No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CYNTHIA KAYE WOOD
Petitioner

v.

THE STATE OF TEXAS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Texas, the *mens rea* for attempted capital murder is a specific intent to kill. The defendant did not know this. Thus, she pled guilty although she had no such intent. She would not have pled had she known the *mens rea* and that expert testimony could support her claim of no intent to kill. Was the defendant's guilty plea voluntary when she did not know the *mens rea* for the charged offense?

PARTIES TO THE PROCEEDINGS

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RELATED PROCEEDINGS IN THE TRIAL COURT AND ON DIRECT APPEAL

January 27, 2016
Trial Court Judgment of Conviction
State of Texas v. Cynthia Kaye Wood, No. 1445251
351st District Court of Harris County, Texas

September 19, 2017
Opinion by the First District Court of Appeals of Texas at Houston reversing Cynthia's conviction for attempted capital murder and ordering the trial court to adjudge Cynthia guilty of attempted murder
Wood v. State, No. 01-16-00179-CR
Reported as: *Wood v. State*, No. 01-16-00179-CR, 2017 WL 4127835 (Tex. App.—Houston [1st Dist.] Sep. 19, 2017 (mem. op., on rehearing, not designated for publication), *rev'd*, 560 S.W.3d 162 (Tex. Crim. App. 2018).

September 19, 2018
Opinion by the Texas Court of Criminal Appeals reversing the judgment of the First District Court of Appeals and remanding the case to that Court to address a remaining issue
Wood v. State, No. PD-1100-17
Reported as: *Wood v. State,* 560 S.W.3d 162 (Tex. Crim. App. 2018)

March 7, 2019
Opinion by the First District Court of Appeals of Texas at Houston on remand from the Texas Court of Criminal Appeals affirming the trial court's judgment
Wood v. State, No. 01-16-00179-CR
Reported as: *Wood v. State,* No. 01-16-00179-CR, 2019 WL 1064564 (Tex. App.—Houston [1st Dist.] March 7, 2019, pet. ref'd) (mem. op., not designated for publication)

September 11, 2019
Refusal of a petition for discretionary review (PDR) by the Texas Court of Criminal Appeals regarding the First District Court of Appeals' opinion of March 7, 2019
Wood v. State, No. PD-0782-19

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cynthia Kaye Wood, respectfully petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

ORDERS ENTERED IN PETITIONER'S CASE

The order of the Texas Court of Criminal Appeals denying Ms. Wood's request for habeas relief consists of four paragraphs. The order is unpublished. However, it can be found online. *See Ex parte Wood,* No. WR-93,810-01, 2023 WL 3220891 (Tex. Crim. App. May 3, 2023). The order is attached to this petition as Appendix A.

The habeas court was the 351st District Court of Harris County, Texas. (For more information about the habeas court, please see Footnote 69.) The habeas court's findings of fact, conclusions of law, and order recommending relief are unpublished. But they are attached to this petition as Appendix B.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The Court of Criminal Appeals of Texas issued its order denying habeas relief on May 3, 2023. This petition was timely filed on July 18, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, **the accused shall enjoy the right to a speedy and public trial, by an impartial jury** of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; **to be confronted with the witnesses against him;** to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.

FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Factual Summary

A. *Overview of the Injustice*

The petitioner in this case is Cynthia Kaye Wood. She is currently serving a life sentence in a Texas prison.[1] Cynthia was charged with attempting to kill her five-month-old son.[2] She pled guilty to the charge even though she never intended to kill him.[3] And her son experienced no lasting harm.[4] Nonetheless, Cynthia remains in prison.[5]

B. *Cynthia's Bad Act*

On October 12, 2014, Cynthia was in a Houston hospital with her infant son.[6] He was in the hospital because of breathing problems.[7] As it turned out, Cynthia's son's breathing problems were caused by Cynthia herself.[8] A security camera in the hospital

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[1] Brief for Appellant Cynthia Kaye Wood, First Court of Appeals of Texas, *Wood v. State,* No. 01-16-00179-CR, June 20, 2016 (hereinafter Appendix C) at A-41. *See also* Cynthia Wood's Memorandum of Law in support of her 11.07 Petition for Writ of Habeas Corpus, *Ex parte Wood*, 351st District Court of Harris County, Texas, No. 1445251-A (November 1, 2021) (hereinafter Appendix D) at A-109.

[2] *See* Appendix C at A-56 (concerning the charge). *See also* Forensic Science Evaluation of Cynthia Wood by Dr. Mark Moeller, Exhibit 8 of Cynthia Wood's Memorandum of Law in support of her 11.07 Petition for Writ of Habeas Corpus (November 2015) (hereinafter Appendix E) at A-149 to A-151 (concerning the infant's age).

[3] Appendix C at A-57. *See also* Declaration of Cynthia K. Wood, Exhibit 1 of Cynthia Wood's Memorandum of Law in support of her 11.07 Petition for Writ of Habeas Corpus (Sep. 28, 2021) (hereinafter Appendix F) at 154.

[4] State's Appellate Brief, First Court of Appeals, *Wood v. State*, No. 01-16-00179-CR (Sep. 21, 2016) (hereinafter Appendix G) at A-168.

[5] Appendix D at A-109.

[6] Appendix D at A-122. *See also* Appendix G at A-166

[7] Appendix G at A-166; Appendix D at A-108.

[8] Appendix G at A-166 to A-168.

showed Cynthia using her hands to impede her son's ability to breathe.[9] The infant stopped breathing and stopped moving which caused a breathing monitor to go off.[10] Medical personnel then entered the room and resuscitated the infant.[11] He quickly started breathing and moving again.[12] Cynthia's son suffered no permanent damage.[13]

C. *The Criminal Charge*

Cynthia was arrested at her home shortly after the event in the hospital.[14] A couple of months later,[15] a Harris County grand jury indicted Cynthia for the offense of attempted capital murder.[16] To prove that offense, the State had to show that Cynthia acted with the specific intent to cause the death of her son.[17] The indictment

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[9] Appendix G at A-167 (hospital cameras showed Cynthia impeding her son's ability to breathe by pinching his nose shut with one hand and covering his mouth with the other).
[10] Appendix G at A-167 to A-168.
[11] *Ibid.*
[12] *Ibid.*
[13] *See* Appendix G at A-168.
[14] Appendix C at A-45. Cynthia's bail amount was set at $25,000. She was unable to make a bond in that amount. Thus, Cynthia remained in the Harris County Jail following her arrest.
[15] The grand jury presented the indictment on December 18, 2014. Appendix G at A-168.
[16] *Ibid.* The alleged offense was attempted capital murder and not attempted murder because the victim (Cynthis's infant son) was under the age 10. *See* Tex. Penal Code § 19.03(a)(8).
[17] *Sifuenetes v. State,* 615 S.W.3d 914, 917 (Tex. Crim. App. 2021). The statutory intent requirement for criminal attempt in Texas is found in Article 15.01 of the Texas Penal Code. That requirement is the performance of an act "with specific intent to commit an offense." The *Sifuentes* Court said:

> The element "with specific intent to commit an offense" means that the actor must have the intent to bring about the desired result, which is death of an individual in an attempted capital murder case.

Sifuentes v. State, 615 S.W.3d at 917. *See also Flanagan v. State,* 675 S.W.2d 734, 741 (Tex. Crim. App. 1984) ("a specific intent to kill is a requirement of attempted murder"); JANI MASELLI WOOD, O'CONNOR'S TEXAS CRIMINAL OFFENSES & DEFENSES 19 (2022 ed.) ("To prove criminal attempt, the State must establish that the defendant had a specific intent to commit an offense.").

appropriately charged Cynthia of acting "with the specific intent to commit the offense of CAPITAL MURDER."[18]

D. *Counsel's Recommendation to Plead Guilty*

Cynthia was indigent so the trial court (the 351st District Court of Harris County, Texas) appointed counsel to represent her.[19] The first appointed lawyer became unavailable shortly after his appointment.[20] The trial court then appointed a different attorney, Thomas Lewis, to represent Cynthia.[21]

At his initial meeting with Cynthia, Mr. Lewis recommended to Cynthia that she plead guilty.[22] Mr. Lewis did not believe Cynthia's case was a good case to take to trial.[23] This was because of the video recording that showed Cynthia's actions with her son at the hospital.[24] According to Cynthia, Mr. Lewis felt the outcome of any trial was a foregone conclusion – she would be found guilty.[25]

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[18] Appendix G at A-169.
[19] Appendix D at A-103.
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.* This appointment took place in February of 2015. *See* Affidavit of Thomas Lewis, Exhibit 2 of Cynthia Wood's Memorandum of Law in support of her 11.07 Petition for Writ of Habeas Corpus (Sep. 28, 2021) (hereinafter Appendix H) at A-187.
[23] *Ibid.*
[24] *Ibid.*
[25] Appendix F at A-154. According to Cynthia, Mr. Lewis told her that a guilty plea was the only way to avoid dying in prison.

E. *No Discussion of Mens Rea*

Cynthia never had any discussion with Mr. Lewis as to the necessary *mens rea* for the attempted capital murder charge.[26] She did not know that the required *mens rea* for the offense was that she specifically intended to cause her son's death. Looking back on her interactions with Mr. Lewis, Cynthia said:

> I wanted to go to trial when I met Mr. Lewis. I knew what I did was wrong, but **I didn't want to kill my son. I never tried to kill my son.**
>
> . . .
>
> Mr. Lewis said the video of me suffocating my son proved me guilty and we couldn't fight it. I believed him. Mr. Lewis did not discuss particular elements of the offense with me. **I did not understand that if I did not intend to kill my son, then I was not guilty.** Mr. Lewis led me to believe that doing the act on the video meant I was guilty, end of story. I knew it was me on the video, so I thought I was guilty of the charge. I did not know that not meaning to kill my son mattered at all.
>
> . . .
>
> I did not want to plead guilty, I just believed there wasn't any possible defense and that the only way I could avoid a life sentence was to plead guilty. That is what Mr. Lewis told me.[27]

F. *Cynthia's Intent*

Near the beginning of his representation of Cynthia, Mr. Lewis requested that Cynthia undergo a psychiatric and competency evaluation.[28] The trial court granted this request and ordered Dr. Mark Moeller to perform the evaluation.[29] Dr. Moeller found

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[26] *Ibid.*
[27] Appendix F at A-154 to A-155 (emphasis added).
[28] Appendix D at A-102.
[29] *Ibid.*

that Cynthia was competent to stand trial.[30] He also diagnosed Cynthia with General Personality Disorder and Depressive Disorder.[31]

Quite significantly, Dr. Moeller also expressed his belief that Cynthia met the criteria for a disorder known as Factitious Disorder Imposed on Another (FDIA).[32] The Cleveland Clinic has described this disorder as follows:

> Factitious Disorder Imposed on Another (FDIA) formerly Munchausen Syndrome by Proxy (MSP) is a mental illness in which a person acts as if an individual he or she is caring for has a physical or mental illness when the person is not really sick.[33]

The Cleveland Clinic has also explained the motivation behind the disorder:

> Often, people with FDIA have an inner need for their child (or other dependent person) to be seen as ill or injured. This isn't done to achieve a concrete benefit, like financial gain. It's is [sic] **often done in order to gain the sympathy and special attention given to people who are truly ill and their families**.
>
> . . .
>
> FDIA is most often seen in mothers – although it can also happen with fathers – **who intentionally harm** or describe non-existent symptoms in **their children to get the attention given to the family of someone who is sick**. A person with FDIA uses the many hospitalizations as a way to earn praise from others for their devotion to the child's care, often using the sick child as a means for developing a relationship with the doctor or other healthcare provider. [34]

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[30] *Ibid.*

[31] Appendix D at A-102 to A-103.

[32] Appendix D at A-103. The disorder was previously known as Munchausen Syndrome by Proxy.

[33] https://my.clevelandclinic.org/health/diseases/9834-factitious-disorder-imposed-on-another-fdia. This website was last consulted on July 8, 2023.

[34] *Id.* (emphasis added).

The Cleveland Clinic has also opined as to the cause of FDIA:

> The exact cause of FDIA isn't known, but researchers believe both biological and psychological factors play a role in the development of the disorder. Some theories suggest that **a history of abuse or neglect as a child** or the early loss of a parent might be factors in its development.[35]

While Dr. Moeller believed Cynthia met the criteria for FDIA, he needed the medical records for Cynthia's son in order to make the diagnosis.[36] Mr. Lewis did not provide those records to Dr. Moeller.[37] And Mr. Lewis never discussed FDIA with Cynthia.[38] Thus, the possibility that Cynthia had FDIA never entered into the decisions she made in connection with her criminal case.[39]

During the writ investigation, habeas counsel for Cynthia provided Dr. Moeller with the medical records for Cynthia's son.[40] Armed with those records, Dr. Moeller

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[35] *Id.* (emphasis added). This is significant because Cynthia experienced a truly horrible childhood and adolescence. At the time of the offense in question, she was only 19. *See* Appendix C at A-41. Her infant son was already her fourth child. *Id.* at A-41 to A-42. Cynthia was impregnated with her first child, a girl, by her step-brother when she was just 12. *Id.* at A-41. He had been sexually abusing her since she was 5 years old. *Ibid.* Her second child, a girl, died in 2013 at the age of 2. *Id.* at A-41 to A-42. She gave up her third child, a boy, for adoption. *Id.* at A-42. Cynthia did not meet her biological father (to whom her mother was never married) until she was 14. *Ibid.* Cynthia's mother drank heavily and had many, many boyfriends. *Id.* at A-144. Many times, there was no food in the house and nobody cared if Cynthia attended school. *Ibid.* One of Cynthia's mother's boyfriends was arrested for beating Cynthia. *Ibid.* Upon becoming pregnant the first time, Cynthia was moved out of her middle school to an alternative school for pregnant girls. *Ibid.* Cynthia began drinking and experimenting with drugs. *Ibid.* She had sex with many partners – all of whom were at least 18 (and one who was 30). *Id.* at A-44 to A-45. Cynthia attempted to kill herself at least twice. *Id.* at A-45.

[36] Appendix D at A-103.

[37] *Ibid.*

[38] Appendix F at A-154.

[39] *See ibid.*

[40] Appendix D at A-117. These records had been in the file of Mr. Lewis.

concluded that Cynthia met the DSM-5 criteria for FDIA.[41] Notably, he concluded that Cynthia probably did not intend to kill her son:

> Generally, an intent to kill the victim is inconsistent with FDIA. Specifically [sic] to this case (and as explained in my report), an intent to kill would be "counter-intentional" and unexpected for Ms. Wood. I believe that it is unlikely that Ms. Wood intended to kill her son.[42]

In his report (mentioned above), Dr. Moeller declared:

> It has been asserted that Ms. Wood intended to severely injure or kill [her son] on 10/12/2014. In my opinion, Ms. Wood had unlimited opportunities to injure or kill her son prior to the instant offense. I believe that intending to kill or killing [her son] would have been counter-intentional for her. **It is more likely that she suffocated him with the intent to cause distress and derive benefit from the attentions of medical staff.** Killing the child is unexpected because doing so removes the mechanism by which the perpetrator mobilizes attention, support and an identity as a heroic caregiver.[43]

G. *The Guilty Plea*

On November 23, 2015, Cynthia attended a plea hearing in her case where she entered a guilty plea.[44] This was the exact course of action Mr. Lewis had recommended.[45] In accepting Cynthia's pleas, the trial judge did not discuss the elements of the attempted capital murder.[46] The necessary *mens rea* for the offense was

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[41] *Ibid.*

[42] Affidavit of Dr. Mark Moeller, Exhibit 3 of Cynthia Wood's Memorandum of Law in support of her 11.07 Petition for Writ of Habeas Corpus (Aug. 10, 2021) (hereinafter Appendix I) at A-192.

[43] Appendix E at A-150 (emphasis added).

[44] Appendix D at A-105. Cynthia also entered a plea of true to an allegation that she used a deadly weapon – her hands – to commit the crime. *Ibid.*

[45] *Id.* at A-103 to A-105. *See also* Appendix F at A-154 to A-155.

[46] Appendix D at A-116.

not mentioned.[47] Neither did the plea papers Cynthia signed address the elements of the offense, including the *mens rea*.[48]

There was no agreement between the State and Cynthia as to what her punishment should be.[49] The trial judge did not assess punishment on the day of Cynthia's plea.[50] Instead, the judge directed that a pre-sentence-investigation (PSI) report be prepared so he could consider the report in connection with deciding an appropriate punishment.[51] On January 27, 2015,[52] the judge formally found Cynthia guilty and assessed her punishment at life in prison.[53] This was the most severe sentence of imprisonment the trial court could have imposed.[54]

H. *The Direct Appeal*

Cynthia chose to appeal the judgment.[55] Initially, the appeal was successful. The First District Court of Appeals of Texas found the sentence of life in prison to be an

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[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] This was just over two months after Cynthia's guilty plea.
[53] *Ibid.* The range of punishment was 5 to 99 years in prison or life in prison. *See* Tex. Penal Code § 12.32(a) (listing punishment for a first-degree felony). Attempted capital murder is a first-degree felony. *See* Tex. Penal Code § 19.03(b) (capital murder is a capital offense) and Tex. Penal Code § 15.01(d) (attempted offense is one category lower than offense attempted).
[54] *See* preceding footnote.
[55] *See* Appendix C at A-26 to A-101. The direct appeal was handled by the Harris County Public Defender's Office and specifically by Ted Wood, Cynthia's counsel in connection with this Petition.

illegal sentence.[56] Accordingly, the Court of Appeals reversed Cynthia's conviction for attempted capital murder and ordered the trial court to adjudge Cythnia guilty only of attempted murder.[57] The trial court was directed to reassess punishment (with the upper range of that punishment being 20 years).[58] Obviously, that was a much better than a life sentence.

Unfortunately for Cynthia, the Texas Court of Criminal Appeals [CCA] reversed the Court of Appeals' decision, finding that the sentence was not illegal after all.[59] Thus, Cynthia's life sentence was put back in place.

The CCA remanded the case to the First Court of Appeals to consider two issues that had not been addressed the first time around. The Court of Appeals ruled against Cynthia in regard to those two issues.[60] The CCA rejected Cynthia's petition for discretionary review on September 11, 2019 which brought her direct appeal to an end.

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[56] *See Wood v. State*, No. 01-16-00179-CR, 2017 WL 4127835 (Tex. App.—Houston [1st Dist.] Sep. 19, 2017 (mem. op., on rehearing, not designated for publication), *rev'd*, 560 S.W.3d 162 (Tex. Crim. App. 2018). The Court of Appeals found the sentence to be illegal because the indictment did not authorize a conviction for attempted capital murder. *Id.* at *6. Instead, the indictment only authorized a conviction for attempted murder, a second-degree felony offense with a maximum sentence of confinement of twenty years. *Ibid.* This was because the indictment did not allege an aggravating factor (e.g., victim under the age of 10) that would transform murder into capital murder. *Id.* at *5.

[57] *Id.* at *6.

[58] *Ibid.*

[59] *Wood v. State,* 560 S.W.3d 162, 168 (Tex. Crim. App. 2018). The CCA acknowledged that an indictment charging a consummated offense must properly charge all the elements of that offense. *Ibid.* But the CCA said an indictment charging an attempted offense is not fundamentally defective for failure to allege the constituent elements of an attempted offense. *Ibid.*

[60] *Wood v. State*, No. 01-16-00179-CR, 2019 WL 1064564 (Tex. App.—Houston [1st Dist.] March 7, 2019, pet. ref'd)) (mem. op., not designated for publication).

Notably, the issues on direct appeal had nothing to do with FDIA or the necessary *mens rea* for the offense of attempted capital murder. The issues raised in this petition are not the same issues that were raised in the direct appeal.

II. The Habeas Action

A. *Two Issues*

Following the appeal, Cynthia was represented once again by the Harris County Public Defender's Office. This time, the Public Defender's Office served as counsel in regard to a writ of habeas corpus.[61] Cynthia advanced the following two grounds:

> Ground One
> Cynthia's trial attorney rendered ineffective assistance of counsel by failing to pursue the diagnosis for factitious disorder imposed on another. The ineffective assistance caused Cynthia to plead guilty.[62]
>
> Ground Two
> Cynthia's guilty plea offended due process because she pleaded unknowingly, erroneously believing she had no defense to attempted capital murder and not understanding the elements of the offense.[63]

The habeas court was the 351st District Court of Harris County, Texas. This was the court in which Cynthia had been convicted. Upon habeas counsel's request, the habeas court designated two issues which are shortened versions of the two foregoing grounds:

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[61] Attorneys Nicholas Vitolo, Bob Wicoff, and Michael Falkenberg represented Cynthia in the habeas proceeding.
[62] Appendix D at A-118.
[63] *Ibid.*

Issue One
Whether the Applicant was denied the effective assistance of counsel at the guilt-innocence phase of her case.

Issue Two
Whether the applicant's guilty plea was involuntary.[64]

B. *The Habeas Court's Findings and Conclusions*

The habeas court made findings of fact and conclusions of law in regard to each of the two issues.[65] Then, the habeas court made a "Recommendation and Order" that applied to both issues.[66] The habeas court recommended a new trial.[67] Unfortunately for Cynthia, the Texas Court of Criminal Appeals (CCA) did not agree with at least some of the habeas court's findings.[68] And in Texas, the CCA has the final say.[69]

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[64] Applicant's Motion Requesting Designation of Issues, *Ex parte Wood*, No. 1445251-A, Nov. 24. 2021 (hereinafter Appendix J); Order Designating Issues, *Ex parte Wood*, No. 1445251-A, Dec. 6, 2021 (hereinafter Appendix K).

[65] *See* Appendix B at A-4 to A-24.

[66] *Id.* at A-23.

[67] *Ibid.*

[68] *See* Appendix A at A-2 to A-3.

[69] In post-conviction habeas corpus cases in Texas, the CCA is the "ultimate factfinder." *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007). The habeas court (*i.e.*, the convicting court) is the "original factfinder." *Id.* The CCA gives "almost total deference" to the habeas court's findings of fact when those findings are supported by the record. *Ex parte White*, 160 S.W.3d 46, 50 (Tex. Crim. App. 2004). But if the findings are not supported by the record, the CCA may depart from them. In *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008), the CCA said:

> When our independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record, we may exercise our authority to make contrary or alternative findings and conclusions.

This petition is not concerned with first issue in the writ proceeding that involves ineffective assistance of counsel. The CCA made two specific findings that defeated that issue.[70] The CCA's entire order is reproduced below:

> Applicant [Cynthia] was convicted of attempted capital murder and sentenced to life imprisonment. The First Court of Appeals affirmed her conviction. *Wood v. State*, No. 01-16-00179-CR (Tex. App.-Houston [1st Dist.] Sep. 19, 2017. Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forward it to this Court. *See* TEX. CODE CRIM. PROC. art. 11.07.
>
> Applicant contends that her guilty plea was involuntary because her trial counsel failed to investigate, and discuss with Applicant, the possible defense that she suffered from Factitious Disorder Imposed on Another ("FDIA") (previously known as Munchausen Syndrome). The trial court [habeas court] has determined that Applicant was not properly advised and that Applicant's guilty plea was involuntary.
>
> However, based on our independent review of the entire record, this Court finds that Applicant has failed to meet her burden to show that her counsel's representation was deficient and show there is a reasonable probability that she would not have pled guilty and would have insisted on going to trial but for counsel's errors. *Ex parte Morrow*, 952 S.W.2d 530 (Tex. Crim. App. 1997).
>
> We deny relief.[71]

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[70] The first finding was that Cynthia did not show her trial counsel's representation was deficient. *See* text accompanying Footnote 71. The second finding was that Cynthia did not show there was a reasonable probability she would not have pled guilty but for counsel's errors. *See* text accompanying Footnote 71.

For a claim of ineffective assistance of counsel to be successful, a defendant must show two things. "First, the defendant must show that counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). "Second, the defendant must show that the deficient performance prejudiced the defense." *Ibid.*

[71] Appendix A at A-2 to A-3. As can be seen, the CCA stated that its independent investigation revealed that neither of the two *Strickland* requirements had been satisfied. *See* Footnote 70 for the requirements to show ineffective assistance of counsel under *Strickland v. Washington*. The CCA did

The CCA's order is short on details. But Cynthia accepts the fact that the CCA is the ultimate fact finder and has found against her. At least this is the case in regard to Issue One. However, the CCA's order did not address Issue Two at all. Issue Two also concerns the fact that Cynthia's guilty plea was involuntary. But this second reason that the plea was involuntary is wholly independent of whether her trial counsel was ineffective. And the CCA simply did not address this independent issue in its order. This is why Cynthia is focusing on Issue Two in this petition.

The habeas court made six findings of fact in regard to Issue Two as follows:

> **Finding 1:** After reviewing all of the exhibits, including correspondence between applicant and trial counsel, Dr. Moeller's reports and affidavits, and taking into account Applicant's age and mental circumstances at the time of her plea, the trial court finds the Applicants [sic] claim that her plea was not knowing or voluntary to be credible.
>
> **Finding 2:** Applicant believed that she was guilty because she committed an act that could have killed her son (Applicant's Exhibit 1).
>
> **Finding 3:** Applicant believed she had no possible defense to the charge of attempted capital murder because the act was captured on a video recording (Applicant's Exhibits 1, 11).
>
> **Finding 4:** Applicant did not understand that proof of the charge required proof that she acted with the specific intent to kill her son (Applicant's Exhibits 1, 11).
>
> **Finding 5:** Trial counsel told Applicant that there was no possible defense and that a guilty plea to the charged offense was the only way to avoid a life sentence (Applicant's Exhibits 1, 2, 11). Trial counsel did not believe the

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not make any statements regarding Cynthia's second issue which concerned the fact that her guilty plea was involuntary.

defense could overcome the video of the charged conduct. (Supplemental Affidavit).

Finding 6: Applicant would not have pled guilty had she known that the State had to prove her specific intent, and that expert testimony could support a claim that she acted without the intent to kill (Applicant's Exhibits 1, 11).[72]

The habeas court made four conclusions of law in regard to Issue Two. For some reason, these four conclusions are numbered 1, 2, 10, and 11. These four conclusions are set out below:

Conclusion 1: Applicant's guilty plea was not entered with an understanding of the law in relation to the facts. *Boykin v. Alabama,* 395 U.S. 238, 243 n.5 (1969) (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege. Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. **Moreover, because a guilty plea is an admission of all of the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.**") [sic]

Conclusion 2: Applicant's choice to plead guilty was not a voluntary and intelligent choice among the alternative courses of action open to her. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

Conclusion 10: Applicant's plea was involuntary, violating due process.

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[72] Appendix B at A-20 to A-21. References to the Applicant's Exhibits are to exhibits attached to Cynthia Wood's Memorandum of Law in support of her 11.07 Petition for Writ of Habeas Corpus. The body of the petition is Appendix D to this petition.

Conclusion 11: Due to her involuntary guilty plea, Applicant is entitled to have her conviction and sentence vacated and be returned to face the indictment in this case.[73]

REASONS FOR GRANTING THE PETITION

I. Summary Reversal is warranted because the CCA did not find the Habeas Court's findings were unsupported by the record. This is a procedural-due-process problem.

