

No. _____

**In the
Supreme Court of the United States**

ANTHONY CARDELL HAYNES,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

PETITION FOR WRIT OF CERTIORARI

APPENDICES

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APPENDIX A

733 Fed.Appx. 766

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

Anthony Cardell HAYNES, Petitioner-Appellant

v.

Lorie DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee

No. 15-70038

Filed May 8, 2018

Synopsis

Background: Texas death-row inmate petitioned for federal writ of habeas corpus. The United States District Court for the Southern District of Texas denied petition, 2007 WL 268374, and denied petitioner's motion for relief from judgment, 2012 WL 4739541. Petitioner appealed. The Court of Appeals denied petitioner's application for certificate of appealability and his motion for stay of execution, 489 Fed.Appx. 770. The Supreme Court granted petitioner a stay of execution, vacated, and remanded to District Court. The District Court, Sim Lake, J., 2015 WL 6016831, again denied petitioner's motion for relief from judgment. Petitioner appealed.

The Court of Appeals, Edith Brown Clement, Circuit Judge, held that petitioner failed to establish that there were extraordinary circumstances warranting relief from denial of his habeas petition.

Affirmed.

James L. Dennis, Circuit Judge, wrote dissenting opinion.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:05-CV-3424

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Before DENNIS, CLEMENT, and SOUTHWICK, Circuit Judges.

Opinion

EDITH BROWN CLEMENT, Circuit Judge: *

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

*767 Petitioner Anthony Cardell Haynes appeals the district court's denial of his motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). For the reasons stated below, we AFFIRM.

I

Haynes was convicted by a jury of murdering an off-duty police officer and sentenced to death. He was denied state habeas relief in 2004 and federal habeas relief in 2007. In Haynes' initial federal habeas petition, he contended that his trial counsel was constitutionally deficient under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), because counsel failed to investigate and present available mitigating evidence at the penalty phase of his capital trial. Haynes also alleged that his state habeas counsel was ineffective, in part because counsel neglected to present several meritorious constitutional claims on appeal. The district court found that Haynes' claims—including the relevant ineffective assistance of trial counsel ("IATC") claims—were unexhausted and procedurally barred; the district court alternatively rejected his claims on the merits. This court ultimately denied Haynes' appeal, *see Haynes v. Thaler*, 438 Fed.Appx. 324 (5th Cir. 2011), the Supreme Court denied certiorari review, *see Haynes v. Thaler*, 566

U.S. 964, 132 S.Ct. 1969, 182 L.Ed.2d 822 (2012), and the state set his execution date for October 18, 2012.

Haynes proceeded to file a motion for relief from judgment in the district court pursuant to Rule 60(b) (6). He claimed that the Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012)—which held that inadequate assistance of counsel at state collateral proceedings may establish cause for procedural default of an IATC claim—constituted an “extraordinary circumstance” warranting relief from judgment. The district court denied the motion on several bases: (1) based on *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012), the equitable exception announced in *Martinez* did not apply to Texas prisoners; (2) *Martinez* was merely a change in law and did not constitute an “extraordinary circumstance”; (3) relief was unnecessary because Haynes' IATC claims had actually been adjudicated—and rejected—on the merits; and (4) even if *Martinez* was applicable, Haynes could not demonstrate “actual prejudice” arising from his state habeas counsel's failure to raise his IATC claim on collateral review.

This court denied Haynes' application for a certificate of appealability and his motion for a stay of execution, agreeing with the district court that *Ibarra* controlled. See *Haynes v. Thaler*, 489 Fed.Appx. 770 (5th Cir. 2012). The Supreme Court ultimately granted Haynes a stay of execution. See *Haynes v. Thaler*, 568 U.S. 970, 133 S.Ct. 498, 184 L.Ed.2d 311 (2012). *768 Following its decision in *Trevino v. Thaler*, 569 U.S. 413, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013)—which held that *Martinez* does in fact apply to Texas prisoners—the Supreme Court vacated and remanded the case, and this court remanded to the district court for reconsideration of Haynes' Rule 60(b) motion in light of *Trevino*. The district court again denied Haynes' motion, standing by its three alternative, and independently adequate, grounds for rejecting Haynes' claims: (1) the change in decisional law does not, by itself, constitute an “extraordinary circumstance” warranting relief; (2) the court had already considered the underlying merits of Haynes' claims and found no basis for relief; and (3) Haynes failed to demonstrate actual prejudice stemming from state habeas counsel's failure to raise his IATC claim. This appeal follows.

II

This court reviews a denial of a Rule 60(b) motion for abuse of discretion. *Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir. 2013). Under this standard, “[i]t is not enough that the granting of relief might have been permissible, or even warranted[—]denial must have been so unwarranted as to constitute an abuse of discretion.” *Id.* (quoting *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)).

III

Rule 60(b) provides generally that the court may relieve a party from a final judgment, order, or proceeding in the event of obvious error such as mistake or inadvertence, newly discovered evidence, or fraud. See Fed. R. Civ. P. 60(b)(1)-(3). Rule 60(b)(6), often referred to as the “catchall” provision, also permits the court to relieve a party from judgment for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). This court has cautioned, however, that “[t]he desire for a judicial process that is predictable mandates caution in reopening judgments.” *Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir. 1998) (quoting *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990)). Accordingly, relief under Rule 60(b) (6) is only appropriate upon a showing of “extraordinary circumstances.” *Rocha v. Thaler*, 619 F.3d 387, 400 (5th Cir. 2010). The Supreme Court has stated that “[s]uch circumstances will rarely occur in the habeas context.” *Gonzalez v. Crosby*, 545 U.S. 524, 535, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). Furthermore, a change in decisional law does not, on its own, constitute an “extraordinary circumstance” warranting relief from judgment. *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (citing *Bailey*, 894 F.2d at 160); see also *Gonzalez*, 545 U.S. at 536, 125 S.Ct. 2641. “[T]his rule applies with equal force in habeas proceedings under the Antiterrorism and Effective Death Penalty Act (“AEDPA”).” *Adams*, 679 F.3d at 320 (internal quotations omitted).

In *Buck v. Davis*, the Supreme Court explained that in determining whether a petitioner has demonstrated “extraordinary circumstances,” courts may consider a “wide range of factors,” which may include “ ‘the risk of injustice to the parties’ and ‘the risk of undermining the public’s confidence in the judicial process.’ ” — U.S. —, 137 S.Ct. 759, 778, 197 L.Ed.2d 1 (2017) (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)).

). This court has articulated a number of equitable factors relevant to the Rule 60(b) inquiry:

(1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to *769 achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether if the judgment was a default or a dismissal in which there was no consideration of the merits the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Seven Elves, 635 F.2d at 402. Though we have never explicitly held that the “*Seven Elves* factors” bear on the extraordinary circumstances analysis under Rule 60(b)(6) specifically, we have used them as a guide in evaluating the strength of a motion brought pursuant to Rule 60(b)(6). See, e.g., *Diaz*, 731 F.3d at 377 (stating that “[w]e will assume *arguendo* that *Seven Elves* may have some application in the Rule 60(b)(6) context”); *Matter of Al Copeland Enters., Inc.*, 153 F.3d 268, 272 (5th Cir. 1998) (noting that several *Seven Elves* factors weighed in favor of sustaining the lower court’s grant of the party’s Rule 60(b)(6) motion).

We have recognized, however, that “in the context of habeas law, comity and federalism elevate the concerns of finality, rendering the 60(b)(6) bar even more daunting.” *Diaz*, 731 F.3d at 376 n.1. Furthermore, while the viability of a petitioner’s underlying constitutional claim may be tangentially relevant to the Rule 60(b) analysis, see, e.g., *Buck*, 137 S.Ct. at 778, the Rule may not be used to

attack “the substance of the federal court’s resolution of a claim *on the merits*.” *Gonzalez*, 545 U.S. at 532, 125 S.Ct. 2641 (emphasis added); see also *Adams*, 679 F.3d at 319. Such motions constitute improper successive habeas petitions under AEDPA. *Id.* Instead, Rule 60(b) motions must allege “some defect in the integrity of the federal habeas proceedings.” *Gonzalez*, 545 U.S. at 532, 125 S.Ct. 2641, and may challenge only erroneous rulings “which precluded a merits determination[—]for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar,” *id.* at n. 4.

Haynes acknowledges that the change in decisional law effectuated by *Martinez* and *Trevino* is insufficient, on its own, to demonstrate “extraordinary circumstances.” He maintains, however, that the balance of individual equities this court considers when reviewing a Rule 60(b) motion weighs in his favor. The gravamen of Haynes’ argument is that, because he has demonstrated that he has a substantial IATC claim and that his state habeas counsel was deficient in failing to raise it, he has established “extraordinary circumstances” warranting relief from judgment. We disagree.

First, whether “there is merit in [Haynes’] claim” only becomes a relevant factor in the Rule 60(b) analysis if “there was no consideration of the merits” below. *Seven Elves*, 635 F.2d at 402. Here, the district court reviewed the merits of Haynes’ underlying IATC claim on multiple occasions. Furthermore, as the district court has repeatedly noted, the merits of Haynes’ IATC claim are not particularly compelling.¹ Despite Haynes’ efforts to *770 demonstrate the contrary, the record indicates that Haynes’ trial counsel was more than adequate and that counsel’s penalty-phase investigation was sufficiently diligent. See *Wiggins*, 539 U.S. at 522–23, 123 S.Ct. 2527. The thrust of Haynes’ argument seems to be that there may have been a *better* mitigation strategy available to defense counsel. But this amounts to no more than a claim that a different strategy could have been “more effective,” which falls far short of the required showing that “but for counsel’s errors, the result of the proceeding would have been different.” *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007). Accordingly, even if we were to agree with Haynes that he has raised a colorable claim with respect to the adequacy of his state habeas counsel, he would still be unable to claim the benefit of *Martinez* and *Trevino*. See *Martinez*, 566 U.S. at 14, 132 S.Ct. 1309 (stating that

“to overcome [] default, a prisoner must also demonstrate that the underlying [IATC] claim is a substantial one”).

1 Although we touch briefly on the merits of Haynes’ IATC claim, as they are arguably relevant to our “extraordinary circumstances” analysis, we are precluded from conducting a comprehensive merits review. *Gonzalez*, 545 U.S. at 532, 125 S.Ct. 2641; see also *Adams*, 679 F.3d at 319. Haynes’ Rule 60(b) motion may not be used to attack the substance of the district court’s resolution of Haynes’ IATC claim on the merits or to circumvent the requirements imposed by AEDPA. *Gonzalez*, 545 U.S. at 532, 125 S.Ct. 2641.

The balance of the remaining equitable factors also weighs against granting relief under Rule 60(b)(6). In addition to considering whether the district court conducted a merits review, we also take into account the fact that “final judgments should not be lightly disturbed” and that “the Rule 60(b) motion is not to be used as a substitute for appeal.” *Seven Elves*, 635 F.2d at 402. Again, finality is a particularly strong consideration in the habeas context. See *Diaz*, 731 F.3d at 376 n. 1. Haynes was convicted by a jury in state court nearly twenty years ago. He has been litigating his claims in federal court for over a decade, and this case has gone through multiple cycles of review. As the court stated in *Diaz*, the “State’s strong interest in the finality of [Haynes’] conviction and sentence[] and the delay that will undoubtedly result from reopening this long-closed case all weigh in favor of denying [his] Rule 60(b)(6) motion.” *Id.* at 378. Moreover, to the extent that the underlying purpose of Haynes’ motion is to force this court to review the merits of his IATC claim, he is impermissibly using Rule 60(b)(6) as a “substitute for appeal.” *Seven Elves*, 635 F.2d at 402. Haynes has already received a more in-depth merits review of his claims than he was likely entitled from the district court, and his Rule 60(b)(6) motion is an improper vehicle for relitigating them.

In sum, Haynes has not demonstrated “extraordinary circumstances” warranting relief from judgment. The district court did not abuse its discretion in denying his Rule 60(b)(6) motion.

IV

For the foregoing reasons, we AFFIRM.

JAMES L. DENNIS, Circuit Judge, dissenting:

At the time of the capital crime in question, Anthony Haynes was nineteen years old, had no prior criminal record, and was apparently under the influence of drugs. At the punishment phase of his capital trial, Haynes was deprived of the opportunity to present his best defense. Haynes was deprived of the opportunity to raise his ineffective assistance of trial counsel claim in state court by what appears to have been egregiously deficient post-conviction counsel. And he was deprived of federal review of his claim by a procedural bar that the Supreme Court has since expressly lifted. The majority opinion now refuses to allow Haynes’s claim to go forward, on the theory that Haynes’s claim *771 lacks merit and that, in any event, he has already had a fair shot at litigating it. Because I believe that Haynes presents a substantial ineffective-assistance-of-trial-counsel claim that has never been properly considered and that the district court abused its discretion in failing to reopen his case, I respectfully dissent.

*

Haynes’s claim is before us on appeal from the denial of a motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), which requires Haynes to demonstrate the presence of “extraordinary circumstances.” See *Gonzalez v. Crosby*, 545 U.S. 524, 535, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). “In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. ... [including] ‘the risk of injustice to the parties’ and ‘the risk of undermining the public’s confidence in the judicial process.’ ” *Buck v. Davis*, — U.S. —, 137 S.Ct. 759, 778, 197 L.Ed.2d 1 (2017) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863–64, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)).

We review a district court’s Rule 60(b) determination deferentially, and extraordinary circumstances are just that, extraordinary. But that does not mean that a district court’s discretion is limitless, or that relief is all but impossible to obtain. See, e.g., *Buck*, 137 S.Ct. at 778. A district court “must exercise its discretion within the bounds set by ... relevant, binding precedents.” *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008). Such relevant, binding precedents here

include *Osborne v. Homeside Lending, Inc.* (*In re Osborne*), 379 F.3d 277, 283 (5th Cir. 2004), which directs that circumstances supporting Rule 60(b) relief “must necessarily be evaluated on a case-by-case basis”; *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981), which provides a non-exclusive list of factors to be considered in balancing the equities of a Rule 60(b) motion, including whether a claim is substantial, yet previously unreviewed; and *Gonzalez v. Crosby*, 545 U.S. at 537, 125 S.Ct. 2641, which recognizes the salience of diligence to Rule 60(b) motions that are premised, in part, on a change in decisional law. In this case, the district court failed to consider all of the relevant factors and misevaluated the factors it did consider. While the majority opinion at least places this case in the proper framework, it stumbles in its assessment of significant factors.

Initially, it is important to keep in mind that this case is before us because Haynes’s claim was denied merits review by a procedural bar that was lifted shortly after final judgment was entered in his federal habeas case. Through its decisions in *Martinez v. Ryan*, 566 U.S. 1, 17, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 429, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), the Supreme Court made it possible for a petitioner like Haynes to present his procedurally-barred ineffective-assistance-of-trial-counsel claim if his claim is “substantial” and if his state habeas counsel was ineffective in failing to bring the claim. See *Trevino*, 569 U.S. at 429, 133 S.Ct. 1911; *Martinez*, 566 U.S. at 17, 132 S.Ct. 1309. In so doing, the Court effected a remarkable sea change in decades-old precedent that lower courts and litigants previously understood as settled. See *Martinez*, 566 U.S. at 15, 132 S.Ct. 1309; *id.* at 23, 132 S.Ct. 1309 (Scalia, J., dissenting) (noting that *Martinez* is “a repudiation of the longstanding principle governing procedural default, which Coleman and other cases consistently applied”); *id.* at 2, 132 S.Ct. 1309 (describing *Martinez* as “a radical alteration of our habeas jurisprudence”). The change adopted in *Martinez* and expanded in *772 *Trevino* “was also important, crafted, as it was, to ensure that fundamental constitutional claims receive review by at least one court.” *Cox v. Horn*, 757 F.3d 113, 124 (3d Cir. 2014). Though not alone an “extraordinary circumstance” warranting Rule 60(b) relief, this significant change in habeas jurisprudence provides an important baseline for our review of Haynes’s particular circumstances.

The majority opinion insists that “the district court reviewed the merits of Haynes’ underlying IATC claim on multiple occasions.” Op. at 769. But, as I have previously noted, though purporting to address the merits, the district court’s opinion denying Haynes habeas relief entirely failed to engage with the specifics of Haynes’s ineffective-assistance-of-counsel claim. See *Haynes v. Stephens*, 576 Fed.Appx. 364, 366 (5th Cir. 2014) (Dennis, J. concurring). The district court addressed Haynes’s fact-intensive claim in three sentences:

[A]s noted by respondent, Haynes’ argument is essentially “not that counsels’ performance should have been better, rather, his argument is that counsel should have investigated and presented evidence at the punishment phase in a completely different manner.” The record indicates that the defense counsel (as well as the prosecution and trial court) went to great lengths to ensure that Haynes’ constitutional rights were protected and viable defenses pursued. Haynes’ allegations do not show flagrant omissions by the players involved in his trial; rather, they merely demonstrate the exercise of strategy and typify the maxim that “the Constitution entitles a criminal defendant to a fair trial, not a perfect one.”

Haynes v. Quarterman, No. H-05-3424, 2007 WL 268374, at *9 (S.D. Tex. Jan. 25, 2007) (citations omitted). The Supreme Court has rejected a similarly cursory alternative holding as insufficient to constitute review on the merits. *Cone v. Bell*, 556 U.S. 449, 474–75, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009).

And even if the district court had engaged in some meaningful merits review, Haynes did not receive full consideration of his claim because, although he sought to appeal the district court’s merits holding, this court did not grant review of that issue, instead denying a certificate of appealability on the ground that it was procedurally barred. See *Haynes v. Quarterman*, 526 F.3d 189, 194–96 (5th Cir. 2008). “A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce” to that ruling. See *U.S. Bancorp Mortg. Co. v. Bonner Mall Pshp.*, 513 U.S. 18, 25, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994). Indeed, when a district court’s judgment is based on alternative holdings and this court addresses only one of these holdings on appeal, the district court’s ruling is only conclusive as to that holding. See *Borst v. Chevron*

Corp., 36 F.3d 1308, 1314 n.11 (5th Cir. 1994) (“Because we do not consider whether or not a partial vertical (or horizontal) termination occurred, the district court’s ruling on this issue is not conclusive between the parties.”); *Dow Chem. v. EPA*, 832 F.2d 319, 323 (5th Cir. 1987) (“The federal decisions agree that once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision.”) (quoting 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 4421 (1981)). Because the final judgment as to Haynes’s ineffective-assistance-of-counsel claim rested solely on procedural grounds, the majority opinion’s suggestion that our current review is constrained by 28 U.S.C. § 2244, which applies when a *773 claim has been adjudicated on its merits, is unfounded.¹

¹ Nor was the district court’s cursory discussion of the merits at the Rule 60(b) phase a sufficient merits review. In *Buck v. Davis*, the Supreme Court held that the district court abused its discretion by declining to reopen a petitioner’s case, notwithstanding the Court’s observation that the district court had discussed the merits of the claim in its Rule 60(b) order. 137 S.Ct. at 772, 778. In any event, the district court’s alternative holdings have again deprived Haynes of appellate review of this issue.

The majority opinion further errs by dismissing Haynes’s claim as “not particularly compelling.” *See Op.* at 769. This conclusion is tenable only if, like the district court and the majority opinion, one does not actually engage with the specifics of Haynes’s ineffective-assistance claim.² In support of his contention that trial counsel’s penalty-phase investigation and presentation were unconstitutionally deficient, Haynes relies on the report of a mitigation specialist who opines that counsel’s investigation was extremely limited in depth and breadth as a function of its unreasonably late start. He also points to significant mitigation evidence amassed by federal post-conviction counsel, which trial counsel either did not discover, did not present, or both. Haynes’s evidence supports a substantial claim both that trial counsel’s penalty phase performance was deficient and that the deficiency prejudiced him.

² The majority opinion contends that “we are precluded from conducting a comprehensive merits review.” *Op.* at 769. Neither *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005), nor *Adams*

v. Thuler, 679 F.3d 312 (5th Cir. 2012), supports this assertion. However, I do agree that it is not our task at this stage to decide whether Haynes has a meritorious claim, only whether the merits of his claim are substantial.

Haynes confessed, on tape, to shooting the victim with the belief that he was a police officer. Faced with a strong case for Haynes’s guilt of capital murder, part of counsel’s defense was that Haynes may have “believed” that the victim was a police officer, but did not “know” that this was true. Because their guilt-phase argument was unlikely to be successful, reasonable counsel would have begun to focus on the penalty phase early on. *Cf. Walbey v. Quarterman*, 309 Fed.Appx. 795, 801 (5th Cir. 2009) (“Given the Texas law establishing that the facts of [defendant’s] crime are themselves legally sufficient to support a finding of future dangerousness, the virtually impossible battle that [counsel] faced on future dangerousness makes all the more unreasonable [his] failure to investigate a mitigation defense thoroughly.”).

Yet the record reflects that counsel delayed psychological evaluations until after the trial had begun. Given Haynes’s history of significant mental-health interventions, of which competent counsel should have been aware, counsel should not have waited until the last minute to solicit expert evaluations. *Cf. Escamilla v. Stephens*, 749 F.3d 380, 386, 392 (5th Cir. 2014) (granting COA on plaintiff’s ineffective-assistance-of-counsel claim where counsel, inter alia, “failed to obtain a psychological evaluation for their client until after trial began”); *Busby v. Davis*, 677 Fed.Appx. 884, 886, 893 (5th Cir. 2017) (holding that reasonable jurists could debate whether habeas petitioner had presented a viable ineffective-assistance-of-counsel claim where counsel “waited approximately nineteen months to assemble a mitigation investigation team[,] hired a mitigation specialist days before voir dire,” and hired a mental-health expert a week after voir dire started). According to Haynes’s post-conviction expert, mental-health *774 professionals would not have had sufficient time to make a reasonable assessment within the timeframe counsel’s tardy investigation allowed. Unsurprisingly, then, the trial experts’ reports were unhelpful, and extensive mental-health evidence presented by the State went unchallenged and uncontextualized.

Moreover, counsel waited until shortly before trial to conduct most lay-witness interviews. When they finally did begin their investigation, they failed to speak

to multiple character witnesses suggested by Haynes's parents and turned away witnesses who reached out to them. Several witnesses who testified at trial claimed that counsel did not properly prepare them. Trial counsel presented only a handful of mitigation witnesses, some of whom did not seem to know Haynes well.

