprehensive social history that is focused on adaptive behavior and onset in the developmental period.

The ABA Guidelines are in accord with the Texas Guidelines and similarly detail the comprehensive investigation that is required and the fact that a trained mitigation specialist is essential to that end. *See* 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.7 (reprinted in 31 HOFSTRA L. REV. 913 (2003)) (setting out the investigation requirements and requiring use of a mitigation specialist as essential to the efforts). Mitigation specialists are a required and essential component of any capital defense team, and those without one fail to meet the requisite standard of care owed to their clients. *See id*. at Guideline 4.1.A (requiring at least two attorneys, an investigator, and a mitigation specialist).[5] As a result, "[t]he defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history." *See* 2008 ABA SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 5.1.B (reprinted in 36 HOFSTRA L. REV. 677, 689-90 (2008)). Furthermore, "[m]itigation specialists must be able to identify, locate and interview relevant persons in a

[5] *See also* Sean D. O'Brien, *When Life Depends On It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 708-12 (2008) ("Even the most skilled capital defense attorneys need the assistance of a mitigation specialist; capital defense is simply too large a task.").

culturally competent manner that produces confidential, relevant and reliable information." *Id*. at Guideline 5.1.C. Importantly, a mitigation specialist must be a skilled interviewer "who can recognize and elicit information about mental health signs and symptoms...." *Id*. This is particularly important in developing evidence that can later be used by a mental health professional in providing expert assistance. *Id*. at Guideline 5.1.E (noting the specialized training required "in identifying, documenting and interpreting symptoms of mental and behavioral impairment...."). *See generally* Richard G. Dudley, Jr., et al., *Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963 (2008). Additionally, a mitigation specialist must be able to

> establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures.

Id. at Guideline 5.1.C. Finally, mitigation specialists must "possess the knowledge and skills to obtain all relevant records pertaining to the client and others." *Id*. at Guideline 5.1.F. In other words, the mitigation specialist possesses important skills that few attorneys have.

V. Contrary to Respondent's argument, 28 U.S.C. § 2254(e)(2) does not erect a barrier to factual development in cases involving cause and prejudice under *Martinez* and *Trevino*.

Respondent also argues that, notwithstanding *Martinez*/*Trevino*, any factual development would be futile, because 28 U.S.C. § 2254(e)(2)—which bars federal hearings when "the applicant has failed to develop the factual basis of a claim in State court proceedings"—would not allow Mr. Segundo to present evidence in a federal hearing. *Respondent's Post*-Trevino *Brief*, at 14-16. This is incorrect for three reasons: first, the text of § 2254(e)(2) only addresses claims that were exhausted in state court but not adequately developed—but Mr. Segundo's claim was never presented in state court; second, the § 2254(e)(2) bar tracks the law of cause-

and-prejudice, and thus is controlled by the cause-and-prejudice rule in *Martinez* and *Trevino*; and third, the Director's interpretation is absurd because it would *necessarily* render *Martinez* and *Trevino* a legal nullity.

First, on its face, the proper construction of "claim" within the § 2254(e)(2) opening clause—"[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings"—refers only a "claim *in State court proceedings*," meaning one actually presented, but insufficiently developed, in state court. In other words, an IATC claim that is defaulted-but-excused under *Martinez*/*Trevino* would never be a claim in state court proceedings that Mr. Segundo "failed to develop" as contemplated in (e)(2). As the Fifth Circuit has explicitly held, the § 2254(e)(2) bar is not applicable for procedurally defaulted claims. *See Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000) (holding that when a habeas petitioner "establishes cause for overcoming his procedural default, he has certainly shown that he did not 'fail to develop' the record under § 2254(e)(2)"). Therefore, if this Court determines that Mr. Segundo "has established cause and prejudice for his procedural default, it should conduct an evidentiary hearing on [the] claim for which cause and prejudice exists," and the (e)(2) bar would never come into play. *Id*.

Second, the *Martinez*/*Trevino* cause-and-prejudice construct is consistent with the Supreme Court's construction of § 2254(e)(2) in *Williams v. Taylor*, 529 U.S. 420, 432-33 (2000). Though the Court held that "a failure to develop the factual basis of a claim is not established *unless* there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel," *id*. at 432, the Court also clearly contemplated that causes "external to the defense" that hindered the development of the factual basis in state court would not trigger the "failure to develop" triggering mechanism in (e)(2)'s opening clause. *Id*. at 434-35. At the

time that the Court decided *Williams*, it was well established that attorney negligence in general and ineffective assistance of state habeas counsel in particular[6] could not constitute cause for defaulting a claim in state court. *See Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991) (holding that ineffective assistance of state habeas counsel as a general rule cannot serve as cause); *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986) (holding that attorney negligence that did not rise to the level of ineffective assistance of counsel under *Strickland* cannot serve as cause). This of course changed with *Martinez* and *Trevino*, in which the Court carved out a narrow exception to the general rule of *Coleman*, and the justification for this change was premised on the fact that a state procedural framework that routed IATC claims to habeas proceedings created, in effect, an external impediment to adjudicating such claims.

Thus, *Martinez* maintained the general principle that only external impediments are excuses but explained that ineffective state habeas representation is now to be treated as an external impediment. *Martinez v. Ryan*, 132 S. Ct. at 1316-18.

> By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims. It is within the context of *this state procedural framework* that counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default.

Id. at 1318 (emphasis added). As a matter of black-letter law, *Trevino* specifically held that Texas' procedural framework for adjudicating IATC claims—in which the Court of Criminal Appeals actively discouraged raising these claims on direct appeal and in which the procedural rules made it virtually impossible to litigate them there in any event—was likewise a sufficient external impediment to justify applying the *Martinez* rule in Texas. *Trevino v. Thaler*, 133 S. Ct.

[6] However, ineffective assistance of trial or appellate counsel could constitute cause. The Court reasoned that because the right to effective assistance of counsel at trial and on appeal was constitutionally guaranteed, a violation of these rights that resulted in the default of a claim was attributable to the State. *Murray*, 477 U.S. at 488-89 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)).

at 1917-21. Similarly, under a straightforward reading of *Williams* and (e)(2), ineffective assistance of state habeas counsel, as contemplated in *Martinez* and *Trevino*, is an external impediment to the factual development of the underlying IATC claim. The idea, as advanced by Respondent, that ineffective state habeas representation would be an *external* impediment under a procedural default inquiry but an *internal* impediment under § 2254(e) is not logically sustainable. Accordingly, under *Williams*, Mr. Segundo does not "fail to develop" the factual basis of his IATC claim—and the § 2254(e)(2) bar is not applicable—if he can show cause under *Martinez* and *Trevino*.

Third, and more fundamentally, if Respondent's reading of § 2254(e)(2) is accepted, it would necessarily render *Martinez* and *Trevino* a legal nullity. If the bar applied even to claims excusable by *Martinez*/*Trevino* cause, then no litigant would ever prevail because he would never have an opportunity to develop the record that could support those claims. Respondent's reading would require this Court to presume that the Supreme Court granted certiorari in two cases, carefully crafted a remedy to a specific narrowly-defined problem, and returned these and many other cases to lower courts for reconsideration under this new rule when Congress had already rendered federal district courts impotent to implement the new remedy. This construction would also require an abrogation of Fifth Circuit precedent, *Barrientes v. Johnson*, 221 F.3d at 771, in which the court applied a straightforward holding that a showing of cause sufficient to excuse default is also sufficient to permit factual development of the claim in an evidentiary hearing.

WHEREFORE, PREMISES CONSIDERED, Petitioner, Juan Ramon Meza Segundo, respectfully requests that this Court reconsider its prior ruling denying funding for a mitigation specialist, authorize the expenditure of funds in order to allow Mr. Segundo to retain a mitigation

specialist as set out in that motion, and grant him any and all other relief to which he may be entitled.

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By: /s/ Paul E. Mansur
Paul E. Mansur
Member of the Bar of this Court

Attorneys for Petitioner,
Juan Ramon Meza Segundo

Certificate of Conference

I hereby certify that on February 19, 2014, I conferred with counsel for Respondent, Thomas Jones, on this matter. Counsel informed me that Respondent opposes the relief requested in this motion.

/s/ Paul E. Mansur
Paul E. Mansur

Certificate of Service

I hereby certify that on February 20, 2014, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. District Court, Northern District of Texas. The ECF system sent a "Notice of Electronic Filing" to counsel for Respondent:

Greg Abbott
attn: Thomas Jones
Texas Attorney General
Postconviction Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548

/s/ Paul E. Mansur
Paul E. Mansur

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION**

JUAN RAMON MEZA SEGUNDO,	§	
	§	
Petitioner,	§	
	§	
	§	
-v-	§	**NO. 4:10-cv-970-Y**
	§	
	§	
	§	
WILLIAM STEPHENS,	§	
Director, Texas Department of Criminal	§	
Justice, Correctional Institutions Division	§	**CAPITAL CASE**
	§	
Respondent.	§	

ORDER

On the ___ day of February 2014, this Court considered Petitioner's Motion for Reconsideration of the Motion for Appointment of an Investigator/Mitigation Specialist. On April 30, 2012, Petitioner filed a motion for appointment of a mitigation specialist under 18 U.S.C. § 3599(f). (Doc. No. 18). This Court denied the requested funding on July 16, 2012, basing the decision on then applicable Fifth Circuit precedent in *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012). (Doc. No. 21). The Supreme Court subsequently abrogated *Ibarra*. *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013). Based on the development in *Trevino*, this Court reconsiders its previous denial of funding.

Petitioner has requested that this Court to authorize the expenditure of funds to retain the services of a mitigation specialist to assist in the development of the underlying merits of Petitioner's ineffective assistance of counsel claim, as well as to establish facts that would be sufficient to prove that state habeas counsel rendered ineffective assistance of counsel in the development of this claim, establishing cause for any procedural default in light of *Martinez v.*

Ryan, 132 S. Ct. 1309 (2012). On consideration of the law and facts in this case, Petitioner's request is hereby GRANTED.

IT IS THEREFORE ORDERED, that Petitioner shall have leave to retain the services of a qualified mitigation specialist and that the investigator so retained will be compensated for services as a mitigation specialist up to $12,000.00 (Twelve Thousand Dollars).

IT IS FURTHER ORDERED, that Petitioner may, upon a showing of substantial need, request additional funds for investigation when the current funds have been exhausted.