The CCA said "[w]e deny relief."[74] The denial certainly makes sense in regard to the CCA's findings regarding Cynthia's ineffective-assistance-of-counsel claims.[75] But, the denial of relief does not make sense in regard to Cynthia's claim that her plea was involuntary.[76] The CCA did not find any of the habeas court's findings of fact regarding Cynthia's involuntary-plea claim to be without support in the record.[77] The CCA did not find Cynthia's claim that her plea was not knowing or voluntary to <u>not</u> be credible.[78] Nor did the CCA find that Cynthia did not believe she was guilty because she committed an act that could have killed her son.[79] The habeas court's finding that Cynthia believed she had no defense because of the video recording was not addressed by the CCA either.[80] The same goes for the finding that Cynthia did not understand

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[73] Appendix B at A-21 to A-22 (emphasis added).
[74] Appendix A at A-3. *See* text accompanying Footnote 71.
[75] *See* Footnote 71 and accompanying text.
[76] *Ibid.*
[77] *Ibid.*
[78] *See* Appendix B at A-20 (Finding of Fact One).
[79] *See ibid.* (Finding of Fact Two).
[80] *See ibid.* (Finding of Fact Three).

the *mens rea* necessary for a conviction of the charged offense.[81] Additionally, the CCA did not dispute the finding that Cynthia's counsel told her the only way to avoid a life sentence was to plead guilty.[82] Finally, the CCA did not address the finding that Cynthia did not know expert testimony could support a claim that she acted without murderous intent.[83]

The CCA should not have denied relief when it took no issue with the habeas evidence showing Cynthia's plea to have been involuntary. As a matter of Texas law, the CCA is the ultimate factfinder.[84] But to replace the habeas court's findings with its own, the CCA needed to find the habeas court's findings were not supported by the record.[85] Here, the CCA never found the habeas court's records to be unsupported by the record.[86] Moreover, the CCA never made any of its own findings in regard to Issue Two.[87] Instead, the CCA just denied relief.[88]

The CCA's action is a violation of due process as guaranteed by the Fourteenth Amendment. And that is why this Court should be concerned. This Court has often

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[81] *See id.* at A-21 (Finding of Fact Four).
[82] *See ibid.* (Finding of Fact Five).
[83] *See ibid.* (Finding of Fact 6).
[84] *Ex parte Van Alstyne*, 239 S.W.3d at 817.
[85] *Ex parte Reed*, 271 S.W.3d at 727.
[86] *See* Appendix A at A-2 to A-3.
[87] *Ibid.*
[88] *Ibid.*

stepped in when a person's due-process rights have not been protected in a state habeas action.[89] As this Court declared in *Wearry v. Cain*:

> This Court, of course, has jurisdiction over the final judgments of state postconviction courts, *see* 28 U.S.C. § 1257(a), and exercises that jurisdiction in appropriate circumstances.[90]

Here, the due-process problem is procedural in nature.[91] There is nothing constitutionally amiss with the relevant Texas statute – Article 11.07 of the Texas Code of Criminal Procedure. The due-process problem has to do with the CCA's departure from its own accepted procedures regarding findings of fact.

The specific due-process problem here is that the CCA did not give "almost total deference" to the habeas court's findings.[92] Had the CCA deferred to the habeas court's findings of fact, the CCA would not have denied relief in connection with Issue Two. This non-deferral by the CCA violated procedural due process.

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[89] *See e.g., Williams v. Pennsylvania,* 579 U.S. 1, 6, 136 S.Ct. 1899, 1910, 195 L.Ed.2d 132 (2016) (due process entitled defendant to habeas proceeding in which state supreme court justice, who had authorized death penalty years earlier as prosecutor, did not participate); *Wearry v. Cain*, 577 U.S. 385, 396, 136 S.Ct. 1002, 1008, 194 L.Ed.2d 79 (2016) ("Because Weary's due process rights were violated, we grant his petition for a writ of certiorari . . ."); *Smith v. Cain*, 565 U.S. 73, 75-76, 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012) (defendant's due-process rights were violated by State's withholding of material evidence).

[90] *Wearry v. Cain*, 577 U.S. at 395-96.

[91] In other words, this case presents a procedural due process violation.

[92] *See Ex parte White*, 160 S.W.3d at 50 (CCA is to give "almost total deference" to habeas court's findings if they are supported by the habeas record).

Procedural due process requires an "opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[93] Here, Cynthia was able to present her application for habeas relief to the habeas court. But the findings made by the habeas court ended up being anything but meaningful. This is because the CCA wholly disregarded the findings even though the CCA did not find that the habeas record did not support them. It was hardly meaningful to Cynthia to convince the habeas court she deserved relief when ultimately the CCA disrespected those findings and conclusions.

Cynthia respectfully asks this Court to treat her petition in this case the same way this Court recently treated the petition in *Escobar v. State*.[94] In *Escobar*, the habeas court made hundreds of findings of fact and conclusions of law and recommended that relief be granted. In a very unusual move, the Texas prosecutor agreed with the habeas court that relief was appropriate. Nevertheless, the CCA rejected the recommendations of the habeas court and denied relief. Mr. Escobar filed a petition for a writ of certiorari with this Court and the State of Texas filed a brief in support of the petition.[95] This Court granted the petition and remanded the case to the CCA for further consideration.[96]

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[93] *Mathew v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)).
[94] *See Ex parte Escobar*, No. WR-81,574-02, 2022 WL 221497 (Tex. Crim. App. Jan. 26, 2022).
[95] Mr. Escobar argued that the "CCA's decision was patently wrong." *See* Petition for a Writ of Certiorari in *Escobar v. Texas*, No. 21-1601 (filed June 24, 2022).
[96] *Escobar v. Texas*, 143 S.Ct. 557, 214 L.Ed.2 330 (2023).

II. Summary reversal is warranted because Cynthia's plea was involuntary. This is a substantive-due-process problem.

The habeas court's penultimate conclusion of law was that Cynthia's "plea was involuntary, violating due process."[97] This conclusion is consistent with the law as set out by this Court.

In *Boykin v. Alabama*, this Court quoted from *McCarthy v. United States*[98] concerning a defendant's guilty plea:

> 'A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. **Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.**[99]

Here, Cynthia had absolutely no idea as to the *mens rea* connected with the attempted-capital-murder charge against her.[100] Thus, she did not know that an element of the offense was a specific intent to kill. Without an understanding of the necessary

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[97] Appendix B at A-22 (emphasis added).
[98] *McCarthy v. United States*, 394 U.S. at 466.
[99] *Boykin v. Alabama*, 395 U.S. at 243 n. 5.
[100] *See* Appendix B at A-21 (Finding of Fact 4).

intent element, her guilty plea was necessarily involuntary. This is precisely what the habeas court concluded.[101]

Cynthia's guilty plea was invalid. It is a violation of due process to conclude that her plea was anything other than void. Because her plea was void, she did not waive her privilege against self-incrimination and her rights to a jury trial and to confront her accusers. Accordingly, the habeas court's final conclusion, set out below, was spot on:

> Due to her involuntary guilty plea, Applicant is entitled to have her conviction and sentence vacated and be returned to face the indictment in this case.

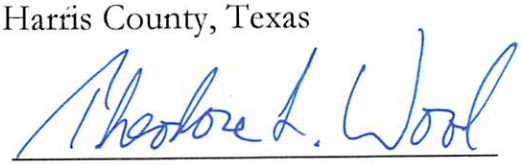
[101] *See* Appendix B at A-21 to A-22 (Conclusion of Law 1) (guilty plea is admission of all elements of a criminal charge and "cannot be truly voluntary" if the defendant does not understand those elements).

CONCLUSION

For the foregoing reasons, Cynthia asks this Court to summarily reverse the judgment below and remand the case to the Texas Court of Criminal Appeals. Alternatively, Cynthia requests that this Court grant her petition and set the case for argument.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas



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LIST OF APPENDICES

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Applicant's Motion Requesting Designation of Issues, *Ex parte Wood*, No. 1445251-A, Nov. 24. 2021.

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Appendix A

Order of Texas Court of Criminal Appeals, *Wood v. State*, No. WR-93,810-01 (Tex. Crim. App. May 3, 2023)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-93,810-01

EX PARTE CYNTHIA KAYE WOOD, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 1445251-A IN THE 351ST JUDICIAL DISTRICT COURT
FROM HARRIS COUNTY**

Per curiam.

ORDER

Applicant was convicted of attempted capital murder and sentenced to life imprisonment. The First Court of Appeals affirmed her conviction. *Wood v. State*, No. 01-16-00179-CR (Tex. App.—Houston [1st Dist.] Sep. 19, 2017). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* TEX. CODE CRIM. PROC. art. 11.07.

Applicant contends that her guilty plea was involuntary because her trial counsel failed to investigate, and discuss with Applicant, the possible defense that she suffered from Factitious Disorder Imposed on Another ("FDIA") (previously known as Munchausen Syndrome). The trial court has determined that Applicant was not properly advised and that Applicant's guilty plea was

involuntary.

However, based on our independent review of the entire record, this Court finds that Applicant has failed to meet her burden to show that her counsel's representation was deficient and show there is a reasonable probability that she would not have pled guilty and would have insisted on going to trial but for counsel's errors. *Ex parte Morrow*, 952 S.W.2d 530 (Tex. Crim. App. 1997). We deny relief.

Filed: May 3, 2023
Do not publish

Appendix B

Findings of Fact, Conclusions of Law, Order and Recommendation, 351st District Court of Harris County, Texas, *Ex parte Wood,* No. 1445251-A (September 16, 2022)

P.20

FILED
Marilyn Burgess
District Clerk
SEP 16 2022
Time:
Harris County, Texas
By
Deputy

IN THE 351ST DISTRICT COURT
OF HARRIS COUNTY, TEXAS

EX PARTE §
§ CAUSE NO. 1445251-A
CYNTHIA KAYE WOOD §

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND RECOMMENDATION

The Court, having considered the application for a writ of habeas corpus, the brief, the exhibits, all affidavits from trial counsel, the official court records from the trial and habeas corpus proceedings, the reporter's record from the trial and habeas proceedings, and the recommendations from the parties, makes the following findings of fact, conclusions of law, and recommendation:

JURISDICTION

1. The applicant, Cynthia Kaye Wood, is confined pursuant to the judgment and sentence of the 351st District Court of Harris County, Texas, in cause number 1445251, where the applicant was convicted of the felony offense of attempted capital murder on January 27, 2016 pursuant to her guilty plea and sentenced to life in prison.
2. The applicant, through habeas counsel, filed a writ application in the instant cause number 1445251-A on November 1, 2021.

CASE HISTORY

1. On December 18, 2014, Applicant was charged by indictment with attempted capital murder. The indictment alleged that, on or about October 12, 2014, Applicant, with specific intent to commit the offense of capital murder of K.W., used her hand to impede the complainant's ability to breathe, which amounted to more than mere preparation that tended to but failed to effect the commission of capital murder.
2. After initially being appointed different counsel for a brief period, trial counsel Thomas Lewis was appointed by court order on February 3, 2015. (Appellate Court Record (APP CR) 34).
3. On July 30, 2015, trial counsel filed a motion to appoint an independent psychiatrist. (APP CR 41).
4. On September 4, 2015, the parties reset the case to October 23, 2015, for a plea. The reset form noted that a "psych eval[uation was] pending." (APP CR 46).
5. On September 19, 2015 and September 26, 2015, applicant was evaluated by Dr. Mark Moeller. (Applicant Exhibit 8; Reporter's Record (R.R.) PSI, V 2 p. 24 & 27). A draft report by Dr. Moeller is dated November 2015. It is apparent from subsequent correspondence that trial counsel had received the draft at some point prior to November 19, 2022 (App. Ex. 9).

6. On November 23, 2015, Applicant pled guilty to attempted capital murder without any plea agreement, and asked the court to set punishment after the preparation of a presentence investigation (PSI) report. She further admitted that, during the commission of the offense, she used or exhibited her hands as a deadline weapon during the commission of the offense. A court reporter transcribed the plea proceedings. (R.R. "Plea").
7. A sentencing hearing was held on January 27, 2016. (RR. PSI). After the hearing, the judge assessed punishment at life in prison.
8. The First Court of Appeals reversed the conviction and ordered the trial court to adjudge Applicant guilty of attempted murder. *Wood v. State*, No. 01-16-00179-CR (Tex. App.—Houston [1st Dist.] Sep. 19, 2017) (not designated for publication). On discretionary review, the Court of Criminal Appeals concluded that Applicant's sentence was not illegal, reversed the appellate court, and directed it to address remaining points of error. *Wood v. State*, 560 S.W.3d 162 (Tex. Crim. App. 2018). The First Court of Appeals then affirmed the conviction. *Wood v. State*, No. 01-16-00179-CR (Tex. App.—Houston [1st Dist.] March 7, 2019) (not designated for publication). Mandate issued on October 18, 2019.

WRIT PROCEEDINGS

1. This is Applicant's first post-conviction application for a writ of habeas corpus.
2. The Applicant has filed a writ, along with a memorandum of law and exhibits. In her writ, she claims that her counsel was ineffective for failing to pursue the psychiatrist's preliminary diagnosis of factitious disorder imposed on another (FDIA) and that trial counsel's ineffectiveness caused her to plea. Applicant further claims that the plea offended due process because she pleaded unknowingly and without being apprised of a possible defense to the charge. (Applicant's Memorandum of Law in Support of her 11.07 Petition).
3. On December 6, 2021, the trial court designated issues. (Writ Clerk Record 122).
4. On May 4, 2022, the trial court entered findings of fact and conclusions of law recommending relief. On May 5, 2022, the trial court held a status conference on the record, (See WR RR), and subsequently withdrew its findings and ordered a supplemental affidavit from trial counsel Thomas Lewis. (See Supp. Writ Summary Sheet at 20, 21-23). During the status conference, the state presented State's Exhibit 1.
5. On May 17, 2022, the District Clerk properly forwarded the writ application to the Court of Criminal Appeals as required by Texas Rule of Appellate Procedure 73.4(b)(5).
6. On May 27, 2022, the District Clerk forwarded a supplemental record to the

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Court of Criminal Appeals containing the trial court's May 23, 2022 orders.

7. On June 15, 2022, the Court of Criminal Appeals granted the trial court's request for additional time to complete its evidentiary investigation and make findings of fact and conclusions of law. *Ex parte Wood*, No. WR-93,810-01, 2022 WL 2137522, at *1 (Tex. Crim. App. June 15, 2022).

8. On July 19, 2022, Lewis filed his court-ordered affidavit. *Supplementary Affidavit of Trial Counsel—Thomas Lewis.*

9. On August 19, 2022, the applicant and state both filed proposed findings of facts and conclusions of law. The State also filed State's Exhibit 2, and the Applicant filed Exhibits 14-20.

GROUND ONE—INVOLUNTARY PLEA DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL

Findings of Fact

1. On July 30, 2015, Trial counsel requested that Applicant be evaluated by Mark D. Moeller M.D. to determine whether Applicant was competent to stand trial, to assess her legal sanity at the time of the charged offense, and to consider mitigation as to punishment (APP CR 41, Applicant's Exhibits 2, 3, 8).

2. According to trial counsel's supplemental affidavit, "based on a review of the evidence it was immediately obvious that her defense would have to focus on her mental health issues." (Lewis Supp. Aff 1). Trial counsel also indicates, however, that he "believed her case was not a good trial case, in particular

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because of the videotape recording of her and her son at the hospital, (App. Ex. 2), and that he discussed with applicant "how the evidence affected her defenses" prior to her submitting to any mental health examination (Lewis Supp Aff. 1).

3. On July 30, 2015, Trial counsel shared the motion for appointment of a psychiatric expert with the trial prosecutor, explaining the expert was "for the purposes of mitigation," and "to lay the groundwork for a PSI which I think she will plead to at the next setting." (Applicant's Exhibit 7).
4. In his November 2015 draft report, Dr. Moeller concluded Applicant was competent and sane. He further suggested that Applicant Factitious Disorder Imposed on Another (FDIA) (formerly known as Munchausen syndrome by proxy) but said he could not make an actual diagnosis without the complainant's medical records. (Applicant's Exhibits 3, 8; see also RR PSI V.2).
5. The trial court finds that trial counsel did not complete any investigation into whether Applicant had FDIA .
6. The trial court finds that trial counsel could not have and therefore did not discuss a FDIA diagnosis or the fact that such a diagnosis could arguably negate a finding of specific intent with applicant.
7. In his affidavit, trial counsel notes that "an FDIA diagnosis could arguably negate a finding of specific intent." Supp. Affidavit Lewis, p. 2.

8. It is undisputed that trial counsel did not provide Dr. Moeller with the medical records required for a definitive opinion addressing whether Applicant could be diagnosed with FDIA. (Applicant's Exhibit 3, States PFFCL p.6 par. 43; State's Exhibit 2.).

9. In an email to the district attorney on July 30, 2022, at the same time trial counsel sought funds for an independent examination, trial counsel suggested that applicant would plead at "the next setting." (App. Ex. 7). On September 4, 2015, prior to Dr. Moeller's evaluation later than month, trial counsel set the case for a plea for October. (See September 4, 2015 Case reset Form).

10. The trial court finds that trial counsel spoke with Dr. Moeller on September 24, 2015, October 14, 2015, and October 29, 2015 (see Attorney Voucher 2/5/2016 documenting out of court hours and meetings with "psychiatrist").

11. However, November 16, 2015, Applicant sent a letter to trial counsel on asking whether "the doctor has finished his report and I'm still pleading." Applicant Exhibit 19.

12. Trial counsel sent a letter to Applicant dated November 18, 2015 without any attachment, and indicating that Dr. Moeller had submitted a draft of his report that "[b]asically [] is about [Applicant's] medical and family history to show the court how [] these factors led to what happened in your case." (App. Ex. 20).

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13. Trial counsel's statement that he moved for appointment of an expert for evaluation and development of the FDIA issue for guilt or innocence is not credible in view of the documented reasons for the examination, his contemporaneous statements about its purpose, and his subsequent failure to pursue a diagnosis (Appellate Clerk Record 41; Applicant's Exhibits 3, 7, 8; Supplemental Affidavit).

14. According to trial counsel's supplemental affidavit, he discussed an "FDIA diagnosis" with Applicant, but in his experience "following several Harris County trials where FDIA was an issue, the diagnosis did not succeed on guilt or innocence but may have helped in mitigation." (Supplemental Affidavit). Trial counsel "hoped that the diagnosis would be persuasive in mitigation." (Supplemental Affidavit).

15. According to Dr. Moeller, the incidence of FDIA is very low, and new cases occur at a rate of 2 out of 100,000 children. (State's Exhibit 2).

16. Counsel provides no names of cases, courts, lawyers, or judges involved with cases in which an FDIA diagnosis was used to defeat specific intent. (Supplemental Affidavit). He cites no relevant appellate opinions containing the issue and does not describe any similar fact patterns that he was aware of. (Supplemental Affidavit).

17. According to his first affidavit, counsel did not believe this was a good case for

pursuing a FDIA defense at trial because of a video of the charged conduct. (Supplemental Affidavit). Trial counsel recommended pleading guilty as the better option. (Applicant's Exhibits 1, 2). According to his supplemental affidavit, he "believed that a FDIA diagnosis could arguably be sufficient to negate a finding of specific intent," though he did not believe a jury would agree due to the inflammatory nature of the video recording (Supplemental Affidavit).

18. According to trial counsel, his practice was to explain the elements of the offense to clients before making plea decisions. (Supplemental Affidavit). He says he would have explained "the State would have to prove beyond a reasonable doubt that she attempted to commit capital murder by performing an act clearly dangerous to the life of a child younger than ten. The State would further have to prove that she committed the act intentionally or knowingly." (Supplemental Affidavit). However, Counsel's statement did not describe the elements of attempted capital murder because an offense committed under Penal Code Section 19.02(b)(3)[1] is not a predicate for capital murder. *See* Tex. Penal Code§ 19.03(a) (requiring commission of murder as defined under Section 19.02(b)(1), which requires intentionally or knowingly causes the death

[1]A person commits an offense under 19.02(b)(3) if "he commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

of an individual). Moreover, the advice incorrectly focused on the intent to engage in the conduct rather than the intent to cause the result. *Turner v. State*, 805 S.W.2d 423,430 (Tex. Crim. App. 1991) (capital murder is a result of conduct offense).

19. At all times during the representation, before and after Dr. Moeller's report, trial counsel planned for a guilty plea. (Applicant's Exhibit 1, 2, 7, 11, 12, 18, 19, 20).

20. Applicant did not know that the issue of her specific intent to kill was an element of the offense that the State had to prove beyond a reasonable doubt to convict her. (Applicant's Exhibit 1).

21. Applicant pled guilty because she believed there wasn't any possible or viable defense. (Applicant's Exhibit 1).

22. Trial counsel's attorney fees expense claim reflects a total of 11.4 "out of court hours" worked on this case during the year he represented Applicant. (Appellate Clerk Record 73-74).

23. Trial counsel's itemized out of court work reflects no time spent researching legal issues, and no time undertaking independent investigation of mental health issues. (App. CR 74).

24. At the PSI hearing, trial counsel did not proffer any evidence concerning FDIA or make any mention of a possible FDIA issue in mitigation of punishment.

(PSI RR 26-45). In closing, he observed that for the bond between mother and child to be twisted and damaged is a terrible thing (PSI RR 40-41) and alluded to "psychiatric issues that are amply documented at the psychiatric evaluation," specifically mentioning personality disorder and depression. (PSI RR 42). The evaluation did not say that Applicant had been diagnosed with FDIA and contained no explanation of the diagnosis (Applicant's Exhibit 8). If, as stated, his strategy was to raise FDIA in mitigation, he did not execute that strategy or have sufficient information to do so.

25. Trial counsel's supplemental affidavit's discussion of an FDIA "diagnosis" applicable at the time of his representation is inapt, as Applicant was not diagnosed with FDIA until after her conviction was final. (Supplemental Affidavit; Applicant's Exhibits 1, 3, 8, 10).

26. Trial counsel could not have told Applicant she had been diagnosed with FDIA because she had not been diagnosed at the time of her trial proceedings. (Applicant's Exhibits 1, 3, 8, 9, 10).

27. Post-conviction counsel provided Dr. Moeller with the medical records necessary to supplement his opinions about Applicant's psychiatric state. (Applicant's Exhibits 3, 10).

28. In his July 2021 report, Dr. Moeller concluded to a reasonable degree of medical certainty that Applicant meets the DSM-5 criteria diagnoses of,

among other things, Factitious Disorder Imposed on Another (FDIA). (Applicant's Exhibits 3, 10. State's Ex. 2).

29. Dr. Moeller consulted with Marc D. Feldman, M.D., an international expert in factitious disorder, whose opinion is that the behaviors of women similar to Applicant are not meant to kill the child, because killing the child removes the object of manipulation and is ultimately self-defeating. (Applicant's Exhibit 10).

30. Dr. Moeller' s opinion, offered after the conviction was final, is that an intent to kill in this case would have been counter-intentional for Applicant, and that it is more likely that her actions were intended to cause distress and derive benefit from the attentions of the medical staff. (Applicant's Exhibits 3, 10; State's Exhibit 2).

31. In a supplemental opinion provided to the State, Dr. Moeller reiterated his conclusion that Applicant meets the criteria for the diagnosis of FDIA and that he believes it is more likely than not that she did not intend to kill her son. (State's Exhibit 2).

32. Had trial counsel provided Dr. Moeller with available medical records required for a diagnosis, Dr. Moeller could have and would have diagnosed Applicant with FDIA and offered this view of Applicant's specific intent in this case before Applicant made a decision whether to pled guilty or not guilty to the charged offense. (Applicant's Exhibits 3, 10).

33. Trial counsel never took steps necessary for Dr. Moeller to determine whether a FDIA diagnosis could be made (Applicant's Exhibits 3, 8, 10). Therefore, he could not have explained to Applicant that she had a mental health diagnosis that could be used to contest the specific intent element of the attempted capital murder charge. Given the lack of documented independent research, it is not clear that counsel understood the meaning of a potential FDIA diagnosis or contemplated how it could provide a defense to the charged offense. That information was raised by Dr. Moeller after he was able to make a post-conviction diagnosis (Applicant's Exhibits 3, 10).

34. Applicant did not know that she could admit the conduct portrayed on the video and dispute the allegation that she intended to kill her child. (Applicant's Exhibits 1, 11, Supp. Affidavit).

35. Had trial counsel explained that a mental health diagnosis provided a basis to contest an element of the charged offense, Applicant would not have pled guilty to attempted capital murder to the judge without a recommendation and would have gone to trial. (Applicant's Exhibits 1, 11).

Conclusions of Law:

1. Proof of specific intent to kill is a necessary element of attempted capital murder. *Sifuentes v. State*, 615 S.W.3d 914, 917 (Tex. Crim. App. 2021); Tex. Penal Code § 15.01.

2. Testimony relating to "a mental disease or defect that directly rebuts the particular mens rea necessary for the charged offense is relevant and admissible unless excluded under a specific evidentiary rule" such as Rules 403 or Rules 703-705. *Ruffin v. State*, 270 S.W.3d 586, 588 (Tex. Crim. App. 2008).
3. Dr. Moeller's medical opinion rebuts the State's theory that evidence in this case shows Applicant acted with specific intent to cause the victim's death.
4. Trial counsel's failure to provide Dr. Moeller with the necessary medical records and pursue the offer of an opinion about an FDIA diagnosis was not a reasonable decision that made further investigation unnecessary. *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984).
5. Trial counsel's decision not to investigate was unreasonable given the minimal effort, expense, and time that provision of medical records to the appointed expert would have required, and the broader scope of options it could have provided Applicant in view of the charges. Counsel's choice not to pursue any further investigation into the charges made it impossible for Applicant to make a fully informed decision about how to proceed.
6. Counsel's trial strategy to recommend a guilty plea was not made after thorough investigation of law and facts relevant to plausible options. *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984).

7. Counsel's failure to determine whether Dr. Moeller could diagnose Applicant with FDIA was error.

8. Applicant has proven there is a reasonable probability that, but for Counsel's error, she would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Ex parte Moody*, 991 S.W.2d 856, 867–58 (Tex. Crim. App. 1999); *Ex parte Imoudu*, 284 S.W.3d 866, 869 (Tex. Crim. App. 2009) (In the context of a guilty plea, a defendant satisfies the prejudice requirement by showing that he would not have pleaded guilty and would have insisted on going to trial.); *see also id* at 870-71 ("We next turn to whether Applicant was prejudiced by counsel's error. … Applicant has shown a reasonable probability that counsel's ineffective assistance affected the outcome of the plea process... In this case, the psychiatrist hired by habeas counsel reviewed Applicant's medical records and determined that Applicant was actively schizophrenic at the time of the offense and that the nature of the schizophrenic process includes the inability at any given moment to discern right from wrong. He stated in his affidavit:

> Given the likelihood that [Applicant] was psychotic and paranoid when he stole the car, his psychosis and paranoia probably were exacerbated during the chase, causing him to believe that someone was trying to kill him. Therefore, it is my opinion, based on reasonable medical probability, that

[Applicant] was suffering from untreated schizophrenia, was unable to discern right from wrong, and was insane at the time of the offense on August 1, 2005.

Had Applicant gone to trial, such testimony by a psychiatrist may have raised a reasonable doubt in the mind of the trier of fact. This satisfies *Strickland's* prejudice requirement.").

9. Due to her involuntary guilty plea, Applicant is entitled to have her conviction and sentence vacated and to be returned to face the indictment in this case.

GROUND TWO—UNKNOWING, INVOLUNTARY PLEA

Findings of Fact:

1. After reviewing all of the exhibits, including correspondence between applicant and trial counsel, Dr. Moeller's reports and affidavits, and taking into account Applicant's age and mental circumstances at the time of her plea, the trial court finds the Applicants claim that her plea was not knowing or voluntary to be credible.
2. Applicant believed that she was guilty because she committed an act that could have killed her son (Applicant's Exhibit 1).
3. Applicant believed she had no possible defense to the charge of attempted capital murder because the act was captured on a video recording (Applicant's Exhibits 1, 11).

4. Applicant did not understand that proof of the charge required proof that she acted with the specific intent to kill her son (Applicant's Exhibits 1, 11).
5. Trial counsel told Applicant that there was no possible defense and that a guilty plea to the charged offense was the only way to avoid a life sentence (Applicant's Exhibits 1, 2, 11). Trial counsel did not believe the defense could overcome the video of the charged conduct. (Supplemental Affidavit).
6. Applicant would not have pled guilty had she known that the State had to prove her specific intent, and that expert testimony could support a claim that she acted without the intent to kill (Applicant's Exhibits 1, 11).

Conclusions of Law:

1. Applicant's guilty plea was not entered with an understanding of the law in relation to the facts. *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege. Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process

and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.")

2. Applicant's choice to plead guilty was not a voluntary and intelligent choice among the alternative courses of action open to her. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

10. Applicant's plea was involuntary, violating due process.

11. Due to her involuntary guilty plea, Applicant is entitled to have her conviction and sentence vacated and be returned to face the indictment in this case.

RECOMMENDATION AND ORDER

The Court recommends a new trial.