By contrast, federal habeas counsel has presented affidavits from dozens of Haynes's friends, family, and acquaintances, representing a veritable cross-section of Haynes's community. Affidavits from two of Haynes's ex-girlfriends, in addition to affirming Haynes's good character, describe how upset and remorseful Haynes was after the shooting. Other affidavits attest that Haynes was a "good kid" and "very respectable," that he was not violent, and that he was not likely to be a future danger. Several affidavits state that Haynes was not hostile toward authority figures or police officers. An affidavit from Haynes's teacher avers that Haynes was among the best students in his school's ROTC program. There is no basis in this record to conclude that counsel's failure to present these witnesses resulted from a strategic decision when their principal mitigation theory seems to have been that Haynes was a good kid. Rather, trial counsel's mitigation presentation appears to have been needlessly and inexplicably meager.

In addition, federal habeas counsel has presented evidence of Haynes's history of mental-health problems and Attention Deficit Hyperactivity Disorder, Haynes's drug use at the time of the murder, and his low risk of future violence. Because of their late and limited investigation, trial counsel failed to present this evidence, which would have augmented Haynes's case for a life sentence in multiple, significant ways, presenting a stronger case for both mitigation and a lack of future dangerousness.

Additional details of Haynes's childhood would have shown a more complete picture of chaos and abuse, undercutting the idea that Haynes had a privileged upbringing—one of the principal themes of the prosecution's penalty-phase case. *Cf. Sears v. Upton*, 561 U.S. 945, 951, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) ("[E]vidence [of a personality disorder] might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts—especially in light of his purportedly stable upbringing."). The evidence would have presented a stronger case that Haynes was distraught and immediately

remorseful after the murder, countering another one of the prosecution's principal themes.

A robust mitigation presentation would also have revealed that Haynes was predisposed to addiction and likely high on methamphetamine on the night in question, presenting a much stronger argument to support trial counsel's theory that Haynes was a fundamentally good person whose night of violent crime was influenced by drug dependency and intoxication. *See Cone*, 556 U.S. at 475, 129 S.Ct. 1769 (vacating decision that ignored that substance addiction may be mitigating even if it is not exculpatory); *cf. Williams v. Taylor*, 529 U.S. 362, 398, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (evidence that defendant's "violent behavior was a *775 compulsive reaction rather than the product of cold-blooded premeditation" weighed in favor of prejudice). It would also have explained the interrelation of Haynes's home life, mental-health problems, behavioral problems, and substance-abuse problems, with likely repercussions for the jury's assessment of Haynes's moral blameworthiness. *See Sears*, 561 U.S. at 951, 130 S.Ct. 3259. Additional evidence would have "humanize[d]" Haynes by showing how many people in his life thought of him as a good person: As the affidavits of over forty lay witnesses show, he was well liked by his family members, friends, acquaintances, and teachers. *See Neal v. Puckett*, 286 F.3d 230, 244 (5th Cir. 2002) (en banc) (undiscovered evidence that defendant had people in his life who saw his worth contributed to finding of prejudice). Furthermore, it would have provided the jury with a better framework for assessing Haynes's risk of future violence in prison, which was likely to be low given Haynes's good behavior in institutional settings and the fact that experts thought the structure of prison would abate the risk of violence.

The majority opinion once again misrepresents the relevant legal standard by suggesting that Haynes must establish that counsel's deficient performance necessarily altered the outcome of his case. *See Op.* at 769–80. In fact, Haynes's ultimate burden is only to show "a probability sufficient to undermine confidence in that outcome." *Porter v. McCollum*, 558 U.S. 30, 44, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (cleaned up). And his only burden at this stage is to show that his claim is substantial. *See Martinez*, 566 U.S. at 14, 132 S.Ct. 1309; *Seven Elves*, 635 F.2d at 402.

“Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.” *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (cleaned up). Before the night of the offense, Haynes had no criminal record, let alone one that would portend a capital offense. Given the relatively limited case in aggravation, which mainly included Haynes’s actions the night of the murder and evidence of his mental-health problems, this was a case in which presentation of the available mitigation evidence was very likely to persuade at least one juror that Haynes was not “deserving of execution.” *See id.* In sum, Haynes has made a substantial showing with respect to the merits of his claim.

In light of the above, a proper balancing of equitable factors weighs in favor of Rule 60(b) relief: for reasons already established, Haynes’s claim is substantial yet unreviewed; his “motion was made within a reasonable time,” just months after the landmark decision in *Martinez* lifted the procedural bar to his claim; and Rule 60(b) “should be liberally construed in order to achieve substantial justice,” here, ensuring that a death penalty petitioner’s substantial ineffective assistance of trial counsel claim has been considered. *See Seven Elves*, 635 F.2d at 402.

The majority opinion repeatedly cites to finality interests, but this cannot overcome the strong showing in favor of reopening Haynes’s case. The majority opinion cites *Diaz v. Stephens*, 731 F.3d 370 (5th Cir. 2013), for the

proposition that “in the context of habeas law, comity and federalism elevate the concerns of finality, rendering the 60(b)(6) bar even more daunting.” But, as is clear from that opinion, the quoted language is a statement by one judge only, not joined by the other panel members. *See id.* at 376 n.1 (statement of Jones, J.) (“Judge Jones notes that.... in the context of habeas law, comity and federalism elevate the concerns of finality, rendering *776 the 60(b)(6) bar even more daunting.”). In any case, whatever weight this statement might carry is strongly tempered by the Supreme Court’s recent rejection of the notion that finality is the overriding concern when assessing Rule 60(b) motions in habeas cases. *Buck*, 137 S.Ct. at 779. As the Court explained, “the whole purpose of Rule 60(b) is to make an exception to finality.” *Id.* (cleaned up).

I would add that the whole purpose of federal habeas review is to make an exception to finality. Indeed, in this context, our duty to search for constitutional error is at its apex. *See Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (“Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.”). I believe Haynes’s claim deserves, but has not received, close consideration. I would hold that the district court’s ruling constituted an abuse of discretion and remand for plenary consideration of the merits of his claim. For these reasons, I respectfully dissent.

All Citations

733 Fed.Appx. 766

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70038

ANTHONY CARDELL HAYNES,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

Before DENNIS, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is *denied*.

ENTERED FOR THE COURT:

G. B. Coleman
UNITED STATES CIRCUIT JUDGE

APPENDIX C

2015 WL 6016831

Only the Westlaw citation is currently available.

United States District Court,
S.D. Texas,
Houston Division.

Anthony Cardell HAYNES, Petitioner,

v.

William STEPHENS, Director, Texas
Department of Criminal Justice, Correctional
Institutions Division, Respondent.

Civil Action No. H-05-3424.

Signed Oct. 14, 2015.

Attorneys and Law Firms

Allen Richard Ellis, Attorney At Law, Mill Valley, CA,
for Petitioner.

Jeremy C. Greenwell, Edward Larry Marshall, Office of
the Attorney General, Austin, TX, for Respondent.

MEMORANDUM OPINION AND ORDER

SIM LAKE, District Judge.

*1 In 2007 this court denied Anthony Cardell Haynes' ("Haynes") federal petition for a writ of habeas corpus challenging his Texas conviction and death sentence. The issue before the court is whether United States Supreme Court precedent requires the reopening of Haynes' federal habeas action for consideration of a procedurally barred ineffective-assistance-of-trial-counsel claim. (Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) ("Rule 60(b)(6) Motion"), Docket Entry No. 60) For the reasons provided below, the court finds that Haynes has not shown that he is entitled to relief from judgment.

I. Background

In 1998 Haynes shot and killed off-duty Houston Police Department Officer Kent Kincaid. The State of Texas charged Haynes with capital murder. A jury found him guilty. He received a death sentence. Haynes

unsuccessfully availed himself of Texas state appellate and habeas review. Haynes filed a 456-page federal Petition for Writ of Habeas Corpus ("Petition") in 2005 (Docket Entry No. 1). Among the 23 claims in his Petition, some of which raised numerous subclaims, Haynes argued that trial counsel provided ineffective representation under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in the preparation and presentation of mitigating evidence. Haynes submitted numerous affidavits from individuals whom he wished trial counsel had called to testify in the penalty phase.

Haynes raised most of his claims for the first time in federal court, including his *Strickland* claim. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") precludes federal relief unless "the applicant has exhausted the remedies available in the courts of the State ..." 28 U.S.C. § 2254(b)(1)(A). Haynes made two primary arguments relating to the procedural deficiencies in his Petition. First, Haynes asked the court to allow a return to state court to exhaust his claims under *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). Second, Haynes argued that he could overcome the procedural bar of his unexhausted claims by showing cause and actual prejudice under *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). Haynes specifically argued that state habeas counsel's failure to advance his federal *Strickland* claim should allow for plenary review.

In 2007 this court entered a Memorandum Opinion and Order denying relief (Docket Entry No. 19). The court found that Haynes had not made a showing sufficient to authorize staying his federal action.¹ The court also relied on Fifth Circuit precedent and held that "ineffective assistance of habeas counsel cannot provide cause for a procedural default." (Docket Entry No. 19 at 18) (quotation and citations omitted) Thus, federal law barred this court from granting relief on Haynes' unexhausted claims.

¹ The court specifically denied his request for a *Rhines* stay for several reasons: Haynes waited until the case became ripe to ask for a stay; he could easily have exhausted his claims earlier; the state courts would find any successive habeas action an abuse of the writ, making a stay futile; and Haynes had not "made a compelling showing that, if presented to the state

courts, his unexhausted claims would entitle him to habeas relief.” (Docket Entry No. 19 at 15–16)

In the alternative, the court reviewed the merits of the barred claims.² With special attention to his *Strickland* claim, the court summarized:

- 2 “An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(2).

*2 Most of Haynes' unexhausted claims involve unresolved factual issues. Primarily, those claims attack trial counsel's efforts, but also charge the prosecution with misconduct. Haynes has apparently spent a significant amount of time developing the factual basis for these claims and has devoted a considerable portion of his already-lengthy petition on those issues. Without addressing the individual basis for each unexhausted, factually dependant claim, the court notes that none of his arguments facially command habeas relief.

Particularly, Haynes has taken great pains to develop evidence that he alleges trial counsel should have presented at trial. Yet, as noted by respondent, Haynes' argument is essentially “not that counsel's performance should have been *better*, rather, his argument is that counsel should have investigated and presented evidence at the punishment phase in a completely *different* manner.” (Docket Entry No. 10 at 29) The record indicates that the defense counsel (as well as the prosecution and trial court) went to great lengths to ensure that Haynes' constitutional rights were protected and viable defenses pursued. Haynes' allegations do not show flagrant omissions by the players involved in his trial; rather, they merely demonstrate the exercise of strategy and typify the maxim that “the Constitution entitles a criminal defendant to a fair trial, not a perfect one.” *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). If the constraints of federal review did not command that Haynes first give the state courts an opportunity to adjudicate his claims of error, this court would still not issue a habeas writ.

(Docket Entry No. 19 at 21–22) As to his claims that were fully available for federal review, the court concluded that Haynes had not met the AEDPA's requirements for habeas relief.

Haynes unsuccessfully moved to alter or amend judgment under FED. R. CIV. P. 59(e). (Docket Entry Nos. 21, 22) Haynes then unsuccessfully pursued appellate relief.³

- 3 Haynes' federal Petition asserted that the prosecution used its peremptory challenges in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). After granting a Certificate of Appealability on that ground, the Fifth Circuit reversed this court's denial of the *Batson* claim. *See Haynes v. Quarterman*, 561 F.3d 535 (5th Cir.2009). Subsequent review in the United States Supreme Court, however, reinstated this court's judgment. *Thaler v. Haynes*, 559 U.S. 43, 130 S.Ct. 1171, 175 L.Ed.2d 1003 (2010).

On the eve of a pending execution date, Haynes filed a Rule 60(b) (6) Motion in this court. (Docket Entry No. 60) Haynes based his motion on the Supreme Court's decision in *Martinez v. Ryan*, — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). The *Martinez* Court found that deficient performance by a state habeas attorney may amount to cause to forgive a procedural bar under some circumstances. The *Martinez* Court held:

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

Martinez, 132 S.Ct. at 1320. Haynes argued his state habeas attorney's failure to raise the procedurally barred *Strickland* claim that he included in his federal Petition should provide an avenue for federal review.

- *3 The court provided four reasons for denying Haynes' Rule 60(b) (6) Motion. First, the court followed then-current Fifth Circuit precedent holding that *Martinez* did not apply to federal habeas cases arising from Texas convictions. Starting with *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir.2012), the Fifth Circuit had issued a series of decisions distinguishing Texas's habeas review from that giving rise to the *Martinez* decision. *See Foster v. Thaler*, 2012 WL 4328336 (5th Cir. Sept.21, 2012) (unpublished);

Newbury v. Thaler, 2012 WL 3032718, at *1 (5th Cir. July 26, 2012) (unpublished); *Ayestas v. Thaler*, 2012 WL 2849487, at *1 (5th Cir. July 11, 2012) (unpublished); *Gates v. Thaler*, 2012 WL 2305855, at *6 (5th Cir. June 19, 2012) (unpublished).

Second, the court found that the advent of *Martinez* itself did not require reopening Haynes' case. The court relied on *Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir.2012), which held that “the *Martinez* decision is simply a change in decisional law and is ‘not the kind of extraordinary circumstance that warrants relief under Rule 60(b)(6).’”

Third, the court observed that the prior Memorandum Opinion and Order “ha[d] already reviewed the merits of Haynes' *Strickland* claim in the alternative and found it to be without merit.” (Docket Entry No. 62 at 10) The court stated that it “has already granted Haynes the relief he now requests: The court considered the merits of his barred claims. While Haynes may disagree with the earlier adjudication, the relief requested has already been granted.” (Docket Entry No. 62 at 10)

Finally, the court observed that even under the *Martinez* framework Haynes could not overcome the procedural bar merely by showing that habeas counsel's representation provided “cause.” Haynes would still need to show “actual prejudice.” The court again reviewed Haynes' defaulted claim and, placing it into the context of trial, found that any deficiency caused by habeas counsel's not raising the unexhausted claim did not result in “actual prejudice.” (Docket Entry No. 62 at 10–13)

The Fifth Circuit affirmed this court's denial of post-judgment relief, emphasizing that *Martinez* did not apply to cases arising from Texas courts. *Haynes v. Thaler*, 489 F. App'x 770 (5th Cir.2012). The Supreme Court stayed Haynes' execution. *Haynes v. Thaler*, — U.S. —, 133 S.Ct. 498, 184 L.Ed.2d 311 (2012). Later that term the Supreme Court decided *Trevino v. Thaler*, — U.S. —, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), which held that *Martinez* does apply to Texas convictions. The Supreme Court later vacated the judgment in this case and remanded for further consideration in light of *Trevino*. *Haynes v. Thaler*, — U.S. —, 133 S.Ct. 2764, 186 L.Ed.2d 214 (2013).⁴

⁴ This procedure—granting the certiorari petition, vacating the judgment below, and remanding the

case—is often referred to by the acronym “GVR.” See *Greene v. Fisher*, — U.S. —, —, 132 S.Ct. 38, 45, 181 L.Ed.2d 336 (2011); *Wellons v. Hall*, 558 U.S. 220, 130 S.Ct. 727, 731, 175 L.Ed.2d 684 (2010). The Supreme Court issues a GVR “[w]here intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation ... is ... potentially appropriate.” *Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 607, 133 L.Ed.2d 545 (1996). Yet, a GVR order is not a reversal on the merits, see *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 2478, 2484 n. 6, 150 L.Ed.2d 632 (2001), and “does not necessarily imply that the Supreme Court has in mind a different result in the case, nor does it suggest that [the circuit court's] prior decision was erroneous.” *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 845 (6th Cir.2013).

On July 28, 2014, the Fifth Circuit entered an order remanding the case. See *Haynes v. Stephens*, 576 F. App'x 364 (5th Cir.2014). In doing so, the Fifth Circuit declined to order a full merits review of Haynes' procedurally barred claim:

*4 A district court's discretion when considering Rule 60(b)(6) motions is “especially broad,” *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir.1992), and subject only to “limited and deferential appellate review,” *Gonzalez v. Crosby*, 545 U.S. 524, 535, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). Accordingly, given our limited role in reviewing Rule 60(b)(6) orders, we return this case to the district court without additional advisory instructions as to how to exercise its discretion when considering whether Haynes meets the prerequisites for obtaining relief under Rule 60(b)(6). See, e.g., *id.* (setting out the standard for determining whether Rule 60(b)(6) motions should be granted).

Id. at 365.

The parties have provided briefing after remand. (Docket Entry Nos. 82, 85, 88) The parties agree that the instant question is whether *Martinez* provides a basis to reopen judgment under Fed. R. Civ. P. 60(b) to consider Haynes' claim that trial counsel provided ineffective representation during the punishment phase of trial. The recent briefing is sufficient to decide the matters before the court without additional legal argument or factual development.

II. Discussion

Rule 60(b) allows for relief from judgment under six enumerated circumstances. Haynes specifically moved for relief from judgment under Rule 60(b)(6)'s "catchall provision" *Solis v. Dretke*, 436 F. App'x 303, 306 (5th Cir.2011). Because the Fifth Circuit has "consistently held that relief under 60(b)(6) is mutually exclusive from relief under sections (1)(5)," *Hesling v. CSX Transportation, Inc.*, 396 F.3d 632, 643 (5th Cir.2005), the court will limit its review to the circumstances allowing for relief from judgment under that section.

Rule 60(b)(6) strikes a balance "between the desideratum of finality and the demands of justice." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir.1981). Rule 60(b)(6) is "an extraordinary remedy" and "[t]he desire for a judicial process that is predictable mandates caution in reopening judgments." *Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir.1998) (quoting *Bailey v. Ryan Stevedoring Co., Inc.*, 894 F.2d 157, 160 (5th Cir.1990)). Rule 60(b)(6) motions "will be granted only if extraordinary circumstances are present." *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir.2002).

A. Fifth Circuit Precedent

As discussed above, the court previously relied on four factors to deny Haynes' Rule 60(b)(6) Motion. The Supreme Court subsequently overruled the Fifth Circuit's *Ibarra* precedent and held that *Martinez* applies to cases arising from the Texas courts. Therefore, the court's first reason for denying the Rule 60(b)(6) Motion is no longer valid. The court, however, relied on three other reasons for denying Haynes' Rule 60(b)(6) Motion. The briefing after remand has not undercut the other three reasons that independently required denial of post-judgment relief.⁵

5 Generally, a district court evaluating a motion for relief from judgment considers the seven factors from *Seven Elves*, 635 F.2d at 396:(1) final judgments should not lightly be disturbed; (2) a Rule 60(b) motion should not be used as a substitute for appeal; (3) the rule should be liberally construed in order to achieve substantial justice; (4) if the case was not decided on its merits due to a default or dismissal, the interest in deciding the case on its merits outweighs the interest in the finality of the judgment and there is merit in the claim or defense; (5) whether, if the judgment was rendered on the merits, the movant had a fair opportunity to present his claims; (6) whether there are intervening equities that would make it inequitable to grant relief; and (7) any other factors relevant to the justice of the judgment under attack. *Id.* at 402. The Fifth Circuit, however, has "declined to answer whether *Seven Elves* sets the standard for a Rule 60(b)(6) motion in habeas proceedings." *Buck v. Stephens*, — F. App'x —, 2015 WL 4940823, at *4 (5th Cir. Aug.20, 2015). In *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir.2013), the Fifth Circuit considered the *Seven Elves* factors and observed that the district court had rejected a portion of the inmate's *Strickland* claim: "the general expectation that final judgments will not be lightly overturned; the State's strong interest in the finality of Diaz's conviction and sentence; and the delay that will undoubtedly result from reopening this long-closed case" all would "weigh in favor of denying [the] Rule 60(b)(6) motion." 731 F.3d at 378. While Haynes argues that he defaulted a stronger *Strickland* claim than that in *Diaz*, this court would reach the same result as in that case if applying the *Seven Elves* factors.

B. Exceptional Circumstances

*5 The court's second reason for denying the Rule 60(b)(6) Motion was that "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment." *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir.1990) (citations omitted). Even in habeas cases, courts have found that the AEDPA's concerns for comity and finality override any interest in applying new decisional law through a Rule 60(b)(6) motion. *See Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641, 2651–52, 162 L.Ed.2d 480 (2005); *Hernandez v. Thaler*, 630 F.3d 420, 430 (5th Cir.2011); *Hess*, 281 F.3d at 216. The Supreme Court's decision in *Trevino* has not altered the Fifth Circuit's jurisprudence that *Martinez* was

not a change in decisional law “that warrants relief under Rule 60(b).” *Hall v. Stephens*, 579 F. App’x 282, 283 (5th Cir.2014); *see also Buck*, — F. App’x at —, 2015 WL 4940823, at *5; *Pruett v. Stephens*, 608 F. App’x 182, 185 (5th Cir.) *cert. denied*, — U.S. —, 135 S.Ct. 1919, 191 L.Ed.2d 782 (2015); *In re Paredes*, 587 F. App’x 805, 825 (5th Cir.2014); *Diaz*, 731 F.3d at 376. The Fifth Circuit has also characterized the *Trevino* decision as “hardly extraordinary.” *Id.* While Haynes’ briefing disagrees with the Fifth Circuit’s holdings, this court is bound to follow precedent.

Haynes invites the court to look beyond the mere advent of the *Martinez* and *Trevino* decisions, arguing that the new law is not “the *sole* extraordinary circumstance” that would permit the reopening of his judgment. (Docket Entry No. 82 at 37) But Haynes does not clearly establish what distinguishes his post-judgment motion from those in which the Fifth Circuit found no extraordinary circumstance, other than to argue the merits of his underlying *Strickland* claim. The court has already considered the merits and found no basis for federal habeas relief. The arguments Haynes makes to warrant reopening the judgment are not exceptional, but common to cases in which a petitioner alleges ineffective assistance by a state habeas attorney. *See Buck*, — F. App’x at —, 2015 WL 4940823, at *5.