SIGNED on this the ____ day of _____, 2014.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JUAN RAMON MEZA SEGUNDO, *Petitioner,*	§	
V.	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, *Respondent.*	§	No. 4:10-CV-970-Y (Death Penalty Case)

ORDER GRANTING EXPANSION AND DENYING RECONSIDERATION

On February 19, 2014, Petitioner filed a motion to expand the record (doc. 37). On February 19, Petitioner filed a motion to reconsider this Court's denial of his post-petition motion for appointment and funding of a mitigation investigator (doc. 38). Respondent has filed responses in opposition to both motions (doc.s 42, 43). For the reasons set out below, the motion to expand the record is granted and the motion to reconsider is denied without prejudice.

I

More than four months after his petition for habeas relief was filed in this Court and the limitations period under 28 U.S.C.A. § 2244(d) expired, Petitioner filed a motion for funding that sought to hire a licensed attorney as a mitigation investigator to "assist in the development of issues in support of cause for procedural default in this case, and facts of the underlying merits of his claims." (ECF No. 18 at 1.) More specifically, Petitioner claimed

that the additional mitigation investigation was needed to show that his prior counsel, primarily state habeas counsel, was ineffective for relying upon defense mitigation investigators that failed to provide an adequate social history to the defense mental-health experts to show the adaptive-deficits prong of his mental-retardation claim. (Doc. 18 at 14-15.) Petitioner's motion for reconsideration argues that subsequent Supreme Court authority reverses the Fifth Circuit precedent relied upon in denying the motion for funding. (Doc. 38 at 3-5.)

II

As observed in this Court's order denying funding (doc. 21), the district court has broad discretion to grant funding up to $7,500 for expert and investigative services on behalf of Petitioner if he shows that the services are reasonably necessary for his representation. *See* 18 U.S.C. § 3599(f). Beyond that amount, the applicant must also show that the excess funding is "necessary to provide fair compensation for services of an unusual character or duration" and receive approval from the chief judge of the circuit. 18 U.S.C. § 3599(g)(2). The funding application sought leave of court to exceed funding at this presumptive limit.

A habeas petitioner is entitled to funding if he makes a showing of substantial need for expert or investigative services, and the district court abuses its discretion in denying funding when such a need is shown. *See Powers v. Epps*, 2009 WL 901896, at *2 (S.D.

Miss. Mar. 31, 2009)(citing *Riley*, 362 F.3d at 307 construing prior version of section 3599).[1] A substantial need is not shown (a) when a petitioner fails to demonstrate that his funding request would support a viable constitutional claim that is not procedurally barred, (b) when the sought assistance would only support a meritless claim, or (c) when the sought assistance would only supplement prior evidence. *See Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005).

To make a viable claim of the deprivation of the effective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 687–90 (1984), for failing to provide an expert with information, the petitioner must show that the expert requested the information and that the information would have made a difference to the expert's opinion. *See Bloom v. Calderon,* 132 F.3d 1267 (9th Cir.1997) (cited with approval by *Roberts v. Dretke,* 356 F.3d 632, 640 (5th Cir. 2004)); *Hendricks v. Calderon,* 70 F.3d 1032, 1038 (9th Cir. 1995). In *Hendricks,* the United States Court of Appeals for the Ninth Circuit observed that an attorney has no duty to provide information to an expert that is not requested by the expert.

> To now impose a duty on attorneys to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert, would defeat the whole aim of having experts participate in the investigation. An integral part of an expert's specialized skill at analyzing

[1]Pursuant to the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub.L. No. 109-177, 120 Stat. 192 (2006), the provisions of 21 U.S.C. § 849(q)(9) were replaced with identical provisions now set forth in 18 U.S.C. § 3599(f).

> information is an understanding of what information is relevant to reaching a conclusion.

Id. Further, a claimant should show that the testifying experts would have changed their opinions if they had possessed the missing information. *See, e.g., Roberts v. Singletary,* 794 F. Supp. 1106, 1131-32 (S.D. Fla. 1992) (holding ineffective assistance of counsel not shown when experts did not state that the additional information would have changed the diagnosis in any meaningful way and did not express inability to base conclusions on available information) *aff'd,* 29 F.3d 1474 (11th Cir. 1994). In contrast, when counsel provides the defense expert with the information that the expert considered necessary to form an expert opinion, and the expert does, in fact, investigate the potential defense, "[l]ater disagreement by other experts as to the conclusions does not demonstrate a violation of *Strickland*." *Fairbank v. Ayers,* 650 F.3d 1243, 1252 (9th Cir. 2011); *see also Jennings v. Stephens,* 537 F. App'x 326, 334 (5th Cir. 2013) (finding dueling expert opinions insufficient to show state court's rejection of ineffective-assistance-of-trial-counsel claim to be unreasonable under AEDPA) *cert. granted on other ground,* 134 S. Ct. 1539 (2014).

III

Petitioner was convicted and sentenced to death in 2006 for the 1986 rape and murder of eleven-year-old Vanessa Villa. *Segundo v. State*, 270 S.W.3d 79, 83 (Tex. Crim. App. 2008), *cert. denied*, 130 S.Ct. 53 (2009). At the punishment stage of his trial, Petitioner's

attorneys presented evidence of his deprived, abusive, and tragic childhood, along with evidence of brain dysfunction that did not reach the level of mental retardation. *Id.,* at 84-85. During the postconviction proceedings, Petitioner's attorneys presented additional expert evaluations regarding whether he was mentally retarded under *Atkins v. Virginia,* 536 U.S. 304 (2002). The state district court held an evidentiary hearing and entered findings of fact and conclusions of law that relief be denied. *See Ex parte Segundo*, No. WR-70963-01, 2010 WL 4978402 at *1 (Tex. Crim. App. 2010). The Texas Court of Criminal Appeals adopted these findings and denied postconviction habeas relief. *Id.*

In the motions before the Court, Petitioner has presented an apparent disagreement between experts. He has not suggested that his prior experts requested any of the sought information, that the sought information was capable of making a meaningful difference in their testimony, or that his prior experts felt incapable of basing their conclusions on the information that was available to them. In fact, the contrary appears.

Dr. Clifford Alan Hopewell, Ph.D., testified that as a result of the information that he had (including his examinations and evaluation) that he was able to form an opinion on the inquiries that had been made of him. (Vol. 25, Reporter's Record, "RR", at 164-65, 171.) He testified that Petitioner had significant brain damage resulting primarily from inhalant abuse, illegal drug use, and alcohol

abuse. (25 RR at 171.) He concluded, however, that Petitioner was not mentally retarded. (25 RR at 175; 26 RR at 19-20.) Dr. Hopewell also noted his consultations with another defense expert, Dr. Kelly Goodness. (25 RR at 140-42, 149; 26 RR at 4-5, 7-9, 14.)

In the postconviction habeas proceedings, Dr. Stephen A. Thorne reviewed the available records, performed a clinical interview, conducted tests and made a report of his findings. (Vol. 2, State Habeas Reporter's Record, "SHRR", at 18-19.) He found "a lot of helpful information" that gave him "insight into the history of adaptive functioning." (2 SHRR at 19.) He found no evidence that Petitioner had ever been found to be mentally retarded, either before or after age 18. (2 SHRR at 54.) He found that Petitioner's adaptive abilities would preclude a finding of mental retardation, even if his IQ had so indicated. (2 SHRR at 56.) He concluded that Petitioner was not mentally retarded.

Petitioner presents a declaration from a new expert, Dr. Stephen Greenspan, Ph.D. Dr. Greenspan does not contend that prior experts would have testified differently with the information sought, but merely expresses disagreement with prior experts regarding the standards and application of those standards in the professional evaluation of mental retardation under *Atkins*. Dr. Greenspan repeatedly criticized prior experts for "not recognizing" that the intellectual functioning prong had been met (Greenspan Decl. at 3-16), and for not making an adequate effort to evaluate the other prongs.

(Greenspan Decl. at 17-23.) Dr. Greenspan did not aim his criticism at trial counsel, but at the experts who "failed to understand, or convey to the attorneys" the correct opinions. (Greenspan Decl. at 16.) Rather that showing that the experts would have used the sought information, Dr. Greenspan suggests the opposite. For example, regarding the trial experts, Dr. Greenspan states:

> Drs. Goodness and Hopewell basically ignored prong two--impairments in adaptive behavior (also termed adaptive functioning)--and appeared to operate on the assumption that as prong one was not met (a conclusion I find unsupported by prevailing standards of practice) ***then there was no point even proceeding to evaluate Mr. Segundo's adaptive deficits***.

(Greenspan Decl. at 17) (emphasis added). Dr. Greenspan also attributes the failure of the experts, particularly in the state habeas proceedings, to express the proper standard for measuring adaptive skills to their "apparent unfamiliarity . . . with the official standards." (Greenspan Decl. at 19.) Regarding the need for a comprehensive social history made the subject of the funding motion, Dr. Greenspan attributes the failure to obtain or utilize that information to the judgment of the clinician making the evaluation of mental retardation, rather than to the attorney. (Greenspan Decl. at 21-22.)

Without any indication that the testifying experts wanted the information or any likelihood that it would have changed their opinions and testimony, Petitioner has presented nothing more than a disagreement between experts that is not capable of showing that

trial counsel unreasonably relied upon the experts that were available and qualified to testify on the issues presented. *See Fairbank v. Ayers,* 650 F.3d at 1252. If ineffective assistance could be established by presenting a mere disagreement with prior experts, there would be no end to the investigation of such claims.

IV

Under Rule 7 of the Rules Governing Habeas Corpus Cases, "the judge may direct the parties to expand the record by submitting additional materials relating to the petition." In discussing this rule, the Court of Appeals has observed that a federal habeas petitioner "is 'entitled to careful consideration and plenary processing of (his claim,) including full opportunity for presentation of the relevant facts.'" *Stewart v. Estelle,* 634 F.2d 998, 1000 (5th Cir. 1981) (quoting *Harris v. Nelson,* 394 U.S. 286, 298 (1969)). The Court grants the requested expansion to allow it to consider the materials submitted.

V

Petitioner acknowledges that this claim is unexhausted, subject to procedural default, and that Circuit precedent prior to *Martinez v. Ryan,* 132 S. Ct. 1309 (2012), and *Trevino v. Thaler,* 133 S. Ct. 1911 (2013), would not allow funding of procedurally barred claims. (Doc. 18 at 6-7 (citing *Riley v. Dretke*, 362 F.3d 302, 307-08 (5th Cir. 2004), and *Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir. 1997).) He relies entirely on the exception to procedural bar created in

Martinez as found in *Trevino* to apply to Texas cases. This requires a showing that his counsel at both the trial and state habeas stages were potentially ineffective under the standard announced in *Strickland*. All of the prior experts found that Petitioner was not mentally retarded. Petitioner does not allege that his prior counsel failed to provide information requested by his prior experts, but instead presents nothing more than a disagreement among experts. Therefore, he has not shown potential merit to any claim of ineffective assistance of counsel and does not present a reasonable need for funding a claim that could be granted by this Court.

