IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-35,938-01 and WR-35,938-03

EX PARTE ROBERTO MORENO RAMOS[1], Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION IN CAUSE NO. CR-1430-92-B IN THE 93RD JUDICIAL DISTRICT COURT HIDALGO COUNTY

***Per curiam*. ALCALA, J., filed a dissenting opinion.**

O R D E R

We have before us a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5 and a

[1] Applicant's indictment was amended to strike the "o" from some instances of "Roberto." Thus, the direct appeal issued under the name of "Robert Moreno Ramos." However, applicant's writs have issued under the name "Roberto," and several documents, including those from applicant, use the name "Roberto." We will continue to use "Roberto" for consistency.

motion to stay applicant's execution.[2]

In March 1993, a jury found applicant guilty of the February 1992 capital murder of his wife and two youngest children. The jury answered the special issues submitted pursuant to Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Ramos v. State*, 934 S.W.2d 358 (Tex. Crim. App. 1996).

In his initial application for a writ of habeas corpus, applicant raised eight claims asserting error in applicant's jury selection and the court's charge. This Court denied relief on those claims. *Ex parte Ramos*, 977 S.W.2d 616 (Tex. Crim. App. 1998).

Applicant filed a subsequent writ application (our -02) in the trial court on March 23, 2005. In that application, applicant raised a single claim in which he asserted that the State had violated its obligations under Article 36 of the Vienna Convention on Consular Relations, and that violation was prejudicial. This Court consolidated applicant's case with five others raising the same claim, determined that the claim did not meet the requirements of Article 11.071 § 5, and dismissed the six applications in a single order. *Ex parte Cardenas, Fierro, Gomez, Leal, Ramos*, and *Rocha*, Nos. WR-48,728-02, WR-17,425-05, WR-52,166-02, WR-41,743-02, WR-35,938-02, WR-52,515-03 (Tex. Crim. App. Mar. 7, 2007)(not designated for publication).

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[2] Unless otherwise indicated, all future references to Articles are to the Texas Code of Criminal Procedure.

On November 7, 2018, applicant filed in the trial court the instant writ application. In this application, he raises a single claim asserting that he was denied the effective representation of trial counsel at the penalty phase of his trial in violation of the Sixth Amendment.

Applicant has failed to meet the requirements of Article 11.071 § 5. Accordingly, we dismiss this application as an abuse of the writ without reviewing the merits of the claim raised. Art. 11.071 § 5(c).

Asserting the same argument, applicant also urges this Court to reconsider his initial writ application on our own motion. However, this claim was not raised in his initial writ application. Therefore, there is nothing to "reconsider," and we decline applicant's suggestion. Applicant's motion to stay his execution is denied.

IT IS SO ORDERED THIS THE 12th DAY OF NOVEMBER, 2018.

Do not publish

IN THE 93rd DISTRICT COURT
HIDALGO COUNTY, TEXAS
AND
IN THE TEXAS COURT OF CRIMINAL APPEALS

EX PARTE	**§**	
	§	
	§	**CAUSE NO. CR-1430-92-B (Hidalgo)**
	§	**WR-35,938-____ (CCA)**
ROBERTO MORENO RAMOS	**§**	

APPLICATION FOR A WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE

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IN THE 93rd DISTRICT COURT
HIDALGO COUNTY, TEXAS

AND

IN THE TEXAS COURT OF CRIMINAL APPEALS

EX PARTE	**§**	
	§	
	§	**CAUSE NO. CR-1430-92-B (Hidalgo)**
	§	**WR-35,938-____ (CCA)**
ROBERTO MORENO RAMOS	**§**	

APPLICATION FOR A WRIT OF HABEAS CORPUS

Roberto Moreno Ramos, a bipolar, brain-injured, Mexican national on Texas' death row, petitions this Court for a writ of habeas corpus.

I. SUMMARY

The decision to take Mr. Moreno Ramos' life was made and has since been repeatedly accepted without any of the decision-makers ever engaging in the "constitutionally indispensable"[1] process of considering powerfully mitigating evidence of his cognitive impairment, brain dysfunction, debilitating symptoms of severe life-long mental illness and childhood characterized by shocking brutality and desperate poverty.

Mr. Moreno Ramos was sentenced to die in a one day penalty phase during which the state presented three witnesses and the defense presented none. At penalty phase, trial counsel made no opening statement, cross-examined only one of the state's witnesses, offered no evidence and made an almost incomprehensible five page closing argument in which he failed to

[1] "[I]n capital cases the fundamental respect for humanity underlying the eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death" *Woodson v. North Carolina,* 428 U.S. 280 (1976).

offer even one reason to oppose a death sentence, never even mentioned Mr. Moreno Ramos and failed to ask the jury to spare his life. Penalty Phase Tr. Vol. 84, pp. 76-80, March 19, 1993.

The jury burdened with deciding whether Mr. Moreno Ramos should live or die knew absolutely nothing about the life they were asked to take, imposing a death verdict under conditions that pose an intolerable risk that "the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586 at 604-605 (1978).

His trial counsel had conducted no life history investigation whatsoever. Trial counsel conducted virtually no investigation of culpability, and absolutely no investigation of future dangerousness or mitigation. The only "investigation assistance" was provided by the attorney's assistant a week before trial. No life history investigation was conducted. There was virtually no pretrial litigation, with only five appearances before the first day of the trial, but Mr. Moreno Ramos's counsel never even filed a motion to continue the trial.

As a Mexican national, Mr. Moreno Ramos should have had the benefits of his own country's resources as a safety net when Texas failed to meet its Sixth Amendment obligations. But, Mexican officials were never notified of Mr. Moreno Ramos' detention. Consular officials learned of the case through news reports in the final days of jury selection and just before trial began, much too late to intervene in any meaningful way. Had the Mexican government been timely notified of the charges against their national, officials would have acted to prevent trial counsel's ineffectiveness by providing resources and assistance.

Instead, Mr. Moreno Ramos received no penalty phase defense whatsoever.

During state post-conviction proceedings, which should have been his next best chance to have his story investigated and presented, Mr. Moreno Ramos was again provided no assistance of counsel. Counsel appointed by the Court of Criminal Appeals over Mr. Moreno Ramos's

objections was completely inexperienced in capital cases and new to post-conviction litigation. He did not even seek funds for investigative or expert assistance, conducted no investigation of either phase, failed to developed even one cognizable post-conviction claim, missed the filing deadline and finally submitted a twelve page petition containing seven record-based claims, five of which had already been denied on direct appeal.

Unfortunately, this complete abdication by trial counsel was not raised in the first Application for state post-conviction relief, nor his initial federal habeas petition. Indeed, Mr. Moreno Ramos was constructively unrepresented in the initial state and federal habeas proceedings that set the stage for everything that has happened since.

The initial state and federal habeas petitions – both filed by the same lawyer whose appointment Mr. Moreno Ramos had opposed[2] – contained not one single properly framed legal challenge between them so that the Courts declined to even address a single issue raised.

The CCA found that no post-conviction claims had been raised, held that the claims raised "will not be addressed" and quickly disposed of the Application in a paragraph. *Ex Parte Ramos*, 977 S.W.2d 616 at 616-17 (Tex. Crim. App. 1998).

Mr. Moreno Ramos' first opportunity to alert a federal court to his unconstitutional confinement and death sentence was also squandered when the same lawyer who had failed to represent him in state post-conviction proceedings was appointed by the federal district court and filed exactly the same eight record-based claims that he had filed in state court.

The notion of holding Mr. Moreno Ramos responsible for the failures of appointed counsel is even more horrifying given that Mr. Moreno Ramos and his direct appeal counsel had both vehemently opposed the appointment of Mr. Welch, alerted the CCA to his lack of

[2] Exhibit 14, Affidavit of David Schulman, May 30, 2013.

experience, and petitioned to have him removed. Exhibit 14, Affidavit of David Shulman.

Unfortunately, Mr. Moreno Ramos' initial federal habeas proceedings provided not even a speed bump in "the blind infliction of the death penalty" through "[a] process that accord[ed] no significance to relevant facets of the character and record of the individual offender" and "exclude[d] from consideration . . . the possibility of compassionate or mitigating factors stemming from the diverse frailities of humankind." *Woodson v. North Carolina*, 428 U.S. 280 at 304 (1976).

Subsequent investigation has revealed a compelling and undeniably mitigating life history of the sort the U.S. Supreme Court has repeatedly found to have been sufficient to establish prejudice under prevailing constitutional norms. By simply following the routine standard of care common to capital defenders at the time, a later defense team discovered extensive and compelling life history evidence that completely changes the picture of Mr. Moreno Ramos and places the crimes of which is has been convicted, as well as the evidence of "future dangerousness" in an entirely new context.

Had trial or post-conviction counsel conducted a life history investigation, they would have discovered the heart-breaking story of a child born in rural Mexico and raised into a life of crippling poverty, nutritional deprivation, brutal violence, and a multi-generational history of mental illness. The physical violence young Roberto endured at the hands of his father was unspeakable both in frequency – occurring several times *per week* – and in kind, including: Roberto's father regularly whipped him with a chain used on car engines, he would burn his hands on a hot stovetop, dunk his head in a pail used to wash dishes until Roberto believed he would drown, force him to kneel on sand or small stones for long periods with arms outstretched while holding bricks, and hang him upside-down from his ankles, sometimes so long that

Roberto would defecate himself while hanging. Exhibit 1, Affidavit of Nancy Pemberton.

Food was scarce to the point of near-starvation. *See id*. at p. 10-11. Shelter often consisted of little more than a shack without running water or electricity. *See id.* at p. 10. Medical care was virtually non-existent except for two emergency instances in 15 years, including one where Roberto had swallowed a small arrow, which got stuck in his throat and severed his tonsils. *See id*.

Early childhood left Roberto ill equipped to grow and mature. He struggled in elementary school, was called "blockhead" or "stupid" by teachers and classmates alike, and eventually dropped out of school after the ninth grade. *See id.* at p. 12.

Mental illness is also rampant in Roberto's family. His brother Enrique is schizophrenic, his sister Andrea, who is now deceased, struggled with addiction, and his father, though never formally diagnosed, shows clear signs of paranoia and mania. *See id*. at p. 12.

Not surprisingly, Roberto, too, suffered with severe mental illness that went largely undiagnosed despite readily observable symptoms. Family members remember his hallucinations, grandiose delusions, abnormal speech patterns, bizarre behaviors, and severe mood swings. *See id*. at p. 12-17. This constellation of symptoms is the result of Mr. Moreno Ramos' co-morbid mental disease and cognitive impairments. Roberto has low-average intelligence. *See id*. He also suffers from a severe brain dysfunction, possibly of a genetic origin, which impairs his executive functions, such as impulse control, judgment and decision-making. *See id*. at p. 17. On top of these cognitive impairments, Roberto has suffered from Bipolar Mood Disorder for most of his life, including the time period during which the offense occurred and throughout the time of his trial and conviction. *See id.* at p. 18.

None of these facts were ever discovered by trial counsel. None were ever presented to

the jury that sentence Mr. Moreno Ramos to die. None were discovered or developed by counsel in Mr. Moreno Ramos' initial state and federal post-conviction proceedings. And – most critically for the current proceedings and this motion – no court has yet provided any merits review of the serious constitutional issues raised by these facts.

By the time Mr. Moreno Ramos met a mitigation specialist for the very first time, virtually all of his substantive constitutional rights had been waived, defaulted or trampled by counsel he had no hand in choosing.

Despite years of litigation up and down state and federal courts, from the moment of Mr. Moreno Ramos' arrest to today, no fact-finder or decision-maker entrusted with Mr. Moreno Ramos's life has ever been provided with evidence of Mr. Moreno Ramos's "diverse human frailities" to assist them in dispensing the most severe punishment under law.

The state has never argued that the performance of trial counsel was adequate or that the compelling evidence later developed would not have been persuasive to fact finders. Rather, the State of Texas has fought tooth and nail to prevent any court from hearing or considering the evidence and has for seventeen years been successful in raising procedural bars to ensure that the merits of the various claims raised regarding why and how Mr. Moreno Ramos' jury was denied any information regarding the "diverse human frailities" of the life they were asked to take evaded review. The failures of Mr. Moreno Ramos's state post-conviction and federal habeas counsel obstructed efforts to address the failures of his trial counsel.

Until now.

In the time since Mr. Moreno Ramos was last before this court, there have been changes in the law that create new procedural avenues to finally obtain substantive review.

Now unfettered by the truly indefensible procedural defenses that have blocked

substantive litigation in this case for almost two decades, this Court is now free to do what courts do and must facilitate the factual development of the prima facia case outlined in the evidence proffered below to give real and meaningful consideration to the question of whether the investigation, development and presentation of evidence developed in post-conviction and never before presented would have made a difference in either or both phases of Mr. Moreno Ramos' capital trial.

The various procedural obstacles to consideration of Mr. Moreno Ramos' claims are designed for the purpose of insuring that parties raise their claims in a timely fashion, that litigants do not waste court resources through piecemeal litigation doling out their complaints one at a time, that defendants are motivated to give state courts the first "bite at the apple." They are not meant to collide in such a fashion that a death row prisoner is given not one single forum for presentation and consideration of substantive and troubling questions regarding the constitutionality of is sentence.

Mr. Moreno Ramos has not abused the process by "laying behind the log", filing "piecemeal" litigation or bombarding the courts with "frivolous claims." His is not the sort of plea meant to be filtered out by procedural bars. To suggest that a brain-damaged, mentally ill, undocumented Mexican national laborer unfamiliar with the American justice system[3] and denied the assistance of his government made choices regarding what evidence to develop and present at trial or what claims to raise in state and federal post-conviction proceedings – to imply that he parsed Byzantine procedural rules that leave scholars and justices baffled to devise a wily scheme for defeating the ends of judicial economy, and spent twenty years deviously orchestrating this plan from his cell on Texas' death row – is to simply abandon any pretense of a

[3] Exhibit E, Declaration of Arturo A. Dager Gomez.

fair and equitable death penalty and "retreat the field". *Callins v. Collins*, at 1156 (Blackmun, J., dissenting).

However, the State of Texas has a strong interest in not allowing this freakishly improbable injustice to go on any longer. The question today is not even whether the mitigating circumstances of Mr. Moreno Ramos' life should prohibit his execution, but whether at least someone along the way should have the evidence in support of those circumstances squarely in front of them to consider without procedural obstacles blocking their view. Mr. Moreno Ramos is not asking for his second or third bite at the apple; he's still waiting for his first. As set out below, undersigned has good reason to believe that this Court will give him that opportunity.

Because the State has convinced the federal courts not to grant Stay and Abey, Mr. Moreno Ramos will get no federal review of this travesty of justice.

II. STATEMENT OF FACTS

Roberto Moreno Ramos was born May 23, 1954 in Aguascalientes, Ags., Mexico the second of ten children. His childhood home in a high crime neighborhood of Tijuana was an unfinished shack, with no running water or electricity that could not be secured so that lights were kept on all night to discourage intruders.

The family was hungry.

Roberto's father, Pedro, worked in construction and often was absent for months at a time, sending money to the family only sporadically. In Pedro's absence, Carmen Moreno, Roberto's mother had little means of providing food for her ten children. They were forced to sell household goods to survive. There was no medical care except in extreme emergencies. As soon as they were able, the children contributed to the family's economic survival, including odd jobs that exposed them to numerous chemical toxins.

Pedro was an extremely violent man who brutalized his wife and his children frequently over the span of many years. Pedro himself had been victimized in a cycle of domestic violence that damaged the lives of at least four generations of the family. Roberto's paternal grandmother abused her children and her grandchildren by insulting them, hitting them, throwing objects at them and inflicting bizarre, sadistic, forms of excessive punishment. Her children, in turn, terrorized each other and, later, their own children.

Pedro reenacted this treatment with his own children, beating them with various tools, burning them, dunking them in water, putting them in stress positions and hanging them by their ankles. For Roberto the abuse began at the age of four years old.

Roberto's mother was in no position to protect her children from either the violence of their father, or the extreme poverty in which they lived. She too was a victim of Pedro's anger and violence, and her children often heard their father beat and abuse their mother. Pedro had frequent extramarital affairs, making little to no attempt to hide them from his wife.

When Pedro was home he exerted control over his family by isolating them from the neighbors and their community. This isolation only facilitated the abuse as there was no one to witness the abuse suffered.

Life didn't improve when Pedro was gone. Not only did the family often go hungry, but they were totally unprotected from the dangers of being assaulted or robbed.

Roberto grew up with a relentless sense of fear and vulnerability and lack of security, for years living in an incomplete house with the constant threat of intruders, so impoverished that getting basic nutrition became a daily struggle for survival and with the ever present threat of violence at the hands of Pedro, moving from one high crime urban neighborhood to another.

These stressors were made all the more difficult by Roberto's underlying brain

dysfunction, low IQ and severe mental illness.

Roberto is of low-average intelligence and also suffers from a severe brain dysfunction, possibly of a genetic origin. The portion of Roberto's brain that is devoted to higher functions, such as impulse control, does not work properly.

Roberto struggled in elementary school. He was known as "blockhead," or stupid, by both teachers and classmates. The family immigrated to the United States in 1970 when Roberto was 16. Roberto started ninth grade and was placed in English as a Second Language classes, art, and physical education. He was not placed in any academic subjects, was never tested, and dropped out of school at the end of ninth grade to work in the construction with his father.

Roberto has also suffered from Bipolar Disorder for most of his life, including the time period during which the crime occurred and throughout the time of his trial and conviction.

Both Roberto and his brother Enrique demonstrated emotional problems, odd thinking, and aggressiveness even during their early childhood. Roberto demonstrated severe problems in socialization and mood regulation likely related to persistent and severe childhood trauma. Roberto also demonstrated eccentric thinking and grandiose ideation. Throughout Roberto's childhood and early adolescence his other siblings would make fun of him "because of the odd and silly things he would say."

When he was 17 years old, Roberto moved in with a 22 year old woman he met in a restaurant. The next year, they married.

There is a long history of mental illness in the Ramos family. Roberto's father displayed signs of paranoia and mania. Roberto's brother Enrique is schizophrenic. Roberto's sister Andrea, who is now deceased, had problems with drug use.

The delusions that increased in frequency and intensity through his life were noticed by

Roberto's family beginning when he was a young adult. Roberto thought he had "special powers." Roberto suffered from mood swings and his behavior was at times unpredictable.

Roberto was ambitious and hard-working but struggled in every area of life, moving around repeatedly, from Los Angeles to Chicago back to Los Angeles, starting businesses and projects and jobs always with high hopes and big plans. But he could never quite establish himself and at every point the people around him noticed irrational beliefs and odd behaviors.

In the late 1980s Roberto and Leticia moved to Puerto Progreso, Texas, where he struggled to find regular employment. Like his father, Roberto had extramarital affairs during his relationship with Leticia.

Robert occasionally visited his family in California without his wife or children, making grandiose statements about how well he was doing financially, but then hanging around the Home Depot to obtain work as a day laborer. During those visits in the year before the crime of which he has been convicted, Roberto's family noticed that he suffered from greater emotional lability and mood swings. He exhibited strange behaviors and abnormal speech patterns, talking about the devil and witchcraft.

The psychiatric disorders from which Mr. Moreno Ramos suffered during and around the time of the deaths of his wife and children have been treatable by mental health professionals for many years, beginning long before the time that Mr. Moreno Ramos' wife and two children died, and continuing until the present.

The jurors burdened with the decision of whether to take Mr. Moreno Ramos's life heard none of this evidence.

A. The Crime and Mr. Moreno Ramos's Detention

In mid-February 1992, 8 year old Abigail Ramos stopped attending school and church.

When representatives of the school and church went to check on her, the family home appeared to be vacant. Later, a private investigator did the same thing arriving at the same impression.

At this time, Mr. Moreno Ramos reportedly told some family members that his family had died in a car accident. He claimed that they were then cremated. Mr. Moreno Ramos asked for money from relatives in order to pay for funeral expenses. The police investigated and found no evidence that a family of three had been killed in a car accident and cremated near the time and place described by Mr. Moreno Ramos.

Eventually, the police entered the house for a "welfare check." They found that no one was home. On March 30, 1992, Mr. Moreno Ramos arrested on an outstanding traffic warrant and brought to the police station to be questioned.

He has never since left custody. (S.F. 61: 234-36.) For the next several days he was held in police custody and interrogated. Mr. Moreno Ramos told the police that his wife and two children were in Jalisco, Mexico. He explained that he needed to relocate the family because Leticia had been receiving welfare illegally. Mr. Moreno Ramos also told the police that his family was living in Austin and San Antonio, Texas.

His government was not notified and he was not provided with counsel. *See Avena and Other Mexican Nationals* (Mex. v. U.S.), No. 128 (I.C.J. Mar. 31, 2004) ["Avena"].

> Mr. Moreno Ramos was not a sophisticated or wealthy defendant who "knew the system." He had no prior criminal convictions at the time of his arrest. He spent his entire childhood and adolescence in Mexico, migrating to the United States with his family when he was in his late teens. Moreno Ramos attended school in both Mexico and in the United States, but he did not obtain a high school diploma. He was indigent and could not afford to retain an attorney. Moreover, Mr. Moreno Ramos had no family in Texas who could provide financial assistance for his case. There is no question that a defendant like Mr. Moreno Ramos would have benefited from the assistance a consulate could provide.

Exhibit E, Affidavit of Arturo A. Dager Gomez.

On March 31, 1992, an investigator from the Hidalgo County Sheriff's Office took Mr. Moreno Ramos, dressed in jail clothes, from the jail in Weslaco to an interview room at the Hidalgo County Sheriff's Office in Edinburg and questioned him. (S.F. 61:249-265; 61:276-280.). After additional interrogation, Mr. Moreno Ramos signed a consent form to search his house and car.

The following day, April 1, 1992, Mr. Moreno Ramos was interrogated again at the Sheriff's Office. (S.F. 66: 785-808.) Based on statements Mr. Moreno Ramos made during his interrogation, he was arrested on a theft charge on April 2, 1992 (S.F. 66: 829) and thus could not leave jail even after his traffic violations were resolved on April 3, 1992. (S.F. 62: 401.)

During the consent search on April 1, 1992, the police noted that that there was a pile of dirt in the back yard and some pieces of crushed concrete. After conducting this brief search, the police sought and obtained a search warrant on April 5, 1992. Forensic testing of the house revealed the presence of blood in a number of rooms.

During the execution of the search warrant on April 6, 1992, the police noticed that there was blood in the bathroom and that the floor was freshly tiled.

On April 7, 1992, Mr. Moreno Ramos was interrogated in both Spanish and English by police while in custody. (S.F. 66: 864—67:887.) After this interrogation, he signed a written statement to police and drew a map of the bathroom in his house, indicating the location of the bodies. In this written statement, Mr. Moreno Ramos stated that he returned home around 4:00 a.m. on "February 5th or 6th" and when he walked into his bedroom he "saw Leticia on the bed with her head hanging down [and] saw that she had blood all over her head [and] that she had a hammer that [he] use[d] for work still on her hand." He stated further that he "then went to the bathroom and […] found [his] two son [sic] in the bathroom – bathtub [and] checked their bodies

[and] saw that they had blood on their foreheads." He went on to say that he was "thinking of killing" himself, but his "oldest son came to mind," so he "then started to think that [he should] hide the bodies […] because [he] did not want [his] oldest son to find out what happened." (S.F. 64: 581-82, 601-602 607-12.). Mr. Moreno Ramos told the police that he decided to bury the family in the bathroom because he did not have money for a proper burial. After burying them, he took some of the family furniture (later tested positive for blood) to his new wife's family's house in Mexico. The state's witness Maria Escamilla, an immigration officer, testified to Mr. Moreno Ramos's status as a non-citizen. (S.F. 77: 1885, 1892.)

Based on this statement, the Hidalgo County Sheriff's Office obtained a second search warrant for the house that day and the bodies of Leticia, Jonathan, and Abigail Ramos were found under the bathroom floor. (S.F. 67:898.) All three had sustained blunt force trauma to their heads. They were buried with their wrists bound. The medical examiner concluded that all three individuals were killed in a sequential manner and buried within a short time after their death.

Mr. Moreno Ramos was arrested on capital murder charges on April 8, 1992. (S.F. 67:908.) While being escorted from the Justice of the Peace Morales' office in Weslaco for arraignment back to the Sheriff's Department, Mr. Moreno Ramos allegedly made a spontaneous admission that "I only hit my wife on the head several times because I did not want her to suffer anymore." (S.F. 75: 1668-1669, 1679.)

On April 14, 1992, officers from the Hidalgo County Sheriff's Office went to Valle Hermosa, Mexico, and took furniture and other evidence from Mr. Moreno Ramos's second wife's house there. (S.F. 67:935.)

Although arresting authorities were well aware that Mr. Moreno Ramos was and is a

Mexican national, they never informed him of his right to consular notification and assistance pursuant to Article 36 of the Vienna Convention. The authorities also failed to notify Mexican consular officials of Mr. Moreno Ramos's detention.

Unfortunately, counsel also failed to seek readily available consular assistance.

B. Trial Counsel Belatedly Appointed

Mr. Moreno Ramos was finally provided with counsel for the first time on July 28, 1992, after 120 days in custody. The trial court appointed Ricardo Flores as lead counsel. Second chair Jack Duval Hunter was appointed two weeks later, on August 13, 1992.

Mr. Hunter had previously worked as a civil attorney, a prosecutor, and an attorney for the Immigration and Naturalization Service before opening his own office. Mr. Hunter had tried two or three criminal cases as a defense attorney, but had never participated in the prosecution or defense of a capital cases prior to representing Mr. Moreno Ramos. Exhibit 7, Affidavit of Jack Duval Hunter, II. Mr. Hunter had never done a capital case before he was placed in charge of preparing motions and researching case law on this one. *Id.*

The only other member of the defense team was Mr. Flores' assistant, Xavier Guerra, who was appointed on January 5, 1993, a week before the commencement of jury selection, (S.F. I:183) look at the crime scene locally and to go to Austin to inspect where Mr. Moreno Ramos had lived and collect court documents relevant to an issue of pretextual arrest. Exhibit 7, Affidavit of Jack Duval Hunter, II.

Mr. Moreno Ramos's trial attorneys retained psychologist Alphonso J. Alamia to help them decide whether to put Mr. Moreno Ramos on the stand, not retained as a mitigation specialist and did not conduct a life history investigation. Exhibit 7, Affidavit of Jack Duval Hunter, II, at 10.

Mexican officials heard about his case for the first time through the media mid-way through jury selection. The Mexican Consulate "had received no notification of Mr. Moreno Ramos's detention." *See* Exhibit 9, Affidavit of Hugo Alberto Garza Ramirez. Consular official Hugo Alberto Garza Ramirez's first contact with Mr. Moreno Ramos was February 12, 1993, eleven months after Mr. Moreno Ramos' arrest and twelve days before opening statements. *Id.*

While consular officers did attend the trial (S.F. 83: 2357), it was too late to assist defense counsel prior to trial, when Mexico would have provided critical investigative resources and would have assisted in negotiations with the prosecutor. *Id.*

C. The Trial

At trial, the State put on twenty-five witnesses. The defense presented two.

Evidence was introduced that Mr. Moreno Ramos had been having an affair with Marissa Robledo since November 1991. (S.F. 77: 1896; 78: 1959.) The State's theory of the case, set forward in opening statements, was that Mr. Moreno Ramos murdered his wife and two children by beating them with a blunt instrument and then burying their bodies under the bathroom floor in their house, so that he could marry another woman, Marisa Robledo. The defense theory was that some unknown drug dealers killed the family. (S.F. 83: 2318.)

Police officers testified as to the horrifying details of the crime scene. They described blood evidence on the curtains, in two bedrooms, in the hallway, in the bathroom, and on men's boots. (S.F. 845). They also testified that only men's clothing was in the closets, but women's and children's clothes were in the attic. (S.F. 1658).

The officers described their recovery of the bodies. (S.F. 887-889). A forensic pathologist testified that it was very unlikely that Mr. Moreno Ramos's wife's injuries were self inflicted. (S.F. 1394).

Marisela Velasquez, a neighbor testified that she heard a shout come from the inside of the Ramos house. (S.F. 80: 2102). Two other witnesses testified that they went to the Ramos home in the days following the last time Leticia, Abigail, or Jonathan had been seen. One witness testified that Mr. Moreno Ramos told him the family had moved to California. (S.F. 76: 1778). The other witness testified that Mr. Moreno Ramos told him the family was too busy to see him because Mr. Moreno Ramos said his mother had died and they were handling her affairs. (S.F. 76: 1798). Mr. Moreno Ramos's cousin testified that he went by Mr. Moreno Ramos's house in March and asked about his family, Mr. Moreno Ramos told him that his family had died in a car accident. (S.F. 76: 1847).

Marisa Robledo testified in Spanish with the bailiff translating. (S.F. 78: 1908-09). Ms. Robledo, who is legally blind, testified that she met Mr. Moreno Ramos in Austin, Texas in November 1991, at the Criss Cole Rehabilitation Center. (S.F. 78:1916-20). Mr. Moreno Ramos's son, Osmar, worked there at the time. Mr. Moreno Ramos told Marisa that he was a single man and that his mother wanted him to get married. On one occasion when Mr. Moreno Ramos was with Marisa at the Center, they ran into Osmar. Mr. Moreno Ramos, who told Marisa that he was a counselor employed by the Center, introduced Osmar to Marisa as one of Mr. Moreno Ramos's clients. (S.F. 78: 1920-21). Osmar testified that Mr. Moreno Ramos's actions made him feel bad. In January of 1992, the two decided to marry. (S.F. 78:1938) Ms. Robledo testified that Mr. Moreno Ramos did not tell her he was already married to Leticia Ramos; only that he was giving shelter to a widow and her two children. (S.F. 80: 1920-22). Mr. Moreno Ramos and Ms. Robledo married on February 10, 1992. (S.F. 78: 1959). They did not move into the house in Progreso, Texas immediately. Mr. Moreno Ramos told Marisa that a widow and her two children rented the house. (S.F. 78: 1946) Then he told Marisa that he

needed to do a lot of work at the house. (S.F. 79: 1979). They moved into the house on February 14, 1992. Marisa immediately noticed that the bathroom smelled really bad. (S.F. 79: 1986). Shortly after moving in, Marisa stated Mr. Moreno Ramos moved a number of pieces of furniture to her family's house in Mexico. (S.F. 79:1999-2000). The local police later seized these items in Mexico and they were used against Mr. Moreno Ramos at his trial.

As part of their investigation of the case, police traveled to Valle Hermosa, Mexico, where they collected several items of evidence that were admitted as part of the prosecution's case-in-chief. (S.F. 75: 1686.) A hammer with blood stains on it was also found at Ms. Robledo's brother's residence in Mexico. (S.F. 1691). There is no indication in the record that the local police ever consulted with Mexican officials regarding the seizure of property in Mexico or concerning transporting the property back to the United States.

At trial, defense counsel proposed that Leticia and her two children had been killed by unknown assailants in a narcotics "hit." The only evidence to support this theory was some vague writing on a piece of paper that inferentially could have related to narcotics.

The defense presented two witnesses during the culpability phase. One witness testified as to Ms. Robledo's work and educational history and the other was a private investigator who discussed a note that the defense alleged was evidence to their alternative theory of the crime. The exhibit, a sheet of paper, which had impression on it from a sheet above it that had been written on, was recovered from the Ramos home. The translator translated the document and read it into the record in Spanish, but stated that more than half of it was untranslatable. (S.F. 83:2194-2196). The witness, Juan Garza, testified that the note appears to have something to do with running drugs up north and that when the drugs were taken up north, they were ripped off. He also agreed that, when asked to translate it into English, it is "basically unreadable." (S.F. 83:

2207-2208).

Unsurprisingly, Mr. Moreno Ramos was convicted of capital murder on March 18, 1993.

At the penalty phase of the trial, the defense waived opening statement.

The state offered three witnesses in support of future dangerousness. Mr. Moreno Ramos's oldest son, Osmar Ramos, testified about physical and verbal abuse suffered at the hands of his father. (S.F. 84: 8-13.) Osmar told jurors that his father beat him with "pipes or whatever he could get hold of" and on one occasion "put a telephone wire" around his "private parts" and put an "iron and […] books on it as weight." (S.F. 85: 8, 10).

When the State asked Osmar if, in his opinion, Roberto Ramos would continue to commit criminal acts of violence, Osmar responded that "yes, he would." (S.F. 85: 8, 15).

The defense cross-examined Osmar about his own suicide attempts, seeking to demonstrate that his father had not been the cause of his despair.

The state then introduced the surprise testimony of two witnesses regarding an unproven, uncharged, hypothetical crime. Basilisa Hernandez Silva testified that her daughter, Maria Elena Aguilar Hernandez, had married Mr. Moreno Ramos in Mexico in 1988, after which the couple moved to the United States. (S.F. 84: 21-23, 31-34). She testified that she had not seen her daughter since that time. (*Id.*) Miguel Aguilar Hernandez, Basilisa's son, provided similar testimony. (S.F. 84: 36-41.) The State presented no evidence, however, that Maria Elena Aguilar Hernandez had been harmed, let along that Mr. Moreno Ramos had previously been arrested or charged with any violent crime, including that of a murder of a former wife.

The clear implication of the Aguilar family's testimony was that Mr. Moreno Ramos had killed his first wife. While trial counsel objected to introduction of this evidence, when that

objection was overruled, counsel failed to ask for a continuance to prepare to rebut the testimony and did not even cross examine these devastating state witnesses. (S.F. 85: 24-30).

The State rested. Immediately thereafter, the defense rested, having presented no evidence whatsoever at penalty phase.

During the State's closing arguments at penalty phase, ADA Lopez summarized Osmar's Ramos's testimony, reiterating the story Osmar told about Roberto Ramos putting tape around his mother's mouth "so that the neighbors wouldn't hear her screams of pain." (S.F. 84: 73). Ms. Lopez lingered on disturbing images of the crime scene and exhumation of the victims' bodies. (S.F. 84: 73). The State then addresses Mr. Moreno Ramos's potential to commit criminal acts of violence in the future:

> And, when I asked his own son, who was nineteen years old, who knows Robert Ramos better than any one of us because he lived with him, 'Will he continue to commit criminal acts of violence?' Osmar said, 'I believe he would.'

(S.F. 84: 73).

ADA Lopez capitalized on defense counsel's abandonment of their client, arguing that no mitigation was presented because none existed: "What is redeeming about this man? Nothing. Nothing. There is nothing mitigating here. Not one thing." (S.F. 84: 74).

Defense counsel's penalty phase closing, reproduced here in its entirety, was only 4 pages long and can only charitably referred to as an argument:

> Thank you, Your honor. Good afternoon, ladies and gentlemen. We're about done in this case. And, the most difficult part of the case is going got be laid at your feet shortly. The entire amount of evidence that has been brought to you over the last few weeks is before you again. It is not only in the guilt and innocence phase, but we went through this legal text, and it says everything that was in there before, we want it in again. That, technically, allows us to say that its all here again and we don't have to listen to all of these witnesses all over again. So, basically, you have all of that evidence again, all those exhibits, all that testimony. We simply ask you to consider it. Consider it and weigh it for what it's worth and then answer Special issues No. 1 and Special issue No. 2.

Ms. Lopez says there nothing here redeeming. I don't know that we can there's nothing here redeeming. The facts, as you believe, are harsh and are cruel. They found this man guilty of having killed his wife and two children at the same time, in one criminal transaction. And, its not a misdemeanor. It's not something to sneeze at. That is something that shocks. That is something that saddens.

The issue, then, becomes what should be your answers to Special Issue No. 1 and No. 2. They should be what you think the evidence shows. If the evidence shows that this man is going to continue to be a threat to any society he finds himself in until the day he dies, that he will continue to commit criminal acts of violence, if the evidence shows you that, then, indeed, you must answer that, yes. Okay.

Special issue No. 2 is a problem. During voir dire we all discussed it. It is a problem for many many reasons. They ask you to consider all kinds of things from different angles. But, as we said during voir dire, in essence, tit really is a simple question. Okay. Is there anything here that one can say is sufficient to at least raise a question, a reasonable doubt, as to whether a life sentence in prison is preferable to death. That's really it. There's really not much more.

It asks you to consider everything and, then, specifically, asks you to consider these things. Not only those things, but at least these things. Then, it asks you that question. If you look at it, if you read it, and you bounce it around and you get to that, then, that is really the question. Can you say, I have no doubt. I have no reasonable doubt that this man cannot be given a life sentence. That a life sentence is not appropriate. I have no reasonable doubt. If you have a reasonable doubt about that, then, you must not answer that, no, but you must answer it, yes. And it is easy to do the emotional. It is easy to do what pleases a crowd. It is easy to do many things. And, when you took your oath, that same oath we were talking about yesterday, you were asked to decide on the evidence. And, if you do, that's fine. We have no problem with that, so long as it is on the evidence and it is an honest vote.

I would simply remind you of those matters in the Charge that are things to consider – there is a word, "militate," which you're going to here. We talked about mitigate, but there's one that – mitigate reduces. Militate increases. Militate means it's more likely. You'll find that in Paragraph III.

Paragraph VII, the Judge said,, and it's really one that is appropriate. Because it is easy to come in and deal with very emotional topics and expect that emotion will carry the day. Paragraph VII reads, "You are further instructed that you are not to be swayed by mere sentiment, conjecture – speculation – sympathy, passion, prejudice, public opinion or public feeling in consideration" – it should be – "of all the evidence before you in answering the Special Issues." Why would they put that in there in a capital murder case? Because capital murders are kind of unique animals in that they deal with rather strange fact patterns.