C. Review of the Merits

The court’s third reason for denying relief under Rule 60(b)(6) was that the merits of Haynes’ *Strickland* claim did not entitle him to relief from judgment. *Martinez* and *Trevino* provide no independent bases for federal habeas relief. Instead, those cases allow a court to reach the merits of an otherwise barred claim. The court has twice reviewed the merits of Haynes’ defaulted *Strickland* claim. The original Memorandum Opinion and Order rejected Haynes’ arguments in the alternative. (Docket Entry No. 19 at 21–22)⁶ The court again assessed the merits of Haynes’ claim on the first round of Rule 60(b) review. (Docket Entry No. 62 at 10–13)

⁶ In seeking a Certificate of Appealability from the court’s original denial of relief, Haynes argued that the court “erred in denying a COA and relief on ... [his] ineffective assistance of counsel claims.” *Haynes v. Quarterman*, No. 07–70004, Docket Entry No. 21 at 17. Without extensive discussion of the merits, the

Fifth Circuit “denied [a COA] as to all issues except for Haynes’s *Batson* claims....” *Haynes v. Quarterman*, 526 F.3d 189, 202 (5th Cir.2008). The Fifth Circuit, therefore, has already concluded that the merits of Haynes’ *Strickland* claim do not require relief.

Haynes’ Rule 60(b)(6) Motion disputed the depth of this court’s alternative review and its conclusions. The court based its alternative holdings on a review of the record evidence, the post-conviction developments, and the applicable law. Haynes’ Petition and briefing provided extensive discussion regarding his *Strickland* claim. Haynes based his claim on 39 affidavits and various records. Haynes now asks for additional factual development, but he has not shown that it would result in any information that would exceed the contours of that already before the court.

*6 While Haynes may disagree with the extent to which the court evaluated the *Strickland* claim or its ultimate outcome, Rule 60(b)(6) relief is not available on the alternative merits review itself. Rule 60(b)(6) does not exist for claims of legal error or mistake. *McMillian v. MBank Fort Worth, N.A.*, 4 F.3d 362, 367 (5th Cir.1993). Rule 60(b)(6) does not provide an avenue for relief because a movant disagrees with the court’s reasoning or conclusions. An appeal, not a Rule 60(b)(6) motion, is the appropriate vehicle for reconsideration of a district court’s judgment on the merits. *See Diaz*, 731 F.3d at 377–78.⁷ Haynes may disagree with the extent to which the court discussed the *Strickland* claim or its ultimate outcome, but he has not shown any reason for this court to consider his *Strickland* claim for the third time. Haynes “has already received all the relief he has requested” because the court twice reviewed the merits of his barred claim. (Docket Entry No. 62 at 13)

⁷ In fact, the Supreme Court has suggested that a Rule 60(b) motion attacking the district court’s resolution of the merits is actually a successive habeas petition “since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.” *Gonzalez*, 125 S.Ct. at 2648.

D. Actual Prejudice

The court’s fourth reason for denying relief under Rule 60(b)(6) relied on the alternative merits review to find that Haynes did not show “actual prejudice” under the

procedural-bar doctrine. Under traditional habeas law a federal petitioner may overcome the default of his claims if he can “demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law....” *Coleman*, 111 S.Ct. at 2565 (emphasis added). This requirement is not disjunctive; a petitioner must show both cause and actual prejudice to allow plenary review of the merits. *See Martinez*, 132 S.Ct. at 1321 (remanding because “the court did not address the question of prejudice”). Like claims of ineffective appellate representation, an inmate challenging his habeas attorney's efforts must presumably show that but for the deficient performance, the outcome of the habeas action would have been different. *Cf. Amador v. Quarterman*, 458 F.3d 397, 411 (5th cir.2006).

Even though *Trevino* opened the door for Haynes to argue that his state habeas representation could provide cause to overcome the procedural bar, Haynes' briefing only superficially addresses the question of actual prejudice. (Docket Entry No. 82 at 56) Haynes has not shown that had state habeas counsel raised the same claim as in his federal petition, a state court would have granted the habeas writ. Haynes has not provided any reason to question this court's earlier decision that he has not made a convincing argument to show actual prejudice that would overcome the procedural bar.

Regardless of the *Martinez* and *Trevino* decisions, Haynes has not shown that this court was incorrect in denying his Rule 60(b)(6) Motion. The court, therefore, again concludes that Haynes' arguments do not warrant post-judgment relief.

III. Stay and Abeyance

Haynes argues that this court should stay federal proceedings to allow exhaustion of his *Strickland* claim. In *Rhines* the Supreme Court held that “a district court has discretion to stay a mixed petition ... to allow a habeas petitioner to present his unexhausted claims to the state court in the first instance, then return to federal court for review of his perfected petition.” *Day v. McDonough*, 547 U.S. 198, 126 S.Ct. 1675, 1684 n. 10, 164 L.Ed.2d 376 (2006). Under *Rhines* a district court possesses authority to stay a federal habeas case when a petitioner shows “good cause,” has not “engaged in intentionally dilatory litigation tactics,” and raises

potentially meritorious claims. *Rhines*, 125 S.Ct. at 1535. Haynes again asks this court to authorize his return to state court to exhaust his *Strickland* claim.

*7 When Haynes requested a stay during the initial proceedings, the court observed that “[s]everal factors persuade the court that a stay is not appropriate.” (Docket Entry No. 19 at 12) The court found that Haynes had not been expeditious in seeking to exhaust his claims and that he did not demonstrate good cause to justify returning to state court. Importantly, the court found that “the exhaustion doctrine, including the stay-and-abeyance safety valve, is predicated on the availability of state court remedies.” (Docket Entry No. 19 at 14) Haynes has still not shown that a state avenue of relief remains open to him.

Texas strictly enforces its abuse-of-the-writ doctrine (codified at Tex.Code Crim. Pro. art. 11.071 § 5(a)) and generally prohibits the filing of successive habeas applications. While article 11.071 permits the filing of a successive state habeas application in three limited circumstances, Haynes does not establish that he meets these demanding requirements. *See Hall v. Thaler*, 504 F. App'x 269, 283–84 (5th Cir.2012) (refusing to stay a case when the petitioner did not show that state remedies would be available).⁸ Specifically, section 5(a) (1) of article 11.071 authorizes the filing of a successive application when the claims “have not been and could not have been presented previously ... because the factual or legal basis for the claim was unavailable[.]” Haynes has not shown that the state courts would find that his defaulted *Strickland* claim was previously unavailable. In fact, Haynes faults his state habeas attorney for not raising this *Strickland* claim in his initial state habeas application, implicitly conceding its prior availability. *See Aystas v. Thaler*, 462 F. App'x 474, 482 (5th Cir.2012) (finding in the *Rhines* context that an inmate's ineffective-assistance-of-habeas-counsel argument was “a tacit admission that the claims he now seeks to exhaust could have been advanced in his previous state habeas proceeding”), *rev'd on other grounds*, — U.S. —, 133 S.Ct. 2764, 186 L.Ed.2d 214 (2013).

8 Sections 5(a)(2) and (3) of article 11.071 allow successive state review after a persuasive showing of actual innocence. *See Ex parte Davis*, 947 S.W.2d 216, 237 (Tex.Crim.App.1996) (finding that “[t]he ‘actual innocence’ standard embodied in Subsections 5(a)

(2) and 5(a)(3) mirrors that for bringing successive writ applications in federal habeas review of state convictions”). In the original Memorandum Opinion and Order the court has already found that Haynes has not “provide[d] a viable argument that he is actually innocent.” (Docket Entry No. 19 at 15, n. 4)

Haynes argues that the alleged deficiencies in his state habeas counsel's representation would serve as an equitable basis to skirt Texas's limitations on successive habeas applications. The Texas Court of Criminal Appeals does not recognize equitable exceptions to the abuse-of-the-writ statute, even in the case of deficient habeas representation. *Ex parte Graves*, 70 S.W.3d 103, 111 (Tex.Crim.App.2002). Although Haynes cobbles together statements from dissenting opinions to argue that the Court of Criminal Appeals may reconsider its jurisprudence, he has not shown that state review is currently open to him or that state law will change. See *Ex parte Alvarez*, No. 62,426–04, 2015 WL 1955072 (Tex.Crim.App. April 29, 2015) (implicitly refusing to overrule *Graves*). Moreover, for the reasons discussed above, Haynes' failure to meet the *Martinez* requirements or substantively prove entitlement to relief weighs against any stay of these proceedings. See *Rhines*, 125 S.Ct. at 1535 (authorizing a stay only when a claim is “potentially meritorious”).⁹

⁹ In addition, the court initially found that a stay was not appropriate because Haynes had waited until late in the adjudicative process to ask for a return to state court. (Docket Entry No. 19 at 11) Haynes argues that “[n]o such delay exists” now because he requested a stay soon after the instant remand. (Docket Entry No. 82 at 53) Haynes' argument, however, only highlights that a stay is appropriate early in the habeas process, not years later and after protracted litigation. The court also observes that Haynes could have filed a successive state habeas application after the Supreme Court denied certiorari review from his initial federal litigation and before filing his eve-of-execution motion.

*8 Haynes has not shown that staying this case would cure the procedural defects that prevent federal review. Instead, pausing the federal action at this late date would “frustrate[] AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal

proceedings” and “also undermine[] AEDPA's goal of streamlining federal habeas proceedings [.]” *Rhines*, 125 S.Ct. at 1534. The court **DENIES** Haynes' request to stay and abate this action.

IV. Certificate of Appealability

No appeal from this court's decision can proceed unless Haynes receives a Certificate of Appealability. Since Haynes' conviction in 1999, courts have repeatedly considered constitutional claims. Haynes invoked federal jurisdiction over a decade ago. During the several years that have passed since this court decided the merits of Haynes' *Strickland* claim, appellate courts have repeatedly considered various issues. The court is confident in its conclusion that Haynes is not entitled to relief under Rule 60(b)(6). Nevertheless, recognizing the “AEDPA's acknowledged purpose” to “reduc[e] delays in the execution of state and federal criminal sentences[.]” *Ryan v. Valencia Gonzales*, — U.S. —, —, 133 S.Ct. 696, 709, 184 L.Ed.2d 528 (2013) (quotation omitted), and in an effort to expedite appellate consideration of this case, the court *sua sponte* finds that “the issues presented [are] adequate to deserve encouragement to proceed further.” *Miller–El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1034, 154 L.Ed.2d 931 (2003); see also 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). The court, therefore, will issue a COA on the issue of Whether Haynes has shown that Rule 60(b)(6) relief is warranted in this case.

V. Conclusion and Order

For the reasons described above, Haynes' Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) (Docket Entry No. 60) is again **DENIED**. A Certificate of Appealability **WILL ISSUE** in this case.

All Citations

Not Reported in F.Supp.3d, 2015 WL 6016831

APPENDIX D

576 Fed.Appx. 364 (Mem)

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47) United States Court of Appeals, Fifth Circuit.

Anthony Cardell HAYNES, Petitioner–Appellant

v.

William STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent–Appellee.

No. 12–70030.

|

July 28, 2014.

Attorneys and Law Firms

Allen Richard Ellis, Law Offices of A. Richard Ellis, Mill Valley, CA, for Petitioner–Appellant.

*365 Jeremy Craig Greenwell, Esq., Assistant Attorney General, Office of the Attorney General, Austin, TX, for Respondent–Appellee.

Appeal from the United States District Court for the Southern District of Texas, USDC 4:05–CV–3424.

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

EDITH BROWN CLEMENT, Circuit Judge: *

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

I.

On October 15, 2012, we denied Haynes's application for a certificate of appealability (COA) asking us to review the district court's denial of his motion under Federal Rule of Civil Procedure 60(b)(6). We denied Haynes's application on the grounds that *Martinez v. Ryan*, — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), which Haynes tried to claim the benefit of in his 60(b)(6) motion, did not apply in Texas because Texas inmates could raise claims of ineffective assistance of counsel on direct appeal. See *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir.2012).

After our opinion was issued, the Supreme Court held in *Trevino v. Thaler*, — U.S. —, —, 133 S.Ct. 1911, 1921, 185 L.Ed.2d 1044 (2013), that the rule from *Martinez v. Ryan* does apply in collateral challenges to Texas convictions. The Supreme Court granted certiorari to Haynes, vacated our judgment, and remanded for further consideration in light of *Trevino*. See *Haynes v. Thaler*, — U.S. —, 133 S.Ct. 2764, 186 L.Ed.2d 214 (2013). Pursuant to the Supreme Court's order, we GRANT Haynes's application for a COA and REMAND to the district court to reconsider its denial of Haynes's Rule 60(b)(6) motion in light of *Trevino*.

II.

Judge Dennis's concurrence argues that we should go further and order the district court to carry out a full reconsideration of Haynes's *Strickland* claim. We decline to do so. A district court's discretion when considering Rule 60(b)(6) motions is “especially broad,” *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir.1992), and subject only to “limited and deferential appellate review,” *Gonzalez v. Crosby*, 545 U.S. 524, 535, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). Accordingly, given our limited role in reviewing Rule 60(b)(6) orders, we return this case to the district court without additional advisory instructions as to how to exercise its discretion when considering whether Haynes meets the prerequisites for obtaining relief under Rule 60(b)(6). See, e.g., *id.* (setting out the standard for determining whether Rule 60(b)(6) motions should be granted).

JAMES L. DENNIS, Circuit Judge, concurring:

I concur as to Part I of the order to remand for further consideration in light of the Supreme Court's recent holding in *Trevino v. Thaler*, —U.S. —, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), but I write separately to note that I would further instruct the district court to carry out a full reconsideration of the Petitioner's ineffective-assistance-of-counsel claim in accordance with both *Trevino* and *Martinez v. Ryan*, —U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).

Petitioner has presented significant evidence in support of his argument that his state-court trial counsel provided him with constitutionally ineffective assistance in the investigation and presentation of mitigation evidence at trial, under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In federal habeas proceedings, Petitioner presented the declarations of thirty-nine lay witnesses and an expert witness who were available to testify at trial but were not called by trial counsel. These witnesses would have testified regarding, *inter alia*, Petitioner's childhood history of physical abuse and emotional neglect, as well as evidence of his significant substance abuse and psychiatric disorder; issues that had not been fully raised before the trial court.

In its previous decision denying Petitioner's motion for relief from judgment, the district court stated that it had “already reviewed the merits of Haynes' *Strickland* claim in the alternative and found it to be without merit” and that therefore “he has already received all the relief he has requested.” *Haynes v. Thaler*, No. H-05-3424, 2012 WL

4739541, at *5–6 (S.D.Tex. Oct.3, 2012). The district court was apparently referring to three sentences of an earlier opinion, in which the district court concluded that:

[A]s noted by respondent, Haynes' argument is essentially “not that counsels' performance should have been better, rather, his argument is that counsel should have investigated and presented evidence at the punishment phase in a completely different manner.” The record indicates that the defense counsel (as well as the prosecution and trial court) went to great lengths to ensure that Haynes' constitutional rights were protected and viable defenses pursued. Haynes' allegations do not show flagrant omissions by the players involved in his trial; rather, they merely demonstrate the exercise of strategy and typify the maxim that “the Constitution entitles a criminal defendant to a fair trial, not a perfect one.”

Haynes v. Quarterman, No. H-05-3424, 2007 WL 268374, at *9 (S.D.Tex. Jan.25, 2007) (citations omitted). The district court did not conduct an analysis of—or even discuss—the post-conviction evidence. Given the cursory nature of this analysis, I would instruct the district court to reconsider the Petitioner's ineffective-assistance-of-counsel argument on remand.

All Citations

576 Fed.Appx. 364 (Mem)

APPENDIX E

133 S.Ct. 2764

Supreme Court of the United States

Anthony Cardell HAYNES, petitioner,

v.

Rick THALER, Director, Texas Department of
Criminal Justice, Correctional Institutions Division.

No. 12–6760.

|

June 3, 2013.

Synopsis

Case below, 489 Fed.Appx. 770.

Opinion

On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Trevino v. Thaler*, 569 U.S. —, 133 S.Ct. 1747, 185 L.Ed.2d 783 (2013).

All Citations

569 U.S. 1015, 133 S.Ct. 2764 (Mem), 186 L.Ed.2d 214, 81 USLW 3668

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APPENDIX F

 Search documents in this case Search	
No. 18A221 *** CAPITAL CASE ***	
Title:	Anthony Cardell Haynes, Applicant v. Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division
Docketed:	August 29, 2018
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Numbers:	(15-70038)

DATE	PROCEEDINGS AND ORDERS
Aug 14 2018	Application (18A221) to extend the time to file a petition for a writ of certiorari from September 18, 2018 to October 18, 2018, submitted to Justice Alito. Main Document Lower Court Orders/Opinions Lower Court Orders/Opinions
Aug 30 2018	Application (18A221) granted by Justice Alito extending the time to file until October 18, 2018.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
A. Richard Ellis Counsel of Record	Law Office of A. Richard Ellis 75 Magee Avenue Mill Valley, CA 94941-4532 a.r.ellis@att.net	4153896771
Party name: Anthony Cardell Haynes		

APPENDIX G

DECLARATION OF ERIC HAYNES

My name is Eric Haynes. My date of birth is September 18, 1962. My address is 5303 Newkirk, Houston, Texas 77021.

I am the youngest brother of Donald Haynes, Anthony Haynes' brother. I have known and been around Anthony since his birth. Anthony was a good kid, always very respectful. He was my first nephew, and we did a lot of things together.

When Anthony was young, he lived with his mother, and then he went to live with his father. Donald wanted Anthony around and Anthony liked being around males. He could do his sports better living with his father. Anthony played soccer, baseball and was on the football team at Dulles High School.

Anthony rarely got into trouble. I was aware of his drug use when he was in high school, but as far as I knew it was just marijuana, like most kids. I did not know he was using other drugs such as methamphetamine or mixing marijuana with embalming fluid.

Anthony would do things with my kids, who were younger than Anthony. They are now aged 18, 15, and 13. Anthony would teach them, take them places, babysit them, and would be like a big brother to them. I never saw Anthony show anger or blow up around my boys.

From my point of view, judging his actions, when Anthony did get into trouble it was mainly through peer pressure. Anthony was a good student, well above average. His father made him act respectable and get good grades. Donald bought Anthony a truck, and there were conditions on him to earn it.

Anthony was proud of being in the ROTC and being selected for the BOOST program. From the information we received, he was doing well in the program. When he came back after not making it in the program, he said he was going to try again in the program. Anthony said he enjoyed the freedom he had while he was in the BOOST program. Through the program, he qualified for a scholarship.

I attended 3 or 4 days of the trial. I observed uniformed police officers present during the trial, at least 4 to 6 when I was there. The victim's family sat up front. One day, there were quite a few officers present at the trial, about 15 or 20 in uniform.

I remember an incident when defense attorney Nunnery was thrown out of the courtroom for something he had said. The judge told Mr. Nunnery to sit down and he walked out. I felt like the judge was biased against the defense attorneys. I also felt that they could have done a better job.

I spoke once with Mr. Jones about six months before the trial, and maybe once more. I just met Mr. Nunnery once but did not really speak to him. I never spoke with a defense investigator.

When I heard about Anthony's arrest for the killing of the police officer, I was shocked. Based on my knowledge of Anthony Haynes, I believe he would be a very low risk of committing future dangerous acts or acts of violence. This was my belief at the time of the trial and it is my belief now.

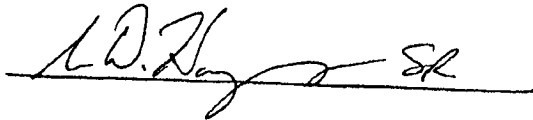
Neither of the defense attorneys spoke to me at the time of the trial. I was living at 



home in the Houston area at the time of the trial, and I was easy to reach.

Once the trial started, Mr. Nunnery took over. It seemed the trial was rushed because of finances. Suddenly, they were going to trial in a few weeks. If the defense attorneys or the investigator had talked to me at the time of the trial, I would have told them what I have said in this declaration. Had they asked me to be a witness for Anthony at the trial. I would have been willing to do so.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on July 31, 2005, 2005 in Houston, Texas.

A handwritten signature in black ink, appearing to read "L.D. Nunnery", is written over a horizontal line. The signature is stylized and includes a small mark at the end that looks like "SK".

DECLARATION OF TIFFANY DECKARD

My name is Tiffany Deckard. I am 23 years old. My address is 16506 Quail Park Drive, Missouri City, Texas 77489. I am currently in Houston Community College Police Academy, in training to be a police officer.

I knew Anthony through Dulles High School, where I attended with him. He was a junior when I was a freshman. I was also in the ROTC program. Anthony and I spent time together and we would hang out at Ashley's house. We did date in my sophomore year, for about two months, and we were friends after that. Anthony played football at Dulles High. I knew Anthony up until this incident happened.

Anthony did well in the ROTC program. Col. Davis, who testified at the trial, lied about Anthony.

I have seen Anthony get mad but nothing serious. He would help people out, share food with them and loan money. He never displayed any hostility toward authority figures. At the time of the trial, it was my opinion that Anthony was a very low risk for committing future dangerous or violent acts, and I would have told Anthony's jury this if I had been called as a witness. Today, this is still my opinion, that Anthony is essentially a very non-violent person.

The day after the incident, Anthony showed up at my house. He was scared and did not know what to do. Someone turned on the Channel Two News and his picture was on. Anthony said he had shot someone and said he had done some things with other people first. In these other incidents, he said he did not point the gun at them, but they saw it. Regarding the incident when he shot someone, he said the man was reaching for something in his back. Anthony also said the person was cursing and calling him names. Anthony also said he was trapped by the guy who was cursing up a storm. As soon as the person walked up, Anthony said his voice got louder and Anthony said he felt that he was going to be grabbed or dragged out of his vehicle. The man's hand went to his back and Anthony felt he had to protect himself. As soon as the gun went off, Anthony said he was in shock. Anthony said he was sorry and remorseful. He told me all this the next afternoon, when I was life-guarding at a local pool. I told him to go to the police.

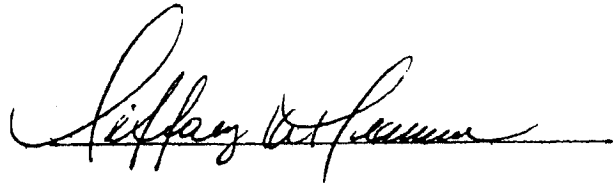
I attended the whole trial, along with some friends Carmen and Terise. It seemed to me that the judge favored the prosecution. At times, the judge read a newspaper during the proceedings. His attitude seemed to be to hurry up and get it over with.