Petitioner's motion to expand the record (doc. 37) is **GRANTED** to the extent that this Court may consider the declaration of Dr. Greenspan. Even considering this declaration and the allegations of the motion to reconsider (doc. 38), Petitioner has not made the minimum showing required for funding under 18 U.S.C. § 3599(f), much less the additional showing required for funding in excess of $7,500 under 18 U.S.C. § 3599(g)(2). Petitioner's opposed motion to reconsider this Court's denial of funding (doc. 38) is **DENIED**.

SIGNED May 20, 2014.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/rs

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION**

JUAN RAMON MEZA SEGUNDO,	§	
	§	
Petitioner,	§	
	§	
	§	
-v-	§	**NO. 4:10-cv-970-Y**
	§	
	§	
	§	
RICK THALER,	§	
Director, Texas Department of	§	
Criminal Justice, Correctional	§	
Institutions Division	§	**CAPITAL CASE**
	§	
Respondent.	§	

**MOTION FOR FUNDING FOR INVESTIGATION
OF CONSTITUTIONAL CLAIMS IN LIGHT OF THE SUPREME COURT'S
RECENT DECISION IN *HALL v. FLORIDA***

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION**

JUAN RAMON MEZA SEGUNDO,	§	
	§	
Petitioner,	§	
	§	
	§	
-v-	§	**NO. 4:10-cv-970-Y**
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RICK THALER,	§	
	§	
Director, Texas Department of Criminal Justice, Correctional Institutions Division	§	**CAPITAL CASE**
	§	
Respondent.	§	

**MOTION FOR FUNDING FOR INVESTIGATION
OF CONSTITUTIONAL CLAIMS IN LIGHT OF THE SUPREME COURT'S
RECENT DECISION IN *HALL v. FLORIDA***

NOW COMES Petitioner, Juan Ramon Meza Segundo ("Mr. Segundo"), and files this renewed representation request for investigative services to assist his counsel in discovering facts relevant to his *Atkins*[1] and ineffective assistance of trial counsel ("IATC") claims in light of the recent landmark decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014). In support, Mr. Segundo would show the Court the following:

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

I. Introduction

In *Hall*, the Supreme Court clarified the legal standards for evaluating whether a defendant has intellectual disability ("ID").[2] In light of the clarification provided in *Hall*, Mr. Segundo requests the services of a mitigation specialist under 18 U.S.C. § 3599(f) to investigate facts supporting (1) his claim under *Atkins* that he has ID and therefore the Eighth Amendment prohibits his execution, and (2) his claim that trial counsel was ineffective because they failed to investigate and present evidence of his ID. The Supreme Court's recent decision in *Hall* reaffirms the principle—first recognized in *Atkins*—that courts must consider evidence of poor adaptive functioning and early onset in order to properly evaluate a defendant's ID claim, especially when his IQ score is 75 or below. Mr. Segundo scored 75 or below on four separate IQ tests;[3] yet his state trial and habeas lawyers never investigated his adaptive functioning or early onset. Mr. Segundo's present federal counsel's previous request for investigative services to conduct this investigation was denied. As a result, Mr. Segundo has been unable to meaningfully plead and prove facts relevant to adaptive functioning. This Court accordingly lacks an adequate record

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[2] The term "mental retardation," which was used by the Court in *Atkins* and in many of the subsequent cases addressing *Atkins* claims, has been recently changed intellectual disability. *See Hall v. Florida*, 134 S. Ct. at 1990. *See also* AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES ("AAIDD"), INTELLECTUAL DISABILITY: DEFINITIONS, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 3 (11th ed. 2010) [hereinafter 2010 AAIDD GUIDE]. In this motion, the condition shall be referenced by the new terminology, ID, unless when describing holdings in cases prior to the change in order to preserve consistency.

[3] As discussed further below, Mr. Segundo scored 75 or below on the following four IQ tests: The Assessment of Neuropsychological Status ("RBANS"); the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III"); the Wechsler Adult Intelligence Scale, Fourth Edition ("WAIS-IV"); and the Culture Fair Test. *See* Exh. K to Orig. Pet. at 2 (July 11, 2006 Letter from Dr. Goodness to Wes Ball and Mark Daniel); *id.* at 1; Exh. B to Orig. Pet. at 9 (Dr. Thorne Psychological Evaluation); Exh. D to Orig. Pet. (Arden Dominey Aff.).

from which to determine, consistent with the standard announced in *Atkins* and proclaimed again in *Hall*, whether the Eighth Amendment prohibits the State of Texas from executing Mr. Segundo because of his ID. Moreover, further investigation will also permit Mr. Segundo to fully plead his IATC claim related to trial counsel's sentencing investigation.

II. Background

Mr. Segundo is challenging his conviction and death sentence in the instant federal habeas corpus proceeding. *See Petition for Writ of Habeas Corpus by a Person in State Custody*. (DE 11). Mr. Segundo pleaded a partial *Atkins* claim, which was presented in an incomplete and ineffective manner in state court, and an unexhausted Sixth Amendment claim contending that his trial counsel provided ineffective assistance of counsel in failing to investigate and develop the *Atkins* claim. *Id*. at 58-70.

In order to adequately identify and plead the factual bases for these claims, Mr. Segundo sought funding under 18 U.S.C. § 3599(f) for a mitigation investigator. *See Motion for Appointment of Investigator-Mitigation Specialist to Assist in Development of Unexhausted Facts in Capital Post-Conviction Proceedings*. (DE 18). This Court denied that motion without prejudice. *See Order Denying Motion for Funds*, at 5-6. (DE 18). The lack of investigative services hampered Mr. Segundo's efforts to counter Respondent's assertion that his claims were unexhausted, and for that reason, procedurally defaulted. *See Respondent Thaler's Answer with Brief in Support*, at 2-3, 34-36 (DE 14). Mr. Segundo filed a reply to Respondent's answer

and motion for summary judgment which again urged this Court to afford him investigative services. *Petitioner Juan Meza Segundo's Reply and Opposition to Respondent's Answer and Motion for Summary Judgment,* at 56-58 & n.7 (DE 20).

In the wake of the Supreme Court's decision in *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013), which expressly held that the equitable exception to federal procedural default doctrine for defaulted IATC claims as set out in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), applied in Texas, Mr. Segundo filed a motion asking this Court to reconsider its previous denial of investigative services, arguing that because *Martinez* and *Trevino* provided a gateway to allow consideration of the defaulted IATC claim, investigation was reasonably necessary to discover and plead facts relevant to the two levels of ineffective assistance in order to take advantage of the equitable remedy. *See Petitioner's Motion for Reconsideration of the Motion for Appointment of an Investigator/Mitigation Specialist*. (DE 38). This Court again denied the representation request without prejudice. *See Order Granting Expansion and Denying Reconsideration*. (DE 44).

III. Discussion

The Supreme Court's recent decision in *Hall* exemplifies Mr. Segundo's need to conduct a comprehensive investigation into adaptive behavior and early onset. Moreover, it undermines this Court's reasons for previously denying investigative services. As a result, Mr. Segundo re-urges his representation request for investigative services under 18 U.S.C. § 3599(f).

A. Mr. Segundo has a statutorily guaranteed right under 18 U.S.C. § 3599(f) to investigative and expert assistance that is reasonably necessary for his representation.

Under 18 U.S.C. § 3599(f), a federal court may grant a capital prisoner with investigative or expert services to assist counsel's investigation of claims raised in the prisoner's federal habeas petition. The provision of ancillary services turns on whether the services requested are "reasonably necessary" to post-conviction counsel's "representation" of their client. 18 U.S.C. § 3599(f). The statute states: "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant . . ." *Id. See also Hill v. Johnson*, 210 F.3d 481, 487 (5th Cir. 2000). In addition to counsel provided under § 3599, "[t]he services of investigators and other experts may be critical in the pre-application phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *McFarland v. Scott*, 512 U.S. 849, 855 (1994). This is no less true after a petition has been filed, particularly, as in this case, when the Respondent has raised a procedural default defense and responding to the defense under the equitable gateway opened by *Martinez* and *Trevino*, which occurred after the original petition had been filed, requires considerable factual development. *Cf. Patterson v. Johnson*, 3:99-cv-0808-G, 2000 WL 1234661, at *2 (N.D. Tex., Aug. 31, 2000) (not designated for publication) (holding that investigative services are generally reasonably necessary under § 3599(f) in order to

establish the factual predicate needed to prove cause and prejudice in order to overcome a defense built upon procedural default). *See also Hearn v. Dretke*, 376 F.3d 447, 451 (5th Cir. 2004) (holding that § 3599 does not employ "language of limitation" and that funding for counsel and investigation extends to all phases of federal post-conviction litigation, including clemency and successor litigation).

B. The Supreme Court's recent decision in *Hall v. Florida* clearly demonstrates that Mr. Segundo's proposed investigation of adaptive behavior and early onset is reasonably necessary.

Hall v. Florida emphasized the importance to accurate legal conclusions of developing and presenting adaptive behavior evidence when there are qualifying IQ scores within the range of 70 to 75. Indeed, *Hall* clarified that *Atkins*, as the clearly established Eighth Amendment law, secured a right to present this evidence to the fact-finder. *Hall* not only demonstrates the critical importance of factual development in this case; it also demonstrates that this Court's refusal to afford investigative services under § 3599(f) runs counter to the principles set out in *Atkins*.

1. Atkins v. Virginia *established that a legal determination of ID involves a three-prong inquiry encompassing not just IQ score, but also adaptive functioning and early onset.*

Over twelve years ago, in *Atkins v. Virginia*, the Supreme Court announced that the Eighth Amendment prohibits states from executing people with ID. *See Atkins v. Virginia*, 536 U.S. at 321. The Eighth Amendment's ban on cruel and unusual punishment protects people with ID from execution because they do not act with the same "level of moral culpability that characterizes the most serious

criminal conduct," and their "impairments can jeopardize the reliability and fairness of capital proceedings." *Id.* at 306-07. In *Atkins*, the Supreme Court recognized that ID is more than just an IQ score. *See id.* at 318. Rather than turn on a single IQ score, a diagnosis of ID involves a holistic inquiry of three prongs: (1) whether a defendant has sub-average intellectual functioning, (2) whether he has limitations in adaptive functioning, such as poor "communication, self-care, and self-direction," and (3) whether those deficits manifested before the age of 18. *Id.* *Atkins* recognized that a person with an IQ score "between 70 or 75 and lower" could meet "the intellectual function prong of the mental retardation definition." *Id.* at 318 n.5. The Court drew directly from the prevailing scientific literature in reaching this conclusion. *See id.* (citing 2 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (B. Sadock & V. Sadock eds. 7th ed. 2000)).[4]

2. Hall v. Florida *reaffirmed the* Atkins *rule that courts should consider evidence of adaptive functioning and early onset, especially when a defendant's IQ is 75 or below.*

Last year, in *Hall v. Florida*, the Supreme Court revisited its decision in *Atkins.* The Court did not announce a new rule of interpretation or change the definition of ID in *Hall*, but it did provide further explanation of why adaptive functioning and early onset are essential to a proper evaluation of an *Atkins* claim.