The District Clerk is ordered to prepare a transcript of all papers in this cause and send it to the Court of Criminal Appeals as provided by article 11.07 of the Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

a. the application for a writ of habeas corpus;

b. the memorandum of law in support of the application for a writ of habeas corpus;

c. the exhibits;

d. the court's orders in this habeas proceeding;

e. the State's answer and responsive pleadings, if any;

f. the entire Clerk's trial record, including any motions, orders, case reset forms, and attorney vouchers;

g. the Reporters Record of the trial, including the plea to the PSI and the Sentencing transcript;

h. the appellate clerk record;

i. the Clerk's and Reporters record of the habeas writ in the instant case;

j. Applicant's proposed findings of fact and conclusions of law;

k. the State's proposed findings of fact and conclusions of law;

l. the court's findings of fact and conclusions of law;

m. any objections filed by either party to the court's findings of fact and conclusions of law; and

n. any other documents required by Texas Rule of Appellate Procedure 73.4(b)(4).

The District Clerk shall send a copy of this order to Applicant, her counsel, and counsel for the State.

The Parties shall have ten (10) days from the date of receipt of this recommendation and order to file objections.

Signed on September 16, 2022.

Judge Natalia Cornelio

351st District Court

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Appendix C

Brief for Appellant Cynthia Kaye Wood, First Court of Appeals of Texas, *Wood v. State*, No. 01-16-00179-CR (June 20, 2016)

No. 01-16-00179-CR

In The Court of Appeals
For the First District of Texas

Cynthia Kaye Wood
Appellant

v.

The State of Texas
Appellee

On Appeal from Cause Number 1445251
From the 351st District Court of Harris County, Texas
Hon. Mark Kent Ellis, Judge Presiding

Brief for Appellant

ORAL ARGUMENT REQUESTED

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TRIAL PROSECUTOR:	Tiffany Dupree Assistant District Attorney Harris County, Texas 1201 Franklin Avenue Houston, Texas 77002
DEFENSE COUNSEL AT TRIAL:	Thomas Lewis 1602 Washington Avenue Houston, Texas 77007
PRESIDING JUDGE:	Hon. Mark Kent Ellis 351st District Court Harris County, Texas 1201 Franklin Avenue, 14th Floor Houston, Texas 77002
COUNSEL ON APPEAL FOR APPELLANT:	Ted Wood Assistant Public Defender Harris County, Texas State Bar of Texas No. 21907800 1201 Franklin, 13th Floor Houston, Texas 77002

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STATEMENT OF THE CASE

This case involves the conviction of Cynthia Kaye Wood in the 351st District Court of Harris County for the offense of attempted capital murder.[1] The offense is a first-degree felony. Cynthia pleaded guilty without an agreed recommendation.[2] The judge directed that a presentence investigation (PSI) report be prepared.[3] A sentencing hearing was held in which the PSI report was considered.[4] Following the hearing, the judge assessed punishment at life in prison.[5] No motion for new trial was filed. But Cynthia did timely file a notice of appeal.[6] Her direct appeal is now before this Court.

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[1] C.R. at 70.
[2] C.R. at 48-49.
[3] C.R. at 64, 66.
[4] 1 R.R. at 3.
[5] C.R. at 70; 1 R.R. at 50.
[6] C.R. at 75.

STATEMENT REGARDING ORAL ARGUMENT

The undersigned attorney requests oral argument. The first two issues in this appeal both involve the nature of a "plea to a PSI." Because these pleas are quite common, the issues surrounding such pleas are important. Oral argument would facilitate an in-depth discussion of these pleas. This Court's opinion will benefit both the bench and the bar.

ISSUES PRESENTED

Issue Number One

A defendant who pleads guilty may not be convicted unless sufficient evidence of each element of the offense is introduced to support her plea. Additionally, the evidence must be accepted by the trial court as the basis for its judgment. Here, Defendant Cynthia Wood was convicted of attempted capital murder even though a necessary element of the offense was not both introduced and accepted. Should the conviction stand?

Subsidiary Issue One

Cynthia Wood judicially confessed that the allegations in her attempted capital murder indictment were true, but the indictment was missing one element of the offense. Did Cynthia's judicial confession constitute sufficient evidence to support her guilty plea to the offense of capital murder?

Subsidiary Issue Two

Evidence adduced at a sentencing hearing may be used to substantiate a guilty plea. Here, evidence from the sentencing hearing substantiated Cynthia Wood's guilty plea. But the sentencing hearing evidence was never accepted by the trial court as the basis for its judgment. Should evidence from the sentencing hearing be used to substantiate Cynthia's plea of guilty to the offense of attempted capital murder?

Issue Number Two

A presentence investigation [PSI] report is a sentencing tool that is used after a defendant's guilt has been established. Here, a PSI report and other evidence was presented at Cynthia Wood's sentencing hearing. Can evidence adduced during a sentencing hearing in which the PSI is considered be used to substantiate a defendant's guilty plea?

Issue Number Three

A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and constitutes an illegal sentence. Here, Cynthia was sentenced to life in prison which is a legal sentence for a first degree felony conviction. But the evidence was sufficient only to support a second degree felony conviction which carries a punishment of two to twenty years in prison. Was Cynthia's sentence illegal?

Issue Number Four

A trial attorney is ineffective when his performance is deficient and the deficiency prejudiced the defendant. Here, Cynthia's trial counsel failed to object to the imposition of an illegal sentence of life imprisonment. Cynthia should only have been sentenced to a maximum term of twenty years in prison. Was Cynthia's trial counsel ineffective?

Issue Number Five

A presentence investigation on any defendant convicted of a felony who appears to the judge to have a mental impairment shall include a psychological evaluation. Such an evaluation must determine the defendant's IQ and adaptive behavior scores. Here, the evidence indicated that Cynthia may have a mental impairment, but the court-ordered psychological evaluation did not contain Cynthia's IQ or adaptive behavior score. Did the court err in proceeding with sentencing without a complete psychological evaluation?

STATEMENT OF JURISDICTION

The Trial Court certified that the cause being appealed is not a plea bargain case and that Cynthia has the right of appeal.[7] This certification is accurate. Generally, the defendant in a criminal action has the right of appeal.[8]

Additionally, a defendant must timely file a notice of appeal to give a court of appeals jurisdiction over an appeal.[9] A defendant's notice of appeal is timely if the notice is filed within thirty days after the day the sentence is imposed or suspended in open court.[10] In this case, a notice of appeal was timely filed. Sentence was imposed on January 27, 2016.[11] A notice of appeal was filed on February 3, 2016.[12] Accordingly, this Court of Appeals has jurisdiction to hear this appeal.

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[7] C.R. at 57.
[8] Tex. Code Crim. Proc. Ann. art. 44.02 (West 2006).
[9] *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996).
[10] Tex. R. App. P. 26.2(1)(A).
[11] C.R. at 70; 1 R.R. at 50.
[12] C.R. at 75.

STATEMENT OF PROCEDURAL HISTORY

The judgment in this case was entered on January 27, 2016.[13] Notice of appeal was filed on February 3, 2016.[14] No motions for new trial or motions in arrest of judgment were filed. The Public Defender's Office was not appointed to handle the appeal until March 4, 2016 – after the time for filing a motion for new trial. The judgment is now before this Court on appeal. The clerk's record in the cause was filed on March 23, 2016. The reporter's record was filed on April 19, 2016.

Generally, an appellant's brief must be filed within 30 days after the later of the filing of the clerk's record or the reporter's record.[15] In this case, the reporter's record was filed after the clerk's record. Accordingly, the appellant's brief in this case was due to be filed by the 30th day after April 19, 2016 which is May 19, 2016. However, on May 16, 2016, undersigned counsel requested a 30-day extension of time to file appellant's brief. This Court granted the extension and set a new due date for appellant's brief of June 20, 2016.

This brief was filed on June 20, 2016.

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[13] C.R. at 70.
[14] C.R. at 75.
[15] Tex. R. App. P. 38.6(a).

STATEMENT OF FACTS

Part A
Who is Cynthia Wood?

Cynthia Wood is currently in prison serving a life sentence for the attempted capital murder of her infant son.[16] A hospital's hidden camera showed her trying to suffocate him two different times.[17] Cynthia sounds like a horrible person. But truth be told, this is a girl who never had a chance.[18]

Cynthia is only 20 years old.[19] But she is already the mother of four children – two girls and two boys.[20] She was impregnated with her first child, a girl, by her step-brother when she was just 12.[21] He had been sexually abusing her (and a different step-brother) since she was five years old.[22] Her second child, another girl, died in 2013 at

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[16] C.R. at 70-71 (judgment); 1 R.R at 48-49 (trial judge's comments about how Cynthia "didn't accomplish killing [her] own child").
[17] 1 R.R. at 17-20; 2 R.R. at State's Exhibit 3 (the actual videotape).
[18] As the trial judge said in the course of sentencing Cynthia, "I wouldn't wish your childhood on anyone." 1 R.R. at 48.
[19] 2 R.R. at State's Exhibit 2 (cover sheet of the presentence investigation). Her birthdate is July 30, 1995.
[20] 2 R.R. at State's Exhibit 2 (chart within the presentence investigation showing "Cynthia and her 4 children").
[21] 2 R.R. at State's Exhibit 2 ("Family Background" subsection of the "Social History" section of the pre-sentence investigation).
[22] *Id.*

the age of two.[23] She gave up her third child, a boy, for adoption.[24] Her fourth child, a second son, was the infant boy at the center of the current case.[25]

To call the family in which Cynthia was raised "dysfunctional" would be an understatement. She never met her biological father until she was 14 years old.[26] Her mother, Tammy, was never married to her father.[27] When Cynthia was quite young, her mother married George Morales.[28] This was the second time Cynthia and George

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[23] 2 R.R at State's Exhibit 2 ("Marital History" subsection of the "Social History" section of the presentence investigation report); 2 R.R. at State's Exhibit 2 (chart within the presentence investigation report showing "Cynthia and her 4 children"). According to the presentence investigation report, the child's death was the result of epilepsy and brain malformation. *Id.* But the child's death certificate described the child's death as a "developmental delay" due to a "seizure" and also as a "sudden unexplained death." 2 R.R. at State's Exhibit 4. The prosecutor at least implied that Cynthia had something to do with the child's death. 1 R.R. at 31-34. In the course of cross-examining Cynthia's mother, the prosecutor confirmed that Cynthia had set up a Facebook page about her deceased daughter. 1 R.R. at 32-34. The prosecutor confirmed that the responses to Cynthia's Facebook page provided her (Cynthia) with sympathy and encouragement. 1 R.R. at 32-34. The prosecutor wanted to have the Facebook records admitted into evidence "to show the attention [Cynthia] received as a result of the death of the first child and that the second child provides a motive for why it would be beneficial to her to have a second child that's deceased." 1 R.R. at 34.

[24] 2 R.R. at State's Exhibit 2 (chart within the presentence investigation showing "Cynthia and her 4 children"); 2 R.R. at State's Exhibit 2 (letter from Cynthia's friend Melanie White). In her letter, Melanie said:

> I watched her [Cynthia] struggle within her mind to figure out the best situation for her beloved baby [son]. Constantly she asked, "What would be better for him? Is adoption the right course of action? Am I making the right choice as a mother?" She made the right choice for her son, he is loved not only by his adopted parents but by Cynthia, she chose an open adoption with a wonderful set of people and until the past year was actively in his life.

[25] 2 R.R. at State's Exhibit 2 (chart within the presentence investigation showing "Cynthia and her 4 children").

[26] After Cynthia already had two of her own children, she contacted her biological father and moved in with him and his girlfriend in Summit, Mississippi. 2 R.R. at State's Exhibit 2 ("Pertinent History" section of "Forensic Psychiatric Evaluation" within the presentence investigation report). While living with her biological father, Cynthia's daughter died. *Id.*

[27] *Id.*

[28] *Id.*

married each other.[29] For a time, Cynthia lived under the same roof with George and Cynthia, her older half-sister,[30] and two half-brothers.[31] Cynthia considers George to be her "Real Dad."[32] It was during this time that Cynthia was first abused by the older of her two step-brothers.[33] The "Forensic Psychiatric Evaluation" describes the abuse as follows:

> Ms. Wood told me [the doctor who performed the forensic psychiatric evaluation] that when she was about 5 years old, David began abusing Adam, his younger brother. She recalled knowing that David fondled Adam and this progressed to penetration, anal and oral. David threatened to hurt both Adam and Cynthia if they told Tammy or George. David began sexually abusing Cynthia. She recalled that he did "Everything to her." At times, she was aware that Adam sacrificed himself for her – "He let David use him to protect me." The molestation and implicit threats to remain silent went on for years. When Cynthia was nine years old, George caught David in the act of abusing one of the children. David was removed from the home and treated for some time at . . . a residential treatment program for juvenile sex offenders.[34]

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[29] *Id.* Tammy and George had previously been married to each other, but had divorced.

[30] *Id.* Cynthia's sister had been born out-of-wedlock to Tammy's mother and a man who is not identified in the record. *See* 2 R.R. at State's Exhibit 2 (chart within the presentence investigation report showing "Cynthia's Family of Origin").

[31] 2 R.R. at State's Exhibit 2 ("Pertinent History" section of "Forensic Psychiatric Evaluation" within the presentence investigation report). The half-brothers were the product of Tammy and George from when they were married the first time. *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

Tammy and George's second marriage failed when Cynthia was nine years old.[35] As described in the presentence investigation report, Cynthia's next four years were horrible:

> From the ages of 9 to 12, Cynthia lived primarily with her mother in a grossly chaotic situation. Cynthia told me [the doctor who performed the forensic psychiatric evaluation] that her mother drank heavily and had many, many boyfriends. Cynthia told me that many times, there was no food in the house and "No one" cared if she attended school or not. On one occasion, one of Tammy's boyfriends was arrested for beating Cynthia. On some weekends, Cynthia went to stay at George's house. There, David again molested her. Cynthia believed she couldn't tell anyone because: (1) She was afraid to tell Tammy because she wouldn't be able to visit George and he provided the only stability and kindness in her life; (2) David told her that it was her fault that Tammy and George divorced the second time; and (3) She was afraid to tell George because he believed that David had changed.[36]

As noted earlier, David impregnated Cynthia.[37] She was moved out of her middle school to an alternative school for pregnant girls.[38] After her first child was born, Cynthia began attending high school while her half-sister took care of the baby.[39] As noted in the presentence investigation report, Cynthia began drinking and experimenting with drugs.[40] She engaged in sex with many partners – all of her partners

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* Cynthia drank heavily. *Id.* She experimented with cocaine, opiates, marijuana, kush, and methamphetamines. *Id.* The drinking had started at an early age. *Id.* Cynthia's mother took Cynthia

were at least 18 and one was 30.[41] The drugs and the sex apparently did not provide Cynthia with much happiness and satisfaction – she tried to kill herself at least twice.[42] Also, Cynthia was treated for post-partum psychosis or depression at Kingwood Pines Hospital after giving up her third child for adoption.[43]

Part B
Cynthia's Mental Health and Medications

The event for which Cynthia was ultimately convicted took place on October 12, 2014.[44] A police officer made a formal complaint about the incident on October 16th.[45] She was arrested pursuant to a warrant[46] shortly thereafter and taken before a magistrate.[47] Bond was ultimately set at $250,000.[48] Cynthia was unable to make the bond so she stayed in jail for over a year until her guilty-plea hearing on November 23, 2015.[49]

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into bars with her. *Id.* "Cynthia learned to drink a cocktail of R & R Canadian whiskey, Dr. Pepper, and grenadine." *Id.*

[41] *Id.*

[42] 2 R.R. at State's Exhibit 2 ("Family Background" subsection of the "Social History" section of the presentence investigation report). Cynthia was 14 or 15 at the time of her first suicide attempt and 17 at the time of her second attempt. *Id.*

[43] 2 R.R. at State's Exhibit 2 ("Pertinent History" section of "Forensic Psychiatric Evaluation" within the presentence investigation report).

[44] C.R. at 70; 1 R.R. at 17-18; 2 R.R. at State's Exhibit 2, pages 2 and 3.

[45] C.R. at 6-7; 2 R.R. at 4.

[46] *See* C.R. at 106.

[47] C.R. at 10.

[48] C.R. at 15, 28-29, 106.

[49] The guilty-plea hearing was denominated by the court reporter as a "Plea to PSI." C.R. at 60. Cynthia had been indicted on December 18, 2014. C.R. at 32.

At the guilty-plea hearing, the following exchange took place between the trial judge, Thomas Lewis (Cynthia's trial counsel), and Cynthia:

> THE COURT: Have you been found to be mentally incompetent or mentally ill?
>
> MR. LEWIS: May I respond to that, Your Honor?
>
> THE COURT: Sure.
>
> MR. LEWIS: There have – pursuant to psychiatric evaluation, there are issues but, Ms. Wood, I do not believe, is incompetent.
>
> THE COURT: Are you on medication for mental health?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: I know you talked to Mr. Lewis about your case and what you should do in this situation. Do you feel like you understand the choice you're making today?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Mr. Lewis, is your client of sound mind and competent to give this plea?
>
> MR. LEWIS: I believe that she is, Your Honor.[50]

As Mr. Lewis disclosed to the trial judge, Cynthia had psychiatric "issues." The judge went ahead and directed that a PSI report be prepared.[51] The judge set the sentencing hearing for January 27, 2016.[52]

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[50] C.R. at 62-63.
[51] *See* C.R. at 64, 66.
[52] C.R. at 67.

While Cynthia was in jail between her arrest and the guilty-plea proceeding, her trial counsel filed a written "Motion to Appoint Psychiatric Expert Witness."[53] In pertinent part, the motion said:

> Defendant has a history of diagnosis for mental health problems including major depression with recurring psychotic episodes. Defendant is presently in custody and receiving medications including Trazodone, Olanzapine, and Fluoxetine. Because of the medications, Defendant at present appears competent to stand trial. However, due to the seriousness of the crime with which Defendant is charged, the preparation of a psychiatric evaluation by a psychiatric expert is requested to explain the relevance of Defendant's background and mental health history in mitigation of punishment.[54]

The trial court granted the motion and ordered Dr. Mike Moeller, a psychiatric expert witness, to examine Cynthia and prepare a written report.[55] Dr. Moeller performed his evaluation on two separate days – September 19th and 26th of 2015.[56] Dr. Moeller actually completed two separate reports. His first report was a "Competency Evaluation Form" which he completed on January 13, 2016.[57] His second report was a "Forensic Psychiatric Evaluation" which he completed the same day.[58] Thus, these two reports were completed after the guilty-plea hearing on November 23, 2015, but

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[53] C.R. at 41-42. The motion was filed on August 28, 2015.
[54] C.R. at 41.
[55] C.R. at 43.
[56] 2 R.R. at State's Exhibit Two on page 1 of the "Competency Evaluation Form" prepared by Dr. Moeller.
[57] *Id.* at pages 1-3.
[58] 2 R.R. at State's Exhibit Two on page 1 of the "Forensic Psychiatric Evaluation" prepared by Dr. Moeller.

before the sentencing hearing on January 27, 2016. The two reports were included in the PSI report.[59]

Neither of Dr. Moeller's two reports included a calculation of: (1) Cynthia's IQ; or (2) Cynthia's "adaptive behavior score."[60]

Part C
Trial Court Proceedings

The trial court conducted a hearing on November 23, 2015 at which Cynthia pleaded guilty to the offense of attempted capital murder.[61] She also pleaded true to an allegation that she had used a deadly weapon – her hands – to commit the crime.[62] There was no agreement between the State and Cynthia as to what the punishment should be.[63] Rather, Cynthia requested that the trial judge set punishment following the judge's review of a PSI report that was yet to be prepared.[64] The judge found the evidence sufficient to find Cynthia guilty, but he made no finding of guilt.[65] The judge reset the case for January 27, 2016 at which time he would consider the PSI report and sentence Cynthia.[66]

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[59] *See* Footnotes 56, 57 and 58.
[60] *See id.*
[61] C.R. at 62.
[62] C.R. at 64.
[63] C.R. at 64.
[64] C.R. at 64.
[65] C.R. at 67.
[66] C.R. at 67.

The sentencing hearing was conducted on January 27, 2015 as scheduled.[67] The PSI report was introduced into evidence and considered by the judge.[68] Following the presentation of evidence and the argument of counsel, the trial judge found Cynthia guilty and assessed her punishment at life in prison.[69]

[67] 1 R.R. at 1.
[68] 1 R.R. at 4.
[69] 1 R.R. at 50.

SUMMARY OF THE ARGUMENT

There are five issues in this appeal.

In Issue Number One, appellant Cynthia Wood contends the evidence was insufficient to support her guilty plea to the offense of attempted capital murder. Under Article 1.15 of the Code of Criminal Procedure, evidence can support a defendant's guilty plea only if two requirements are satisfied. First, the evidence must be introduced into the record. Second, the evidence must be accepted by the trial court as the basis for its judgment of conviction. If both requirements are not satisfied, there can be no conviction.

The trial court accepted the evidence introduced at the case's guilty-plea hearing as the basis for its judgment of conviction. The court did not accept the evidence introduced at the sentencing hearing as the basis for its judgment of conviction. Thus, any evidence introduced at the sentencing hearing could not serve to substantiate Cynthia's plea. Only the evidence introduced at the guilty-plea hearing could be used to substantiate her plea.

The only evidence produced at the guilty-plea hearing was Cynthia's judicial confession. Her confession did not cover every constituent element of attempted capital murder. A judicial confession that fails to establish every element of the offense

does not authorize a trial court to convict a defendant of that offense. Thus, there was insufficient evidence to support Cynthia's conviction.

Issue Number Two is similar. Cynthia argues that there was insufficient evidence to support her plea of guilty to the offense of capital murder. As in Issue Number One, Cynthia contends that the evidence adduced at the sentencing hearing could not be used to substantiate her guilty plea. But Cynthia's argument is not that the trial court failed to accept the sentencing hearing evidence as the basis for its judgment of conviction. Rather, Cynthia argues that evidence from her sentencing hearing should not be used to substantiate her guilty plea in any event. This is because the sentencing hearing was centered on her PSI report. Cynthia argues that a PSI is only ordered after a finding of guilty. Thus, evidence from a hearing on a PSI should not be used to substantiate guilt.

Issue Number Three is based on the idea that the evidence that was both introduced and accepted was insufficient to support her guilty plea. Accordingly, Cynthia's life sentence was illegal.

Issue Number Four argues that Cynthia's trial counsel was ineffective in failing to object to the illegal sentence. This failure resulted in Cynthia being punished for a first degree felony when the evidence only substantiated her guilt for a second degree felony.

Each of the first four issues results in a situation in which Cynthia's conviction for attempted capital murder (first degree felony) should be reformed to a conviction for attempted murder (second degree felony). The cause should then be remanded to the trial court for a new sentencing hearing.

Issue Number Five should only be reached if none of the first four issues are sustained. The issue concerns deficiencies in the psychological evaluation within the presentence investigation (PSI) report. Specifically, the psychological report did not contain Cynthia's IQ score or adaptive behavior score. These scores are statutorily required to be part of the psychological evaluation. Even if Cynthia was properly convicted of attempted capital murder, the case should be remanded to the trial court for a new sentencing hearing. Sentencing should take place only after preparation of a psychological evaluation that includes an IQ score and an adaptive behavior score.

ARGUMENT

Issue Number One

A defendant who pleads guilty may not be convicted unless sufficient evidence of each element of the offense is introduced to support her plea. Additionally, the evidence must be accepted by the trial court as the basis for its judgment. Here, Defendant Cynthia Wood was convicted of attempted capital murder even though a necessary element of the offense was not both introduced and accepted. Should the conviction stand?

No, the conviction should not stand. The conviction contravenes Article 1.15 of the Code of Criminal Procedure. Article 1.15 reads in its entirety as follows:

> No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing in accordance with Articles 1.13 and 1.14; provided, however, that it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same. The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court. Such waiver and consent must be approved by the court in writing, and be filed in the file of the papers of the cause.[70]

[70] Tex. Code Crim. Proc. Ann. art. 1.15 (West 2005) (emphasis added).

For the reasons set forth below, Cynthia Wood's conviction for attempted capital murder does not comport with the requirements of Article 1.15. Accordingly, her conviction should be overturned.

Subsidiary Issue One
Cynthia Wood judicially confessed that the allegations in her attempted capital murder indictment were true, but the indictment was missing one element of the offense. Did Cynthia's judicial confession constitute sufficient evidence to support her guilty plea to the offense of attempted capital murder?

No, Cynthia's confession did not constitute sufficient evidence to support her guilty plea. The reasons for this conclusion are set out below in Parts A through E of this subsidiary issue.

Part A
A defendant who pleads guilty may not be convicted unless sufficient evidence is introduced to support her plea.

As a general rule, a person can be convicted of a felony only upon the verdict of a jury.[71] But there is a huge exception. A defendant may waive her right of trial by jury.[72] A defendant who waives this right may plead not guilty and go to trial before a judge.[73] Additionally, a defendant who waives this right may choose to plead guilty.[74]

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[71] *Id.*
[72] *Id.*
[73] Tex. Code Crim. Proc. Ann. art. 27.02 (West 2006).
[74] *Id.*

The fact that a defendant pleads guilty does not automatically result in a defendant being convicted.[75] The State must actually introduce evidence into the record showing the defendant's guilt before there can be any conviction.[76] "[I]n no event shall a person charged be convicted upon his plea without sufficient evidence to support the same."[77]

Part B

A defendant's judicial confession will not constitute sufficient evidence unless every element of the charged offense is covered.

The evidence offered to support a guilty plea can take various forms.[78] First, evidence can be proffered in testimonial or documentary form.[79] Second, evidence can take the form of an oral or written stipulation.[80] Third, the defendant can make a judicial confession.[81] A judicial confession is a sworn written statement or testimony under oath in court in which the defendant: (1) specifically admits her culpability; or (2) generally acknowledges that the allegations against her are in fact true and correct.[82]

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[75] *See* Tex. Code Crim. Proc. Ann. art. 1.15 (West 2005).
[76] *See id.*
[77] *Id.* A different rule exists in misdemeanor cases. *Dees v. State,* 676 S.W.2d 403, 404 (Tex. Crim. App. 1984) ("[W]hen a defendant, who is charged with committing a misdemeanor offense, pleads guilty or nolo contendere to the charge, such plea constitutes an admission to every element of the charged offense.")
[78] *Menefee v. State,* 287 S.W.3d 9, 13 (Tex. Crim. App. 2009).
[79] *Id.* Such evidence can be admitted only if the defendant consents to such a proffer. *Id.*
[80] *Id.* Stipulations can be admitted only if the defendant consents. *Id.*
[81] *Id.*
[82] *Id.*

If the evidence takes the form of a stipulation or a judicial confession, all of the constituent elements of the charged offense must be covered.[83] "[A] stipulation of evidence or judicial confession that fails to establish every element of the offense will not authorize the trial court to convict."[84]

Part C
One of the elements of attempted capital murder is an aggravating circumstance.

Cynthia Wood was charged with attempted capital murder.[85] "A person commits [capital murder] if the person commits murder as defined under Section 19.02(b)(1) and" an aggravating circumstance exists.[86] Thus, "[o]ne of the elements of capital murder is the existence of one of the aggravating circumstances enumerated in the statute."[87]

"If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense

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[83] *See id.*
[84] *Id.* at 14.
[85] C.R. at 32.
[86] Tex. Penal Code § 19.03(a) (West Supp. 2015). There are nine possible aggravating circumstances (also known as aggravating factors) listed in Section 19.03(a). Examples of these aggravating circumstances are murdering a peace officer, murdering for remuneration, and murdering an individual under 10 years of age. *Id.*
[87] *Hernandez v. State,* 10 S.W.3d 812, 819 (Tex. App.—Beaumont 2000, pet. ref'd).

accompanies the attempt."[88] "Therefore, the element of an aggravating circumstance for capital murder is also an element of attempted capital murder."[89]

Part D

Defendant Cynthia Wood judicially confessed that the allegations in her capital murder indictment were true, but the indictment was missing one element of capital murder.