During the trial, I talked with Mr. Jones, one of the defense attorneys, twice, and with Mr. Nunnery four times, but this was just outside the courtroom. But they never went into detail about anything I had to say. Mr. Nunnery would just want to know things quickly, and once he knew I was "the girlfriend," he did not want to know anything else. A male investigator talked to me once for about five minutes. I told the attorneys about the incident when Anthony told me about the shooting and how he was remorseful, but Mr. Nunnery told me he was not going to put me on the stand because I had a short relationship with Anthony. Terese was angry with Mr. Nunnery for not doing anything. I did not talk with Mr. Jones at all, and he was distant. Mr. Jones basically brushed me off.

I was aware that Mr. Jones and Mr. Nunnery had problems working together. They did not want to work with each other. I had the feeling their heart was not in it.

I attended the trial every day, thinking that I was going to be a witness. The attorneys never asked me to testify. If they had, I would have been willing to testify and I would have told them what I have said here.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on 09/13, 2005 in Houston, Texas.

A handwritten signature in cursive script, appearing to read "Tiffany K. Deekard", written over a horizontal line.

Tiffany K. Deekard

EARL WASHINGTON, SR.

My name is Earl Washington, Sr. I am 50 years old. I live at 9811 Bent Spur Lane, Houston, Texas 77064.

I am a firefighter in the Houston Fire Department, where I have been for 27 years. I have known Anthony Haynes since he was born, right up until the incident when he was charged with killing the police officer. Anthony's father and I used to work in the same department.

Anthony's father, Donald Haynes helped me get a job in the Department, and we have been good friends since. My son is 20 years old, and his name is Earl Washington, Jr. He is 4 or 5 years younger than Anthony. I have known Donald since before Anthony was born, and I also know Patrika, Anthony's mother. I used to live in Missouri City, and we were in the same neighborhood.

I treated Anthony like my own son, and I was like a second father to him. My son and Anthony played T-ball together, and I would take them to games. Anthony was very interested in sports, such as flag football. We would have birthday parties and go on out-of-town trips, such as a visit to 6 Flags Amusement Park.

We all went to church together, to New Faith Baptist Church. Anthony would regularly attend church with his father. Anthony attended Sunday school and was in the youth ministry, an after-church program. Instead of hanging around, he was in various programs. When I moved from Missouri City, I did not change churches, so I kept in contact with Anthony and his dad.

At school, Anthony joined the ROTC, and he spoke well of it. His aim was to obtain a navy scholarship. Anthony did tell me of a blow-up at school. I met Col. Davis after the incident, and in court. He spoke highly of Anthony at the court. He said he had been trying to persuade Anthony to pursue higher degrees and extend his scholarship. Col. Davis said he could not believe what happened in regard to the killing of the police officer. At court, Col. Davis' opinion of Anthony was twisted around.

I think Anthony became involved with the wrong people. I saw his friends but I did not talk with them. I assumed they were good kids. Anthony played football at Dulles High School. He was in the BOOST program later.

Anthony was a good kid. He was respectful to adults, and would always say "Yes sir" or "No sir." He would cooperate.

I did attend two days of the trial. I saw some officers in uniform, 2 or 3. There were also some out of uniform when I attended, 2 or 3 or 4. I knew their faces. The judge seemed to favor the prosecution.

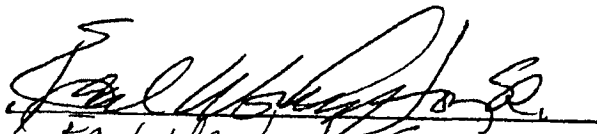
I had seen Anthony shortly before the incident, at church. He was acting normally. I did not see any indication anything was out of the ordinary. I never knew Anthony to use drugs. Anthony was taking Ritalin. It seemed OK since Anthony was doing well in school on it.

I don't think the defense attorneys were sufficiently on the offensive. It did not look like they were giving it their all. They really did not get down to defending Anthony. While

When I first heard that Anthony was involved in a criminal act, I can not believe it because that was not his character. I learned of the offense from the newspaper and television news report.
~~I knew Anthony had done the crime, I did not think the punishment was appropriate, as it was~~
his first time in trouble with the law.

Anthony's defense attorneys and investigators never talked to me. Donald Haynes had a list of people to whom the defense attorneys started to talk, and I was on that list. However, they never contacted me, and I was surprised at this. If I had been contacted by them, I would have told them what I have said in this declaration. If they had asked me to be a witness on behalf of Anthony, I would have been willing to testify, and I would have told the jury what I have said here.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on 8/9/05, 2005 in Houston, Texas.


Earl Washington Sr.

0006

15-70038.2366

DECLARATION OF MYRTLE HINTON

My name is Myrtle Hinton. I am Anthony Haynes's grandmother. I am over the age of eighteen and am competent to make this declaration. My address is 4716 Providence Street, Houston, Texas 77020. My phone number is 713-672-2702. I have been retired since 1991. My former occupation was as an insurance collector for Memorial Hospital, for 13 years. At the time of Anthony's trial, I was living where I am now.

I have known Anthony Haynes all his life. I took a big part in raising him in the first twelve years of his life. When his mother started working with the airline, she asked me to keep Anthony. Anthony's father Donald agreed.

Anthony Haynes was very active in sports and church. His mother taught him how to get to and from school on the city bus, and he was independent from an early age. Anthony was also very considerate of other people. He attended Canaan Baptist Church at 5111 Lockwood Drive in Houston. Anthony sang in the church choir and attended Sunday School. His father belonged to another church.

After living with me, Anthony went to California to live with his mother for three years. After that, he returned to Houston to live with his dad for three years, when he graduated from high school. He then went into the BOOST Program in Newport, Rhode Island.

Anthony wanted to be an officer in the military and then attend college. One of his relations was in the Navy and that may have influenced him.

Anthony returned from the BOOST Program in April of 1998. I remember because his mother had foot surgery and couldn't get around. He was depressed and also hyper at the same time. He would say "It didn't work for me." Anthony said that in Rhode Island, he had gotten into using marijuana. Pat and her husband were afraid of the way he was acting after he returned, and Anthony was acting out of character. We did not know he was on drugs nor was he acting suicidal, but he was hyper. Within a short time of when he returned, he was arrested.

When Anthony was arrested, the police read him the statement that he gave. Anthony told me this, and he said he was forced to read it. He was forced into making his "confession." I asked him why he read it if it wasn't true. He said someone was standing over him with a gun and he could have shot him and said he was resisting. I know he was forced into making the statement. He had just been robbed. In his wallet were receipts for property belonging to him that he had pawned, rings, necklaces and jewelry.

Anthony's attorneys did not talk to me extensively before the trial. One meeting was for about 30 or 35 minutes when I went to Mr. Jones's office to take him money for the case. Mr. Nunnery had not yet been involved in the case. They did not properly prepare me to testify and I was asked only a few questions at this meeting.

Later, there were seven or eight of us at Mr. Nunnery's office for a meeting on a Saturday. We were questioned together as a group and then he called us in individually and these individual meetings only lasted a few minutes. This was the only time I talked to Mr. Nunnery.

0007

15-70038.2367

I could have told the jury a lot more than I did about Anthony's background when I testified at his trial, but because the attorneys did not ask me much about Anthony's background, they didn't ask me. On the stand, I said I would not change the way I had dealt with Anthony. At the time of the trial, I did not think there was a high probability of Anthony committing future violent or dangerous acts. Anthony never did anything around me that was a problem. He was not violent, he was always considerate and wanted to help people. I would have testified that he was not a future danger if I had been asked by his attorneys. I also heard that some of the jurors voted for death because they thought he would have a chance to have it overturned on appeal.

Although I did briefly talk with Anthony's defense attorneys, and was called as a witness, they did not ask me much of what is in this declaration. If they had, I would have been willing to tell the jury what I have said in this declaration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on 09-11-2005, 2005 in Houston, Texas.


MYRTLE HINTON

Declaration of Lawrence Hughes

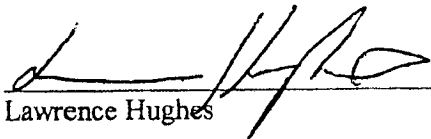
My name is Lawrence Hughes and my date of birth is December 16, 1978 and my address is 6207 Hampton Oak Katy, TX. 77449 and my telephone number is 832-794-1805 and I am currently employed.

1. I have known Anthony Haynes all of my life. My mother and Patrica Anthony's mother are very good friends.
2. Anthony was a very typical kid and was always very considerate, and very disciplined.
3. Patrica lived in the ^{Cy}Si Fair area as I did, and Anthony lived with his father Donald in Missouri City.
4. Anthony thought his dad was too strict and he didn't like staying with him all of the time, so he would come to Si Fair to visit his mother and subsequently visit with me.
5. When Anthony left the ROTC program he was staying with his mom and his mom was getting after him about getting a job, but instead of looking he was hanging out with me. We would play video games and some times smoke pot.
6. I am the person that introduced Anthony to Crystal Meth through Tim Reese. Anthony knew that I didn't like Tim Reese, but would sell Crystal Meth to him.
7. Anthony wanted to make some money, because he was not working and his mother was riding him hard about not getting a job, so he approached me about selling some meth, Anthony asked for the Meth 2 days before the murder. I did not know that Anthony had taken the Meth until I received a phone after I had left to go to Dallas to attend a graduation. I learned at that time that Anthony had taken Meth and was acting wierd and talking crazy.
8. Anthony had told me that a few days before the murder that he had been "jacked" in his car by someone driving a jeep. It really scared him.
9. After taking the Meth Anthony called me at 5:00 a.m. in Dallas talking crazy about wanting a gun because he was being followed again by a jeep.
10. A guy named Octavias from Missouri City had a 22 pistol and sold it to Anthony, however I gave Anthony \$60.00 for the pistol and hid it in a drawer before I went to Dallas.
11. Within 2 days before the murder I am not sure how much Crystal Meth Anthony had ingested, but I know through people that were around him like Lisa and Melonie that he had not slept at all and was acting very parinoid and talking about being followed.
12. I later learned that on the day of the murder Anthony had met up with Tim Reese and they

were together during the day and up until the incident.

13. I was never asked to testify and if I had I would have. This was the drug not Anthony, and I feel so responsible for placing Anthony in the position that brought him to this situation that he is in today,

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and that this declaration was execution on June 30, 2005 in Houston, TX.



Lawrence Hughes

0010

15-70038.2370

DECLARATION OF KENNETH PORTER

My name is Kenneth Porter. I am over the age of 18 and am capable of making this declaration. My address is 1815 Wood Orchard Drive, Missouri City, Texas 77489.

My wife and I were neighbors of Anthony Haynes and his family. My wife's name is Lee Esther Porter. We lived three houses down from them. We lived there from when Anthony was 12 or 13. Our two daughters, now aged 26 and 22, were about Anthony's age. Anthony was friends with our daughters.

Anthony was a good kid, always smiling, always joking around, and very respectable. He was the kind of kid you would not mind hanging around your house. I would see him in the neighborhood, helping out his dad in the yard. Anthony was always helping his father, and would never give any back talk. We would also see him at the store, and he was always very polite. He never expressed any animosity toward the police or police officers. Anthony was a humble kid, not boastful. I was shocked when this happened. I never knew him to hang out with the wrong crowd.

I think that the likelihood of Anthony committing future violent or dangerous acts is very low, and I would have been willing to testify to this at the time of Anthony's trial. The defense attorneys or investigators never contacted me at the time of the trial. If these attorneys or defense investigators had contacted me, I would have told them what is in this declaration. If I had been asked to be a witness for Anthony Haynes, I would have been willing to do so.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on July 11, 2005 in Missouri, Texas.

Kenneth Porter

DECLARATION OF LEE ESTHER PORTER

My name is Lee Esther Porter. I am over the age of 18 and capable of making this declaration. I am employed at Douglas Elementary School as a reading specialist for grades K through 3. My husband and I were neighbors of Anthony Haynes and his family. My husband's name is Kenneth Porter. We lived three houses down from them. We lived there from when Anthony was 12 or 13. Our two daughters, now aged 26 and 22, were about Anthony's age and Anthony was friends with our daughters.

Anthony was a good kid, always smiling, always joking around, and very respectable. He was the kind of kid you would not mind hanging around your house. I would see him in the neighborhood, helping out his dad in the yard. Anthony was always helping his father, and would never give any back talk. We would also see him at the store, and he was always very polite. He never expressed any animosity toward the police or police officers. Anthony was a humble kid, not boastful. I was shocked when this happened. I never knew him to hang out with the wrong crowd.

I think that the likelihood of Anthony committing future violent or dangerous acts is very low, and I would have been willing to testify to this at the time of Anthony's trial. The defense attorneys or investigators never contacted me at the time of the trial. If these attorneys or defense investigators had contacted me, I would have told them what is in this declaration. If I had been asked to be a witness for Anthony Haynes, I would have been willing to do so.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on July 11, 2005 in Missouri City Texas.

Lee Esther Porter

0012

15-70038.2372

DECLARATION OF BEVERLY SCOTT

My name is Beverly Scott. My date of birth is April 29, 1958. My address is 1823 Wood Orchard, Missouri City, Texas 77489.

I was a next door neighbor of Mr. Donald Haynes. Anthony Haynes was in grade school when I first met him, in the fourth or fifth grade. He was a nice, respectable kid, and I had no problems from him. Anthony has been in my house many times. I never saw him get into trouble and he didn't hang around with bad kids. Occasionally, Anthony would help me take groceries into my house. He would also help his father out in the yard. I knew that Anthony drove his father's truck, but never knew him to drive recklessly.

Anthony was a good student at school and he said he got good grades. I knew he was in ROTC at high school. I knew him up until he was arrested for the killing of the officer.

Anthony was not hostile toward the police. I did not know he used drugs. He was a respectful kid, an all-around good kid. I knew he had a scholarship to Prairie View A & M, and he was proud of that. Anthony was looking forward to attending college.

Based on what I know about Anthony Haynes, I think he is a very low risk of committing future dangerous or violent acts. This was my opinion at the time of the trial and it is still my opinion now.

I was never talked to or contacted by attorneys or investigators for Anthony at the time of his trial. If they had contacted me, I would have told them what I have said in this declaration. If they had asked me to be a witness for Anthony Haynes at his trial, I would have been willing to do so.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on October 3, 2005 in Missouri City, Texas.

Beverly Scott

Signed with express
permission by A. Richard Ellis

Anne Ellis

10-3-05

Mill Valley CA 94941

0013

15-70038.2373

DECLARATION OF DEBRA SWISHER

My name is Debra Swisher and I am 45 years old. My address is 2007 Hammerwood, Missouri City, Texas 77489.

I was a friend of Anthony Haynes. I used to own a restaurant, RonDee's Diner, in the 2300 block of te Texas Parkway. I closed it in 1998. Before the incident in which Anthony was charged with the killing of the police officer, Anthony would come in to the restaurant and talk to me. I liked him a lot. He was soft-spoken, intelligent, polite, and often gave me a hug when he left.

For a period of about six months, before he graduated from high school, Anthony would come in to the diner about twice a week. He wanted to talk, about school and his fellow students, just general stuff. He would talk about his teachers, his favorites and his not- so-favorites. I never knew him to be disrespectful or violent or to be involved in drugs, and I never saw him in any angry outbursts. I was always glad to see him come into the restaurant.

I knew Anthony when he was in high school and after he graduated in 1997. When he was in high school, I was aware he was in ROTC as he would tell me about it.

When I heard about the crime, I was shocked. I did not attend the trial. Based on what I know about Anthony, I believe he would be a very low risk of committing future acts of violence or acts endangering the safety of others. This is my belief now and it was my belief at the time of Anthony's trial.

At the time of the trial, I was never contacted by Anthony's defense attorneys or his investigators. Neither of the defense attorneys spoke to me. If the defense attorneys or the investigator had talked to me at the time of the trial, I would have told them what I have said in this declaration. Had they asked me to be a witness for Anthony at the trial. I would have been willing to do so.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on August 24, 2005 in Houston, Texas.

Debra H. Swisher
832-289-6277 cell
713-704-4033 office
281-437-2321 home

0014

15-70038.2374

SHELIA HAYNES

My name is Shelia Harness. My date of birth is January 8, 1960. I am the aunt of Anthony Haynes, the younger sister of his father Donald Harness.

I have lived in Houston since 1970. Anthony was born in 1979. I lived near Anthony and his father Donald and his mother Patrica. Donald eventually got custody of Anthony and I had a lot of contact with him as he grew up. Anthony was very smart and well behaved. I do not know his friends, but I was aware of his drug use. Anthony and I were very close before this incident. I think that the problems started when Anthony began to hang around with the wrong crowd.

My opinion is that Anthony is at very low risk of committing future dangerous acts. I thought that at the time of his trial and is my opinion now.

At the time of his trial I was talked to by Anthony's attorney. I relayed to him the opinion stated above. I would have been willing to be a witness at his trial if I had been asked.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on July 30, 2005 in Houston, Texas.

Shelia Harness

0015

15-70038.2375

SGT. ALLEN HARRIS

My name is Sgt. Allen Harris. I am 59 years old. I live at 3810 Watershoal Lane, Missouri City, Texas 77459. I am the deputy director of the ROTC program at Dulles High School.

I first met Anthony when he came into the ROTC program as a freshman. He loved ROTC. He saw it as a way to make a mark. He once said that one of the things he was interested in was flying. He was aiming at attending the Naval Academy.

In the ROTC program, Anthony was on the drill team and eventually became an officer in the program. There are about 125 students in the program. In freshman year, the emphasis is on doing what you are asked to do. There is also a summer leadership school, which Anthony completed. In the second year, there are more leadership responsibilities. Only 50 of the 125 students go to the summer leadership program.

Of the 125 students in the program, about 25 to 30 become officers. Anthony came through well and he was made an officer. He had some problems but I always had a good student-teacher relationship with him. Anthony loved the structure of ROTC and loved the program because of its consistency. I saw Anthony grow up and mature in the program.

I remember one day in November of 1996 when Anthony got into a shouting match with my boss, Col. Davis. I got between them and I asked Anthony, "What are you doing?" I then took him aside. Anthony said "You're right." I came at him a different way than Col. Davis, because I wanted him to be successful. Anthony then went to the administration office voluntarily. This is the only incident I saw when Anthony was not well behaved. After that, Col. Davis saw Anthony differently. It made him see Anthony negatively. Col. Davis handled the incident differently than I would have.

I am aware that after this incident, the kids were setting up a military ball and Col. Davis said he was going to exclude Anthony from it. We worked it out so that Anthony's grandmother and his mother Pat would accompany him to the Military Ball, as he wanted to attend very much.

Anthony would hang out mainly with other ROTC cadets. On the whole, Anthony did very well in the Dulles High ROTC program. He became an officer, and he had good honors. Out of all the students in ROTC, at the time he graduated, Anthony was fourth best in the program.

The BOOST program is a program to enable minorities to become officers in the Navy, to get them ready. BOOST is a pre-academy program. I did not want Anthony to go into the BOOST program, but Anthony wanted to attend the Naval Academy. Anthony needed a little help to get his grades up, and I thought a learning center would have been better. In the BOOST program, if a person doesn't do everything right, they are out. Anthony tried to make a good decision.

I saw Anthony the week he came back from the BOOST program. He told me he did not make it in the program. But he said he had another option of attending Prairie View A & M which had a Navy program. His goal was to go to Prairie View and prove himself.

I spoke with both of Anthony's defense attorneys on the phone and told them

0016

15-70038.2376

essentially what I have said in this declaration. I also talked with two persons who were probably from the prosecution, as they told me "We have Col. Davis." Since they had Col. Davis, they said they would not call me as a witness at the trial. I think it was a prosecution investigator that called me first, then a prosecutor. No one asked me to be a witness for Anthony, but I would have been willing to be a witness if I had been asked. At the time of the trial, my feeling was that the act that he was charged with, the killing of the police officer, was totally out of character from the Anthony I knew. I did not see anything like what he was charged with in his character. At the time of the trial, it was my opinion that Anthony was a very low risk for committing future violent acts, and that is my opinion now. I would have told this to the jury at Anthony's trial.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on 27 June, 2005 in Missouri City, Texas.

Allan J. Harris

0017

EARL WASHINGTON, SR.

My name is Earl Washington, Sr. I am 50 years old. I live at 9811 Bent Spur Lane, Houston, Texas 77064.

I am a firefighter in the Houston Fire Department, where I have been for 27 years. I have known Anthony Haynes since he was born, right up until the incident when he was charged with killing the police officer. Anthony's father and I used to work in the same department.

Anthony's father, Donald Haynes helped me get a job in the Department, and we have been good friends since. My son is 20 years old, and his name is Earl Washington, Jr. He is 4 or 5 years younger than Anthony. I have known Donald since before Anthony was born, and I also know Patrika, Anthony's mother. I used to live in Missouri City, and we were in the same neighborhood.

I treated Anthony like my own son, and I was like a second father to him. My son and Anthony played T-ball together, and I would take them to games. Anthony was very interested in sports, such as flag football. We would have birthday parties and go on out-of-town trips, such as a visit to 6 Flags Amusement Park.

We all went to church together, to New Faith Baptist Church. Anthony would regularly attend church with his father. Anthony attended Sunday school and was in the youth ministry, an after-church program. Instead of hanging around, he was in various programs. When I moved from Missouri City, I did not change churches, so I kept in contact with Anthony and his dad.

At school, Anthony joined the ROTC, and he spoke well of it. His aim was to obtain a navy scholarship. Anthony did tell me of a blow-up at school. I met Col. Davis after the incident, and in court. He spoke highly of Anthony at the court. He said he had been trying to persuade Anthony to pursue higher degrees and extend his scholarship. Col. Davis said he could not believe what happened in regard to the killing of the police officer. At court, Col. Davis' opinion of Anthony was twisted around.

I think Anthony became involved with the wrong people. I saw his friends but I did not talk with them. I assumed they were good kids. Anthony played football at Dulles High School. He was in the BOOST program later.

Anthony was a good kid. He was respectful to adults, and would always say "Yes sir" or "No sir." He would cooperate.