> And, they are things that usually tug at one's prejudices, one's heartstrings. There is a great sway of emotion sometimes in the courtroom. I'm sure you didn't see any of that in this trial.
>
> It is easy to try and please a crowd instead of doing your job. But there is nothing wrong with doing your job. If you look at all of the evidence, and you can answer these honestly and you do, you've done your job. You can walk out of here and there's no problem at all. If you, then, have to look at yourself and say, no, I didn't, then we have a problem. I don't think we will. I think you all have shown lots of character and strength throughout this trial. There have been many moving things that have happened. I think this is the last one. This is the last moment.
>
> And, it is easy to say a lot of words but, really, your task is simple. It is just difficult. It is just like saying that, you know, it's easy for someone to give birth. The idea is simple. Most people find it somewhat difficult. If this man, to your satisfaction, beyond a reasonable doubt, poses a danger to any society that he's in to commit further and future criminal acts of violence, your answer must be, yes.
>
> If you can find insufficient evidence to mitigate against death to the extent that a life sentence should be imposed, then, you must answer, as Ms. Lopez says, no, to Special Issue Number 2. But if you have a reasonable doubt, then you ought to say yes, to Special Issue No. 2, if that's what the evidence shows. I simply ask you to look at the evidence, consider it. Consider it all. Consider the testimony, however, farfetched it's been, however, biased it's been. Not necessarily unreasonably biased. But biased is biased, whether it's for revenge. Whether it's out of anger, if its bias, its bias. Weigh it, sift it out, and if you answer honestly, you've done your duty and we can ask no more and we ask no more from you. We simply ask you do it. Were sure you will. And we wish you well. Thank you.

(S.F. 84: 76-81).

Defense counsel did nothing to counter the prosecution's portrayal of Mr. Moreno Ramos as a ruthless killer. Counsel never even asked the jury to return a life sentence. (S.F. 84:47)

Defense counsel never mentioned his client's name; never addressed any of the evidence; never gave a reason for life; instead, went over the decision tree for reaching a death verdict twice, explaining that if they voted for death he would "have no problem with that, so long as it is on the evidence and it is an honest vote." (S.F. 81:83)

The State, by contrast, used its closing argument to inflame the jury with jingoistic race-baiting to which the defense posed no objection:

> We are a nation of laws. We are a people of laws. And, we are governed by our nation's laws. And, the flags that you see in this courtroom are merely symbols of our great nation. If you look back, you'll see the flag of the United States. It is a great nation, but merely a symbol of who we are. We are the people that make this nation great. The flag, symbolizing the State of Texas, is merely that, a symbol. We are the people that make this State great. And, we are people that are governed by laws. And, if a man chooses to enter this country, then that man must abide by the laws. And, he must walk this country, understanding that our country is governed by laws. That our state is governed by laws. That our people are governed by laws. And, so Robert Moreno Ramos chose to enter the United States. He must now abide by our laws.
> . . . .
> Your verdict was certainly loud enough for him to hear. He is now a convicted, arrogant, little man that must suffer the consequences of his actions. And, he realizes the brutality of his actions. It was not a stranger taking a hammer and bludgeoning three individuals. It was a father, a husband, who chose to murder his family. And, because of that, you, as a jury, must decide what his punishment is.
> I represent the State of Texas. And, I am here simply to guide you and make sure that you have the inner strength to do what is right, to answer those two Special Issues. You decide the message that the people of this State will receive by your verdict. And, that can only be one thing. I know it. And, inside, you know it. And, Robert Moreno Ramos knows it. And, he knows that these two Special Issues are going to be answered, "Yes," and "no."
>
> I am not here to praise Robert Moreno Ramos. I am here to make sure that your answers bury him.

(S.F. 84: 81-83).

Having heard not even the whisper of an alternative, the jury predictably and quickly found Mr. Moreno Ramos constitutes a future danger and that no mitigating circumstances existed to choose life.

> At the life and death part it didn't take us that long to deliberate, maybe a couple of hours. Then we just sat in the jury room for a long time, about an hour and a half, because we didn't want to make that decision.
>
> The main thing I remember about the sentencing was that he didn't have any defense.

> I was sitting there waiting for a defense but there wasn't one. When they rested their case we were all surprised because we were expecting a defense. When we went back and discussed there was nothing we could do, we had no information to use to give life. When they gave us the instructions and we had to answer those questions there was just nothing. We really had no choice. The life-death was the worst part, we didn't want to make that kind of decision, but we had no choice.
>
> We didn't have any doubt that he would be a future danger, because of what he did to his son and also that poor woman whose daughter had been missing. And, we didn't have any mitigating evidence at all for the other question, so we had to say there wasn't any. But, we would have answered differently if there had been some evidence.

See Exhibit 11, Statement of Juror Maria Orozco.

Within mere hours, the jury voted to sentence him to death on March 19, 1993. *See* Exhibit 11, Statement of Juror Maria Orozco.

The trial court sentenced Mr. Moreno Ramos to death.

D. Appointment of State Post-conviction Counsel

Kyle Welch, appointed to represent Mr. Moreno Ramos in state post-conviction, failed to perform the basic tasks necessary to identify the factual bases for a habeas corpus application, much less the investigation necessary plead and prove any habeas claims. He never went beyond the four corners of the record, filing a twelve-page petition comprised only of record-based claims without even seeking resources for investigation and development of claims that might be cognizable. There is no tenable argument that Mr. Welch's representation of Mr. Moreno Ramos came close to meeting the prevailing norms for capital counsel in Texas in 1995.

"As early as the late 1980s, capital counsel in Texas were expected to investigate and develop evidence about the client's life history. The process was not a formal as it is now and the title of "mitigation specialist" wasn't necessarily used, but somebody on the capital defense team was tasked with the responsibility of investigating the client's life history and any possible

mental illness or other evidence that we would now call mitigating circumstances." Exhibit 14, Affidavit of David Shulman.

"After Texas added the mitigation special issue to the statute in 1991, there was a proliferation of articles, training materials and CLE courses emphasizing the investigation, development and presentation of life history evidence at trial, and the re-investigation of mitigating evidence by post-conviction counsel." Exhibit 14, Affidavit of David Shulman.

"It was always clear in Texas that post-conviction writs and direct appeals were vehicles for very different kinds of claims. It was commonly understood by capital counsel in Texas that record claims should be presented on direct appeal and that it was not necessary to raise those claims again in state post-conviction in order to preserve them for federal habeas. It was also commonly understood by Texas capital counsel in the 1980s and 1990s that post-conviction writs were not an appropriate vehicle for record-based claims and that investigation should be conducted to present extra-record evidence during post-conviction proceedings." Exhibit 14, Affidavit of David Shulman.

The legislature passed 11.071 in 1995, effective as of September 1, 1995. It provided indigent condemned prisoners with post-conviction counsel, to be appointed by the CCA, with "a provision for the TCCA to formulate and follow guidelines regulating such appointments." As former General Counsel for the CCA, Rick Wetzel, recalls "these guidelines were not formally created." Exhibit 17, Declaration of Rick Wetzel.

> Instead, the TCCA solicited a group of attorneys, mainly comprised of appellate lawyers familiar to TCCA Judges, who were interested in post-conviction appointments in capital cases. Acting on a case-by-case basis, a panel of TCCA Judges determined who would receive the appointments to capital habeas proceedings under the new statute. There were few, if any, predetermined qualification criteria".

Id. at 1-2.

In August 1995, TCDLA sponsored a training for Texas post-conviction counsel to prepare them for the implementation of 11.071. "This CLE included instruction on how to get funding for investigative and expert assistance to develop extra-record evidence." Exhibit 14, Affidavit of David Schulman.

The standard of care in Texas in the 1990s in state post-conviction unequivocally required investigation.

> As a capital practitioner in Texas during the 1990s, I knew that the prevailing standard of care for representation of death-sentenced petitioners in state post-conviction required that the defense team conduct investigation into both phases of the trial, including a life history investigation. By 1995, it was common for Texas capital post-conviction counsel to raise claims of ineffective assistance of trial counsel for failure to conduct a sufficiently thorough life history investigation even for trials that took place in the late 1980s and early 1990s.

Exhibit 14, Affidavit of David Schulman.

1. The Expectations of Texas Capital Post-Conviction Counsel in 1993

The core duties of capital habeas corpus counsel are enumerated in Tex. Code Crim. Proc. Art. 11.071, the statute governing counsel's appointment. Additionally, this Court can ascertain the duties of capital habeas counsel from evidence reflecting the contemporaneous standard of care, such as training publications. *See, e.g. Padilla v. Kentucky*, 130 S.Ct. 1473, 1482 (2010) (looking to, *inter alia*, state and city bar publications to establish prevailing norms of criminal defense practice). From these sources it is clear that investigating beyond the trial record is the most fundamental duty of habeas corpus counsel.

a. Texas's capital habeas corpus statute requires that appointed counsel conduct an extra-record investigation

Article 11.071 of the Texas Code of Criminal Procedure governs Texas capital habeas corpus proceedings. Tex. Code Crim. Proc. art. 11.071 § 1. The appointment of counsel is mandatory unless waived by the prisoner. *Id*. at § 2. The habeas statue requires that counsel

conduct an extra-record investigation:

> Investigation of Grounds for Application
> Sec. 3 (a) On appointment, counsel *shall* investigate expeditiously, *before and after* the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

Id. at § 3 (emphasis added). That the required investigation is an extra-record endeavor is clear from the statutory command to investigate even before the appellate record is finalized. Counsel must be thorough and exercise reasonable diligence to uncover the factual basis for every available claim. *Id*. at § 5(e) (claims are not cognizable in subsequent habeas application, and thus waived, unless "the factual basis was not ascertainable through the exercise of reasonable diligence" when the prior application was filed).

Investigation is so fundamentally important that Texas courts are obligated to grant all reasonable investigative funding requests. *Id*. at §3(c); § 3(d). The statute extends prepayment of expert and investigative fees "to investigate and present potential habeas corpus claims." *Id.* at §3(b). In fact, the statute authorizes appointed counsel to "incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals." *Id*. at § 3(d).

Once the state has answered the application, a trial court faced with "controverted, previously unresolved factual issues" may "resolve the issues" by requiring the submission of additional evidence through "affidavits, depositions, interrogatories, and evidentiary hearings." *Id*. at § 9(a).

Thus, article 11.071 presumes that counsel will investigate the client's case and sets out mechanisms for resolving the factual disputes raised by the evidence submitted by the parties.

b. The contemporaneous standard of care in Texas capital habeas corpus cases, as reflected in State Bar of Texas materials, prescribed a broad and thorough investigation.

One year after the 1995 passage of article 11.071 overhauled capital habeas corpus proceedings and established a right to counsel, the State Bar of Texas published the third edition of the Texas Criminal Appellate Manual. Exhibit 16 (Excerpt, Texas Criminal Appellate Manual 1996, 3d ed.) (the introduction to the manual, an unnumbered page, describes its publication history). One of the chapters in the State Bar Manual was a primer for defense counsel litigating capital habeas corpus cases. Exhibit 16. The State Bar Manual confirms that, by 1996, the prevailing standard of care in capital habeas corpus representation compelled counsel to conduct extensive investigation

The manual begins with "essential ideas to bear in mind" when beginning post-conviction litigation, the first two of which stress the need to investigate the case:

> 1. *State habeas litigation is not the same as a direct appeal. Habeas litigation concentrates on developing and presenting facts outside the appellate record* which, in conjunction with facts in the record, raise important constitutional claims. Habeas counsel must know the appellate record, but cannot be bound to it, or they will offer their clients nothing more than another attempt at a direct appeal.
>
> 2. *Writ practice requires investigation.* You can't learn about, develop, and present facts outside the record if you don't investigate the case. *Investigation for a writ can be as intensive as investigation in preparation for trial. This must be so particularly where habeas counsel believes that trial counsel may have rendered ineffective assistance of counsel.* It is impossible to accurately evaluate the effectiveness of counsel without knowing what the counsel in question knew or could have known.

Exhibit 16 at 4 (emphasis added).

The State Bar Manual repeatedly emphasizes the paramount importance of extra-record fact development:

> Facts outside the record are critical to a successful writ application. Those facts must be sought out through investigation.... Because of the nature of habeas claims, habeas counsel must investigate not only the client's background and the facts that gave rise to the offense, but also the investigation by police and defense

> counsel and the actions of the jury. There is no quick and easy way to do this and counsel will almost certainly need the help of a trained investigator to do an efficient and complete job . . . .

Id. at 31.

Ten pages—almost 25%—of the State Bar Manual are dedicated to describing the scope and depth of the requisite investigation. *Id*. at 31–40. Of course, any investigation begins with the client, and the State Bar Manual describes the "[t]opics to cover" during client interviews:

> (1) Your client[']s version of the facts of the offense; (2) his or her relationship with the trial and direct appeal lawyers; (3) anything the client found strange, unusual or objectionable about the trial or direct appeal; (4) *your client's social history, including his or her background, education, family history, medical history, drug abuse history, etc*. You should strive to know more about your client and his or her history than any other lawyer has known, and perhaps more than his own family has known, to ensure that you are aware of and can use all beneficial information that might come from that knowledge.

Id. at 32–33 (emphasis added).[4]

Given this broad range of topics, the State Bar Manual advises habeas counsel that "the information you need from your client cannot be obtained in just one interview," thus "the more conversations you have, the more likely it is that you will win the inmate's trust and uncover additional helpful and highly relevant information." *Id*. at 33.

Client interviews, though critical, "must serve as the beginning, not the end, of [counsel's] investigation":

> [The client's family] may shed light on mitigating evidence that was not presented at trial, or guilt/innocence phase evidence that was suggested to trial counsel, but not presented. *They will certainly have things to tell you about your client's background that you can get nowhere else that could contribute substantially to the development of claims* concerning mental disorders, mental limitations, or drug abuse. You will also want to ask them about their contacts with trial counsel,

[4] This standard essentially mirrors this Court's determination that, in a 1997 trial, capital defense counsel had a duty to interview the client about specific aspects of his social history. *Ex parte Gonzales*, 204 S.W.3d 391, 400–01 (Tex. Crim. App. 2006) (Cochran, J., concurring).

as part of your investigation into trial counsel's investigation.

Id. at 33–34 (emphasis added).

Habeas counsel must also meet with trial counsel or, at a minimum, obtain trial counsel's files:

> [Y]ou should always, at the first meeting with [trial counsel], request their files. The files and all the notes in them belong to the client, not the lawyer, and you should insist on them being turned over to you . . . . [H]aving access to the file is vital, for it will tell you a lot about what information the lawyers had and what they were doing before, during and after the trial. Be sure that the file you receive includes all notes of the lawyers as well, for those notes are also the property of the client.

Id. at 34.

The above steps are merely preliminary measures: "Your record review, and interviews of your client, his or her family, and trial counsel will give you a pretty good idea of what some of the important issues may be in the case. That will allow you to focus your energy on developing information relevant to those issues." *Id*. at 34–35. The State Bar Manual subsequently describes three basic methods for investigating the case.

First, habeas counsel must collect a wide variety of records, a lengthy process that begins early in the representation: "It is vital to start gathering records as early in your writ preparation process as possible. Records collection is time consuming and is sometimes contested by agencies who are the custodians of records. It is preferable to deal with these disputes early in the investigation rather than in the last weeks or days before the writ application is due." *Id*. at 35. The State Bar Manual describes some of the records that should be gathered in every case:

- Prison records: "Be sure to request all prison records from every previous incarceration of your client in any institution, as well as his or her time on death row . . . . Those records may contain very important information concerning your client's mental and medical condition." *Id.*

- School Records: "School records are another valuable source of information. Through them you can find out about learning and mental difficulties your client

was having throughout school that your client may be too embarrassed to tell you about or does not think are important. The records may include I.Q. tests or other testing that is quite helpful in learning how your client was able to function as he or she developed." *Id.*

- Medical and mental health records: "Medical and mental health records should be sought from any care provider who treated your client. When getting these records, particularly from mental health professionals, make sure you specifically request all the records the care provider has, including handwritten or dictated notes made at or shortly after interviews or times of testing." *Id.*

- Criminal records of witnesses: "Criminal records of all important witnesses at the trial should be checked in the county of conviction and any counties where they have spent substantial time. You may find that some non-law enforcement witnesses had good reason to cooperate with the state at the trial, due to pending charges against them. You may also find that some witnesses had prior convictions that could have been used to impeach their testimony at trial." *Id.* at 35-36.

In addition to these fundamental documents, the State Bar Manual includes a five-page "Investigative Source List," *id.* at Appendix I, that itemizes numerous other sources of relevant documents.

Second, habeas counsel must collect information from all relevant law enforcement agencies:

> Always seek access to the district attorney's files and law enforcement agency files regarding the capital offense and any other offenses that you believe will be relevant to any of your claims, including offenses committed by key state's witnesses, such as jailhouse informants.... [I]t [is] important to energetically seek access the files of every law enforcement agency that may have generated information regarding your client.

Id. at 36.

Third, habeas counsel must interview witnesses and, when possible do so in person: "As you begin to focus on the claims you want to pursue, you will identify people who have important information about those claims. Some may have testified at trial. Others may never have been called or perhaps were even unknown at the time of trial. You or your investigator

need to interview these people in person, if at all possible." *Id*. at 37.

The State Bar Manual observed that "it should be clear that the services of an experienced criminal or habeas investigator are invaluable in efficiently and comprehensively gathering the information necessary for a writ application." *Id*. at 38. "Other experts will likely be needed, too," including mental health and medical experts. *Id*.

B. Mr. Moreno Ramos' Initial 11.071 Counsel Failed to Perform His Duties

The Court of Criminal Appeals appointed solo practitioner Kyle B. Welch to represent Mr. Moreno Ramos in post-conviction proceedings. There was no process for capital certification of counsel at the time and Mr. Welch doesn't recall how the CCA came to appoint him. He had no experience in capital post-conviction cases. Exhibit 15, Declaration of Kyle Welch, at ¶ 4.

Mr. Welch had never handled a capital post-conviction case and admits he "did not have the experience, training, assistance, resources or time to do what [was] necessary" and "was simply not equipped to handle this case the way it should have been handled" to represent Mr. Moreno Ramos. Exhibit 15, Declaration of Kyle Welch, supra, at 2.

A solo practitioner appointed to his first capital post-conviction case, Mr. Welch never sought funding for investigative or expert services, never conducted any investigation on his own, and developed no extra-record claims.

> I did not seek funding for any investigative or expert assistance. I did not have a mitigation specialist, fact investigator, or co-counsel. I did not have any mental health evaluation of Mr. Moreno Ramos. I spoke with the trial counsel in the case but did not conduct any other investigation or interviews. I believe that I met Mr. Moreno Ramos twice, but do not recall the dates or if it was before or after filing the initial state PCR writ application. I did not meet any of Mr. Moreno Ramos' family nor collect primary records regarding his life history and family background.

Exhibit 15, Declaration of Kyle Welch, at ¶8.

Mr. Welch developed no extra-record claims. This failure was not a strategic decision on the part of the defense. As Mr. Welch observes:

> I don't know what my understanding was at the time regarding the use of post-conviction litigation to prepare and present extra-record claims. I don't know if the lack of extra-record investigation was because I didn't know it was necessary or because I didn't have the time or resources. I think it must have been a combination of both. But, I do know that the lack of extra-record investigation was not a strategic choice on my part. There was no factual or legal reason to avoid investigation of the crime or of Mr. Moreno Ramos' life history. There was no factual or legal reason to avoid conducting a mental health evaluation.

Exhibit 15, Declaration of Kyle Welch at ¶9.

After missing the filing deadline twice, he finally filed a twelve (12) page Application for Post-Conviction Relief, raising eight (8) entirely record-based claims, none of which were even cognizable in post-conviction and five (5) of which had already been denied on direct appeal.

The scope of Mr. Welch's work on behalf of Mr. Moreno Ramos is reflected in the nature and source of the claims he filed in the initial application. Missing is any hint of extra-record investigation. Mr. Welch did not interview any life history witnesses or collect any records.

The time records Welch submitted to the CCA indicate that he spent only 51.5 hours in Mr. Moreno Ramos' representation. This included 1.5 hours reviewing the direct appeal briefs and opinions; 23 hours reviewing the trial record; 4.5 hours interviewing prior counsel; and 8 hours conducting legal research (3 hours on jury selection issues; 3.5 hours on the jury charge; 1.5 hours unspecified) and 14.5 preparing the application. Mr. Welch spent no time whatsoever on investigation; no time conducting legal or factual research of any issue outside the record; and never visited his client prior to filing. Exhibit 19, Attorney Fees of Kyle Welch, Court of Criminal Appeals (confirmed visits occurred on 1/8/1998 and 1/4/2001 with an appointment made but apparently not kept on 4/9/1999).

It is not the case that Mr. Welch considered and rejected the claims subsequently

presented on behalf of Mr. Moreno Ramos. The petitions he produced were not the product of "informed strategic choices" of counsel or the defendant. *Strickland v. Washington*, 466 U.S. 664 at 691 (1984). Mr. Welch was disserved by the CCA, given the burden of defending Mr. Moreno Ramos in life-and-death proceedings for which he was untrained, without guidance or assistance and had only nine months to prepare. Exhibit 15, Declaration of Kyle Welch at ¶9, 7.

Mr. Welch filed eight record-based claims not cognizable in post-conviction because he "did not have the experience, training, assistance, resources or time to do what [was] necessary." He "was simply not equipped to handle this case the way it should have been handled." Exhibit 15, Declaration of Kyle Welch, ¶10.

E. State Post-conviction Counsel's Failure to Investigate, Develop and Present Evidence of Trial Counsel's Ineffectiveness and the Denial of Mr. Moreno Ramos's Rights Under the Vienna Convention, Catastrophically Prejudiced Mr. Moreno Ramos

Had Mr. Welch conducted an investigation into Mr. Moreno Ramos' life history, he would have found the evidence contained in the attached affidavits that tells the horrific story of a child trapped and broken by the rock of his father's violence and the hard, hazardous places where he lived. Roberto Moreno Ramos's childhood was defined by extreme poverty, family dysfunction, and severe physical abuse. Subsequent investigation has revealed a compelling and undeniably mitigating life history of the sort the U.S. Supreme Court has repeatedly found to have been sufficient to establish prejudice under prevailing constitutional norms.

Had Mr. Welch conducted that investigation, he would have established that Mr. Moreno Ramos's trial counsel were deficient for failing to conduct any penalty phase investigations and that their deficient performance prejudiced Mr. Moreno Ramos in violation of his Sixth Amendment right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). He would also have established that had Mr. Moreno Ramos's VCCR rights been

honored in a timely manner, his Government would have ensured that his trial representation was competent and effective and the outcome at the sentencing phase would likely have been different.

Once the new defense team interviewed family members and gathered records, a wealth of information was revealed regarding the deprivation of his early life, his ongoing struggles with mental illness and his organic brain damage. Mental health experts, including a neuropsychologist and a psychiatrist, evaluated Mr. Moreno Ramos and conducted interviews with several family members. The resulting evidence far surpasses that in cases in which relief has been granted.

Unfortunately, no Court has yet considered the merits of that evidence.

III. PRIOR PROCEEDINGS

Pre-trial hearings were held on January 4, 5, and 11, 1993. Jury selection lasted over a month, and opening statements were not heard until February 24, 1993. The culpability phase of the trial lasted 15 days. A jury convicted Mr. Moreno Ramos of capital murder on March 18, 1993 (S.F. 83: 2352-53) and he was sentenced to death on March 23, 1993 after a one-day penalty phase, where three witnesses were presented by the state and none by the defense.

The trial court appointed Joseph Connors III, Mark Alexander, and Dorina Ramos to represent Mr. Moreno Ramos on his direct appeal on March 25, 1993, with Mr. Connors being the primary attorney on the case. David Schulman later joined Mr. Moreno Ramos's defense team and defense counsel filed a *First Amended Brief* raising sixty-three errors. *First Amended Brief of Appellant*, No 71, 714 (Sept. 19, 1995). Mr. Moreno Ramos's conviction was affirmed on direct appeal in an unpublished opinion, *Ramos v. State*, No. 71714 (Tex. Crim. App. June 26, 1996). The U.S. Supreme Court denied an application for writ of certiorari on April 28, 1997.

Mr. Moreno Ramos developed a good working relationship with direct appeal counsel Joe Connors and wished to have him continue the representation into state post-conviction proceedings. Article 11.071 § 2(e) permits direct appeal counsel to be appointed to represent death row inmates in state post-conviction proceedings if both the inmate and the counsel state on the record that they wish to be represented by and represent one another.

The trial court held a hearing regarding Indigency determination and appointment of counsel during which both Mr. Connors and Mr. Moreno Ramos affirmed that they wished for Mr. Connors to represent Mr. Moreno Ramos in state post-conviction proceedings. "I was hoping that Mr. Connors would continue handling my case, having gained a little bit of trust on the way he was doing things for me." Exhibit 13a, Motions and Orders Related to Appointment of 11.071 Counsel, Roberto Moreno Ramos, Tr. Hrg. Oct. 18, 1996 at 4. The trial court told Mr. Moreno Ramos that "I can't do the appointment, but I'm sure the Court of Criminal Appeals will appoint him in this case." *Id.* at 5.

The trial court entered findings of fact that "Defendant Robert Moreno Ramos specifically requested, on the record, that Joseph A. Connors, III be appointed as one of his attorneys for purposes of this habeas corpus proceeding. Mr. Connors also requested to be appointed for this purpose on the record." Exhibit 13a, *State v. Ramos*, CR-1430-92-B, Trial Court's Findings Based on Tex. Code Crim. Pro. Ann. Art. 11.071, (Oct. 18, 1996).

However, the Court of Criminal Appeals appointed attorney Kyle Welch instead. Exhibit 13b, Order. With Mr. Connors's assistance, Mr. Moreno Ramos filed a *pro se* motion to the CCA seeking appointment of Mr. Connors. Exhibit 13c, Motion for Appointment, December 6, 1996. It was denied in a *per curiam* opinion the same day. Exhibit 13d, *Order*, Ramos v. State, AP-71-714, (Tex. Crim. App.), December 6, 1996.

Because he knew that Mr. Welch "was not experienced in post-conviction habeas corpus work" and that "Joe Connors had the necessary experience to be appointed as state habeas counsel", direct appeal counsel David Shulman filed a request for reconsideration of the denial of Mr. Moreno Ramos' request to continue his ongoing attorney-client relationship with Mr. Connors. Mr. Shulman alerted the Court to the fact that Mr. Connors was more familiar with the case having already read the record, and that he and Mr. Moreno Ramos had developed an effective attorney client relationship. Exhibit 13e, Motion to Reconsider and Exhibit 14, Affidavit of David Schulman.

Citing *Buntion v. Harmon*, 827 S.W.2d 945 (Tex. Crim. App. 1992) and *Clinton v. Stearns*, for the principle that indigent clients do have a right to continuation of counsel where an attorney-client relationship with appointed counsel had been established, Mr. Shulman urged the CCA to reconsider its appointment of Welch. Exh. 13e, Motion to Reconsider. The Court of Criminal Appeals denied the request. Exhibit 13f, Order.

The deadline for the state post-conviction petition was May 21, 1997, 180 days after Mr. Welch's appointment to the case. After allowing the filing date to pass, Mr. Welch sought an extension on May 22, 1997 for 90 days. Exhibit 18a, Motion for Extension of Time to File Writ. Mr. Welch presenting the Court with a proposed order setting August 22, 1997 as the filing date, which was granted. Exhibit 18b, Order. However, "[t]he order was internally inconsistent, because a period of 90 days would have ended on August 20, while a period which ended on August 22 would be 92 days long." *Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998).

Mr. Welch finally filed a twelve (12) page "Motion" raising eight (8) entirely record-based claims involving jury selection and jury instructions, none of which were even cognizable

in post-conviction and five (5) of which had already been denied on direct appeal. No extra-record evidence was offered. Exhibit 18c, *Motion for Post-Conviction Writ of Habeas Corpus*, Ex parte Ramos, CR-1430-92-B, August 22, 1997.

The State responded that the petition should be considered untimely. Exhibit 18d, Proposed Order Regarding Untimely Writ.

Apparently after both parties met with the trial court, the State then revised their proposed order, consenting to the court recommending merits review on equitable grounds. Exhibits 18e, f, g, Proposed Order; Hake letter; Welch letter. The trial Court entered findings that counsel had relied upon the date in the Order in good faith and should be heard on the merits, then granted the State leave to respond. Exhibit 18h Order and Findings.

The state court later entered Findings of Fact and Conclusions of Law recommending that habeas relief be denied.

This Court denied relief on July 15, 1998. *Ex parte Ramos*, 977 S.W.2d 616 (Tex. Crim. App. 1998). The Court applied the due course of law provision of the Texas Constitution, art. I §19, to excuse the otherwise procedurally fatal late filing on grounds that counsel had relied upon the trial court's date-setting in good faith.

This Court excused counsel's multiple failures to meet filing deadlines, but needed only a few lines to swat this petition away:

> Five claims involving jury selection and a claim involving the court's charge to the jury at the guilt stage of the trial have already been raised and rejected on the direct appeal from this conviction. See *Ramos v. State*, 943 S.W. 2d 358 (Tex.Cr.App. 1996). They will not be addressed on habeas corpus. Two claims concern the court's charge to the jury at the punishment stage of the trial. These claims should have been, but were not, raised on the appeal. Habeas corpus will not lie as a substitute for appeal. *See Ex Parte Gardner*, 959 S.W.2d 189, 198-200 (Tex. Cr. App. 1998). The claims will not be addressed. The application is denied.

977 S.W.2d at 616-17.

Shockingly, the same attorney who had failed to file a single cognizable claim in state post-conviction proceedings was then appointed to represent Mr. Moreno Ramos in federal habeas corpus proceedings, and filed the same eight (8) record-based claims there that he had filed in state court. Unsurprisingly, the District Court granted the State's motion for summary judgment on all claims, Order, D.E. 15, *Ramos v. Johnson*, No. 7:99-cv-134 (S.D. Tex. 2000), the Fifth Circuit Court denied a certificate of appealability, *Ramos v. Cockrell*, No. 00-40633 (5th Cir. 2002) (*per curiam*), and the Supreme Court denied certiorari. *Ramos v. Cockrell*, 537 U.S. 908 (2002).

Subsequent investigation developed the compelling mitigating evidence contained herein.

Mr. Moreno Ramos first presented that evidence to the state court after the International Court of Justice ruled in *Avena and Other Mexican Nationals (Mex. v. U.S.),* No. 128 (I.C.J. Mar. 31, 2004) [hereinafter "*Avena*"] that the United States had violated the Vienna Convention on Consular Relations by failing to notify him of his right to consular assistance – a claim not previously available to him. The new life history evidence was presented for purposes of demonstrating what the government of Mexico could have provided had they been notified. Subsequent Application for Post-Conviction Writ of Habeas Corpus at pp. 17-20, Ex Parte Robert Moreno Ramos, No. WR 35,938-02 (Filed in Tex. Crim. App. September 29, 2004)

The facts of his trial counsel's ineffectiveness were alleged in that petition with citations to Wiggins and related authorities. However, he did not specifically seek relief on grounds of trial ineffectiveness as that possibility was foreclosed at the time. *See Rojas*.

Neither the trial court or the CCA considered the substance of the evidence at that time because the successive petition was found to be procedurally barred and dismissed that

application in a summary order:

> This Court has reviewed the subsequent applications at issue here and find that they do not meet the dictates of Article 11.071 § 5. Therefore, they are dismissed. *See Ex parte Medellin*, S.W.3d, No. AP-75,207 (Tex. Crim. App. Nov. 15, 2006).

Ex parte Ruben Ramirez Cardenas, Cesar Roberto Fierro, Ignacio Gomez, Humberto Leal, Roberto Moreno Ramos, and Felix Rocha, Nos. WR-48,78-02, WR-17,425-05, WR-52,166-02, WR-41, 713-02, WR-35,938-02 and WR-52,515-03 (Tex. Crim. App. 2007).

Mr. Moreno Ramos was pending in federal district court on after the judgement was reopened pursuant to an agreed 60(b) motion when the Supreme Court issued it's holding in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013) that ineffectiveness of initial-review state habeas counsel may excuse procedural default of ineffective assistance of trial counsel claims in federal court. *Id*. at 1921. Mr. Moreno Ramos immediately sought leave to amend with a trial counsel ineffectiveness claim, arguing that he can now establish cause under *Trevino.* Motion for Leave to File Amended Petition, D.E. 38, Ramos, No. 7:07-cv-0059 (S.D. Tex., 5/30/2013).

The past five years of litigation in federal court have all related to whether or not Mr. Moreno Ramos would be permitted amend his federal petition with the ineffectiveness claim, not about the substance of the claim itself.

The State argued that Mr. Moreno Ramos' ineffective assistance of trial counsel claim could not be heard by the federal courts because it had not yet been heard in state court and the state courts should get the first opportunity to consider the claim.[5]

However, when Mr. Moreno Ramos sought to go back into State Court to allow Texas that "first bite at the apple", pointing to legal developments in the CCA regarding consideration

[5] *Id.* at 9.

of the merits of a successive petition in light of Trevino[6], the State argued from the other side of its mouth that the federal court should not grant his Motion to Stay and Abey because raising the claim in the CCA would be "futile".

> Here, even if Ramos were given another opportunity to return to state court, there is no question that the Court of Criminal Appeals would dismiss any application as successive pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5.[7]

In the end, the claim was never heard: the Federal District Court declined to Stay and Abate to send the case back to state court but also denied leave to amend so that the claim could be heard in federal court[8]; the Fifth Circuit denied a Certificate of Appealability on procedural grounds and never reached the question of whether Mr. Moreno Ramos had stated a denial of a significant constitutional right[9]; and the United States Supreme Court denied Certiorari.

At long last, the merits of Mr. Moreno Ramos's claims must be examined.

IV. GROUNDS FOR RELIEF: MR. MORENO RAMOS WAS DENIED EFFECTIVE REPRESENTATION AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH AMENDMENT

The failure to put any mitigation evidence before the jury was not for lack of available compelling evidence of childhood abuse, extreme poverty, and family dysfunction that could have been developed and presented.

The U.S. Supreme Court has established a two part test for assessing the effectiveness of trial counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant must show that: (i) counsel's performance fell below an objective standard of reasonableness and (ii) counsel's errors "prejudiced" the defense by depriving the defendant of a

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[6] Motion to Stay and Abey, Case 7:07-cv -00059, Doc. 64 at 1-2, (11/28/2017).
[7] Opp., *supra*, at 10.
[8] Final Judgment, D.E. 73, Ramos, No. 7:07-cv-0059 (S.D. Tex., 4/22/2015).
[9] Opinion Order, Doc. 08-70044, Ramos, No. 08-70044 (5th Cir., 6/30/2016).

fair trial whose result is reliable. That objective standard of reasonableness is generally measured by the prevailing standards of defense practice in the community.

The question as to both prongs in this case are both far more simple and clear than so many cases addressed by this Court. There is no question as to whether trial counsel made strategic choices because nothing was done and no reasons have been offered. Lacking the experience, training and qualifications required for capital defense, trial counsel do not seem to have understood that it was necessary to develop mitigation. Counsel never considered pursuing a mitigation investigation, nor did they seek or obtain enough information from Mr. Moreno Ramos to make a decision as to whether such an investigation was warranted. Exhibit 7, Affidavit of Jack Duval Hunter, II, at 6-7.

As to prejudice, there will be no questions regarding whether new evidence would be cumulative of evidence presented[10], and no re-weighing of the trial and post-conviction evidence together[11] since absolutely nothing was presented at trial.

The two attorneys, together, billed $54,598.00 for the entire representation at a rate of $40 for out of court hours and $70 for in-court time. Jack Hunter billed $9,291 for 112.4 out of court hours and 68.5 in-court hours to cover all work through January 22, 1993, which was 9 days into jury selection. He was later paid $8,000.00 on 2/26/1993 and $8,900 on 4/6/1993 for the remainder of trial. Exhibit 8, Hunter fee voucher.

Mr. Hunter concedes that inexperience in dealing with capital cases led the attorneys to erroneously focus an inordinate amount of their attention on the guilt phase preparations, to the detriment of the mitigation case. Exhibit 7, Affidavit of Jack Duval Hunter, II at 4-5. Mr.

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[10] *Ex parte Martinez*, 195 S.W.3d 713 (Tex. Crim. App. 2006); Bobby v. Van Hook, 558 U.S. 4, 12 (2009) and *Cullen v. Pinholster*, 563 U.S. 170, 200-01 (2011).

[11] *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000).

Hunter approximates that the defense team spent "approximately seventy-five percent of [the] time preparing for the guilt/innocence portion of the case and twenty-five percent on the penalty phase." Exhibit 7, Affidavit of Jack Duval Hunter, II.

But it doesn't appear that the team did much to prepare for guilt innocence, either. Few pre-trial motions were filed. Pre-trial hearings were held on only four days, and often only for a portion of the day. Though a hearing was held on the voluntariness of Mr. Moreno Ramos's statements, no investigation was done into Mr. Moreno Ramos's mental health, which has bearing on voluntariness.

Mr. Hunter did not personally speak to any witness. Mr. Hunter does not believe that Mr. Flores spoke with any witnesses or with their client without him. Exhibit 7, Affidavit of Jack Duval Hunter, II, at 4. Thus, Mr. Flores' out-of-court preparation would have been quite similar to that of Mr. Hunter.

A. Trial Counsel Failed to Meet the Prevailing Standard of Care for Capital Defense Counsel in Texas in 1993.

This case is not a close call. Counsel never tried to develop a penalty phase case. Unlike so many cases, there is no debate here as to whether the failure to present any evidence was a strategic choice by counsel. They never even looked for any such evidence, much less evaluated it strategically. Appointed counsel readily admits that the defense team never considered pursuing a mitigation investigation, nor did they seek or obtain enough information from Mr. Moreno Ramos to make a decision as to whether such an investigation was warranted. Exhibit 7, Affidavit of Jack Duval Hunter, II at 6-7 9. Counsel cannot choose not to investigate nor reject mitigating evidence without knowing what it is. *See Rompilla v. Beard*, *545* U.S. 374 (2005).