Cynthia Wood signed a document entitled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession."[90] The heading of the document notes that the felony charge is attempted capital murder.[91] Below the document's heading and title, the following paragraph appears:

> In open court and prior to entering my plea, I waive the right of trial by jury. I also waive the appearance, confrontation, and cross-examination of witnesses, and my right against self-incrimination. The charges against me allege that in Harris County, Texas, **Cynthia Kaye Wood,** hereafter styled the Defendant, heretofore on or about **October 12, 2014,** did then and there unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended.
>
> **AGAINST THE PEACE AND DIGNITY OF THE STATE.**

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[88] *Id.*
[89] *Id.*
[90] C.R. at 48.
[91] C.R. at 48.

> It is further alleged that during the commission of the felony offense of attempted capital murder, the Defendant, used and exhibited a deadly weapon, namely, her hands, on or about October 12, 2014.[92]

The first paragraph above describes a murder, but does not say anything about an aggravating factor. The relevant language[93] in the first paragraph was taken verbatim from the indictment.[94] Thus, the indictment failed to properly charge Cynthia with attempted capital murder because no aggravating circumstance was found therein. "Everything should be stated in the indictment which is necessary to be proved."[95] "It is essential, in order to fully apprise the accused of the charge against him, that an indictment for capital murder allege one of the [aggravating] conditions."[96]

Cynthia's signature on the document followed a statement that said "I understand the above allegations and I confess that they are true and that the acts alleged above were committed on Oct. 12, 2014."[97] There is no question that this document signed by Cynthia constitutes a judicial confession. But she did not judicially

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[92] C.R. at 48.
[93] The relevant language is "on or about **OCTOBER 12, 2014,** did then and there unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended."
[94] *See* C.R. at 32.
[95] Tex. Code Crim. Proc. Ann. art. 21.03 (West 2009).
[96] *Jurek v. State,* 522 S.W.2d 934, 941 (Tex. Crim. App. 1975).
[97] C.R. at 49.

confess to committing all the elements of attempted capital murder. The "aggravating circumstance" element was missing.

Cynthia's judicial confession did not establish every element of the offense of attempted capital murder. Accordingly, Cynthia's judicial confession does not constitute sufficient evidence to support her plea of guilty to the charge of attempted capital murder.

Part E
No other evidence was introduced at the guilty-plea proceeding to support Cynthia's guilty plea.

Cynthia's judicial confession did not contain every element of the offense of capital murder. Thus, her judicial confession did not support her guilty plea. But this does not end this Court's inquiry. This Court must review the record to see if there is any other evidence to support her guilty plea.[98]

The document containing Cynthia's judicial confession was introduced into evidence (as State's Exhibit 1) at a hearing entitled "Plea to PSI."[99] This type of hearing

[98] *See Menefee v. State,* 287 S.W.3d at 11; *see also Dinnery v. State,* 592 S.W.2d 343, 352 (Tex. Crim. App. 1980) (opinion on rehearing) (where defendant entered written judicial confession to the wrong offense, reviewing court would look to other evidence in the record for substantiation of guilty plea).
[99] C.R. at 60, 66-67.

is often referred to as "the guilty plea proceeding."[100] The guilty-plea proceeding stands apart from what is commonly called the "sentencing proceeding."[101]

At the guilty-plea proceeding on November 23, 2016, the following colloquy occurred between the trial court and Cynthia:

> THE COURT: Cause No. 1445251, entitled State of Texas vs. Cynthia Wood. Ms. Wood, you're charged with attempted capital murder. Do you understand what you're charged with?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: When you signed these papers, you gave up important rights. They included your right to have a trial by jury, your right to have the witnesses come to testify in that trial, and your right to remain silent. Do you understand that you gave up these rights?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: How do you plead to this charge, ma'am, guilty or not guilty?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: Are you pleading guilty because you actually committed this crime?
>
> THE DEFENDANT: Yes.[102]

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[100] *See Menefee v. State,* 287 S.W.3d at 11.
[101] *See id.* at n. 12.
[102] C.R. at 62-67.

Cynthia's oral plea of guilty at the hearing is not sufficient to satisfy the evidence required by Article 1.15 of the Code of Criminal Procedure.[103] The Court of Criminal Appeals made the following declaration in *Menefee v. State*:

> [W]e hold that the appellant's sworn affirmation in response to the trial court's questioning, that he was in fact pleading guilty to the charges in the indictment does not constitute a judicial confession and does not otherwise supply evidence, in whole or in part, sufficient to support the plea under Article 1.15. A guilty plea entered under oath is still just a guilty plea. It does not provide independent evidence to substantiate the defendant's guilt.[104]

In accordance with *Menefee,* Cynthia's oral acknowledgement that she was pleading guilty did not satisfy Article 1.15's evidentiary requirement.

Subsidiary Issue Two

Evidence adduced at a sentencing hearing may be used to substantiate a guilty plea. Here, evidence from the sentencing hearing substantiated Cynthia Wood's guilty plea. But the sentencing hearing evidence was never accepted by the trial court as the basis for its judgment. Should evidence from the sentencing hearing be used to substantiate Cynthia's plea of guilty to the offense of attempted capital murder?

No, the evidence from the sentencing hearing cannot be used to substantiate Cynthia's guilty plea. The reasons for this conclusion are set out below in Parts A through E of this subsidiary issue.

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[103] *Menefee v. State*, 287 S.W.3d at 14.

[104] *Id.* at 17-18. To convict a defendant "on what is essentially no more than his plea," would be sanctioning "the very vice the statue was designed to combat." *Id.* at 14 (citing *Dinnery v. State,* 592 S.W.2d at 359 n. 14 (Clinton, J., dissenting)).

Part A
Can evidence presented at a sentencing hearing be used to support a defendant's guilty plea?

Yes, at least according to the Court of Criminal Appeals opinion in *Menefee v. State.*[105] In *Menefee,* the Court of Criminal Appeals said neither the defendant's judicial confession nor his plea of guilty satisfied Article 1.15.[106] Both the judicial confession and the guilty plea in *Menefee* took place at the guilty-plea proceeding.[107] But this was not the end of the story. In the "Disposition" portion of its opinion, the *Menefee* Court wrote as follows:

> The court of appeals erred to hold that the deficiency in the written stipulation was remedied by the appellant's plea colloquy with the trial court in this cause. On appeal, the State also argued that evidence adduced at the subsequent sentencing hearing also independently served to provide evidentiary support for appellant's guilty plea. The court of appeals was not compelled to address this argument given its acceptance of the State's other argument. However, in light of our holding today, we think it necessary to the final disposition of the appeal that the court of appeals address it now. . . . It may become necessary for the court of appeals to confront these issues on remand. Accordingly, we vacate the judgment of the court of appeals and remand the case to that court for further consideration of the appeal consistent with this opinion.[108]

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[105] Cynthia Wood challenges this proposition in Issue Number Two in this brief.
[106] *Menefee v. State,* 287 S.W.3d at 17-18.
[107] *Id.* at 11-18.
[108] *Id.* at 18-19 (emphasis added). The reference in the above quotation to "these issues" exists because there were two other issues the Court of Criminal Appeals did not reach. *Id.*

The underlined language in the above quotation can be interpreted two different ways. The first interpretation is that the court of appeals was directed to determine whether evidence adduced at the sentencing hearing could be considered at all. The second interpretation is that: (1) the Court of Criminal Appeals implied that evidence from the sentencing hearing could be considered; and (2) the court of appeals was then directed to decide if such evidence substantiated the defendant's guilty plea.

On remand, the Tyler Court of Appeals acted in accord with the second interpretation.[109] The Court did not engage in any discussion of whether considering evidence adduced at the sentencing hearing was appropriate.[110] Rather, the Court simply proceeded on the understanding that such evidence should be considered.[111] Upon considering evidence from the sentencing hearing, the Court concluded that sufficient evidence existed to support the defendant's guilty plea.[112] Specifically, the Court noted that the trial court had taken judicial notice of a presentence investigation

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[109] *Menefee III v. State,* No. 12-07-00001-CR, 2010 WL 3247816 (Tex. App.—Tyler Aug. 18, 2010, pet. ref'd).

[110] *Id.* at *6. The Court did say "there is no requirement that all the evidence to support a guilty plea be contained in the stipulation of evidence." *Id.* (citing *Dinnery v. State,* 592 S.W.2d 343, 352 (Tex. Crim. App. 1970)). But *Dinnery* had nothing to do with evidence adduced at a sentencing hearing.

[111] *Menefee III v. State,* No. 12-07-00001-CR, 2010 WL 3247816 (Tex. App.—Tyler Aug. 18, 2010, pet. ref'd) at *6.

[112] *Id.* at *6-*7.

(PSI) report.[113] After looking at the PSI report, the Court of Appeals concluded there was sufficient evidence to satisfy Article 1.15.[114]

This Court's opinions have also been consistent with the second interpretation. Eight years prior to the Court of Criminal Appeals' *Menafee* opinion, this Court published an opinion in *Stewart v. State.*[115] In *Stewart,* this Court set out its reasoning for finding that evidence from a sentencing hearing could substantiate a guilty plea:

> Appellant further argues that his judicial confession is insufficient because it was made during the punishment phase instead of the guilt/innocence phase of the trial. Again, appellant cites no authority for the proposition that all evidence in support of a guilty plea must be made before the beginning of the punishment phase of the trial. To the contrary, article 1.15 does not distinguish between evidence offered at the guilt/innocence phase and the punishment phase of the trial. Article 1.15 simply requires that there be evidence in "the record showing the guilt of the defendant. Tex. Code Crim. P. Ann. art. 1.15. Whether the evidence comes from the guilt/innocence or punishment phase is inconsequential, provided the evidence is introduced into the record.[116]

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[113] *Id.* at *6.
[114] *Id.* at *6-*7 ("Consequently, we hold that the State met its burden under article 1.15 to introduce 'sufficient evidence' of Appellant's possession of cocaine as charged in the indictment.").
[115] *Stewart v. State,* 12 S.W.3d 146 (Tex. App.—Houston [1st Dist.] 2000, no pet.)
[116] *Id.* at 148-49.

This Court's opinions after the Court of Criminal Appeals' *Menefee* case have also accepted the second interpretation. In *Menefee v. State,* this Court stated that "[e]vidence adduced at a sentencing hearing may also suffice to substantiate a guilty plea."[117]

The 14th Court of Appeals has also embraced the second interpretation. In *Jones v. State,*[118] the Court repeated the same exact language that this Court used in *Menefee.* That language was "[e]vidence adduced at a sentencing hearing may also suffice to substantiate a guilty plea."[119]

The Austin Court of Appeals has followed the second interpretation too. In *Taylor v. State,*[120] the Court explicitly addressed the issue:

> In her brief, Taylor contends that the court of criminal appeals has determined that courts may not consider evidence presented during the punishment phase when determining if a plea is properly supported. When making this statement, Taylor cites *Menefee v. State*, 287 S.W.3d 9, 14 & n. 20 (Tex. Crim. App. 2009), and *Stringer v. State*, 241 S.W.3d 52, 58 (Tex. Crim. App. 2007). However, we do not read those cases as standing for the proposition urged by Taylor. *See Menefee,* 287 S.W.3d at 18-19 (remanding case to appeals court to consider, among other issues, whether "evidence adduced at the subsequent sentencing hearing also independently served to

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[117] *Menefee v. State,* Nos. 01-09-00090-CR and 01-09-00091-CR, 2013 WL 4320352 (Tex. App.—Houston [1st Dist.] Aug. 15, 2013, no pet.). This opinion involved James Menefee and has no connection to the *Menefee* opinion from the Court of Criminal Appeals (which involved Robert Menefee). The fact that the two cases feature defendants with the same last name is just a coincidence.
[118] *Jones v. State*, 373 S.W.3d 790 (Tex. App.—Houston [14th Dist.] 2012, no pet.).
[119] *Id.* at 793.
[120] *Taylor v. State,* No. 03-14-00300-CR, 2014 WL 5315363 (Tex. App.—Austin Oct. 14, 2014, pet. ref'd).

> provide evidentiary support for the appellant's guilty plea); *Stringer,* 241 S.W.3d at 58-60 (determining that waiver of right to confront witnesses made at time defendant pleaded guilty did not apply to punishment phase).[121]

Apparently, the Court of Criminal Appeals has never directly said that sentencing hearing evidence can support a defendant's guilty plea and thereby satisfy Article 1.15. But there are a number of intermediate appellate court opinions that take this view.[122] This Court is included among these courts.[123] Accordingly, the current state of the law is that evidence adduced at a sentencing hearing may substantiate a guilty plea.[124]

Part B
Was evidence presented at Cynthia's sentencing hearing that would be sufficient to support her plea of guilty to attempted capital murder?

Yes. The evidence adduced at the sentencing hearing showed that Cynthia's attempted murder involved her own infant son who was under the age of ten.[125] This evidence is certainly sufficient to show an aggravating factor that would make a murder

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[121] *Id.* at *1 n. 2.
[122] *See e.g., Reese v. State,* No. 13-13-00616-CR, 2015 WL 4381223 (Tex. App.—Corpus Christi July 16, 2015, pet. ref'd); *Taylor v. State,* No. 03-14-00300-CR, 2014 WL 5315363 (Tex. App.—Austin Oct. 14, 2014, pet. ref'd); *King v. State,* No. 12-12-00020-CR, 2013 WL 2407198 (Tex. App.—Tyler May 31, 2013, no pet).
[123] *See Menefee v. State,* Nos. 01-09-00090-CR and 01-09-00091-CR, 2013 WL 4320352 (Tex. App.—Houston [1st Dist.] Aug. 15, 2013, no pet.).
[124] For purposes of Issue Number One, appellant Cynthia Wood accepts the idea that evidence adduced at a sentencing hearing can substantiate a guilty plea. But in Issue Number Two, Cynthia challenges this proposition in the context of a plea to a presentence investigation (PSI).
[125] 1 R.R. 6-25; 2 R.R. at pages 1-5 of the PSI report.

into a capital murder. The aggravating factor, of course, is the attempted killing of an individual under the age of ten.[126] Thus, the evidence from the sentencing hearing would be sufficient to support her plea of guilty to attempted capital murder.

Part C
Must evidence supporting a guilty plea be accepted by the trial court as the basis for its judgment in order to substantiate the plea?

Yes, the explicit language of Article 1.15 requires such an acceptance by the trial court. The relevant portion of Article 1.15 says:

> No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing in accordance with Articles 1.13 and 1.14; provided, however, that it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same.[127]

Not only must evidence be introduced showing the guilt of the defendant, but the court must accept the evidence as the basis for its judgment. The judgment spoken of in the statute is a judgment of conviction. This makes sense because Article 1.15 begins by saying that "[n]o person can be convicted of a felony . . . ." And as stated in Article 42.01 of the Code of Criminal Procedure:

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[126] *See* Tex. Penal Code Ann. § 19.03(a)(8) (West Supp. 2015).
[127] Tex. Code Crim. Proc. Ann. art. 1.15 (West 2005) (emphasis added).

> A judgment is the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant.

Thus, Article 1.15 explicitly requires that the trial court "accept" the evidence showing the defendant's guilt as the basis for its judgment of conviction.

Part D
Did the trial court accept the evidence presented at Cynthia's sentencing hearing as the basis for its judgment of conviction?

No.

In the current case, the trial court conducted a guilty-plea hearing on November 23, 2015.[128] As noted in Parts D and E of Subsidiary Question One, the evidence adduced at the guilty-plea hearing was insufficient to satisfy Article 1.15. This is because there was no evidence of the aggravating factor necessary to support a conviction for attempted capital murder.

But the trial court conducted a sentencing hearing on January 27, 2016 – just over two months after the guilty-plea hearing.[129] At this hearing there was plenty of evidence to show the existence of an aggravating circumstance.[130] The aggravating circumstance was that the intended victim was under the age of ten.[131]

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[128] C.R. at 60-69.
[129] 1 R.R. at 1.
[130] *See* Part B of Subsidiary Issue Two.
[131] *See* Tex. Penal Code Ann. § 19.03(a)(8) (West Supp. 2015).

The question here is whether the evidence adduced at the sentencing hearing can now be used to support Cynthia's guilty plea. As acknowledged earlier, this Court has said "[e]vidence adduced at a sentencing hearing may also suffice to substantiate a guilty plea."[132] But nothing in the record indicates the trial court accepted the evidence adduced at the sentencing hearing as the basis for its judgment of conviction. Nor should this Court assume the trial court accepted the sentencing hearing evidence as the basis for its judgment under a presumption-of-regularity theory.[133] This is because the trial court explicitly decided that Cynthia's guilty plea was supported on the basis of evidence produced at the earlier guilty-plea hearing.[134] The record of the guilty-plea hearing shows this to be the case. Please note especially the underlined portions of the following colloquy between the trial judge and Cynthia at the guilty-plea hearing:

> THE COURT: All right. It says here that there is no agreement between you and the State as to what the punishment should be. So, you're asking that I set the punishment after a presentence investigation report is prepared. Did you agree to that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You understand that the range of punishment for this offense is 5 to 99 years or life and up to a $10,000 fine?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you ever been convicted of a felony before?

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[132] *Menefee v. State,* Nos. 01-09-00090-CR and 01-09-00091-CR, 2013 WL 4320352 (Tex. App.—Houston [1st Dist.] Aug. 15, 2013, no pet.).
[133] *See McCloud v. State,* 527 S.W.2d 885, 997 (Tex. Crim. App. 1975) ("It is a cardinal rule of appellate procedure in this State that we must indulge every presumption in favor of the regularity of the proceedings and documents in the lower court.").
[134] C.R. at 67.

THE DEFENDANT: No, sir.

THE COURT: Have you ever been placed on any kind of felony probation?

THE DEFEDANT: No, sir.

THE COURT: Then the law says you're also eligible for consideration of deferred adjudication. Deferred adjudication is the kind of probation where at the beginning there is no finding of guilt. You're placed on a period of probation, up to 10 years. In this case, because it's a first degree felony, 5 to 10 years, possibility, and then given rules to follow. If you follow the rules on deferred, then you're never convicted and, of course, you don't go to prison. But if you fail to follow the rules on a deferred, then the State can file a motion to adjudicate. At that point you're only entitled to have a hearing before the Court. If at that point I find you violated probation, I can revoke your probation, find you guilty, and assess a punishment within the full range of 5 to 99 years or life. If I do that, you cannot appeal my decision to adjudicate. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you need to understand that my mind is open to all the punishments I've described to you, 5 to 99 years or life in prison or 5 to 10 years deferred adjudication and up to a $10,000 fine in each situation. My mind is open to all of that, but I cannot tell you what I'm going to do today because I don't know because I haven't gotten the report, and we haven't had a hearing. So, my mind is open, but I have to wait to find out what happened, find out about you, and have both sides have an opportunity to make their presentations of evidence and argument. And at that point, I'll decide what to do. Do you understand that?

THE DEFENDANT: Yes, sir.

. . .

THE COURT: All right. Ms. Wood, based on your plea and on the papers that you filed today, I'm going to find there is sufficient evidence to find you guilty, but I'm going to make no further finding today. Your case will be reset. . . . So, in January, the report will be finished and you'll, of course, get a chance to read it. Both sides will have the report, and I'll have the report. And then we'll have a hearing. If there's any additional evidence from either side, I will listen to that evidence. I will read any documents that are presented and take it all into account, and then at that point, I'll decide what to do. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. We'll see you in January.[135]

As this colloquy shows, the judge decided there was adequate evidence to support a conviction against Cynthia for attempted capital murder at the guilty-plea hearing. Specifically, the judge said, "based on your plea and on the papers that you filed today, I'm going to find there is sufficient evidence to find you guilty."[136] The judge did not proceed to actually find Cynthia guilty, but this was because the judge was holding open the possibility of deferred adjudication.[137] The judge gave absolutely no

[135] C.R. at 64-67 (emphasis added).
[136] C.R. at 67.
[137] C.R. at 66-67. The judge had said "my mind is open to all the punishments I've described to you, 5 to 99 years or life in prison or 5 to 10 years deferred adjudication and up to a $10,000 fine in each situation." C.R. at 66.

indication at the guilty-plea hearing that the upcoming sentencing hearing would be about anything other than determining an appropriate sentence. Specifically, the judge indicated he would set punishment after consideration of a presentence investigation (PSI) report.[138] Only upon receiving the report, the judge said, could he decide upon the proper punishment.[139]

Article 1.15 explicitly requires that evidence introduced to support a defendant's guilt "be accepted by the court as the basis for its judgment."[140] Here, the trial court did not accept the evidence introduced at the sentencing hearing as the basis for its judgment that Cynthia was guilty. Rather, as noted above, the trial court explicitly declared that the basis for its judgment was the evidence introduced at the guilty-plea hearing:

> All right. Ms. Wood, based on your plea and on the papers that you filed today, I'm going to find there is sufficient evidence to find you guilty, but I'm going to make no further finding today.[141]

Nothing that transpired during the sentencing hearing changed the trial court's basis for its finding. At the conclusion of the sentencing hearing, the trial court made the following statement:

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[138] C.R. at 64.
[139] C.R. at 66 ("My mind is open to all that [different possible sentences], but I cannot tell you what I'm going to do today because I don't know because I haven't gotten the [PSI] report, and we haven't had a hearing.").
[140] Tex. Code Crim. Proc. Ann. art. 1.15 (West 2005).
[141] C.R. at 67 (emphasis added).

> Ms. Wood, any time I'm called upon to decide in this circumstance between the arguments of counsel and the consideration of the evidence, and on the one hand a request for deferred adjudication, on the other hand a request for life in prison, that any time I have a choice between probation and prison time, one thing I have to resolve in my own mind is can I trust a person to be on probation. And there's not a chance in the world I can do that with you. So I find you guilty. I assess your punishment at life confinement in the Texas Department of Criminal Justice Institutional Division.[142]

As his comments indicate, the trial judge was focused on the appropriate punishment in the case. He considered deferred adjudication at the lenient end of the spectrum and life in prison at the other end. The evidence he considered during the sentencing hearing persuaded him that life in prison was the appropriate punishment. Accordingly, the judge found Cynthia guilty. Had the judge determined that deferred adjudication was appropriate, he would have deferred any finding of guilt.[143]

The judge never said he was basing his finding of sufficient evidence to find Cynthia guilty on the sentencing hearing evidence. Rather, the judge explicitly stated at the guilty-plea hearing that he found sufficient evidence to support Cynthia's guilt on

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[142] 1 R.R. at 50.

[143] *See* Tex. Code Crim. Proc. Ann. art. 42.12, Sec. 5(a) (West Supp. 2015) ("when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision").

Cynthia's plea and signed papers.[144] Thus, the evidence from the sentencing hearing cannot be used to substantiate Cynthia's guilty plea.

Summation of Argument on Issue Number One

Cynthia Wood judicially confessed that the allegations in her attempted capital murder indictment were true. But the indictment failed to include any aggravating circumstance which is a necessary element of attempted capital murder. Thus, Cynthia did not confess to committing all the elements of attempted capital murder. Accordingly, Cynthia's judicial confession does not constitute sufficient evidence to support her conviction for attempted capital murder. No other evidence was introduced at the guilty-plea proceeding to support Cynthia's guilty plea.

The evidence produced at the guilty-plea hearing failed to support Cynthia's conviction for attempted capital murder. Notwithstanding this fact, the trial court explicitly accepted Cynthia's plea and the papers she signed as the basis for finding that Cynthia's guilt was substantiated.[145] So while the trial court accepted the evidence produced at the guilty-plea hearing, that introduced evidence was not sufficient to support Cynthia's guilty plea.

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[144] C.R. at 67.

[145] The judge said, "based on your plea and on the papers that you filed today, I'm going to find there is sufficient evidence to find you guilty." C.R. at 67.

At the sentencing hearing, sufficient evidence to support Cynthia's guilty plea was introduced to support Cynthia's guilty plea. But this evidence was never accepted by the trial court as the basis for its judgment.

The only evidence accepted by the trial court as the basis for its judgment was insufficient to support Cynthia's guilty plea. Put simply, not all elements of the offense of attempted capital murder were both introduced into evidence and accepted by the trial court. Accordingly, Article 1.15 does not permit Cynthia to be convicted.

Is a harm analysis appropriate and, if so, was the error harmless?

In *Menefee,* our Court of Criminal Appeals said a conviction in violation of Article 1.15 is "trial error."[146] The Court directed the court of appeals to perform a harm analysis on remand:

> Neither the appellant nor the State briefed the issue of harm, *vel non,* in their briefs in the court of appeals. Nor does the State argue now, in its reply brief to the appellant's brief on discretionary review, that trial error, if any, was harmless. Nevertheless, "it is the responsibility of the reviewing court, once it concludes there was error, to determine whether the error affected the judgment." *Ford v. State,* 73 S.W.3d 923, 925 (Tex. Crim. App. 2002) (plurality opinion), *citing Johnson v. State,* 43 S.W.3d 1, 5 (Tex. Crim. App. 2001). Should it conclude on remand that trial error did occur, and that the error was preserved, the court of appeals should not reverse the conviction without addressing the harm issues enumerated above.[147]

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[146] *Menefee v. State,* 287 S.W.3d at 14 ("A conviction rendered without sufficient evidence to support a guilty plea constitutes trial error.").
[147] *Id.* at 18 n. 48.

With all due respect to the Court of Criminal Appeals, the requirement of a harm analysis seems questionable. Article 1.15 says "in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same."[148] If no circumstances exist in which a conviction upon a plea without sufficient supporting evidence can stand, then a harm analysis makes little sense. The Texarkana Court of Appeals has interpreted the "in-no-event" language as being very significant in the context of a preservation-of-error issue:

> Since the failure to present "sufficient evidence to support" the finding of guilt was not raised at trial, we must decide whether the failure to object to the trial court's finding of guilt is properly presented for review. . . . By statute, our law requires that upon the entry of a plea of guilty, it "shall be necessary to introduce evidence into the record showing the guilt of the defendant. TEX. CODE CRIM. PROC. ANN. art. 1.15. Further, in no event shall a person be convicted upon his plea without sufficient evidence to support the same." *Id.* . . . We find this statutory directive falls within the absolute or systemic requirement category by its requirement that "in no event" shall a person be convicted on his or her plea without sufficient evidence to support it. A claim of error for noncompliance with it is not forfeited or waived by the failure to object. No other evidence supports the plea and finding of guilt; we conclude error is shown.[149]

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[148] Tex. Code Crim. Proc. Ann. art. 1.15 (West 2005) (emphasis added).

[149] *Baggett v. State,* 342 S.W.3d 172, 175 (Tex. App.—Texarkana 2011, no pet.). Despite the foregoing statement, the Texarkana Court then went on to conduct a harm analysis as required by the Court of Criminal Appeals. *Id.* at 176.

Recognizing that the Court of Criminal Appeals has directed a harm analysis to be undertaken, this Court should, of course, engage in such an analysis. Appellant Cynthia Wood simply raises the question in order to preserve the issue if this case should someday go to the Court of Criminal Appeals.

In *Baggett*, the Texarkana Court of Appeals followed the Court of Criminal Appeals directive to analyze error under Tex. R. App. P. 44.2(b).[150] As did the Texarkana Court, this Court should also analyze the error at issue for harm under Rule 44.2(b).

"Pursuant to Texas Rule of Appellate Procedure 44.2(b), any non-constitutional error that does not affect [an] appellant's substantial rights must be disregarded."[151] Here, the error was finding the evidence sufficient to support Cynthia's guilty plea to the offense of attempted capital murder – a first degree felony. This error subjected Cynthia to the punishment range for a first degree felony. That punishment range is 5 to 99 years in prison or life in prison.[152] Cynthia, of course, was sentenced to life in prison.[153]

Cynthia's judicial confession was insufficient to support her plea of guilty to the offense of attempted capital murder. But her judicial confession was sufficient to

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[150] *Id.*
[151] *Haley v. State,* 173 S.W.3d 510, 518 (Tex. Crim. App. 2005).
[152] Tex. Penal Code Ann. § 12.32 (West 2011).
[153] C.R. at 70.

support her plea of guilty to the lesser-included offense of attempted murder.[154] She confessed to all the elements of attempted murder, C.R. at 48-49, and the judge accepted her judicial confession as the basis for the judgment. On the facts in this case, a conviction for attempted murder would have been appropriate.