I did attend two days of the trial. I saw some officers in uniform, 2 or 3. There were also some out of uniform when I attended, 2 or 3 or 4. I knew their faces. The judge seemed to favor the prosecution.

I had seen Anthony shortly before the incident, at church. He was acting normally. I did not see any indication anything was out of the ordinary. I never knew Anthony to use drugs. Anthony was taking Ritalin. It seemed OK since Anthony was doing well in school on it.

I don't think the defense attorneys were sufficiently on the offensive. It did not look like they were giving it their all. They really did not get down to defending Anthony. While

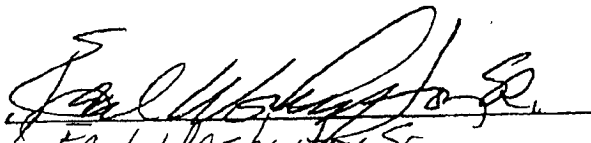
0018

15-70038.2378

When I first saw that Anthony was involved in a Criminal Act, I could not believe it because that was not his character. I learned of the efforts from the newspaper and television news report.
~~I know Anthony had done the crime, I did not think the punishment was appropriate, as it was~~
his first time in trouble with the law.

Anthony's defense attorneys and investigators never talked to me. Donald Haynes had a list of people to whom the defense attorneys started to talk, and I was on that list. However, they never contacted me, and I was surprised at this. If I had been contacted by them, I would have told them what I have said in this declaration. If they had asked me to be a witness on behalf of Anthony, I would have been willing to testify, and I would have told the jury what I have said here.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on 8/9/05, 2005 in Houston, Texas.


Earl Washington Sr.

0019

15-70038.2379

DECLARATION OF BONITA DENYSE THIERRY

My name is Bonita Denyse Thierry and I am over the age of eighteen and competent to give this declaration. My address is 405 Main Street, Ste. 300, Houston, Texas 71002. My phone number is 713-223-0400 (-0434 for FAX). I am an attorney in solo practice and also work for the NAACP.

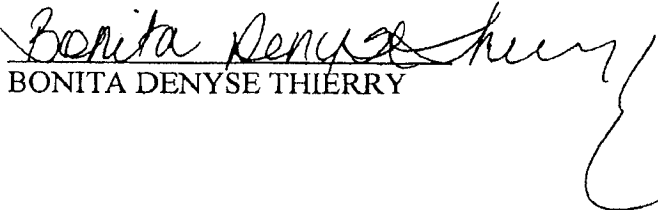
I was a sorority sister with Anthony's mother Patrika. We were instantly friends. I have known her since 1996.

Anthony is a great kid. He was well behaved and I never saw him acting out. He never got into fights. I never had the impression he was violent, and this was my feeling at the time of his trial. Therefore, I would have told the jury that I thought his potential risk for committing future dangerous or violent acts was very low.

Anthony was interested in joining the Navy and when he was back east in Rhode Island at the training program, he would send souvenirs. I can't believe that he is on death row. I still have his picture hanging on my wall.

Anthony's defense attorneys and investigators never contacted me. If I had been contacted by them, I would have told them what I have said in this declaration. If they had asked me to be a witness on behalf of Anthony, I would have been willing to testify, and I would have told the jury what I have said here in this declaration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on September 11, 2005 in Houston, Texas.


BONITA DENYSE THIERRY

0020

15-70038.2380

DECLARATION OF LEON TOUSANT

My name is Leon Tousant. I am over the age of eighteen and am competent to make this declaration. My address is 1916 Woodland Hills Drive, Missouri City, Texas 77489. My phone number is 281-499-3662. I am a substitute teacher for the Fort Bend Independent School District on a as-needed basis.

Anthony and I had a friendship in high school. It centered around football and we were both on the Dulles High School team. I played running back as did Anthony. I first met Anthony in the tenth grade.

Anthony was not a violent kid. He enjoyed being in ROTC and had his eye on a military career. In his earlier grades, he did well in school. I never knew him to be a trouble-maker. He was not a quitter, but instead was a hard worker. Anthony would always try to do the best he could. He was very sociable and got along with people. Anthony was usually neat and clean and correct.

Anthony only got into one fight that I knew about, but it was not serious. Someone was messing with him and Anthony did not start it. All in all, Anthony was a pretty straight-laced guy. In my presence, he had respect for others, was kind, and didn't have an attitude.

When I heard about this, I was shocked. I never thought something like this could happen to him. After it happened, we did not have contact.

I was not contacted by Anthony's defense attorneys or investigators. If I had been contacted by them, I would have told them what I have said in this declaration. If they had asked me to be a witness on behalf of Anthony, I would have been willing to testify, and I would have told the jury what I have said here in this declaration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on October 2, 2005 in Missouri City, Texas.

Leon Tousant
LEON TOUSANT

Signed, with express permission, by

A. Richard Ellis

on 10/2/05, Mill Valley, CA

A. Richard Ellis

0021

DECLARATION OF BARBARA TAVERAS

My name is Barbara Taveras. I am over the age of eighteen and am competent to make this declaration. My address is 1835 Grand Park, Missouri City, Texas 77489. My phone number is 281-208-1334. I work for UPS.

I knew Anthony at Dulles High School. I first met him in the seventh or eighth grade, and also knew him outside of school. We were in ROTC together. Col. Davis was the highest ranking officer in that program, and he was tough. Although he was higher ranking than Sgt. Harris, Sgt. Harris was more in touch with the kids. Although Col. Davis would sometimes instruct, often he was not there, and Harris ran the program more than Davis.

Anthony was into his school work and he was interested in a military career, and he tried hard in ROTC. A certain number of the kids were offered a chance to attend boot camp and Anthony was one of them. This was summer camp in San Antonio, Texas and Anthony attended this.

Anthony was respectful of his parents. I did not see him getting into fights and never saw any hostility in him. I never saw him use drugs. Anthony would hang around outside school. He would do his homework and chores. Most of our friends had single parents who were strict disciplinarians.

I couldn't believe it when we heard the news of Anthony's arrest. I followed the crime and visited Anthony in jail.

I was not contacted by Anthony's defense attorneys or investigators. If I had been contacted by them, I would have told them what I have said in this declaration. If they had asked me to be a witness on behalf of Anthony, I would have been willing to testify, and I would have told the jury what I have said here in this declaration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on October 2, 2005 in Missouri City, Texas.

Barbara Taveras
BARBARA TAVERAS

Signed with Express Permission
by R Richard Ellis
10/2/05
Mill Valley, CA 94941
R. Richard Ellis

DECLARATION OF RON ROYAL

0022

15-70038.2382

DECLARATION OF RON ROYAL

My name is Ron Royal. I am over the age of eighteen and competent to make this declaration. My address is 2430 Ridgemont Drive, Missouri City, Texas 77489. My phone number is 832-654-5315. My occupation is a customer service representative for Vertrue Corporation.

I knew Anthony Haynes at Dulles High School. I met him in freshman year. I was on the football team with him. I played outside line-back. We hung around a lot. Anthony was laid back and he liked to chill out. Anthony wanted a career in the military and was interested in football. He would generally like to keep busy, with ROTC and sports. I did not know Anthony's family.

I had a couple of classes with Anthony. He got along well with the teachers, and he was a little shy. He took pride in his ROTC and said that if he didn't get a military scholarship, he would still go into the military. My opinion is that he went into the ROTC program so that he could be like his dad.

I heard out about Anthony's arrest when a mutual friend called. I was shocked. This was totally out of character for Anthony. I had never known Anthony to get into fights, he was just not the kind of person to get into altercations. Anthony was very laid back and he knew when to be calm.

At the time of his trial, my opinion was that Anthony was not and is not now a high risk of committing future dangerous acts or acts of violence. I would say he was a Anthony wanted to fit in and be around his friends. He was well-liked. He never did anything to anybody. He always spoke well of his father.

I was not contacted by Anthony's defense attorneys or investigators. If I had been contacted by them, I would have told them what I have said in this declaration. If they had asked me to be a witness on behalf of Anthony, I would have been willing to testify, and I would have told the jury what I have said here in this declaration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on one month of August 2005 in Houston, Texas.



RON ROYAL

0023

DECLARATION OF DEBRA ELAINE HAYNES

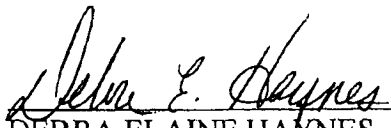
My name is Debra Elaine Haynes. I am over the age of eighteen and am capable of making this declaration. I am Anthony Haynes's aunt, married to his uncle Eric Haynes. My address is 11803 Dellfern Court, Houston, Texas 77035. My phone number is 713-721-6885. My occupation is an early childhood teacher at JCC Bertha Alyce.

I have known Anthony since he was a little boy. He was a good boy, obedient and he did not cause problems and was well behaved. Anthony was interested in football, basketball and ROTC, as well as church activities. Anthony was not violent. It was a real shock when he was arrested, because the crime was so out of character for him. I had a hard time believing that he had done this. It was a real shock to the entire family.

I never talked to Anthony's trial attorneys and they never called me. I would have been willing to be a witness at Anthony's trial. At the time of his trial, I thought Anthony was a low risk of committing future dangerous acts and would have told this to the jury if I had been a witness. If Anthony's attorneys had talked to me, I would have told them this and the other things I have stated in this declaration.

This act was very out of character for Anthony, and I believe now as I did then that there is a very low risk of his ever committing an act like this again. Anthony had never been in trouble before he was arrested for this crime.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on _____, 2005 in _____, Texas.


DEBRA ELAINE HAYNES

0024

DECLARATION OF RICHARD HAYNES

My name is Richard Haynes. I am over the age of eighteen and am competent to make this declaration. My address is 5303 Newkirk Lane, Houston, Texas 77021. My phone number is 832-239-0291. I am a surgical technologist at prime Staff Surgical Services.

I am Donald Haynes's brother and Anthony Haynes's uncle. I have known Anthony ever since he was born. I have lived in Houston all my life except for four years of military service. I was in the U.S. Air Force, and my father had also been in the military. For me, it was a good way to obtain an education and skills.

When Anthony was born I was in the military. We did a lot together when Anthony was between four and ten years old. I knew Patrika also. Anthony was very intelligent and had a strong religious background. Anthony would travel with his mother and this broadened his social skills. We would attend soccer games together and for awhile I had a lot of contact with Anthony. Sometimes he was withdrawn, but he was not violent. During his teenage years he would sometimes not want to go to family functions, but he was normally very well behaved. He would do a lot of night fishing in Galveston. I never knew him to use drugs. And this did not come to my attention until his arrest.

I approved his orientation toward a military career and the program he was in, BOOST, would have put him in line for a military scholarship.

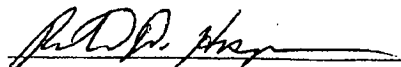
When I heard Anthony had been arrested, I was shocked. Donald told us about it. I do not believe that he has a propensity toward violence and I did not believe he did at the time of his trial. I never talked to Anthony's two trial attorneys, but I met them once, at the first day of the trial.

I sat through the trial and only missed one or two days. I did not think Anthony's character was presented to the jury. Mr. Nunnery was stifled by the judge and one time the judge told him to sit down and shut up. There were a lot of police officers in uniform with weapons at the trial. At least eight were there every day, surrounding the victim's widow. Other officers were standing along the wall.

I was surprised there were not more witnesses at the penalty phase. The jury never received an adequate picture of Anthony's character. I volunteered to be a character witness for Anthony, but the attorneys said they had certain people they would use. They said they were going to do a brief character presentation.

There is a history of off-duty officers acting as if they are on-duty in Houston.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on 9/8/05, 2005 in Houston, Texas.


RICHARD HAYNES

0025

DECLARATION OF SHARON DAVIS McELROY

My name is Sharon Davis McElroy. I am over the age of eighteen and am competent to make this declaration. I live at 6422 Nunn, Houston, Texas 77087. My phone number is 713-640-2089. I am a federal investigator for the EEOC (Equal Employment Opportunity Commission), and have been such since 1985.

I have known Anthony since he was a baby. I knew Anthony's father Donald Haynes at college, at the University of Houston, through the fraternity and sorority system.

As Anthony grew up, I kept in contact with him. I would see him occasionally. My daughter is Anthony's age and we would meet eight to ten times per year. Anthony was very quiet and obedient. Donald was very strict with Anthony and had him under a lot of restrictions. Donald had a lot of rules and he was very strict with Anthony and kept him under a lot of restrictions. I never saw Anthony talk back, and he was very obedient. He was never violent or out of control.

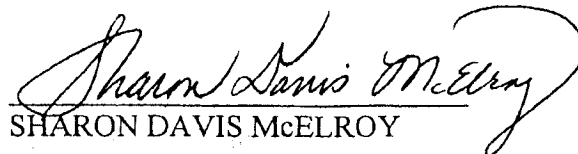
When I heard he had been arrested for murder, it was a real shock for me. At first, I thought it was someone with the same name. Later, I still could not believe it was the same person.

I had contact with Anthony until about one year before he was arrested. I never saw him use drugs or even suspected that he might be using them. Anthony was a nice kid, not the usual self-centered only child. My daughter enjoyed hanging around with him. I was stunned when I heard about the crime because Anthony did not seem violent to me.

Anthony's attorneys never talked to me. Mr. Jones, one of Anthony's attorneys, had been one of my instructors at the University. I had some reservations about his representation. I never heard about the other kids involved in this and was concerned that they were having their charges reduced in return for testifying against Anthony. I also had reservations about Mr. Jones handling the defense.

I tried to keep up with the defense but I did not know their strategy. I was not contacted by Anthony's defense attorneys or investigators. If I had been contacted by them, I would have told them what I have said in this declaration. If they had asked me to be a witness on behalf of Anthony, I would have been willing to testify, and I would have told the jury what I have said here in this declaration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on September 2, 2005 in Houston, Texas.


SHARON DAVIS McELROY

0026

15-70038.2386

Sharon McElroy



Federal Investigator
EEOC
1919 Smith
Houston, Texas 77002
(713) 209-3440
Fax: (713) 209-3381

August 24, 2005

To Whom it May Concern:

My name is Sharon Davis McElroy. I am a Federal Investigator with the Equal Employment Opportunity Commission. I have been employed in Federal Service for 27 years. I am 53 years old, divorced with a 22 year old daughter and a 1 ½ year old granddaughter.

I came to know Anthony Haynes through my long friendship with his father, Donald. Donald and I were college classmates and friends. We both attended the University of Houston and became close friends through our sorority and fraternity. Don and I remained friends after college and stayed in close contact with each other. I always admired the fact that Donald was a single father and that he was very involved in Anthony's life. Don was strict on his son and as a result, I never knew Anthony to be involved in any delinquent activity. Don often scolded me for being a little lenient with my own child.

When I heard that Anthony had been accused of this incident, I was shocked. The entire week, I thought it was just someone with the same name. I only realized that it was in fact "our" Anthony Haynes, when I saw him on television. During the trial, I never believed that he would be convicted. The story just didn't make sense. Something seemed to be missing from the whole chain of events. Needless to say, I was devastated to learn that he had in fact been convicted and sentenced to death. I know that a life was lost and I feel badly for the officer and his family. I had hoped and prayed that the court would be merciful, given Anthony's background and the fact that he had never been in trouble before. I hoped that Anthony's lawyers had presented the best case possible, but I out of respect for Donald, I did not ask if he was satisfied with the defense. I was not called to speak up for Anthony and his family for whatever reason. If called, I can assure you that I would have. I hope this information will be of help in Anthony's appeal. I am available for interview if needed.

Sincerely,

A handwritten signature in black ink, appearing to be 'S. McElroy'.

Sharon McElroy

0027

DECLARATION OF RHONDA JACKSON

My name is Rhonda Jackson. My address is 719 North Rock Drive, Houston, Texas 77073. My phone number is 281-610-2627. I am a civilian employee of the Houston Police Department.

I have known Anthony Haynes all his life. My acquaintance with his parents, Donald Haynes and Patrica Davis dates to before Anthony's birth. My daughter Summer is about Anthony's age and was a friend of his. She was going to ask Anthony to take her to her high school prom, but Anthony was out of state in the Boost Program in Rhode Island.

When he was young, Anthony was a good kid, somewhat spoiled but well behaved. When his mom and dad split up, he had both households to help with his upbringing. When Anthony was older, he mainly lived with his father. During his childhood, his mother had to live out of state because of her job.

When Anthony was in high school, he was basically seen by all of us as well behaved and respectful. He did not get into fights as far as I could see. His behavior around my kids was fine. In fact, my older daughter Summer used to call him "nerdy." Anthony was certainly not seen by me as wild or out of control.

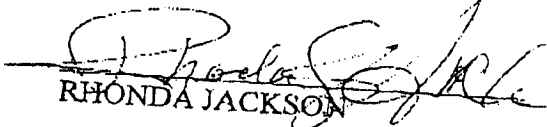
Don and Pat tried to point Anthony in the right direction, and we were all very shocked when we heard the news of his involvement with the killing of the Houston Police Department officer. It was hard for us to believe that it was Anthony who was accused of the crime. Because of what I know about Anthony, at the time he was arrested and the time of his trial I did not think that he was a high risk for committing future dangerous or violent acts. This is also my opinion today.

At the time of his trial, I know that Anthony showed remorse, as his father told me that he did. Anthony was also sorry for the harm this caused his parents and he told Don that he didn't do anything wrong in raising him.

Although I didn't attend the trial, I know there were a lot of uniformed officers in the courtroom, from what I saw and heard from the television coverage of the case.

Anthony's attorneys or investigators never talked to me. If they had, I would have told them what I have said here.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on 20th September 2005 in Houston, Texas.


RHONDA JACKSON

Sheila
DECLARATION OF SHEILA WATERS

Sheila
My name is Sheila Waters. I am over the age of 18 and competent to give this declaration. My residence is at 16335 Quail Hunt, Missouri City, Texas 77489.

I am friends with Donald Haynes, Anthony Haynes' father and have known Anthony for 8 or 9 years. I first met him in 1996 or 1997. He was a junior at Dulles High School. He seemed well raised to me, and he got along well with his father. Donald took Anthony to bible classes on Wednesdays and to church on Sundays. I would also attend that church.

I never met Anthony's friends. When I was at Donald's house, I would mostly sit around and play Scrabble. I went to a play with Anthony once. I did not feel that Anthony's father was too strict, and Donald told me he was trying to do what was right for Anthony. Anthony said he loved his dad.

I was not aware of Anthony's drug use. Donald and I were dating for awhile, and when I was at Donald's house, Anthony was almost always there. At that time, Anthony went to his mother's house on the weekends.

Anthony told me his goal was to go into the armed services. Mostly, when I came into contact with him, he would be clowning around and playing board games. Anthony had chores to perform and Donald was a strict disciplinarian. Donald was strict about how Anthony would dress, and he would not let Anthony dress like a gangster. Anthony had a curfew and I know he adhered to it. Anthony and his father seemed to get along well.

After Anthony entered the BOOST program, I did not see him. When I heard about what he was charged with, I was shocked. It was such a shock because I did not think that Anthony was a violent person and I thought he would be one of the least likely to commit an act like this. This is also my opinion now, that he is essentially not a person prone to violence.

The defense attorneys for Anthony never talked to me. If they had, I would have told them what I have said in this declaration. If they had asked, I would have been willing to be a witness at Anthony's trial.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on *July 23*, 2005 in *Missouri City*, Texas.

Sheila J. Waters

Declaration of Socorro Herda

1. My name is Socorro Herda. My address is 1250 Lincoln Road #209, Miami Beach, Florida, 33139. I am 25 years old.
2. I first met Anthony Haynes in 1997 when I attended the BOOST Program in Newport Rhode Island. BOOST stands for "Broadened Opportunity for Officer Selection and Training." It is a program for students who are excellent candidates for ROTC scholarships. Successful completion of the BOOST program guaranteed a student a full Navy ROTC scholarship at any university that offered the program (granted, acceptance from the university admissions was received). BOOST primarily enabled prior enlisted personnel to bolster their academic qualifications before entering a university environment. This program also enabled a limited number of civilians who had shown an aptitude or interest in a military career the opportunity to pursue a ROTC scholarship as well. The program in Newport, Rhode Island involved students who were aimed at careers in the Navy and the Marine Corps. The program lasted ten months, from August 1997 to May 1998.
3. I grew up in San Luis Obispo, California and St. George, Utah, but enlisted in the U.S. Navy and departed directly to the BOOST program from Seattle. I arrived a couple days late to the program, and the other students were already there. This was in 1997. The first weeks of the BOOST program involved only the entering civilian students who were title "Track II's." These initial weeks involved demanding physical training, somewhat like a boot camp program. Focus during this time was indoctrinating these civilians; who were without any prior fleet experience, standard military and Navy protocol, courtesies, traditions, etc. After these first two weeks, the "Track I's" arrived who were the prior enlisted personnel. After an additional week of indoctrination into the BOOST program for the entire class, academics commenced. Academics took priority and the program was rigorous.

0030

15-70038.2390

4. Anthony and I were both "Track II" enrollees, of a group of 27 other students who had come directly from high school. Because we were such a small population and had spent a couple weeks together in such intense training most "Track II's" bonded quickly. Soon after I had arrived, Anthony sent me a note and we quickly became friends. Once the "Track I's" arrived, numbering close to 300 enrollees, the "Track II's" were dispersed among them. Anthony was one of just a handful of "Track II's" that resided in the company adjacent to mine which was another reason we became such good friends. I would have daily contact with him over the course of the program, until he left it early, sometime in 1998.
5. It is hard to judge a person in a military environment, where much of daily life is routine and regulated. BOOST was initially like this, especially at the beginning of the program. But once classes started and the discipline became more relaxed, I could get a much better sense of Anthony Haynes as a person. I trusted him immediately.
6. I still think he is one of the most sincere and honest people I have ever known. Anthony did tell me about things he had done in Houston, such as joyriding, and using marijuana, but he seemed determined to change his life around. Anthony became one of the few people I considered a real friend, and still do. Although we did not date or go out, we were so close that other students would kid me that he was my boyfriend.
7. Toward the end of his attendance at BOOST, Anthony seemed to undergo a change in personality. He became fervently involved in a church group and I recall him chiding me on my lifestyle, that it was wrong to go to clubs and being around drinkers. I didn't appreciate his advice, and I let it affect our friendship. He threw out his rap CDs and said he was going to change his life. I expressed to him my concern that it was a little extreme to have such a big change so fast.