[4] Likewise, citing to prevailing medical standards, the CCA, in its first post-*Atkins* foray, recognized, in *Ex Parte Briseño*, that "IQ tests differ in content and accuracy;" thus, "psychologists and other mental health professionals are flexible in their assessment" of the intellectual-functioning prong of ID, and a person "whose IQ has tested above 70 may be diagnosed as" intellectually disabled. *Ex Parte Briseño,* 135 S.W.3d 1, 7 n.25 (Tex. Crim. App. 2004) (citing AMERICAN PSYCHIATRIC ASSOCIATION (APA), DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM) 39 (APA 4th ed. 2000); AMERICAN ASSOCIATION ON MENTAL DEFICIENCY (AAMD), CLASSIFICATION IN MENTAL RETARDATION N1 (Grossman ed. 1983)).

Read in conjunction with *Atkins*, *Hall* sheds light on why Mr. Segundo urgently needs investigative services to develop evidence of the second two prongs of the ID test.

In *Hall*, the Supreme Court considered whether the Florida Supreme Court's definition of ID—which automatically excluded people with an IQ score above 70—violated the Eighth Amendment. *See Hall v. Florida*, 134 S. Ct. at 1990. Mr. Hall had an IQ score of 71, and thus, according to the plain language of *Atkins*, could potentially have ID. *Id.* at 1992, 1998, 2000; *see also Atkins*, 536 U.S. at 318 n.5. Yet the Florida Supreme Court's 70 cutoff prevented the court from considering "substantial and weighty evidence" of adaptive functioning and early onset, which together with his poor intellectual functioning could have shown he had ID. *Hall*, 134 S. Ct. at 1994; *see also id.* at 1996. The Court ruled that the Florida cutoff violated the prohibition set forth in *Atkins* because it created "an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 1989.

The Supreme Court's decision was premised on the importance of evidence of adaptive functioning and early onset to a court's determination of whether a defendant has ID. Because of "the inherent error in IQ testing," which *Atkins* itself recognized, *id.* at 1998 (citing *Atkins*, 536 U.S. at 317), IQ scores should be considered "an approximation, not a final and infallible assessment of intellectual functioning," *id.* at 2000. Thus, the second two prongs of the *Atkins* ID test—poor adaptive functioning and early onset—are not just an afterthought; they are "central to the framework followed by psychiatrists and other professionals in diagnosing

intellectual disability." *Id.* at 1991. In other words, intellectual disability under *Atkins* is "a condition, not a number." *Id.* at 2001.

The Court emphasized that evidence of adaptive functioning and early onset was particularly important in a situation like Mr. Hall's, where a defendant's IQ score is 75 or lower. The Florida strict cutoff contravened the Supreme Court's assessment in *Atkins* that "an individual with an IQ test score 'between 70 and 75 or lower,' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." *Id.* at 2000 (quoting *Atkins*, 536 U.S. at 309 n.5). Therefore, the Court agreed "with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error"—ordinarily at or below 75—a "defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001. The Florida Supreme Court's cutoff violated the Eighth Amendment's prohibition on cruel and unusual punishment because it "bar[red] consideration of evidence *that must be considered* in determining whether a defendant in a capital case has intellectual disability." *Id.* (emphasis added).

The Florida Supreme Court's standard was offensive to the Constitution because it prohibited Mr. Hall from introducing evidence of poor adaptive functioning and early onset. The cutoff prevented the lower courts from considering evidence that, in combination with Mr. Hall's IQ score of 71, could show he had ID and was thus ineligible for the death penalty. Moreover, the Court found Mr. Hall's evidence of adaptive functioning and early onset quite compelling and potentially

indicative of ID. The Court explained that adaptive functioning and early onset could be shown through such evidence as medical histories, behavioral records, school tests and reports, and testimony of past behavior and family circumstances. *See id.* at 1994. Utilizing these sources, Mr. Hall had presented "substantial and unchallenged evidence" of an ID claim, such as: school records showing that his teachers considered him to be intellectually disabled; testimony from an attorney from an earlier case who said that he could not understand "anything Hall said" and that Mr. Hall had the mental acuity of his four-year-old daughter; testimony from Mr. Hall's siblings that "there was something very wrong with him as a child" and he had difficulty talking and learning; and evidence of a terribly abusive upbringing that "appeared to make his deficits in adaptive functioning all the more severe." *Id.* at 1990-91 (internal quotation marks and brackets omitted).

3. Mr. Segundo's allegation that his IQ score is 75 or below is uncontroverted.

Hall reaffirms the principle set forth in *Atkins* that courts must assess evidence of adaptive functioning and early onset when determining ID, especially when a defendant's score falls at or below 75. The evidence overwhelmingly indicates that Mr. Segundo's IQ falls within this range.

On four separate IQ tests, Mr. Segundo scored at or below 75. In 2006, Mr. Segundo scored 60 on the Assessment of Neuropsychological Status ("RBANS") administered by Dr. Goodness—a score so low that less than one-half a percent of people tested scored lower than him. *See* Exh. K to Orig. Pet. at 2 (July 11, 2006 Letter from Dr. Goodness to Wes Ball and Mark Daniel). Dr. Goodness also

administered the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III"), on which Mr. Segundo scored 75. *See id.* at 1. In 2009, Dr. Thorne administered the Wechsler Adult Intelligence Scale, Fourth Edition ("WAIS-IV"), on which Mr. Segundo scored 72, placing him in the bottom three percent of individuals his age. *See* Exh. B to Orig. Pet. at 9 (Dr. Thorne Psychological Report, dated November 12, 2009). Mr. Segundo received a score of 71 on the Culture Fair Test administered by the Texas Department of Criminal Justice ("TDCJ"), two points below a passing score. *See* Exh. D to Orig. Pet. (Arden Dominey Aff.). If the "Flynn Effect" is taken into account, Mr. Segundo's IQ scores are likely even lower than the scores reported by clinicians.[5] Correcting for the "Flynn Effect," Mr. Hall actually scored 72 on the WAIS-III rather than 75. *See* Exh. A to Motion to Expand Record, at 11 ¶ 32 (Dr. Greenspan Decl.). Likewise, when corrected for the "Flynn Effect," Mr. Segundo's score on the WAIS-IV was 71 rather than 72. *See id.*, at 13 ¶ 39.

In addition to receiving these four scores within the sub-average range, Mr. Segundo "flunked" two other IQ tests administered by TDCJ, for which the scores are not available. According to TDCJ's Supervising Psychologist of Health Services, Mr. Segundo flunked the Revised Beta intelligence test[6] administered by TDCJ. *See*

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[5] The "Flynn Effect" recognizes the phenomenon that mean IQ scores increase over time, resulting in artificially inflated test scores. Clinicians should consider the "Flynn Effect" when administering an IQ test and make appropriate adjustments to ensure the score is not artificially inflated. *See* 2010 AAIDD GUIDE, at 37.

[6] The Revised Beta intelligence test is a screening test and, on its own, is not a reliable indicator of intellectual functioning. *See* Exh. A to Mot. Exp. Record at 14 ¶ 43 (Dr. Greenspan Decl.). Nonetheless, Mr. Segundo's score was low enough on this test to cause TDCJ to conduct further testing and eventually place him in its Mentally Retarded Offender Program. *See* Exh. D to Orig. Pet. (Arden Dominey Aff.). As noted by Dr. Greenspan, the Revised Beta intelligence test provides further support of Mr. Segundo's sub-average intellectual functioning because it "was

Exh. D to Orig. Pet. (Arden Dominey Aff.). Mr. Segundo also flunked the WAIS-R test administered by TDCJ.[7] *See id.* Because he flunked the WAIS-R test, Mr. Segundo qualified for—and was sent to—TDCJ's Mentally Retarded Offender Program. *See id.*

Mr. Segundo only scored outside the range for deficits in intellectual functioning on a single test, the Reynolds Intellectual Assessment System ("RIAS") administered by Dr. Price in 2006, on which he scored an 86. *See* Exh. C to Orig. Pet. ¶ 6 (Dr. Price Aff.). Yet during the 2009 hearing on Mr. Segundo's state court habeas petition, Dr. Price himself acknowledged that the RIAS tends to "over-estimate intelligence," *Hearing on Writ of Habeas Corpus (December 9, 2009)*, at 83, and said that because the RIAS was an outlier score, he would "put more emphasis on the WAIS-III and WAIS-IV that were administered." *Id.* at 86. In his declaration, Dr. Greenspan agreed that the RIAS test overstates IQ and is an inappropriate measure of Mr. Segundo's intellectual functioning. *See* Exh. A to Mot. Exp. Record at 15 ¶ 46 (Dr. Greenspan Decl.). Discounting the RIAS results, which even the State's expert intimated was appropriate, every IQ score in Mr. Segundo's case indicates that his intellectual functioning is so profoundly low he falls within the range of a potential *Atkins* claim.

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congruent with, and supports, other indicators" of ID. Exh. A to Mot. Exp. Record at 14 ¶ 43 (Dr. Greenspan Decl.).

[7] Mr. Segundo's WAIS-R test was destroyed by TDCJ; therefore, his score on the test is not available. However, TDCJ's Supervising Psychologist testified that Mr. Segundo qualified for the Mentally Retarded Offender Program because he did not "pass" the WAIS-R test. *See* Exh. D (Arden Dominey Aff.).

4. Prevailing professional norms in place at the time of Mr. Segundo's trial required that counsel investigate adaptive functioning and early onset in a case like Mr. Segundo's, with multiple IQ scores under 75

Hall did not break new ground; rather, it simply emphasized the clearly established Supreme Court law set out more than a decade earlier in *Atkins*: When an individual scores 75 or below on an IQ test, like Mr. Segundo repeatedly did, he falls within the range of potential ID and therefore must have the opportunity to present evidence of . . . intellectual disability" in support of his *Atkin*'s claim—specifically, evidence of adaptive deficits and early onset. *Hall v. Florida*, 134 S. Ct. at 2001; *see also Atkins v. Virginia*, 536 U.S. at 309 n.5.