1. The Prevailing Standard of Care for Capital Defense Counsel in Texas in 1993

The American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989 and February 2003) (hereinafter "*ABA Guidelines*"), outline the duties and obligations of undersigned counsel in their representation of a defendant facing the death penalty. The *ABA Guidelines* have "long . . . [been] referred [to]" by the U.S. Supreme Court "as 'guides to determining what is reasonable'" *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2537 (U.S. 2003); *Strickland v. Washington*, 466 U.S. 668, at 688-89 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable").

A thorough pretrial investigation is "[o]ne of the primary duties defense counsel owes to his client." *Magill v. Dugger*, 824 F.2d 879, 886 (11th Cir. 1987). For that reason, "[i]t should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness." *Osborn v. Shillinger*, 861 F.2d 612, 627 (10th Cir. 1988)(quoting *Blake v. Kemp*, 758 F.2d at 533 (11th Cir. 1985)). Unless counsel undertakes "a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived," he cannot provide effective assistance. *Baldwin v. Maggio*, 704 F.2d 1325, 1332-33 (5th Cir. 1983).

The Sixth Amendment right to effective representation demands, in a capital case, the thorough investigation and development of mitigating circumstances. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (finding that trial counsel has an "obligation to conduct a thorough [mitigation] investigation of the defendant's background."); *Wiggins v. Smith*, 539 U.S. 510 (2003) (failure of trial attorney to investigate defendant's background and present mitigating evidence violated Sixth Amendment right to effective assistance of counsel); *Kenley v.*

Armontrout, 937 F.2d 1298, 1309 (8th Cir. 1991) (counsel ineffective for not producing non-statutory mitigation "[g]iven the sympathetic light in which Kenley's past behavior could have been presented, in the context of his family . . . background"); *see also Lewis v. Dretke*, 355 F.3d 364, at 368 (5th Cir. 2003) ("It is axiomatic – particularly since *Wiggins* – that [the decision not to present mitigating evidence] cannot be credited as calculated tactics or strategy unless it is grounded in sufficient facts, resulting in turn from an investigation that is at least adequate for that purpose.") and *Rompilla v. Beard*, 545 U.S. 374 (2005).

A comprehensive mitigation investigation requires defense counsel to conduct an extensive and detailed investigation into (a) the circumstances of the offense, (b) the defendant's character and background, (c) any evidence relating to the moral blameworthiness of a defendant, (d) aggravating evidence that may be used by the prosecutor at the penalty phase to secure a sentence of death, and (e) any additional evidence that would mitigate against a sentence of death. *Wiggins*, 539 U.S. 510 (2003) (finding that counsel has a constitutional duty to conduct an investigation into the defendant's background, as well as, to gather evidence relating to the defendant's personal moral culpability); *Williams v. Taylor*, 529 U.S. 362, 415 (2000) (stating that counsel has a duty to conduct a requisite, diligent investigation into his client's background); *Rompilla v. Beard*, 545 U.S. 374 (2005) (holding that even when a capital defendant and his family members have suggested that no mitigating evidence is available, defense counsel is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase).

2. The prevailing standard of care at the time of Mr. Moreno Ramos's trial mandated that defense counsel conduct a thorough social history

It was well established by the time of Mr. Moreno Ramos' trial that an effective

mitigation investigation requires a meticulous multi-generational biopsychosocial inquiry aimed at understanding who the client is. See Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 2 U. Ill. L. Rev. 323 (1993); Arlene Bowers Andrews, *Social Work Expert Testimony Regarding Mitigation in Capital Sentencing Proceedings*, Soc. Work 36 (Sept. 1991); Russell Stetler, *Mitigation Evidence in Capital Cases*, The Champion, Jan./Feb. 1999, at 35-40. *See also*, Lee Norton, "Capital Cases: Mitigation Investigation," *The Champion* (May 1992), pp.43-45.

At the time of Mr. Moreno Ramos's trial, the prevailing professional norms required counsel to conduct a thorough mitigation investigation. *See Porter v. McCollum*, 130 S.Ct. 447, 454 (2009) ("It is unquestioned that under the prevailing professional norms at the time of Porter's [1988] trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'") (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). *See also Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing to *1989 ABA Guidelines* to establish prevailing professional norms in 1989 capital trial). The Texas and national practices reflect "well-defined norms" for mitigation investigation, and thus the floor below which counsel may not descend. *Wiggins*, 539 U.S. at 524–25; *Rompilla*, 545 U.S. at 380.[12]

The mid-1990s standard of care in Texas required a thorough social history when

[12] In Rompilla, in which the Court also found ineffective assistance in capital sentencing, the trial was conducted in Pennsylvania in 1988. Nonetheless, the Court cited and quoted the 1989 ABA Guidelines, which "applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases." Id. at 387 n.7. The Court also cited and quoted the 2003 ABA Guidelines as an "even more explicit" statement, but applying the same standards. Id. Thus, it is clear that the Court found that the 1989 ABA Guidelines, as well as the 2003 ABA Guidelines, describe the "well-defined" norms for counsel in capital cases tried before or after their publication in 1989 and revision in 2003. See also Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003) (sentenced in April 1983) (relying on both the 1989 and 2003 guidelines, the court found ineffective assistance of counsel in sentencing in 1983).

preparing to defend a capital case. As in the current edition, in the *1989 ABA Guidelines*, "the duty to investigate mitigating evidence" was prescribed "in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin." *Van Hook*, 130 S. Ct. at 17. *See also Wiggins*, 539 U.S. at 524 (counsel's conduct "fell short of the professional standards" required of capital counsel "in Maryland in 1989," because no "social history report" was prepared even though counsel had funds available to retain a "forensic social worker"); *Poindexter v. Mitchell*, 454 F.3d 564, 579 (6th Cir. 2006) (sentenced in June 1985) (counsel ineffective, in part, for "failing to "consult with an investigator or mitigation specialist, who could have assisted in reconstructing [the petitioner's] social history").

The accepted standard was that "investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *1989 ABA Guidelines* 11.4.1.C.

Further, counsel has an obligation to secure the assistance of experts in a capital trial. *1989 ABA Guideline* 11.4.1 ("Counsel should secure the assistance of experts where it is necessary or appropriate for . . . presentation of mitigation"); *Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010) (holding trial counsel ineffective, in part, for failing to present expert testimony that could have helped jury better understand defendant in a 1993 capital trial because "[c]ompetent counsel should have been able to turn some of the adverse evidence into a positive").

Materials from professional literature at the time of Mr. Moreno Ramos's trial also reflect a well-defined standard of care requiring counsel to seek out a wide range of mitigating evidence, instructing counsel to both collect a comprehensive set of life history documents and interview people who can shed light on the client's background. In addition, it was already accepted practice to hire specialized investigators for life history inquiries in capital cases.

David C. Stebbins & Scott P. Kenney, *Zen and the Art of Mitigation Presentation, or, The Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial*, The Champion, Aug. 1986; James Hudson, Jane Core and Susan Schorr, *Using the Mitigation Specialist and the Team Approach*, The Champion, NACDL (June 1987); Cessie Alfonso and Katharine Baur, *Enhancing Capital Defense: The Role of the Forensic Clinical Social Worker*, The Champion, NACDL (June 1986).

Materials from Texas capital defense CLE programs and defender publications around the time of Mr. Moreno Ramos's trial also reflect a well-defined standard of care requiring counsel to seek out a wide range of mitigating evidence.

The State Bar of Texas 20th Annual Advanced Criminal Law Course took place in July of 1994, merely a year after Mr. Moreno Ramos's trial. Materials distributed at the State Bar course included a primer on defending capital cases at the sentencing phase. Exhibit 10 *Capital Sentencing Strategy: A Defense Primer*, July 1994 (hereinafter "*1994 State Bar Materials*"). The materials reflect the expectation that defense counsel will conduct a searching life history investigation:

> A thorough intergenerational life history ***must*** be developed, incorporating all life history documents and interviews with all first and second degree relatives, friends, [and] peers. As relatives with histories of relevant physical illnesses (diabetes, endocrine/hormonal, and neurological) and mental illnesses are identified, obtain their medical and life history documents.

Exhibit 10 at 17–18 (*1994 State Bar Materials)* (emphasis added). The standard of care required that the defense team search for all potentially relevant mitigating circumstances because the then-relatively new mitigation special issue made explicit that "everything about the circumstances of the underlying offense (or other prior bad acts), the defendant's character, and the defendant's record (read 'history') is relevant to the jury's final determination of the issue." *Id*. (emphasis in the original).

Decisions of this Court applying *Strickland* to cases tried in the early-1990s confirm that these standards were clearly known and acknowledged at the time of Mr. Moreno Ramos's trial. *See e.g. Martinez-Macias v. Collins*, 810 F. Supp. 782 (1991); *Moore v. Johnson*, 194 F.3d 586, 601 (5th Cir. 1999).

In *Ex parte Gonzales*, 204 S.W.3d 391, 393–96 (Tex. Crim. App. 2006), this Court plainly announced that, in a post-1991 trial, capital defense counsel were ***required*** to investigate the client's childhood and mental health—even in a case in which (1) counsel, ***before*** investigating, "never even dreamed" the investigation would turn up evidence of abuse; and, (2) counsel interviewed family members who did not spontaneously volunteer that the client had been abused. Put differently, by the mid-1990s, Texas capital defense counsel had a duty to independently investigate mitigating circumstances related to mental and physical health, and the client's childhood, regardless of whether the information was volunteered by the client and his family. *See also Ex parte Kerr*, 2009 WL 874005, at *2 (Tex. Crim. App. April 1, 2009) (unpublished) (overturning a 1995 death sentence based on ineffective assistance of counsel because trial counsel failed to discover "compelling evidence of physical and emotional abuse, familial violence, wretched treatment of the defendant by his father, alcoholism, the mental retardation of siblings, drug abuse, a history of head injuries, learning disabilities, and possible fetal alcohol syndrome."); *Lewis v. Dretke*, 355 F.3d 364, 367 (5th Cir. 2003) ("[I]n the context of a [1987 Texas] capital sentencing proceeding, defense counsel has the obligation to conduct a 'reasonably substantial, independent investigation' into potential mitigating circumstances." (citation omitted)); *Moore v. Johnson*, 194 F.3d 586, 617 (5th Cir. 1999) (holding, when overturning a 1980 Houston death sentence, "that [because] counsel's conduct in failing to develop or present mitigating evidence was not informed by any investigation and not supported

by reasonably professional limits upon investigation, we find that there is no decision entitled to a presumption of reasonableness under *Strickland*.").

3. Trial Counsel's Deficient Performance

Trial counsel did not seek the assistance of a mitigation specialist or conduct a life history investigation via any other means. Counsel did not "do the work of a mitigation specialist" themselves. Exhibit 7, Affidavit of Jack Duval Hunter, II. The defense team did not conduct any life history interviews, gather any school, medical or employment records, or even discuss the possibility of trying to find former teachers, neighbors, co-workers, or any other witnesses. Exhibit 7, Affidavit of Jack Duval Hunter, II.

No one on the trial team traveled to Mexico, where Mr. Moreno Ramos lived until he was a teenager, to conduct a thorough investigation of his background. Nor did anyone on the trial team contact Mr. Moreno Ramos's extended family in California, or conduct any investigation of his life in Texas. Exhibit 7, Affidavit of Jack Duval Hunter, II. Mr. Hunter concedes that the defense team never "considered or discussed" traveling outside of Texas to investigate Mr. Moreno Ramos's childhood and background. Exhibit 7, Affidavit of Jack Duval Hunter, II.

Trial counsel Hunter never secured investigative or expert assistance. He later speculated that it would have been denied. See Exhibit 7 at 26. This reflects his lack of understanding of the role of counsel in capital penalty phase and that he was uniformed regarding the standard of care. Had he sought funding, the Court would have provided investigative and expert assistance because the standard at the time required them to do so and Courts across the state routinely granted such motions. At the time, life history investigations were required and mitigation specialists were widely used. Counsel made no effort to take advantage of readily available resources because they were simply not qualified to do capital work, not trained and had no

experience.

Nor did defense counsel seek consular assistance. Mr. Jack Duval Hunter, Mr. Moreno Ramos's appointed attorney, stated that although the entire defense team was aware Mr. Moreno Ramos was a Mexican national, he did not "remember speaking to or seeing any representative of the Mexican Consulate prior to trial." Exhibit 7, Affidavit of Jack Duval Hunter, II. Mr. Hunter also admitted that at the time, he was not aware that the authorities were obligated to inform Mr. Moreno Ramos of his right to seek the assistance of the consulate or that the consulate would have been able to provide assistance in the investigation of mitigating evidence.

Without investigation, decisions regarding punishment phase cannot be considered reasonable strategy. *See Wiggins,* supra; *see also Rolan v. Vaughn,* 445 F.3d 671, 682 (3d Cir.2006) (A "decision . . . cannot be according the normal deference to strategic choices [where] it was uninformed.")

4. Trial Counsel Failed to Meet the Standard of Care for Utilizing Expert Assistance

Given the bizarre circumstances of the crime, trial counsel's total failure to develop and present any expert testimony about Mr. Moreno Ramos's psychological problems cannot be explained.

Experts such as Drs. Cervantes, Weinstein, and Silva, could have presented and interpreted actual test data showing Mr. Moreno Ramos's medical, psychological and neurological impairments, thus "translat[ing] a medical diagnosis into language that [would] assist the trier of fact, and therefore offer[ing] evidence in a form that has meaning for the task at hand." *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). Testing was available at the time and neurological defects could have been diagnosed. Exhibits 3 and 4, Declaration of Ricardo Weinstein, Ph.D., and Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva,

M.D., respectively.

Trial counsel never secured a complete mental health evaluation of Mr. Moreno Ramos.

The defense team failed to provide Mr. Alamia with "any kind of a detailed life history […] since [they] did not have a mitigation specialist and had not investigated his background on [their] own." Exhibit 7, Affidavit of Jack Duval Hunter, II. The defense team did not ask Mr. Alamia to conduct social history interviews with other witnesses to support his evaluation nor did they ask him to develop a social history using collateral evidence or witnesses. Exhibit 7, Affidavit of Jack Duval Hunter, II.

Presumably, Mr. Alamia did not identify Mr. Moreno Ramos's severe and debilitating mental disease nor his brain dysfunction. This is likely because he administered tests "inappropriate with individuals with the background, education and cultural upbringing of Mr. Moreno Ramos." Exhibit 3, Declaration of Ricardo Weinstein, Ph.D. Further, the testing done by Mr. Alamia was incomplete.

> A comprehensive evaluation of brain function must include tests that tap all cognitive domains i.e.: attention, memory, concentration, working memory, visual-spatial coordination, etc. The Bender Gestalt is at best a screening instrument. Although there have been several attempts to standardize the results, none are accepted as valid neuropsychological results.

Exhibit 3, Declaration of Ricardo Weinstein, Ph.D.

Mr. Alamia did not collect documents or interview family members or otherwise develop a social history of Mr. Moreno Ramos. This evaluation did not meet the professional standards of psychologists at the time.

> Furthermore, without obtaining information from collateral sources and investigation of the subject's psychosocial developmental history and cultural background, including his level of acculturation, any conclusion would be greatly lacking if not completely invalid. In forensic evaluations, relying exclusively on the reports of the subject is considered below the standard of practice.

Exhibit 3, Declaration of Ricardo Weinstein, Ph.D. However, the testing instruments necessary to achieve a proper diagnosis of Mr. Moreno Ramos were widely available at the time and could have been employed to identify his disabilities and present them to the jury, as described below. *See* Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D.

B. PREJUDICE: The totality of the mitigating evidence "might well have influenced the jury's appraisal" of Mr. Moreno Ramos' moral culpability.

For a successful claim of ineffective assistance of counsel, Mr. Moreno Ramos must also show the deficient performance of his trial counsel prejudiced his defense creating a reasonable probability that the result of the proceeding would have differed but for trial counsel's errors. *Strickland v. Washington*, 466 U.S. at 687, 694. A "reasonable probability" is a probability sufficient to undermine this Court's confidence in the outcome of the proceeding. *Id*. Is there a reasonable probability that the available mitigating evidence would have caused at least one juror to have struck a different balance? *Rompilla*, 545 U.S. at 393.

With inexperienced defense counsel having failed to investigate, develop or prepare any life history evidence and the Mexican government unaware of the need to provide assistance that might have filled that gap, there was no mitigating evidence whatsoever presented at trial. (S.F. 84: 45.)

A proper investigation, however, would have revealed a wealth of mitigating evidence. And had Mr. Moreno Ramos' jurors heard his life history it would have changed how he was seen in myriad ways – jurors would have understood the context for evidence they assumed to be aggravating including the statement made to police and his odd and off-putting behaviors.

1. Poverty

Roberto Moreno Ramos was born May 23, 1954 in Aguascalientes, Ags., Mexico the second of ten children in a family crippled by extreme poverty, nutritional deprivation, brutal

violence, and a multi-generational history of mental illness.

Roberto grew up in Guadalajara and Tijuana. His childhood homes were little more than shacks, with no running water or electricity. *Id.* at 16, 21-22 and appendices.

The Moreno Ramos family frequently did not have enough to eat. Their mother often had to resort to selling personal belongings and begging for money just to put food on the table. Exhibit 2, Declaration of Dr. Richard C. Cervantes, 53.

Roberto's father, Pedro, worked in construction and often was absent for months at a time, sending money to the family only sporadically. *Id.* at 24, 26. In Pedro's absence, Carmen Moreno had little means of providing food for her ten children. They were forced to sell household goods to survive, and Roberto and his siblings were forced to work. Exhibit 1, Affidavit of Nancy S. Pemberton at 31, 32, 33.

Roberto's first job was as an ice cream vendor pushing a cart in the bustling city streets of Mexico by the time he was 13. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D. at 12.

When the children were not in school, they were generally expected to be either directly or indirectly contributing to the family's economic survival.

Pedro regularly enlisted his children, including Roberto, to combine kerosene and wood dust with their bare hands into a mixture that they would sell to local shops. *Id.* at 24. The children would perform this chore about three times a week with their bare hands, and the skin on their hands would peel. *Id*. at 24.

There was no money for professional medical care except in a case of extreme emergency. In the 15 years they lived in Guadalajara, members of the Moreno Ramos family went to the doctor twice. One of the emergencies concerned Roberto, who had swallowed a

small arrow, which got stuck in his throat. The arrow had severed Roberto's tonsils. The doctor had to pull it out with tweezers. *Id*. at 20.

The jury never heard evidence of poverty, the type of evidence in caselaw that leads to a finding of prejudice and grant of relief. *See e.g. Wiggins, infra*.

2. Struggled in school

Roberto struggled in elementary school. He was known as "blockhead," or stupid, by both teachers and classmates. *Id.* at 35. With no resources, support or protection at home and no one to teach him successful coping strategies, Roberto suffered these humiliations alone and learned to distract attention from his deficits by acting out and interrupting classes, sometimes leading to expulsion and even further isolation. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D. Not surprisingly, Roberto skipped school to avoid being bullied. While in Los Angeles, Roberto started ninth grade and was placed in English as a Second Language classes, art, and physical education. *Id*. at 46. He was not placed in any academic subjects, was never tested, and dropped out of school at the end of ninth grade. *Id*.

Pedro encouraged Roberto to behave aggressively with the other children. As often the case in abusive families, Roberto sought his father's attention and approval despite the horrific abuse. Exhibit 2, Declaration of Dr. Richard C. Cervantes. In order to win praise from his absent father, Roberto would get into fights at school, showing that he was "aggressive" and was "defending himself." Exhibit 1, Affidavit of Nancy S. Pemberton at 37.

3. Father's Infidelity and Family Dysfunction

Pedro inflicted not only physical but emotional abuse on Carmen throughout their marriage. He participated in extramarital affairs with other women, making little to no attempt to hide them from her. On one occasion the family was confronted by Pedro's infidelity when a

woman appeared on their doorstep. Another instance was when Pedro took Roberto's brother, Gustavo, to the movies with a woman who he was unashamedly hugging and kissing while in front of him. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

Pedro was also frequently absent. Pedro worked in construction and often was gone for months at a time, sending money to the family only sporadically. Exhibit 1, Affidavit of Nancy S. Pemberton at 24, 26. Some family members attributed Pedro's erratic disappearances from the family home at least in part to his infidelity. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

Knowing this would have put testimony regarding Roberto's own infidelity into a different context, particularly the scenes described by Osmar which so closely mirror those between Pedro and Gustavo.

4. Brain damage

Roberto suffers from a severe brain dysfunction, possibly of a genetic origin. The portion of Roberto's brain that is devoted to higher functions, such as impulse control, does not work properly. There are significant abnormalities in his frontal lobe, the area of the brain that helps deal with stress, regulate emotions, and control impulsivity. This area is also responsible for interpreting feedback from the environment and when damaged often impairs the processing of information necessary for sound judgment. Exhibit 3, Declaration of Ricardo Weinstein, Ph.D. at 10-11. Roberto is also of low-average intelligence. *Id*. at 13.

Due to counsel's deficiencies, the jury never learned about Mr. Moreno Ramos' longstanding brain injury, which manifested in significantly compromised cognitive and psychiatric functioning and affected all aspects of his life.

The jury thus had no way to contextualize the evidence before them of his struggles in

life, nor reason to conclude that his crimes and other failings were anything other than bad choices by a bad man, as the prosecution contended. Courts reviewing capital sentencing claims in habeas have acknowledged the unique importance of evidence of organic or physical brain injury:

> Evidence of organic brain damage is something that we and other courts, including the Supreme Court, have found to have a powerful mitigating effect.... And for good reason—the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action." *See Victor Hooks*, 689 F.3d at 1205 (citations omitted). Because of its central significance, where the defendant's circumstances put it in play, ordinarily it would be "patently unreasonable for [counsel] to omit this evidence from his case for mitigation." *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir.2004); *see id.* (noting "evidence of [petitioner's] mental retardation, brain damage, and troubled background constituted mitigating evidence" and, indeed, is "exactly the sort of evidence that garners the most sympathy from jurors").

Littlejohn v. Trammell, 704 F.3d 817, 860 (10th Cir. 2013) (footnote omitted).

No accurate picture of Mr. Moreno Ramos could have been presented without the central fact that his brain is damaged, and that damage was exacerbated by his repeated exposure to trauma. Nor could his jury reliably assess his moral culpability – the very purpose of a capital sentencing proceeding – without knowing about these disabilities. Trial counsel's failure to investigate and present this essential information undermined the reliability of his death sentence. *See Williams v. Taylor*, 529 U.S. 362, 370 (2000).

Evidence of damage to Mr. Moreno Ramos's frontal lobe – the area responsible for executive functioning, such as moral judgments and impulse control - would have assisted the jury in understanding the bizarre circumstances of the crime. Numerous courts have found prejudicial error in cases where compelling mitigating evidence bearing on mental capacity existed but was neither developed nor presented at trial. *See, e.g., Lewis v. Dretke*, 355 F.3d at 368 (finding trial counsel ineffective for failing to investigate and present evidence of childhood

abuse perpetrated by defendant's father); *Battenfield* v. *Gibson*, 236 F.3d 1215, 1226 (10th Cir. 2001) (counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence of, *inter alia*, the defendant's "involvement in a serious car accident at age 18, during which he sustained a serious head injury and after which he heavily used alcohol and drugs"); *Bloom* v. *Calderon*, 132 F.3d 1267 (9th Cir. 1997), *cert. denied*, 523 U.S. 1145 (1998); *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988) (failure to conduct investigation into petitioner's background, to uncover mitigating, psychiatric, IQ, and childhood information, and to present that information at penalty phase of death penalty case ineffective); *Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988) (counsel ineffective for failing to investigate, present, and argue to jury at sentencing evidence of defendant's mental history and condition); s*ee Frazier v. Huffman*, 343 F.3d 780, 797-799 (6th Cir. 2003), *cert. denied*, 124 S.Ct. 2815 (2004) ("Had the jurors been confronted with the mitigating evidence of [petitioner's] brain injury, the probability that at least one juror would not have decided that the aggravating circumstances of the case outweighed the mitigating circumstances" was sufficient to establish prejudice).

More importantly, with the evidence of brain damage, the jury could have learned that violence was not an inescapable part of Mr. Moreno Ramos' life. The picture the state put before the jury was a cold man, predestined to be violent. Evidence of brain damage puts the lie to this assertion because although brain damage is irreparable, it is treatable. As the *Littlejohn* court wrote:

> [E]vidence [of brain damage] could have been used to powerful mitigating effect, indicating that Mr. Littlejohn's criminal past is a product of a physical condition that is treatable, such that his criminal past is not an accurate predictor of his future. That is, it could have indicated to a jury that Mr. Littlejohn was not a continuing threat. *See Victor Hooks*, 689 F.3d at 1205 ("Diagnoses of specific mental illnesses ..., which are associated with abnormalities of the brain and can be treated with appropriate medication, are likely to [be] regarded by a jury as more mitigating than generalized personality disorders...." (alterations in original)

> (quoting *Wilson*, 536 F.3d at 1094) (internal quotation marks omitted)); *cf. Gilson v. Sirmons*, 520 F.3d 1196, 1249–50 (10th Cir.2008) (holding that evidence of organic brain disorder— seemingly with no evidence as to possible treatment— would not have altered the jury's prejudice analysis because the "presentation of th[e] evidence would likely have weighed against [the petitioner] by erasing any lingering doubts that may have existed as to his role in [the underlying] murder, and by confirming the jury's conclusion that he represented a continuing threat, even if confined in prison for life").

Littlejohn, 704 F.3d at 33-34.

5. Major Mood Disorder

Mr. Moreno Ramos has suffered from Bipolar Disorder for most of his life, including the time period of the crime for which he has been convicted and the trial that resulted in that conviction. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D.

Although Roberto did not have insight into his symptoms, numerous family witnesses recall having observed an array of signs and symptoms of mental illness, including mood instability, episodes of anger that he would not later remember, derailment and tangential speech, pressured speech, grandiosity, from the time he was a child up until the time of his arrest. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D.

Throughout Roberto's childhood and early adolescence his other siblings would make fun of him "because of the odd and silly things he would say." Exhibit 2, Declaration of Dr. Richard C. Cervantes. Roberto's family members also noticed his strange mood swings, seeming hallucinations, and apparent dissociation from reality. Exh. 3 at 49, 63-65; *see also*, Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D.

Both Roberto and his brother Enrique demonstrated emotional problems, odd thinking, and aggressiveness that did not appear to be associated with a conduct disorder, even during their early childhood. For example according to statements made by his brother, Ramiro Moreno

Ramos, Roberto was so delusional that he would talk about all the possessions he had, while at the same time he was looking for a job and asking for money. He tried to make his siblings believe that he was a successful contractor. According to Ramiro, Roberto was very temperamental and would get mad for no reason, and he acted "weird and psychotic." Exhibit 2, Declaration of Dr. Richard C. Cervantes.

The delusions that increased in frequency and intensity through his life were noticed by Roberto's family beginning when he was a young adult. When Roberto was a young adult he had delusions about his life, and his brother Carlos recalled times when Roberto thought he had "special powers." Exhibit 2, Declaration of Dr. Richard C. Cervantes

"He would always tell us that he had lots of money, that he owned lots of property and cars. Even when he was gone for long periods of time as an adult he would come home and tell us unbelievable stories about his material possessions, property and things like that." Exhibit 2, Declaration of Dr. Richard C. Cervantes.

6. Roberto was Industrious and Ambitious, but Repeatedly Thwarted by His Mental Illness

When Roberto was living in Los Angeles, California in the 1970s to 1980s, he left school and was introduced to the construction industry by his father. With the help of his father he got himself into a labor union and by his own accounts was proficient in his trade. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D.. In 1971 and 1974 Roberto worked for his uncle, Jose Ceballos, again in construction. His uncle noticed that Roberto suffered from mood swings, at times acting normal to suddenly becoming quite aggressive. He also noticed that his behavior was at times unpredictable, for example Roberto would refuse to go under a house because he was fearful then on other occasions he would be happy to go under a house. Exhibit 1, Affidavit of Nancy S. Pemberton at 13.

When he was 17 years old, Roberto moved in with a 22 year old woman he met in a restaurant. The next year, they married. Exhibit 1, Affidavit of Nancy S. Pemberton at14.

Roberto continued to work in the construction industry. In 1974 he was an employee of Craftsman Lens Company and then in 1975 to 1978 he worked for Ryland Homes of California. Exhibit 1, Affidavit of Nancy S. Pemberton at 13.

By the mid-1970s, Roberto and Leticia had eventually moved back to live with the Ramos family at 216 South Gage Avenue. Exhibit 1, Affidavit of Nancy S. Pemberton at 13.

Roberto and Leticia later purchased a house. Roberto set out to fix the property up however it remained incomplete before they moved to Chicago in the 1980s. Roberto started his own construction company. During this time, Roberto's family heard very little from him or Leticia and would only get the rare report that they were doing well. Exhibit 1, Affidavit of Nancy S. Pemberton at 14.

In the late 1980s Roberto and Leticia moved to Puerto Progreso, Texas. Roberto discovered that the economy at the time was not very good, providing little opportunity for work and therefore Roberto struggled to find regular employment. He did a couple of jobs, one where he made kitchen cabinets. Roberto also travelled to Los Angeles again and worked with his brother –in-law, Jose Sarabia, for about three months. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D.. Roberto worked at Hopes Group Home that provided care for mentally ill individuals. His employer had said that Roberto was good with the patients, however he observed that they tended to control Roberto rather than the other way around. Exhibit 1, Affidavit of Nancy S. Pemberton at 15.

Roberto still did not maintain regular contact with his family during this time; however he would occasionally visit them without Leticia and his children, who would remain in Texas.

Roberto continued to tell his family that he was doing well, yet it was reported by some members of his family that Roberto would hang around the Home Depot, trying to obtain work as a day laborer. Exhibit 1, Affidavit of Nancy S. Pemberton at 15.

Roberto suffered from emotional lability and mood swings noticeable to those around him. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D..

During these sporadic visits Roberto's family noticed that he exhibited strange behaviors and abnormal speech patterns. He consumed excessive amounts of caffeine and cigarettes. On one occasion he was talking normally with his sister-in-law "when the look on his face changed, his eyes got 'weird' and he began talking about reading books about the devil and witchcraft." Exhibit 1, Affidavit of Nancy S. Pemberton at 16. This conversation continued for a time then he suddenly returned to normal. Another occasion while watching TV, Roberto suddenly called his nephew a monkey and started to imitate the actions of one by scratching himself, and jumping up and down. Exhibit 1, Affidavit of Nancy S. Pemberton at 15.

Roberto and Leticia frequently argued. Exhibit 1, Affidavit of Nancy S. Pemberton at 14. Like his father, Roberto had extramarital affairs during his relationship with Leticia. He said he felt by having the affairs it brought him and Leticia closer. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D..

In the early 1990s Roberto traveled to Mexico and met a woman, Maria Elena Aguilar, he married her in Reynosa while he was still married to Leticia. He believed that this marriage with Maria was legal and had obtained a marriage certificate that cost 30 pesos. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D..

7. Mental Health Evidence Would Have Helped Rebut Future Dangerousness

Mr. Moreno Ramos's condition was identifiable and treatable at the time of his trial in

1993. *Id.*

> Had the proper testing and investigation been done, an expert could have testified to the jury that Mr. Moreno Ramos suffers from an organic brain dysfunction that is either genetic or the result of a brain injury; that he suffers from Bipolar Disorder, which is a severe and debilitating mental disease; that he has been psychologically damaged by a lifetime of poverty and physical abuse; that these conditions impaired his judgment and prevented him from coping with stress in normal, healthy ways; that all of these conditions are treatable and that, with treatment, Mr. Moreno Ramos could manage well in the structured world of a prison and that he would pose a very low risk to society.

Id. at pg. 3.

The psychiatric disorders from which Mr. Moreno Ramos suffered during and around the time of the deaths of his wife and children have been treatable by mental health professionals for many years, beginning long before the time that Mr. Moreno Ramos' wife and two children died, and continuing until the present.

Had Mr. Moreno Ramos been properly diagnosed prior to trial, an expert could have testified before the jury that his conditions were treatable and that proper medication would greatly reduce the likelihood of his being violent in the future, particularly if he were living in the controlled environment of a prison. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D..

With regard to Bipolar Disorder, by1990, effective psychopharmacological interventions were already well established in clinical psychiatric practice. As early as the 1970's, effective psychopharmacological treatment of Bipolar Disorder had already become available (Goodwin and Jamison, 1990, pp. 603-629). Moreover, by 1990, psychotherapeutic techniques had long been introduced in the treatment of Bipolar Disorder (Goodwin and Jamison, 1990, pp. 725-745).

With regard to the components of Mr. Moreno Ramos' Personality Disorder, there are both biological as well as psychotherapeutic interventions that may be of benefit. See, for

example, Soloff, 2000. Many of these interventions were available well before 1990. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D., Psychiatric Evaluation and Diagnostic Impressions.

8. Mental Health Evidence Would have Re-Framed Understanding of Mr. Moreno Ramos' Statements to the Police

Had defense counsel been aware of Mr. Moreno Ramos' Bipolar disorder, long history of mental illness and brain dysfunction, they may have been successful in excluding the statements allegedly made by this unsophisticated first-time defendant with low IQ who was held without representation for two months and interrogated without out counsel for over a week or better explained and contextualized the statements at penalty phase. Their failure to investigate severely prejudiced Mr. Moreno Ramos at guilt/innocence phase and penalty.

9. Evidence of Mental Illness Would Have case a Different Light on Aggravating Evidence of Strange Stories Told by Mr. Moreno Ramos

Basilisa Hernandez Silva testified at penalty phase that in 1988 Roberto Ramos married her daughter Maria Elena Aguilar. Mrs. Silva testified that the last time she saw her daughter was in 1989 when she moved with Mr. Ramos to Fort Worth, Texas. (S.F. 84:31-33) The only news she had of her daughter was through Mr. Ramos. Ms. Silva testified that Mr. Ramos called her and told her that she had a grandson named Ulises Jonathan. (S.F. 84:33) Mr. Ramos also returned to Mexico and told her "that her daughter was fine and not to worry about her." (S.F. 84:33)

During the previous witness testimony, the district attorney introduced State's Exhibits 213, 214, and 215. (S.F. 84:14) Osmar Ramos testified that the three exhibits were pictures were of his brother, Johnathan Ramos. (S.F. 84:15**)** Ms. Silva was shown the same exhibits and testified that they were photos given to her by Mr. Ramos who told her that they were a photo of

her grandson, Ulises Jonathan. (S.F. 84:34**)** Miguel Aguilar Hernandez, Maria Elena Aguilar's brother, was also shown State's Exhibits 213, 214, and 215 and testified that there were the photos he was shown of his sister's son, Jonathan Ulises, and that the photos were given to his mother by Mr. Ramos.

During the punishment phase the jury heard testimony from Miguel Aguilar Hernandez, brother of Maria Elena Aguilar. He testified that his sister married Mr. Ramos in June of 1988 and that his sister and Mr. Ramos then lived with him for about six months. (S.F. 84:36-38**)** During the state's previous examination of Osmar Ramos, Osmar testified that in June of 1988 Mr. Ramos sent his family, Leticia, Osmar and Abigail, to Austin, Texas to live with Osmar's uncle because Mr. Ramos "said he had some work to do around the house, and he was going to start building another house." (S.F. 84:16**)**

During the closing arguments, district Attorney Lopez told the jury

> And, just as they were silenced, that man, Robert Ramos, should be silenced, so that he will never deceive any woman again. So that he will never beat anyone again. So that he will never use a hammer over the head of anyone.

(S.F. 84:75**).**

10. Multi-generational history of mental illness

There is a long history of mental illness in the Ramos family. Roberto's brother Enrique is schizophrenic. *Id.* at 54. In addition, Roberto's sister Andrea, who is now deceased, had problems with drug use. *Id.* at 47. Roberto's father also displayed signs of paranoia and mania. Roberto's family members also noticed his strange mood swings, seeming hallucinations, and apparent dissociation from reality. *Id.* at 49, 63-65. See also, Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D..

There is a long history of mental illness in the Moreno Ramos family. Roberto's brother,

Enrique, has "religious delusions" of being the indigenous Saint, Juan Diego, and has been diagnosed as schizophrenic. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D.. Roberto's sister Andrea, who is now deceased, struggled with addiction. *Id.* at 47. Roberto's father displayed signs of paranoia and mania.

11. Aggravating Evidence of Domestic Violence Would have Been Cast In an Entirely Different Light had the Jury Heard the Compelling Evidence of Multi-generational history of Severe child abuse

Pedro was also an extremely violent man who brutalized his wife and his children frequently over the span of many years. Pedro himself had been victimized in a cycle of domestic violence that damaged the lives of at least four generations of the Ramos family. Roberto's grandmother was extremely abusive towards both her children and her grandchildren. Many of the most sadistic forms of abuse seemed to be passed on from one generation to the next.

> Punishment was frequent, it was painful, and it was unpredictable. Pedro hit the boys with his fist, his belt, and a chain from a car engine. He threw whatever he could get his hands on at them. He made them kneel on grains of sand or small stones for long periods, while they held their arms out and held bricks in their hands. He dunked their heads in the pail used to wash dishes, over and over, until they felt as though they would drown. . . The children learned not to react, not to cry or yell in pain, because their reactions would stimulate yet more punishment.

Id. at 25.

Similar methods of abuse were perpetrated by Roberto's grandmother on her son Pedro and on Pedro's own children, Roberto and his siblings. *Id.* at 7, 25. Roberto's father would tie him up by his ankles and let him hang, repeating what he had experienced as a child when he was hung by his thumbs as punishment. *Id.* at 8, 25. Roberto's mother was a victim of similar abuse by Pedro and was utterly unable to protect her children from their father, leaving them defenseless. *Id.* at 28, 32.