Unlike attempted capital murder, attempted murder is not a first degree felony. Rather, attempted murder is a second degree felony.[155] The punishment range for a second degree felony is two to twenty years in prison.[156] Cynthia was harmed by being sentenced to life when the upper limit of the punishment range for a second degree felony is only twenty years. The error affected Cynthia's substantial rights. In fact, the error caused Cynthia to be given an illegal sentence. "A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and is therefore illegal."[157] "[A] defendant has an absolute and nonwaivable right to be sentenced within the proper range of punishment established by the Legislature."[158] Because the trial error here resulted in Cynthia being given an illegal sentence, the error affected Cynthia's substantial rights and should not be disregarded.

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[154] Attempted murder is a lesser-included offense of attempted capital murder. The only element of attempted capital murder that is not also an element of attempted murder is the aggravating circumstance.

[155] *See* Tex. Penal Code Ann. § 19.02(c) (West 2011) (murder is a first degree felony) and Tex. Penal Code Ann. § 15.01 (West 2011) (an attempt to commit an offense is "one category lower than the offense attempted). Because murder is a first degree felony, attempted murder is a second degree felony.

[156] Tex. Penal Code Ann. § 12.33(a) (West 2011).

[157] *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003).

[158] *Speth v. State,* 6 S.W.3d 530, 532-33 (Tex. Crim. App. 1999).

The cause should be remanded for a new punishment hearing.

As explained immediately above, Cynthia was convicted of attempted capital murder when the evidence was only sufficient to support the offense of attempted murder. Cynthia was thus subjected to punishment for a first degree felony when she should have been subject only to the punishment for a second degree felony. Should this Court grant Issue Number One, Cynthia's conviction for attempted capital cannot stand. This Court should reverse Cynthia's attempted capital murder conviction and remand the case to the trial court.[159] The trial court should be ordered to adjudge Cynthia guilty of the second degree felony offense of attempted murder. The trial court should also be ordered to set an appropriate punishment for that offense. This necessarily means the sentence of confinement could not exceed twenty years.

[159] *See* Tex. R. App. P. 43.2(d). *Accord Thornton v. State,* 425 S.W.3d 289, 299-300 (Tex. Crim. App. 2014) (after court of appeals finds evidence insufficient to support defendant's conviction for greater-inclusive offense, the court is required to reform the judgment to reflect a conviction for a lesser-included offense).

Issue Number Two

A presentence investigation [PSI] report is a sentencing tool that is used after a defendant's guilt has been established. Here, a PSI report and other evidence was presented at Cynthia Wood's sentencing hearing. Can evidence adduced during a sentencing hearing in which the PSI is considered be used to substantiate a defendant's guilty plea?

No.

This court has stated that "[e]vidence adduced at a sentencing hearing may also suffice to substantiate a guilty plea."[160] Cynthia Wood makes no challenge to this proposition in Issue Number One because Issue Number One does not succeed or fail solely on the proposition. But here in Issue Number Two, Cynthia does directly challenge this proposition in the context of a "plea to a PSI."[161]

Article 37.07, Section 3 of the Code of Criminal Procedure is entitled "Evidence of prior criminal record in all criminal cases after a finding of guilty."[162] Article 37.07, Section 3(d) reads as follows:

> When the judge assesses punishment, he may order an investigative report as contemplated in Section 9 of Article 42.12 of this code and after considering the report, and after hearing the evidence hereinabove provided for, he shall forthwith announce his decision in open court as to the punishment to be assessed.[163]

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[160] *See* Footnote 117 and accompanying text.
[161] Cynthia does not challenge the viability of the proposition in contexts other than a PSI.
[162] Tex. Code Crim. Proc. Ann. art. 37.07, Section 3 (West Supp. 2015) (emphasis added).
[163] Tex. Code Crim. Proc. Ann. art. 37.07, Section 3(d) (West Supp. 2015).

The investigative report contemplated in Section 9 of Article 42.12 is the presentence investigation report.[164] The presentence investigation report is known colloquially as a PSI report.[165]

As noted above, Section 3 of Article 37.07 speaks of matters occurring after a finding of guilt. Chapter 42 deals with judgments and sentences. Both statutes envision proceedings and occurrences that take place after a defendant's guilt has been determined. Writing for a unanimous Court of Criminal Appeals, Judge Meyers made this clear in *Stringer v. State*:

> A PSI is used anytime a sentence is to be determined by a judge. Originally, a PSI was used by the court only in cases in which the defendant was sentenced to probation; however, now the report contains general punishment-phase evidence and assists the court in determining what sentence to assess. Under Code of Criminal Procedure Article 42.12 Section 9, a PSI is used in all non-capital felony cases when community supervision is an option and the judge is assessing punishment but does not intend to follow a plea-bargain agreement under which the defendant has agreed to imprisonment. The judge must order a PSI unless the defendant requests that one not be made and the judge agrees, or the judge determines that there is sufficient information in the record to permit sentencing discretion and explains his reasoning on the record. CODE OF CRIMINAL PROCEDURE Art. 42.12 § 9(b)(1) & (2). A PSI includes "the criminal and social history of the defendant, and any other information relating to the defendant or the offense requested by the judge." Art. 42.12 § 9(a). The defendant is allowed under Section 9(e)

[164] *See* Tex. Code Crim. Proc. Ann. art. 42.12, Sec. 9 (West Supp. 2015).
[165] *See* C.R. at 60 where Cynthia's guilty-plea hearing was entitled by the court reporter as "Plea to PSI."

> to introduce testimony or other information alleging a factual inaccuracy in the report. The PSI statute is also mentioned in Article 37.07 Section 3(d), which relates to evidence of a prior criminal record after a finding of guilty and states that, when a judge assesses punishment, he may order a PSI. That article places no condition on the trial court in considering the contents of the PSI.[166]

The *Stringer* case addressed a defendant's Sixth-Amendment rights under *Crawford v. Washington*[167] in a PSI hearing.[168] As Judge Meyers noted, "*Crawford* dealt with the guilt phase of trial, and courts have disagreed about whether it applies to a punishment hearing after a finding of guilty."[169] The key point in the foregoing quote is that the punishment hearing occurs after guilt has already been found to exist. At the time of the punishment hearing, the court is acting "as a sentencing entity."[170]

As noted in *Stringer,* the United States Supreme Court has spoken concerning the benefits of a trial court having open access to information at sentencing.[171] In *Williams v. New York*,[172] the Supreme Court said:

> A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of

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[166] *Stringer v. State,* 309 S.W.3d 42, 45 (Tex. Crim. App. 2010) (emphasis added).
[167] *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).
[168] *Stringer v. State,* 309 S.W.3d at 45.
[169] *Id.* (emphasis added).
[170] *Smith v. State,* 227 S.W.3d 753, 763 (Tex. Crim. App. 2007).
[171] *Stringer v. State,* 309 S.W.3d at 46.
[172] *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed.2d 1337 (1949).

> punishment after the issue of guilt has been determined. Highly relevant – if not essential – to his selection of an appropriate sentence is the possession of the fullest information concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.[173]

In *Stringer,* the Court of Criminal Appeals held that *Crawford* does not apply when a PSI report is used in a non-capital case.[174] In the course of reaching this conclusion, the Court made important comments concerning the purpose of a PSI report and an attendant hearing:

> The issue in this case is whether the inclusion of an unadjudicated offense in the PSI violated Appellant's Sixth Amendment right to confrontation. As noted in the cases cited above [such as *Williams*], the purpose of a report such as the PSI used here is to provide a wide range of information to the trial court without an adversarial hearing. The probation officer who prepares the report is neutral and the report is written in anticipation of consideration by the trial judge for sentencing, not for prosecution. . . . We hold that when a PSI is used in a non-capital case in which the defendant has elected to have the judge determine sentencing, *Crawford* does not apply. For us to conclude in Appellant's favor would require a trial judge to hold a mini-trial for sentencing and would thwart the purpose of a PSI as a tool for the court to use in assessing punishment.[175]

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[173] *Id.* at 247 (emphasis added).
[174] *Stringer v. State,* 309 S.W.3d at 48.
[175] *Id.* (emphasis added).

As the foregoing authorities show, a PSI is a sentencing tool that is used after a defendant's guilt has been established. Neither the PSI nor the evidence adduced at a hearing on the PSI should be used to substantiate a guilty plea.

Surprisingly, the case of *Barfield v. State*[176] supports the foregoing argument. *Barfield* is the case in which the Court of Criminal Appeals said that bifurcated trial provisions are "not applicable in a trial without a jury."[177] The *Barfield* case involved a felony DWI conviction. DWI is normally a misdemeanor,[178] but becomes a felony when the defendant has been twice previously been convicted of DWI.[179] "To convict the appellant for a felony it was therefore necessary for the State to prove that the appellant committed DWI as alleged, and that he had been twice previously convicted of DWI as alleged."[180]

As noted in the Court's opinion:

> The parties presented their evidence on the issue of the instant DWI, but they did not present evidence of the prior convictions for DWI. Then they rested. . . . The attorneys argued the issue of guilt, and the Court found the appellant guilty.
>
> After a recess, the prosecuting attorney read allegations of the previous felony convictions. The appellant pleaded that they were not true. The State presented documentary proof of the previous convictions for DWI . . . . The evidence was closed.

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[176] *Barfield v. State,* 63 S.W.3d 446 (Tex. Crim. App. 2001).
[177] *Id.* at 449.
[178] *See* Tex. Penal Code Ann. § 49.04(b) (West Supp. 2015).
[179] *Barfield v. State,* 63 S.W.3d at 448.
[180] *Id.*

> The court heard arguments, found that the allegations of previous DWI convictions . . . were true, and sentenced the appellant to 35 years in prison.[181]

On appeal, the appellant argued that the evidence was insufficient to prove felony DWI "because there was no evidence of the jurisdictional prior convictions of DWI at the guilt stage of the trial."[182] The Court of Criminal Appeals disagreed. The Court explained that a case tried before a judge (as opposed to a jury) is not actually a bifurcated trial.[183] In such a circumstance, there are not separate guilt/innocence and punishment phases. Rather, the trial is a "unitary" trial.[184] This being the case, the Court determined that the evidence introduced during the so-called "punishment phase" of the appellant's trial "is [to be] considered in deciding the sufficiency of the evidence to prove guilt.[185]

At first glance, the *Barfield* decision would seem to cut against Cynthia's argument here in Issue Number Two. But a closer look at *Barfield* reveals that the case actually supports Cynthia's contention.

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[181] *Id.*
[182] *Id.* at 448-49.
[183] *Id.* at 449-50.
[184] *Id.* at 450.
[185] *Id.* The Court also said, "the decision of the court in a unitary trial is not fixed until it renders judgment on guilt and punishment after all the evidence and the arguments have been heard." *Id.* at 451.

The Court of Criminal Appeals stated that "the bifurcation statute[186] 'is applicable only to pleas of not guilty before a jury.'"[187] "The statute 'has no application to a trial before the court on a plea of not guilty.'"[188] Please note that the Court was specifically addressing a trial before the court on a plea of not guilty. The Court was not addressing a trial before the court on a plea of guilty which is the situation in the current case. A further comment from the Court indicates that the Court was concerned only with bench trials on pleas of not guilty:

> In a genuinely bifurcated trial before a jury on a plea of not guilty, evidence that is introduced at the punishment phase of the trial can have little, if any, effect on the force of the evidence on the issue of guilt. In such a case, therefore, "our consideration of the evidence is necessarily limited to that evidence before the jury at the time it rendered its verdict of guilt." But in a trial without a jury on a plea of not guilty, evidence that is introduced at the "punishment" stage of trial is considered in deciding the sufficiency of evidence to prove guilt.[189]

The Court went out of its way to be clear that it was speaking only of bench trials involving pleas of not guilty. The Court had just finished discussing

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[186] Tex. Code Crim. Proc. Ann. art. 37.07, Section 2(a) (West Supp. 2015).
[187] *Barfield v. State,* 63 S.W.3d at 449 (citing *Morales v. State,* 416 S.W.2d 403, 405 (Tex. Crim. App. 1967)).
[188] *Barfield v. State*, 63 S.W.3d at 449-50 (citing *Coutney v. State,* 424 S.W.2d 440, 443 (Tex. Crim. App. 1968) (internal brackets omitted) (underlining added).
[189] *Barfield v. State*, 63 S.W.3d at 450 (citing *Munoz v. State,* 853 S.W.2d 558, 560 (Tex. Crim. App. 1993)) (underlining added).

the PSI situation in which court proceedings involve pleas of guilty. The Court recognized that PSI proceedings – especially those in Harris County[190] – had perhaps given rise to the bifurcation of bench trials in not-guilty-plea situations.[191] The Court quoted from an earlier case, *Ricondo v. State,*[192] that had made the same observation:

> Records reaching this court frequently show courts bifurcating bench trials where the plea is guilty. Often the court will hear evidence, declare the defendant guilty, order a pre-sentence investigation and sometimes months later re-convene the "penalty stage" of the guilty plea, allowing the State and the defense to offer evidence as to punishment and guilt.[193]

Although *Ricondo* spoke of "evidence as to punishment and guilt" being offered at when a PSI was considered, the *Barfield* Court offered a clarification, saying:

> This practice [bifurcation] became common after the legislature authorized pre-sentence investigation reports to be used in assessing punishment. [194]

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[190] *See Bean v. State,* 563 S.W.2d 819, 821 (Tex. Crim. App. 1978) (Onion, P.J., concurring).
[191] *Barfield v. State,* 63 S.W.3d at 450.
[192] *Ricondo v. State,* 634 S.W.2d 837, 842 (Tex. Crim. App. 1981).
[193] *Id.* as repeated in *Barfield v. State,* 63 S.W.3d at 450.
[194] *Barfield v. State,* 63 S.W.3d at 450 (emphasis added).

As recognized by the Court of Criminal Appeals in *Barfield,*[195] PSI reports are to be used in assessing punishment. They are not to be used to provide evidence of guilt.[196]

In the case at bar, Cynthia's judicial confession did not constitute sufficient evidence to support her plea of guilty to attempted capital murder.[197] No other evidence was introduced at the guilty-plea proceeding to support Cynthia's guilty plea.[198] But evidence presented at Cynthia's sentencing hearing (including the PSI) substantiated her guilty plea.[199] Without this evidence from the sentencing hearing, Cynthia's conviction cannot stand.

This Court should reject the idea that evidence adduced at a sentencing hearing can serve to substantiate a plea of guilty in all circumstances. When a defendant has entered a plea to a PSI, the trial court becomes a sentencing entity and the PSI becomes the court's chief tool. The time for determining a defendant's guilt has at that point passed. In such circumstances, sentencing-

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[195] *Id.*

[196] *See also* Tex. Code Crim. Proc. Ann. art. 42.12, Section 9(i) (West Supp. 2015). This statutory provision requires a PSI report to include a psychological evaluation in certain situations "on any defendant convicted of a felony offense." *Id.* (emphasis added). This provision envisions that defendants will have already been convicted before a PSI is conducted.

[197] *See* Parts A – D of Subsidiary Issue One of Issue Number One in this brief.

[198] *See* Part E of Subsidiary Issue One of Issue Number One in this brief.

[199] *See* Part B of Subsidiary Issue Two of Issue Number Two in this brief.

hearing evidence should not be used to determine whether sufficient evidence has been produced to support a guilty plea. Issue Two should be sustained.

Issue Number Three

A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and constitutes an illegal sentence. Here, Cynthia was sentenced to life in prison which is a legal sentence for a first degree felony conviction. But the evidence was sufficient only to support a second degree felony conviction which carries a punishment of two to twenty years in prison. Was Cynthia's sentence illegal?

"A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and is therefore illegal."[200] "[A] defendant has an absolute and nonwaivable right to be sentenced within the proper range of punishment established by the Legislature."[201]

For the reasons set out in Issue Number One and Issue Number Two, the trial court erred in sentencing Cynthia to life in prison. The evidence introduced in support of Cynthia's plea of guilty to attempted capital murder did not substantiate her guilt of that first degree felony offense. Rather, the evidence substantiated only the offense of attempted murder – a second degree felony.

Cynthia should have been sentenced in accord with the punishment for a second degree felony. The punishment range for a second degree felony is two to twenty years in prison.[202] Instead, Cynthia was sentenced to life in prison which constitutes an illegal sentence.

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[200] *Mizell v. State*, 119 S.W.3d at 806 (Tex. Crim. App. 2003).
[201] *Speth v. State*, 6 S.W.3d at 532-33 (Tex. Crim. App. 1999).
[202] Tex. Penal Code Ann. § 12.33 (West 2011).

Any court with jurisdiction can notice and take action upon an illegal or void sentence at any time, even sua sponte."[203] This Court has jurisdiction to reform an illegal sentence.[204] Cynthia urges this Court to take notice of her illegal sentence and sustain this issue.

[203] *Baker v. State,* 278 S.W.3d 923, 927 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd); *see also Kuol v. State,* 482 S.W.3d 623, 629 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (citing *Baker).*
[204] *Harris v. State,* 670 S.W.2d 284, 285 (Tex. App.—Houston [1st Dist. 1983, no pet.).

Issue Number Four

A trial attorney is ineffective when his performance is deficient and the deficiency prejudiced the defendant. Here, Cynthia's trial counsel failed to object to the imposition of an illegal sentence of life imprisonment. Cynthia should only have been sentenced to a maximum term of twenty years in prison. Was Cynthia's trial counsel ineffective?

Claims of ineffective assistance of counsel are reviewed under the two-prong analysis set forth by the Supreme Court in *Strickland v. Washington.*[205] To show ineffective assistance a defendant must demonstrate that 1) his trial counsel's performance was deficient, and 2) the deficient performance prejudiced the defense to such a degree that the defendant was deprived of a fair trial.[206] A deprivation of a fair trial occurs when there is a reasonable probability the results of the trial would have been different but for counsel's unprofessional errors.[207] Additionally "counsel's competence is presumed, and the appellant must rebut this presumption by identifying the acts or omissions of counsel that are alleged as ineffective and affirmatively prove that they fell below the professional norm of reasonableness."[208]

In the usual case, "the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision making as to overcome the presumption that counsel's conduct was reasonable and

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[205] *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Cannon v. State,* 252 S.W.3d 342, 349 (Tex. Crim. App. 2008).
[206] *Strickland v. Washington,* 466 U.S. at 687.
[207] *Cannon v. State,* 252 S.W.3d at 349.
[208] *Milburn v. State,* 15 S.W.3d 267, 269 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd).

professional.[209] Nevertheless, an exception to *Strickland*'s presumption of strategy exists when the record clearly confirms no reasonable trial counsel would have engaged in the complained of conduct or omission.[210] Holding counsel ineffective in light of such a record is not speculation because the appellate record confirms the deficient performance. In other words, *Strickland* does not require deference when there is no conceivable strategic purpose that would explain counsel's conduct.[211] There are rare cases in which the record is sufficient for a court to make a decision on the merits.[212] This is such a case.

Cynthia's trial counsel failed to object to the imposition of a life sentence. The sentence was an illegal one for the reasons set out in Issue Number Three. There simply could be no strategy in failing to object. The evidence was sufficient to substantiate only the second degree felony offense of attempted murder. The evidence was not sufficient to support a conviction for attempted capital murder. In fact, the indictment failed to even allege all of the elements of capital murder.[213] Because trial counsel failed to object, the first prong of *Strickland* is satisfied.

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[209] *Bone v. State,* 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).
[210] *See Vasquez v. State*, 830 S.W.2d 948, 951 (Tex. Crim. App. 1992) (per curiam); *Cavez v. State*, 6 S.W.3d 66, 71 (Tex. App. – San Antonio 1999, pet. ref'd).
[211] *Vasquez v. State,* 830 S.W.2d at 950-51 n. 3 (Tex. Crim. App. 1992); *Gifford v. State,* 980 S.W.2d 791, 793-94 (Tex. App. - Houston [14th Dist.] 1998, pet. ref'd).
[212] *Andrews v. State,* 159 S.W.3d 98, 101-102 (Tex. Crim. App. 2005).
[213] C.R. at 32. The aggravating factor transforming attempted murder into capital murder was missing.

The second *Strickland* prong is also satisfied. Cynthia was given a life sentence. This was legally authorized, of course, had Cynthia been properly convicted of a first degree felony.[214] But she should have been convicted only of a second degree felony. The upper limit of the punishment range for a second degree felony is twenty years.[215] But for trial counsel's error in failing to object, Cynthia would not have been sentenced to more than twenty years in prison. Accordingly, this Court should find that Cynthia received ineffective assistance of counsel. The cause should be remanded to the trial court to set punishment hearing for a second degree felony conviction.

[214] Tex. Penal Code Ann. § 12.32 (West 2011).
[215] Tex. Penal Code Ann. § 12.33 (West 2011).

Issue Number Five

A presentence investigation on any defendant convicted of a felony who appears to the judge to have a mental impairment shall include a psychological evaluation. Such an evaluation must determine the defendant's IQ and adaptive behavior scores. Here, the evidence indicated that Cynthia may have a mental impairment, but the court-ordered psychological evaluation did not contain Cynthia's IQ or adaptive behavior score. Did the court err in proceeding with sentencing without a complete psychological evaluation?

Yes.

Texas Code of Criminal Procedure, Article 42.12, § 9 provides:

> A presentence investigation conducted on any defendant convicted of a felony offense who appears to the judge through its own observation or on suggestion of a party to have a mental impairment *shall* include a psychological evaluation which determines, at a minimum, the defendant's IQ and adaptive behavior score. The results of the evaluation *shall* be included in the report to the judge as required by Subsection (a) of this section.[216]

"The legislative intent of article 42.12, section 9 is that in all felony cases, a trial court is required to direct a probation officer to prepare and provide to the court a written PSI report before the court imposes a sentence on the defendant."[217] As noted by the San Antonio Court of Appeals in *Garrett v. State*, Article 42.12, Section 9(i) is a mandatory statute.[218] The *Garrett* Court held that a defendant with a history of mental illness could not waive compliance with the

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[216] Tex. Code Crim. Proc. Ann. art. 42.12, Section 9(i) (West Supp. 2015) (emphasis added).
[217] *Wright v. State*, 873 S.W.2d 77, 81 (Tex. App.—Dallas 1994, no pet.).
[218] *Garrett v. State*, 818 S.W.2d 227, 229 (Tex. App.—San Antonio 1991, no pet.).

requirements of the statute.[219] In other words, the defendant's failure to object was not fatal to the defendant's complaint on appeal. In remanding the case to the trial court for a new punishment hearing, the Court said:

> The State contends the appellant waived any complaint under art. 42.12 § 9(i) by failing to object to the lack of a presentence investigation. We are unable to find any authority to justify the contention that the provisions of art. 42.12 § 9(i) can be forfeited if evidence of mental impairment exists.[220]

Cynthia acknowledges that several courts of appeals have held that error in considering an incomplete report under Article 42.12, Section 9(i) can be waived.[221] But the *Garrett* opinion has never been overruled.

In the current case, the trial court had been presented with a motion requesting that a psychiatric expert be appointed.[222] The motion asked that the expert prepare a psychiatric evaluation of Cynthia.[223] The motion recounted that Cynthia had "a history of mental health problems including major depression with recurring psychotic episodes."[224] The motion listed three different

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[219] *Id.* at 229.
[220] *Id.* A decade later, the same court of appeals held that "[t]he right to a PSI report is subject to waiver. *Wiseman v. State,* No. 04-99-00901-CR, 2000 WL 1210914 (Tex. App.—San Antonio 2000, no pet.) (mem. op.) (not designated for publication). But the Court distinguished *Wiseman* from *Garrett* because in *Wiseman* there was no showing in the record of the defendant's mental illness.
[221] *See Nguyen v. State,* 222 S.W.3d 537, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. ref;'d); *Wright v. State*, 873 S.W.2d at 83.
[222] C.R. at 41-42. The relevant text of the motion is set out on page 22 of this brief.
[223] C.R. at 41.
[224] C.R. at 41.

medications Cynthia was taking to allow her to be competent to stand trial.[225] The motion concluded with this request:

> [D]ue to the seriousness of the crime with which Defendant is charged, the preparation of a psychiatric evaluation by a psychiatric expert is requested to explain the relevance of Defendant's background and mental health history in mitigation of punishment.[226]

The trial court granted the motion.[227] The Court ordered Dr. Mike Moeller to examine Cynthia and prepare a written report.[228]

The PSI report was considered by the trial court at the sentencing hearing.[229] The PSI report contained two separate analyses by Dr. Moeller. The first was a "Competency Evaluation Form."[230] The second was a "Forensic Psychiatric Evaluation."[231] Neither analysis contained Cynthia's IQ. Neither analysis contained Cynthia's adaptive behavior score. Thus, the psychiatric evaluation did not contain the two things that Article 42.12, Section 9(i) mandates such an evaluation to contain.

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[225] C.R. at 41.
[226] C.R. at 41.
[227] C.R. at 43.
[228] C.R. at 43.
[229] 1 R.R. at 4.
[230] 2 R.R. at State's Exhibit Two on page 1 of the "Competency Evaluation Form."
[231] 2 R.R. at State's Exhibit Two on page 1 of the "Forensic Evaluation Form."

The trial court had already found sufficient evidence to support a finding that Cynthia had attempted to kill her baby.[232] The trial court had already granted a motion for the appointment of a psychiatric expert.[233] Given the nature of the charged offense, the motion for a psychiatric expert, and the doctor's two reports, Cynthia's mental condition was an issue. The trial court erred in proceeding to sentence Cynthia in the absence of a psychological evaluation containing Cynthia's IQ score and adaptive behavior score. The trial court should have ordered Cynthia to be further tested for determination of an IQ score and an adaptive behavior score. This would have allowed the court to take those scores into account before sentencing Cynthia. The scores could well have constituted mitigating evidence that may have affected the trial court's decision to sentence Cynthia to life in prison.

[232] C.R. at 67.
[233] C.R. at 43.

PRAYER

Cynthia Wood respectfully prays that this Court sustain any or all of her first four issues. Upon granting any of these issues, Cynthia prays that this Court reverse her attempted capital murder conviction and remand the case to the trial court. Cynthia prays that on remand the trial court be ordered to adjudge Cynthia guilty of attempted murder and set an appropriate punishment.

Cynthia further prays that if this Court does not grant any of the first four issues, her fifth issue be considered and sustained. Upon granting the issue, Cynthia prays that this Court reverse the sentence and remand the case to the trial court for a sentencing hearing. Cynthia prays that the trial court be ordered to conduct the sentencing hearing in compliance with the mandatory provisions of Article 42.12, § 9(i).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on June 20, 2016, I provided this brief to the Harris County District Attorney via the EFILETEXAS.gov e-filing system.

/s/ Ted Wood
TED WOOD
Assistant Public Defender
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief contains 14,213 words. This word-count is calculated by the Microsoft Word program used to prepare this brief. The word-count does not include those portions of the brief exempted from the word-count requirement under Texas Rule of Appellate Procedure 9.4(i)(1). The number of words permitted for this type of computer-generated brief (a brief in an appellate court) is 15,000.[234]

/s/ Ted Wood
TED WOOD
Assistant Public Defender
Attorney for Appellant

[234] Tex. R. App. P. 9.4(i)(2)(B).

Appendix D

Cynthia Wood's Memorandum of Law in Support of her 11.07 Petition for Writ of Habeas Corpus, *Ex parte Wood,* 351st District Court of Harris County, Texas, No. 1445251-A (November 1, 2021)

14452510101A / Court: 351

No. _____

In the

351ST DISTRICT COURT OF HARRIS COUNTY, TEXAS

EX PARTE CYNTHIA KAYE WOOD

APPLICANT'S MEMORANDUM OF LAW
IN SUPPORT OF HER 11.07 PETITION FOR WRIT OF HABEAS CORPUS

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ILLEGAL RESTRAINT/CUSTODY

Applicant (TDCJ number 02045020), is illegally restrained and in custody at the Christina Melton Crain Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, pursuant to a judgment from the 351st District Court of Harris County, Texas.

PROCEDURAL HISTORY

1. December 18, 2014 – A grand jury indicts Applicant for attempted capital murder of her son, K.W.
2. November 23, 2015 – Applicant pleads guilty to the court and without a sentencing agreement.
3. January 27, 2016 – The court holds a sentencing hearing. At the conclusion of the hearing, the Honorable Judge Mark Kent Ellis sentences Applicant to life in prison.
4. September 19, 2017 – The First Court of Appeals reverses Applicant's conviction and sentence.
5. September 19, 2018 – The Court of Criminal Appeals reverses the First Court and remands for resolution of the remaining issues.
6. March 7, 2019 – The First Court of Appeals affirms Applicant's conviction and sentence.
7. October 18, 2019 – The appellate mandates issues, ending Applicant's direct appeal and finalizing her conviction.