By the time of Mr. Segundo's trial in 2006, it was well known to the Texas capital defense bar that adaptive behavior must be fully investigated when a client scores between 70 and 75 on a properly administered, gold-standard IQ test, such as the WAIS-III and, later, the WAIS-IV. In 2004, the International Justice Project ("IJP"), in conjunction with the Cornell Law School Death Penalty Project, Federal Death Penalty Resource Counsel, and Habeas Assistance and Training Counsel, published A Practitioner's Guide to Defending Capital Clients Who Have Mental Retardation, excerpts of which are attached to this motion as Exhibit "A." [Hereinafter IJP PRACTIONER'S GUIDE]. As in *Atkins* and *Briseno*, the Guide stated that IQ scores between 70 and 75 qualified under the *Atkins* first prong. *See* IJP PRACTIONER'S GUIDE, at 33. Because most capital defendants with ID are in the range formerly referred to as "mild mental retardation," the Guide emphasized that "[o]ne of the striking characteristics of [such] people . . . is that, without IQ testing

and thorough assessment of adaptive functioning, it is difficult for anyone—especially lay people—to determine reliably whether that person has mental retardation." *Id*. at 18 (emphasis added). In order to accurately assess whether a client has ID, the Guide stated that it was "imperative to proceed with extreme care, and the Guide strongly emphasized that a "full history should be taken to ensure that every possibility is examined rather than allowing the client to selectively provide information that they consider to be most useful." *Id*. at 19 (bold-face emphasis omitted). This required the compilation of a thorough, comprehensive life history, which included the collection of all relevant documents and interviewing a broad range of people, including parents, grandparents, siblings, extended family members, child care workers, teachers, social service providers, previous health care providers, pastors, friends, co-workers, military personnel, police officers, juvenile authorities, and jail and prison officers. *Id*. at 19-23. Importantly, the Guide recommended engaging in this comprehensive screening process, which involved an up-front life-history investigation, before taking the additional steps of engaging experts for IQ testing and diagnosis. *Id*. at 25-28.

Assessing adaptive behavior, through investigation and expert evaluation was essential to determining the existence of ID:

> At the outset, it is important to remember that the assessment of adaptive behavior limitations is not only necessary, but crucial to the diagnosis of mental retardation. Without a clinical conclusion that your client has significant limitations in adaptive behavior, s/he will not be found to have mental retardation. Cases have been lost because the evaluation focused solely on the IQ, even though there was available evidence of limitations in adaptive behavior. Limitations in adaptive behavior, manifested during your client's developmental

> period, also provide independent and irrefutable corroboration of his/her significant limitations in intellectual functioning. Developing evidence of these limitations is, therefore, the lynchpin of proving your client has mental retardation.

IJP PRACTIONER'S GUIDE, at 29. Thus, counsel were advised strongly that reliance only on IQ scores alone was not only scientifically unsound, it could be fatal to the client. Rather, it is essential to conduct a comprehensive life history before making any determination whether the client has or, more importantly, does not have ID. This evidence is also essential to determining onset: "The significant limitations in adaptive behavior that are characteristic of mental retardation must be apparent during the developmental period. . . . This reemphasizes the *absolute necessity* of developing a comprehensive life history of the client." *Id*. at 31 (emphasis added).

In 2005, Texas Appleseed and the Houston Endowment published Opening the Door: Justice for Defendants with Mental Retardation, excerpts of which are attached as Exhibit "B." [Hereinafter OPENING THE DOOR]. As with the IJP Practitioner's Guide, the Appleseed publication cautioned that a diagnosis of ID involves more than just a low score on an IQ test and that a comprehensive mitigation investigation is essential to the determination of ID: "Mental conditions that inspire compassion, without justifying or excusing the crime, can be powerful mitigation evidence. . . . In capital cases, showing that your client has mental retardation could mean the difference between life and death." OPENING THE DOOR, at 3. Attorneys were cautioned to take the standard error of measurement into account, meaning that "a score of up to 75 may still make a person eligible for a determination of mental retardation." *Id*. at 6. *See also id*., at 70. Adaptive behavior

and onset must be considered concurrently with IQ test scores, particularly when scores fall within the qualifying range. *Id.* at 7-9 ("IQ tests are but one of the measures used to reach a determination of mental retardation. Measurement of adaptive behavior and age of onset are also considered."). The Appleseed publication advised attorneys to use an "incremental approach" to assessing whether a client had ID, which invariably begins with a mitigation specialist and the compilation of a comprehensive life history. *Id.* at 51-52. "Mitigation investigations need to be thorough and extensive. If you are defending someone who could receive the death penalty, his/her life quite literally may depend upon your ability to show that he/she is a person with mental retardation." *Id.* at 52 (bold-face emphasis omitted). The publication cautioned against relying solely on a psychologist, who may be unqualified to compile the relevant data for an ID diagnosis:

> While a psychologist may be able to administer an IQ test, he/she may not have experience and expertise in working with individuals with mental retardation. . . . [Y]our mitigation expert should be a someone who has a wealth of experience in working with individuals who have mental retardation.

Id. at 68. Once the life history is compiled, the attorney then must seek out experts, which includes a psychologist to administer an IQ test and an expert conversant with diagnosing ID and assessing adaptive behavior. *Id.* at 52-53. "This incremental approach to developing mitigating evidence may be more cost efficient, more likely to produce information that will advance your theory of the case, and less likely to generate information that will be of no use or, worse, will harm your client." *Id.* at 53.

In the wake of *Atkins*, and particularly by the time of Mr. Segundo's trial in 2006, reasonable counsel would have vigorously questioned whether his client was intellectually disabled and would not have simply pulled up stakes and moved on based solely on the evidence that Mr. Segundo scored a 75 on the WAIS-III. Reasonable counsel would have done what all reasonable counsel representing a capitally-charged client would do—investigate thoroughly and compile a comprehensive life history. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("It is unquestioned that under prevailing professional norms at the time of Porter's trial [1988], counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)).

5. Notwithstanding case precedent and prevailing professional norms, Mr. Segundo's trial and state habeas counsel never investigated his adaptive functioning and early onset.

Despite the fact that virtually all of Mr. Segundo's IQ scores were indicative of ID, his state trial and habeas attorneys never investigated adaptive functioning and early onset. Indeed, trial counsel conducted hardly any mitigation investigation at all; the few efforts they put toward mitigation focused nearly exclusively on gathering evidence of Mr. Segundo's good character,[8] rather than his adaptive functioning and early onset of symptoms. Trial counsel never interviewed witnesses, such as family members, colleagues, neighbors, and friends, specifically about his ID. They never obtained Mr. Segundo's childhood medical records. They never spoke

[8] The only exception was a few pages of testimony that trial counsel elicited from Mr. Segundo's brother, in which he testified briefly about Mr. Segundo's upbringing. *See* III.B.6, *infra*. However, this testimony hardly probed Mr. Segundo's adaptive behavior during the developmental period and just alluded to the fact that he had a difficult upbringing.

with teachers or counselors who could report on Mr. Segundo's academic functioning. *See Petition for Writ of Habeas Corpus by a Person in State Custody*, at 63-70.

Mr. Segundo was equally unfortunate at the state habeas level in which his state habeas counsel conducted virtually no independent investigation at all. Though raising a bare-bones *Atkins* allegation in the original petition, state habeas counsel made no effort to develop any evidence in support of the claim, relying instead exclusively on the admittedly unreliable screening test provided by TDCJ. Counsel conducted no independent investigation, much less prepared a comprehensive social history that would have detailed fully Mr. Segundo's adaptive functioning and onset issues. It was only after the trial court reluctantly granted a hearing that counsel scrambled to find an expert, and he provided the psychologist he retained with inadequate data and background information to enable that expert to assess ID properly and render a reliable opinion. *See Petitioner, Juan Meza Segundo's Reply and Opposition to Respondent's Answer and Motion for Summary Judgment*, at 43-45 (DE 20). *See also Petitioner's Supplemental Briefing on the Effect of* Martinez v. Ryan *and* Trevino v. Thaler *on the Issues in this Case*, at 22-25.

As a consequence of trial and state habeas counsels' complete lack of investigation of ID, the clinicians who evaluated Mr. Segundo at the state trial and habeas levels had to rely on his highly inaccurate self-reports to make their diagnosis. For example, in detailing Mr. Segundo's family, psychosocial, and medical history, Dr. Hopewell explained that the "current information relies mostly

upon his self report." Exh. A to Orig. Pet. at 2 (Dr. Hopewell Neuropsychological Report). Likewise, Dr. Thorne based his assessment of Mr. Segundo's developmental milestones, and educational, employment, relationship, and psychiatric history solely on Mr. Segundo's own explanations during his clinical interview. *See* Exh. B to Orig. Pet. at 2-3 (Dr. Thorne Psychological Evaluation). Dr. Goodness cautioned that "the reliability of some evaluation results is uncertain" because she based her assessment of Mr. Segundo's personal history on his self-report. Exh. K to Orig. Pet. at 1-2 (July 11, 2006 Letter from Dr. Goodness to Wes Ball and Mark Daniel).

Self-reports alone are not a reliable measure of adaptive functioning or early onset. According to widely established medical standards for assessing ID, clinicians should not rely solely on self-reports when assessing adaptive functioning because they can be highly inaccurate. *See* 2010 AAIDD GUIDE, at 52; Mark J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 114, 119 (2009) (explaining that "relying solely on the individual's self-report" to diagnose ID "is fraught with problems"). Individuals often do not accurately report their own deficits in adaptive functioning because (1) they want to "mask their deficits and attempt to look more able and typical then they actually are;" (2) ID has a stigma, leading many individuals to "fight hard" against the label; (3) ID "is closely tied to how a person is perceived by peers, family members, and others in the community;" and (4) people with ID have a strong "bias to please," which may lead to erroneous responses. 2010 AAIDD GUIDE, at 51-52. As federal habeas expert, Dr. Greenspan observed in his

declaration, it has never been standard practice to rely solely on self-reports; instead, clinicians are "required to rely on third parties who were well-acquainted with the individual's behavior over an extended period of time and in multiple settings." Exh. A to Mot. Exp. Record, at 17 ¶ 53 (Greenspan Decl.). This wisdom is exemplified in this case: Dr. Goodness noted that Mr. Segundo was "not a reliable historian" and often reported patently false stories, or contradicted himself from one meeting to the next. Exh. K to Orig. Pet. at 1-2 (July 11, 2006 Letter from Dr. Goodness to Wes Ball and Mark Daniel).