Carmen Sandoval's lifetime of hunger and misery shaped her into a strong, bitter and judgmental woman, and a shockingly abusive parent and grandparent. She physically and emotionally abused her children and grandchildren, insulting them, throwing objects at them and inflicting other forms of excessive and irregular punishment. Exhibit 1, Affidavit of Nancy S. Pemberton. She would hit the children with a big stick, with her shoes, or with any object that was around, hitting them on the head, face and body. *Id*. at 7.

Roberto's father, Pedro, had been victimized in a cycle of domestic violence that damaged the lives of at least four generations of the Ramos family. Many of the most sadistic forms of abuse seemed to be passed on from one generation to the next. Pedro suffered physical and mental abuse from his mother and also his siblings. Jose Ceballos, Pedro's half-brother, used to hang Pedro from his thumbs when he was a child, something that Pedro would later inflict on his own children as an adult. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

Carmen Sandoval's abuse was often targeted to specific children, Roberto's father, Pedro, was one of the children singled out by his mother to suffer severe forms of abuse.

As do many survivors of childhood abuse, Pedro reenacted this form of treatment with his own children. Pedro used various tools in beating Roberto and his children, including a chain from a car engine; he burned their hands on the stove, he dunked their heads in the pail used to wash dishes until they felt as if they would drown, he forced them to kneel on sand or small stones for long periods with their arms stretched out holding bricks, as well as hanging Roberto by his ankles and let him hang, repeating what he had experienced as a child when he was hung by his thumbs as punishment. *Id*. at 25. On one occasion Roberto was hanging from his ankles, as punishment, for such a long period of time and would not be brought down when he needed the toilet. Having no other choice he would have to defecate himself while hanging upside down

from his ankles. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D., III. Data, Social History having been the Victim of Physical Abuse.

Roberto and his brother Enrique suffered the most severe forms of abuse at the hands of their father. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

Sandoval similarly abused her grandchildren. Roberto's sister Natividad remembers her grandmother punishing her by thrusting her head into the bucket that was used as a toilet. *Id*. Ramiro Ramos, Roberto's younger brother, also recalls the abuse they suffered from Sandoval and how she treated Roberto and his siblings differently from her other grandchildren. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

What was perpetrated by Carmen Sandoval on her son Pedro and on Pedro's own children was then perpetrated by Pedro on Roberto and his siblings. *Id.* at 7, 25.

Roberto was confronted with brutal violence, directed at him as a child, and witnessed by him when he was powerless to protect his mother and siblings. His father, Pedro, was a cruel, violent man. Although the entire family experienced physical and emotional abuse, it was Roberto and his brother who suffered the most and who was most affected by the abuse. For Roberto the abuse began at the age of four years old, when Pedro was home, he frequently brutalized Roberto 2 to 3 times a week for both real and imagined misbehavior. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

Pedro's other children could not escape completely from his abuse, Roberto's brother, Carlos recalls an instance when he suffered at the hands of his father. When he was 9 years old, he was getting onto a bus with Pedro, when a watermelon that he was holding fell and broke on the stairway of the bus. His father became enraged, yelling at him and hitting him with his hand and fist into Carlo's body and face. This incident happened in front of the passengers on the bus,

none of whom interfered or said anything. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

Pedro incited fear among his children, his daughter Natividad described a time when she and her siblings were required to learn several pages of homework, while they sat on their knees, before their father returned from picking up a check. Natividad became so nervous that she could not learn anything, when it came time to recite it to her father, she burst out crying and wet herself. Pedro responded by taking off his belt and hitting her on her arms, legs and body. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

When Pedro was home he continued to exert his power and control over his family by isolating them from the neighbors and their community. This isolation only facilitated the abuse as there was no one to witness the abuse suffered. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

During the punishment phase of trial the jury heard testimony from Mr. Ramos' son, Osmar Ramos, about the physical and verbal abuse he was subjected to by Mr. Ramos. He testified that Mr. Ramos would hit him "with pipes or whatever he could get his hands on." (S.F. 84:8) Osmar testified about a time Mr. Ramos hit him with a belt and left him with scratches and bruises. In order to be able to go to school the next day Mr. Ramos told Osmar to "wear some of his clothes so that it wouldn't show." (S.F. 84:9) Osmar testified that as punishment Mr. Ramos "held me up through my private part." (S.F. 84:10) He further explained that "it was telephone wire. He put an iron and he put books on it as weight," and that it was tied to his penis. (S.F. 84:10) He testified that when he was 8 years old he was in the bathtub "just playing with bubbles and that in the bathroom, and he said I was taking too long and he stuck my head in there." (S.F. 84:12) Osmar testified that Mr. Ramos encouraged him to commit suicide and pointed a loaded gun at him.

> I would try to tell him sometimes I wish I wasn't born or I feel like killing myself. And, he said, go ahead. That time, he gave me a loaded pistol and, he pointed it right at my mouth…He says, "You want to die? Go ahead, do it." I told him, "Why did you point it at my head?" He said, "No, if you want to die, you'll die faster, once you shoot yourself in the mouth." (S.F. 84:12-13)

Osmar Ramos also testified about the physical abuse he witnessed his mother, Leticia Ramos, suffer at the hands of Mr. Ramos.

> I saw him beat her, frequently. There would be times when he would put tape around her mouth so the neighbors wouldn't hear her scream. It would be that gray duct tape, as he would hit her. (S.F. 84:11)

Osmar recalled when Mr. Ramos beat his mother for going to bail his cousin out of jail.

> And, Roberto Ramos, he got mad and he beat her up because she was out to go bail him out. I remember seeing blood all over the kitchen floor. I heard cursing that night. They thought I was asleep. I was just lying in bed, hearing them argue and fight all night. I was nine years old at the time. (S.F. 84:11)

Osmar testified that his mother endured both physical and verbal abuse. He testified that is happened "twice a month. There wouldn't -- in other words, there wouldn't be a month, a day in a month where none of that would go on at home." (S.F. 84:13)

Having conducted no life history investigation, the defense were utterly unaware of how these specific acts of coercion and control are a recreation of the multi-generational patterns of abuse in the Moreno Ramos family.

> Roberto Moreno Ramos' family history exemplifies a cycle of severe and persistent violence, coupled with abandonment and neglect. My interviews as well as the interviews reflected in Pemberton's Affidavit disclosed a cycle of violence that began at least two generations before Roberto.

Exhibit 2, Declaration of Dr. Richard C. Cervantes, at 3.

The defense failed to cross Osmar about family history and instead focused on Osmar's suicide attempts, seeking to demonstrate that his father had not been the cause of his despair. Osmar's history of depression and suicidal ideation should not have been understood as

aggravation, but as evidence of a multi-generational history of mental illness.

In her closing remarks, ADA Lopez told the jury that Mr. Ramos is a "brutal man." (S.F. 84:73) and asked the jury:

> What is mitigating? This is a deceitful man. A man who was married three times, and one can't be found. He's abusive. He beats. He kills. What is redeeming about this man? Nothing. Nothing. There is nothing mitigating here.

(S.F. 84:74)

12. Lack of support to meet special needs—

The children also received little cognitive stimulation or enrichment. Not only were there no resources to provide the stimulation necessary to a child's proper development, neither parent was educated enough to contribute meaningfully to their cognitive development. Moreover, one parent was either absent or uninvolved while the other was overwhelmed with trying to meet the physical needs of her children. Exhibit 2, Declaration of Dr. Richard C. Cervantes

Roberto's mother, Carmen Moreno, was in no position to protect her children from either the violence of their father, or the extreme poverty in which they lived. She too was a victim of Pedro's anger and violence, incapable of intervening and protecting her children. *Id*. at 28. Pedro would repeatedly threaten to hit his wife, when challenged he would hit the wall with his fists with such force that on one occasion he broke it. Before long, Pedro began to hit Carmen and despite her best efforts to keep the abuse hidden from her children, they often heard their farther beat and abuse their mother. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

1. Stressors--

Roberto Moreno Ramos' childhood and young adulthood were defined by multiple, severe and continuous stressors that interrupted his development and placed him at great risk of developing a mental illness as an adult. These risk factors include:

a) As a child, Mr. Moreno Ramos was subjected to severe physical and emotional abuse. He and his brother Enrique were particularly targeted by their father. All the children witnessed the physical abuse of their mother.

b) The breakdown of the family structure, including lack of adequate parenting and neglect of basic needs. Mr. Moreno Ramos' father was frequently absent and eventually abandoned the family.

c) The stresses associated with family immigration, life in a high risk border city, and multiple family separations.

d) Extreme poverty and uncertainty in meeting daily material needs such as food and housing, particularly while living in Guadalajara, Tijuana and East Los Angeles.

Taken together, these factors greatly increased the risk that Mr. Moreno Ramos would develop a psychiatric disorder as an adult. Mr. Moreno Ramos' predisposition to mental disease was increased by a family history of mental illness. Finally, the abuse meted out by his father, and Mr. Moreno Ramos' exposure to multiple toxins as a child, create conditions conducive to organic brain damage. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

Roberto was exposed to numerous chemical toxins from an early childhood. When the family was living in Mexico, they were living in metropolitan areas, where the air and water quality standards were non-existent and were exposed to numerous toxins in the home and neighborhood. Exhibit 2, Declaration of Dr. Richard C. Cervantes.

13. Chaos, lack of safety—

The Moreno Ramos family experienced a long history of dislocation and family upheaval. Roberto's father was rarely with the family, often leaving to work in other cities, or to have affairs with other women. *Id.* at 26, 30, 45.

The Moreno Ramos family experienced an unremitting lack of safety, chaos, dislocation, isolation and family upheaval. Life didn't improve when Pedro was gone. Not only did the family often go hungry, but they were totally unprotected from the dangers of being assaulted or robbed. Because the family's ramshackle house was constantly under construction, it was not secure and Carmen Moreno would leave the lights on all night to keep intruders at bay. Exhibit 1, Affidavit of Nancy S. Pemberton at 27. The family needed Pedro, despite his abusive treatment, both for their physical safety and for their economic survival. Exhibit 2, Declaration of Dr. Richard C. Cervantes at 29.

The Moreno Ramos family moved from one high crime urban neighborhood to another, for years living in an incomplete house with the constant threat of intruders, so impoverished that getting basic nutrition became a daily struggle for survival and with the ever present threat of violence at the hands of Pedro. This relentless sense of fear and vulnerability and lack of security does lasting damage to children who live under such circumstances. As Dr. Cervantes explains:

> The very first developmental task that all children master is safety and security. As illustrated by Maslow's "Hierarchy of Needs," a child's most fundamental needs must be met before it is possible for him or her to move forward with other aspects of cognitive and emotional development. Children in an environment such as the one survived by Roberto Moreno Ramos don't have the ability to develop cognitively and emotionally in appropriate ways. If a child is not safe and secure, as these children were not, they use all of their psychological resources on the fear and anxiety of their daily lives and learn merely to survive. They cannot learn or develop normal relationships.

Exhibit 2, Declaration of Dr. Richard C. Cervantes.

The family immigrated to the United States in 1970, after moving through Guadalajara, Aguascalientes, and Tijuana. When they arrived, several of the younger children were undocumented and had to be hidden at their grandmother's house for several months, separated

from the rest of the family. *Id.* at 44. After bringing his family to the United States, Roberto's father finally abandoned them permanently and returned to Mexico in 1976. *Id.* at 45.

These adjustments were made all the more difficult by Roberto's underlying brain dysfunction, low IQ and severe mental illness.

The severe abuse and family dysfunction in Mr. Moreno Ramos's background were exacerbated by acculturation struggles incident to the family's immigration to the United States, as well as the conditions of extreme poverty under which the family lived on both sides of the border. A lack of family structure, combined with the stresses of immigration, can give rise to severe psychological problems. Exhibit 2, Declaration of Dr. Richard C. Cervantes, Ph.D.

Roberto demonstrated severe problems in socialization and mood regulation likely related to persistent and severe childhood trauma. Roberto also demonstrated eccentric thinking and grandiose ideation.

14. Risk factors

While some children can overcome these risk factors if they receive effective intervention, Roberto and his brother Enrique, who suffered the brunt of their father's abuse, were not so lucky. School officials and health care professionals failed to provide them with needed services. It is no coincidence that both Roberto and his brother Enrique suffer from mental illnesses. The linkages between childhood exposure to the risk factors listed above and the onset of psychiatric disorders is well established. Exhibit 2, Declaration of Dr. Richard C. Cervantes**.**

15. Mental Health Experts Would Have Provided a Mitigating Context to Mr. Moreno Ramos' Suicide Attempt in the Jail, Which was Instead Used In Aggravation Against Him

Lieutenant Contreras testified during Mr. Ramos' trial that he received a call from the

security at the hospital on April 8th, 1992. (S.F. 62:356) He testified that he later saw Mr. Ramos "with some bandages on the wrist." (S.F. 62:357) He testified that he "asked him if he was okay. He told me, sort of like laughing, that he was only playing." (S.F. 62:357) Lieutenant Contreras clarified that he saw bandages "on both wrists." (S.F. 62:357) The Report regarding his trip to hospital was entered into evidence as State's Exhibit No. 2. (S.F. 62:383)

This evidence would have been understood in an entirely different light had jurors been informed of Mr. Moreno Ramos' mental illness and taught that those suffering with mental illness quite typically deny their symptoms. In fact, when evaluated by Dr. Silva, Mr. Moreno Ramos denied being abused as a child, denied being mentally ill, denied substance abuse, and denied "that anybody had ever suggested that he was in any need of psychiatric treatment" Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D. even though such evidence would be helpful to his defense. And, in those interviews he was found to have put forth good effort and found not to have malingered.

Dr. Silva explained that the DSM-IV-TR described malingering as "grossly exaggerated physical or psychological symptoms, motivated by external incentives" such as "evading criminal prosecution." Dr. Silva utilized a test to measure malingering and he explained:

> Independent sources of information often were not consistent with his history because he tended to minimize or deny his psychopathology. Therefore, this inconsistency was in the opposite direction than would be expected of Malingering. . . I am of the opinion that he was consciously uncooperative in that he consistently tried to appear more mentally healthy than is objectively true.

Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D.

Dr. Silva explained that "Mr. Moreno Ramos is at some risk for under-reporting his psychopathology because he is very much interested in appearing to be normal." Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D..

That testing as well as the testimony of a mental health professional would have helped the jury understand that his denial of any suicidal intention does not mean that he had not tried to kill himself. Nor does it mean that he was lying or manipulating anyone. On the contrary it is entirely consistent with someone suffering from mental illness to be both overwhelmed by signs and symptoms of disease and at the same time in denial that the disease or the symptoms even exist. Exhibit 4, Psychiatric Evaluation and Diagnostic Impressions by J. Arturo Silva, M.D..

This testimony also would have allowed the jury to give mitigating effect to the evidence of Mr. Moreno Ramos' suicide attempt in the jail, which the state had suggested was faked. (S.F. 63:357) (Lt. Contreras told jurors that he had been called by security at the hospital on April 8th, 1992 and later saw Mr. Ramos "with some bandages on . . . both wrists. I asked him if he was okay. He told me, sort of like laughing, that he was only playing.) (S.F. 62:357)

Dr. Silva could have explained that such minimization and denial is entirely consistent with serious mental illness and real suicidal thoughts and actions. He also could have taught the jurors about Mr. Moreno Ramos' inappropriate affect both as described by witnesses and in the courtroom.

Furthermore, easily obtainable jail records and emergency room records, however, would have demonstrated, consistent with Dr. Silva, that Mr. Moreno Ramos had not been seeking addition. He had, in fact, tried to hide his wounds from nearby officers and denied that anything was wrong. Coming as it did just hours after the bodies of his family had been recovered by police following his description of their location, the most obvious interpretation of his self-inflicted wounds is that Mr. Moreno Ramos wanted to die. Exhibits 5 and 6; S.F.

16. Trial Counsel's Failure To Contact the Mexican Government Had Catastrophic Consequence for Mr. Ramos that Were Compounded by the Additional Violation of his Right to Consular Notification

Mexican national capital defendants have the additional failsafe of a government that is willing to step in and provide resources where states fail to fund adequate defense. In Mr. Moreno Ramos's case, this redundant back up became a redundant failure.

Law enforcement authorities failed to inform him of his right to consular access and assistance, failed to afford him the opportunity to communicate with and seek assistance from his consulate, and failed to inform his consulate of his arrest and pending charges. The state has never disputed that law enforcement authorities violated Mr. Moreno Ramos's VCCR rights after he was arrested.

Had state officials or defense counsel notified Mexico of Mr. Moreno Ramos' detention, as the Vienna Convention dictates, counsel would have had a second source of funding to rely upon in meeting his constitutional obligations. Mexico would have provided significant assistance, such as: representing Mr. Ramos, advising defense counsel representing Mr. Ramos of the intricacies of a capital case, providing funds for experts, mitigation specialists, and investigators, facilitating contact between defense counsel and Spanish speaking witnesses, and meeting with prosecutors to arrange a plea deal if possible. Exhibit E, Affidavit of Arturo A. Dager Gomez.

Mexico has a long and well-established history of providing substantial assistance to its detained nationals in the U.S., particularly those detained on capital murder charges. Since at least 1920, the Mexican government has extended legal assistance to its nationals sentenced to death in the United States. As early as 1921, upon the motion of Nobel laureate Octavio Paz, who was then a congressman in Mexico, Mexico appropriated special funding for criminal

defense attorneys to represent Mexican nationals in United States courts.

Shortly before Mr. Moreno Ramos's prosecution, for example, consular officials in Texas were heavily involved in the defense of Ricardo Aldape Guerra, who had previously been convicted and sentenced to death in Houston without the benefit of consular assistance, and whose case was overturned on appeal for a new trial. As early as 1988, the Mexican Ministry of Foreign Relations had designated a point-person charged specifically with monitoring legal cases of Mexican citizens in the United States. The Ministry was particularly interested in the cases of Mexican nationals facing the death penalty. This emphasis persisted throughout the 1990s and up to the present. Indeed, by 1993 Mexico was already providing extensive and effective consular assistance for the development of crucial mitigating evidence regarding mental illness. *See* Claire Cooper, *Foes of Death Penalty Have a Friend: Mexico*, Sacramento Bee, June 26, 1994, at Al (describing extensive Mexican consular assistance in 1992 that "may have saved the life" of a capital defendant).

The Government of Mexico had an active and far-reaching program of consular assistance in 1993, the year Mr. Moreno Ramos was convicted and sentenced to death. The United States government has acknowledged as "an obvious fact" that "Mexico has elected to give extraordinary assistance to its nationals in capital cases"[13] and that "undoubtedly a consul can provide important information to the detainee who is unfamiliar with the legal system of the receiving State."[14] Oklahoma's highest court has recognized that Mexico was providing crucial assistance to its nationals facing the death penalty since at least 1989. In vacating the death

[13] 1 Counter-Memorial of the United States of America, *Avena and Other Mexican Nationals* (Mex. v.U.S.) (Nov. 3, 2003), at 186, *available at* <http://www.icj-cij.org/docket/files/128/10837.pdf>.
[14] *Id*. at 70.

sentence of a Mexican national in that state, the court observed:

> We cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate. It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure that he received a fair trial and sentencing hearing. . . .We believe trial counsel, as well as representatives of the State who had contact with Petitioner prior to trial and knew he was a citizen of Mexico, failed in their duties to inform Petitioner of his right to contact his consulate.

Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002).

17. Counsel's Failure to make any argument or present any theory for life prejudiced Mr. Moreno Ramos

Counsel's incoherent closing argument presented no theory for life, no mitigating evidence, contests none of the State's portrayal of Mr. Moreno Ramos as a cruel and inhuman future danger, and repeatedly misstates both the question before the jury and the burden of proof. Defense counsel never even asked the jury to return a verdict for life.

The fact that no mitigating evidence whatsoever was presented by the defense gave the impression, which went unrebutted by the defense, that none existed:

ADA Lopez capitalized on defense counsel's abandonment of their client, arguing that no mitigation was presented because none existed: "What is redeeming about this man? Nothing. Nothing. There is nothing mitigating here. Not one thing." (S.F. 84: 74).

Jurors also were shocked by the entire absence of any argument for life:

> After we convicted Mr. Ramos, there was a penalty phase. We were expecting the defense to put on witnesses, but they didn't. We wondered about him and would have wanted to know more about him.

Exhibit 12, Affidavit of Juror Teresa Espinoza.

As one juror has since said:

> The main thing that I remember about the sentencing was that he didn't have any defense. For the sentencing he didn't have anyone testify. I mean he didn't have

> anyone on his side, no family, no employers, there were no relatives in court with him at all. No one to speak on his behalf or to talk about his behavior. But, the government had lots of evidence. . . .So, we got the impression that he was very cruel and cold and there was nothing on the other side. No one from his family testified about how he was when he was younger, or his behavior, we heard only about his cruelty.
> . . .
> At the life-death part it didn't take us that long to deliberate, maybe a couple of hours. Then we just sat in the jury room for a long time, about an hour and a half, because we didn't want to make that decision. We just sat there quietly for a long time. He just had no one on his side, no one to talk about how was a s a little boy, his psychological problems, nothing. That surprised me. I was sitting there waiting for a defense but there wasn't one. When they rested their case we were all surprised because we were expecting a defense. When we went back and discussed there was nothing we could do, we had no information to use to give life. When they gave us the instructions and we had to answer those questions there was just nothing. We really had no choice. The life-death was the worst part, we didn't want to make that kind of decision, but we had no choice.

Exhibit 11, Statement of Juror Maria Orozco.

In that sense, the presentation of anything at all would have greatly improved Mr. Moreno Ramos' odds.

There simply is no doubt that mitigation (versus no mitigation) makes a difference in even the most aggravated case, especially evidence of the ritualized child abuse experienced by Mr. Moreno Ramos. Jury as Critic, 83 Va. L. Rev. 1109, 1175-78 (1997) (describing extremely aggravated killing where jurors became convinced childhood had turned him into a "ticking timebomb"; and Chapter 5, 133-59 of A Life and Death Decision: A Jury Weighs the Death Penalty (extremely aggravated killing where child abuse led jurors to life sentence though strongly inclined towards death after guilt and aggravation phases).

Had evidence of his struggles with poverty, severe child abuse, familial dysfunction and neglect, mental illness, or neurological damage been presented, it would have been heard by a jury eager to listen.

Instead, the jurors were left entirely without guidance. Counsel didn't even ask

the jury to return a life verdict.

There is a reasonable probability the outcome of his case would have been different notwithstanding the aggravating facts of the crime had trial counsel properly developed and presented this evidence of Mr. Moreno Ramos' mental health. As the Fifth Circuit has noted, the horrific nature of capital murder does not override *Strickland* prejudice:

> The State's stereotypical fall-back argument – that the heinous and egregious nature of the crime would have ensured assessment of the death penalty even absent [the error] – cannot carry the day here. … [O]ur decades of experience with scores of § 2254 cases from the death row of Texas teach an obvious lesson that is frequently overlooked: Almost without exception, the cases we see in which conviction of a capital crime has produced a death sentence arise from extremely egregious, heinous, and shocking facts. But, if that were all that is required to offset prejudicial legal error and convert it to harmless error, habeas relief based on evidentiary error in the punishment phase would virtually never be available, so testing for it would amount to a hollow judicial act.

Walbey v. Quarterman, 309 Fed. Appx. 795, 804 (5th Cir. 2009)(quoting *Gardner v. Johnson*, 247 F. 3d 551 (5th Cir. 2001)).

This is particularly true where the mitigation evidence is of type in Mr. Moreno Ramos' case. As the Tenth Circuit recently held in reversing a federal capital case,

> evidence of mental impairments "is exactly the sort of evidence that garners the most sympathy from jurors," *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004), and that **this is especially true of evidence of organic brain damage** …Organic brain damage is so compelling … because "the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action." *Hooks* [*v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 32012)].
>
> *United States v. Barrett*, 797 F.3d 1207, 1231 (10th Cir. 2015) (emphasis added)

(reversing death sentence and remanding for an evidentiary hearing).

A. <u>This evidence would have made a difference to the jurors who sentenced Mr. Moreno Ramos.</u>

Had it been presented, such evidence would have found the jury eager to listen. As one

juror described:

> We didn't have any doubt that he would be a future danger, because of what he did to his son and also that poor woman whose daughter had been missing. And, we didn't have any mitigating evidence at all for the other question, so we had to say there wasn't any. But, we would have answered differently if there had been some evidence.
>
> I have recently been informed by Mr. Moreno Ramos's defense that he was abused as a child and suffers from a dissociative disorder as a result. This may have made a difference to us in sentence. . .
>
> I have also recently been informed by Mr. Moreno Ramos's defense that he has been diagnosed with brain damage. This would have given us evidence to vote for a life sentence. This is the kind of thing we wanted to know. His attorney could have done a better job. He had no defense. Knowing some other things about Ramos might have helped because all we heard was that he was mean and we never got any explanation about why he was like that.
>
> Exhibit 11, Statement of Juror Maria Orozco.

Another juror had a similar reaction:

> I have recently learned from defense counsel for Mr. Moreno Ramos that he has been diagnosed with brain damage and that he had a long history of childhood abuse. I wish that we had known this at trial.
>
> It definitely would have made a difference at the penalty phase if we had known that he was abused as a child or if we knew about his brain damage. I know that in the spur of the moment, someone can snap. We would have wanted to see a psychiatric report.
>
> Knowing that Mr. Moreno Ramos grew up in an abusive would [sic] have made the crimes more understandable. It doesn't condone or justify anything, but it could have been a reason for voting for life.
>
> Exhibit 12, Affidavit of Juror Teresa Espinoza.

Evidence regarding the physical abuse experienced by Mr. Moreno Ramos as a child and the resulting dysregulation of his emotions and expression of emotions would have further made a difference in the way the jury understood the state's evidence of future dangerousness.

> We watched Mr. Ramos in court and wondered about him. When his lawyers talked to him, he just spaced out. He looked out of his mind, like he was in shock. When they were playing the video, he didn't look shocked or emotional. He looked angry, he had bloodshot eyes. It would have been good for him to show

> emotion, these were his kids. He was scary looking. To see him like that, we thought he was cold and scary. If we had known that these are symptoms of a dissociative disorder, it would have made a big difference in how we thought of Mr. Ramos. It's not his fault if he can't express emotion, but we didn't know that.

Exhibit 12, Affidavit of Juror Teresa Espinoza.

> It [evidence of a dissociative disorder] would have help us to understand why he didn't show any emotion in court. I couldn't see him from my vantage point, but the other jurors talked about how he showed no emotion and that made us believe that he was cruel and not sorry for what he had done. If we knew he had an emotional disorder this would have explained his behavior in the courtroom.

Exhibit 11, Statement of Juror Maria Orozco.

Mr. Moreno Ramos's defense counsel, who met the jurors, heard the aggravating evidence, and is familiar with the facts of the facts of the case believes that evidence of Mr. Moreno Ramos's brain damage "could have made the difference between life and death."

> I have been informed that a neuropsychologist has concluded that Mr. Moreno Ramos suffers from brain damage. [At trial] we would have been able to tell the jury that Mr. Moreno Ramos suffered from a disability that was beyond his control. This could have made the difference between life and death.
>
> I have also recently learned that experts hired by Mexico have conducted a complete evaluation of Mr. Moreno Ramos's background and mental health. I understand that they could have provided expert testimony to counter the state's argument that Mr. Moreno Ramos would be dangerous in the future. This would have been enormously important and I believe this could have changed the outcome of the case.
>
> I have also recently learned that experts hired by Mexico have found extensive evidence that Mr. Moreno Ramos suffered from severe physical and emotional child abuse and that there was a long, multi-generational, history of child abuse in his family. They have also collected data concerning the terrible poverty of Mr. Moreno Ramos's family, the disruptions to his development caused by family discord, and the psychological stresses of immigrating to a new country under these conditions. All of this would have been helpful to present to the jury.
>
> If we had had these experts available to us at trial, we would have been able to present to the jury an understanding of how Mr. Moreno Ramos became the person they had found guilty of such a horrible crime so that even if they found he was a continuing threat to society, they would have had some compelling and coherent reasons to spare Mr. Moreno Ramos's life. This could have made the

difference between life and death. **We only needed to convince one juror.**

Exhibit 7, Affidavit of Jack Duval Hunter, II (emphasis added).

Evidence of poverty, mental health issues, neurotoxin exposure, brain damage, and other factors would have offered the jury a glimpse into Mr. Moreno Ramos's life which would have likely persuaded at least one juror to vote for life.

The U.S. Supreme Court has found prejudice in cases far more aggravating than Mr. Moreno Ramos's case, repeatedly holding that capital counsel is obligated to investigate, develop and present mitigating evidence even in the worst of cases. For example, in *Williams v. Taylor*, 529 U.S. 362 (2000), the Fourth Circuit summed up the case in aggravation against Mr. Williams in this way:

> ***The murder of Mr. Stone was just one act in a crime spree that lasted most of Williams's life***. Indeed, the jury heard evidence that, in the months following the murder of Mr. Stone, Williams savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw.

Williams v. Taylor, 163 F.3d 860, 868 (C.A.4 1998) (emphasis added). The U.S. Supreme Court, when assessing the potential impact of the mitigating evidence in Mr. Williams' case, emphasized that whether the mitigating evidence might have resulted in a different outcome is an entirely separate question from whether it negates future dangerousness or the prosecution's case for death eligibility:

> While [evidence of Williams' voluntary surrender, co-operation with the police and remorse], coupled with the prison records and guard testimony, ***may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability***. *See Boyde v. California*, 494 U.S. 370, 387, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). The circumstances recited in his several confessions are consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation.

> Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.

Id. at 398 (emphasis added). The Court made it clear that prejudice inures even if the omitted evidence does not rebut the case for death eligibility. The question is not whether there is sufficient evidence to justify a death sentence, *see e.g. Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995) (the *Brady* and *Strickland* prejudice test is "not a sufficiency of evidence test"), it is whether the totality of the mitigating evidence "might well have influenced the jury's appraisal of [the defendant's] moral culpability." *Williams*, 529 U.S. at 398.

Prejudice ensues whenever the totality of the mitigating evidence "might well have influenced the jury's appraisal" of the defendant's moral culpability. *Rompilla*, 545 U.S. at 393; *Wiggins*, 539 U.S. at 538; *Williams*, 529 U.S. at 398.

Numerous courts have found prejudice, under *Strickland*, in cases with similar, or less compelling fact patterns than that of Mr. Moreno Ramos. *Ex parte Gonzales*, 204 S.W.3d 391, 396 (Tex. Crim. App. 2006) (holding that defense counsel was ineffective for failing to explore mitigating evidence and defendant was prejudiced as a result); *Wiggins v. Smith*, 539 U.S. 510, 535-36, 123 S. Ct. 2543 (2003) (stating extensiveness of petitioner's physical and sexual abuse as a child); *Penry v. Lynaugh*, 492 U.S. 302, 308-10, 109 S. Ct. 2942-43 (1989) (evidence of petitioner's mental retardation, brain damage, and abuse); *Williams v. Taylor*, 529 U.S. 362, 364-65, 120 S. Ct. 1498-99 (2000) (stating the petitioners extensive mitigating evidence of nightmarish childhood, borderline mental retardation, and good behavior in prison); *Sears v. Upton*, 130 S. Ct. 3259, 3263(2010) (finding that petitioner was prejudiced by counsel's failure to introduce mitigating evidence of physical, sexual, and verbal abuse from parents and mental retardation).

The results of the Capital Jury Project indicate that the evidence Mr. Moreno Ramos's trial counsel failed to develop would more likely than not have saved his life. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 Colum.L.Rev. 1538 (1998). Fifty-two percent of jurors interviewed found it mitigating that the defendant suffered from mental illness. Jurors reported consideration of child abuse and other deprivations that may have helped shape the defendant into the kind of person who could commit a capital crime as issues which reduced culpability. Approximately forty-eight percent of jurors felt that abuse as a child was mitigating. The more a juror reported having felt sympathy or pity for the defendant, having found the defendant likeable as a person, and having imagined being in the defendant's situation, the more likely she was to case her first vote for a sentence of life imprisonment. "Telling the defendant's story does appear to have its intended emotional effect. If a juror believed the defendant experienced the torment of abuse as a child, labored under the burden of a mental defect or mental retardation, was emotionally disturbed, battled with alcoholism (but not drug addiction), was a loner in the world, or had generally gotten a raw deal in life, the usual response was sympathy or pity." Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 New York University Law Review 26 (2000).

Evidence of poverty, mental health issues, neurotoxin exposure, possible intellectual disabilities, and other factors would have offered the jury a glimpse into Mr. Moreno Ramos's life which would have likely persuaded at least one juror to vote for life

As one juror described:

> I have recently been informed by Mr. Moreno Ramos's defense that he was abused as a child and suffers from a dissociative disorder as a result. This may have made a difference to us. It would have been evidence for that question and it would have help us to understand why he didn't show any emotion in court. I couldn't see him from my vantage point, but the other jurors talked about how he showed no emotion and that made us believe that he was cruel and not sorry for

> what he had done. If we knew he had an emotional disorder this would have explained his behavior in the courtroom.
>
> I have also recently been informed by Mr. Moreno Ramos's defense that he has been diagnosed with brain damage. This would have given us evidence to vote for a life sentence.

See Exhibit 12, Affidavit of Juror Teresa Espinoza.

> Additionally, as another juror stated:
>
> I have recently learned from defense counsel for Mr. Moreno Ramos that he has been diagnosed with brain damage and that he had a long history of childhood abuse. I wish that we had known this at trial.
>
> It definitely would have made a difference at the penalty phase if we had known that he was abused as a child or if we knew about his brain damage.
>
> Knowing that Mr. Moreno Ramos grew up in an abusive would have made the crimes more understandable. It doesn't condone or justify anything, but it could have been a reason for voting for life.

See Exhibit 11, Statement of Juror Maria Orozco**.**

Mr. Moreno Ramos's defense counsel, who met the jurors, heard the aggravating evidence, and is familiar with the facts of the facts of the case believes that evidence of Mr. Moreno Ramos's brain damage "could have made the difference between life and death."

> I have been informed that a neuropsychologist has concluded that Mr. Moreno Ramos suffers from brain damage. [At trial] we would have been able to tell the jury that Mr. Moreno Ramos suffered from a disability that was beyond his control. This could have made the difference between life and death.
>
> I have also recently learned that experts hired by Mexico have conducted a complete evaluation of Mr. Moreno Ramos's background and mental health. I understand that they could have provided expert testimony to counter the state's argument that Mr. Moreno Ramos would be dangerous in the future. This would have been enormously important and I believe this could have changed the outcome of the case.
>
> I have also recently learned that experts hired by Mexico have found extensive evidence that Mr. Moreno Ramos suffered from severe physical and emotional child abuse and that there was a long, multi-generational, history of child abuse in his family. They have also collected data concerning the terrible poverty of Mr.

> Moreno Ramos's family, the disruptions to his development caused by family discord, and the psychological stresses of immigrating to a new country under these conditions. All of this would have been helpful to present to the jury.
>
> If we had had these experts available to us at trial, we would have been able to present to the jury an understanding of how Mr. Moreno Ramos became the person they had found guilty of such a horrible crime so that even if they found he was a continuing threat to society, they would have had some compelling and coherent reasons to spare Mr. Moreno Ramos's life. This could have made the difference between life and death. **We only needed to convince one juror.**

See Exhibit 7, Affidavit of Jack Duval Hunter, II.

The completely new picture of Mr. Moreno Ramos that has emerged in post-conviction was the result of routine life history investigation that has been the prevailing norm among capital defense attorneys in Texas since the early 1980s. These include: hiring experts to evaluate the client for mental disorders and organic brain disease; hiring a mitigation specialist to compile a social history of a client through interviews of the client, his/her family, neighbors, friends and acquaintances; and collecting school, medical, employment, and other records.

Numerous courts have found prejudicial error in cases where compelling mitigating evidence existed but was neither developed nor presented at trial. *See, e.g., Lewis v. Dretke,* 355 F.3d at 368 (finding trial counsel ineffective for failing to investigate and present evidence of childhood abuse perpetrated by defendant's father); *Battenfield* v. *Gibson,* 236 F.3d 1215, 1226 (10th Cir. 2001) (counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence of, *inter alia*, the defendant's "involvement in a serious car accident at age 18, during which he sustained a serious head injury and after which he heavily used alcohol and drugs"); *Bloom* v. *Calderon,* 132 F.3d 1267 (9th Cir. 1997), *cert. denied,* 523 U.S. 1145 (1998); *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988) (failure to conduct investigation into petitioner's background, to uncover mitigating, psychiatric, IQ, and childhood information, and to present that information at penalty phase of death penalty case ineffective);

Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988) (counsel ineffective for failing to investigate, present, and argue to jury at sentencing evidence of defendant's mental history and condition).

Although the state often argues that the brutality of a crime trumps any possible mitigation, in fact, there have been numerous cases across Texas and the nation where a jury returned a life verdict when the facts of the underlying offense were similar to, or more heinous than, those in this case.