ISSUES PRESENTED

1. Whether Applicant's trial attorney rendered ineffective assistance of counsel by failing to pursue the diagnosis for factitious disorder imposed on another ("FDIA") that her examining psychologist suggested in his report before she pleaded guilty and that contradicts the intent to kill, an essential element of the charge.

2. Whether Applicant's guilty plea offended due process because she pleaded unknowingly, erroneously believing she had no defense to the charge of attempted capital murder and failing to understand that the intent to kill was a distinct element from doing the act.

STATEMENT OF FACTS

In 2014, Cynthia Wood, the Applicant, sought medical care for her infant son, K.W., whom she reported was having difficulty breathing. 1 R.R. at 9-10.[1] During the treatment of K.W., medical staff became suspicious of Cynthia, so they put him in a hospital room with a hidden camera. *Id.* at 14-16. The hidden camera showed Cynthia suffocating her son on two occasions, one right after the other. *Id.* at 18, 21-22. In both

[1] In this memorandum of law, "R.R." refers to the Reporter's Record and is preceded by the volume number. "C.R." is the Clerk's Record. "AX" refers to the Applicant's exhibits in support of her 11.07 application, filed separately.

cases, medical staff intervened, and K.W. survived. *Id.* at 22-23. Afterward, Cynthia pleaded guilty to the attempted capital murder of her son. C.R. at 62; 70-71. She is now serving a life sentence in prison. *Id.*

The allegation and Cynthia's acts are terrible. But there is much more to this case, and to Cynthia, than what appears on the videotape and her plea.

PART A – Who is Cynthia Wood?

To call the family in which Cynthia was raised "dysfunctional" would be an understatement—even the trial judge said in the course of sentencing Cynthia to life, "I wouldn't wish your childhood on anyone." 1 R.R. at 48.

For one, Cynthia's mother, Tammy, was never married to her father, and Cynthia did not know him growing up. 2 R.R. at 28 (State's Exhibit 2). When Cynthia was quite young (no older than 5 years old), her mother married George Moralez, whom Cynthia considers her "real dad." *Id.* This was the second time Cynthia and George married each other. *Id.* Cynthia lived under the same roof with George and Tammy, her older half-sister, and two half-brothers. *Id.*

It was during this time that Cynthia was first abused by the older of her two step-brothers, David Moralez. *Id.* (The Harris County District Attorney has filed continuous sexual abuse charges against David Moralez, and Cynthia is the alleged victim. AX 13).[2] The "Forensic Psychiatric Evaluation" describes the abuse this way:

> "Cynthia told me [the doctor who performed the forensic psychiatric evaluation] that when she was about 5 years old, David began sexually abusing Adam, his younger brother. She recalled knowing that David fondled Adam and this progressed to penetration, anal and oral. David threatened to hurt both Adam and Cynthia if they told Tammy or George. David began sexually abusing Cynthia. She recalled that he did "Everything to her." At times, she was aware that Adam sacrificed himself for her – "He let David use him to protect me." The molestation and implicit threats to remain silent went on for years. When Cynthia was nine years old, George caught David in the act of abusing one of the children. David was removed from the home and treated for some time at . . .a residential treatment program for juvenile sex offenders."

2 R.R. at 28 (State's Exhibit 2).

Tammy and George's second marriage ended around this time. *Id.* The next four years—a period when Cynthia lived primarily with her mother—were "grossly chaotic" and abusive. *Id.* Her mother drank heavily. *Id.* There was often no food in the house, and "no one cared"

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[2] David Moralez is currently imprisoned for his conviction in military court for "rape of a child and sexual abuse of a child involving sexual contact."

whether she went to school. *Id.* On some weekends Cynthia would stay with George Moralez; there, the abuse by her step-brother continued. *Id.* Cynthia did not report the abuse during this period for three reasons: (1) She feared she would no longer be able to visit George, who provided the only stability and kindness in her life; (2) David told her she caused their parents to divorce the first time; and (3) George believed that David had changed. *Id.* at 28-29. David impregnated Cynthia when she was only 12 years old. *Id.* at 9.

This would be the first of four children Cynthia would give birth to before she turned 19 years old. *Id.* at 4, 35. Cynthia gave birth to her step-brother David's child in 2009. *Id.* at 35. Cynthia had a second child, another girl, in 2011 when she was 15 years old. *Id.* This daughter, Madi, died in 2013 at the age of two. *Id.* Then Cynthia gave birth to a son, whom she gave up for adoption, at age 17. *Id.* Her fourth child, K.W., born in 2015, is the infant boy at the center of this case. *Id.*

After her first pregnancy (which resulted from David's sexual abuse), Cynthia began drinking and experimenting with drugs. *Id.* She started having sex with older men – all of her partners were over 18 and one was 30. *Id.* The drugs and the sex apparently did not provide Cynthia

with much happiness and satisfaction – she was treated for post-partum psychosis or depression at Kingwood Pines Hospital and tried to kill herself at least twice. *Id.* at 10, 30.

PART B – Cynthia's Mental Health and Medications

Cynthia's mental health problems did not go away. For example, after her arrest in this case, an "Initial Psychiatric Assessment" was conducted in the Harris County Jail. *Id.* at 30. The Assessment found Cynthia suffered from Major Depressive Disorder and Anxiety Disorder. *Id.* In jail, Cynthia "complained of nightmares, paranoia and hallucinations about her brother molesting her," and had bouts of trichotillomania (pulling out her hair). *Id.* Cynthia was prescribed Trazodone (sleep medication), Olanzapine (anti-psychotic and mood stabilizer), Fluoxetine (anti-depressant), and Lithium carbonate (mood stabilizer). *Id.*

Cynthia's trial attorney moved for a psychiatric and competency evaluation of Cynthia, which the trial court granted. C.R. at 41-42. The court ordered that Dr. Mark Moeller perform the evaluations. *Id.* at 43-45. Dr. Moeller found Cynthia competent to stand trial and sane. 2 R.R. at 31-32 (State's Exhibit 2). Dr. Moeller diagnosed Cynthia with General

Personality Disorder and Depressive Disorder. *Id.* at 32. Dr. Moeller also believed Cynthia met the criteria for Factitious Disorder Imposed on Another (Munchausen Syndrome by Proxy) but needed K.W.'s medical records to make the diagnosis. *Id.* Dr. Moeller ruled out the diagnosis because Mr. Lewis did not provide the records to him. *Id.*; AX 3.

PART C – Trial Proceedings

Cynthia was arrested and charged with attempted capital murder of her son in October 2014. C.R. at 6-7. The trial court first appointed Mr. James Brooks to represent Cynthia. *Id.* at 27. When Mr. Brooks became unavailable in February 2015, the court appointed Mr. Thomas Lewis to the case. *Id.* at 34. Mr. Lewis remained Cynthia's only attorney through sentencing. 1 R.R. at 2.

Mr. Lewis met Cynthia in the jail cell behind the courtroom on the date of the appointment. AX 1. At this time, Cynthia believed she would go to trial for her case. *Id.* However, even at this initial meeting Mr. Lewis expressed his opinion to Cynthia that she should plead guilty. *Id.* Mr. Lewis also met with Tammy, Cynthia's mom, and Rayetta Pittman, her grandmother, that day and asked them to encourage Cynthia to plead guilty. AX 11, 12.

Mr. Lewis never changed his mind—to him, Cynthia should plead guilty. AX 1, 2. In his opinion, the videotape evidence showing Cynthia impeding her son's breathing meant he could not try the case. AX 2. Mr. Lewis led Cynthia to believe that the videotape evidence proved she was guilty—since she was on the tape, she could have no defense. AX 1. Cynthia did not understand that to be guilty of attempted capital murder, she had to have intended to kill her son. *Id.* Cynthia did not intend to kill her son, but she did not realize that the intent to kill was an element of the offense. *Id.* Mr. Lewis did not discuss the elements with her. *Id.*

Mr. Lewis discussed the possibility of trial with Cynthia, but he told her that pleading was the best option because trial would only lead to conviction. AX 2. Mr. Lewis told Cynthia that if she went to trial, she would die in prison. AX 1. Mr. Lewis was so sure that Cynthia should plead guilty, he did not investigate defenses for trial. C.R. at 43-44, 73-74, 81-82; AX 7.[3] As he explained to the district attorney Tiffany Dupree via email in July, the purpose of the work that he did on the case—which primarily comes down to

[3] C.R. at 43-44 (order appointing Dr. Moeller as expert for competency, sanity, and mitigation; no other request in record for defensive expert or investigator); C.R. at 73-74, 81-82 (invoice and detail of time spent showing no investigation); AX 7 (Mr. Lewis explains his purpose of having Cynthia evaluated is for mitigation "to lay groundwork for PSI" rather than defensive issues).

having Dr. Moeller evaluate her—was for "mitigation" after Cynthia pleaded guilty. AX 7.

Likewise, Mr. Lewis did not discuss any possible defenses with Cynthia. AX 1. And when Dr. Moeller suggested that Cynthia met the criteria for FDIA, Mr. Lewis did not provide Dr. Moeller with K.W.'s medical records to confirm the diagnosis. AX 3. Not only did Mr. Lewis fail to investigate this diagnosis, but he also failed to discuss it with Cynthia. AX 1, 9.

Believing she had no possible defense and thus no real choice, and without fully understanding the charge against her, Cynthia agreed to plead guilty to attempted capital murder of her son, K.W. AX 1. She pleaded guilty during a short hearing on November 23, 2015. C.R. at 60-68. She also pleaded true to an allegation that she had used a deadly weapon—her hands—to commit the crime. *Id.* at 64.

In taking the plea. The judge did not discuss the particular elements of the offense, for example, the *mens rea.* He asked in general terms:

- "Cynthia, you're charged with attempted capital murder. Do you understand what you're charged with?..." *Id.* at 62.

- "How do you plead to this charge, ma'am, guilty or not guilty?..." *Id.*

- "I know you talked to Mr. Lewis about your case and what you should do in this situation. Do you feel like you understand the choice you're making today?..." *Id.* at 63.

Cynthia also signed plea papers. *Id.* at 48-51. These papers did not address or explain the particular elements of the charged offense, like the *mens rea*. *Id.* As mentioned above, Mr. Lewis did not explain them to Cynthia, either. AX 1.

There was no agreement between the State and Cynthia as to what the punishment should be, and the trial court reset the case for the preparation of a PSI report and for sentencing. C.R. at 64-67. The sentencing hearing was conducted on January 27, 2015. 1 R.R. at 1. The PSI report was introduced into evidence and considered by the judge. *Id.* at 4. Following the presentation of evidence and the arguments of counsel, the trial judge found Cynthia guilty and assessed her punishment at life in prison. *Id.* at 50.

PART D – Post-Conviction

Cynthia appealed the judgment. C.R. at 75-76. During the appeal, the Public Defender Office for Harris County (which has continued to represent her) obtained the trial file of Mr. Thomas Lewis. AX 4-6.

Cynthia won the first appeal at the First Court of Appeals. *Wood v. State*, No. 01-16-00179-CR, 2017 Tex. App. LEXIS 8823 (Tex. App.—Houston [1st Dist.] Sep. 19, 2017, not designated for publication), rev'd by *Wood v. State*, 560 S.W.3d 162 (Tex. Crim. App. 2018). But the Court of Criminal Appeals reversed the reversal. *Wood v. State*, 560 S.W.3d 162 (Tex. Crim. App. 2018). Finally, on remand the First Court of Appeals affirmed Cynthia's conviction and sentence. *Wood v. State*, No. 01-16-00179-CR, 2019 Tex. App. LEXIS 1753 (Tex. App.—Houston [1st Dist.] Mar. 7, 2019, not designated for publication).

Following the appeal, writ counsel began reviewing Cynthia's case. Of primary significance to this writ, counsel provided K.W.'s medical records—records that were in Thomas Lewis's and the district attorney's case file from trial—to Dr. Mark Moeller. AX 3. After reviewing them, Dr. Moeller concluded that Cynthia likely met the DSM-5 criteria for FDIA. *Id.* As a result, he opined that Cynthia most likely did not intend to kill her son because it was inconsistent with the case facts and the FDIA condition. *Id.* Dr. Moeller confirmed that he would have made this diagnosis had Mr. Lewis given him K.W.'s records during trial. *Id.*

GROUNDS FOR GRANTING THE WRIT

Cynthia's 11.07 application presents two grounds for relief from her illegal judgment. First, Cynthia contends that her trial attorney, Mr. Thomas Lewis, rendered ineffective assistance of counsel. Second, Cynthia contends that her plea of guilty offends due process because it was unknowingly made. These grounds are explained below.

I.

CYNTHIA'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PURSUE THE DIAGNOSIS FOR FACTITIOUS DISORDER IMPOSED ON ANOTHER. THE INEFFECTIVE ASSISTANCE CAUSED CYNTHIA TO PLEAD GUILTY.

The Sixth Amendment to the United States Constitution guarantees effective assistance of counsel to the defendant. U.S. CONST., Am. VI; *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). This guarantee of effective assistance extends to the defendant's guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

To sustain a defendant's ineffective assistance of counsel claim, the defendant must show two things. First, she must show that her counsel's representation "fell below an objective standard of reasonableness."

Strickland, 466 U.S. at 687-88. Second, she must show prejudice as a result. *Id.* at 692.

A. Counsel's failure to investigate the psychiatrist's preliminary diagnosis of factitious disorder imposed on another ("FDIA") fell below objective standards for criminal defense attorneys.

Thomas Lewis decided Cynthia should plead guilty *before* investigating the case. AX 1, 11, 13. Thus, when Dr. Moeller suggested the diagnosis for FDIA—a diagnosis that contradicts an essential element of the offense—Mr. Lewis rebuffed it to follow through with his plan for Cynthia to plead guilty. AX 8. Mr. Lewis's failure to investigate the defense based on, at best, his preconceived strategy fell below the standards for reasonable representation.

1. The Sixth Amendment requires trial counsel to make reasonable investigations.

Trial attorneys have a duty to make reasonable investigations into the law and facts relevant to the case. *Strickland,* 690-91. Reasonable strategic decisions may limit the duty to investigate. *Id.* However, "[u]nder *Strickland,* investigation must determine trial strategy, not the other way around." *Weeden v. Johnson,* 854 F.3d 1063, 1070 (9th Cir. 2017). Thus, a reviewing court focuses on the investigation performed

and the information available to counsel to determine whether his decision not to investigate further was reasonable. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 415 (2000) (O'Connor, J., concurring)). Put another way, "[w]hen assessing the reasonableness of an attorney's investigation, a reviewing court must consider the quantum of evidence already known to counsel and whether the known evidence would lead a reasonable attorney to investigate further." *Ex parte Lahood*, 401 S.W.3d 45, 50 (Tex. Crim. App. 2013).

The attorney's decision not to investigate is unreasonable when it "falls below an objective standard of reasonableness under prevailing professional norms and according to the necessity of the case." *Id.* at 49-50. The American Bar Association's practice standards set the benchmark for prevailing professional norms. *Id.*; *Strickland*, 466 U.S. at 688-89.

According to the ABA Standards, "defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges." ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, 4-4.1(a) (4th Ed. 2017). Defense counsel must investigate regardless of "the apparent force of the prosecution's

evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt." *Id.* at 4-4.1(b). Defense counsel must follow leads that could reasonably "lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties." *Id.* at 4-4.1(c). And counsel must "regularly re-evaluate the need for" investigation "throughout the representation." *Id.* at 4-4.1(d).

Ultimately, the assessment for reasonableness of the failure to investigate considers "all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland,* 466 U.S. at 691.

With those general principles in mind, courts have found that trial counsel had a duty to investigate in the following circumstances:

- Where psychological evidence had the potential to exculpate the defendant by negating the *mens rea. Weeden,* 854 F.3d at 1070.
- Where defense counsel had reason to believe the defendant was insane at the time of the offense. *Ex parte Imoudu,* 284 S.W.3d 866, 870 (Tex. Crim. App. 2009).
- Where investigation into evidence had the potential to exculpate the defendant *and even though* defense counsel believed it would not help defense. *United States v. Baynes,* 687 F.2d 659, 667 (3rd Cir. 1982) (refusing to "excuse" defense attorney's failure to review voice exemplar where client urged police recording did

not contain his voice and voice exemplar would have shown his innocence).

- Where defense counsel could not meaningfully discuss the case—including its weaknesses—with his client because he did not interview any witnesses. *Gaines v. Hopper*, 575 F.2d 1147, 1149-50 (5th Cir. 1978) (affirming grant of habeas relief while remarking, "[i]nformed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel").

A closer look at two of the cases, *Weeden* and *Imoudu*, will assist the court in its application of the law to the facts of this case.

a. *Weeden*

The defendant in *Weeden* was convicted of felony murder for her role in a robbery that occurred when she was 14 years-old. *Weeden*, 854 F.3d at 1066. During trial, defense counsel presented only four character witnesses in her defense. *Id.* Plus, the attorney did not seek a psychological examination "or present expert testimony about the effect of Weeden's youth on her mental state." *Id.*

When Weeden challenged her conviction based on ineffective assistance of counsel, her attorney claimed that psychological evidence did not "support his defense strategy." *Id.* The state court upheld Weeden's conviction, finding the attorney's "refusal to investigate

psychological testimony was a reasonable strategic decision." *Id.* The federal district court upheld the State court's decision. *Id.* at 1069.

The United States Court of Appeals for the Ninth Circuit reversed for ineffective assistance of counsel (notably, it reversed under the especially difficult, "doubly deferential standard"). *Id.* The Ninth Court disagreed with the district courts' conclusion that counsel's decision not to investigate was reasonable strategy because there was no "reasonable decision made by Weeden's trial counsel that rendered an investigation of psychological evidence unnecessary." *Id.* at 1070 (internal quotations omitted). In other words, merely invoking strategy cannot justify refusing to investigate; such a rule incorrectly "puts the cart before the horse." *Id.*

The *Weeden* court summarized the problems with counsel's failure to investigate this way:

> "Weeden's counsel could not have reasonably concluded that obtaining a psychological examination would conflict with his trial strategy without first knowing what such an examination would reveal. Equally unpersuasive was counsel's conclusion that the prosecution could have used the results of an examination against Weeden. While a defendant must disclose expert reports she intends to rely on at trial, simply procuring a report does not mean it must be produced."

Id. (internal quotations and citations omitted). If an attorney does not know what the evidence is, then he cannot make a reasonable tactical decision about it.

Weeden then turned to the "correct inquiry:" whether, considering all the circumstances, defense counsel had a duty to investigate the evidence in question "in order to form a trial strategy." *Id.* "The answer is yes." *Id.* The prosecution had to prove that Weeden had the requisite mental state to make its case. *Id.* Weeden was young and "unusually immature." *Id.* Expert testimony by a psychologist who evaluated Weeden—obtained through postconviction investigation—concluded it was unlikely that she had the requisite intent at the time of the offense. *Id.* at 1067. Thus, considering the "exculpatory potential of psychological evidence" that would have been available to defense counsel had he investigated, his failure to do so "ignored pertinent avenues for investigation of which he should have been aware." *Id* at 1070. His performance was deficient. *Id.* at 1070-71.

b. *Imoudu*

In *Ex parte Imoudu*, the defendant pleaded guilty to murder as part of a plea agreement for a 17-year sentence. *Imoudu*, 284 S.W.3d at 867.

He later challenged his conviction, arguing "his plea was involuntary because his trial counsel failed to investigate and advise him of the availability of an insanity defense." *Id.*

Before pleading guilty, Imoudu presented symptoms of "deteriorating mental health" while in jail. *Id.* at 868. When he first met his attorney, Imoudu displayed symptoms of poor mental health, such as staring into space, striking odd poses, mumbling, and speaking incoherently. *Id.* Despite these signs, the trial attorney did not request mental health records from jail. *Id.* at 869. If he had, he would have received "extensive" records of mental health treatment that included psychiatric evaluations, prescriptions for anti-psychotic medications (often prescribed to treat schizophrenia), and transfer to the jail's unit for mentally ill inmates. *Id.* at 868. Although defense counsel had a psychiatrist evaluate Imoudu for competency to stand trial—he was found competent to stand trial—the attorney did not seek an expert to determine whether Imoudu may have been insane at the time of the offense. *Id.* at 868-69.

Imoudu's habeas attorney obtained the jail medical records and had a psychiatrist review them. The psychiatrist concluded Imoudu probably

suffered from schizophrenia and "was likely insane at the time of the offense." *Id.* at 868.

The Court of Criminal Appeals held the trial attorney's failure to investigate—neither obtaining medical records nor having a psychiatrist evaluate Imoudu for his mental state at the time of the offense—constituted deficient performance. *Id.* at 869-70. A key aspect of *Imoudu*'s conclusion is that counsel had reason to investigate further: Imoudu's odd behavior when they met with him, his family's concerns about his mental health, and the fact that they were retained because a jail social worker had observed a decline in Imoudu's mental health all "should have" signaled to counsel that their client "may have been insane at the time of the offense, at least enough to have looked into it." *Id.* at 870.

Both *Weeden* and *Imoudu* hold that a defense attorney must investigate psychological evidence that provides a defense to the State's charge, at least where defense counsel has reason to suspect the client has such a psychological condition. As shown below, Cynthia's trial attorney did not meet this standard.

2. Thomas Lewis rendered constitutionally deficient performance by failing to investigate the psychiatrist's preliminary diagnosis of FDIA that would have refuted the intent to kill, an essential element of the charge.

Cynthia's trial attorney failed to pursue any investigation into the psychiatrist's suggested diagnosis for FDIA. There is no reasonable excuse for his failure. His representation fell below prevailing professional norms and was deficient under the Sixth Amendment.

To begin, the Court must look to evidence that was available to trial counsel at the time of his decision. *See Lahood*, 401 S.W.3d at 50. The most crucial piece of information here is that Mr. Lewis knew that Dr. Moeller, Cynthia's examining psychologist, suggested the diagnosis of FDIA for her—he simply needed her son's medical records to confirm it. AX 3, 8.

Given this, the Court must decide whether trial counsel's failure to investigate the possible FDIA diagnosis was reasonable. *See Wiggins*, 539 U.S. at 523. In other words, the question is whether this information "would lead a reasonable attorney to investigate" the possibility that Cynthia had FDIA. *See Lahood*, 401 S.W.3d at 50. The answer—as shown by applying the ABA standards and similar cases—is a clear yes: a

reasonable attorney would have pursued the FDIA diagnosis because it directly contradicts the charged offense.

a. Under the ABA Standards, the trial attorney had a duty to investigate the possibility of the FDIA diagnosis.

The FDIA diagnosis is inconsistent with the intent to kill. AX 3. After receiving K.W.'s medical records during the investigation for this writ, Dr. Moeller found that Cynthia likely had FDIA and so she likely did not intend to kill K.W. *Id.* This diagnosis and related defense were unavailable to Cynthia before her plea simply by virtue of her attorney's unreasonable failure to give Dr. Moeller the medical records. *Id.*

Mr. Lewis's failure to investigate the FDIA diagnosis violated the ABA Standards. First, the FDIA diagnosis undermined the intent to kill, an essential element of the charged offense. *See Flanagan v. State*, 675 S.W.2d 734, 741 (Tex. Crim. App. 1984) ("a specific intent to kill is a necessary element of attempted murder"). Without confirming whether Cynthia met the criteria for FDIA, Mr. Lewis missed Dr. Moeller's crucial defensive opinion that Cynthia did not intend to kill her son. AX 3. The FDIA diagnosis, therefore, was essential information to "determine whether there (was) a sufficient factual basis" for the attempted capital

murder charge. *See* ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION at 4-4.1(a).

Second, the FDIA diagnosis is relevant to the merits, consequences, and disposition of this case. *See Id.* at 4-4.1(c). Dr. Moeller's opinion, if credited by the factfinder, would have precluded her conviction for attempted capital murder. AX 3. Trial counsel had an absolute duty to investigate this diagnosis.

Finally, it is no excuse for Mr. Lewis that he had already settled on the strategy that Cynthia plead guilty when Dr. Moeller suggested the FDIA diagnosis. Defense counsel had a duty to re-evaluate his strategy throughout the representation. *See Id.* at 4-4.1(d). So once Dr. Moeller suggested the diagnosis, Mr. Lewis had to re-evaluate the case and the significance of FDIA to it. *See id.*

b. Defense counsel's failure to investigate FDIA mirrors cases where other courts have found constitutionally ineffective assistance of counsel.

Mr. Lewis had already decided that his client should plead guilty when he failed to investigate the FDIA diagnosis. AX 1, 2, 7. But "investigation must determine trial strategy, not the other way around." *Weeden*, 854 F.3d at 1070. The trial attorney's failure to investigate

FDIA, which would have produced expert evidence undermining an essential element of the charged offense, cannot be squared his Sixth Amendment duty to effectively represent his client. *See Strickland*, 466 U.S. at 687.

Even if trial counsel believed investigating the potential FDIA diagnosis would not have helped Cynthia, he had a duty to pursue it. *See Baynes*, 687 F.2d at 667. Without knowing whether his client had FDIA, trial counsel could not have effectively discussed the case and potential defenses with her. *See Gaines*, 575 F.2d at 1149-50. The investigation into FDIA had the potential to counter the essential element of intent to kill, so it was unreasonable for trial counsel not to investigate it. *See Weeden*, 854 F.3d at 1070. This is especially true because defense counsel had such a compelling reason to believe the FDIA diagnosis was available—the evaluating psychologist suggested Cynthia had the condition. *See Imoudu*, 284 S.W.3d at 870.

Weeden and *Imoudu*, the two cases reviewed in detail above, are on point to this case: this Court should follow them and recommend habeas relief based on counsel's ineffective assistance of counsel.

In both cases, the trial attorney failed to investigate psychological evidence that would have provided a defense to the charge. *See Weeden*, 854 F.3d at 1067; *Imoudu*, 284 S.W.3d at 869. *Weeden* reveals such failure "ignore(s) pertinent avenues for investigation for which (the trial attorney) should have been aware," rejects the proposition that choosing not to pursue evidence can be justified simply because it does not fit the defense attorney's strategy, and holds such representation deficient. *See Weeden*, 854 F.3d at 1070-71. Similarly, *Imoudu* holds that a defense counsel's failure to investigate a psychological defense despite signs suggesting the client suffered from psychological issues is deficient performance. *See Imoudu*, 284 S.W.3d at 868-70.

The scenarios in *Weeden* and *Imoudu* mirror this case. Like the attorneys in *Weeden* and *Imoudu*, Mr. Lewis rendered deficient performance by failing to pursue the FDIA diagnosis that would have showed Cynthia did not intend to kill K.W. AX 3, 10. The Court should evaluate the attorney's deficient performance for prejudice.

B. Counsel's deficient performance prejudiced Cynthia because she would not have pleaded guilty if she had known about the FDIA defense.

The Supreme Court applies the reasonable probability standard to the prejudice prong for IAC claims. *See, e.g., Lee v. United States,* 137 S. Ct. 1958, 1964 (2017). In a case where the defendant pleaded guilty, the court must decide, looking to the totality of the circumstances, if there is a reasonable probability that she would have opted for a jury trial but for counsel's deficient performance. *Id.* at 1965-66; *Miller v. State,* 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). This inquiry focuses on the defendant's decision-making at the time, not on the likelihood of a better outcome had she opted for trial. *Lee,* 137 S. Ct. at 1966 (citing *Hill*).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. Although the deficient performance "must have had more than a 'conceivable effect' on the outcome," a reasonable probability is less than a preponderance. *Weeden,* 854 F.3d at 1071 (citing and quoting *Strickland,* 466 U.S. at 693). *See also Williams v. Taylor,* 529 U.S. 362, 405-06 (2000) (observing that state court requiring preponderance for IAC would be "contrary to this Court's clearly established precedent").