0031

15-70038.2391

8. Anthony had to leave the BOOST program because of grades, and after that I did not have contact with him. After he left, someone from the program showed me an article from the internet about Anthony killing someone. I could not believe it and thought it was a cruel joke.
9. Anthony was not a violent person, and this crime was not in character for him. He was not aggressive with other people. Once he got into a fracas at a nightclub, in which he was defending himself, but I never saw him resorting to violence. I still cannot see him resorting to violence. Anthony is very verbal and strong-willed and will not hesitate to tell you if he doesn't agree with you that people have tended to misconstrue his body language and even manner of speech as aggressive. I do not know him as a violent man.
10. I was not aware of the trial. I could have been contacted by Anthony's attorneys, but no one ever contacted me. If they had, I would have told them what I have stated in this declaration and I would have been willing to be a witness for Anthony at the trial.
11. As I have stated here, I believe Anthony would be a very low risk of committing future violent or dangerous acts, and I would have told that to his jury if I had been given the opportunity. My opinion is that the risk of Anthony's repeating such an act is extremely low, based on my knowledge of him.
12. Had the defense attorneys or investigators talked to me in detail, I would have told them what I have said here in this declaration. I would have been willing to be a witness, but I was never called upon to do so by the attorneys or investigators for Anthony at the time of his trial.
13. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on July 17,

0032

15-70038.2392

2005 in Miami Beach, Florida

A handwritten signature in cursive script, appearing to read "Socorro Herda". The signature is fluid and stylized, with a large initial 'S' and a long, sweeping tail.

SOCORRO HERDA

0033

15-70038.2393

August 24, 2005

Attorney Richard Ellis

Re: Anthony Haynes

Dear Mr. Ellis,

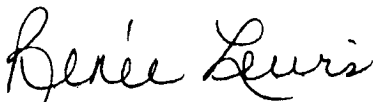
My name is Renee Lewis and I am a long time friend of both Donald Haynes and his son Anthony Haynes and am writing to you today on their behalf. First of all my address is 11543 Sagecreek Dr., Houston, Texas 77089. My home phone number is 281-484-2380. I am employed at Kinder Morgan, Inc. in Houston, Texas for 20 years as an Account Representative.

For approximately 25 years I have been friends with Donald Haynes and I have known Anthony Haynes since about the age of 8 or 9 months old. I have to say to you that I was completely shocked to learn of this tragic event involving Anthony Haynes because, given the type of kid Anthony is, this behavior does not fit with his personality. Anthony's character and disposition has always been one of politeness, as well as very smart and bright. This incident is totally uncharacteristic of Anthony's demeanor.

After following the case, I was shocked to see that Anthony was given the death penalty instead of a second chance. Our society seems to be very unforgiving and has come to a place of not yielding second chances to young adults. Yet we release child molesters and rapists back into society and allow numerous chances at rehabilitation, while first time child offenders are alienated from society permanently. There is something very wrong with our justice system.

I was not notified by Anthony's prior attorneys, but if I had been called I would have been able to be a character witness for Anthony. My feelings are that Anthony will not be a threat to society if given the chance at a release. Anthony was so young and obviously got caught up in a one time situation that does not warrant the taking of his life. Two wrongs will not right this situation. Anthony is a good person and I am sure that rehabilitation is a possibility for Anthony if given the chance.

Sincerely,

A handwritten signature in cursive script that reads "Renee Lewis".

Renee Lewis
A Friend

0034

15-70038.2394

Declaration of Renita Royal

My name is Renita Royal and my date of birth is August 18, 1955 and I reside at 19746 Plantation Road ~~Trial~~ ^{Grove Trail} Katy, TX. 77449 and my phone number is 281-685-6248.

1. I have known Anthony Haynes since he was about four years old, and Anthony always had a very joyful spirit, and was very artistic.
2. I sat in during opening arguments and I attended two days of the trial, and on each day I observed six to eight police uniforms with black tape on their badges.
3. Anthony was a very typical young man that was very respectful, and I am not aware of any abuse.
4. Anthony did not appear to be very close to his biological mother.
5. I was not asked to testify and if I had I would have clearly stated that Anthony would not have been a future danger to society.
6. It appeared that Anthony was judged before he ever went to trial.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and that this declaration was executed on August 3, 2005 in Houston, TX.


Renita Royal

0035

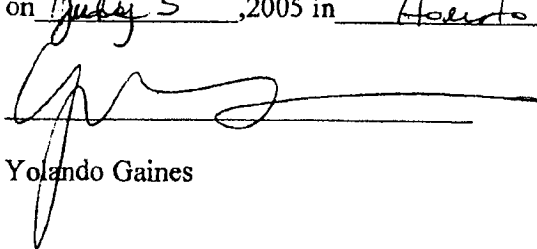
15-70038.2395

Declaration of Yolando Gaines

NAME: Yolando Gaines DOB: 3-3-61
ADDRESS: 10706 Chimney Rock Rd., Houston, Tx 77096
PHONE: Home: 713-721-5945 Cell: 832-771-1288
RELATIONSHIP TO ANTHONY: Best friend of Anthony's mother.

I knew Anthony growing up. I am a family friend. Defense never talked to me. I would have spoken to them and would have testified. I have known Anthony all his life. I met Patricia in 1981 when Anthony was 2 years old. He was bright, intelligent, good manners, respected authority. He was how she wanted her child to act in front of her. He was energetic. Made eye contact. He had no behavioral problems. I saw him several times a week. In high school he seemed more mature. He had spiritual values. He was never angry or belligerent. I was devastated when I heard the news of the murder. I cried and thought it couldn't have happened. It was hard to believe they were talking about Anthony. I thought they had to have the wrong person. My niece would have told me if Anthony was on drugs. I last saw Anthony about a month or two after he got home from military school. He went out with my niece for 1 ½ hrs. There was no sign of concern for him. He never drank alcohol around me. I recognized he had ADHD, he was very hyper. I didn't notice any mood swings and he never seemed depressed. I wasn't present at the trial. My niece last saw Anthony in March or April. He had a passion for the military. He was disciplined.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and that this declaration was executed
on July 5, 2005 in Houston, TX.


Yolando Gaines

Declaration of Debbie Lucas Moerbe

1. My name is Debbie Lucas Moerbe. My address is 15414 Flemington Ave., Houston, TX 77084. My date of birth is 12-9-1958 and I am 46 years old. I am currently a full-time student at Cy-Fair College, and I have a daughter named Ladera Lucas.
2. I first met the Haynes family about 2 days after I moved in and Patrika, Anthony's mother, came by and introduced herself. We became friends as she lived about 4 houses away from mine. This was in January of 1992. I have known both Anthony and his mother since then, right up to the time of the incident for which he received the death penalty.
3. At the time we met, my daughter was 12 years old, a little younger than Anthony, and they became friends. I would see Anthony every day when he lived with his mother, and when he lived with his father in Missouri City, I would typically see him on weekends.
4. I liked Anthony from the minute I met him. Anthony is honest and open, and he has never lied or tried to deceive me. He talked to me all the time.
5. As she grew older, at age 16 or 17, my daughter became rebellious. Anthony was a mediator between us. He would talk to her and then try to reassure me that she would turn out fine. Anthony was a voice of reason to her and he acted very maturely for his age.
6. Once, I was confronted with a snake in my house, and became hysterical. Anthony came over and killed the snake for me. He was a person you could rely upon and who would do anything you asked of him.
7. I trusted Anthony completely. I would let him take my car. He was often in my house

at night. Even when he was living with his father, he would stop by or say hello if I saw him in the neighborhood.

8. I remember Anthony talking about the Naval Academy, which he was eager to attend. He also did volunteer work at a local hospital. It looked like he was an orderly, as he wore white clothes. He took this hospital volunteer work very seriously.

9. Anthony would also do spur-of-the-moment good deeds. Once I took in a Rottweiler dog to help a homeless person. The dog needed veterinarian attention, and it was too expensive, so Anthony helped me take the dog over to a Rottweiler dog rescue organization in Missouri City who were able to have the work done more inexpensively.

10. When Anthony's mother married a man named Courtney Davis, Anthony accepted him and they became close. They had a good relationship. Anthony never had a disagreement with Courtney Davis. The step-father- child relationship was very good, better than a subsequent relationship with my daughter and husband.

11. Courtney Davis had two children: the boy's name was Courtney Jr. and the girl was named Christie. Anthony also had a good relationship with them. Courtney was about four years younger than Anthony and Christie was about eight years younger than him. Anthony would take care of them. Courtney and Patrika had a child together whose name was Ally, and Anthony baby-sat her.

12. My daughter did know Timothy Reese. He was very untrustworthy and basically a bad seed. My daughter told me he broke windows and he was known to have taken guns to

parties. Mr. Reese's reputation in the neighborhood was very bad.

13. I was in contact with Anthony right before this incident occurred. He had returned from the Naval Academy training program. At first, he acted as if it was not a big thing, and then he said he would try again and not all was lost.

14. When I heard of the incident of the shooting of the police officer, I was very distraught. I could not believe Anthony had done it. It was as if I had lost a loved one. I told people it was out of character and not something that he would have been likely to do.

15. Before the trial, someone called me on the phone and we spoke for about 15 minutes. I think it must have been a defense investigator, as it was not the prosecution. They merely wanted to know my opinion on some things, but nothing concrete was asked. I told them I wanted to be a witness for Anthony.

16. I attended part of the trial, and was present at most of the guilt/innocence phase. The day the verdict was read, I remember that there was many uniformed police officers in the courtroom, somewhere between 12 and 25. The other days, they were also there, but not as many. At the trial, the defense attorneys did not speak to me or attempt to interview me.

17. Based on what I know about Anthony, he would be a very low risk of committing future violent or dangerous acts. I don't think he would be a high risk of abusing drugs and in his normal state of mind he would not have considered doing these acts or any acts of violence. His risk of repeating such an act is extremely low, based on my knowledge of him. I have never seen anything that resembled anger or violence from him.

18. Had the defense attorneys or investigators talked to me in detail, I would have told them what I have said here in this declaration. I was willing to be a witness, and had even told the person I talked to that I wanted to be one, but I was never called upon to do so by the attorneys or investigators for Anthony at the time of his trial.

19. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on June 15,
2005 in Houston,
Harris County Texas.

Debby Lucas Moerbe

DEBBY LUCAS MOERBE

Declaration of Lawrence Aaron Tate

NAME: Lawrence Aaron Tate DOB:10-3-78
ADDRESS: 7730 Chaseview Drive, Missouri City, TX 77489
PHONE: Home: 281-835-3913 Cell: 832-338-6596
RELATIONSHIP TO ANTHONY: High school friend

Anthony and I were friends in ROTC and ran track together. I am now a preacher. No one from the defense contacted me. I would have testified. I first met Anthony in the 10th grade. Anthony was a leader in ROTC. He wanted to go to the Air Force Academy. Anthony was vocal and outgoing. They called him "Sunshine." He was very popular. Anthony had a disagreement with Col. Davis. He never saw any explosiveness, never saw him angry. ^{He} introduced ^{me} ^{my} him to his girlfriend. We did community service together at the VA hospital. We would feed, ~~bath~~ the patients. We went out once a month. We collected food and clothing. Anthony worked closely with the school administration. We had fun with community service. ROTC was a cohesive group. Anthony always got along with people. The girls called him pretty boy. It was rumored Anthony used pot, but nothing else. He drank alcohol but didn't have a problem. I haven't seen Anthony since graduation. I heard Anthony went to military school. Anthony called me and told me he was back in town. I remember Anthony as always happy, always smiling. He liked to joke. He was nice and popular. I never noticed any mood swings. ~~Hyperactivity would fit.~~ He made good grades. I never noticed Anthony being paranoid, that would have been unusual. No one in ROTC was asked to testify. ^{my knowledge} My date and I sat with Anthony and LaToya at the ROTC ball. I knew about Anthony's dad but there was no abuse. I was totally shocked when he heard about the murder. At no time did I ever think that Anthony would be a future danger to society.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and that this declaration was executed on 8/10/, 2005 in Houston, TX.

L. Aaron Tate

Lawrence Aaron Tate

Change of Address: 2602 Lakeside Village
Missouri City Tx. 7745.
Phone 832-230-5128

DECLARATION OF RYAN BRAUD

My name is Ryan Braud. I am 25 years old. My residence is at 2048 Hickory Glen, Missouri City, Texas 77489. My occupation is an artist.

I knew Anthony at Missouri City Middle School and at Dulles High School. We played football together and were good friends. Anthony was one of my best friends. Anthony was very outgoing, when he was comfortable. Generally, he was laid-back and not aggressive. Anthony was picked on a lot, by his peers and by adults, because he was light-skinned. He could be intimidated by people, and often I had to reassure him. I knew that he was into drugs.

Anthony was really into the ROTC. Col. Davis, who ran the program, did not give him a promotion. He later attended the BOOST program and something happened to Anthony when he was away at that program. He may have gone into the program as a way of not having to deal with his dad's strict discipline. Anthony was a good kid, and was interested in a lot of things such as football.

When he got back from the BOOST program, when he was trying to get into the Naval Academy, he called me.

The day after the shooting of the policeman, he came to my house. Anthony said, "Ryan, I need to talk to you." He was acting fidgety, and was agitated more than normal. He had been staying at motels he said. There was some marijuana on the table that was his. Anthony was very nervous that day. He said he had been without sleep for a long time and had not been to his mother's house. I could tell that something was not right. But we never got a chance to talk about it because my brother, who was from out of town, and I were going somewhere.

Anthony was never violent and I was surprised when I found out he was charged with the killing of a policeman. I do not think he is likely to be violent in the future.

I did not attend the trial. The defense attorneys or investigators never talked to me. If they had, I would have told them what is in this affidavit. If they had asked me to be a witness for Anthony at his trial, I would have been willing to do that.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on Aug. 5, 2005 in Houston, Texas.

Ryan Braud
RYAN BRAUD

0042

DECLARATION OF CHERRIE McGLORY

My name is Cherrie McGlory. My date of birth is January 12, 1954. I live at 5715 Mason Oaks, Houston, Texas 77085. I work for the Baylor College of Medicine as a program administrator for the graduate school.

I came to know Anthony through his father Donald Haynes. I knew Anthony for 19 years, since he was small. I got to know him through church attendance with his father, at the New Faith Baptist Church. Anthony attended regularly with his father.

Anthony was a well-mannered and polite kid. He was always very respectful, and a good student, never in trouble. I did not have a lot of contact with him when he was in high school, but saw him periodically over the years. My son, Cory McGlory, is a year older than Anthony. I was not aware of Anthony's friends or any drug use on his part. I knew he wanted to go into the navy.

The last time I saw Anthony was shortly before he graduated from high school. I was shocked when I heard about the incident regarding the killing of the policeman.

Anthony is not a high risk for committing future acts of violence. I think he just got caught up in a situation. I would never have seen him as a person who would have been involved in a criminal act, because of how he was raised. He is not a high risk of future acts of violence at all. This was my opinion at the time of the trial and it is my opinion now.

I did not attend Anthony's trial. I was never talked to by the defense attorneys or investigators. If they had contacted me, I would have told them what is in this declaration. If they had asked me to be a witness for Anthony at his trial, I would have been willing to be one.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on July 11, 2005 in Houston, Texas.

Cherrie McGlory
CHERRIE McGLORY

0043

15-70038.2403

DECLARATION OF IVORY JACKSON

My name is Ivory Jackson and I am over the eighteen years old and competent to make this declaration. My address is 1507 Arrowhead Dr. Patego, TX. 76013 and my telephone number is 817-801-6996. I am currently retired.

I have known Anthony Haynes all of his life. He is my great-nephew. I lived in New York until approximately four years ago, however I made weekend trips to Texas to visit my family.

Anthony was always a very well mannered person and very respectful. Anthony had a good support system through his entire family and was well liked by all. I never saw Anthony upset as a matter of fact he was always smiling.

When I heard about this tragic incident I was in shock as it was totally out of character for Anthony. I was never contacted by Anthony's attorneys or investigators. At the time of his trial, my opinion was that Anthony was not and is not now a high risk of committing future dangerous acts or acts of violence. If I had been contacted by anyone regarding this matter I would have been willing to testify, and would have told the jury what I have stated in this declaration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and this declaration was executed on 09/07, 2005 in PATEGO, Texas. 76013

Ivory Jackson 9/07/05

IVORY JACKSON

0044

15-70038.2404

DECLARATION OF MELVIN BROCK

My name is Melvin Brock and I am over the age of eighteen and competent to make this declaration. My address is 2440 Lynwood Dr. Beaumont, TX. 77703 and my telephone number is 409-838-6647. I work in the oil refineries.

I have known Anthony Haynes since his birth. Anthony is a fine young man with no problems. Although I did not live near the Haynes family I was a good friend of Donald Haynes and saw the Haynes family several times a year. Anthony was a very polite, well adjusted young man.

When I heard about this tragic incident I was in shock as it was totally out of character for Anthony. I was never contacted by Anthony's attorneys or investigators. At the time of his trial, my opinion was that Anthony was not and is not now a high risk of committing future dangerous acts or acts of violence. If I had been contacted by anyone regarding this matter I would have been willing to testify, and would have told the jury what I have stated in this declaration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and this declaration was executed on September 8, 2005 in Beaumont, Texas.

Melvin Brock
MELVIN BROCK

0045

15-70038.2405

DECLARATION OF PORTIA ROSE

My name is Portia Rose. I am over the age of 18 and am capable of making this declaration. My residence is at 3158 LaQuinta Drive, Missouri City, Texas 77459. I am currently employed as an attorney for the Internal Revenue Service.

I have a son a year younger than Anthony. I was friends with Anthony's father Donald Haynes. We were at the University of Houston together. I was a freshman and he was a senior. We also lived in the same neighborhood, and would do things together. Donald and I would coach our son's teams.

I got to know Anthony through sports activities and when Don was at my house. Don was a good parent. Anthony was a pretty good kid. Don was a strict disciplinarian, and Anthony was respectful. Don took Anthony to church. Anthony was also in ROTC in high school. Don had modified his life to make it conducive to raising his son. Anthony seemed like a good student, and I never knew that he used drugs. I did not know Anthony's friends.

The last time I saw Anthony was when a friend had a Christmas party and Don picked Anthony up at the airport. Anthony told us about the BOOST program he was in. He spoke well about the program and he was animated.

I heard about the incident in which Anthony was accused of killing a policeman when my son was watching television and he said that Anthony killed someone. It showed his mother Pat's house. I was shocked because Anthony did not seem to be a violent person. This was my belief at the time of Anthony's trial and it is still my belief today.

Anthony's defense attorneys never talked to me at the time of his trial. I did not attend the trial. If the defense attorneys or investigators had talked to me, I would have told them what I have said in this declaration. If they had asked, I would have been willing to be a witness for Anthony at his trial.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on 9/5/05, 2005 in Missouri City, Texas.



Portia N. Rose

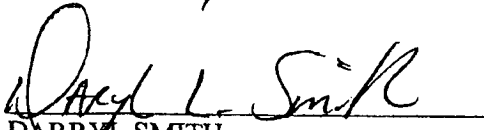
DECLARATION OF DARRYL SMITH

My name is Darryl Smith. I am over the age of eighteen and competent to make this declaration. My address is 1835 Wood Orchard Dr. Missouri City, TX. 77489, and my telephone number is 713-854-8943. I am currently employed as a Police Officer with the Missouri City Police Department.

I have known Anthony Haynes since he was a child. He lived in the same neighborhood, and played with my son Darryl Smith Jr. Anthony was always displayed good manners and was very polite and respectful. Anthony and my son played football together, fished and did normal activities. In my opinion Anthony was a all around good kid.

I was never contacted by Anthony's attorneys or investigators. Had I been contacted I would have said exactly what I am stating in this declaration. At the time of his trial, my opinion was and still is that Anthony is not at a high risk for committing future dangerous acts, or acts of violence. Anthony was a very well liked person and well respected.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and this declaration was executed on Sept 11, 2005 in Missouri City, Texas.


DARRYL SMITH

Ms. Bonita D. Padmore
Kellogg Brown and Root
Camp Cedar II, Iraq
APO, AE 09331
281-669-2455 Houston Office Line
E-mail: Bonita.Padmore@Halliburton.Com

Declaration of Bonita D. Padmore

My name is Ms. Bonita D. Padmore, and residing in Cedar, Iraq. My permanent residence is 9421 Kappa Drive, Houston, Texas 77051, 713-731-9612, where I resided for over 20 years. I am 40 year of African American female. I am employed with Kellogg Brown and Root and I have work oversees in Kuwait and Iraq for over 14 months. Prior to my employment at Kellogg Brown and Root, I was employed in the Public School System for 16 years including Houston ISD, Dallas ISD and Wilmer-Hutchins ISD.

I became acquainted with Anthony Haynes, when he was 8 years old, through my friendship with his father Mr. Donald Haynes. Mr. Haynes has always been a big brother to me since 1984. Anthony grew up in a loving home with his father Mr. Donald Haynes and never wanted for anything. He (Anthony) was a very mannerly person and showed much respect for me. In the year of 1991, I decided to marry Mr. George L. Padmore and Anthony was a Junior Groomsman in my wedding. As Anthony grew older and we communicated more we begin to talk about his future plans. Anthony was an excellent student and always had Military plans for his future. When Anthony was accepted into the BOOST Military Program he was honored and excited.

When I found out that Anthony was involved in this tread incident I was devastated. It is just not in Anthony's character to commit such a crime. Today, I am still puzzled by the incident, because I know that the whole truth was not brought out in his trail. I am abreast of the news trail and more of the news coverage. I was upset with the negative way that the news Media portrayed Anthony and his family. The defense Attorney never contacted me and requested a statement or my appearance in court. I would have appeared and testified in court if I would have been asked by Anthony's Attorney. I would have gladly taken off from work on my own time to testify on Anthony's behalf.

I have read newspapers, listen to the news and there have been numerous of cases in Houston, Texas where individuals have illegally posed as Police Officer in the past. Some have even use Police Officer uniforms and false badges. I always though that off duty Police Officers had to properly identify themselves, especially when they are out of uniform and differently before making a traffic stop.