In the following Texas trials, the juries returned a life verdict:

- **Gabriel Armandariz (Tarrant County, Texas, 2015)** – Armandariz was convicted of strangling his eight-month-old and two-year-old sons and sending a photo of the dead children to his estranged wife. *Jury sentences Young County child killer to life without parole*, Fort Worth Star-Telegram, March 12, 2015 (available at http://www.star-telegram.com/news/local/crime/article13853561.html).
- **Brendon Gaytan (Nueces County, Texas, 2015)** – Gaytan was convicted of killing six-year-old and two-year-old girls in a drive by shooting. The girls were celebrating a birthday party at the time. *Brendon Gaytan found guilty of capital murder*, KRISTV 6, Feb. 26, 2015 (available at http://www.kristv.com/story/28209977/brendon-gaytan-found-guilty-of-capital-murder); *Brendon Gaytan has been sentenced to life without parole*, KRISTV 6, Feb. 27, 2015 (available at http://www.kristv.com/story/28223165/brendon-gaytan-has-been-sentenced-to-life-without-parole).
- **Cornelius Harper (Fort Bend County, Texas, 2014)** – Harper was convicted of killing his cousin, his cousin's pregnant girlfriend, and their unborn baby. *Harper sentenced to life without parole in triple slaying, including unborn child*, Houston Chronicle, June 19, 2014 (available at http://www.chron.com/neighborhood/fortbend/crime-courts/article/Harper-sentenced-to-life-without-parole-in-triple-5564298.php).
- **Maron Thomas (Austin County, Texas, 2013)** – Thomas was convicted of killing his mother, stepfather, brother, and sister, as well as decapitating his two-year-old niece. *Thomas gets life in sibling murders*, The Sealy News, July 11, 2013 (available at http://www.sealynews.com/news/article_ec7d8c9e-e983-11e2-b4d5-001a4bcf887a.html).
- **Roberto Rojas Aguirre (Hidalgo County, Texas, 2011)** – Aguirre was convicted of killing his two-year-old son, two stepsons, and his mother-in-law. *After guilty plea, jury convicts Rojas of capital murder*, The Brownsville Herald, Aug. 18, 2011 (available at

http://www.brownsvilleherald.com/article_d2d9a218-c244-59ed-891c-852d9cdc10d7.html); *Alton man gets life in prison for family's murder*, Valley Central 4, Aug. 26, 2011 (available at http://valleycentral.com/news/local/alton-man-gets-life-in-prison-for-familys-murder).

- **Levi King (Lubbock County, Texas, 2011)** – King was convicted of killing a man, his pregnant wife, and their fourteen-year-old son. King also shot the family's ten-year-old daughter, who lived to testify against King at trial. The jury also heard testimony that King had killed two other people in Missouri before driving to Texas to commit this crime. Skip Hollandsworth, *The Girl Who Saw Too Much*, Texas Monthly, Mar. 12, 2014 (available at http://www.texasmonthly.com/articles/the-girl-who-saw-too-much/).
- **Andrea Yates (Harris County, Texas, 2007)** – Yates was convicted of drowning her five children in a bath tub. At her first trial, the jury returned a life verdict. At her second trial, Yates was found not guilty by reason of insanity. *Andrea Yates case: Texas mother gets life in prison*, CNN, Dec. 31, 2007 (available at http://www.cnn.com/2007/US/law/12/11/court.archive.yates1/).
- **Steve Charles McKinney** (Fort Bend County, Texas, 2003) – McKinney was convicted of killing a five-year-old girl, her father, and her mother, who was eight-months pregnant at the time. *Townewest murder convict gets life sentence*, Your Houston News, May 5, 2003 (available at http://www.yourhoustonnews.com/archives/townewest-murder-convict-gets-life-sentence/article_230538aa-e33e-5e78-94df-a2a75d200611.html).

Over the past several years, juries across the country have returned life sentences under similar or worse facts:

- **Lester Ross (Florida, 2016)** – Ross was convicted of killing his three-year-old daughter and her mother. *Winter Haven man sentenced to life in prison for killing 3-year-old daughter and her mother*, The Ledger, Feb. 18, 2016 (available at http://www.theledger.com/article/20160218/NEWSCHIEF/160219386).
- **Joyce Hardin Garrard (Alabama, 2015)** – Garrard was convicted of killing her granddaughter by forcing her run for hours because the granddaughter had lied about eating candy. *Alabama woman gets life sentence for running granddaughter to death*, Fox News, May 12, 2015 (available at http://www.foxnews.com/us/2015/05/12/alabama-woman-gets-life-sentence-for-running-granddaughter-to-death.html).
- **James Holmes (Colorado, 2015)** – Holmes was convicted of killing twelve people, including children, in the infamous shooting at an Aurora movie theater. Holmes also injured 70 people in the attack. Ann O'Neill, *Theater shooter Holmes gets 12 life sentences, plus 3,318 years*, CNN, Aug. 27, 2015 (available at http://www.cnn.com/2015/08/26/us/james-holmes-aurora-massacre-sentencing/).

- **Billy Frank Davis Jr. (Kansas, 2015)** – Davis was convicted of kidnapping, raping, and killing an eight-year-old girl before stuffing her body into a clothes dryer. *Billy Frank Davis Jr. sentenced to life in prison*, KSNT, Feb. 13, 2015 (available at http://ksnt.com/2015/02/13/billy-frank-davis-jr-sentenced-to-life-in-prison/).
- **Joseph McEnroe (Washington, 2015)** – McEnroe was convicted of killing three generations of his ex-girlfriend's family, including a three-year-old boy and five-year-old girl, as they gathered for a Christmas celebration. *With death on table, McEnroe jury's friendships crumble*, Seattle Times, May 27, 2015 (available at http://www.seattletimes.com/seattle-news/with-death-on-table-mcenroe-jurys-friendships-crumble/).
- **Richard Anthony McTear, Jr. (Florida, 2014)** – McTear was convicted of killing a three-month-old boy by throwing him out of a moving vehicle along an interstate highway. *Richard McTear Jr. sentenced to life in prison for killing Hillsborough baby*, Tampa Bay Times, Aug. 5, 2014 (available at http://www.tampabay.com/news/courts/criminal/testimony-continues-in-hillsborough-baby-killing-case-after-request-for/2191570).
- **Andre Hampton (North Carolina, 2013)** – Hampton was convicted of beating his two-year-old son to death. *Dad gets life in prison for fatally beating toddler son*, WBTV 5, 2013 (available at http://www.wbtv.com/story/21388249/man-sentenced-to-life-in-prison-no-parole-for-beating-death-of-toddler-son).
- **Samuel Jordan (Louisiana, 2012)** – Jordan was convicted of killing his nine-week-old daughter. Carolyn Roy, *Jury deadlocked, Jordan gets life in prison for baby murder*, WAFB 9, Aug. 2, 2012 (available at http://www.wafb.com/story/19180042/jury-deadlocked-jordan-gets-life-in-prison-for-baby-murder).
- **Amy Hebert (Louisiana, 2009)** – Hebert was convicted of stabbing her seven-year-old and nine-year-old sons. *Killer mom sentenced to two life terms*, Houma Today, June 19, 2009 (available at http://www.houmatoday.com/article/20090619/ARTICLES/906191000?p=1&tc=pg).
- **Kenneth Mark Hartley (North Carolina, 2009)** – Hartley was convicted of killing his mother, fourteen-year-old half-brother, and nine-year-old half-sister, who he also confessed to raping. *State v. Hartley*, 212 N.C. App. 1 (2011) (available at http://caselaw.findlaw.com/nc-court-of-appeals/1567801.html).
- **Marc Anthony Colon (Nevada, 2008)** – Colon was convicted of beating his girlfriend's three-year-old daughter to death. *Colon, Perez get life sentences in slaying of 3-year-old Crystal Figueroa*, Las Vegas Review-Journal, Oct. 10, 2008 (available at http://www.reviewjournal.com/news/colon-perez-get-life-sentences-slaying-3-year-old-crystal-figueroa).
- **Pascual Lozano (Nevada, 2006)** – Lozano was convicted of killing a

nine-year-old girl during a drive-by shooting. *Las Vegas Jury Spares Pascual Lozano's Life*, Las Vegas Now 8, Sept. 15, 2006 (available at http://www.lasvegasnow.com/news/las-vegas-jury-spares-pascual-lozanos-life).

- **Adair Garcia (California, 2005)** – Garcia was convicted of smothering his five children with fumes from a burning charcoal grill. *Life term for Adair Garcia*, Press-Telegram, Apr. 19, 2005 (available at https://www.highbeam.com/doc/1P2-10985104.html).
- **Janet Bell Hall (North Carolina, 2005)** – Hall was convicted of killing her eleven-year-old son and attempted murder on her sixteen-year-old daughter. *State v. Hall*, No. COA07-9 (NC Ct. App. 2007).
- **Quang Bui (Alabama, 2004)** – Bui was convicted of killing his three children and attempting to kill himself. He was sentenced to death, but won a retrial due to a *Batson* violation. At retrial, the jury returned a life verdict after hearing evidence that Bui had fled his native Vietnam during the war after communist insurgents took over his home town. *Man convicted of slaying children taken off death row*, Tuscaloosa News, Dec. 18, 2004 (available at http://www.tuscaloosanews.com/article/20041218/news/412180326); *Bui v. State*, CR-95-0855 (Al. Ct. Crim. App. 1997).
- **Michael Landrum (Alabama, 2003)** – Landrum was convicted of hiring a man to kill his three-year-old daughter and her grandmother. *Landrum Gets Life Without Parole*, WTOK, Mar. 23, 2005 (available at http://www.wtok.com/news/headlines/1396412.html).
- **Chevie O'Brien Kehoe (Arkansas, 1999)** – Kehoe was convicted of killing two adults and an eight-year-old girl by suffocating them with plastic bags, then dumping their bodies into a bayou. *White supremecist's 1999 murder convictions upheld*, Arkansas News, Apr. 22, 2013 (available at http://www.arkansasnews.com/article/20130422/NEWS/304229840).
- **Susan Smith (South Carolina, 1995)** – Smith was convicted of drowning her fourteen-month-old and three-year-old sons. *Susan Smith: 20 years later, case still a shocker*, The State, Oct. 18, 2014 (available at http://www.thestate.com/news/local/crime/article13900058.html).
- **Irvin Rogers (Florida, 1992)** – Rogers was sentenced to seven years in prison in 1987 for killing his seventeen-month-old stepdaughter. While on probation for that crime, Rogers was arrested for killing his eight-month-old stepson. He was sentenced to life in prison without the possibility of parole on the second charge. *Orlando Man Gets Life in Killing of Stepson*, Orlando Sentinel, Sept. 15, 1992 (available at http://articles.orlandosentinel.com/1992-09-15/news/9209150319_1_marquise-sentence-stepson).
- **Thomas Coe (Florida, 1990)** – Coe was convicted of killing his two-year-old stepson by plunging him headfirst into a toilet. *Man Gets Life Term in Killing of Stepson, 2*, L.A. Times, Aug. 18, 1990 (available at http://articles.latimes.com/1990-08-18/news/mn-587_1_child-abuse).

Thus, juries have made clear that punishment phase evidence can make a difference regardless of the facts of the underlying offense. With the understanding that prejudice must be assessed from the perspective of a hypothetically reasonable juror who follows the law, Mr. Moreno Ramos has clearly met his burden. Had counsel presented the readily available mitigation and future dangerousness evidence, there is a reasonable probability that at least one juror would have voted differently.

V. THIS COURT SHOULD REMAND MR. MORENO RAMOS' APPLICATION TO THE TRIAL COURT FOR MERITS REVIEW OF THE TRIAL COUNSEL INEFFECTIVENESS CLAIM.

State post-conviction counsel's failure to investigate, develop and present evidence of trial counsel's ineffectiveness should not prevent this Court from reaching the merits of his IAC claim. When Mr. Moreno Ramos was previously before this Court there was no readily available means for the Court to acknowledge and remedy the deficient performance of appointed state habeas counsel. Since the time, however, this Court's jurisprudence has slowly and continually developed and now there are several avenues for finally remedying the obvious deficiencies of Mr. Moreno Ramos' appointed habeas counsel. Indeed, this Court has recognized in numerous cases that non-statutory exceptions to the Section 5 procedural bar do exist, and that this Court has the authority to apply judicially created doctrines when interpreting the plain language of Article 11.071, Section 5 of the Texas Code of Criminal Procedure.[15]

A. The Filing of Mr. Moreno Ramos' Initial 11.071 Counsel Cannot be Fairly Characterized as an "Application"

This Court's decision in *Ex parte Kerr*, 64 S.W. 3d 414 (Tex. Crim. App 2002) marked

[15] *See Ex parte Granados,* No. WR-51, 135-01 (Tex. Crim. App. Jan. 10, 2007); *Ex parte Hood*, 211 S.W.3d 767 (Tex. Crim. App. 2007); *Ex parte Moreno*, No. WR-25, 897-01, 2007 WL 2019745 (Tex. Crim. App. 2007); *Ex parte Ruiz*, No. WR-27-328-03 (Tex. Crim. App. July 6, 2007).

the beginning of a change in this Court's jurisprudence on successive applications. In that case, the Court held:

> To constitute a document worthy of the title "writ application" filed pursuant to article 11.071, the writ must seek "relief from a judgment imposing a penalty of death."14 A death penalty "writ" that does not challenge the validity of the underlying judgment and which, even if meritorious, would not result in immediate relief from his capital murder conviction or death sentence, is not an "initial application" for purposes of art. 11.071, § 5 which generally bars consideration of a subsequent writ after filing the "initial application." This same rule applies to non-capital writs filed under Article 11.07. See Ex parte Evans, 964 S.W.2d 643, 646–47 (Tex.Crim.App.1998) (an "initial application" for a writ under art. 11.07 pertaining to a parole revocation hearing does not challenge the underlying conviction and thus does not bar a subsequent writ which does challenge the conviction).

Ex Parte Kerr at 419 (footnote omitted).

In the years immediately following *Kerr,* this Court narrowly interpreted the decision believing that *Kerr*'s holding only applied to cases where the post-conviction writ failed to challenge the validity of the conviction or sentence at all. In *Rojas*, several judges in dissent, reiterated that holding but argued that *Kerr* must be more expansive if it was meant to protect habeas review: *Ex parte Rojas*, 2003 WL 1825617 at *3 (Tex. Crim. App. 2003) (Price dissenting, joined by Johnson and Holcomb, JJ) ("A habeas application must do no more than seek relief from the underlying judgment. *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002). But the issues ought to be, at a minimum cognizable. And competent counsel out to understand the difference between claims that must be raised on direct appeal or are waived and claims that are cognizable in habeas proceedings.")

In 2006 the Court for the first time suggested that some remedy might exist even where a writ, on its face, contained an actual challenge to the conviction or sentence. *Ex parte Reynoso*, 2006 WL 3735397 (Tex. Crim. App. 2006): although application raised one claim challenging the conviction and sentence, court remands to investigate counsel's actions in post-conviction.

A month later, several CCA judges acknowledged the Court's actions in *Reynoso* and, concurring in the judgment, explained how the Court's jurisprudence now allowed for scrutiny of a wider array of cases than it had previously. *Ex parte Granados,* 2007 WL 9683726 (Tex. Crim. App. 2007) (Johnson, J, concurring joined by Meyers and Price):

> The circumstances of this case echo the circumstances-ineffective assistance of appellate counsel-in *Ex parte Kerr*, 64 S.W.3d 414 (Tex.Crim.App. 2002). Appellate counsel in this case filed a two-page habeas corpus application that raised a single record-based claim, a claim that should have been raised on direct appeal and is therefore not cognizable in habeas corpus. If a claim is not cognizable, this Court may not, and will not, consider the merits of the claim. The claim should not, therefore, be said to "challenge the conviction." To constitute a document worthy of the title "writ application" filed pursuant to article 11.071, the writ must seek "relief from a judgment imposing a sentence of death." (Footnote omitted.) A death penalty "writ" that does *not* challenge the validity of the underlying judgment and which, even if meritorious, would not result in immediate relief from his capital murder conviction or death sentence, is not an "initial application" for purposes of art. 11.071, § 5 .... ***4** *Id.* at 419 (emphasis in original).
>
> If the document does not challenge the conviction, it is not a writ. The pleading at issue here, styled an application for writ of habeas corpus and filed by previous habeas counsel, stated only one claim, a claim that is not cognizable on habeas. Arguably then, the prior pleading was not a writ application.

Id.

In at least two cases, the CCA has considered *Kerr* claims, raised in cases where the initial habeas filing neglected to include a single claim cognizable on habeas. In *Ex parte Christopher Wilkins,* 2017 Tex. Crim. App. Unpub. LEXIS 193, No. WR-75,229-02, the document filed contained 18 purported claims; four challenged lethal injection, and the rest either could have been or actually were raised on direct appeal. Judge Alcala authored a long dissent, explaining that "the underlying reasoning of *Medina* and *Kerr* appears to apply to initial habeas counsel's failure to raise even one cognizable claim, thus rendering the initial application a nullity so as to further habeas proceedings in this case." *Id.* at 4-5. She noted, however, that the

Medina and *Kerr* applications were "more skeletal" than what Mr. Wilkins' initial habeas counsel filed.

In *Ex parte Juan Alvarez*, No. WR-62,426-04, 2015 Tex. Crim. App. Unpub. LEXIS 324, counsel presented only three claims, all of which could have been raised on direct appeal; Mr. Alvarez, however, had a problem not present here. Judge Yeary, in concurrence, noted that there was no reason the *Wiggins* claim could not have been included in a prior petition filed *by the same counsel* who was then seeking to circumvent section 5. Moreover, *Alvarez* was riddled with procedural complications, including a supplemented state habeas petition due to a mid-proceeding change of counsel, and a complicated remand from federal court seeking state court resolution of the role of ineffective habeas counsel. Finally, *Alvarez* predated *Ex parte Ruiz*, discussed below, in which the CCA articulated the need to hear this type of claim.

In Mr. Moreno Ramos' case, the first successor—raising the ICJ's *Avena* decision—was filed by attorneys different from those who filed either the initial or the present application; the federal court's action was straightforward and unequivocal, refusing even accept the proposed filing including the IATC claim; and the court now has the benefit of the *Ruiz* analysis.

In other cases where the Court has declined an applicant's suggestion to apply *Kerr*, the applications included at least one claim cognizable in post-conviction. *See Ex parte Duane Buck*, 418 S.W.3d 98, No. WR-57,004-03; *Ex parte Kimberly McCarthy*, 2013 Tex. Crim. App. Unpub. LEXIS 731. No. WR-50,360-04; *Ex parte Clinton Young*, 2009 Tex. Crim. App. Unpub. LEXIS 368, No. WR-65,137-03; *Ex parte Robert Pruett*, 2014 Tex. Crim. App. Unpub. LEXIS 1137; 2017 Tex. Crim. App. Unpub. LEXIS 708, WR-62,099-01, -02, -08; *Ex parte Bernardo Tercero*, 2017 Tex. Crim. App. Unpub. LEXIS 480, No. WR-62,593-02, -04; *Ex parte Frank Garcia*, 2011 Tex. Crim. App. Unpub. LEXIS 801, No. WR-66,977-02.

B. Even if Technically an "Application", The Filing of Mr. Moreno Ramos' Initial 11.071 Counsel Was So Insufficiently Plead that It Must be Redone

In 2011, the CCA found an initial application for writ of habeas corpus filed on behalf of a capital prisoner to be so deficient that it was not, "in fact, 'an application for writ of habeas corpus' under Article 11.071 of the Texas Code of Criminal Procedure," though it did state claims that, if true, would have resulted in relief, including claims cognizable on habeas. *Ex parte Medina*, 361 S.W.3d 633, 634 (Tex. Crim. App. 2011). The CCA remedied that constructive denial of counsel by exercising its discretion under Article 11.071 § 4A(b)(3) to appoint new counsel and granted the applicant 180 days to prepare and file a new state habeas application. *Id*. at 643.

In *Medina*, appointed counsel conducted investigations and raised ten claims related to the ineffectiveness of trial and direct appeal counsel, but refused to plead the facts he had uncovered "because he did not want the State to know what his evidence was." *Id*. at 635-36.

The district court dismissed the application, and after briefing and oral arguments were completed in the CCA, including briefing on the potential impact that the CCA's decision would have on "past, present and future 11.071 writ applications," *id*. at 637 n.8, the court issued a decision holding that counsel's deficient performance had deprived the applicant of his "one full and fair opportunity to present his constitutional or jurisdictional claims . . . . Not full because he is entitled to one bite at the apple, i.e., one application, and the document filed was not a proper writ application. Not fair because applicant's opportunity, through no fault of his own, was intentionally subverted by his habeas counsel." *Id*. at 642. Accordingly, the applicant was entitled to an entirely new "bite at the apple."

As the Fifth Circuit has since noted, *Ex parte Medina*, "allowed a mulligan after finding

it was not the client's fault that [state habeas counsel] had filed an incomplete application." *Hall v. Thaler*, 504 Fed.Appx. 269, 284 (5th Cir. Dec. 21, 2012).

Similarly, in *Ex parte McPherson*, 32 S.W.4d 860 (Tex. Crim. App. 2000), the Court elected not to treat the first filing, which complained of appellate counsel's failure to timely file an appeal, as a habeas corpus application, thus opening the door for the second application to be considered on the merits as though it were an initial application. And in *Ex parte Evans*, 964 S.W.2d 643 (Tex. Crim. App. 1998), the Court heard a subsequent application because the initial application, concerning parole hearings, was not a "challenge to the conviction;" the second application, then was not a subsequent application subject to the procedural bar.

Indeed, in arguing to the United State Supreme Court that the holding of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective"[16] should not apply to Texas prisoners, Respondent specifically invoked the CCA's decision in *Ex parte Medina*, 361 S.W.3d 633 (Tex. Crim. App. 2011), as proof that such oversight was unnecessary because Texas already had safeguards in place. Respondent informed the Supreme Court that:

> Texas courts likewise have a proven track record of hearing once-defaulted claims on the merits under appropriate circumstances. For example, the CCA has created equitable exceptions to the state-law bar on successive petitions—*including an exception for ineffective assistance of state-habeas counsel. See, e.g.*, *Ex parte Medina*, 361 S.W.3d 633, 642-643 (Tex. Crim. App. 2011) (per curiam); *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000); *Ex parte Evans*, 964 S.W.2d 643, 647 (Tex. Crim. App. 1998). And the CCA has allowed prisoners to reopen their habeas applications and raise defaulted claims. *See, e.g.*, *Ex parte Matamoros*, 2011 WL 6241295 (Tex. Crim. App. Dec. 14, 2011) (per curiam); *Ex*

[16] *Id.* at 1320.

parte Moreno, 245 S.W.3d 419, 420 (Tex. Crim. App. 2008).

Brief for Respondent at 59, *Trevino v. Thaler*, No. 11-10189 (Jan. 14, 2013) (emphasis added).

If that is true, then Mr. Moreno Ramos' case clearly presents the "appropriate circumstances" for an equitable exception" to section 5 and this Court should maintain its "proven track record" by hearing this "once-defaulted claim on the merits". Mr. Moreno Ramos's state habeas counsel, appointed over his strenuous and repeated objections, failed to provide him with effective assistance during state habeas proceedings, doing no investigation and raising no cognizable issues. As a result the state has argued that Mr. Moreno Ramos's ineffectiveness of trial counsel and *Avena* claims are procedurally defaulted because they were not first raised in state habeas. *See* Respondent's *Answer With Brief in Support* (Doc. 29) at 12.

The document that state habeas counsel filed on Mr. Moreno Ramos's behalf was even more deficient than the one filed by counsel for Mr. Medina. In *Medina*, the court found that some claims were sufficiently pled such that relief could be granted if the factual allegations were proven. *Id*. at 646 (Keller, P.J., joined by Hervey, J., dissenting). In stark contrast, not one of the allegations raised by appointed counsel in Mr. Moreno Ramos' state habeas application was justiciable and the Court refused to even address them. *Ex parte Moreno Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998).

Mr. Medina's counsel at least conducted extra-record investigations and pled allegations of ineffective assistance of trial counsel, but omitted the fruits of his investigations from the petition for misguided strategic reasons. Mr. Moreno Ramos' counsel, on the other hand, never conducted any investigation, consulted any experts or even sought funding for investigative and expert assistance, and failed to raise a readily apparent trial counsel ineffectiveness claim for no strategic, factual or legal reason whatsoever.

These proceedings simply "cannot be what the Legislature intended when it enacted Article 11.071 to provide capital habeas litigants "one full and fair opportunity to present all [ ] claims in a single, comprehensive post-conviction writ of habeas corpus[.]" *Ex parte Buck*, 418 S.W.3d at 98 (Alcala, J., dissenting).

This Court must give Mr. Moreno Ramos the "one very well represented run at a habeas corpus proceeding" the law purports to promise. *See Ex parte Kerr*, 64 S.W.3d 414, 418-19 (Tex. Crim. App. 2002) (quoting Representative Pete Gallego).

If this Court appointed new counsel and permitted a newly-filed application, new counsel can properly plead Mr. Moreno Ramos' ineffective assistance of counsel claims by not only providing the facts and evidence required to establish deficient performance, but also by alleging prejudice, an essential element of an ineffective assistance of counsel claim that is completely absent from the ten enumerated claims in the instant Application. *See Strickland*, 466 U.S. at 687.

Allowing him to re-file his application as the Court did with Mr. Medina, will ensure the availability of relief under Article 11.071, section 4A. Prior to the enactment of Article 11.071, this Court permitted applicants to replead their claims when the original application was deficient. *See e.g. Ex Parte Maldonado*, 688 S.W.2d at 116 and *Ex Parte Dutchover*, 779 S.W.2d at 78. In the wake of the enactment of Article 11.071, section 5, this Court can no longer permit such liberal repleading. Article 11.071 sets a very high bar and makes it extremely difficult for applicants to file a subsequent application. This was part of the Legislature's stated intent to "streamline the review of capital convictions." *See* House Committee, Bill Analysis, Tex. S.B. 440 74th Leg., R.S. (1995).

However, the Legislature also explicitly stated that it wanted to assure "that capital

convictions and death sentences are fully and fairly reviewed," and section 4A exists as a critical safety net that should be used in just such instances as Mr. Moreno Ramos'. *Id.* To recognize that situations like this one must be corrected, this Court would be furthering the stated aims of the Legislature by ensuring that present and future death-sentenced individuals are allowed to access the section 4A protections in the rare instance where their rights to a full and fair review of their claims would otherwise be curtailed.

C. If Treated As A Subsequent Application, Mr. Moreno Ramos' Trial Ineffectiveness Claim Satisfies Article 11.071 Sec. 5 as it Was Previously Unavailable to Him.

Tex. Code Crim. Proc. art 11.071§5(a) prohibits the consideration of a successive application unless the applicant can establish one of the following showings:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror would have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury [at punishment] . . .

Id.

Mr. Moreno Ramos' claim could not have been presented in his most recent application and meet the standards set forth in art. 11.071 §5(a) because both the legal and factual bases were unavailable to him.

A claim is "unavailable" for the purposes of Sec. 5(a)(1), "if it was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court." *Id*. at Sec. 5(d).

The factual basis for Mr. Moreno Ramos' *Wiggins* claim was unavailable within the meaning of Sec. 5(a)(1) at the time Mr. Moreno Ramos filed his last petition because the state of Texas prevented him from developing it by choosing and installing an unqualified attorney and twice denying his request to provide adequate counsel. Mr. Moreno Ramos was utterly dependent upon that inexperienced lawyer of the Court's choosing who took over responsibility for asserting and protecting Mr. Moreno Ramos' rights but never even met him until after he had defaulted those rights. Mr. Moreno Ramos had no ability to develop or present this claim or any other.

The legal basis for Mr. Moreno Ramos' *Wiggins* claim was unavailable within the meaning of Sec. 5(a)(1) at the time Mr. Moreno Ramos filed his previous Application.

Mr. Moreno Ramos alerted the Court to the ineffectiveness of trial counsel in the *Avena* successor but the expansion of *Kerr* to include cases without cognizable claims hadn't occurred yet. As described above, until *Ex parte Reynoso* in 2006, there was no suggestion that *Kerr* could apply to Applicants whose initial 11.071 stated any claim for relief, whether or not cognizable or insufficiently plead. *Medina* was much later, in 2011.

Because Mr. Moreno Ramos' claim of ineffective assistance of counsel, when viewed together with the available mitigating evidence, establishes that no rational juror would have would have answered in the state's favor one or more of the special issues that were submitted to the jury at punishment, Mr. Moreno Ramos should be allowed to present his new claims to the state district court pursuant to Section 5(a)(3).

D. If Treated As A Subsequent Application, the Ineffectiveness of Mr. Moreno Ramos' Initial State Post-Conviction Counsel Excuses the Art. 11.071 § 5 as it Was Previously Unavailable to Him

Though the ineffectiveness of state post-conviction counsel does not constitute a claim

for relief from the conviction or sentence that attorney was hired to challenge,[17] that ineffectiveness remains a factual circumstance that rebuts the presumptive Section 5 bar of Article 11.071 in a manner similar to the federal exception announced in *Trevino*.[18] That a prisoner was provided with ineffective counsel to review the constitutionality of his confinement does not necessarily mean that his conviction or sentence were infirm. But it does surely mean that the reliability of those judgments remains an unresolved question that in all fairness must be revisited.

Even though there is no such thing as ineffective assistance of state post-conviction counsel, the facts of a post-conviction lawyer's failure to meet the prevailing standard of care can refute the conclusion that he has already had his first bite of the apple; rebut the assumption that piecemeal litigation is an abuse of the process and is relevant to the equitable question of whether a procedural bar should apply.

As the Supreme Court has done in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), this Court may rely upon the deficient performance of state habeas counsel as grounds to overcome the otherwise applicable procedural default of

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[17] *Graves* holds that "the absence of a constitutional right to counsel [in state habeas proceedings] necessarily means that an applicant may not challenge the effectiveness of habeas counsel's representation." *Ex parte McCarthy*, 2013 WL 3283148, at *6 (Alcala & Johnson, JJ., dissenting). *Graves*, 70 S.W.3d at 109 ("It is a well established principle of federal and state law that no constitutional right to effective assistance of counsel exists on a writ of habeas corpus.") (emphasis added). See also, id. at 109 n.25 (citing Coleman, 501 U.S. at 752 ("there is no constitutional right to an attorney in state post-conviction proceedings . . . consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings").

[18] *See Ex parte Diaz*, 2013 Tex. Crim. App. Unpub. LEXIS 1011at *12-24 (Price, J., dissenting); *Ex parte McCarthy*, 2013 Tex. Crim. App. Unpub. LEXIS 731 at *2-20 (2013) (Price, J., joined by Meyers, J., concurring); *Id*. at *20-40 (Alcala, J., joined by Johnson, J., dissenting); *Ex parte Buck*, 418 S.W.3d 98, 106-07 (Tex. Crim. App. 2013) (Alcala, J., joined by Price and Johnson, JJ., dissenting); *Ex parte Diaz*, 2013 Tex. Crim. App. Unpub. LEXIS 1011 at *2-12 (Alcala, J., joined by Cochran, J., concurring). *See also Ex parte Graves*, 70 S.W.3d 103, 121 (Tex. Crim. App. 2002 (Price, J., dissenting).

unexhausted trial counsel ineffectiveness claims even in the absence of a constitutional right to counsel in state post-conviction proceedings. *See Martinez*, 132 S. Ct. at 1315.

That the legal landscape has changed is evidence in federal district court judge's analysis of motions to stay and abbey, which require consideration of whether the application to state court would be "futile." Since *Trevino*, several Federal district courts have relied upon evolving Texas authority to issue stay and abey orders sending cases back for exhaustion of trial counsel ineffectiveness claims in state court. These district courts prudently chose to abstain from deciding a question of state law that the CCA itself has made clear is unsettled, and opted instead to allow the state courts the first opportunity to pass upon the constitutionality of the petitioners' state-appointed and state-funded trial representation. *See Carpenter v. Stephens, supra*, 2014 U.S. Dist. LEXIS 71479 at *7-8 ("Because the CCA has not resolved the questions raised in the multiple opinions issued in *Ex parte McCarthy*, and those questions may control this Court's application of *Martinez*, the recommendation to allow the state court to address them in the first instance is sound."); *Sparks v. Stephens*, 2014 U.S. Dist. LEXIS 3835 (N.D. Tex. Jan. 13, 2014); *Alvarez v. Thaler*, 2013 U.S. Dist. LEXIS 187533 at *4 (S.D. Tex. 2013) ("It is not entirely clear whether the Texas courts will authorize renewed habeas proceedings . . . . Texas should have the first opportunity to interpret its law, especially considering recent Supreme Court developments."); *id*. at *7 ("The circumstances of state habeas counsel's performance is also an issue best addressed in the first instance by the Texas courts in light of *Trevino*.").

In *Wardrip v. Stephens*, 2014 U.S. Dist. LEXIS 55471 (N.D. Tex. Apr. 22, 2014), the court held,

> it is not entirely clear that the [CCA] would apply an independent and adequate procedural bar to this [ineffective assistance of trial counsel] claim in a subsequent state habeas proceeding, especially in light of concurring and dissenting opinions in *Ex parte McCarthy* indicating a willingness to reconsider

> its interpretation of state law in light of *Martinez* and *Trevino* in an "appropriate" case.

Id. at *5 (*citing Wilder v. Cockrell*, 274 F.3d 255, 262-63 (5th Cir. 2001); *Ex parte McCarthy*, *supra*, 2013 Tex. Crim. App. Unpub. LEXIS 731 at *5)) (internal quotations omitted).

The court went on to hold that because Texas law is currently unsettled regarding the availability of a *Trevino*-like exception to the Section 5 bar, a stay and abeyance is appropriate:

> Whether this would be an appropriate case [for state court consideration] is not yet clear, but the magistrate judge correctly observed that this matter of state law should be determined, in the first instance, by the state court. It is not the task of this court to resolve questions of state law, such as the state court's judicial interpretation of the meaning and import of state statutory terms, particularly when state court opinions signal unresolved questions. *See Engle v. Isaac*, 456 U.S. 107, 110, 119, [] (1982) (federal courts in post-conviction habeas corpus proceedings do not sit to review questions of state law); *Johnson v. Cain*, 215 F.3d 489, 494 (5th Cir. 2000) (same); *Dickerson v. Guste*, 932 F.2d 1142, 1145 (5th Cir. 1991) ("We will not review a state court's interpretation of its own law in a federal habeas corpus proceeding."). Instead, "comity and judicial economy make it appropriate to insist on complete exhaustion where 'unresolved questions of fact or of state law might have an important bearing.'" *Horsley v. Johnson*, 197 F.3d 134, 137 (5th Cir. 1999) (*quoting Granberry v. Greer*, 481 U.S. 129, 134-35, [] (1987)).

Id. at *5-6; *see also Wardrip v. Stephens*, 2014 U.S. Dist. LEXIS 56847 at *16 (N.D. Tex. Mar. 7, 2014), *adopted by, objection overruled by, stay granted by Wardrip v. Stephens*, *supra*, 2014 U.S. Dist. LEXIS 55471 ("Because it is not entirely clear how the CCA would rule in a case that the above-listed judges would find 'appropriate' to recognize a change in state law, or whether they would find that the circumstances of the instant case are appropriate for such purpose, the state court should be allowed to make that determination in the first instance. This would be served by staying these proceedings to allow Wardrip to present his claim and evidence to the state court.").

When urging the United States Supreme Court not to permit federal court review of claims defaulted by ineffective state post-conviction lawyers, the State of Texas represented that

such oversight was unnecessary because Texas courts "have proven willing to forgive or ignore procedural defaults in response to developments in federal-habeas doctrine." Brief for the Respondent, *Trevino v. Thaler*, No. 11-10189, 2013 WL 179940 at *59 (Jan. 14, 2013).

The State of Texas "submit[ted] that its courts should be permitted, in the first instance, to decide the merits of Trevino's ineffective-assistance-of-trial-counsel claim." 133 S. Ct. at 1921 (citing Brief for Respondent 58-60), and assured the Supreme Court that "[i]f this Court changes the rules now, equity demands at a minimum that the [Court of Criminal Appeals] have an opportunity to reevaluate its procedural ruling and adjudicate Trevino's *Wiggins* claim on the merits." Brief for the Respondent, *Trevino v. Thaler*, No. 11-10189, 2013 WL 179940 at *59.

The Supreme Court did rule in favor of Mr. Trevino. And, Respondent is quite right that equity does demand that the CCA "adjudicate [Mr. Moreno Ramos'] *Wiggins* claim on the merits."

In other post-*Trevino* cases, Respondent has asked that the federal courts "force" a petitioner "to give the state courts what AEDPA demands—namely, *a fair opportunity to adjudicate his IATC claim on the merits*," by sending his claim back to state court for exhaustion. The Director's Supplemental Briefing Respecting the Petition for Rehearing En Banc at 4 (emphasis added), *Ibarra v. Thaler*, No. 11-70031 (5th Cir. June 4, 2013).

This Court can hear claims that might otherwise be barred by § 5 when doing so is necessary to preserve an applicant's opportunity to have one full and fair chance to litigate his claims.

E. *Ex part Graves* Does Not Prohibit This Court's Merits Review Of Mr. Moreno Ramos' Trial Ineffectiveness Claim

This Court agreed with Mr. Graves that it "would seem an empty gesture to appoint incompetent counsel" and that "a 'potted plant' appointed as counsel is no better than no counsel

at all." *Id.* The Court disagreed, however, as to the point at which counsel should be "competent" and decided that the "plain language" of the statute meant that counsel must be "competent" at the time of appointment, not during the actual representation and refused to permit a subsequent habeas petition where the first petition was undermined by "egregiously inept" counsel. *Id.*

The Graves Court found that the legislature had created a right to representation by a lawyer who was qualified at the time of appointment based on experience and training to handle a capital case. Mr. Welch clearly was not.

Here, Mr. Moreno Ramos' state post-conviction counsel was not competent at the time of appointment, and the CCA had been put on notice that Mr. Connors was better prepared and knowledgeable about the case that the lawyer they appointed.

Although the CCA had not yet established a process for capital certification of counsel, Hidalgo county apparently had a capital appointment list and Mr. Connors was on it. Tr. Hrg. 10/18/1996 at 5. Welch on the other hand was inexperienced and unqualified for the appointment. Exhibits 14 and 15, Affidavits of David Schulman and Kyle Welch.

F. If *Graves* Operates To Bar Consideration Of A Trial IAC Claim Even In The Face Of The Catastrophic Failures And Freakish Events Catalogued Here, Then The Court Should Overturn *Graves* And This Is The Case Where That Must Happen.