Counsel's failure to present or investigate expert testimony may undermine confidence in the outcome. *See Ex parte Overton*, 444 S.W.3d 632, 640-41 (Tex. Crim. App. 2014) (holding applicant demonstrated prejudice for counsel's unreasonable failure to present expert testimony that would have "directly supported" defense). Specifically, failing to investigate expert psychological evidence that contradicts the essential *mens rea* element in the case undermines confidence in the outcome. *See Weeden*, 854 F.3d at 1072 (concluding, "had Dr. Perrine's opinion been presented to the jury, the probability of a different result is 'sufficient to undermine confidence in the outcome'"). The failure to investigate such evidence may affect the outcome of the plea process. *Imoudu*, 284 S.W.3d at 870-71 (overturning plea conviction where counsel failed to investigate insanity defense where expert found defendant likely insane at time).

In this case, counsel's deficient performance—failing to investigate Dr. Moeller's suggested diagnosis of FDIA and his opinion that Cynthia did not intend to kill her son—prejudiced Cynthia. The evidence provided in this writ establishes a reasonable probability that Cynthia would have opted for trial if not for her counsel's deficient performance. This is clear

from looking at the totality of the circumstances and comparing this case to *Ex parte Imoudu*. *See Imoudu*, 284 S.W.3d 866.

1. Totality of the circumstances shows prejudice.

Cynthia wanted to go to trial when this prosecution began. AX 1. Cynthia understood that her actions were wrong, but she did not intend to kill K.W. *Id.*; 2 R.R. at 17-18. She would not have pleaded guilty if she had known of the FDIA diagnosis and its significance. AX 1.

To begin, the facts of the case suggest no intent to kill. As Dr. Moeller noted in his Re-evaluation, Cynthia had numerous opportunities to kill K.W., if that had been her intent. AX 10. But the many times she sought medical treatment—as well as the fact the incident at issue occurred in the hospital, the least likely place to successfully suffocate a child—suggest she had no intent to kill. *Id.* In fact, they show Cynthia suffered from FDIA—she wanted attention, not the death of her son. *Id.* Consistent with that diagnosis and Cynthia's intent to gain attention, Killing K.W. was, in fact, "counter-intentional." AX 3, 10.

Moreover, it is apparent that Cynthia's trial attorney wanted Cynthia to plead guilty from the day he got the case and pushed her to do so. AX 1. He asked Cynthia's mother and grandmother to persuade

her to plead guilty that day. AX 11, 12. He explained to Cynthia that pleading guilty was her only chance for a lenient sentence. AX 1, 2. He did not discuss FDIA with Cynthia or the possibility of using it as a defense. AX 1, 9.

Mr. Lewis led Cynthia to believe she had no defense. AX 1. She understood from him that the fact that she was on camera suffocating her son meant she had no defense to prosecution. *Id.* Mr. Lewis appears to have agreed. AX 2. As a result, Cynthia believed her only realistic option was to plead guilty and hope for leniency. AX 1.

Finally, Cynthia maintains that she would not have pleaded guilty had she known she had a defense to the charge. AX 1. In other words, Cynthia would not have pleaded guilty if her attorney had investigated the FDIA diagnosis and discussed it with her. *Id.* And Ms. Moralez, Cynthia's mother, confirms that she would have urged Cynthia not to plead guilty had she known. AX 11.

Under these circumstances, there is more than a reasonable probability that Cynthia would have opted for trial had she known that Dr. Moeller could have testified that she had FDIA and did not intend to kill her son. *See Weeden*, 854 F.3d at 1072; *Imoudu*, 284 S.W.3d at 870.

2. *Ex parte Imoudu* controls: Cynthia was prejudiced and is entitled to relief.

Imoudu is on point to this case. Its prejudice analysis—whether the defendant showed "a reasonable probability that counsel's ineffective assistance affected the outcome of the plea process"—is short, resting on two key facts:

a. Defendant's affidavit stated counsel never discussed the insanity defense with him, and he would have rejected the plea agreement and pleaded not guilty by reason of insanity if counsel had not unreasonably failed to have him evaluated. *Id.* at 870.

b. Defendant's father swore in his affidavit that the lawyers did not advise him of a possible insanity defense, he would have provided funds for an evaluation, and he would have encouraged his son to plead not guilty by reason of insanity had he been aware of the psychiatrist's conclusions. *Id.*

Based on these affidavits, the high court concluded, "Applicant has shown a reasonable probability that counsel's ineffective assistance affected the outcome of the plea process."[4] *Id.*

In Cynthia's case, the result is just as simple but stronger.

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[4] *Imoudu* also discussed "whether the insanity defense would have been validly raised and likely to succeed at trial." *Imoudu*, 284 S.W.3d 870-71. However, this line of inquiry has been abandoned. *See Miller*, 548 S.W.3d at 501-02 (citing *Lee*). Now the prejudice determination in cases where the defendant waives trial and pleads guilty turns on the defendant's decision-making and whether he would have opted for trial but for the deficient performance, not on the outcome. *Id.*

First, Cynthia's case shares the same key facts on which the *Imoudu* decision rested: Mr. Lewis never discussed FDIA with Cynthia. AX 1, 9. Cynthia swears that she would not have pleaded guilty but for counsel's failure to investigate and advise her that she had a defense. AX 1. Tammy Moralez, Cynthia's mother, would have urged her daughter to go to trial had she known that Cynthia had a defense. AX 11. Tammy would have paid for the expert opinion if necessary. *Id.*

Second, other facts make this case even more compelling than *Imoudu*. For example, Mr. Lewis led Cynthia to believe that the video evidence essentially eliminated all possibility of a viable trial defense, making it much more likely his deficient performance contributed to her decision to plead, whereas in *Imoudu* the attorney simply failed to investigate a defense. AX 1. Two, in contrast with *Imoudu*, there was no plea offer from the State and so no obvious benefit to pleading guilty for Cynthia. AX 2. She pleaded guilty for no reason other than the false belief that she had no defense and, therefore, no choice. AX 1.

In conclusion, *Imoudu* shows that (1) any competent attorney would have pursued the FDIA diagnosis because it provided a defense to an essential element of the charge; and (2) Mr. Lewis's failure to investigate

it prejudiced Cynthia. *See Imoudu*, 284 S.W.3d at 871. This Court should grant relief.

II.

CYNTHIA'S GUILTY PLEA OFFENDED DUE PROCESS BECAUSE SHE PLEADED UNKNOWINGLY, ERRONEOUSLY BELIEVING SHE HAD NO DEFENSE TO ATTEMPTED CAPITAL MURDER AND NOT UNDERSTANDING THE ELEMENTS OF THE OFFENSE.

Cynthia pleaded without knowing she had a defense based on Dr. Moeller's FDIA diagnosis and his opinion that she did not intend to kill her son, and without understanding the elements of attempted capital murder. Her plea does not satisfy the due process requirement that the defendant plead while understanding the law in relation to her case and the options available to her. For this reason, as well as her counsel's ineffective assistance, she deserves habeas relief.

A. An unintelligent guilty plea offends due process.

A guilty plea that is not both voluntary and knowing violates due process and is void. *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969). "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy*

v. United States, 394 U.S. 459, 466 (1969). Thus, a defendant has the right to "be reasonably informed of the nature of the charges against him, the factual basis underlying those charges, and the legal options and alternatives that are available." *LoConte v. Dugger*, 847 F.2d 745, 751 (11th Cir. 1988) (citing *Boykin*). "The test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *State v. Guerrero*, 400 S.W.3d 576, 588 (Tex. Crim. App. 2013) (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)).

When determining whether a defendant's plea reflects an intelligent choice, "the representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings, and [s]olemn declarations in open court carry a strong presumption of verity." *Mendoza v. Hatch*, 620 F.3d 1261, 1269 (10th Cir. 2010) (internal citations omitted) (quoting *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977))." However, while a plea record creates an "imposing" barrier for a defendant challenging his conviction, it is not insurmountable. *Id.* at 74. Factors such as

misunderstanding or misrepresentations by defense counsel may render a guilty plea "a constitutionally inadequate basis for imprisonment," even one following a facially valid plea colloquy. *Mendoza*, 620 F.3d at 1271 (adopting magistrate's characterization of applicant's statements during plea colloquy as "courtroom ritual more sham than real").

B. Cynthia entered an unintelligent guilty plea without understanding that she had a viable defense to the attempted capital murder charge.

For reasons related to the ineffective assistance of counsel claim above, Cynthia's plea was unintelligent and violated due process.[5] Trial counsel led Cynthia to misunderstand the nature of the offense and to believe that she had no defenses against the charge. AX 1. As a result, it cannot be said that her guilty plea represented "an intelligent choice among the alternative courses of action" available to her. *See Hill*, 474 U.S. at 56.

Cynthia did not intend to kill her son, which she has been consistent about even while acknowledging what she did was wrong and hurt K.W. AX 1; 2 R.R. at 7, 17-18, 31. Despite this fact, she also believed she was

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[5] *Mendoza*, a case with analogous claims, notes that, "[f]or essentially these same reasons" that the defendant's plea was held involuntary and unintelligent in that case, the defendant "would also be entitled to relief under his alternative theory" that his attorney was ineffective. *Mendoza*, 620 F.3d at 1272 n.5.

guilty of the charged offense. AX 1. This contradiction resulted from her failure to understand the nature of the offense: Cynthia believed she was guilty because she did the act that could have killed her son. *Id.* And because it was caught on tape, she believed she could not successfully defend herself from the charge. *Id.* But attempted capital murder requires the specific intent to kill. *See Flanagan*, 675 S.W.2d at 741. Cynthia did not know of or understand this distinction. AX 1.

Notably, neither the plea documents nor the plea colloquy addressed the intent to kill. If anything, they contributed to Cynthia's confusion.

The plea papers include the indictment. The indictment describes Cynthia's actions this way:

> "Wood... did then and there unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended."

CR 48. Thus, the indictment does not mention or describe the actual *mens rea*—intent to kill the complainant. Rather, the indictment suggests that the intent element refers to doing "an act, to-wit," using the hands to

impede the breath. *Id.* The rest of the plea papers only refer to the indictment. *Id.* at 49-51.

Likewise, no one during the plea hearing described the *mens rea* element of attempted murder.[6] The court called the case and told Cynthia, "you're charged with attempted capital murder." C.R. at 62. The court then asked, "[d]o you understand what you are charged with?" *Id.* Cynthia answered, "Yes, sir." *Id.* She then pleaded guilty. *Id.* There is no other relevant discussion during the plea hearing and simply no explanation of the meaning of the charge. *Id.* at 62-68.

Normally—or at least in direct appeals—it is safe to assume the defense attorney explained the significance of the charge and the elements it entails. *Joseph v. State*, 614 S.W.2d 164, 165 (Tex. Crim. App. 1981) (citing *Henderson v. Morgan*, 426 U.S. 637 (1976)). But that is not the case in postconviction proceedings, which are designed to allow additional evidence. Here, the evidence shows Cynthia's attorney wanted her to plead guilty when he got the case. AX 1, 11, 12. Mr. Lewis did not present any defenses to Cynthia; in fact, he presented the video evidence

[6] To be clear, Applicant does not argue that the court erred in failing to go through each element of the offense with the defendant to ensure her understanding. Rather, the point here is that the plea colloquy does not evidence Cynthia's understanding of the *mens rea* element because it did not reach it.

as conclusive proof of guilt. AX 1, 2. He did not investigate any defenses. C.R. at 73-74, 81-82 (invoice and detail of time spent showing no investigation). And Mr. Lewis did not explain to Cynthia the elements of the offense and what pleading guilty would necessarily admit to. AX 1. Instead, he told Cynthia that she had no defense to the charge, and that her only chance for leniency in punishment would be to plead guilty. *Id.* Cynthia, having no way to know better, believed him. *Id.*

The facts of this case align with *Mendoza v. Hatch*, where the United States Court of Appeals for the Tenth Circuit granted the petitioner's habeas petition because he pleaded unknowingly. *See Mendoza*, 620 F.3d 1271-72. In *Mendoza*, the petitioner pleaded guilty to sexual assault of his partner, and the trial court sentenced him to 25 years in prison plus 5 years supervision. *Id.* at 1265. During the plea colloquy, petitioner answered "yes" to the judge's questions about whether he was guilty and whether he understood the sentencing range, and "no" the judge's question of whether anyone had promised him anything to plead guilty. *Id.* at 1264-65. But the habeas record showed that petitioner's attorney told him how to answer, told him that he had a sentencing agreement with the judge for a three year sentence, and that

he answered the judge's questions because he trusted his attorney and believed the sentencing deal was in place. *Id.* at 1271.

The Tenth Court of Appeals reversed the defendant's conviction. *Id.* at 1272. Because of the "significant misrepresentations" by his counsel, it held petitioner's plea violated due process and represented "a constitutionally inadequate basis for his current imprisonment." *Id.* at 1271-72. Notably, the Tenth Court agreed that the plea proceeding was a "ritual more sham than real," overturning the district court's reliance on petitioner's plea statements to deny him relief. *Id.* at 1271.

Cynthia's conviction suffers from the same flaw as that in *Mendoza*: she pleaded guilty because she believed her attorney's misrepresentations that she could not defend herself against the State's charge. Specifically, the attorney's failures and misrepresentations caused Cynthia to have two fundamental misunderstandings about her case: (1) that guilt for the offense was predicated on the act alone—she believed that she was guilty because she committed the act notwithstanding her lacking the intent to kill; and, relatedly, (2) that she had no defense (including the FDIA diagnosis, which she was never told about), and could have no defense, to the charge because the video

showed her doing the act of impeding her son's breathing. AX 1. As a result, Cynthia could not have pleaded guilty understanding the law in relation to the facts of her case—her plea does not reflect an "intelligent choice among the alternative courses of action" available to her. *See Guerrero*, 400 S.W.3d 576, 588. This Court, like the Tenth Court of Appeals in *Mendoza*, should grant relief.

PRAYER

Applicant Cynthia Wood asks the court to make findings of facts and conclusions of law recommending habeas relief because Cynthia received ineffective assistance of counsel and pleaded guilty unknowingly.

Respectfully submitted,

/s/ Nicholas Vitolo
Nicholas Vitolo
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CERTIFICATE OF COMPLIANCE

I certify that this computer-generated document complies with the typeface and word number requirements of Appellate Rule 73.1. I further certify that it contains 7,933 words.

/s/Nicholas Vitolo
Nicholas Vitolo
Assistant Public Defender

Appendix E

Forensic Psychiatric Report of Dr. Mark Moeller, Exhibit 10 of Cynthia Wood's Memorandum of Law in support of her 11.07 Petition for Writ of Habeas Corpus (July 15, 2021)

EXHIBIT 10

MARK S. MOELLER, M.D.

6300 WEST LOOP SOUTH, SUITE 680
BELLAIRE, TEXAS 77401
PHONE: (713) 661-4670
FAX: (713) 661-4672

CONFIDENTIAL

Forensic Psychiatric Evaluation

Evaluee: Cynthia Wood
DOB: 7/30/1995 (25 years old at time of re-evaluation)
Date of Report: 7/15/2021

Reason for Evaluation

This re-evaluation and report was performed at the request of Mr. Nick Vitolo of the Harris County Public Defender's Office. I was asked to review my own file on this case, review additional records and collateral information and re-assess Ms. Wood. I was asked to render opinions as to diagnoses and state of mind at the time of the offense.

Records Reviewed and Collateral Information

1. Forensic Psychiatric Evaluation – M. Moeller, M.D. (1/13/2016)
2. Cynthia Wood case file (M.M.)
3. Communications with Mr. Vitolo
4. Evaluee's Instagram communications
5. LBJ Hospital Emergency Department Records for K.W. (9/30/2014)
6. Memorial Hermann Hospital Records for K.W. (9/30/2014 – 11/3/2014)
7. Texas Children's Hospital Records for K.W. (8/21/2014 – 9/3/2014)
8. Telephone consultation with FDIA expert, Marc Feldman, M.D.

Review of Texas Children's Hospital Records

K[redacted] W[redacted], age 4 months, was admitted to TCH on 8/21/2014 for evaluation and treatment of "Acute on chronic respiratory disease." He was noted to have increased WOB (work of breathing). The treatment team consisting of cardiology, pulmonology and infectious disease performed lab tests and improved the patient's respiratory status. At the time of discharge, K.W. was stable and his required supplemental oxygen had been reduced. He was treated for a urinary infection, circumcised and sent home with follow up care and instructions on 9/3/2014.

Review of LBJ Medical Records (K.W.) (Emergency Department Only)

K[redacted] W[redacted] was admitted to LBJ public hospital on 9/30/2014 for evaluation and treatment of severe respiratory distress. Significant medical history included:

1. Birth at 25 weeks gestation (normal gestation is 39 weeks)
2. ASD (atrial septal defect) – imperfection in the wall between the 2 atria
3. VSD (ventral septal defect) – imperfection in the wall between the 2 ventricles

The child was intubated and stabilized in the ER shock room. He was subsequently transferred to Memorial Hermann Hospital for further care.

Review of Memorial Hermann Hospital Records

K[redacted] was accepted in transfer from LBJ hospital on 9/30/2014. The treatment team became concerned about the possibility of child abuse and placed the child in a video/audio monitored room. On 10/12/2014, the baby's mother was noted to intentionally suffocate the baby temporarily. Ms. Wood was arrested. The child was continually monitored and no further major medical issues were noted. K.W. was discharged to foster care on 11/3/2014.

Telephone Conversation with Marc Feldman, M.D.

Marc D. Feldman, M.D. is a Clinical Professor of Psychiatry and Adjunct Professor of Psychology, the University of Alabama (UA), Tuscaloosa, Alabama. A Distinguished Fellow of the American Psychiatric Association, he is the author of more than 100 peer-reviewed articles in the professional literature. Dr. Feldman is an international expert in factitious disorder, Munchausen syndrome, Munchausen by proxy and malingering.

Dr. Feldman did not personally examine Ms. Wood. He and I discussed aspects of this case (with the permission of counsel). Dr. Feldman told me that, in his experience, behaviors of women similar to Ms. Wood are not meant to kill. That is, killing the child removes the object of manipulation and is ultimately self-defeating for her. Generally speaking, most mothers are unaware of how lethal their abuse of children can be and deaths are typically accidental.

Summary and Opinions

In my medical opinion, Cynthia Wood meets DSM-5 criteria for the diagnoses of:

1. General Personality Disorder
2. Factitious Disorder Imposed on Another (FDIA)
3. Depressive Disorder, NOS

The criteria for #2 above (FDIA) is:

A. Falsification of physical or psychological signs or symptoms, or induction of injury or disease, in another, associated with identified deception.

B. The individual presents another individual (victim) to others as ill, impaired, or injured.

C. The deception behavior is evident even in the absence of obvious external rewards.

D. The behavior is not better explained by another mental disorder, such as delusional disorder or another psychotic disorder.

Note: The perpetrator, not the victim, receives this diagnosis.

Specify:

Single episode

Recurrent episodes (two or more events of falsification of illness and/or induction of injury)

Ms. Wood clearly meets the A and B criteria. To my knowledge, there are no obvious external rewards for her behaviors... Although she receives a great deal of medical, social and financial assistance for taking care of K[redacted], Ms. Wood nonetheless does not enjoy an enviable lifestyle.

It has been asserted that Ms. Wood intended to severely injure or kill K[redacted] on 10/12/2014. In my opinion, Ms. Wood had unlimited opportunities to injure or kill her son prior to the instant offense. I believe that intending to kill or killing K[redacted] would have been counter-intentional for her. It is more likely that she suffocated him with the intent to cause distress and derive benefit from the attentions of K[redacted]'s medical staff. Killing the child is unexpected because doing so removes the mechanism by which the perpetrator mobilizes attention, support and an identity as a heroic caregiver.

Opinions rendered herein are based on information provided and my evaluation and are subject to change should additional data be made available.

Call me if I may be of further assistance.

Respectfully,

Mark S. Moeller, M.D.
Fellow of the American Psychiatric Association
Diplomate, American Board of Psychiatry and Neurology
Added Qualifications in Forensic Psychiatry

References:

1. Forensic Psychiatric Evaluation – M. Moeller, M.D. (1/13/2016)
2. M. Moeller, M.D. case file re: Cynthia Wood
3. "The deceit continues: An updated literature review of Munchausen Syndrome by Proxy" Child Abuse and Neglect 27 (2003) 431-451
4. Diagnostic and Statistical Manual of Mental Disorders 5th edition
5. Conversation with Marc Feldman, M.D.

Appendix F

Declaration of Cynthia K. Wood, Exhibit 1 of Cynthia Wood's Memorandum of Law in support of her 11.07 Petition for Writ of Habeas Corpus (Sep. 28, 2021)

EXHIBIT 1

	§	**In the 351st District Court**
	§	
Ex parte Cynthia K. Wood	§	
	§	
	§	**Harris County, Texas**

DECLARATION – CYNTHIA K. WOOD

1. My name is Cynthia Kaye Wood. I am over 18 years of age and I am fully competent to make this declaration. I have personal knowledge of the matters stated herein because this affidavit describes my experiences as the defendant in this case. Every statement herein is within my personal knowledge and is true and correct.

2. My first attorney was Mr. James Brooks. My second attorney was Mr. Thomas Lewis. The court appointed both attorneys.

3. I first met Mr. Lewis in the cell behind the courtroom. I did not know who he was, but he explained that he would be my new attorney.

4. I wanted to go to trial when I met Mr. Lewis. I knew what I did was wrong, but I didn't want to hurt my son. I never tried to kill my son.

5. Mr. Lewis believed pleading guilty was the best option. This was his opinion from the moment I met him. I understood that I could go to trial, but Mr. Lewis said if I went to trial, then I would die in prison. He said the only way I could avoid that was to plead guilty.

6. Mr. Lewis discussed the outcome of trial as a foregone conclusion that I would be found guilty. Mr. Lewis said the video of me suffocating my son proved me guilty and we couldn't fight it. I believed him.

7. Mr. Lewis did not discuss particular elements of the offense with me. I did not understand that if I did not intend to kill my son, then I was not guilty. Mr. Lewis led me to believe that doing the act on the video meant I was guilty, end of story. I knew it was me on the video, so I thought I was guilty of the charge. I did not know that not meaning to kill my son mattered at all.

8. Mr. Lewis did not discuss potential defenses with me. Mr. Lewis never discussed Munchausen Syndrome by Proxy or Factitious Disorder Imposed on Another with me.

9. If I had known that I had a defense to the prosecution, I would not have pleaded

guilty and would have opted for trial. If Dr. Moeller's diagnosis of me for Factitious Disorder Imposed on Another, and what it means, had been explained to me, then I would not have pleaded guilty; I would have gone to trial.

10. I did not want to plead guilty, I just believed there wasn't any possible defense and that the only way I could avoid a life sentence was to plead guilty. That is what Mr. Lewis told me.

Ms. Cynthia Kaye Wood

INMATE'S DECLARATION

My name is Cynthia (First) Kaye (Middle) Wood (Last).

My date of birth is 07/30/1995, and my inmate identifying number is TDCJ# 02045020.

I am presently incarcerated in Crain Unit (Corrections unit name),

in Gatesville (City), Coryell (County), Texas, 76599 (Zip Code).

I declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on the 28 day of September (Month) 2021.

Declarant's signature

Appendix G

State's Appellate Brief, First Court of Appeals, *Wood v. State,* No. 01-16-00179-CR (Sep. 21, 2016)

No. 01-16-00179-CR

In the
Court of Appeals
For the
First District of Texas
At Houston

No. 1445251
In the 351st District Court
Of Harris County, Texas

CYNTHIA KAYE WOOD
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S APPELLATE BRIEF

DEVON ANDERSON
District Attorney
Harris County, Texas

ALAN CURRY
State Bar No: 05263700
Assistant District Attorney
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ORAL ARGUMENT REQUESTED ONLY IF REQUESTED BY APPELLANT

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 9.4(g) and TEX. R. APP. P. 39.1, the State requests oral argument only if oral argument is requested by the appellant.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

Complainant, victim, or aggrieved party:

K.W.

Counsel for the State:

Devon Anderson — District Attorney of Harris County

Alan Curry — Assistant District Attorney on appeal

Tiffany Dupree — Assistant District Attorney at trial

Appellant or criminal defendant:

Cynthia Kaye Wood

Counsel for Appellant:

Ted Wood — Counsel on appeal

Thomas Lewis — Counsel at trial

Trial Judge:

Hon. Mark Kent Ellis — Presiding Judge

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STATEMENT OF THE CASE

The appellant was charged with the felony offense of attempted capital murder (C.R. 32). The appellant entered a plea of guilty to the offense without an agreed recommendation from the State as to punishment (C.R. 47-48). After the trial court found the appellant guilty of the charged offense, he assessed the appellant's punishment at life in prison (C.R. 70; R.R. I-50). A written notice of appeal was timely filed (C.R. 75).

STATEMENT OF FACTS

The State challenges all factual assertions in the appellant's brief and presents the following account of the facts.

On October 16, 2014, the State filed a complaint, charging the appellant with commission of the offense of attempted capital murder:

> in Harris County, Texas, CYNTHIA KAYE WOOD hereafter styled the Defendant, heretofore on or about OCTOBER 12, 2014, did then and there unlawfully intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANTS ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended.

(C.R. 6). The basis for that charge was stated as follows:

> Affiant, A. Hernandez, is a peace officer with the Houston Police Department Affiant has reason to believe and does believe Cynthia Kaye Wood hereafter referred to as Defendant, who committed the felony offense of Attempted Capital Murder under age of 10 on or about October 12, 2014 at 6410 Fannin in Houston, Harris County, Texas. Affiant bases her belief on the following:
>
> Affiant received a call out to Memorial Hermann Hospital on October 12, 2014 at 6410 Fannin, Houston, Harris County, Texas, the Defendant, identified as Cynthia Kaye Wood, caused cardiac arrest by impeding air flow to her 4 month old son, K. W., hereafter known as the Complainant.
>
> Affiant spoke with the Defendant, who is the mother of the complainant, in a non-custodial voluntary recorded interview. The defendant stated that her son, the complainant, stopped breathing at home on September 30, 2014, and he was transported to Lyndon B. Johnson Hospital. Then he was transported to Children's Memorial Hermann Hospital for further evaluation. The Defendant stated that on Saturday, October 11, 2014, the complainant turned blue while she was in the restroom. Then the Defendant stated that on Sunday, October 12, 2014, the complainant was breathing heavily as he was looking for his pacifier. She stated she saw the monitor go off and then the nurse came in and attended to her son by bumping up his oxygen levels. She stated she gave her the complainant swaddled up and saw him rubbing his eyes. She stated she gave him the pacifier and he fell asleep. Then the Defendant stated she decided to rest since she figured her son was fine. She stated she was watching Law and Order while eating M&Ms on the couch in the room, she saw the complainant rooting for his pacifier and then began to make gasping and gurling [sic] noises. She stated she saw the stats on the monitor drop. The defendant stated she picked him up and began to beat the complainant on his back. Then the nurse came in and took over the care for the complainant. Affiant informed the Defendant there was surveillance video of the incidents, and she denied harming her son. The Defendant stated she was pissed off at herself but could not recall harming the complainant. The defendant also confirmed that when she was in the complainant's hospital room, she was wearing a red shirt with the logo aero written on the front of it. She also stated she was the only person in the room with the complainant.

Affiant spoke with nurse Kristen Green, who is employed as a registered nurse with Memorial Hermann Children's Hospital, and found her to be a credible and reliable witness. Ms. Green stated that on October 12, 2014, she was working in the hospital on the Children's Special Care floor where the complainant's vital signs, breathing, and oxygen saturation levels were being monitored. While caring for the complainant, she observed the complainant's mother, who she knows by name and sight as Cynthia Wood, the defendant, in his room that day. Ms. Green further stated only the defendant, a hospital tech named Crystal Johnson, and herself were in the complainant's room that day. At some point, Ms. Green passed by the complainant's room and heard the complainant's hospital vitals' alarm sound and she saw the defendant holding the complainant slumped over in her arms. The defendant was the only person in the room with the complainant at the time and was not notifying hospital staff of the complainant's condition. Ms. Green called for back-up assistance and began CPR until the complainant was revived. Ms. Green has viewed hospital security cameras and observed two separate incidents where the defendant is seen on camera placing her hand over the complainant's nose and/or mouth and thereby impeding his ability to breathe.