In Anthony's case it is my opinion that the off duty Officer Kincaid should had taken down Anthony's truck license plates number and reported it to the Police Department. The fact that Officer Kincaid had just come from a party where he had been drinking

alcohols beverages and was in his own personal vehicle with his wife, should have been reason enough to report to report the incident to the Police. Since Officer Kincaid followed Anthony in his personal vehicle for five to ten minutes he (Kincaid) had plenty of time to gather his badge and personal identification in order to properly identify himself as a Police Officer. Mr. Kincaid and his wife were the only people that know the Kincaid was and Police Officer when the incident occurred.

I believe that Anthony Haynes was traileed, convicted and sentenced unjustly. I do not believe that Anthony would be a threat to suscity whether out or in the free world. This is a perfect example of how the Death Penalty is unjustly Administrator in Harris County Texas.

I declare under penalty of perjury of the foregoing is true and correct to the best of my ability and that this Declaration was Administrator in Cedar, Iraq.



Bonita D. Padmore

0049

15-70038.2409

DECLARATION OF DEVLIN JACKSON

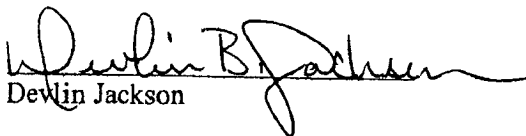
My names is Devlin Jackson. I am over the age of eighteen and competent to make this declaration. My address is 2994 Amarillo St.Beaumont, TX. 77701. I am currently employed as a Correctional Officer.

I have known Anthony Haynes all of his life. Anthony has always been very polite and well mannered. I lived with Donald Haynes and Anthony Haynes from 1984 until 1986 while I was a Correctional Officer at the Darrington Unit Rosharon, TX. Anthony at that time was approximately five years old, however I visited the family frequently and had first hand knowledge of Anthony and his character which has always been very good.

I found about the tragedy while at work. I saw a man that looked so familiar, however I was not paying that much attention to the news, and it was later that my Aunt called me and advised me that it was Donald that I had seen on television. I was shocked then as I am today, because Anthony has never displayed any type of violence.

I was never contacted by the defense attorney, nor any investigator. If I had been contacted by them, I would have told them what I have stated in this declaration. If I had been asked to be a witness of behalf of Anthony, I would have been willing to testify, and I would have told the jury what I have said here in this declaration. I would have also stated during my testimony that Anthony Haynes was not and is not now a high risk of committing future dangerous acts of violence.

I declare under the penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on September 9th, 2005 in Beaumont, Texas.


Devlin Jackson

0050

15-70038.2410

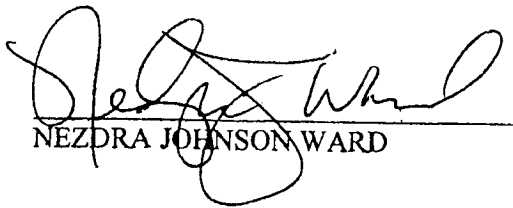
DECLARATION OF NEZDRA JOHNSON WARD

My name is Nezdra Johnson Ward and I am over the age of eighteen and competent to make this declaration. My address is 12806 Fawnway Drive Houston, TX. 77048 and my telephone number is 713-991-3300 and I am currently employed as a tax auditor.

I have known Anthony Hanyes since he was about 12 years old. Anthony associated with my son Corey Joseph. I am a friend of Anthony's father Donald Haynes and they would visit my home, or I would visit their home. Although Anthony and my son did not attend the same school they were friends and would run track together. Anthony was always well behaved, and had good manners and was very respectful.

When I heard about this tragic incident I was in shock as it was totally out of character for Anthony. I was never contacted by Anthony's attorneys or investigators. At the time of his trial, my opinion was that Anthony was not and is not now a high risk of committing future dangerous acts or acts of violence. If I had been contacted by anyone regarding this matter I would have been willing to testify, and would have told the jury what I have stated in this declaration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and this declaration was executed on 9/13/ 2005 in Houston, Texas.


NEZDRA JOHNSON WARD

Declaration of Toya Terry

Name: Toya Terry
Address: 5634 Willowbend, Houston, TX 77096
Phone: Home: 713-724-2077 Cell: 713-724-2077
Relationship to Anthony: Friend

My name is Toya Terry and I live in Houston, TX. I graduated from Grinnell College in Grinnell, IA in May of 2002 with a degree in General Science/Biology. I currently work at the Texas Heart Institute in the Department of Gene Therapy as a Research Associate and have done so for 3 years. I am an active member of The Fountain of Praise Church located in southwest Houston where Rev. Remus Wright serves as my pastor.

I have known and been friends with Anthony Haynes since 1994. It was my freshman year at DeBakey High School for Health Professions. I met him through a mutual church friend while volunteering at Southwest Memorial Hospital. He and I both were apart of their Medical Explorer Junior Volunteer program. We spent many days after school and weekends assisting the staff with various duties involving the hospital and its patients. It was my first experience working in a medical setting and it helped me throughout high school and beyond. It was a program that Anthony and I both enjoyed very much and found to be enriching, even at such a young age. Anthony had such a way with many of the patients and became a favorite among many of the nurses. It was not long until our friendship turned into a relationship and we began to date. We dated for about three years but remained friends until present.

My relationship with Anthony was one of the best things to happen to me. He was very gentle, compassionate, and sensitive. But at the same time strong-minded and assertive in what he wanted. He strove to be a good student and accomplished great achievements in the ROTC at Dulles High School. He loved my family, my friends, and me and did his best to please us all. I never felt, nor did anyone close to me, as though Anthony was a danger or would cause harm at any point in our relationship. He always showed respect towards my loved ones and me.

At the time of the incident at hand, he and I were close friends, in a sense best friends. We shared many things with each other and came to each other for advice and support. Anthony at times felt like he couldn't relate with his parents, as do most teenagers, and so many times we found comfort and solace in each other. Neither of us grew tired of the other and appreciated the friendship we cultivated over the years. I state this because it is important that I stress that I have been there for Anthony in many stressful situations, whether it involved school, home or work. And I was there for Anthony during the time of the incident with officer Kincaid on May 22, 1998. This was one of the most distressing moments of Anthony's life and I was there to offer all the help I could. He contacted me by phone shortly after the incident occurred and clearly demonstrated signs of distress, anxiety and fear. I had never before heard such strong feelings in Anthony's voice as I heard that night. I spoke to him for about 3 hours that night until the early morning. I spoke to him again on the next day by phone and in person at my home. He appeared very shaken and regretful for what had occurred the

night before. I tried my best as a friend to console him but what can you really say to ease someone in such a dire situation. We both were very young and had little idea of what to do or who to go to and were both very scared. It was just two days later that Anthony was arrested and charged.

I felt that the charge and the way they depicted Anthony in the media was skewed and partial. They played him out to be a common thug with no direction and no goals, someone who was out looking to be a nuisance to society and a troublemaker. Anthony was none of these. He worked hard and cared about his family and friends and would never intentionally jeopardize his well being or those whom he was associated. The media, expectedly, ignored his positive characteristics and played completely on hearsay and opinion. I know that many people might say that their loved ones were good people and the like after the fact but I know Anthony to be an individual of good standing and he always has been. I believe Anthony's actions were a result of him feeling threatened and vulnerable. If he had factually known the details of the situation I don't believe he would have reacted in such a manner.

In regards to his trial, I think it was judged unfairly and his legal representation was mediocre and poor. They dropped the ball in many instances regarding his case and treated the case with apathy and neglect. I was only able to follow the case first hand a short while due to my departure to college in Iowa in August of 1998. My mother, letters from Anthony, and the media (via internet) kept me abreast thereafter. It saddened me to watch such a young man with such potential be represented in such a way. Despite my closeness with Anthony and his family, his lawyers never once contacted me. During the actual trial I was on a school break at home in Houston and could have been summoned to court. I would have willingly spoken on Anthony's behalf whether I was in school or not. My testimony along with other key people might have aided his defense and character portrayal. I did not agree with the outcome of the trial and felt many facts were not made lucid to the jury or the media. I know Anthony would not to be a threat in jail (general population) nor to society at large.

Ultimately, I just want Anthony to have due justice as promised to him by our country's founding principles. I don't believe he received his day in court and think that he should at least be afforded such a basic right, to be treated fairly.

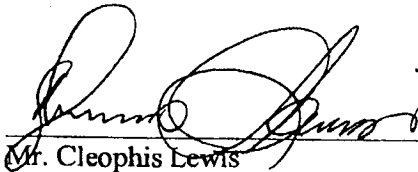
I declare under the penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief and that this declaration was executed on September 8, 2005 in Houston, TX.


Toya Terry

Declaration of Cleophis Lewis

1. My name is Cleophis Lewis and my date of birth is 12/24/1961, and I am currently employed and reside at 1313 Starlight Bay Street, Pearland, TX.
2. I met Anthony Haynes in 1988 or 1989.
3. I did not attend the trial but would have testified had I been asked by the defense.
4. Anthony lived with his father and was a very responsible young man.
5. I was the youngest single person on the block and Anthony and I used to play basketball or watch sports on television
6. I have never known Anthony to use any kind of drugs or alcohol. There had been some rumors in the neighborhood that Anthony may have smoked pot, however I did not have first hand knowledge of this.
7. I would have also testified during Anthony's trial that I do not believe that he would have been a future threat to society.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and that this declaration was executed on SEPTEMBER 8, 2005 in HOUSTON, Texas


Mr. Cleophis Lewis

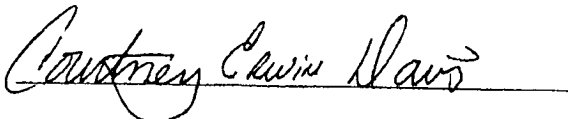
0054

Declaration of Courtney Erwin Davis

NAME: Courtney Erwin Davis DOB: 6-11-53
ADDRESS: 2727 Elmside #312, Houston, Tx 77042
PHONE: Home: 713-787-0957 Cell: 281-687-6552
RELATIONSHIP TO ANTHONY: Stepfather

Attorney's didn't make a case for not capital murder. The prosecutor talked to me after the trial. He cried and said, "I'm so sorry." He had asked them to take a plea. I was told that the victim chased them. They made out like it was a dangerous situation. They never asked if he was on duty or off duty, if he was drinking or not. The defense talked to them in groups. The investigator talked to me. They didn't ask me to testify, and I would have. The defense attorney talked about black slaves and the judge told him to shut up, no more. The 1st chair defense attorney didn't show up for sentencing. The jury couldn't come up with a verdict. The judge threatened to sequester them and they came back with guilty in 10 minutes. There were jurors who walked out with tears in their eyes. The front seats were roped off for the victim's family. The room was surrounded with blue (cops). They didn't save room for Tony's family. The judge said his one regret was that the 18 years Tony had lived was not worth the victim's life. Tony's friend gave a letter between LaToya and Tony where Tony said he was "gonna get off." The defense didn't ask to read the letter before it was read in court. The defense didn't speak to the jury. Anthony was twelve when he lived with Patrica and I.. There were no problems. I wasn't his dad – but his friend. I talked with Anthony a lot. Talked about his mom and dad, girls. In 1996 he came home "on something". We talked and he calmed down. At 17 Anthony started smoking. Patrica never smelled the smoke smell on him. I knew about the boys Anthony was with the night of the murder but didn't "know" them. The cops sat in the front of my house after the trial to intimidate me and Pat for a few weeks. The officers changed, some HPD, constables, sheriff's deputies. They didn't intimidate them at the trial.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and that this declaration was executed on
7/8, 2005 in Houston, TX.



Courtney Erwin Davis

0055

DECLARATION OF ANGELA G. MALCOLM

My name is Angela Glover Malcolm. My date of birth is July 7, 1961. My address is 2523 Lower Valley, Houston, TX 77067. I have lived at this address for 10 years. I am employed by Houston Texas Firefighters Federal Credit Union since February 1984. My current position is North Branch Manager.

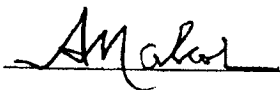
I met Anthony at a very young age, when his father would bring him to the credit union. I was a Member Service Representative at the time. He was always very courteous and respectful. Through the years his father and I became good friends. He would always keep me abreast of Anthony's challenges and accomplishments.

I was shocked and very saddened to learn of the tragic incident and the events that took place during the trial. I was not in attendance during the court proceedings, but I kept up with the trial via news media and newspapers. I don't feel that Anthony was adequately represented by his attorneys. The news media's portrayal of Anthony and his family was very unfair and negative. I have always known Anthony and his family to be well respected and of good moral character. I was never contacted by the defense attorney to testify as a character witness, and I would have gladly done so.

The death sentence that Anthony received was extremely excessive for the crime that was committed. I do not believe that Anthony actually knew that Mr. Kincaid was an off duty police officer. Being that his father (Mr. Haynes) is also a Peace Officer, he respected that type of authority. I believe that Anthony acted as he did because he felt threatened by the way Kincaid approached him. Kincaid was in his personal car, wearing civilian clothes, and with a female passenger.

It is a known fact that many African American males have been unjustly given the death penalty in Harris County Texas. Because of Anthony's inadequate legal representation, the jury was not completely aware of all the facts of this case. I do not feel that Anthony Haynes would be a threat to society.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on September 18, 2005 in Houston, TX.

_____

3056

DECLARATION OF TIOMBE DAVIS

My name is Tiombe Davis. I am ~~25~~ ²⁴ years old. My residence is at 4206 Blue Water Drive, Missouri City, Texas 77459.

I knew Anthony Haynes from when I started as a freshman with him at Dulles High School. I was in his grade all four years. In the ROTC, I was the commander and Anthony was the assistant commander. We were in ROTC activities after school, and we hung around together a lot, after school and on Saturdays and Sundays. There was drill team after school and color guard. Anthony also helped the instructors and on weekends there was parade practice and drills.

I went to leadership school with Anthony for one week at the end of the freshman year. It was in San Antonio.

The ROTC program at Dulles High School was actually run by Sgt. Harris and not by Col. Davis. Col. Davis was an angry old man who mainly stayed in his office or went golfing. If it was sunny, Col. Davis was usually golfing. He did yell at the cadets sometimes. Col. Davis was there mainly for the military structure, but Sgt. Harris gave most of the lectures, took roll call and told us what we had to do.

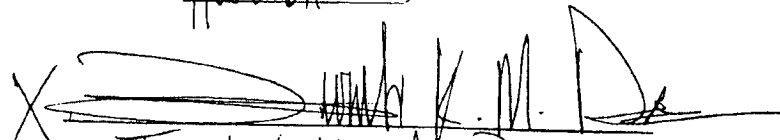
I remember an incident once when Col. Davis was teaching a class and Sgt. Harris was talking to a group of us in the office. Col. Davis came in after yelling at Anthony. Col. Davis had not liked Anthony's response to something, and said that Anthony did not have leadership skills. Anthony did go to the principal's office because of this incident, but it was not a big deal because he did not get a write-up over it. Col. Davis decided to punish Anthony by denying him permission to attend the Military Ball. Other than this incident, I never saw Anthony in trouble and never saw him blow up in class. I had never known him to be violent and I was very surprised and shocked when I learned about the crime he was accused of doing. It was not in his character to do something like that.

Anthony was quiet and would always smile. We called him "Sunshine." Anthony would always do a lot more than he had to. He would volunteer to run errands for Sgt. Harris, to get trophies, etc. Anthony would also give people a ride home often.

After Anthony returned from the BOOST program, I did not see him, and I only saw him once or twice after graduation. We did not date. When I was a freshman at Florida A and M, he wrote once and said he liked the program.

The defense attorneys or investigators never talked with me. If they had, I would have told them what I have said in this declaration. If I had been asked to be a witness at Anthony's trial, I would have been willing to do so.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on August 24, 2005 in Houston, Texas.

X 
Tiombe K. M. DAVIS

3057

APPENDIX H

*8 *Coleman*, 501 U.S. at 750.

Haynes seeks refuge from the procedural bar by arguing that state habeas counsel's ineffective assistance should excuse his failure to exhaust state remedies.⁵ However, "alleged infirmities in state habeas proceedings are not grounds for federal habeas relief." *Brown v. Dretke*, 419 F.3d 365, 378 (5th Cir.2005), *cert. denied*, --- U.S. ---, 126 S.Ct. 1434 (2006); *see also Elizalde v. Dretke*, 362 F.3d 323, 331 (5th Cir.2004); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir.2001); *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir.1999); *Duff-Smith v. Collins*, 973 F.2d 1175, 1182 (5th Cir.1992). Under that reasoning " 'ineffective assistance of habeas counsel cannot provide cause for a procedural default.' " *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir.2003) (quoting *Martinez v. Johnson*, 255 F.3d 229, 241 (5th Cir.2001)); *see also Ruiz*, 460 F.3d at 644. Haynes seeks to distinguish this precedent by arguing that state habeas counsel's representation should serve as cause when he neglects to raise claims that can only be brought in that forum. The Fifth Circuit, however, has repeatedly refused to create such an exception to the procedural bar doctrine. *See Elizalde*, 362 F.3d at 330; *Martinez*, 255 F.3d at 240; *Beazley*, 242 F.3d at 256. Haynes therefore cannot blame habeas counsel for his failure to present the unexhausted claims. Haynes has not made any argument that would justify adjudication of his unexhausted claims.

⁵ Haynes also argues that his actual innocence constitutes a fundamental miscarriage of justice that excuses the procedural default of the unexhausted claims. For the same reasons that argument would not meet the requirements of TEX.CODE CRIM. PRO. art 11.071 § 5, Haynes has not made a persuasive showing of actual innocence to allow federal review.

IV. Alternative Merits Review

While the court cannot grant relief on those claims Haynes has not presented in state court, the court pauses briefly to note that procedural and substantive defects doom the unexhausted claims. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). For instance, Haynes argues that Texas's lethal injection procedure violates the Constitution (claim 12).

Recent Supreme Court precedent forecloses *habeas* relief on Haynes' lethal-injection claim. In *Hill v. McDonough*, --- U.S. ---, 126 S.Ct. 2096, 2102 (2006), the Supreme Court held that challenges to a state's method of execution sound in civil rights, not habeas, law. The court will dismiss Haynes' lethal injection claim without prejudice so that he may advance his arguments by 42 U.S.C. § 1983 or in state court if he so wishes.⁶

⁶ Haynes' petition, therefore, is a "mixed" one in that it contains both civil rights and habeas claims. The Fifth Circuit has stated that "in instances in which a petition combines claims that should be asserted in habeas with claims that properly may be pursued as an initial matter under § 1983, and the claims can be separated, federal courts should do so, entertaining the § 1983 claims" and then adjudicating the remainder of the federal petition. *Serio v. Members of Louisiana State Bd. of Pardons*, 821 F.2d 1112, 1119 (5th Cir.1987). Several reasons prevent this court from severing Haynes' civil rights claim and considering it before turning to his habeas claims. First, civil-rights plaintiffs face a stringent exhaustion requirement. *See Woodford v. Ngo*, --- U.S. ---, 126 S.Ct. 2378, 2382 (2006); *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (stating that federal law "requires that inmates exhaust all available state administrative remedies before bringing a § 1983 action challenging" a state's lethal injection procedure). Even if the court severed Haynes' § 1983 claim, the unexhausted nature of his civil rights claim would compel its dismissal. Second, Congress intended to create a more efficient and quicker review of habeas petitions through the AEDPA. Stopping federal habeas proceedings midstream to consider the merits of claims collateral to Haynes' otherwise-valid conviction and sentence would violate the spirit of the AEDPA. Third, counsel represents Haynes in this matter. The court expects counsel to understand the difference between civil rights and habeas law. Attorneys do not merit the same liberal allowances given to inmates' pleadings. Counsel can act in a timely manner to preserve Haynes' interests by exhausting his state remedies and then seeking appropriate action. The principles of federalism and comity that define current habeas practice cannot be subordinate to a prisoner's right to a forum for challenging the circumstances of his confinement when the petitioner fails to comply with established procedure in asserting his rights.

Some of Haynes' unexhausted claims rely on the unwarranted extension of federal law. For instance,

Haynes argues that the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), renders him exempt from execution because his substance abuse at the time of the murder rendered him mentally incapacitated to the degree that he could not comprehend his actions. The *Atkins* Court held that the Constitution exempts mentally retarded offenders from execution. No precedent extends *Atkins* to substance abuse or any other form of mental impairment. *Cf. In re Neville*, 440 F.3d 220, 221 (5th Cir.2006) (finding that *Atkins* did not exempt mentally ill inmates from execution); *In re Woods*, 155 Fed. App'x 132, 136 (5th Cir.2005) (same).

*9 Likewise, Haynes broadly contests Texas's choice to use the death penalty, arguing that its imposition, both in the abstract and in his case, violates both the Constitution and international law (claims 19 and 20). No federal precedent invalidates Texas's use of the death penalty. Haynes' argument asks for an unwarranted and unsupported extension of constitutional law. Similarly, Haynes lodges complaints about his state habeas counsel's performance, but federal law unquestionably shows that such claims are not actionable on federal habeas review. *See Trevino*, 168 F.3d at 180 (“[I]nfirmities in state habeas court proceedings do not constitute grounds for relief in federal court.”). Under *Teague v. Lane* this court generally cannot create new habeas law.

Most of Haynes' unexhausted claims involve unresolved factual issues. Primarily, those claims attack trial counsel's efforts, but also charge the prosecution with misconduct. Haynes has apparently spent a significant amount of time developing the factual basis for these claims and has devoted a considerable portion of his already-lengthy petition on those issues. Without addressing the individual basis for each unexhausted, factually dependant claim, the court notes that none of his arguments facially command habeas relief.

Particularly, Haynes has taken great pains to develop evidence that he alleges trial counsel should have presented at trial. Yet, as noted by respondent, Haynes' argument is essentially “not that counsels' performance should have been *better*, rather, his argument is that counsel should have investigated and presented evidence at the punishment phase in a completely *different* manner.” (Docket Entry No. 10 at 29) The record indicates that the defense counsel (as well as the prosecution and trial court) went to great lengths to ensure

that Haynes' constitutional rights were protected and viable defenses pursued. Haynes' allegations do not show flagrant omissions by the players involved in his trial; rather, they merely demonstrate the exercise of strategy and typify the maxim that “the Constitution entitles a criminal defendant to a fair trial, not a perfect one.” *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). If the constraints of federal review did not command that Haynes first give the state courts an opportunity to adjudicate his claims of error, this court would still not issue a habeas writ.