The clinicians' only other source for assessing Mr. Segundo's adaptive functioning and developmental history was punishment-phase trial testimony by a handful of acquaintances of Mr. Segundo's. *See* Exh. B to Orig. Pet. at 5-9 (Dr. Thorne Psychological Evaluation). Yet defense counsel hand-picked those acquaintances to testify about Mr. Segundo's good character. The testimony did not focus on, or even remotely concern, the issue of Mr. Segundo's ID. Indeed, because the testimony was hand-picked and presented for the purpose of demonstrating Mr. Segundo's good character, it emphasized his "positive behaviors"—things he could do—whereas adaptive functioning should be diagnosed based on a comprehensive understanding of what a person *cannot* do. *See* Exh. A at 18-19 ¶ 58 (Greenspan Decl.). *See also* 2010 AAIDD GUIDE, at 47 ("[I]n the process of diagnosing ID, significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills."). Like Mr. Segundo's

self-reports, the acquaintances' court testimony is not an adequate basis from which to evaluate whether Mr. Segundo has ID.

Without a complete record documenting Mr. Segundo's adaptive functioning and early onset, this court cannot assess his ID claim consistent with the standards set forth by the Supreme Court. To fully assess Mr. Segundo's ID, an experienced mitigation specialist or clinician must interview people in Mr. Segundo's life with a view to discussing his adaptive functioning and onset of symptoms. Such evidence would provide a complete picture of Mr. Segundo's day-to-day functioning and document factors in his developmental history showing ID.

6. There is compelling reason to believe that Mr. Segundo could discover further evidence supporting an ID claim.

There is strong reason to believe that further investigation will uncover compelling evidence supporting Mr. Segundo's claim of ID. Mr. Segundo's brother, Valentine Ramos Meza, testified during the sentencing phase of trial about his relationship with his brother. Although Mr. Meza's testimony almost entirely focused on the issue of good character and was not introduced to show ID, it nonetheless demonstrates that further investigation could uncover important evidence. Growing up, Mr. Segundo's family was destitute, and their father abandoned them. *28R. 16.* Unable to afford a place for her family to live, their mother took them to live in a small janitor closet with no bathroom or running water. *28R. 16-20.* Mr. Segundo's mother abandoned the family for days a time, leaving Mr. Meza to take care of his younger brothers. *Id.* For meals, Mr. Segundo and Mr. Meza ate rotten food that Mr. Meza scrounged up from garbage bins behind

the doughnut shop and supermarket. *28R. 18-19*. Mr. Segundo suffered a severe head injury as a child, for which he never received medical treatment; and his stepfather abused him. *28R. 21-22, 28*. According to Mr. Meza, Mr. Segundo always seemed "slow" or "not there in some way." *28R. 22*.

Mr. Meza's testimony suggests that Mr. Segundo was raised, like Mr. Hall, "under the most horrible family circumstances imaginable," which could have made "his deficits in adaptive functioning all the more severe." *Hall*, 134 S. Ct. at 1991 (internal quotation marks omitted). Yet Mr. Meza's testimony is only the tip of the iceberg; because no comprehensive life history has been compiled, there remain unanswered but nevertheless important questions about Mr. Segundo's early development and daily functioning.

Dr. Hopewell's evaluation of Mr. Segundo also indicates potential ID that requires further investigation. Based on an incorrect understanding of both the legal and medical standards for evaluating ID, Dr. Hopewell stated that Mr. Segundo's IQ score of 75 on the WAIS-III meant that he was "not technically within" the ID range, but was merely "borderline." Exh. A to Orig. Pet. at 7 (Dr. Hopewell Neuropsychological Report). Even though he ultimately incorrectly excluded an ID diagnosis based on the 75 IQ score, Dr. Hopewell noted several troubling signs that Mr. Segundo may have poor adaptive functioning. Dr. Hopewell determined that Mr. Segundo had "poverty of speech," "impoverished and deteriorated" cognitive functioning, poor sensory-motor functioning, "very low abilities" in the area of "language development" and "verbal concepts," and

difficulties with basic movement and "even basic communication skills." *Id.* at 3-4. Dr. Hopewell also diagnosed Mr. Segundo with "unspecified organic brain syndrome" and "cognitive disorder NOS." *Id.* at 7. Dr. Hopewell made this diagnosis based on the fact that Mr. Segundo had abysmal executive functioning, which he defined as "the ability to engage in independent, purposeful, self-directed, and self-serving behavior," *id.* at 4, to such a degree that it "affects all aspects of one's life." *Id.* at 5. Dr. Hopewell also noted that Mr. Segundo often made nonsensical statements. For example, Mr. Segundo repeatedly insisted that he had a "number of landscaping jobs that he needed to complete," and seemed to think that he would be released and complete the jobs. *Id.* at 6. Dr. Hopewell's evaluation paints a picture of an extremely cognitively impaired man with signs of low adaptive functioning.

The evidence developed through Meza and Hopewell demonstrates the presence of numerous risk factors for ID throughout Mr. Segundo's life. *See* IJP Practitioner's Guide, at 23-25 ("Because of the correlation between risk factors and mental retardation, it is important to identify any risk factors in your client's history."). In the prenatal period, the evidence either indicates or strongly suggests social and educational risk factors in Mr. Segundo's mother, including poverty, maternal malnutrition, lack of access to prenatal care, and lack of preparation for parenthood. *Id*. In the perinatal period (around the time of and shortly after birth), the evidence suggests parental rejection of caretaking and parental abandonment of the child. *Id*. Post-natal risk factors include traumatic brain injury, inadequate medical intervention related to that injury, extreme malnutrition in which Mr.

Segundo and his siblings foraged for food in garbage cans, a severely impaired child-giver, lack of adequate stimulation, family poverty, child abuse and neglect, inadequate safety measures, social deprivation, difficult child behaviors, impaired parenting, inadequate early intervention services, and inadequate family support. *See id*. Mr. Segundo, because of his mental deficits, required special support; however, he received precisely the opposite, which likely compounded his already fragile mental condition.

An adequate mitigation investigation would likely create a much more robust picture of Mr. Segundo's developmental history and daily functioning—one that could help the Court determine, under the *Atkins* and *Hall* standards, whether Mr. Segundo has ID. This investigation would include interviews with people who knew Mr. Segundo as he grew up; visits to the places where Mr. Segundo was born or raised; interviews with relatives; the creation of a detailed three-generation pedigree of his family history; school and academic records or, alternatively, the reconstruction of such records through collateral interviews of former teachers and coaches, and counselors; and collection of hundreds of documents showing Mr. Segundo's daily functioning and childhood development. *See* Exh. A to Motion to Expand Record, at 21 ¶¶ 63-64 (Dr. Greenspan Decl.); *see also* Robert L. Schalock & Ruth Luckasson, CLINICAL JUDGMENT 34-35 (AAIDD 2d ed. 2014). Such information would paint a complete picture of Mr. Segundo's adaptive functioning and age of onset. Mr. Meza's testimony and Dr. Hopewell's report show that there is more

evidence yet to be uncovered—evidence that this court must review to determine whether Mr. Segundo is disqualified from the death penalty because of ID.

C. *Hall* also clarifies why this Court should reconsider its denial of funding for Mr. Segundo to investigate his IATC claim.

In *Hall*, the Court after discussing the "conjunctive assessment necessary to assess an individual's intellectual ability" required by the unanimous consensus of the medical community, held that "when a defendant's IQ test score fall within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Hall v. Florida*, 134 S. Ct. at 2000-01. The Court continued: "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a *fair opportunity* to show that the Constitution prohibits their execution." *Id*. at 2001 (emphasis added).

By foregoing any attempt to investigate evidence that would show Mr. Segundo was in fact intellectually disabled, his counsel effectively deprived him of his constitutionally guaranteed right—established in both *Atkins* and *Hall*—to have the fact-finder consider evidence crucial to prove that he was ineligible for the death penalty because he has ID. *See Williams v. Taylor*, 529 U.S. at 393 ("In the instant case, it is undisputed that Williams had a right—indeed a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer."). Effectively, Mr. Segundo's trial and state habeas counsel *failed to investigate* crucial evidence of intellectual disability, and this is the essential gravamen of his claims.

This Court, in denying Mr. Segundo's request to reconsider funding, misconstrued the nature of Mr. Segundo's claims, recasting them as complaints about the defense experts that rendered opinions in the case. *See Order Granting Expansion and Denying Reconsideration*. The Court posited three reasons Mr. Segundo was not entitled to funding. First, the Court held that as a categorical matter, counsel may not be held ineffective for failing to provide evidence to an expert unless the expert requests the investigation or the evidence. *Id*. at 3-4 (citing *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995)). Also, a claimant must show that the "information *would have made a difference* to the expert's opinion." *Id*. Second, the Court held that "a claimant should show that the testifying experts *would have changed their opinions* if they had possessed the missing information." *Id*. at 4. Finally, the Court held that later disagreement in post-conviction proceedings by a different expert only raises a battle-of-the-experts scenario, and in such a situation, once again, deficient performance cannot be established as a categorical matter. *Id*.

The Court's analysis is flawed for two reasons. First, the Court neglected the underlying teaching in *Strickland* that counsel's performance, which includes the duty to investigate and the selection of experts to assist the defense, must be measured by prevailing professional norms at the time of the representation and not by one-size-fits-all judicial categories. *See Strickland v. Washington*, 466 U.S. 668, 688-89 (1984) (holding that no set of "detailed rules for counsel's conduct" could account for the "variety of circumstances faced by defense counsel or the range of

legitimate decisions regarding how best to represent a criminal defendant"). Second, by requiring Mr. Segundo to prove now, before any funding for investigation is granted and before the contemplated investigation is completed, that the results of the investigation would have changed the opinions of the experts who provided trial and state habeas level services, the Court is creating an impossible situation in which investigative resources are available only if the claimant possesses the evidence to be investigated.

It is well established that counsel in a capital case is responsible for guiding the litigation strategy for the case; however, decisions about strategy do not happen in a vacuum. Rather, all strategic decisions must be informed by a thorough investigation that has uncovered the essential underlying evidence needed to support the decision. It is unquestioned that counsel has a duty to conduct a thorough investigation of the client's background and of the circumstances of the offense. *See Porter v. McCollum*, 558 U.S. at 39. In order to discharge this duty, counsel must assemble a defense team, which includes at a minimum two attorneys, a fact investigator, and a mitigation specialist. *See* 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 4.1.A.2, reprinted in 31 HOFSTRA L. REV. 913 (2003). The defense team must include at least one member (typically the mitigation specialist) who is "qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." 2006 STATE BAR OF TEXAS, GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL, Guideline 3.1.A.2. *See*

also 2008 ABA SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 5.1.E, reprinted in 36 HOFSTRA L. REV. 677 (2008) [hereinafter 2008 ABA SUPPLEMENTARY GUIDELINES]. "It is the duty of counsel to lead the team in conducting the exhaustive investigation into the life history of the client." 2008 ABA SUPPLEMENTARY GUIDELINES, Guideline 10.4.A. In other words, lead counsel bears the primary responsibility for assembling the defense team, selecting investigators, determining the course of the investigation, determining the need for and the scope of expert assistance, and ultimately vetting experts to provide such assistance.