Affiant reviewed the closed circuit surveillance tape, and observed two separate instances where the Defendant is seen placing her arms in the crib and the monitor in the room signals an alarm. In the first instance, the room is dimly lit from outside room light source. While the alarm is signaling the Defendant made no attempt to call for assistance. The nurse is observed walking into the room and turning on the lights in the room. At this point the nurse attends to the complainant. Then, the nurse is observed walking out of the room and the lights are left on. The Defendant is observed placing her hand over the complainant's nose and mouth. Then Defendant quickly removes it and walks to the door of the room. Then the defendant returned to the crib and is observed pinching the complainant's nose, with her left hand and covering his mouth with her right hand, thereby impeding the airflow of the complainant. The monitor alarm begins to signal again. The complainant is observed actively kicking his legs and eventually ceased moving. The second episode lasted approximately three minutes before medical staff is observed entering the room. The nurse is observed giving the complaint a two handed compressions and a crash cart is also observed entering the room. The medical personnel stay in the room until the complainant

> begins to move again. In the surveillance tape, the defendant is seen wearing the red shirt with the logo aero written on the front, as she described in her statement to affiant.
>
> Affiant reviewed a Physician's statement from Children's Memorial Hermann Hospital signed by Dr. R Giradet. Dr. Giradet is the head of the CARE team at MHCH and is familiar with injuries that are consistent with non-accidental trauma. The complainant was in the care of the Defendant on October 10, 2014 and had an acute life-threatening event episode. The complainant's heart rate had dropped significantly and was not having a respiratory effort. The complainant was also looking bluish. Then on October 11, 2014 the Defendant placed an ambu-bag over the complainant's face and administered a few "breathes" using the bag though it had not been connected to oxygen at the time. Then on October 13, 2014, Dr. Giradet reviewed the closed circuit surveillance video from October 12, 2014, and noted the complainant was found blue, pulseless, and not breathing. Dr. Giradet also noted the complainant's heart rate was 0 and oxygen saturation of 14%. Dr. Giradet noted that the complainant was suffocated by the Defendant, and would have died had medical personnel not been available to resuscitate him. The complainant quickly recovered with resuscitation, indicating that the Defendant's actions were the sole explanation for his near-death experience.

(C.R. 6-7). The complaint clearly identified the complainant/victim as a four-month old child and, therefore, younger than ten years of age.[1]

The appellant was indicted for the offense of attempted capital murder on December 18, 2014, based upon the same allegations as that set forth in the complaint (C.R. 32, 58). In filings before the trial court, the appellant acknowledged that she was charged with the first-degree felony offense of attempted capital murder (C.R. 35, 41, 73, 81, 83). On November 23, 2015, the appellant entered a plea of guilty to the first-degree felony offense of attempted capital murder:

---

[1] *See* TEX. PEN. CODE ANN. § 19.03(a)(8) (West 2016).

> The charges against me allege that in Harris County, Texas, CYNTHIA KAYE WOOD, hereafter styled the Defendant, heretofore on or about OCTOBER 12, 2014, did then and there unlawfully, intentionally, with the specific intent to commit the offense of CAPITAL MURDER of K.W., hereafter styled the Complainant, do an act, to-wit: USE HER HAND TO IMPEDE THE COMPLAINANT'S ABILITY TO BREATHE, which amounted to more than mere preparation that tended to but failed to effect the commission of the offense intended.
>
> AGAINST THE PEACE AND DIGNITY OF THE STATE.
>
> It is further alleged that during the commission of the felony offense of attempted capital murder, the Defendant, used and exhibited a deadly weapon, namely, her hands, on or about October 12, 2014.
>
> I understand the above allegations and I confess that they are true and that the acts alleged above were committed on
>
> Oct. 12, 2014
>
> In open court I consent to the oral and written stipulation of evidence in this case and to the introduction of affidavits, written statements, of witnesses, and other documentary evidence.

(C.R. 48-49, 62, 64-65). The appellant was admonished that she was pleading guilty to the first-degree felony offense of attempted capital murder (C.R. 50). When the appellant pleaded guilty to the offense of attempted capital murder, the trial court did not yet enter a finding of guilty, but he found that the evidence substantiated the appellant's guilt (C.R. 67). The case was reset until January 27, 2016 (C.R. 67).

At that subsequent hearing, the trial judge took "judicial notice of all the information contained in the clerk's file . . ." (R.R. I-3).

At that hearing, Dr. Rebecca Girardet testified that the victim was four months old when he was brought to the hospital (R.R. I-6). The victim had been born

premature on May 10, 2014, and he spent the first three months of his life in the hospital (R.R. I-6-7). Just two days after being released to go home, the victim was returned to the hospital because he had stopped breathing (R.R. I-8). He was released from that hospital stay five days later (R.R. I-8). On September 19, 2014, the victim was returned to the hospital because of a vomiting issue, and he was forced to undergo surgery to treat that issue (R.R. I-8-9).

On September 30, 2014, the victim was readmitted to the hospital—to the intensive care unit—because his mother, the appellant, claimed that the victim was not breathing and did not have a pulse (R.R. I-9-10). The medical personnel conducted several tests to determine the cause for the victim's condition, but they could not find a cause (R.R. I-10-11). The medical professionals became concerned that the appellant was the cause of the victim's condition (R.R. I-11). They noticed that the appellant did not seem to be very interested in taking care of the victim (R.R. I-12). The victim's repeated hospitalizations appeared to be out of proportion to how well he looked otherwise (R.R. I-12). The appellant asked that a gastrostomy tube (G-tube) be placed on the victim's body, so that the victim would get food directly to his stomach (R.R. I-13). There was no medical reason for a G-tube (R.R. I-13).

The victim was moved out of the intensive care unit of the hospital to an intermediate care unit of the hospital, and—for the first two days—October 8 and 9—the victim was doing very well (R.R. I-14). The appellant was not there during this time, but the victim's grandmother was with him (R.R. I-14). The appellant returned

to the victim on October 10, and he had another lack-of-breathing episode (R.R. I-14). The victim was alone with the appellant when he had this episode (R.R. I-14-15). The victim was resuscitated and moved to the intensive care unit and then back to the intermediate care unit shortly thereafter (R.R. I-15-16). But this new room had a hidden camera, so that the medical professionals could watch the appellant and the victim (R.R. I-16). On October 11, 2014, the appellant was seen placing an oxygen bag over the victim's face as if to give him oxygen, but the bag was not hooked up to oxygen at the time (R.R. I-16).

On October 12, 2014, the appellant suffocated the victim on two separate occasions, the video recording also captured the victim kicking his legs as he was being suffocated (R.R. I-17-20). The appellant pulled a blanket up over the victim's face, and the victim's oxygen monitors went off shortly thereafter (R.R. I-20-21). The appellant also put her hand over the victim's face, and the monitors went off again (R.R. I-22). After the second occasion, the medical professionals were forced to perform CPR on the victim, and he was again transferred to the intensive care unit (R.R. I-22-23). The victim could have suffered permanent brain damage as a result of this action on the part of the appellant (R.R. I-23).

The victim did very well after that, and when he went to a foster home, he continued to do well (R.R. I-23). The victim has had some developmental delays that could be a result of the appellant's mistreatment of the victim (R.R. I-24-25). The appellant's mother testified that the victim's sister had died after repeated

hospitalizations (R.R. I-31). While the appellant claimed that the sister's death was the result of epilepsy and brain malformations, the sister's death was actually a sudden, unexplained death (R.R. I-31-32). At the end of this hearing, the trial court made a finding of guilty (R.R. I-50).

SUMMARY OF THE ARGUMENT

The evidence in this record is sufficient to show the appellant's guilt of the first-degree felony offense of attempted capital murder. The appellant stipulated to the attempted intentional killing of her baby. A medical professional testified to viewing the appellant attempt to intentionally kill her baby. The trial court also took judicial notice of all of the information that was in the clerk's file. All of this occurred before the trial judge entered his ultimately finding of guilt and before he entered and signed the judgment in this case. It does not matter that some of this evidence was presented at the same hearing during which the pre-sentence investigation report was introduced. Consequently, the appellant's life sentence is not illegal, and the appellant's trial attorney did not render ineffective assistance of counsel in failing to object to that otherwise legal sentence. And no error was preserved with regard to the absence of an intelligence quotient or adaptive behavior score in the appellant's psychological evaluation.

REPLY TO ISSUE FOR REVIEW ONE

Under her first issue for review, the appellant claims that the evidence is insufficient to support her conviction for attempted capital murder because a necessary element of the offense was not both introduced and accepted. The appellant claims that the evidence is insufficient to support her conviction based upon her plea of guilty and accompanying stipulation because the indictment and the resulting judicial confession did not contain the age of the victim (appellant's brief at 32-34).

Traditional standards of sufficiency review do not apply to non-capital felony cases in which the defendant has pleaded guilty or nolo contendere. *Tijerina v. State,* 264 S.W.3d 320, 322 (Tex. App.—San Antonio 2008, pet. ref'd) (citing *Ex parte Martin,* 747 S.W.2d 789, 791 (Tex. Crim. App. 1988); *Ex parte Williams,* 703 S.W.2d 674, 682 (Tex. Crim. App. 1986)). The entry of a valid guilty plea 'has the effect of admitting all material facts alleged in the formal criminal charge, and the State is no longer constitutionally required to prove guilt beyond a reasonable doubt. *Williams,* 703 S.W.2d at 682; *Tijerina,* 264 S.W.3d at 322-23.

Under TEX. CODE CRIM. PROC. ANN. art. 1.15 (West 2016), the State is, however, required to introduce evidence into the record to support the guilty plea. *Tijerina,* 264 S.W.3d at 323. And the State's supporting evidence must embrace every essential element of the offense charged. *Tijerina,* 264 S.W.3d at 323 (citing *Stone v.*

State, 919 S.W.2d 424, 427 (Tex. Crim. App. 1996)). While a plea of guilty is an admission of guilt of the offense charged,' a conviction on such a plea is not authorized unless there is evidence offered to support such plea and the judgment to be entered. *Tijerina,* 264 S.W.3d at 323 (citing *Dinnery v. State,* 592 S.W.2d 343, 351 (Tex. Crim. App. 1980)).

The appellant's first issue for review is premised upon the absence of a reference to the victim's age in the indictment (C.R. 32, 58)[2] and the consequent absence of a reference to the victim's age in the plea papers and the stipulation (C.R. 48-49). However, by the time that the trial judge entered his finding of guilt in this case (R.R. I-50), Dr. Girardet had already testified as to the age of the victim—well under the required statutory age of ten years (R.R. I-6). In that respect, and as noted by the appellant (appellant's brief at 37-41), it is well settled that evidence adduced at a sentencing hearing may suffice to substantiate a guilty plea. *Jones v. State,* 373 S.W.3d 790, 793 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Menefee v. State,* 287 S.W.3d 9, 18-19 (Tex. Crim. App. 2009)).

The appellant in fact concedes that evidence presented at what she calls the sentencing hearing reveals the requisite age of the victim in this case (appellant's brief

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[2] By failing to object to any deficiency in the indictment, the appellant has waived any complaint regarding any such deficiency. *See Limas v. State,* 941 S.W.2d 198, 202-03 (Tex. App.—Corpus Christi 1996, pet. ref'd) (indictment for attempted capital murder failed to allege aggravating circumstance that elevated the murder to capital murder). *Cf. also Caldwell v. State,* 971 S.W.2d 663, 666 (Tex. App.—Dallas 1998, pet. ref'd) (same or similar holding with regard to solicitation of capital murder).

at 41-42); however, the appellant claims that this evidence was not accepted by the trial court, as required by TEX. CODE CRIM. PROC. ANN. art. 1.15 (West 2016) (appellant's brief at 42-49). The appellant cites to and quotes directly from that portion of the record in which the trial court actually made a finding of guilty in this case (R.R. I-50), but she does not specifically acknowledge it (appellant's brief at 48). Rather, the appellant appears to be under the impression that, at the January 27 hearing, the trial judge was only deciding whether to place the appellant on "deferred adjudication" community supervision (appellant's brief at 46-48). The record does not support such an assertion.

At the hearing on the appellant's plea of guilty, the trial judge deferred a finding of guilt after having admonished the appellant that she was subject to the full range of punishment for a first-degree felony (C.R. 66-67).[3] The trial judge did not make his finding of guilt until the end of the hearing on January 27, 2016 (R.R. I-50), which is the date that the judgment in this case was signed and entered (C.R. 70-71). And in light of the punishment that was ultimately assessed in this case, and in light of the remarkably heinous nature of the facts of the appellant's crime, it is doubtful that the trial judge was ever giving any serious consideration to deferred adjudication.

The case law does not support the appellant's hyper-vigilant reading of Article 1.15. As noted by the Fourteenth Court of Appeals,

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[3] As opposed to a second-degree felony, as claimed by the appellant. *Compare* TEX. PEN. CODE ANN. § 12.32 (West 2016) *with* TEX. PEN. CODE ANN. § 12.33 (West 2016).

> Article 1.15 prescribes no set form for the court's written approval of a defendant's waiver and consent and requires neither the court's signature nor that written approval be included on the same instrument which constitutes the waiver and consent. In his concurring opinion in *Morris v. State,* Presiding Judge Onion said:
>
> > It was obviously the legislative purpose not to permit stipulated evidence to be used in proceedings under Article 1.15, supra, unless the same was approved by the trial judge . . . . In the instant case, it is clear that in permitting the plea of guilty to proceed where stipulated testimony was being utilized, the trial court was of necessity giving his approval, **and the entry of the written judgment approved by the court would certainly seem to satisfy the requirements of the statute.**
>
> 483 S.W.2d 260, 263 (Tex. Cr. App. 1972). Guided by Judge Onion's sound reasoning, we hold that the above quoted language of the written judgment filed in the papers of the cause suffices to show the court's approval of Appellant's written waiver and consent to stipulation of evidence as required by article 1.15.

Willhoite v. State, 642 S.W.2d 531, 534 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (emphasis added). *See also Thomas v. State,* 681 S.W.2d 672, 675 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd); *Smith v. State,* 754 S.W.2d 307 (Tex. App.—Austin 1988, no pet.).

A review of the record in this case clearly shows the appellant's guilt of the offense of attempted capital murder. *See Stewart v. State,* 12 S.W.3d 146, 148-49 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (noting that the purpose of Article 1.15 is to provide a future record of support for a plea of guilty against an attack upon the conviction by way of an application for a federal writ of habeas corpus, and that the purpose of the statute as long as the appellate record reflects supporting evidence,

including that presented at the punishment stage of trial). And the appellant was not harmed by any purported failure of the trial judge to comply with Article 1.15. *See Ybarra v. State,* 93 S.W.3d 922, 926 (Tex. App.—Corpus Christi 2002, no pet.); *Whitmire v. State,* 33 S.W.3d 330, 335 (Tex. App.—Eastland 2000, no pet.); *Stewart,* 12 S.W.3d at 148-49. The appellant's first issue for review should be overruled.

REPLY TO ISSUE FOR REVIEW TWO

Under her second issue for review, the appellant claims that the trial court erred in permitting evidence presented at a sentencing hearing, including the pre-sentence investigation report, to be used to substantiate the appellant's guilt. After having conceded that evidence adduced at a sentencing hearing may suffice to substantiate a guilty plea (appellant's brief at 37-41), *see Menefee v. State,* 287 S.W.3d 9, 18-19 (Tex. Crim. App. 2009); *Jones v. State,* 373 S.W.3d 790, 793 (Tex. App.—Houston [14th Dist.] 2012, no pet.), the appellant changes course under her second issue for review and apparently urges this Court to disregard that line of case law—when a pre-sentence investigation report has been prepared. The appellant cites no authority in support of that proposition.

In *Stewart v. State,* this Court upheld the sufficiency of the evidence to support a defendant's conviction under Article 1.15 based upon the defendant's judicial

confession provided at the punishment stage of trial, and *Stewart* was a case in which a pre-sentence investigation report had been prepared. *See Stewart,* 12 S.W.3d at 147-49. As noted by this Court, "the purpose of [Article 1.15] is satisfied as long as the record reflects supporting evidence." *Stewart,* 12 S.W.3d at 148. And "Article 1.15 does not distinguish between evidence offered at the guilt/innocence phase and the punishment phase of the trial. Article 1.15 simply requires that there be evidence in "the record showing the guilt of the defendant." *Stewart,* 12 S.W.3d at 148.

The State is not urging this Court to look to the pre-sentence investigation report to support a finding of guilt of the offense of attempted capital murder. But the State is urging this Court to look to all of the evidence reflected in the record before this Court—including that presented at the hearing held on January 27, 2016—even though and without regard to whether a pre-sentence investigation report was also presented at that hearing. A review of all of that evidence clearly shows that the appellant used her hand to impede the breathing of the victim, who was only a few months old at the time, and that the appellant did so with the intent to commit the capital murder of the victim, and that the appellant's conduct amounted to more than mere preparation that tended to but failed to effect the commission of the offense of capital murder. The appellant's second issue for review should be overruled.

REPLY TO ISSUE FOR REVIEW THREE

The appellant claims that her life sentence is illegal because she was only convicted of a second-degree felony. The appellant's third issue for review is premised upon the validity of her first and second issues for review,[4] which are without merit. The appellant was clearly found guilty of the first-degree felony offense of the attempted capital murder of a young child (C.R. 70-71). The appellant was charged and indicted for that offense (C.R. 6-7, 32, 58), and the appellant pleaded guilty to that offense (C.R. 48-50, 62, 64-65). Before finding the appellant guilty (R.R. I-50; C.R. 70-71), the trial court took "judicial notice of all the information contained in the clerk's file . . ." (R.R. I-3). And—shortly thereafter—the trial judge heard evidence that the appellant impeded the breathing of the victim (who was only several months old (R.R. I-6))—to such a degree that medical professionals were forced to resuscitate the victim (R.R. I-17-23). The appellant tried to kill the victim and very nearly succeeded. The sentence imposed upon her was not illegal. It was a valid sentence for the facts of the offense charged in this case, and it was a valid sentence for the offense of which the appellant was convicted. The appellant's third issue for review should be overruled.

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[4] "For the reasons set out in Issue Number One and Issue Number Two . . ." (appellant's brief at 65).

REPLY TO ISSUE FOR REVIEW FOUR

Under her fourth issue for review, the appellant claims that her trial attorney rendered ineffective assistance of counsel because he failed to object to the appellant's illegal sentence. The appellant's fourth issue for review is premised upon the appellant's third issue for review, which in turn is premised upon the appellant's first and second issues for review. The appellant's trial attorney did not render ineffective assistance of counsel in failing to object to an allegedly illegal sentence because the appellant's sentence was not illegal. The appellant's fourth issue for review should be overruled.

REPLY TO ISSUE FOR REVIEW FIVE

Under her fifth issue for review, the appellant claims that the trial court erred in proceeding with sentencing because the appellant's psychological evaluation did not contain an intelligence quotient or adaptive behavior score. As noted by the appellant, Texas appellate courts—including this Court—have routinely held that a defendant will forfeit any complaint concerning a psychological evaluation by failing to raise the complaint at trial. *See, e.g., Morris v. State,* ___ S.W.3d ___, No. 01-14-00511-CR, 2016 WL 3438228 at *4 (Tex. App.—Houston [1st Dist.], June 21, 2016, pet. ref'd); *Brand v. State,* 414 S.W.3d 854, 856 (Tex. App.—Houston [1st Dist.] 2013,

pet. ref'd); *Welch v. State,* 335 S.W.3d 376, 382 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). In light of the fact that no objection was raised to the absence of an intelligence quotient or adaptive behavior score in the appellant's psychological evaluation, no error has been preserved for the purposes of appeal. The appellant's fifth issue for review should be overruled.

CONCLUSION

It is respectfully submitted that all things are regular and that the conviction should be affirmed.

DEVON ANDERSON
District Attorney
Harris County, Texas

/s/ ***Alan Curry***

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this computer-generated document has a word count of 4,594 words, based upon the representation provided by the word processing program that was used to create the document.

/s/ ***Alan Curry***

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been mailed to the appellant's attorney at the following address on September 21, 2016:

Ted Wood
Attorney at Law
1201 Franklin, 13th Floor
Houston, Texas 77002

/s/ ***Alan Curry***

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Date: September 21, 2016

Appendix H

Affidavit of Thomas Lewis, Exhibit 2 of Cynthia Wood's Memorandum of Law in support of her 11.07 Petition for Writ of Habeas Corpus (Sep. 28, 2021).

EXHIBIT 2

	§	**In the 351st District Court**
	§	
Ex parte Cynthia K. Wood	§	
	§	
	§	**Harris County, Texas**

AFFIDAVIT – THOMAS LEWIS

1. My name is Thomas Lewis. I am over 18 years of age and I am fully competent to make this affidavit. I have personal knowledge of the matters that follow. Every statement herein is within my personal knowledge and is true and correct, to the best of my recollection.
2. The 351st District Court appointed me to represent Ms. Wood in February 2015.
3. I met with Ms. Wood several times during the course of the case, both at court and in the jail.
4. There was no plea offer from the State in this case.
5. I discussed the options of trial and pleading guilty with Ms. Wood.
6. I believed her case was not a good trial case, in particular because of the videotape recording of her and her son at the hospital.
7. I recommended pleading guilty as the better option.
8. I also discussed the case with Cynthia's mother, Ms. Tammy Morales, before the plea and before the sentencing hearing. I do not recall the specifics of the conversation.
9. I reviewed Dr. Mark Moeller's evaluation report and discussed it with him. I do not recall the specifics of the conversation or of his report, other than that he found her competent to stand trial.

Mr. Thomas Lewis

OATH BEFOR A NOTARY PUBLIC

_____, being duly sworn, under oath says:
"I am the affiant in this affidavit and know the contents of it; according to my belief, the facts stated in the affidavit are true and correct."

SUBSCRIBED AND SWORN TO BEFORE ME on the 2nd day of September 2021.

Michelle D. Romero
Notary Public

OFFICIAL SEAL
Michelle D. Romero
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires: 8/13/2022

Appendix I

Affidavit of Dr. Mark Moeller, Exhibit 3 of Cynthia Wood's Memorandum of Law in support of her 11.07 Petition for Writ of Habeas Corpus (Aug. 10, 2021)

EXHIBIT 3

	§	**In the 351st District Court**
	§	
Ex parte Cynthia K. Wood	§	
	§	
	§	**Harris County, Texas**

AFFIDAVIT

1. My name is Dr. Mark Stephen Moeller. I am over 18 years of age and I am fully competent to make this affidavit. I have personal knowledge of the matters stated herein because this affidavit describes my education and training, as well as the work I performed in the criminal case involving Ms. Cynthia Wood. Every statement herein is within my personal knowledge and is true and correct.

2. I am a medical doctor with over 30 years of experience. I specialize in forensic psychiatry, general psychiatry, and neurology. I have treated countless patients as a private physician.

3. I have provided medical/psychiatric services in over 1,000 criminal cases, for both the defense and prosecution.

4. In 2015, I performed a forensic psychiatric evaluation of Ms. Cynthia Wood. I visited Ms. Wood on two occasions, reviewed her jail medical records, viewed the video of the alleged offense, and discussed the case with her attorney, Mr. Thomas Lewis.

5. I did not review Ms. Wood's son's medical records at that time.

6. Following the visits with Ms. Wood and my review of related materials, I created a written report with my conclusions/opinions. I found Ms. Wood competent to stand trial. I also suggested the diagnosis of Factitious Disorder Imposed on Another ("FDIA") for Ms. Wood; however, I noted that "it is not possible for me to render an opinion as to whether" FDIA was appropriate without also reviewing the medical records of her son (the alleged victim).

7. After issuing the report of my evaluation, Ms. Wood's trial attorney Mr. Lewis did not provide me with Wood's son's medical records, nor did he ask me to review said records to form an opinion as to whether FDIA was an appropriate diagnosis for Ms. Wood. The matter was not pursued with me, and the report concluded my work on Ms. Wood's case at that time.

8. If Ms. Wood's trial attorney Mr. Lewis had asked me to review the son's

medical records/pursue the FDIA diagnosis, I would have reviewed them and could have formed an opinion as to the FDIA diagnosis.

9. In 2021, Mr. Nicholas Vitolo contacted me regarding Ms. Wood's case and my report. Mr. Vitolo was specifically interested in the suggested FDIA diagnosis and whether it would still be possible for me to form an opinion as to FDIA from reviewing Ms. Wood's son's medical records.

10. I confirmed that I would still be able to form an opinion as to FDIA for Ms. Wood at the time of the offense if I could review her son's medical records.

11. Mr. Vitolo provided me with medical records for Ms. Wood's son from LBJ Hospital, Memorial Hermann Hospital, and Texas Children's Hospital. These records cover her son's medical history through to around the time of the event leading to Ms. Wood's arrest. Mr. Vitolo also provided me Ms. Wood's Instagram communications from before the event, which I had not seen before.

12. As explained in my Psychiatric Re-evaluation report (dated 07/15/2021), it is my medical opinion that Ms. Wood meets the DSM-5 criteria for FDIA, as well as general personality and depressive disorders.

13. Generally, an intent to kill the victim is inconsistent with FDIA. Specifically to this case (and as explained in my report), an intent to kill would be "counter-intentional" and "unexpected" for Ms. Wood. I believe that it is unlikely that Ms. Wood intended to kill her son.

Dr. Mark S. Moeller, MD

OATH BEFOR A NOTARY PUBLIC, HARRIS COUNTY TEXAS

Mark S Moeller, MD, being duly sworn, under oath says:
"I am the affiant in this affidavit and know the contents of it; according to my belief, the facts stated in the affidavit are true and correct."

SUBSCRIBED AND SWORN TO BEFORE ME on the 10th day of August, 2021.

CARMEN SERRANO FERGUSON
Notary ID #125780715
My Commission Expires
July 31, 2022

Notary Public in and for
Harris County, TX

Appendix J

Applicant's Motion Requesting Designation of Issues, *Ex parte Wood,* No. 1445251-A, Nov. 24, 2021

No. 1445251-A

EX PARTE	§	IN THE 351ST DISTRICT COURT
	§	
	§	
	§	
CYNTHIA KAYE WOOD	§	OF HARRIS COUNTY, TEXAS

APPLICANT'S MOTION REQUESTING DESIGNATION OF ISSUES

TO THE COURT:

CYNTHIA KAYE WOOD, Applicant, requests that the Court designate the following issues for resolution pursuant to article 11.07, section 3(d), Texas Code of Criminal Procedure:

1. Whether the Applicant was denied the effective assistance of counsel at the guilt-innocence phase of her case.

2. Whether the Applicant's guilty plea was involuntary.

Respectfully submitted,

/s/ Bob Wicoff
Bob Wicoff
Assistant Public Defender
State Bar of Texas No. 21422700
1201 Franklin Street, 13th floor
Houston Texas 77002
bob.wicoff@pdo.hctx.net
Phone: (713) 274-6781/Fax: (713)-368-9278

Attorney for Applicant,
Cynthia Kaye Wood

Certificate of Service

Pursuant to Tex. R. App. P. 9.5, the undersigned counsel certifies that on November 24, 2021, a copy of the foregoing was emailed to counsel for the state (through texfile.com) at the following address:

Stephen Nichols
Assistant District Attorney
Nichols_Stephen@dao.hctx.net

/s/ Bob Wicoff
Bob Wicoff

Appendix K

Order Designating Issues, *Ex parte Wood,* No. 1445251-A, Dec. 6, 2021

No. 1445251-A

EX PARTE	§	IN THE 351ST DISTRICT COURT
	§	
	§	
	§	
CYNTHIA KAYE WOOD	§	OF HARRIS COUNTY, TEXAS

ORDER DESIGNATING ISSUES

Pursuant to article 11.07, section 3(d), Texas Code of Criminal Procedure, the Court designates the following issues for resolution:

1. Whether the Applicant was denied the effective assistance of counsel at the guilt-innocence phase of her case.

2. Whether the Applicant's guilty plea was involuntary.

The Clerk shall send a copy of this Order to the Court of Criminal Appeals but shall not send any other documents to that court until ordered to do so.

SIGNED AND ENTERED on _____, 2021.

Signed:
12/6/2021

JUDGE PRESIDING
351st District Court