If *Graves* operates to bar consideration of a trial IAC claim never before heard by any court where the prisoner had vigorously opposed appointment of inexperienced attorney as initial state post-conviction counsel and that counsel missed two deadlines before untimely filing eight direct appeal claims in lieu of a writ application such that this court did not reach any claim for relief, and that same lawyer was the appointed as federal habeas counsel, filing the same direct appeal claims again, but new post-conviction counsel later discovered significant and compelling

mitigating evidence that at least two jurors attest would have changed the outcome of the penalty phase where trial counsel had put on no evidence and cross-examined only one state's witness, making no opening statement and only a brief closing in which he never asked the jury to spare his client's life, then the court should overturn graves and this is the case where that must happen.

The facts in this case illustrate why a doctrine like that announced in *Graves*, if applied uniformly, will too severely restrict the range of tools available to this Court to respond to failures in the court's below and will ultimately cripple this Court's ability to perform its fundamental role of insuring due process and fair administration of justice. When used as a barrier which must be surmounted by all applicants rather than a tool utilized as necessary to discourage abusive practices, the *Graves* rule creates far too great a risk of catastrophic failure.

In *Ex Parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002), the CCA ruled that there is no constitutional or statutory right to competent performance from initial post-conviction counsel. The Court relied on this ruling to foreclose review of a claim that had been forfeited by an ineffective initial state habeas lawyer.

The Court determined that incompetence of state habeas counsel was "not cognizable" and, thus, ineffective assistance of counsel claims brought for the first time in a successive 11.071 petition, were barred by Section 5. *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002).

Since *Graves*, the legal landscape has changed significantly, and the CCA has been awaiting an appropriate case in which to revisit it. This is exactly such a case.

This Case is *Ruiz* Prior to Federal Review. Two years ago, when faced with another case in which state post-conviction counsel had failed to raise a strong claim of penalty phase

ineffectiveness, this Court recognized that "the consequences resulting from the poor performance of Ruiz's habeas counsel. . . may highlight the need to revisit our holding in *Graves*." *Ex parte Ruiz*, No. WR-27,328-03 and -04 (Nov. 9, 2016), Slip Op. at 41. However, in 2016 *Ruiz* was no longer the right case in which revisit *Graves* because this Court had already dismissed his successive application as abuse of the writ despite the ineffectiveness of state post-conviction counsel, and the federal court had denied it on the merits after a thorough review that included an evidentiary hearing in which Mr. Ruiz failed to prove the facts he had alleged. Slip Op. at 38.

Mr. Moreno Ramos comes to this Court where Mr. Ruiz was in 2007, having been denied the opportunity to raise the claim in federal court for failure to exhaust below. No court has reviewed Mr. Moreno Ramos' case on the merits.

Judge Johnson was not alone in his wish to reconsider *Graves*; he is among five TCCA Judges who have indicated a desire to reconsider it in the last few years. See *Ex parte Alvarez*, 2015 WL 1956254, at *1 (Yeary, Johnson & Newell, JJ., concurring); *Ex parte Buck*, 418 S.W.3d at 109 (Alcala, J., dissenting); *Ex parte McCarthy*, 2013 WL 3283148 at *1 (Meyers, J., concurring); *id*. at *5 (Alcala & Johnson, JJ., dissenting). There are a number of compelling reasons to do so.

The three dissenters in *Graves* argued that "Article 11.071 of the Texas Code of Criminal Procedure should be interpreted to afford a death row inmate one full and fair opportunity to present whatever claims he may have with the effective assistance of counsel." *Graves*, 70 S.W.3d at 129 (Holcomb, Price and Johnson, JJ dissent). They disagreed with the Court's narrow reading of 11.071, which focused on "the time at which counsel is deemed 'competent' to represent the habeas applicant" under § 2(a); concluding that the statute entitled an applicant

to counsel whose qualifications meant that counsel was "competent" "*at the time of appointment.*" *Id.* at 114 (emphasis added). The dissent argued that the plain meaning of the statute as well as the legislative history ran contrary to the majority's rigid distinction. Id. at 121-22. Finally, they focused on the equities involved. Judge Price wrote that he had "grave concerns about dismissing claims like the applicant's." Id. at 120. Years later, Judge Price would revisit his dissent, noting that "Graves himself ultimately obtained post-conviction relief in federal court and was later exonerated of capital murder." *In Ex parte Kerr*, 358 S.W.3d 248, 250 (Tex. Crim. App. 2011).

1. Statutory Context, Legislative History, And Plain Meaning All Support An Interpretation Of "Competent" That Encompasses The Manner Of The Representation, Not Just Counsel's Status At Appointment

Under a plain reading, §2(a) does *not* merely require the *appointment* of competent counsel; it directly invokes the *representation*. *See Ex parte Alvarez*, 2015 WL 1956254, at *5 (Yeary, J. concurring joined by Johnson & Newell, JJ.) ("Significantly, Article 11.071, Section 2(a), does not provide merely for 'the appointment' of competent counsel. It mandates that death row applicants actually 'be represented by competent counsel,' which would seem to contemplate an on-going enterprise."); *Ex parte Buck*, 418 S.W.3d 98, 107 (Tex. Crim. App. 2013) (Alcala, J., dissenting, joined by Price & Johnson, JJ.) ("[*Graves*] does not account for the statute's requirement that an applicant be 'represented' by competent counsel. This phrasing suggests that an applicant's entitlement to competent counsel extends throughout the course of representation.").

A reading within the context of the statute supports this interpretation. Article 11.071 §3(a) provides that "counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an

application for a writ of habeas corpus." TEX. CODE CRIM. PROC. art. 11.071, §3(a). Read together, section 2(a) imposes a requirement of competent representation, and section 3(a) defines what competent representation is. *See Ex parte Buck*, 418 S.W.3d at 107 (Alcala, J. dissenting) ("Reading Section 2(a) and 3(a) in conjunction, I conclude that appointed counsel in an 11.071 proceeding must demonstrate a minimum level of competence in his representation of an applicant and in his investigation of any factual or legal bases for relief."). Such a reading of sections 2(a) and 3(a) gives effect to the statutory "premise that a death row inmate does have one full and fair opportunity to present his constitutional or jurisdictional claims in accordance with the procedures of the statute." *Ex parte Kerr*, 64 S.W.3d at 419.

This interpretation is also in keeping with the legislative history. The relevant sections of Article 11.071 were attempts to solve the problems associated with inadequate state post-conviction performance. *See Ex parte Graves*, 70 S.W.3d at 121 (Price., J., dissenting) ("'If enacted, C.S.S.B. [Committee Substitute Senate Bill] 440 would streamline the review of capital convictions and significantly reduce the time between conviction and the imposition of a death sentence, *while assuring that capital convictions are fully and fairly reviewed.*'") (quoting HOUSE COMM. ON JURISPRUDENCE, COMM. REP., Apr. 27, 1995, Tex.C.S.S.B. 440, 74th Leg., R.S. (1995)) (emphasis added); *Ex parte Buck*, 418 S.W.3d at 107 (Alcala, J., dissenting) (quoting DEBATE ON H.B. 440, TEXAS HOUSE, SECOND READING, 74TH LEG., R.S. (May 18, 1995), statement of Rep. Gallego (stating that habeas applicants will "get lawyers from day one. They get fully paid investigators. They get all of the investigation . . . everyone who is convicted will have a fully paid investigation into . . . any claim they can possibly raise.")). Reading § 2(a) as an attempt to solve a specific problem entails a forward-looking interpretation of 11.071 attorney competency. *See Ex parte Alvarez*, 2015 WL 1956254, at *5 (Yeary, J.,

concurring, joined by Johnson, & Newell, JJ.) ("It makes little sense for the Legislature to recognize the need for an attorney who is competent—that is to say, who has the 'qualifications, experience, and ability' to conduct the daunting factual investigation and to navigate the often-byzantine law involved in post-conviction habeas corpus representation— with no expectation that he would then actually *provide* his client with competent post-conviction habeas corpus representation."); *Ex parte Graves*, 70 S.W.3d at 121 (Price, J., dissenting) ("The appointment of counsel is meaningless without the requirement that counsel be competent."); *id.* at 130 (Holcomb, J., dissenting) ("The only sensible interpretation of 'competent counsel' is the traditional one: counsel reasonably likely to render, and rendering, effective assistance.").

Additionally, legislative developments following *Graves* confirm that the Court misinterpreted section 2(a). At the behest of the CCA, the 81st Texas Legislature formed the Office of Capital Writs (OCW) in order to provide counsel to capital defendants during their state habeas proceedings. The Legislature created the OCW to address the grave issue of incompetent attorneys engaged in state post-conviction representation. The Legislature expressly stated that the OCW "would help the state meet *its obligation* that death penalty cases be handled fairly and competently with consistent representation throughout the state." BILL ANALYSIS, SB1091, HOUSE RESEARCH ORGANIZATION, May 18, 2009, at 4 (emphasis added). The legislative history of the OCW statute makes multiple references to "incompetence" as an ongoing basis for the law. *See, e.g., id.* at 4-5 (stating that the OCW "would address the problem of *incompetent* attorneys wasting the resources of the criminal justice system by raising issues that were improper or by making other errors") (emphasis added).

2. Significant Changes in Federal Jurisprudence On Which the Graves Court Relied Also Warrant Modifying Or Reversing Graves.

Principals of federalism also militate in favor of overturning *Graves* and giving state

courts an opportunity to rule on IAC claims forfeited by inadequate state post-conviction counsel. *See Ex parte Alvarez,* 2015 WL 1956254, at *7 (Yeary, Johnson & Newell, JJ., concurring) ("Principles of federalism counsel in favor of Texas making the first determination of the merits of any [IAC] claim, so that federal review will remain as deferential as possible to our judgments."); *Ex parte Diaz,* No. WR-55850-02, 2013 WL 5424971, at *5 (Tex. Crim. App. Sept. 23, 2013) (Price, J., dissenting) ("*Martinez* and *Trevino* have triggered federalism concerns, paving the way for de novo federal review of a number of state claims and concomitantly diluting the control Texas would otherwise exercise over the finality of its own convictions."); *Ex parte McCarthy*, 2013 WL 3283148, at *7 (Alcala & Johnson, JJ., dissenting) ("Unless this Court revises its current approach, federal courts will now have the opportunity to decide a vast number of [IAC] claims . . . without any prior consideration of those claims in state court. The State's interest in finality of convictions would be better served by permitting state courts to address these [IAC] claims on the merits.").

3. Viable Avenues Exist To Allow Mr. Moreno Ramos To Present His Meritorious Claims Involving Ineffective Assistance of Counsel.

When faced with egregious actions by state habeas counsel, in combination with meritorious and compelling claims, the Court can and should carve out a narrow exception to *Graves* to permit process to give way to fairness and afford a petitioner one full and fair opportunity at state habeas that entails competent representation.[19]

Relying upon the plain language of the statute, this Court could permit an applicant to

[19] In *Graves*, the TCCA expressed concern that recognizing an exception based on inadequate 11.071 counsel would initiate a "perpetual motion machine." *See, e.g.*, *Ex parte Graves*, 70 S.W.3d at 114. There are many ways, however, that this Court can carve a narrow exception to *Graves* to permit a rare Applicant, like Mr. Moreno Ramos, who was saddled with 11.071 counsel who was so incompetent as to raise only pro-forma, meritless claims, causing the Applicant to forgo merits review of meritorious ineffective assistance of counsel claims.

proceed under § 2(a) or § 5(a)(1). First, the TCCA could hold that 11.071 § 2(a)'s requirement of competent counsel requires that state courts not give effect to the forfeiture caused by deficient representation.

Second, the Court could refuse to give effect to Mr. Welch's forfeiture on the ground that, because he was incompetent, claims discussed below were in fact "unavailable" when the initial 11.071 application was filed.

Finally, the CCA could invoke its equitable authority to apply the provision in a way that permits merits consideration of claims forfeited by grossly incompetent lawyers, such as Mr. Huff. The CCA is not precluded from using its equitable authority to apply § 5 in a way that reflects parallel federal law—especially if doing so facilitates a state constitutional obligation to ensure the availability of a state habeas privilege. TEX. CONST. art. I, § 12; *see also Ex parte Carpenter*, No. WR–49,656–05, 2014 WL 5421522, at *1 (Tex. Crim. App. Oct. 8, 2014) (Alcala, J., concurring) (stating that in the appropriate case, the TCCA should create an equitable or statutory remedy to forfeiture generated by incompetent 11.071, to create a state corollary to the federal *Martinez* doctrine).

H. The Rights to Access to Courts and Against Suspension of the Writ Require a Remedy for the Deprivation of Initial Post-Conviction Counsel.

The Texas Constitution provides the Courts with additional authority and obligation to remedy the violation in Mr. Moreno Ramos' case. The Legislature enacted Article 11.071 of the Code of Criminal Procedure to regulate the power of the courts to issue a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death. *Ex Parte McGinn*, 54 S.W.3d 324 (Tex. Crim. App. 2000) (Womack, J., concurring). Although the Texas Constitution empowers the Legislature to regulate the courts' power to issue writs of habeas corpus in this manner, *see* Tex. Const. art. V, § 5, the Legislature may never impose limitations

that run afoul of the Texas Bill of Rights, including the open courts and suspension of the writ provisions.

Article I, Section 13 of the Texas Constitution provides, in relevant part, "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." Tex. Const. art. I, § 13. This "open courts" provision includes within it a guarantee that meaningful remedies must be afforded, "so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress." *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex.1995).

Although the CCA has held that § 5 of Article 11.071 does not on its face violate the open courts provision, *Ex parte Davis*, 947 S.W.2d 216, 221 (Tex. Crim. App. 1996), in these particular circumstances, application of § 5 does conflict with the open courts provision and would abrogate entirely Mr. Moreno Ramos' right to a remedy. Because the initial habeas counsel appointed by the court did not pursue the ineffective assistance of trial counsel claim at the only opportunity theoretically afforded, Mr. Moreno Ramos has never had an actual opportunity to present that injury to any Texas Court for a hearing on the merits and a remedy. Thus, 11.071 §5, in preventing the presentation of the claim, would operate in this situation to deprive Mr. Moreno Ramos, through no fault of his own, of a reasonable opportunity that was available under the common law to challenge the illegal sentence. In a typical case, requiring all claims to be brought in the first petition would be compatible with this provision, as recognized in *Davis*, because provided he has competent counsel, an applicant has an opportunity to present any cognizable claim he might have in that initial application. But in this narrow circumstance of ineffective initial habeas counsel, the applicant has no such chance; the open courts provision

thus requires the CCA either to interpret Article 11.071 in such a way to avoid this conflict or to fashion a remedy to enforce the open courts provision of the Texas constitution.

Furthermore, the CCA has the power to create a judicial remedy to protect against suspension of the writ of habeas corpus, notwithstanding the action (or non-action) of the Texas Legislature. Tex. Const. Art. 1, §12 (The Texas Constitution guarantees that the "writ of habeas corpus is a writ of right and shall never be suspended"). This power is clearly supported by Article 1, Section 29 which states: "To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void." Allowing Mr. Moreno Ramos to be executed without ever affording habeas corpus review of his unconstitutional death sentence would constitute a suspension of the writ. Pursuant to Article 1, Section 29 of the Texas Constitution, the CCA has the power, and duty, to prevent that transgression wholly independent of Article 11.071, §5 or any other legislative restriction. *See Alvarado v. State*, 202 S.W. 322 (Tex. Crim. App. 1918).

VI. PRAYER FOR RELIEF

WHEREFORE, for all of these reasons set forth herein, and in his initial petition for writ of habeas corpus, and in his preceding state court applications for writ of habeas corpus, Mr. Moreno Ramos respectfully requests that this Court:

1. Stay his execution;
2. Appoint counsel;
3. Remand this application to the trial court for factual development;
4. Grant Mr. Moreno Ramos such relief as is appropriate and in the interests of justice.

Respectfully submitted,

s/ Danalynn Recer

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Counsel for Mr. Moreno Ramos

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2018, a true and correct copy of the foregoing Application, with Exhibits, was served upon opposing counsel, Assistant Attorney General for the State of Texas, via electronic filing.

s/ Danalynn Recer
Danalynn Recer

VERIFICATION

I, Danalynn Recer, attorney for Petitioner in the above-entitled action, state that to the best of my knowledge and belief, the facts sets for in this Amended Petition for Writ of Habeas Corpus are true and correct.

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

Executed on November 6, 2018, 2018.

/s/ Danalynn Recer
Danalynn Recer

AFFIDAVIT OF NANCY S. PEMBERTON

I, Nancy S. Pemberton, attest and affirm that:

1. I am an attorney admitted to practice in the State of California and an investigator licensed by the State of California. I have worked on capital cases since 1993, in both state and federal court, and at all stages of litigation.

2. I was retained by the Government of Mexico to supervise and to assist in conducting a social history investigation of Roberto Moreno Ramos. Among other tasks, I was asked to interview family members in Los Angeles, California. I interviewed Roberto's mother, Carmen Ramos, his brother, Carlos Ramos, and his sister Natividad Sarabia. The purpose of the interviews was to learn about Roberto's life and his relationships with his family. I also obtained records and photographs regarding Roberto. A mitigation specialist from Los Angeles, Edurne Imana, also interviewed family members and traveled to Tijuana to corroborate information we learned regarding Roberto's life and to obtain photographs of the area where the family lived in Tijuana. Following is a summary of the information we learned.

3. Because some family members have the same first names, they are identified in this affidavit as follows:

Carmen Sandoval	Roberto's paternal grandmother
Carmen Moreno	Roberto's mother
Carmen	Roberto's sister
Pedro	Roberto's father (full name is Pedro Carlos Ramos)
Carlos	Roberto's brother (full name is Pedro Carlos Ramos)

Family History in Mexico

4. Roberto Moreno Ramos is the second of ten children born to Pedro Carlos Ramos and Carmen Moreno Ramos. He was born May 23, 1954 in Aguascalientes, Ags., Mexico. The

family lived in Guadalajara, Mexico at the time but was visiting Aguascalientes when Carmen Moreno went into labor and gave birth to Roberto at her mother-in-law's home.

5. Pedro Carlos Ramos, Roberto's father, was born in 1927 to an extremely aggressive and abusive woman, Carmen Sandoval, who had six children from two men. Pedro was the youngest child from the second husband. Carmen Sandoval survived not only the two men with whom she had six children; she also survived a third companion, Felix Mendoza.

6. Pedro Carlos Ramos was raised in extreme poverty in Aguascalientes. The family "home" was a roofless hovel and family members had to sleep on the floor. Indeed, Carmen Sandoval reportedly gave birth to her son, Pedro, on the dirt floor. Carmen Sandoval could not keep her children fed and they often went without eating.

7. Pedro often told his wife, Carmen Moreno, stories of his mother's cruelty and said that his mother never loved him. She hit her children with sticks, with her shoes, with any instrument she could find, and she hit them all over their little bodies, including their heads and faces. Carmen Moreno had strong recollections of one incident in particular that Pedro recounted to her. When Pedro was about eight years old he was so hungry that he grabbed a tortilla that his mother had just made. Carmen Sandoval flew into a rage and hit Pedro in the head with a plate, knocking him unconscious.

8. Pedro also told his wife about the extreme cruelty he suffered at the hands of his older half-brother, Jose Ceballos. Pedro said that Jose used to hang him by his thumbs and leave him there.

9. After living in the hovel for several years, Carmen Sandoval found work as an apartment manager in Aguascalientes and moved her family into the building she managed. The

family's physical surroundings improved but Carmen Sandoval continued her pattern of cruelty and emotional neglect.

10. Carmen Moreno bore witness to some of Carmen Sandoval's abusive behavior. Pedro's sister, Josefina, was married to an alcoholic who did not support his family. Josefina became pregnant and delivered her child in Carmen Sandoval's home. When Josefina's husband stumbled home drunk after the baby was born, Carmen Sandoval grabbed the bed pan containing Josefina's bloody urine and forced the husband to drink it. The husband disappeared and was never again seen by the family.

11. Natividad Sarabia, Roberto's sister, experienced Carmen Sandoval's cruelty first hand. When Natividad was a little girl, the family visited Carmen Sandoval in Aguascalientes. Carmen Sandoval ordered Natividad to do some chore. When Natividad objected, Carmen Sandoval thrust Natividad's head into a bucket of water that was used as a toilet.

12. Carmen Moreno was born on December 27, 1929 in *ranchito* (small rural community) outside of Aguascalientes. Her mother gave birth to 15 children, only five of whom survived into adulthood. Carmen Moreno is the oldest of those five. In addition, she had two half-sisters and a half-brother from an earlier relationship of her father. The family raised dairy cattle and made cheese which they sold as their cash crop. The family grew their own corn and beans and raised chickens to eat.

13. Carmen Moreno's parents both died when she was about 13. Although the causes of death were not known at the time, Carmen Moreno has subsequently concluded that both of her parents had cancer. She remembers seeing a wound on her mother's chest and thinks her mother had breast cancer.

14. After her parents died, Carmen Moreno was forced to leave the *ranchito* and go to work as a servant for a doctor in Aguascalientes. She cared for his two children and assisted him in his consulting room at his house. Carmen Moreno stayed with the doctor's family for about ten years. She met her husband through his boss who was a patient of the doctor. Pedro and Carmen Moreno married in 1951, when Carmen Moreno was twenty-three years old.

15. Carmen Moreno and Pedro moved to Guadalajara in 1952 because Pedro thought it would be easier for him to get steady work. Carmen Moreno did not want to leave her family but she felt she had no choice. Although Pedro treated Carmen Moreno well in the very beginning of their relationship, he soon began yelling at her, calling her names and pushing her against the wall. The pattern of abuse by Pedro would continue throughout their marriage.

Early Childhood of Roberto Ramos

16. Life in Guadalajara was hard for the family. Neither Pedro nor Carmen Moreno had relatives there and Pedro did not find work easily. Pedro and Carmen Moreno lived in a two-room tenement in an impoverished section of Guadalajara for seven years, and brought their first six children into this world in the squalor of those surroundings. The apartment had no water or electricity, and the family used candles after dark when they had them. Pedro worked in various wood shops, earning 80 pesos (approximately $8 U.S.) a month, when he could work. From that 80 pesos, 35 went for rent and 45 (approximately $4.50 U.S.) was left to feed and clothe the family, and save money for their own home.

17. The six children born between 1952 and 1959 were:

Pedro Carlos (Carlos), born February 22, 1953
Roberto, born May 23, 1954
Ofelia, born November 21, 1955
Enrique, born May 25, 1957
Natividad, born December 25, 1958
Andrea, born 1959

18. When Roberto was born, Pedro and Carmen Moreno were visiting Aguascalientes and stayed at Carmen Sandoval's home. Carmen Moreno delivered Roberto in the home.

19. Roberto was raised on a high carbohydrate and starch diet. As a child, Roberto's diet consisted primarily of beans, tortillas, chiles and pasta soups. They would occasionally get eggs that were always mixed with sliced tortillas or *frijoles* in an omelet. Sometimes, maybe once a week, the mother would buy broken rice of the sort typically fed to animals and make soup with the rice and the head and feet of chicken or cow. She would also boil the rice with water, sugar and cinnamon. On Sundays when possible, they would get a *bolillo* (French bread) each for their breakfast with tea made from orange leaves. Meat, *nopales* (cactus) and *chicharones* (fried pig skin) were only infrequently available; the family went for long periods without any meat. Roberto never had milk, either fresh or canned. Milk that was given to the younger siblings was always mixed with water to make it stretch.

20. There was no money for professional medical care except in a case of extreme emergency. In the 15 years they lived in Guadalajara, they went to the doctor twice. One of the emergencies concerned Roberto who had swallowed a small arrow which got stuck in his throat and the doctor had to pull it out with tweezers. The doctor, located on la Avineda Alcalde, said he had cut his tonsils off with the arrow. Carmen cared for most of her children's illnesses with homemade remedies that consisted basically on teas made from herbs or seeds. When needed, she would purchase aspirins, cough medicine and "desenfriolitos" (cold medicine from Bayer) at the pharmacy. She would also practice spiritualism and prayer when a family member was ill.

Roberto's childhood in Guadalajara

21. In 1960, Pedro moved his wife and six children into a home that he had begun to build but which was still under construction. There was no roof over their head and no windows

when they moved in. It was not until 1963, when Carmen Moreno was in the late stages of her pregnancy with Gustavo (born February 10, 1963), that Pedro finished the roof. Carmen Moreno remembers having to lift pails of concrete over her head to Pedro, who was on the roof finishing it. The house remained unfinished the entire time the family lived there.

22. Pedro eventually put in running water but the house never had any electricity. Carmen Moreno used to steal the electricity out of a public pole outside their house. Everyday at sunset, she connected a cable to the main line of the pole and passed it through a window into the house were she would have more cables running through the walls and connected to two bulbs; every morning before sunrise she disconnected the outside cable. The water in the boiler was heated by burning paper bags filled with a mixture of wood dust and kerosene. To light the bathroom, a kerosene lamp would be used.

23. Between 1960 and 1967, Pedro and Carmen Moreno had three more children:

Gustavo, born February 10, 1963
Carmen, born July 9, 1964
Ramiro, born January 28, 1966.

24. Pedro worked intermittently as a carpenter and supplemented his extremely meager income by selling a homemade combustible product to stores. Consequently, he kept a number of toxic chemicals, including varnish and kerosene on their property, in the back yard and patio. For a period of three years, Natividad, Ofelia, Roberto (when he was 10 or 11) and Carlos would help their father prepare a kerosene and wood dust combination and put the mixture in paper bags that the father would sell to the stores. This procedure would be done about three times a week with their bare hands so that the skin on their hands would be peeling. Carmen Moreno used a strong chemical called Criolina to kill bugs, fleas and other insects, which she kept in a kitchen cabinet accessible by the children. The dishes were washed using a pumice stone

powder taken from the nearby river, which was contaminated from chemicals and dyes dumped by a fabric dye company.

25. During their years in Guadalajara, Pedro savagely abused all his boys, particularly Roberto. The boys were punished for each and every misdeed, real or imagined; for example, they were punished for ignoring their father. Punishment was frequent, it was painful, and it was unpredictable. Pedro hit the boys with his fist, he hit them with his belt, he hit them with a chain from a car engine. He threw whatever he could get his hands on at them. He made them kneel on grains of sand or small stones for long periods, while they held their arms out and held bricks in their hands. He dunked their heads in the pail used to wash dishes, over and over, until they felt as though they would drown. He made them crawl under the sink and stay there for long periods. He burned their hands on the stove. And, he hung Carlos and Roberto by their ankles, leaving them to dangle upside down until Pedro decided to let them down. The children learned not to react, not to cry or yell in pain, because their reactions would stimulate yet more punishment.

26. Pedro also disappeared for periods of time, returning without notice and staying for unpredictable amounts of time. He might disappear for a week, show up one night and be gone the next day, or hang around for awhile before leaving again. Carmen Moreno and the children never knew when to expect him or for how long. Generally, when Pedro returned, life would be calm for a day or two. The first days of his return were sometimes quiet because Pedro often had money or food with him so the family could eat a little, and Pedro was generally in a complacent mood. Inevitably, though, something would trigger Pedro's temper and he would fly into a rage, yelling and inflicting his myriad punishments.

27. Life did not improve when Pedro was gone. Not only was the family often hungry, they were totally unprotected from the dangers of being assaulted or robbed. Because the house was still being built, the family could not be secure in their home. Carmen Moreno had to leave lights on all night to keep intruders at bay.

28. Pedro not only abused the children, he verbally and physically assaulted his wife. Carmen Moreno tried to keep the children from witnessing the abuse her husband inflicted on her, but the children heard them yelling and arguing at night, could hear Pedro hit her, and could hear their mother's sobs. Once, Pedro broke his fist hitting the wall while fighting with Carmen Moreno.

29. The only ones who escaped Pedro's abuse were Ofelia, his favorite daughter, and Gustavo, his favorite son. Pedro also was physically affectionate with them while withholding all affection from the others.

30. The children were told that Pedro was looking for work whenever he was absent from them. Yet, the children have concluded that Pedro in fact had other women, perhaps another family, who he lived with when he was not at home. Two incidents led to this conclusion. Once, a strange woman and young child showed up at the house. Pedro and Carmen Moreno left the house with her. Carmen Moreno returned home alone in tears. When asked who the woman was and why Carmen Moreno was crying, Carmen Moreno responded, "Ask your father" and would say nothing more. Pedro refused to say anything, either, when he was asked about the woman and child. On another occasion, the children had been told their father was in the United States, working. About a week after he left, Pedro showed up with a broken arm and a cut on his head. The family realized that he had been in Guadalajara and had never gone to the United States, raising the question of where he had been staying during his absence.

31. When Pedro was gone from the house, Carmen Moreno and the children often went hungry. Carmen Moreno struggled to find food. She was forced to sell household goods to get money. Carlos, the eldest son, was often enlisted to sell the goods. Sometimes, Carmen Moreno even gave him Pedro's carpentry tools to sell. When Pedro discovered his tools missing, he would fly into a rage. To protect Carlos from the wrath of Pedro's anger, Carmen Moreno would tell Carlos to disappear while Pedro was in the house. Carlos would stay away until his father left again to avoid getting punished for selling his fathers' things.

32. Other than sending Carlos away, Carmen Moreno did nothing to protect the children from Pedro's punishments. She did not intervene regardless of how outrageous the abuse. Indeed, Carmen Moreno sometimes begged the children not to misbehave so that Pedro would not abuse her.

33. Pedro sometimes left Guadalajara to work construction on the coast, where tourist hotels were being built. Carmen and the children would be left destitute, without any money. Carmen sometimes earned a few pesos working for a woman who made tortillas. Carlos and Roberto would work for a man cutting *jicama*, bringing home 50 centavos or a peso (roughly five to ten cents) for their effort. Nothing they did, though, could earn them enough to keep them adequately fed and clothed.

34. Once, in about 1964, Carmen was in such dire straits that she went to the man for whom Pedro was working and begged him for money so that she could buy the children some food and pay for bus fare to Barra de Navidad, where Pedro was working so she could get money from him. The man gave her 50 pesos and Carmen Moreno loaded all of the children on the bus for a five hour ride to the coast. Pedro was initially angry at Carmen Moreno for following him but the family ended up staying on the coast for about six months. They lived in the hotel while

it was being constructed, no roof over their heads. They slept on blankets on the floor. When bad weather hit, they retreated to the closets to get out of the rain.

35. Roberto was an extremely active child and loved to wrestle, even as young as age six. He had difficulty concentrating in school, and his teachers sometimes called him a "*burro*" (meaning blockhead or stupid) in front of the students because he did not get his work done. Students joined the teachers in taunting Roberto.

36. Roberto used to skip school and go swimming in the river near their home. The river was contaminated by a fabric dye company that released chemicals, dyes and other wastes directly into the river, causing the river to look variably green, yellow, blue and red. Roberto often came home with paint dye all over himself.

37. Roberto's father encouraged him to behave aggressively with other children and Roberto, desperate for his father's approval, would get into scrapes to earn his praise. Roberto also hung around older, tough boys in the neighborhood and won their approval by acts of bravado.

38. By contrast, Carlos avoided getting into fights and the neighbor boys often picked on him. Roberto would defend Carlos against the others. Pedro used to call Carlos "chicken" because he would not defend himself.

39. Pedro did not allow any of the children to bring friends home. He isolated his family from the community around them and kept them from their relatives in Aguascalientes. No one was aware of the abuse that took place inside the home.

Roberto's early teen years

40. During the years that the Ramos family lived in Guadalajara, Pedro apparently traveled back and forth to the United States. Pedro's maternal aunt, Juanita Martinez and her

husband, Jose, lived in Los Angeles and had begun helping out Carmen Sandoval by sending her money. They eventually sponsored Carmen Sandoval's migration to the United States. Carmen Sandoval pressured Pedro to join her in Los Angeles.

41. In 1967, Pedro moved the family to Tijuana. He began working in Los Angeles and visited the family on weekends. In some respects, life improved for the Ramos family because they had food more regularly. At the same time, the entire family of two parents and nine children lived in a one-room house with no running water. Pedro eventually built a second room. The house was on a hillside from which rainwater would pour into the house and under the beds. The outhouse almost overflowed in heavy rainstorms. See Appendix A.

42. At first the children could not attend school because there was no room. Eventually the kids did go to school and Carlos graduated there. See Appendix B. Records of Carlos' schooling were found in Tijuana but records for Roberto could not be located and are apparently lost.

43. Carmen Moreno and the children helped make ends meet in Tijuana by raising chickens, growing cactus, and selling them door to door. Despite having a bit more money than they had in Guadalajara, life was still hard. Carmen Moreno used to make *menudo*, a type of stew, from the stomach of goats rather than cows because it was cheaper.

Family migration to the United States

44. In 1970, Pedro was able to bring Carmen Moreno, the three older kids, and the baby into the United States legally. The six other children were smuggled in illegally and kept hidden from immigration authorities at Carmen Sandoval's home. They later became legalized. See Appendix C.

45. Pedro, Carmen Moreno, Carlos, Roberto, Ofelia and Yolanda rented a house at 216 South Gage Avenue. The house, essentially two bedrooms, a living room, dining room and kitchen, was one of two houses on the same lot. Pedro continued his pattern of disappearing and reappearing until he left for good and returned to Mexico in 1976. While in Los Angeles, he had several extra-marital affairs and eventually took up with a woman who went to Mexico with him. See Appendix D.

46. The children attended age-appropriate schools in Los Angeles. Roberto started the ninth grade at Garfield High School and was placed in English as a Second Language, art and physical education classes. He took no academic subjects. See Appendix E. The Los Angeles Unified School District did not test him during ninth grade and he did not continue beyond ninth grade.

47. The schools the children attended in East Los Angeles were tough. Enrique got beaten up by other boys regularly until he took martial arts classes and became better able to protect himself. Andrea became involved with a bad crowd, started using drugs, and ran away from home. She spent some time in juvenile hall and had to live in a group home after pushing a teacher's head through a door. Gustavo and Ramiro both spent a night in juvenile hall for stealing money from parking meters.

48. Carmen Moreno went to work to support her family. Because she had small children of her own, she initially took care of other children. Later, she took in piecework from clothing factories. The factory would deliver pieces of clothing to her in the evening and she would spend all night making covered buttons, trimming threads, and ironing the clothes. Someone from the factory would pick up the clothes in the morning. When the children could care for

themselves, she worked in various clothing factories, getting paid by the piece, $.10 per shirt. Later, after complaints to the Labor Commission, she began receiving hourly pay.

49. Roberto also went to work after leaving school. He had a series of odd jobs between 1971 and 1974. He also worked in construction for his uncle, Jose Ceballos. During that time, his uncle noticed that Roberto suffered wild mood swings, going from being normal to becoming quite aggressive without any apparent reason. At other times, Roberto behaved strangely, for example, sometimes he would refuse to go under a house because he was frightened while at other times he did not have a problem crawling under a house.

50. In 1974, Roberto was employed by Craftsman Lens Company; between 1975 and 1978 he worked construction for Ryland Homes of California.

51. Roberto, his brothers Carlos and Gustavo, and his sisters Ofelia, Carmen, Natividad, and Yolanda remained law-abiding with no criminal histories.

52. Enrique, Andrea, and Ramiro, however, all had run-ins with the law. Andrea was arrested for burglary in 1986; the charges were not pursued. Ramiro was arrested for assault with a deadly weapon in December 1986, pleaded guilty and was placed on two years summary probation.

53. Andrea married a gang member, Freddy Tadeo, when she was about 17 years old. They had two children and moved to Arizona. Tadeo was incarcerated at the time Andrea died of scleroderma (lupus) in 1990.

54. Enrique has the most extensive criminal history: he was arrested in November 1986 for misdemeanor battery, pleaded guilty and was placed on two years summary probation. In January 1988 he was arrested for assault with a deadly weapon, pleaded guilty to a felony, which was reduced to a misdemeanor and set aside after he successfully completed three years

probation. He entered the military and at some point, exactly when is not known, he was diagnosed with schizophrenia and has been treated at the Veterans Administration Hospital in Los Angeles. In May 2001 he was arrested for grand theft and, after pleading no contest, he was placed on probation with psychological treatment ordered. He successfully completed the probation and in December 2003 the felony was reduced to a misdemeanor and the conviction was set aside. See Appendix F.

55. The family has no real contact with Enrique any more, although he lived on and off with his mother up until about two years ago. She had to force him out of the house because he scared her. He is occasionally seen on the streets, looking disheveled, pointing at facades, and speaking nonsense. When he lived with his mother, he covered the walls of his room with images of the Virgin of Guadalupe, and told his family that he was "Juan Diego, the indigenous who appeared to the Virgin of Guadalupe, in Mexico."

Roberto and Leticia

56. Roberto and Leticia met at a restaurant where Leticia worked. Roberto was about 17 years old when he went to live with her and her family near McArthur Park in Los Angeles. See Appendix G. The couple eventually moved in with the Ramos family at 216 South Gage Avenue. Leticia was pregnant at the time.

57. Roberto and Leticia moved out of the house sometime after their first son, Osmar, was born.

58. In 1974, the Ramos family moved to the house at the front of the lot, 214 South Gage Avenue. Roberto and Leticia moved back into 216 South Gage Avenue. Roberto helped to divide the house, which they shared with another tenant family. Leticia and Roberto argued frequently.

59. Roberto and Leticia eventually bought a house in another part of Los Angeles. Roberto worked on fixing it up but did not finish it before he and Leticia moved to Chicago, in about 1979. While they lived in Chicago, the family only rarely heard from them. Both Leticia and Roberto reported that they were doing well.

60. Roberto worked in Chicago, enough to purchase a house for them on West 18th Street.

61. In about 1986, Roberto and Leticia moved to Texas. The family continued to hear from them sporadically and Roberto would visit for a couple of months at a time, leaving his wife and children in Texas. Roberto told family members he was doing well in Texas but the family thought otherwise. One family member saw him outside Home Depot, trying to get work off the street as a day laborer. Once, when his mother was gone, Roberto was unable to even pay for food, and his sister had to buy it for him.