Moreover, when developing mental health evidence, it is crucial to first obtain comprehensive information on the client's background and life history *before* making any determination concerning whether to secure a mental health evaluation, the nature and scope of such an evaluation, and the choice of expert to conduct the evaluation. By first conducting a comprehensive investigation, counsel ensures that any evaluation generates reliable evidence that is useful to the legal issues in the case. *See* Richard G. Dudley, Jr., et al., *Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 966-74 (2008). This is an essential first step in the process and a key to effective representation:

> The process of gathering, organizing, and analyzing life history data often leads to the identification of mental health issues requiring assessments by mental health experts who potentially will testify regarding their findings. When this occurs, and often it does, the mitigation specialist gathers extensive information about the mental health issue at hand, works with the defense team to identify and

> select a qualified expert, assists counsel in preparing the client and his family for the assessment process, and provides any additional information the mental health expert needs to conduct a reliable mental health assessment. The *first step in this process* is to conduct a life history investigation.

Id. at 966 (emphasis added). "As a general rule, it is never appropriate to expect a mental health expert to deliver a comprehensive mental health assessment of the client until the life history investigation is complete." *Id*. at 974-75. *See also* Eric M. Freedman, *Introduction: Re-Stating the Standard of Practice for Death Penalty Counsel: The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 663, 672 (2008) ("They make a fundamental but too-frequently-ignored point: it is simply ineffective assistance of counsel to permit a mental health assessment of the client to occur before having made a reasoned decision about the purpose of the examination and having provided the examiner with the data necessary to reach a professionally competent conclusion respecting the question presented."); George W. Woods, et al., *Neurobehavioral Assessment in Forensic Practice*, 35 INT'L J. OF L. & PSYCHIATRY 432, 433 (2012) (explaining the necessity of placing data derived from neuropsychological and other forms of neurobehavioral assessment within the context of the comprehensive social and life history compiled by the mitigation specialist to ensure reliability through corroboration and to create a "longitudinal and holistic understanding of the individual").[9]

[9] For the Court's convenience, a copy of this article is attached to this motion as Exhibit "C."

When viewed in this context, it is clear that *Hendricks* did not create an immutable rule that counsel is shielded from ineffective assistance of counsel claims anytime an expert is retained and that expert does not request information or suggest avenues for investigation. *Hendricks* involved a 1981 trial in which trial counsel retained two mental health experts to evaluate whether a guilt-innocence phase mental-state defense was viable. *Hendricks v. Calderon*, 70 F.3d at 1038. In federal post-conviction proceedings in 1995, Hendricks contended that his counsel failed to conduct a comprehensive investigation into his background and that by failing to provide evidence that could have been uncovered through such an investigation, counsel made ineffective use of the experts. *See id*. The court held that that prevailing norms at the time of trial would not lead one to conclude that counsel had such a duty. *See id*. At that time, it was not uncommon for experts to assist capital counsel in formulating investigation plans and to guide the investigation:

> An integral part of an expert's specialized skill at analyzing information is an understanding of what information is relevant to reaching a conclusion. Experts are valuable to an attorney's investigation, then, not only because they have special abilities to process the information gathered by the attorney, but because they also are able to guide the attorney's efforts toward collecting relevant evidence.

Id. at 1038-39. Though by the time of federal post-conviction proceedings, trial counsel came to believe that they made ineffective use of their experts by failing to conduct a more thorough investigation, the court held that "[c]ertainly, in 1981, Hendricks' attorneys did not believe they had any duty to investigate Hendricks'

social history in the face of the unanimous opinions of their own experts that there was no basis for a mental defense." *Id*. at 1039. Nevertheless, the court found counsel ineffective for failing to investigate mitigating evidence for use in the punishment phase of trial, including evidence of their client's mental health, when counsel was "on notice that his client may be mentally impaired." *Id*. at 1043-44.

The holdings in *Hendricks* were firmly rooted in the context of the trial, and the court did not purport to fashion any firm rules concerning counsel's use of expert witnesses. In fact, courts have repeatedly found counsel ineffective for failing to properly prepare mental health experts with information gleaned through a comprehensive mitigation investigation. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 391-93 (2005) (holding that had counsel conducted a competent mitigation investigation, they would have discovered evidence, including organic brain damage, extreme mental disturbance, and impairments stemming from fetal alcohol spectrum disorder, that "would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed . . . [in part] from reports of the mental health experts"); *Ferrell v. Hall*, 640 F.3d 1199, 1227 (11th Cir. 2011) (finding counsel ineffective for failing to conduct a comprehensive mitigation investigation, which resulted in a narrowly conscribed mental health evaluation); *Gray v. Branker*, 529 F.3d 220, 231 (4th Cir. 2008) (holding that counsel was ineffective for relying on Gray's "self-assessment of his mental health" and not providing a mental health expert with readily available evidence concerning Gray's mental deterioration and the circumstances surrounding the offense).

Hendricks, therefore, has limited import to this case and is not controlling. Rather, prevailing norms at the time of trial control, and as demonstrated, counsel was required to prepare a comprehensive life history, which would detail adaptive behavior issues and onset, before making any decision concerning the scope of evaluation and the mental health expert needed to conduct such an evaluation. Counsel's complete failure to conduct a timely and comprehensive investigation demonstrates that counsel likely provided deficient performance under the *Strickland* standard. The opinions that counsel received from his mental health experts should not operate as an unassailable shield to an IATC claim now.

Finally, as a precondition to funding, this Court would require Mr. Segundo to prove now that the experts would have changed their minds if confronted with new evidence. *Order Granting Expansion and Denying Reconsideration*, at 3 (". . . the information would have made a difference to the expert's opinion"); *id*. at 4 (". . . the additional information would have changed the diagnosis in any meaningful way"). Also, the Court presumes that, given the current state of the evidence, Mr. Segundo will only end up proving a simple disagreement between well-intentioned experts. *Id*. Though after a comprehensive investigation Mr. Segundo's mental health professionals who provided opinions and testimony might stand firm on their opinions even when faced with new evidence, it is premature to draw that conclusion now. Simply put, these determinations should only be made *after* all the evidence is developed and presented. More importantly, Mr. Segundo should be provided the opportunity to convince the trial and state habeas level experts that

they erred and that with more comprehensive life history information, they may reach a different conclusion. The Court should not deny funding based only on the possibility of one out of two outcomes—the one unfavorable to Mr. Segundo's claims—will materialize. Instead, the Court should allow Mr. Segundo to proceed with the investigation and litigate his claims in full.

D. The Fifth Circuit's restrictions on the provision of ancillary services under § 3599(f) do not limit this Court from granting the relief requested.

Under § 3599(f) and *McFarland*, a claimant need only establish that the ancillary services are reasonably necessary to develop and plead claims for relief. Notwithstanding this low threshold, the Fifth Circuit has construed § 3599(f) in a manner that restricts access to otherwise reasonably necessary ancillary services. Nevertheless, Mr. Segundo is able to satisfy this heightened standard.

According to the Fifth Circuit construction, investigation is reasonably necessary if there is "a substantial need for the requested assistance." *Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004). Though under this standard it is unclear what level of substantiality is required to secure funding, the Fifth Circuit has nevertheless delineated circumstances in which substantiality is lacking: "when a petitioner has (a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (b) when the sought-after assistance would only support a meritless claim, or (c) when the sought after assistance would only supplement prior evidence." *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005). The *Smith* factors ostensibly are premised on a court's ability to

predetermine the futility of the proposed services to change the outcome. In other words, a federal court may decline to grant funding to repeat prior investigations or to investigate a facially meritless claim or a claim that would invariably be subject to inescapable procedural hurdles.

As demonstrated in this motion, the proposed investigative services are not only reasonably necessary, Mr. Segundo has demonstrated a substantial need for them because, as shown in *Atkins v. Virginia* and *Hall v. Florida*, courts require a complete record of adaptive functioning and early onset to accurately assess whether a defendant meets the legal definition of ID. As demonstrated throughout this litigation, Mr. Segundo's *Atkins* claim has considerable merit, particularly given the fact that every IQ test score was within the qualifying range (other than a single outlier score, which even the State's expert admitted was not reliable). Furthermore, because no attorney has ever conducted the needed investigation into adaptive behavior and onset, the evidence that Mr. Segundo proposes to develop would not replicate or even supplement prior evidence. Mr. Segundo's state habeas counsel provided woefully inadequate representation by failing to conduct any meaningful investigation and, as Respondent takes apparent glee in pointing out, *Respondent Thaler's Answer with Brief in Support*, at 14-20 (DE 14), by presenting an inadequately prepared expert witness who testified contrary to the *Atkins* claim in the state court hearing. This leaves procedural default as the only *Smith* factor restricting this Court's funding decision.

Nevertheless, with respect to the *Atkins* claim, procedural default should not factor into this Court's consideration of the claim. Mr. Segundo contended in his original petition before this Court that the State court both unreasonably applied *Atkins* and based its decision on an unreasonable determination of the facts, *see* 28 U.S.C. § 2254(d)(1) & (2). The State court's opinion was unreasonable because it grossly mischaracterized the underlying science of ID by holding that Mr. Segundo's IQ scores indicated that he did not have significantly sub-average intellectual functioning, even though the scores were low enough to potentially classify him as intellectually disabled under widely-accepted ID standards. Moreover, the State court's opinion focused on Mr. Segundo's strengths rather than his limitations in determining significant deficits in adaptive behavior, which is likewise contrary to widely-accepted ID standards. *See Petition for Writ of Habeas Corpus by a Person in State Custody*, at 23-24, 33-52 (DE 11). If Mr. Segundo has satisfied either § 2254(d)(1) or (2), then the statutory limitations on granting relief imposed by § 2254(d) fall away and have no bearing on whether the petitioner is able to establish entitlement to habeas relief. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in Section 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires."). At that point, a federal court must give the constitutional claims plenary consideration and, subject only to the strictures set out in § 2254(b), (c), and (e), may consider additional evidence and, where

appropriate, grant an evidentiary hearing. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) (holding that § 2254(e)(2) "continues to have force where § 2254(d)(1) does not bar federal habeas relief"); *Morris v. Thaler*, 425 Fed. Appx. 415, 423-24 (5th Cir. 2011) (holding that an evidentiary hearing is permissible, and appropriate, after determining that § 2254(d)(1) is satisfied).