Having addressed those claims that stand in a procedurally inadequate posture, the court now considers the claims for which federal review is fully or partially available.

V. Analysis of Exhausted Claims

Before turning to the merits of Haynes' claims, the court will address the applicability of the AEDPA to Haynes' case. Haynes extensively argues that, for various reasons, the AEDPA does not govern his claims. Haynes, however, fails to escape Congress's restrictions on federal review. The Texas courts adjudicated the merits of Haynes' exhausted claims, applied procedural law to prevent adjudication of the claims, or a combination of both in alternative rulings. While Haynes complains about the depth of that review or the strength of the state courts' reasoning, the state courts' substantive adjudication of his claims suffices to trigger the AEDPA deference. *See Neal v. Puckett*, 286 F.3d 230, 235 (5th Cir.2002)) (“In the context of federal habeas proceedings, adjudication ‘on the merits’ is a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural.”). Disagreement with the state court adjudication does not negate the statutorily required deference.

*10 By adopting a litigation strategy that distinguishes or ignores the AEDPA, Haynes has left his briefing vulnerable to summary dismissal. Haynes makes no effort to show that the state court's resolution of his claims was deficient under 28 U.S.C. § 2254(d)(1) or (2). In fact, Haynes hardly mentions the state courts' rulings or describe how they unreasonably violated federal law. As Haynes bears the burden of showing entitlement to habeas relief, proceeding in that manner deprives the court of any

reasonable basis for finding that the state courts' reasoning did not comply with the AEDPA. While this court could summarily deny Haynes' petition based on his failure to meet his AEDPA burden alone, this court will review the merits of each of his claims under the applicable federal standards.

A. Haynes' Exhausted Ineffective-Assistance-of-Counsel Claims (Claims 1(u) and (x))

Haynes raises several complaints relating to his trial counsel's service, but has only exhausted two arguments: that trial counsel prevented him from testifying in his own behalf and that counsel failed to request a limiting instruction for the victim impact testimony. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the *Strickland* standard, a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough v. Gentry*, 540 U.S. 1, 3 (2003); see also *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2462 (2005); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

To establish deficient performance, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct." *Wiggins*, 539 U.S. at 521. Instead, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. In reviewing ineffectiveness claims "judicial scrutiny of counsel's performance must be highly deferential," and every effort must be made to eliminate "the distorting effect of hindsight." *Id.* at 689. An ineffective-assistance claim focuses on "counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct[.]" because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence[.]" *Id.* at 689-90.

*11 A petitioner must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694; see also *Wiggins*, 539 U.S. at 534. A reasonable probability is one that is sufficient to undermine confidence in the outcome. See *Strickland*, 466 U.S. at 689; *Wiggins*, 539 U.S. at 534. The court does not consider prejudice in a vacuum. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.

1. Testifying in His Own Behalf

Haynes claims that he wished to testify at the punishment phase, but his attorneys would not let him. The trial record does not give any indication that Haynes wished to testify. Haynes instead bases this claim on an unnotarized affidavit he prepared while incarcerated. State Habeas Record at 67-69. In that document Haynes described how he wanted to testify, but states that his attorneys either convinced him not to or prevented him from doing so. Haynes' affidavit states that his testimony would have allowed him to avert a capital conviction or death sentence, but does not detail the nature or specifics of his proposed testimony.

Haynes raised this claim on state habeas review. Both of Haynes' trial attorneys submitted affidavits refuting his allegation that they prevented him from testifying. Based on those affidavits, the state habeas court entered the following fact findings:

16. The Court finds, based on the credible affidavits of trial counsel Robert Jones and Alvin Nunnery that trial counsel thoroughly advised the applicant of the potential risks and benefits of testifying during his capital murder trial; that trial counsel wanted the applicant to testify during the suppression hearing, but the applicant indicated that he was too nervous to testify; that the applicant's fear of testifying increased after the jury was impaneled; that the applicant decided not to testify during his capital murder trial; that trial counsels' assessment of the instant case lead them to the conclusion that it was best that the applicant not testify during the applicant's capital murder trial; that the applicant agreed with trial counsels' recommendation that it was best that the applicant not testify, and the applicant never

2012 WL 4739541

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United States District Court,

S.D. Texas,

Houston Division.

Anthony Cardell HAYNES, Petitioner,

v.

Rick THALER, Director, Texas Department
of Criminal Justice, Correctional
Institutions Division, Respondent.

Civil Action No. H-05-3424.

|

Oct. 3, 2012.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

SIM LAKE, District Judge.

*1 In 1998 Anthony Cardell Haynes ("Haynes") shot and killed off-duty Houston Police Department Officer Kent Kincaid. The State of Texas charged Haynes with capital murder. A jury found him guilty. He received a death sentence. After exhausting state and federal proceedings, Haynes now faces an execution date of October 18, 2012.

Relying on recent precedent from the United States Supreme Court, *Martinez v. Ryan*, 566 U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), Haynes now asks the court to reopen his federal habeas action and consider the merits of a procedurally barred ineffective-assistance-of-trial-counsel claim. (Docket Entry No. 60) Haynes also asks the court to stay his execution. (Docket Entry No. 61) For the reasons provided below, the court will deny Haynes' motion for relief from judgment. The court will not stay his execution.

Background

After his capital conviction and death sentence, Haynes unsuccessfully availed himself of Texas state appellate and habeas review. Haynes filed a 456-page federal petition for a writ of habeas corpus in 2005. (Docket Entry No. 1) Among the 23 claims in his petition, some of which raised numerous subclaims, Haynes argued that trial counsel provided ineffective representation under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in the preparation and presentation of mitigating evidence. Haynes submitted numerous affidavits from individuals whom he wished trial counsel had called to testify in the penalty phase.

In 2007 this court entered a Memorandum and Order denying relief. (Docket Entry No. 19) Federal courts have limited authority on habeas review. Federal law precludes relief unless "the applicant has exhausted the remedies available in the courts of the State[.]" 28 U.S.C. § 2254(b) (1)(A). Haynes raised most of his claims for the first time in federal court, including his *Strickland* claim. Haynes proposed two avenues to allow judicial consideration of his unexhausted claims. First, Haynes asked the court to stay his case pursuant to *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), thus allowing state court review. The court denied his request for a *Rhines* stay for several reasons: Haynes waited until the case became ripe to ask for a stay; he easily could have exhausted his claims earlier;¹ the state courts would find any successive habeas action an abuse of the writ, making a stay futile; and Haynes had not "made a compelling showing that, if presented to the state courts, his unexhausted claims would entitle him to habeas relief." (Docket Entry No. 19 at 15-16)

1

In that context, the court observed:

Even if ineffective assistance of habeas counsel constitutes "good cause" under *Rhines*, Haynes has not proved that his state representation was deficient. The record before the court only shows that prior counsel did not raise certain claims—a circumstance that arises every time a capital petitioner includes unexhausted claims in his federal petition. Haynes has not shown whether state habeas counsel's (or for that matter, state appellate counsel's) failure to raise those issues sprang from ineptitude, neglect, or strategic

decision-making. Haynes has not made a record that would show that ineffective assistance of habeas counsel constitutes good cause in this case.

(Docket Entry No. 19 at 14)

Second, Haynes relied on established exceptions to the procedural bar doctrine to overcome his failure to exhaust. When an inmate presents an unexhausted claim in federal court, and “the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred,” a federal procedural bar impedes adjudication. *Coleman v. Thompson*, 501 U.S. 722, 734 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Under the *Coleman* doctrine, however, federal courts can reach the merits of barred claims if “the prisoner can demonstrate cause for the default and *actual prejudice* as a result of the alleged violation of federal law[.]” *Coleman*, 501 U.S. at 750 (emphasis added).²

2 An inmate may also “demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750. That exception is not an issue in this case.

*2 Haynes focused his arguments for cause on state habeas counsel's failure to previously raise the barred claims. The court relied on Fifth Circuit precedent and held that “ineffective assistance of habeas counsel cannot provide cause for a procedural default.” (Docket Entry No. 19 at 18) (quotation and citations omitted) Thus, federal law barred the court from granting relief on Haynes' claims.

The court, however, reviewed the merits of the barred claims in the alternative.³ With special attention to his *Strickland* claim, the court concluded:

3 “An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(2).

Most of Haynes' unexhausted claims involve unresolved factual issues. Primarily, those claims attack trial counsel's efforts, but also charge the prosecution with misconduct. Haynes has apparently spent a significant amount of time developing the factual basis for these claims and has devoted a considerable portion of

his already-lengthy petition on those issues. Without addressing the individual basis for each unexhausted, factually dependant claim, the court notes that none of his arguments facially command habeas relief.

Particularly, Haynes has taken great pains to develop evidence that he alleges trial counsel should have presented at trial. Yet, as noted by respondent, Haynes' argument is essentially “not that counsels' performance should have been *better*, rather, his argument is that counsel should have investigated and presented evidence at the punishment phase in a completely *different* manner.” (Docket Entry No. 10 at 29) The record indicates that the defense counsel (as well as the prosecution and trial court) went to great lengths to ensure that Haynes' constitutional rights were protected and viable defenses pursued. Haynes' allegations do not show flagrant omissions by the players involved in his trial; rather, they merely demonstrate the exercise of strategy and typify the maxim that “the Constitution entitles a criminal defendant to a fair trial, not a perfect one.” *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). If the constraints of federal review did not command that Haynes first give the state courts an opportunity to adjudicate his claims of error, this court would still not issue a habeas writ.

(Docket Entry No. 19 at 21–22) Having denied Haynes' barred claims in the alternative, the court addressed the claims that were available for federal review, finding that Haynes had not met the Anti-Terrorism and Effective Death Penalty Act's requirements for habeas relief.

Haynes moved to alter or amend judgment under Fed.R.Civ.P. 59(e). (Docket Entry No. 21) Haynes maintained that he had met the requirements for a *Rhines* stay and a Certificate of Appealability. The court denied his Rule 59(e) motion. (Docket Entry No. 22) Haynes then unsuccessfully pursued appellate relief. The United States Supreme Court has recently denied Haynes' petition for a writ of certiorari. *Haynes v. Thaler*, — U.S. —, 132 S.Ct. 1969, 182 L.Ed.2d 822 (2012).

*3 Haynes has now filed a Motion for Relief From Judgment Pursuant to Civil Procedure 60(b)(6). (Docket Entry No. 60) Haynes bases his motion on the Supreme Court's recent decision in *Martinez v. Ryan*, 566 U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). Haynes also asks this court to stay his execution. (Docket Entry No. 61)

Discussion

Relying on *Martinez*, Haynes asks the court to reopen judgment under Fed.R.Civ.P. 60(b)(6). “[R]elief under Rule 60(b) is considered an extraordinary remedy.... ‘The desire for a judicial process that is predictable mandates caution in reopening judgments.’” *Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir.1998) (quoting *Bailey v. Ryan Stevedoring Co., Inc.*, 894 F.2d 157, 160 (5th Cir.1990)). Rule 60(b)(6) motions “will be granted only if extraordinary circumstances are present.” *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir.2002). As discussed below, federal law does not entitle Haynes to relief from the judgment because *Martinez* does not apply to habeas cases arising from Texas courts and, even if it did apply, Haynes has not shown extraordinary circumstances under Rule 60(b)(6).

I. *Martinez* Does Not Apply to Texas's Post-Conviction Procedure

The Supreme Court in *Martinez v. Ryan* recently concluded that deficient performance by a state habeas attorney may amount to cause under some circumstances. The *Martinez* court held:

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

Martinez, — U.S. at —, 132 S.Ct. at 1320. The *Martinez* Court reasoned that when, as in Arizona, inmates can only raise *Strickland* claims on state habeas review, a state habeas attorney's deficient performance may forgive a federal procedural bar.

The Fifth Circuit, however, has recently held that *Martinez* does not apply to federal habeas cases arising from Texas convictions. See *Foster v. Thaler*, 2012 WL 4328336 (5th Cir. Sept.21, 2012) (unpublished), cert.

denied, — U.S. —, 2012 WL 4365081 (Sept. 25, 2012); *Newbury v. Thaler*, 2012 WL 3032718, at *1 (5th Cir. July 26, 2012) (unpublished); *Avestas v. Thaler*, 2012 WL 2849487, at *1 (5th Cir. July 11, 2012) (unpublished); *Gates v. Thaler*, 2012 WL 2305855, at *6 (5th Cir. June 19, 2012) (unpublished); *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir.2012). “*Martinez*, by its own terms, ... establishes a specific and narrow exception to the *Coleman* doctrine[.]” *Ibarra*, 687 F.3d at 225–26. Unlike in Arizona, Texas inmates can raise *Strickland* claims in a motion for a new trial or on direct appeal. Texas inmates are therefore “not entitled to the benefit of *Martinez* for [their] ineffectiveness claims[.]” *Ibarra*, 687 F.3d at 227.

*4 Haynes contends that the Fifth Circuit has wrongly decided those cases in refusing to apply *Martinez*. He also argues that despite a “theoretically possible avenue” for raising *Strickland* claims, habeas review is the only meaningful forum for their adjudication in this and all other cases. (Docket Entry No. 60 at 80) This court cannot overrule Fifth Circuit law.⁴ The Fifth Circuit's recent holdings admit of no other conclusion than that *Martinez* cannot serve as a basis for meeting the cause requirement.

4 Haynes observes that the Supreme Court has recently stayed the execution of a Texas inmate raising a *Martinez* issue. See *Balentine v. Thaler*, — S.Ct. —, 2012 WL 3599235 (Aug. 22, 2012). Nevertheless, Fifth Circuit precedent “remains binding until the Supreme Court provides contrary guidance.” *Neville v. Johnson*, 440 F.3d 221, 222 (5th Cir.2006); see also *Foster*, 2012 WL 4328336 (refusing to stay an execution based on the Supreme Court's stay in *Balentine*). The Supreme Court, in fact, recently refused to stay a case on similar grounds. See *Foster*, 2012 WL 4365081.

II. *Haynes* Has Not Shown Extraordinary Circumstances

When this court entered judgment, well-settled Fifth Circuit law rejected any use of habeas counsel's representation to constitute cause. See *Brown v. Dretke*, 419 F.3d 365, 378 (5th Cir.2005); *Elizalde v. Dretke*, 362 F.3d 323, 331 (5th Cir.2004); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir.2001). Therefore, even if *Martinez* applied to capital cases arising from Texas courts, Haynes' Rule 60(b)(6) motion lacks merit.

Martinez itself does not constitute an extraordinary circumstance requiring this court to reopen judgment. Rule 60(b) (6) strikes a balance “between the desideratum of finality and the demands of justice.” *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir.1981). “A change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment” under Rule 60(b) (6). *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir.1990) (citations omitted). Even in habeas cases, federal courts have found that the AEDPA’s concerns for comity and finality override any interest in applying new decisional law through a Rule 60(b)(6) motion. *See Gonzalez v. Crosby*, 545 U.S. 524, 536, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005); *Hernandez v. Thaler*, 630 F.3d 420, 430 (5th Cir.2011); *Hess*, 281 F.3d at 216.

The Fifth Circuit has recently refused to find that *Martinez* is a sufficient basis for Rule 60(b)(6) relief:

... [I]n denying Adams’s initial federal habeas petition, the district court correctly determined that Adams’s claims were procedurally defaulted pursuant to the then-prevailing Supreme Court precedent of *Coleman*. The Supreme Court’s later decision in *Martinez*, which creates a narrow exception to *Coleman*’s holding regarding cause to excuse procedural default, does not constitute an “extraordinary circumstance” under Supreme Court and our precedent to warrant Rule 60(b)(6) relief. *See Gonzalez*, 545 U.S. at 536, 125 S.Ct. 2641, 162 L.Ed.2d 480; *Bailey*, 894 F.2d at 160. The *Martinez* Court’s crafting of a narrow, equitable exception to *Coleman*’s holding is “hardly extraordinary.” *Gonzalez*, 545 U.S. at 536, 125 S.Ct. 2641, 162 L.Ed.2d 480; *see also Martinez*, 132 S.Ct. at 1320 (“The rule of *Coleman* governs in all but the limited circumstances recognized here.”).

Adams v. Thaler, 679 F.3d 312, 320 (5th Cir.2012); *see also Foster*, 2012 WL 4328336. Because “the *Martinez* decision is simply a change in decisional law and is ‘not the kind of extraordinary circumstance that warrants relief under Rule 60(b) (6),’ “Haynes’ “60(b)(6) motion is without merit.” *Adams*, 679 F.3d at 320.

*5 Additionally, the applicability of *Martinez* to Texas’s post-conviction process does not change the fact that the court has already adjudicated Haynes’ *Strickland* claim. Haynes asks the court “to exercise its authority and grant him relief from its prior judgment ... and grant

federal review of this claim....” (Docket Entry No. 60 at 112) (emphasis added) The court has already reviewed the merits of Haynes’ *Strickland* claim in the alternative and found it to be without merit. Haynes argues that this court’s adjudication was not commensurate to his “roughly 130 pages devoted to the claim in the federal petition.” (Docket Entry No. 60 at 20, n. 9) Haynes calls the court’s alternative ruling “flawed,” and containing “logical errors” (Docket Entry No. 9 at n. 9). Be that as it may, the court has already granted Haynes the relief he now requests: The court considered the merits of his barred claims. While Haynes may disagree with the earlier adjudication, the relief requested has already been granted.

Finally, an inmate must not only show “cause,” but also “actual prejudice.” *Martinez*, — U.S. at —, 132 S.Ct. at —; *Coleman*, 501 U.S. at 750. “The Supreme Court has been reluctant to define the precise contours of the prejudice requirement.” *Barrientes v. Johnson*, 221 F.3d 741, 769 (5th Cir.2000); *see also Williams v. Taylor*, 529 U.S. 420, 444, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (leaving to the lower courts “[q]uestions regarding the standard for determining the prejudice that petitioner must establish to obtain relief”). Haynes must show more than “a possibility of prejudice,” but that the errors “worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 168, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); *see also Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

Haynes’ argument for actual prejudice flows from his *Strickland* claim, which the court has already found does not merit habeas relief. Haynes contends that trial counsel “did little to defend” him, allowing the State’s “extraordinarily weak” case to pass uncontested by a “wealth of mitigating evidence, and a huge number of witnesses who were eager to testify” that Haynes was a “young man who made a tragically bad decision one night, but who never intended to kill anyone[.]” (Docket Entry No. 60 at 17–18) Haynes’ pleadings present a possibility that the jury would have assessed his sentence differently had trial counsel called different witnesses. Haynes, however, overstates the effect of his habeas evidence while understating both the evidence against him and trial counsel’s efforts.

As the Texas Court of Criminal Appeals observed on direct appeal, Haynes unremorsefully confessed to knowingly murdering a police officer after a violent crime spree:

On the night of the offense, Haynes committed a string of armed robberies before he murdered Sergeant Kincaid. Under the pretense of asking for directions, Haynes would call a victim over to his vehicle and then point a gun at him, demanding his wallet. In this manner, Haynes approached three victims immediately before killing Sergeant Kincaid. Haynes then fired his gun out of his vehicle while passing the Kincaids. Haynes admitted that he shot Sergeant Kincaid because he was a police officer and, showing no remorse, bragged to friends that he had killed a police officer. Haynes also told people that he should have killed Nancy Kincaid, so that there would have been no witness to the murder.

*6 *Haynes v. State*, No. 73,685 at *5 (Tex.Crim.App.2001). Other evidence showed that Haynes had an eruptive temper marked by drastic mood swings. He had been treated for intermittent explosive disorder. He had threatened police officers in the past. He had been hospitalized for his unremitting drug use that began at age 13. During his hospitalization he often threatened to kill hospital staff. He had previously assaulted his three-year-old sister and tried to kill his dog.

The defense countered with several witnesses who testified that Haynes would not be a future societal danger. Trial counsel prepared for the punishment phase by speaking with numerous friends, family members, and acquaintances of Haynes. During their pre-trial investigation, trial counsel hired an investigator and two separate psychiatrists. In the punishment phase family members and others explained that Haynes was a good person who, despite behavioral problems, would not engage in future violence. While not amplified to the same extent as the evidence on habeas review, the trial testimony followed many of the same mitigating themes. The jury,

nonetheless, returned answers to Texas's special issues requiring the imposition of a death sentence.

Against that background, the court considered the evidence and summarily denied Haynes' claim that trial counsel provided deficient performance in the preparation and presentation of evidence in the punishment phase. Haynes' recent arguments do not provide a stronger basis for relief than those he made before the court entered its earlier judgment. Actual prejudice does not exist for evidence that is "in the main cumulative" to that from trial. *Banks v. Dretke*, 540 U.S. 668, 700, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). While his habeas affidavits included information outside the mitigation theories presented at trial, not all that information was helpful to the defense. Even considering the totality of Haynes' new evidence, "courts must consider the totality of the evidence before the judge or jury." *Berghuis v. Thompkins*, — U.S. —, 130 S.Ct. 2250, 2264, 176 L.Ed.2d 1098 (2010). With the strong evidence against him, Haynes has not shown a "substantial likelihood that the same jury" would not have given him a death sentence absent trial counsel's alleged errors. *Frady*, 456 U.S. at 172. Having found that Haynes' claims lack merit, the court is disinclined to find that "actual prejudice" exists to overcome a procedural bar.

Accordingly, the court finds that because he has already received all the relief he has requested and has shown neither cause nor actual prejudice, his Rule 60(b)(6) motion is without merit.

Certificate of Appealability

Should Haynes need a Certificate of Appealability for appellate review to proceed, the court *sua sponte* finds under the appropriate legal standards that he has made no showing that would require appellate consideration of his arguments. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

Conclusion

*7 For the reasons described above, the court **DENIES** Haynes' Motion for Relief From Judgment Pursuant to

Federal Rule of Civil Procedure 60(b)(6) (Docket Entry No. 60) and his Motion for Stay of Execution (Docket Entry No. 61). No Certificate of Appealability will issue in this case.

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