62. In 1990, he worked for a couple of months at Hopes Group Home in Los Angeles, a group home for mentally and physically disabled children. His employer recalls him being a meek and mild person who was kind to the children. The employer thought the children controlled Roberto, rather than Roberto controlling the children. Texas. Other than the cabinet shop, there are no records of Roberto being employed in.

63. The family noticed that Roberto behaved strangely during these periodic visits. Roberto smoked heavily and drank enormous quantities of coffee. He once scared his young nephew when they were watching television. Without any provocation, Roberto began calling his nephew a monkey, jumping up and down scratching his head and rear in imitation of a monkey, and yelling loudly.

64. Another time, he told his sister that he and Leticia had taken a bus to Guatemala. While traveling through El Salvador, Roberto said, he noticed an "Indian" and a soldier standing on the corner. The Indian tapped the soldier on the shoulder; the soldier swung around and cut off the Indian's head with a machete.

65. Yet another time, Roberto was talking with his sister-in-law, having a normal conversation when the look on his face suddenly changed, his eyes got "weird," and he began talking about reading books about the devil and witchcraft. He continued in that vein for a bit and then, just as suddenly, switched back to a normal conversation. The sister-in-law also noticed changes in Roberto's speech patterns that seemed abnormal.

Post-arrest events

66. After Roberto was arrested, the family never heard from Roberto's attorneys. The only people who contacted Carmen Moreno were a detective, and Leticia's relatives.

67. There were members of Roberto's family who, if contacted, would have testified in his behalf. The owner and operator of Hopes Group Home who employed Roberto in 1990 would have testified in his behalf as well.

LIST OF APPENDICES

Appendix A: Photos of the Ramos Tijuana home and neighborhood.

Appendix B: Photos of school in Tijuana taken by Edurne Imana, and photo of Carlos' graduation. (The school yard in 1967-70 was dirt, not concrete as depicted in the photo.)

Appendix C: Portrait of eight children taken at 216 South Gage Ave.; Consular photo of six children.

Appendix D: Photos of 216 South Gage Avenue taken by Nancy Pemberton.

Appendix E: Los Angeles Unified School District transcript for Roberto Ramos.

Appendix F: Docket sheets for criminal cases against Enrique Ramos; in-home services reports

regarding Enrique Ramos.

Appendix G: Photo of Roberto and Leticia in park.

I swear upon pain of penalty for perjury, that the foregoing is true and correct to the best of my knowledge and recollection.

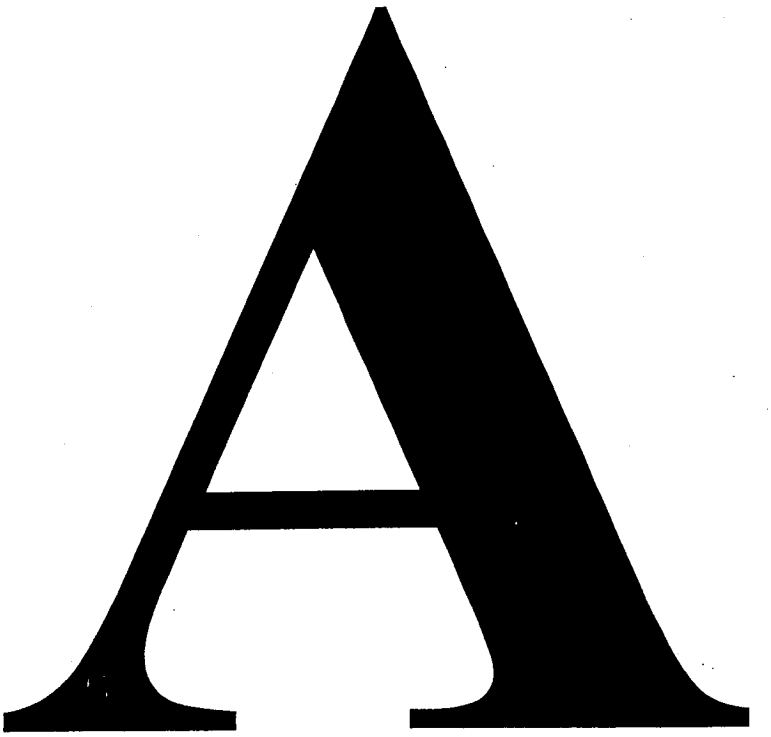
JONATHAN ADAM ORINGHER
Comm. # 1449043
NOTARY PUBLIC - CALIFORNIA
City & County of San Francisco
My Comm. Expires Nov. 3, 2007

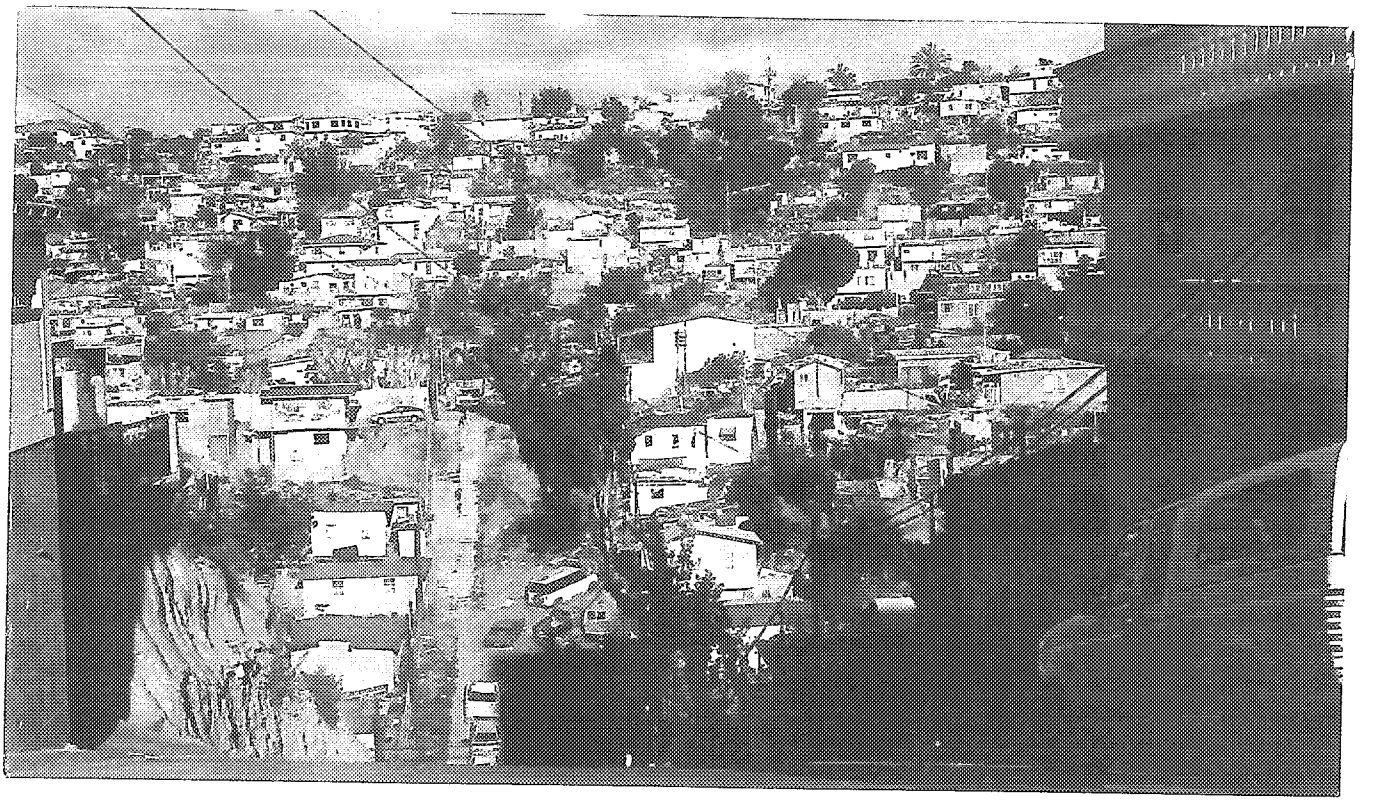
NANCY S. PEMBERTON

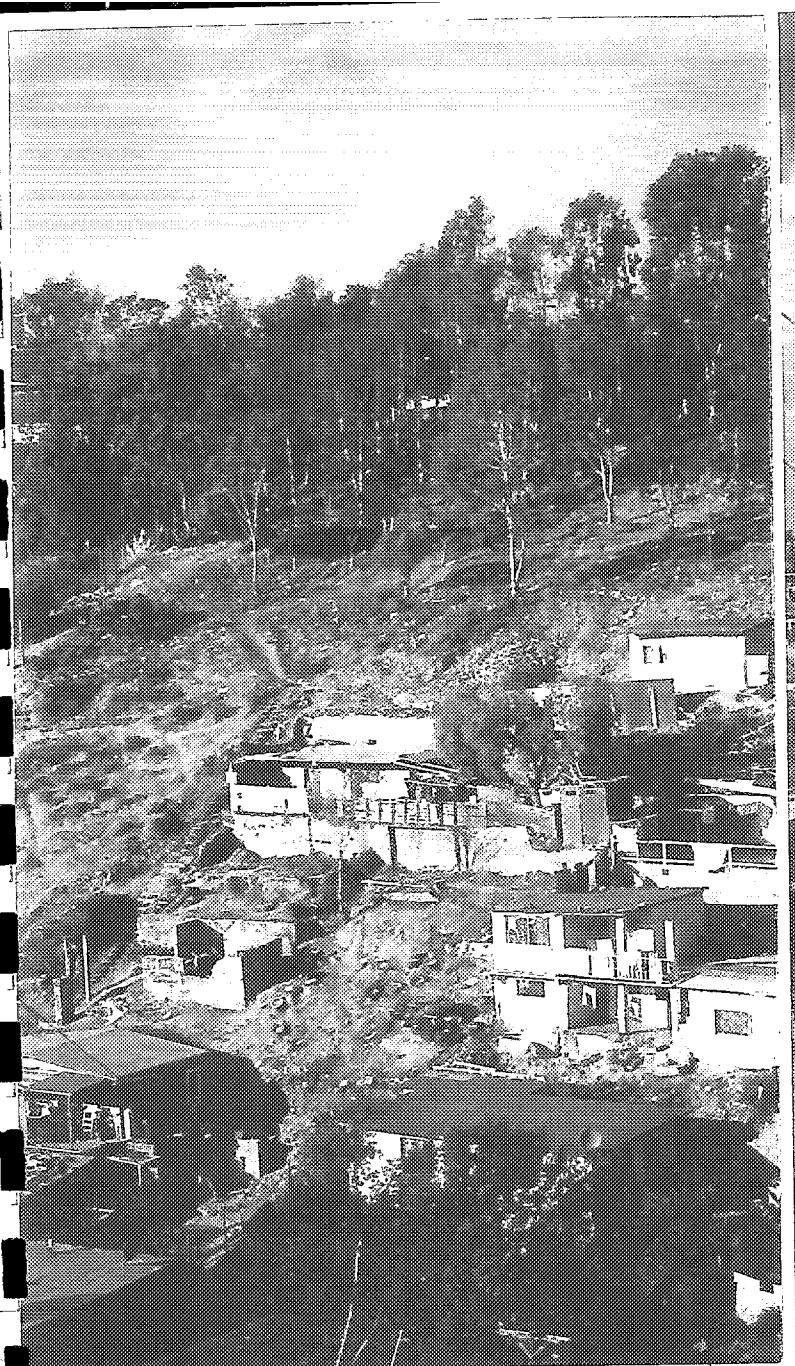
State of California)
County of San Francisco)

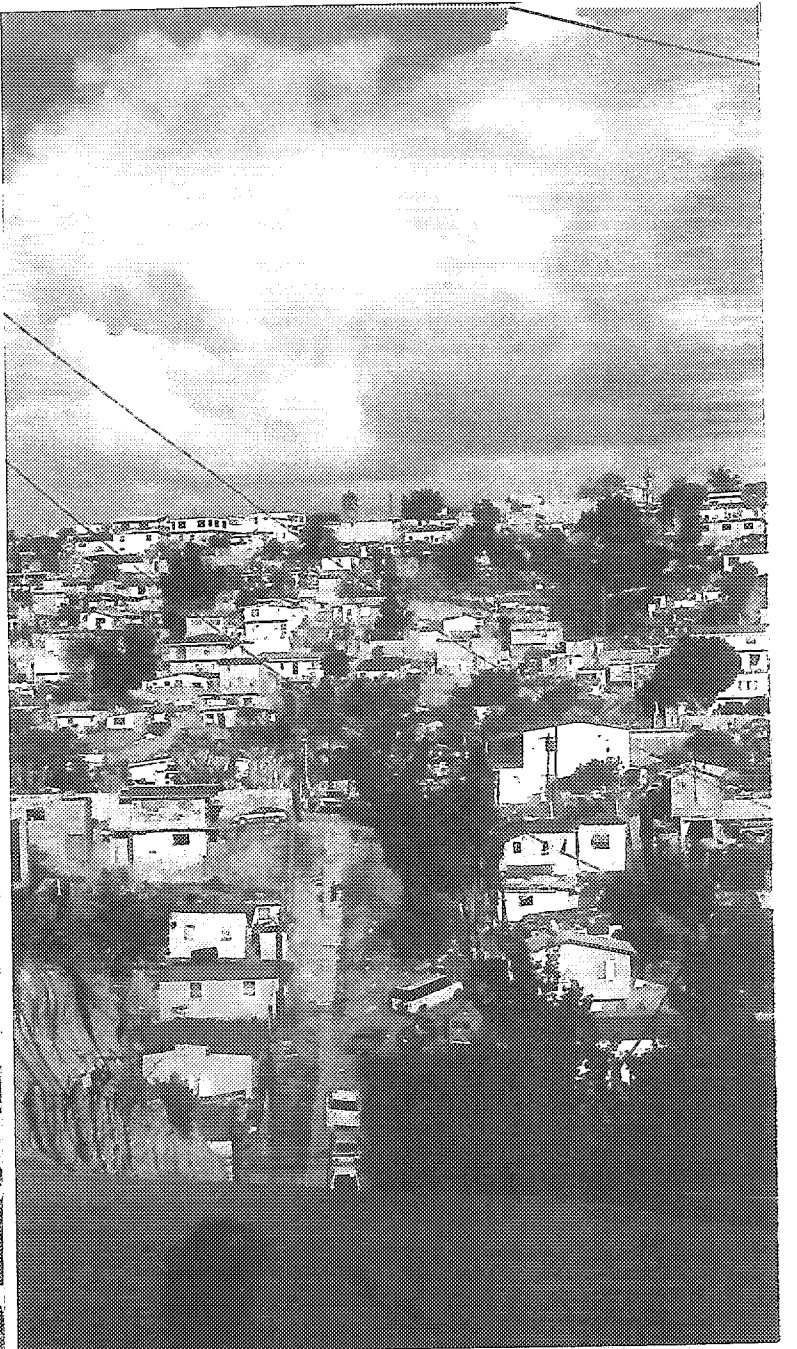
Subscribed and sworn to before me on 21 day of September 2004.

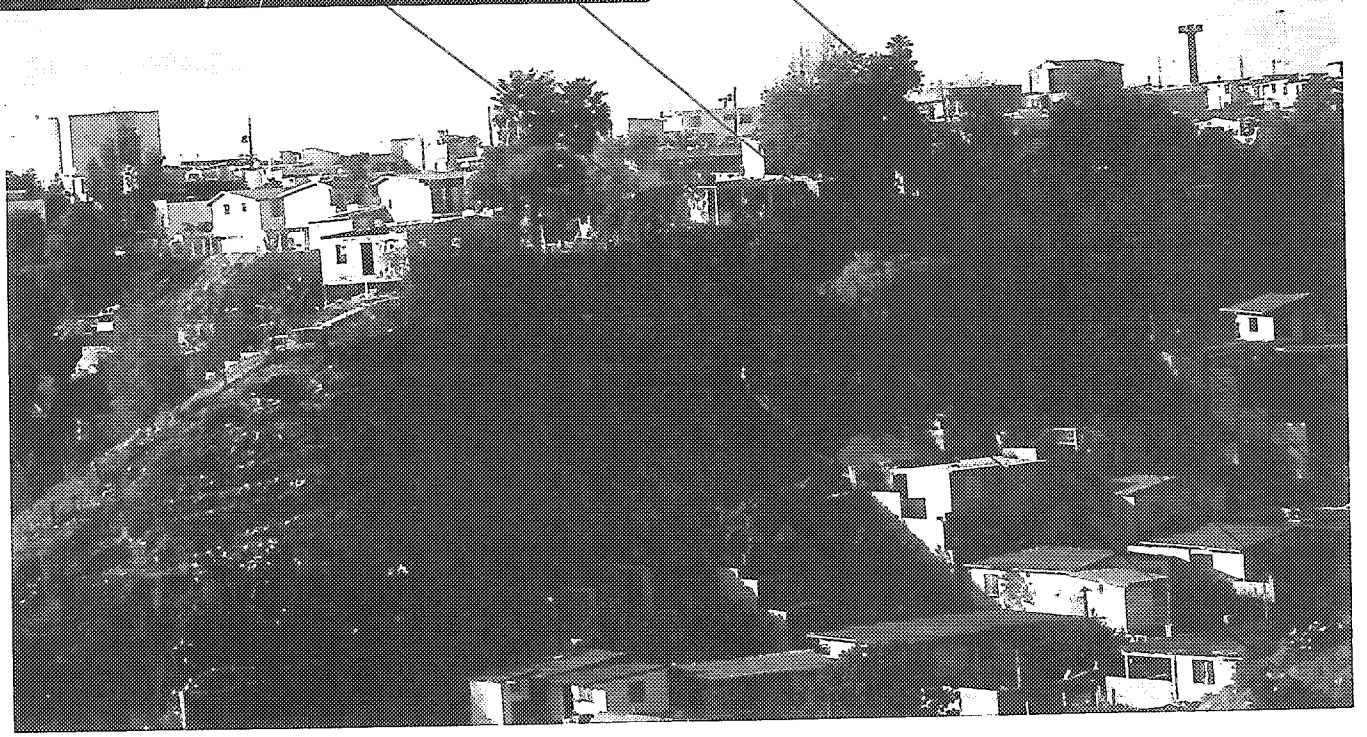
NOTARY SIGNATURE

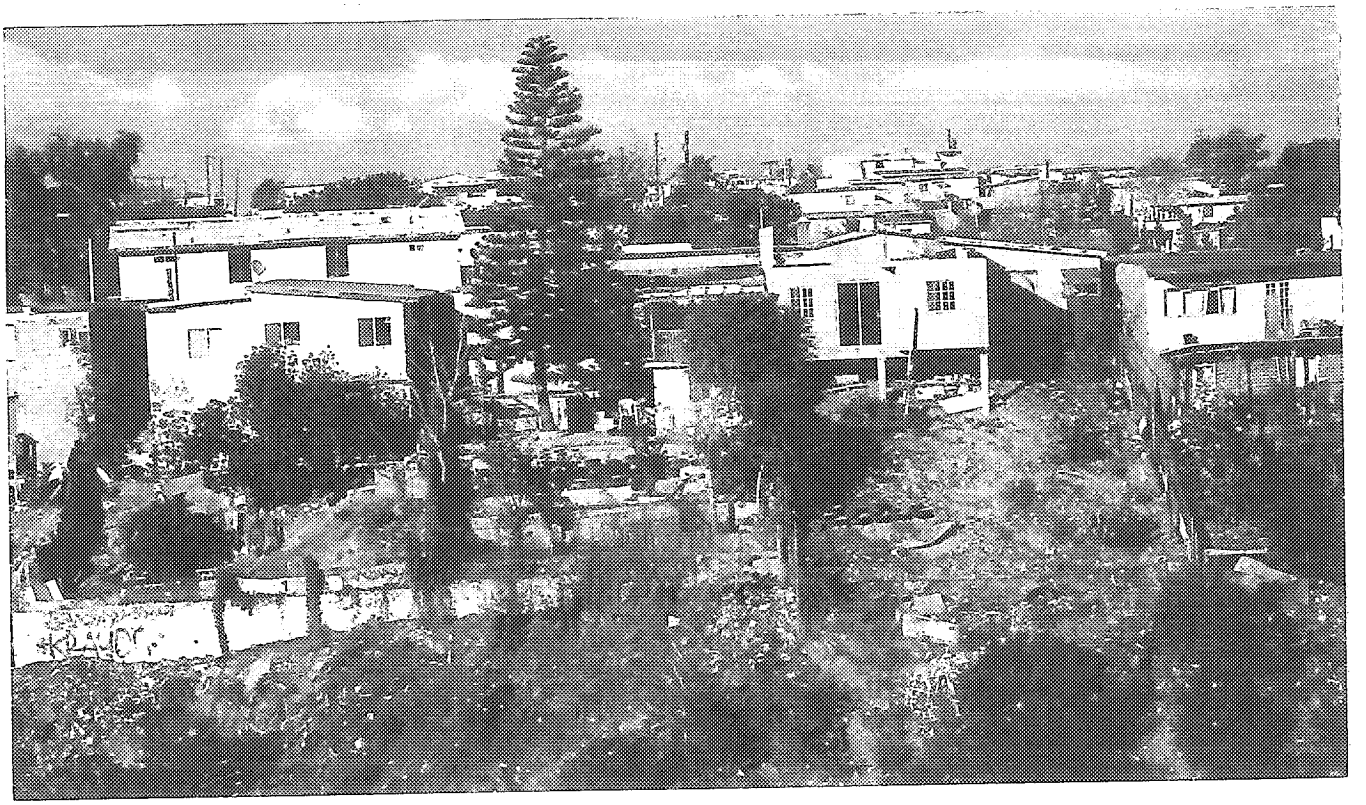


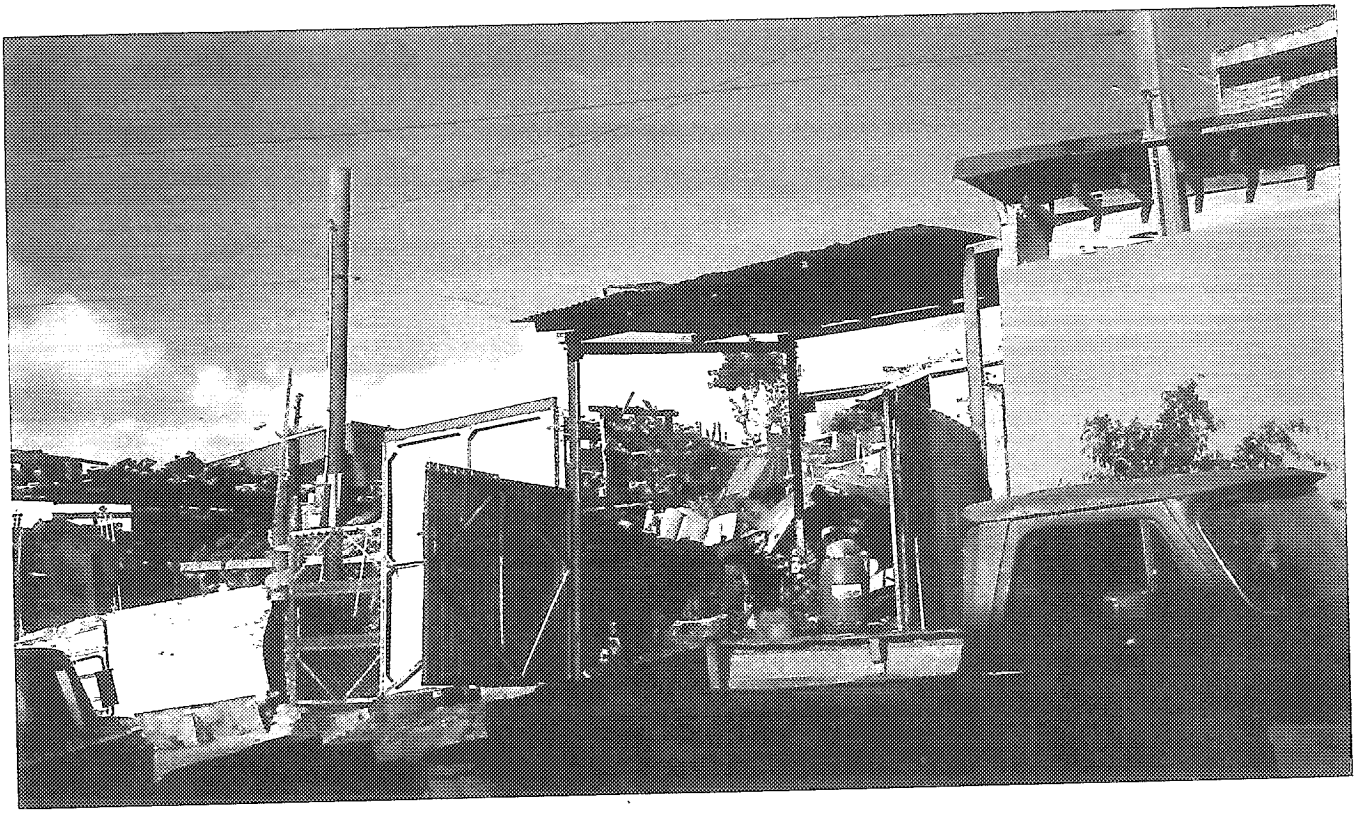


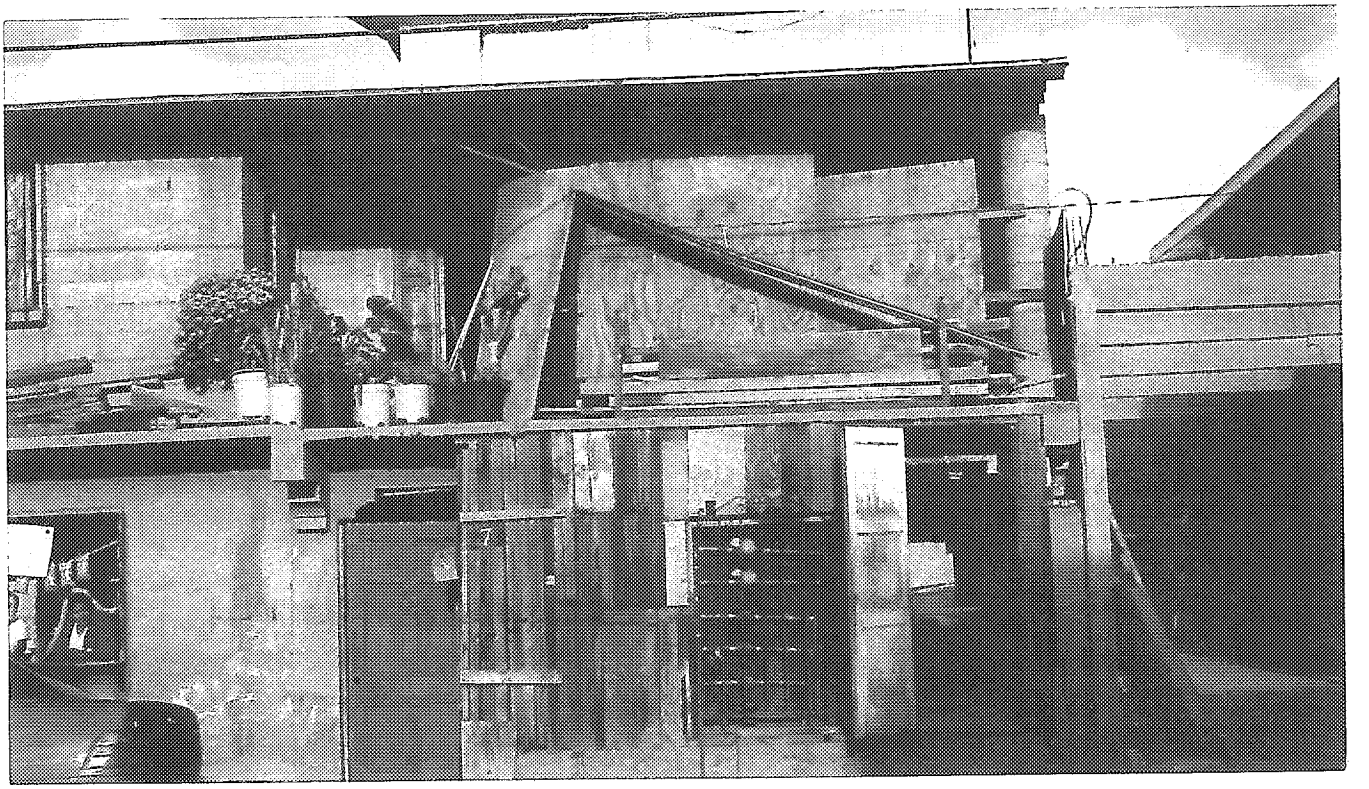




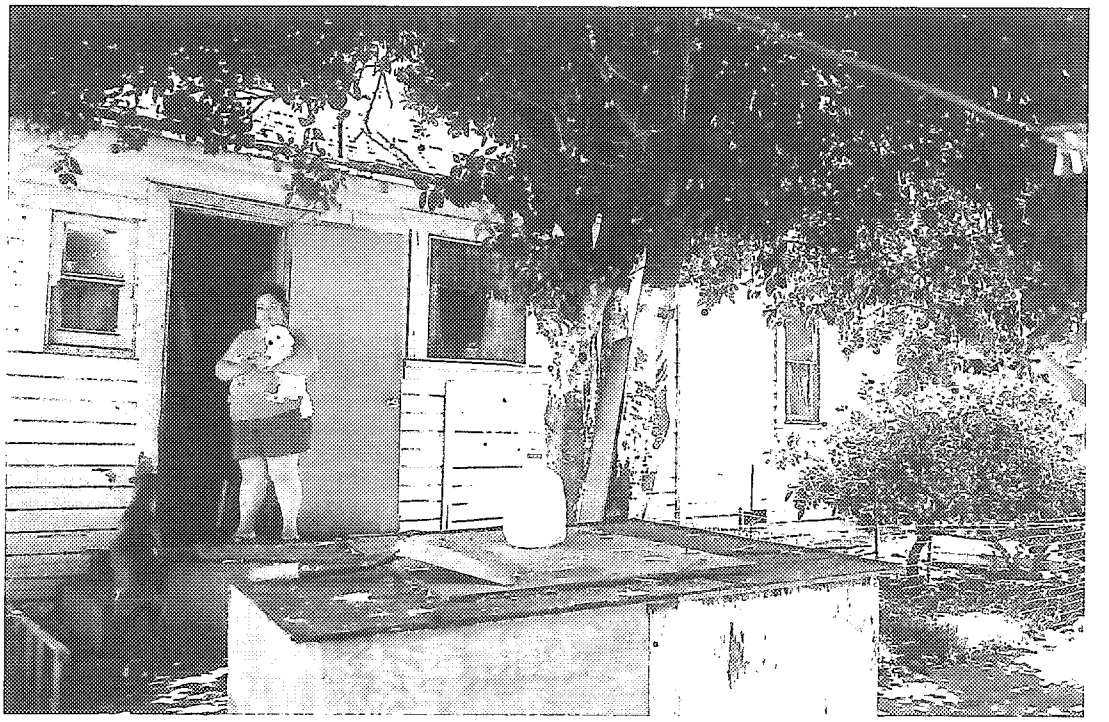


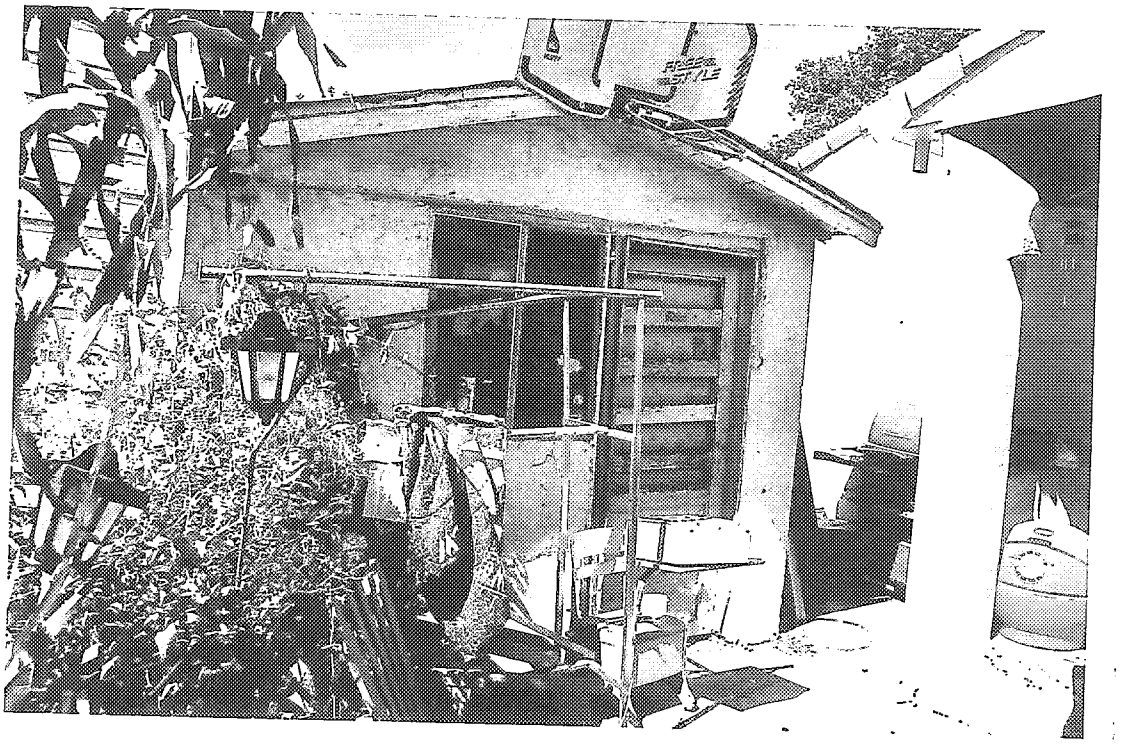


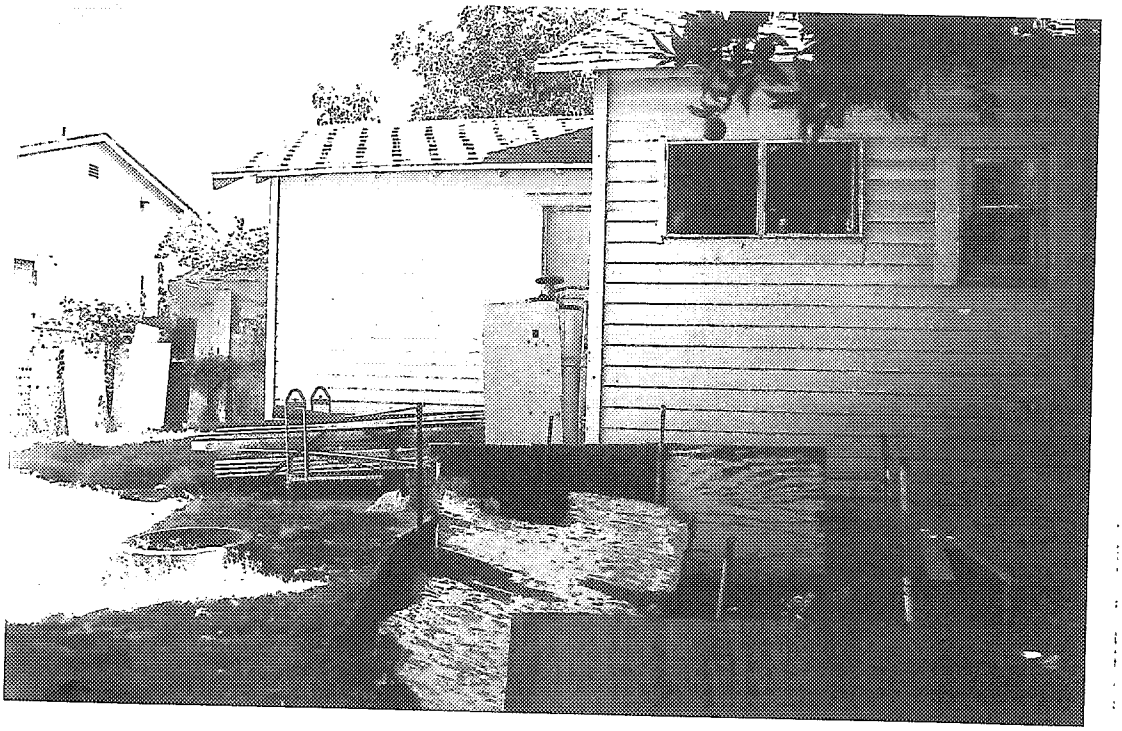




B







E

(THIS CUMULATIVE RECORD IS CONFIDENTIAL INFORMATION ...)

…OS ROBERTO (FIRST)

CHECK SEX: M ☒ F ☐

DATE OF BIRTH: MONTH 5 DAY 23 YEAR 54

PLACE OF BIRTH: CITY AGUASCALIENTES STATE [illegible] HOW VERIFIED

PRIOR SCHOOL: SCHOOL NAME MEXICO CITY STATE

PHOTOGRAPHS

ESL

SOCIAL SECURITY NO. 6345…

CUMULATIVE RECORD
JUNIOR AND SENIOR HIGH SCHOOLS
LOS ANGELES, CALIFORNIA

LOS ANGELES CITY HIGH SCHOOL DISTRICT

REVISED 1961

1. IDENTIFICATION DATA

NONIMMIGRANT FOREIGN STUDENT

VISA TYPE F ☐, B ☐, OTHER: ______

VISA NUMBER: ______

POLIO IMMUNIZATION: 1 ☐ : 2 ☐ : 3 ☐ : EXEMPT ☐

GRADE LEVEL WHEN PHOTOGRAPHS TAKEN

2. JUNIOR HIGH SCHOOL RECORD

ALL SUBJECTS RECORDED IN THIS SECTION ARE GRADE LEVEL OF COLUMN IN WHICH POSTED, UNLESS OTHERWISE INDICATED.