With respect to the IATC claim, *Martinez* and *Trevino* provide a gateway through which Mr. Segundo may, with proper factual development, be able to establish the cause needed to excuse the default under *Coleman*. *See Petitioner's Supplemental Briefing on the Effect of* Martinez v. Ryan *and* Trevino v. Thaler *on the Issues on this Case*, at 4-10, 16-25 (DE 34); *Petitioner's Motion for Reconsideration of the Motion for Appointment of an Investigator/Mitigation Specialist*, at 3-7. Because a pathway exists for overcoming any potential procedural default for failing to raise an IATC claim in state post-conviction proceedings, funding to develop evidence needed to show both cause and prejudice and the underlying merits of the IATC claim would not be an exercise of futility. Again, as Mr. Segundo has contended continuously throughout this litigation, investigation is crucial in order him to develop substantial claims.

Because Mr. Segundo can navigate the Fifth Circuit's narrow limitations on § 3599(f) services, he has a substantial need and a statutory right to the requested funding.

E. In the event that the Court again denies funding under § 3599(f), Mr. Segundo requests that the Court note in the order that a permissive interlocutory appeal of the issue to the Fifth Circuit should proceed.

Under 28 U.S.C. § 1292(b), a district court, upon entering an order that "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," may note in the order denying relief that a discretionary interlocutory appeal should proceed. 28 U.S.C. § 1292(b). The court of appeals may, in its discretion, "permit an appeal to be taken from such order." *Id*.

The manner in which the Court views Mr. Segundo's funding request for the IATC claim essentially empties it of any merit. Moreover, without a comprehensive investigation into adaptive behavior and onset issues, Mr. Segundo is stalled in his ability to pursue both the *Atkins* and IATC claims. Thus, the Court's order involves a controlling question of law to this case as to which there could be a substantial ground for difference of opinion. Short of a final order from the Court, an appeal of the Court's order is necessary to advance the litigation. As a result, Mr. Segundo requests that the Court make a finding in its order under § 1292(b) that an interlocutory appeal should be allowed.

IV. Conclusion

WHEREFORE, PREMISES CONSIDERED, Juan Raul Meza Segundo, respectfully requests that the Court grant § 3599(f) funding, in light of recent developments in *Hall v. Florida*, to enable him to fully investigate whether he has

ID, thus rendering him ineligible for execution under *Atkins*. Mr. Segundo also requests any other relief to which he may be entitled.

Respectfully Submitted,

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Certificate of Conference

I hereby certify that on February 25, 2015, I attempted to contact counsel for Respondent, Thomas Jones, by email concerning the merits of this motion. Based on past opposition to the requested relief, I believe that Respondent remains opposed the relief requested in the present motion.

/s/ Paul E. Mansur
Paul E. Mansur

Certificate of Service

I hereby certify that on February 25, 2015, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. District Court, Northern District of Texas. The ECF system sent a "Notice of Electronic Filing" to counsel for Respondent:

Ken Paxton
attn: Thomas Jones
Texas Attorney General
Post-conviction Litigation Division
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/s/ Paul E. Mansur
Paul E. Mansur

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JUAN RAMON MEZA SEGUNDO, *Petitioner,*	§	
V.	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, *Respondent.*	§	No. 4:10-CV-970-Y (Death Penalty Case)

MEMORANDUM OPINION AND ORDER DENYING RECONSIDERATION

On February 25, 2015, Petitioner filed a motion to reconsider this Court's denial of his post-petition motion for appointment and funding of a mitigation investigator in light of *Hall v. Florida,* 134 S. Ct. 1986 (2014) (doc. 45). Respondent has filed his response in opposition (doc. 46). Because the current motion repeats the defect in the prior motion to reconsider, it will be denied.

I.

After his petition for habeas relief was filed in this Court and after the limitations period under 28 U.S.C.A. § 2244(d) had expired, Petitioner filed a motion to fund a mitigation investigation to show that his trial and state habeas counsel were ineffective for failing to provide information to his experts needed to make a proper determination of his intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002). (Doc. 18, at 1.) After that motion was denied, Segundo moved for reconsideration on the basis that subsequent Supreme

Court authority reversed the Fifth Circuit precedent relied upon in denying the first motion for funding. (Doc. 38 at 3-5.)

This Court denied Segundo's motion to reconsider the denial of funding because he had not shown that the services were reasonably necessary for his representation under 18 U.S.C. § 3599(f), much less that the amount of funding requested in excess of the $7,500 limit was necessary to provide fair compensation for services of an unusual character or duration under § 3599(g)(2). (Order, ECF No. 44, at 2-9.) In particular, Segundo had not shown that any of his prior experts had requested the information or that the information would have made a difference to the opinion of any such expert. (Order at 3-8.) Segundo's second motion to reconsider suffers from the same defect.

II.

As observed in this Court's order denying reconsideration of funding (doc. 44), a habeas petitioner is entitled to funding if he makes a showing of substantial need for expert or investigative services, and the district court abuses its discretion in denying funding when such a need is shown. (Order at 2-3 (citing *Powers v. Epps*, 2009 WL 901896, at *2 (S.D. Miss. Mar. 31, 2009) and *Riley*, 362 F.3d at 307. A substantial need is **not** shown (a) when a petitioner fails to demonstrate that his funding request would support a viable constitutional claim that is not procedurally barred, (b)

when the assistance sought would only support a meritless claim, or (c) when the assistance sought would only supplement prior evidence. (Order at 3 (citing *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005).)

To make a viable claim of the deprivation of the effective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 687–90 (1984), for failing to provide an expert with information, the petitioner must show that the expert requested the information and that the information would have made a difference to the expert's opinion. (Order at 3-4 (citing *Bloom v. Calderon,* 132 F.3d 1267 (9th Cir.1997), *Roberts v. Dretke,* 356 F.3d 632, 640 (5th Cir. 2004), *Hendricks v. Calderon,* 70 F.3d 1032, 1038 (9th Cir. 1995), *Fairbank v. Ayers,* 650 F.3d 1243, 1252 (9th Cir. 2011), and *Jennings v. Stephens,* 537 F. App'x 326, 334 (5th Cir. 2013); *Roberts v. Singletary,* 794 F. Supp. 1106, 1131-32 (S.D. Fla. 1992).) Merely presenting a "disagreement by other experts as to the conclusions does not demonstrate a violation of *Strickland*." (Order at 4 (quoting *Fairbank v. Ayers,* 650 F.3d 1243, 1252 (9th Cir. 2011).)

III.

At trial and in the postconviction habeas-corpus proceedings, Segundo's attorneys obtained the assistance of mental-health experts to evaluate whether he was intellectually disabled and, thus, exempt from execution under *Atkins*. The State also obtained expert

assistance on the question. All of the experts that evaluated Segundo at the state-court level determined that he was not intellectually disabled under *Atkins*.

In his prior motion for reconsideration, Segundo asserted the opinion of a new expert that criticized all the prior experts for failing to adequately investigate and evaluate Segundo's intellectual disability, particularly regarding adaptive deficits.[1] (Doc. 38 at 7-11; Decl. of Stephen Greenspan, Ph.D.) This Court concluded that a mere disagreement among experts was insufficient to show that his counsel was ineffective under the standards of *Strickland*. Instead, Segundo must show that at least one of his prior experts requested the sought information from Segundo's prior counsel, and that the information would have altered the opinion of at least one of those prior experts in Segundo's favor. Because Segundo's motion failed to show how this standard could be met, it would support nothing more than a meritless claim that was procedurally barred.

Segundo's current funding motion also does not show that any of his prior experts requested the information now asserted to be essential or that such additional information would have changed any opinions of his prior experts. The nature of expert assistance would not be served by imposing on counsel a duty to independently know what the expert needs.

[1]As noted in this Court's prior order, Segundo's current expert directs his criticism to the conduct of the prior experts and not to that of Segundo's prior attorneys. (Order at 6-7.)

> An integral part of an expert's specialized skill at analyzing information is an understanding of what information is relevant to reaching a conclusion. Experts are valuable to an attorney's investigation, then, not only because they have special abilities to process the information gathered by the attorney, but because they also are able to guide the attorney's efforts toward collecting relevant evidence. To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach a mental health diagnosis demands that an attorney already be possessed of the skill and knowledge of the expert.

Hendricks, 70 F.3d at 1038-39.

Segundo has provided no indication that his prior counsel did anything but reasonably rely upon expert opinions regarding what information was needed, nor has he shown that any additional information would have made any difference to the prior experts. As was noted by the United States Court of Appeals for the Eleventh Circuit,

> There is no indication that the experts felt incapable of basing their conclusions on the information they obtained through their own testing and examinations. Nor is there any reason that, after receiving the experts' reports, counsel was obligated to track down every record that might possibly relate to [the prisoner's] mental health and could affect a diagnosis. . . .
>
> Finally, it is unclear that, even had these materials been provided to experts, their evaluations of [the prisoner] would have differed.

Card v. Dugger, 911 F.2d 1494, 1512 (11th Cir. 1990); *see also Roberts,* 794 F. Supp. at 1131-32 (noting lack of evidence that the additional information would have changed the expert's opinions, or that the experts felt incapable of basing their conclusions on the information they had obtained).

Rather than addressing the basis for this Court's denial of his prior motion, Segundo asserts that the Supreme Court's opinion in *Hall v. Florida* now supports his request. (Motion at 2-3, 6-33.) That opinion, however, does not address the standards for proving ineffective assistance of counsel, and does not affect the way *Atkins* claims are resolved in Texas.

In *Hall* the Supreme Court found that a Florida statute violated the Eighth Amendment because it prohibited inquiry into the other two elements of intellectual disability under *Atkins* if the prisoner's IQ was above 70. As recognized by the United States Court of Appeals for the Fifth Circuit, Texas law contained no such prohibition. "*Hall* does not implicate Texas. Although the [Supreme] Court listed the states that could be affected by its ruling, the word 'Texas' nowhere appears in the opinion, and the reason is obvious: Texas has never adopted the bright-line cutoff at issue in *Hall*." *Mays v. Stephens,* 757 F.3d 211, 218 (5th Cir. 2014) *cert. denied,* 135 S. Ct. 951 (2015). Therefore, whatever change in the law resulted from *Hall,* it could not support a different ruling on Segundo's funding motion.

IV.

Because Segundo's current motion has the same defect noted by this Court in denying his prior motion to reconsider funding, the current motion is also denied. Further, because the Court is in the process of issuing its final opinion and judgment denying relief

concurrently with this order, Segundo's request for an interlocutory appeal is moot.

Segundo's "Motion for Funding for Investigation of Constitutional Claims in light of the Supreme Court's Recent Decision in *Hall v. Florida*" (doc. 45) is **DENIED**. Segundo's request for an interlocutory appeal is **DENIED**.

SIGNED June 17, 2015.

Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/rs