SCHOOL					
DATE OF ENTRANCE					
DATE OF LEAVING					
LEFT TO					
SEMESTER ENDING					
ADVISER					

GENERAL SUBJECT FIELD	B-7 SPECIFIC SUBJECT TITLE	SUBJ. GRADE LEVEL	SEM. PER. CREDITS	MARKS IN SUBJECTS	WORK HABITS	COOPERATION	A-7 SPECIFIC SUBJECT TITLE	SUBJ. GRADE LEVEL	SEM. PER. CREDITS	MARKS IN SUBJECTS	WORK HABITS	COOPERATION
ENGLISH												
SOCIAL STUDIES	GEOG.						HIST. GEOG.					
MATHEMATICS												
SCIENCE												
FOREIGN LANGUAGE												
PRACTICAL ARTS												
FINE ARTS												
PHYSICAL EDUCATION												
HEALTH EDUCATION												

GENERAL SUBJECT FIELD	B-8 SPECIFIC SUBJECT TITLE	SUBJ. GRADE LEVEL	SEM. PER. CREDITS	MARKS IN SUBJECTS	WORK HABITS	COOPERATION	A-8 SPECIFIC SUBJECT TITLE	SUBJ. GRADE LEVEL	SEM. PER. CREDITS	MARKS IN SUBJECTS	WORK HABITS	COOPERATION
ENGLISH												
SOCIAL STUDIES	U S HIST. GEOG.	1					U S HIST. GEOG.	2				
MATHEMATICS												
SCIENCE												
FOREIGN LANGUAGE												
PRACTICAL ARTS												
FINE ARTS												
PHYSICAL EDUCATION												
HEALTH EDUCATION												

GENERAL SUBJECT FIELD	B-9 SPECIFIC SUBJECT TITLE	SUBJ. GRADE LEVEL	SEM. PER. CREDITS	MARKS IN SUBJECTS	WORK HABITS	COOPERATION	A-9 SPECIFIC SUBJECT TITLE	SUBJ. GRADE LEVEL	SEM. PER. CREDITS	MARKS IN SUBJECTS	WORK HABITS	COOPERATION
ENGLISH												
SOCIAL STUDIES	WLD. HIST. GEOG.	1					WLD. HIST. GEOG.	1				
MATHEMATICS												
SCIENCE												
FOREIGN LANGUAGE												
PRACTICAL ARTS												
FINE ARTS												
PHYSICAL EDUCATION												
HEALTH EDUCATION												

DATE ISSUED JUL 12 2004

I CERTIFY THAT THE INFORMATION HEREON IS CORRECT.

SIGNED [signature]

MICROFILM SUPERVISOR

LOS ANGELES UNIFIED SCHOOL DISTRICT

JUNIOR HIGH SCHOOL COMPLETION: GRADUATION WITH DIPLOMA ☐ SPECIAL TO HIGH SCHOOL ☐ DATE

3. EXPLANATION OF MARKS AND ABBREVIATIONS

A	SUPERIOR	AE	ACADEMICALLY ENRICHED CLASS FOR ABLE PUPILS
B	BETTER THAN AVERAGE	EMR	CLASS FOR THE EDUCABLE MENTALLY RETARDED
C	AVERAGE	H	HONORS CLASS FOR ACADEMICALLY GIFTED PUPILS
D	BARELY PASSING	LI	LOW INDEX CLASS FOR SLOW LEARNERS
FAIL	FAILURE	NES	CLASS FOR NON-ENGLISH SPEAKING PUPILS
INC	INCOMPLETE	R	REMEDIAL CLASS FOR EDUCATIONALLY RETARDED PUPILS OF AVERAGE OR ABOVE AVERAGE ABILITY
NM	NO MARK; ATTENDANCE LESS THAN 3 WEEKS		
NO CR	NO CREDIT		
W	WITHDRAWAL (SUMMER SCHOOL MARK ONLY)		

4. TRANSMITTAL RECORD

DATE	CUMULATIVE RECORD OR TRANSCRIPT SENT TO	DATE	LETTER OF RECOMMENDATION SENT TO:

E EXCELLENT
S SATISFACTORY
U UNSATISFACTORY

5. SENIOR HIGH SCHOOL RECORD

ALL SUBJECTS RECORDED IN THIS SECTION ARE GRADE LEVEL OF COLUMN IN WHICH POSTED, UNLESS OTHERWISE INDICATED.

	B-10	A-10	B-11	A-11	B-12	A-12
SCHOOL	Garfield	GARFIELD				
DATE OF ENTRANCE	9-14-70	2-2-71	9/2			
DATE OF LEAVING						
LEFT TO						
SEMESTER ENDING	1-24-71	6-18-71				
ADVISER						
MAJOR SEQUENCE	B-10 E S L	A-10 Eng/Lang				
ENGLISH Eng Lang	ENG. ESL 1 5 C S S	ENG. ESL 1 5 B U U	ENG			
	ESL 1 5 C S S	ESL 5 C S S				
SOCIAL STUDIES	ESL 1 5 D V S	ESL 1 5 B U U	U.S. HIST 1	U.S. HIST	U.S. GOVT.	
	ESL 1 5 C S S					
SCIENCE						
MATHEMATICS						
FOREIGN LANGUAGE						
BUSINESS EDUCATION						
HOMEMAKING						
INDUSTRIAL ARTS		METAL 0 5 C U U				
FINE ARTS	Sr. Hi Art 5 C S E					
WORK EXPERIENCE						
PHYSICAL EDUCATION	P.E. 5 D S U	P.E. 5 D U S				
TOTAL SEMESTER PERIODS CREDIT	B-10 CURRENT / CUMULATIVE	A-10 CURRENT / CUMULATIVE	B-11 CURRENT / CUMULATIVE	A-11 CURRENT / CUMULATIVE	B-12 CURRENT / CUMULATIVE	A-12 CURRENT / CUMULATIVE

6. EXTRA YEAR IN SENIOR HIGH SCHOOL

SCHOOL		
DATE OF ENTRANCE		
SEMESTER ENDING		

7. GRADUATION DATA

MAJOR SEQUENCE

APPROXIMATE RANK

NO. IN GRADUATING CLASS

GRADE-POINT AVERAGE

EXPLANATION:
BASIS: 5 SEMESTER PERIODS
A:4 B:3 C:2 D:1 FAIL:0

DATE OF GRADUATION FROM SENIOR HIGH SCHOOL
MONTH DAY YEAR

8. CERTIFICATION (FOR USE ON PHOTOSTAT COPY ONLY)

DATE THIS TRANSCRIPT ISSUED

I CERTIFY THAT THE INFORMATION HEREON IS CORRECT.

(SIGNED)

(PRINCIPAL)

RAMOS ROBERTO 5-23-54

LAST NAME FIRST MIDDLE

ESL

9. INFORMATION CONCERNING HOME

NAME	REP	DEAD
FATHER PEDRO RAMOS		
MOTHER (INCLUDE PRESENT AND DECEASED PARENT)		
STEPFATHER		
STEPMOTHER		
GUARDIAN		

DATE	OCCUPATION OF PARENT OR GUARDIAN	RELATIONSHIP

10. ADDRESSES

DATE	HOME ADDRESS	PHONE
	216 SO. GAG. LOS ANGELES 63	

DATE	BUSINESS ADDRESS	PHONE

11. HOME BACKGROUND

DATE	
	LANGUAGE BACKGROUND
	SIBLINGS—OLDER
	SIBLINGS—YOUNGER
	OTHER DATA

YEAR FIRST REPORTED FOR STATE GIFTED PROGRAM _____

12. SCHOLASTIC CAPACITY TESTS

INTELLIGENCE AND ACHIEVEMENT TEST RESULTS RECORDED AS A SINGLE DIGIT ARE ON A STANINE SCALE FROM 1 (LOW) TO 9 (HIGH)

DATE	GRADE	TEST (NAME, LEVEL, FORM)	C. A.	VERBAL INDEX	NON-VERBAL INDEX	TOTAL INDEX

DATE	GRADE	TEST (NAME, LEVEL, FORM)	C. A.	VERBAL INDEX	NON-VERBAL INDEX	TOTAL INDEX

13. APTITUDE AND INTEREST MEASURES

14. EDUCATIONAL ACHIEVEMENT TESTS

DATE	GRADE	TEST (NAME, LEVEL, FORM)	C. A. TO DATE	INDEX	GR. PL. TO DATE	READING		ARITHMETIC		LANG.	SPELL	OTHER TESTS
						VOCAB	COMPR	READ	FUND			

15. HEALTH HC 9/30

[redacted]

JUNIOR HIGH

SENIOR HIGH

SEVENTH

EIGHTH

NINTH

TENTH

ELEVENTH

TWELFTH

17. REFERRALS TO SCHOOL SERVICES OR COMMUNITY AGENCIES (DATE AND SIGN EACH ENTRY)

18. HONORS AND AWARDS (DATE AND SIGN EACH ENTRY)

19. OTHER NOTES (DATE AND SIGN EACH ENTRY)

F

IAL DATE IS VACATED.
URT ORDERS AND FINDINGS:
HE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.
ES STATUTORY TIME.
SCHEDULED EVENT:
./15/01 830 AM PRETRIAL CONF/TRIAL SETTING DIST NORTHEAST DEPT NEJ

ODY STATUS: DEFENDANT REMANDED

1/15/01 AT 830 AM IN NORTHEAST DEPT NEJ

SE CALLED FOR PRETRIAL CONF/TRIAL SETTING
IES: JANICE CLAIRE CROFT (JUDGE) DENIS LEEDS (CLERK)
SUSAN L. VELASQUEZ (REP) PATRICIA K DOYLE (DDA)
DEFENDANT IS PRESENT(IN LOCK UP) AND REPRESENTED BY MARK D. LICKER DEPUTY
BLIC DEFENDER
SET AT $70,000

SCHEDULED EVENT:
N MOTION OF DEFENDANT
/26/01 830 AM DISC COMPL/PTC/TRIAL STG DIST NORTHEAST DEPT NEJ
SCHEDULED EVENT 2:
N MOTION OF DEFENDANT
/10/01 830 AM JURY TRIAL DIST NORTHEAST DEPT NEJ

ODY STATUS: DEFENDANT REMANDED

1/26/01 AT 830 AM IN NORTHEAST DEPT NEJ

SE CALLED FOR DISC COMPL/PTC/TRIAL STG
IES: JOSEPH F DE VANON (JUDGE) GERALD BERNI (CLERK)
SHARON BOYER (REP) PATRICIA K DOYLE (DDA)
DEFENDANT IS PRESENT(IN LOCK UP) AND REPRESENTED BY MARK D. LICKER DEPUTY
BLIC DEFENDER
SET AT $70,000
SCOVERY IS COMPLIED WITH THIS DATE.
IAL DATE OF 12/10/01 TO STAND.
URT ORDERS AND FINDINGS:

HE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.
SCHEDULED EVENT:
/10/01 830 AM JURY TRIAL DIST NORTHEAST DEPT NEJ

ODY STATUS: DEFENDANT REMANDED

2/10/01 AT 830 AM IN NORTHEAST DEPT NEJ

SE CALLED FOR JURY TRIAL
IES: JOSEPH F DE VANON (JUDGE) NANETTE NAVAL (CLERK)
SHARON BOYER (REP) MELISSA MARSHALL (DA)
NDANT IS PRESENT IN COURT, AND REPRESENTED BY MARK D. LICKER DEPUTY PUBLIC
FENDER
SET AT $70,000
IAL IS TRAILED TO 12-14-01.
URT ORDERS AND FINDINGS:
HE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.
SCHEDULED EVENT:

30 AM JURY TRIAL DIST NORTHEAST DEPT NEJ

AT S: DEFENDANT REMANDED

/0 AT 830 AM IN NORTHEAST DEPT NEJ

.LED FOR JURY TRIAL
JOSEPH F DE VANON (JUDGE) NANETTE NAVAL (CLERK)
SHARON BOYER (REP) PATRICIA K DOYLE (DDA)
=F NDANT IS PRESENT(IN LOCK UP) AND REPRESENTED BY MARK D. LICKER DEPUTY
DEFENDER
T AT $70,000
IE COURT FINDS THIS CASE IS 9/10 TODAY AND ORDERS IT
SFERRED FORTHWITH TO DEPT NEE FOR TRIAL ASSIGNMENT. THE
ENDANT IS ORDERED TO APPEAR IN THE ABOVE DEPARTMENT
.THWITH. COURT CLERK TO TRANSPORT THE COURT FILE.
JRT ORDERS AND FINDINGS:

HE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.
SCHEDULED EVENT:
/14/01 1030 AM JURY TRIAL DIST NORTHEAST DEPT NEE

ODY STATUS: DEFENDANT REMANDED

2/14/01 AT 900 AM :
CLARATION AND ORDER RE FEES: AMOUNT PAID $45.00
AIM NUMBER U-939564

2/14/01 AT 1030 AM IN NORTHEAST DEPT NEE

SE CALLED FOR JURY TRIAL
ES: TERI SCHWARTZ (JUDGE) ROBIN BARNHART (CLERK)
KATHERINE INGERSOLL (REP) PATRICIA K DOYLE (DDA)
IDANT IS PRESENT IN COURT, AND REPRESENTED BY MARK D. LICKER DEPUTY PUBLIC
ENDER
EOPLE'S MOTION, COURT ORDERS INFORMATION AMENDED BY INTERLINEATION TO ADD

LATION 602(J) PC MISD -TRESPASS:INJURE PROPERTY AS COUNT 02.
DANT ADVISED OF AND PERSONALLY AND EXPLICITLY WAIVES THE FOLLOWING RIGHTS:
BY COURT AND TRIAL BY JURY
NFRONTATION AND CROSS-EXAMINATION OF WITNESSES;
BPOENA OF WITNESSES INTO COURT TO TESTIFY IN YOUR DEFENSE;
AINST SELF-INCRIMINATION;
DANT ADVISED OF THE FOLLOWING:
NATURE OF THE CHARGES AGAINST HIM, THE ELEMENT OF THE OFFENSE IN THE
MATION AND POSSIBLE DEFENSES TO SUCH CHARGES;
POSSIBLE CONSEQUENCES OF A PLEA OF GUILTY OR NOLO CONTENDERE, INCLUDING
E MAXIMUM PENALTY AND ADMINISTRATIVE SANCTIONS AND THE POSSIBLE LEGAL
ECTS AND MAXIMUM PENALTIES INCIDENT TO SUBSEQUENT CONVICTIONS FOR THE
IE OR SIMILAR OFFENSES;
EFFECTS OF PROBATION;
U ARE NOT A CITIZEN, YOU ARE HEREBY ADVISED THAT A CONVICTION OF THE

H YOU HAVE BEEN CHARGED WILL HAVE THE CONSEQUENCES OF
CLUSION FROM ADMISSION TO THE UNITED STATES, OR DENIAL OF
IO PURSUANT TO THE LAWS OF THE UNITED STATES;
S THAT EACH SUCH WAIVER IS KNOWINGLY, UNDERSTANDINGLY, AND
E; COUNSEL JOINS IN THE WAIVERS
ITH THE COURTS APPROVAL, PLEADS NOLO CONTENDERE TO COUNT 02 A
O SECTION 602(J) PC. THE COURT FINDS THE DEFENDANT GUILTY.
ISPOSITION: CONVICTED
HAT THERE IS A FACTUAL BASIS FOR DEFENDANT'S PLEA, AND COURT
P EA.
P' AMEND THE INFORMATION BY INTERLINEATION TO ADD A

NDANT WAIVES FURTHER PROBATION REFERRAL AND THE COURT
D CONSIDERS THE PRE-PLEA REPORT.
DF ENDANT WAIVES TIME FOR SENTENCING AND REQUESTS IMMEDIATE
CING.
EDULED EVENT:
N7 NCING

ENDANT WAIVES ARRAIGNMENT FOR JUDGMENT AND STATES THERE IS NO LEGAL CAUSE
SENTENCE SHOULD NOT BE PRONOUNCED. THE COURT ORDERED THE FOLLOWING
DGMENT:
O COUNT (02):
SITION OF SENTENCE SUSPENDED
NDANT PLACED ON SUMMARY PROBATION
R A PERIOD OF 002 YEARS UNDER THE FOLLOWING TERMS AND CONDITIONS:
RVE 180 DAYS IN LOS ANGELES COUNTY JAIL
ADDITION:
HE DEFENDANT IS TO PAY A RESTITUTION FINE PURSUANT TO SECTION
1202.4(B) PENAL CODE IN THE AMOUNT OF $ 100.00.
TAY AWAY FROM AND HAVE NO CONTACT WITH ANY OF THE VICTIMS OR
THE WITNESSES IN THIS CASE. DEFENDANT IS TO STAY AWAY FROM AND
HAVE NO CONTACT WITH MR. AND MRS. PENA AND STAY AWAY FROM THE
533 W. MARIPOSA ADDRESS.
BEY ALL LAWS AND ORDERS OF THE COURT.
FENDANT IS GIVEN CREDIT FOR 180 DAYS OF CUSTODY TIME, THUS
EDIT FOR TIME SERVED.
FENDANT IS ORDERED TO SEE A DOCTOR FOR PSYCHOLOGICAL NEEDS
) TO TAKE ALL MEDICATIONS PRESCRIBED BY THAT DOCTOR.

FENDANT IS ORDERED TO RETURN TO THIS COURT ON 2/13/02 WITH
OF OF PROGRESS FROM THE DOCTOR HE IS SEEING.
(02): DISPOSITION: CONVICTED
NING COUNTS DISMISSED:
UNT (01): DISMISSED DUE TO PLEA NEGOTIATION
BSTRACT NOT REQUIRED
SCHEDULED EVENT:
13/02 830 AM PROGRESS REPORT DIST NORTHEAST DEPT NEE

DY-STATUS: DEFENDANT RELEASED

/09/02 AT 100 PM :
INARY TRANSCRIPT FILED

13/02 AT 830 AM IN NORTHEAST DEPT NEE

CALLED FOR PROGRESS REPORT
S: TERI SCHWARTZ (JUDGE) ROBIN BARNHART (CLERK)

KATHERINE INGERSOLL (REP) STEVEN M BARSHOP (DDA)
CASE ENT IN COURT, AND REPRESENTED BY MARK D. LICKER DEPUTY PUBLIC
PARTIES
ION IS CONTINUED ON THE SAME TERMS AND CONDITIONS.
FEND/ ORDERED TO RETURN TO THIS COURT ON 3/14/02 WITH
DEFE IE DEFENDANT IS RECEIVING PSYCHIATRIC CARE AND THAT
NELL F IN PRESCRIBED MEDICATIONS.
TH (S AND FINDINGS:
THE ORDERS THE DEFENDANT TO APPEAL ON THE NEXT COURT DATE.
FIL D ED EVENT:
PRC 02 830 AM PROGRESS REPORT DIST NORTHEAST DEPT NEE
THI
CO ATUS: ON PROBATION
T
EXT
/02 AT 900 AM :
ATION AND ORDER RE FEES: AMOUNT PAID $300.00
AI NUMBER S-864936

3/14/02 AT 830 AM IN NORTHEAST DEPT NEE

SE CALLED FOR PROGRESS REPORT
ES: TERI SCHWARTZ (JUDGE) ROBIN BARNHART (CLERK)
KATHERINE INGERSOLL (REP) STEVEN M BARSHOP (DDA)
NDANT IS PRESENT IN COURT, AND REPRESENTED BY MARK D. LICKER DEPUTY PUBLIC
FENDER
MMARY PROBATION IS CONTINUED ON THE SAME TERMS AND CONDITIONS.
D, FENDANT IS ORDERED TO PROVIDE PROOF OF PSYCHOLOGICAL
EATMENT AT THE NEXT HEARING DATE OF 9/17/02.
URT ORDERS AND FINDINGS:
HE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.
SCHEDULED EVENT:
/17/02 830 AM PROGRESS REPORT DIST NORTHEAST DEPT NEE
DY STATUS: ON PROBATION

/17/02 AT 830 AM IN NORTHEAST DEPT NEE

E CALLED FOR PROGRESS REPORT
S: TERI SCHWARTZ (JUDGE) JENNIFER BEEAL (CLERK)
KATHERINE INGERSOLL (REP) STEVEN M BARSHOP (DDA)
NT IS PRESENT IN COURT, AND REPRESENTED BY MARK D. LICKER DEPUTY PUBLIC
ER
ND COUNSEL CONFER.
AT ON IS CONTINUED SAME TERMS AND CONDITIONS.
TS THE MATTER FOR A PROGRESS REPORT ON 3/17/03.
DERS AND FINDINGS:
T ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.
DL ED EVENT:
830 AM PROGRESS REPORT DIST NORTHEAST DEPT NEE
13/(
L : ON PROBATION

EBY
FILE 830 AM IN NORTHEAST DEPT NEE
N A. (
ES,

_____, DEPUTY

DEPARTMENT OF PUBLIC SOCIAL SERVICES

IN-HOME SUPPORTIVE SERVICES
EEDS ASSESSMENT-FACE AND DOCUMENTATION WORK SHEET

N ORMATION

	CASE NO.	DATE
Enrique	1968-8261272-1	9-15-00
IO ... en R Euclid	IHSS COMPANION CASE(S), NAME(S) AND NUMBERS: None	
... Durolar		
ON TIONS, MEDICAL/SOCIAL PROBLEMS: ...zophrenia, anxiety ... R and knee problem	EMERGENCY CONTACTS/INSTRUCTIONS: Guadalupe Jimenez - friend/ lives at ... provider	

...and fell on 7/29/00 and suffered broken R wrist till wears cast, forgetful.

MEDICAL INFORMATION

	Address	Telephone
...an: Dr. Huan Nguyen	5400 E. Olympic Blvd. City of Commerce	(323) 725-755
...ian: Dr. Cathleen Godzik	2300 S. Flower St. #301 LA	(213) 742-157
...ian		( )

DICATIONS	PURPOSE	MEDICATIONS	PURPOSE
...sico - bifle		4. Ranitidine HCl	
aspirin		5. Hydrocodone	
Tylenol		6. Almacone	

OTHER PERSONS IN HOUSEHOLD

NAME	AGE	RELATIONSHIP	RECEIVE IHSS YES	RECEIVE IHSS NO	HOURS AT SCHOOL/WORK	REASON PERSON CANNOT PROVIDE IHSS TO RECIPIENT
...uadalupe Jimenez	74	friend		✓	N/A	provider

SERVICES	TOTAL NEED	ADJ	ALT HRS	AUTH HRS	COMMENTS ALTERNATE RESOURCES Prorated by 2
OMESTIC SERVICES (STATE GUIDELINES)	6.00	3.00		3.00	state std.
REPARATION OF MEALS –	7.00	3.50		3.50	3 meals / 7 days
IEAL CLEAN UP	2.45	1.22		1.23	3 meal clean up / 7 days
IOUTINE LAUNDRY, ETC (STATE GUIDELINES)	1.50	.75		.75	State std.
HOPPING FOR FOOD (STATE GUIDELINES)	1.00	.50		.50	State std.
THER SHOPPING AND ERRANDS (STATE GUIDELINES)	.50	.25		.25	State std.
HEAVY CLEANING					

KER	FILE NO.	TELEPHONE	AREA OFFICE
Rena Marcos	3250	(323) 727-4176	74

...-HOME SUPPORTIVE SERVICES
...S ASSESS...ENT-FACE AND DOCUMENTATION WORK SHEET

...F ...ATION

DOB: 05/25/57

...nriquez ...

CASE NO.	DATE
1966 826/272	9/30/99

IHSS COMPANION CASE(S), NAME(S) AND NUMBERS: —0—

...S. MEDICAL SOCIAL PROBLEMS

...izophrenia — ...inson's disease, ...n anxiety, heart burn, arthritis of knee & back, ambulate with a cane

EMERGENCY CONTACTS INSTRUCTIONS:

Carmen Ramos (mother)
213/265-4116

...DICAL INFORMATION

		ADDRESS	TELEPHONE
...	Huan Nguyen	V.A. Hospital	
...	Amanat Abraham		
...			

...EDICATIONS	PURPOSE	MEDICATIONS	PURPOSE
Aspirin 81 mg.		acetaminophen 500 g	arthritis/pain
Ranitidine HCL 150 mg	Heart...		
Lorazepam 1 mg.	Anxiety		

OTHER PERSONS IN HOUSEHOLD

NAME	AGE	RELATIONSHIP	RECEIVE IHSS YES	RECEIVE IHSS NO	HOURS AT SCHOOL WORK	REASON PERSON CANNOT PROVIDE IHSS TO RECIPIENT
None						

SERVICES	TOTAL NEED	ADJ	ALT HRS	AUTH HRS	COMMENTS ALTERNATE RESOURCES
DOMESTIC SERVICES (STATE GUIDELINES)	6.00			6.00	State Std. Explain deviation
PREPARATION OF MEALS	7.00			7.00	Needs 3 meals/da. 7 days/wk. B. 15 min/occ. L. 15 min/occ. D 20 min/...
MEAL CLEAN UP	2.45			2.45	Needs 3 clean up/da. 7 days/wk. B. 5 min/occ. L 6 min/occ. D 10 min/o...
...OUTINE LAUNDRY, ETC (STATE GUIDELINES)	1.50			1.50	State Std.
SHOPPING FOR FOOD (STATE GUIDELINES)	1.00			1.00	State Std.
...THER SHOPPING AND ERRANDS (STATE GUIDELINES)	.50			.50	State Std.
...EAVY CLEANING					
				18.45	

...ORKER	FILE NO.	TELEPHONE	AREA OFFICE
...udone Vonghack	3234	727-1624	70

IN-HOME SUPPORTIVE SERVICES
NEEDS ASSESSMENT-FACE AND DOCUMENTATION WORK SHEET

INFORMATION

DOB: 05/25/57 ... ique SEX: ♀	CASE NO. 1966-8261272	DATE 9/15/98
	IHSS COMPANION CASE(S) NAME(S) AND NUMBERS: 0	
... MEDICAL SOCIAL PROBLEMS	EMERGENCY CONTACTS INSTRUCTIONS: Carmen Ramos (Mother) 213/265-4116	

...son's disease, high ...iety, schizophrenia, heart burn, arthritis ... knees & back, ambulate with a cane

MEDICAL INFORMATION

Dr. Huan Nguyen	Address: V.A. Hospital	Telephone	
... Amand Abraham	Address	Telephone	
	Address	Telephone	

MEDICATIONS	PURPOSE	MEDICATIONS	PURPOSE
Risperdal 2mg	Hallucination	Acetaminophen 500mg	Ache/pain
...almacine	Heart burn	Lorazepam 1mg	Anxiety
...ndale Capsaicin 0.025%	Arthritis		

OTHER PERSONS IN HOUSEHOLD

NAME	AGE	RELATIONSHIP	RECEIVE IHSS YES	RECEIVE IHSS NO	HOURS AT SCHOOL/WORK	REASON PERSON CANNOT PROVIDE IHSS TO RECIPIENT
None						

SERVICES	TOTAL NEED	ADJ	ALT HRS	AUTH HRS	COMMENTS ALTERNATE RESOURCES
DOMESTIC SERVICES (STATE GUIDELINES)	6.00			6.00	State Std. Explain deviation
PREPARATION OF MEALS	7.00			7.00	Needs 3 meals/da. 7 days/wk. B. 15 min/occ. L. 15 min/occ. D 25 min/...
MEAL CLEAN UP	3.47			3.47	Needs 3 clean up/da. 7 days/wk. B. 5 min/occ. L 6 min/occ. D 10 min/o...
ROUTINE LAUNDRY, ETC (STATE GUIDELINES)	1.00			1.00	State Std.
SHOPPING FOR FOOD (STATE GUIDELINES)	1.00			1.00	State Std.
OTHER SHOPPING AND ERRANDS (STATE GUIDELINES)	.50			.50	State Std.
HEAVY CLEANING				12.47	

WORKER	FILE NO.	TELEPHONE	AREA OFFICE
...udone Vonghack	3234	727-1624	70

…-HOME SUPPORTIVE SERVICES
…S ASSESS… NT-FACE AND DOCUMENTATION W… RK SHEET

…ATION

DOB: 5/25/57

que …

CASE NO. 1966-826272

DATE 9/19/97

IHSS COMPANION CASES, NAMES, AND NUMBERS:

⊖

MEDICAL SOCIAL PROBLEMS

…son's disease, anxiety, …zophrenia, heart burn, arthritis of knee & …k, ambulate with a cane

EMERGENCY CONTACTS INSTRUCTIONS:

Carmen Ramos (mother) (213) 265-4116

…CAL INFORMATION

	ADDRESS	TELEPHONE
…r O. Kalman	5400 E. Olympic Bl. Commerce	213 894-5360
	ADDRESS	TELEPHONE
	ADDRESS	TELEPHONE

MEDICATIONS	PURPOSE	MEDICATIONS	PURPOSE
…spirin 325 mg.	Ache/Pain	Lorazepam 1 mg.	Anxiety
…speridone 2 mg.	Hallucination	Maalox - Antacid	Heart burn
…taminophen cody.	Arthritis	Benz Tropine Mesylate 2 mg.	Spasm

OTHER PERSONS IN HOUSEHOLD

NAME	AGE	RELATIONSHIP	RECEIVE IHSS YES	RECEIVE IHSS NO	HOURS AT SCHOOL WORK	REASON PERSON CANNOT PROVIDE IHSS TO RECIPIENT
⊖						

SERVICES	TOTAL NEED	ADJ	ALT HRS	AUTH HRS	COMMENTS ALTERNATE RESOURCES
…MESTIC SERVICES (…ATE GUIDELINES)	6.00			6.00	State Std. Explain deviation
…EPARATION OF MEALS	7.00			7.00	Needs 3 meals/da. 7 days/wk. B. 15 min/occ. L. 15 min/occ. D 20 min/…
…EAL CLEAN UP	[illegible]			3.00	Needs 3 clean up/da. 7 days/wk. B. 5 min/occ. L 5 min/occ. D 10 min/o…
…UTINE LAUNDRY, ETC (…ATE GUIDELINES)	1.00			1.00	State Std. [illegible]
…HOPPING FOR FOOD (STATE GUIDELINES)	1.00			1.00	State Std.
…ER SHOPPING AND ERRANDS (…TATE GUIDELINES)	.50			.50	State Std.
…VY CLEANING				17.45	

	FILE NO.	TELEPHONE	AREA OFFICE
…one Vonghack	3234	727-1624	# 70

IS HELD TO ANSWER

CEL

N 06

IN THE MUNICIPAL COURT OF EAST LOS ANGELES JUDICIAL DISTRICT,
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

A962236
HE PEOPLE OF THE STATE OF CALIFORNIA VS.
NDANT 01: ENRIQUE MORENO RAMOS
3708 5TH
LA, CA
DOB 05/25/57 OLN VLN
ENFORCEMENT AGENCY EFFECTING ARREST: LOS ANGELES COUNTY SHERIFF

BAIL: APPEARANCE DATE	AMOUNT OF BAIL	DATE POSTED	RECEIPT OR BOND NO.	SURETY COMPANY	REGISTER NUMBER

SE FILED ON 01/05/88.
OMPLAINT FILED, DECLARED OR SWORN TO CHARGING DEFENDANT WITH HAVING
MMITTED, ON OR ABOUT 01/01/88 IN THE COUNTY OF LOS ANGELES, THE FOLLOWING
FENSE(S) OF:
COUNT 01: 245(A)(1)PC FEL - ASSAULT W DEADLY WEAPON/INSTR..
XT SCHEDULED EVENT:
01/05/88 900 AM ARRAIGNMENT DIST EAST LOS ANGELES DIV 005

SE CALLED FOR ARRAIGNMENT
ON 01/05/88 AT 900 AM IN EAST LOS ANGELES DIV 005
RTIES: COMR HAROLD STANLEY (JUDGE) LEANELLA MCMAHAN (CLERK)
SUSAN SMITH (REP) KELLYJEAN CHUN ()
FENDANT PRESENT, AND WAS REPRESENTED BY RICARD GOMEZ PRIVATE COUNSEL
XT SCHEDULED EVENT:
01/08/88 900 AM BAIL REVIEW DIST EAST LOS ANGELES DIV 005
EXT SCHEDULED EVENT 2:
01/19/88 900 AM PRELIMINARY HEARING DIST EAST LOS ANGELES DIV 005

ASE CALLED FOR PRELIMINARY HEARING
ON 01/19/88 AT 900 AM IN EAST LOS ANGELES DIV 005
OUNT (01): DISPOSITION: HELD TO ANSWER
OUNT (01): DEFENDANT IS HELD TO ANSWER

ABSTRACT NOT REQUIRED.
EXT SCHEDULED EVENT:
PROCEEDING TERM & CLDR CANCEL

0 06

116N

[redacted]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

GLOBE TICKET AND LABEL COMPANY M-00033

PEOPLE vs	CENTRAL	Bench Warrant		CASE NO. A 962236			
BI/OR	X. 197155	Iss.	Svd/ Rcld	Bond No.	Forf	Rein	Exon
MOS ENRIQUE MORENO A1 12000	DEFT'S ATTY: B. Connell K. Kroner Ahe						
	X.						
	DEFT'S ATTY:						
	X.						
	DEFT'S ATTY:						

Info/Indic/Cert of GP filed & set: 02 04 88	DEPT 16N	TRIAL JUDGE:	
Date of Crime: 01 01 88		PEOPLE'S ATTORNEY:	STATUS

A962236

DEPT.	DATE	CHRONOLOGICAL INDEX OF COURT PROCEEDINGS	STATUS
116N	2-4-88	Crol FTA A&P Cont 2-5-88 3/116N	Held
116N	2-5-88	Arraigned Plea NG PTC/TS 2-26-88 3/116N	Held
116N	2-26-88	PTC/TS 1/13.3 3-21-88 3/116N	Held
116N	3-21-88	Cop - PTS - Proc Susp 3 yrs Prob w/fab	
	4-25-88	122 CT Cr 122 (41 Jr) Rel'd #245677	Prob
116N	4-20-88	8D, 04956 Murphy, + bal & Pd 362 50	
116N	2-27-90	Prob cont STC + mod	PROB
116N	6-18-01	Pursuant to 17 PC; Misdem; Terminate pursuant to 1203.3 PC; Case dismissed 1203.4 PC.	

G

COUNTY OF ~~TRAVIS~~ HIDALGO)
)
)
STATE OF TEXAS) IN RAMOS V. QUARTERMAN
)

DECLARATION OF KYLE WELCH

I, Kyle Welch, swear upon pain and penalty of perjury that:

1. I am a criminal defense attorney in McAllen, Texas. I have been licensed to practice law in the State of Texas, since 1978, Bar No. 21124300.

2. I represented Roberto Moreno Ramos in his state post-conviction and federal habeas proceedings beginning with my appointment by the Texas Court of Criminal Appeals on November 2, 1996.

3. The Texas legislature had just put Article 11.071 into effect, which set out the procedures for capital state post-conviction proceedings and gave indigent death row inmates who had not yet filed a petition under the old statute the right to counsel.

4. At the time, I was a solo practitioner doing primarily criminal defense, but this was my only capital post-conviction case. I do not recall how I came to be appointed by the CCA. There was no capital certification process at the time.

5. If there were capital defense manuals, sample pleadings, resource counsel, consultants or other assistance available to counsel appointed to capital state post-conviction cases at that time, I was unaware of it. I did not have any resource or consulting help.

6. I do recall attending a CLE at UT Law School regarding capital cases at some point, but I do not recall the date or if it was for cases at the trial level or the post-conviction level. I had previously represented one capital defendant at the trial level and on direct appeal.

7. What I remember most is that, at the time I was appointed to represent Mr. Moreno Ramos, on November 22, 1996, the state writ application was due on May 21, 1997, just six months later. I got an additional 90 days extension after that. So, I had only 9 months to prepare the 11.071 Application for Post-Conviction Relief.

8. I did not seek funding for any investigative or expert assistance. I did not have a mitigation specialist, fact investigator, or co-counsel. I did not have any mental health evaluation of Mr. Moreno Ramos. I spoke with the trial counsel in the case but did not conduct any other investigation or interviews. I believe that I met Mr. Moreno Ramos twice, but do not recall the dates or if it was before or after filing the initial state PCR writ application. I did not meet any of Mr. Moreno Ramos' family nor collect primary records regarding his life history and family background.

9. I don't know what my understanding was at the time regarding the use of post-conviction litigation to prepare and present extra-record claims. I don't know if the lack of extra-record investigation was because I didn't know it was necessary or because I didn't have the time or resources. I think it must have been a combination of both. But, I do know that the lack of extra-record investigation was not a strategic choice on my part. There was no factual or legal reason to avoid investigation of the crime or of Mr. Moreno Ramos' life history. There was no factual or legal reason to avoid conducting a mental health evaluation.

10. At the time, I did not have the experience, training, assistance, resources or time to do what I now understand is necessary. I was simply not equipped to handle this case the way it should have been handled.

11. After the state post-conviction application was denied, I was appointed to represent Mr. Moreno Ramos in federal habeas proceedings. I did not seek funds for any investigative or expert assistance in federal court. Nor did I have Mr. Moreno Ramos evaluated.

12. I did not have a mitigation specialist or fact investigator. I did not conduct any investigation of the crime or of Mr. Moreno Ramos' life history myself.

13. As with the state 11.071 application, I did not have any strategic reason for filing only record-based claims in the 2254 petition.

14. At the time I prepared and filed the federal habeas petition, I had no co-counsel. After Respondent had moved for summary judgment, I did briefly have a co-counsel, Richard Bruce Gould. When the Magistrate recommended that summary judgment be granted, Mr. Gould moved to withdraw.

15. After the federal district court denied relief and COA, the case moved into the Fifth Circuit. Around that time, I took a job with the federal public defender and moved to withdraw. I was replaced by David Sergi and Larry Warner.

I swear upon pain and penalty of perjury that the foregoing statement is true and complete to the best of my knowledge and understanding.

Kyle B. Welch

Signed and sworn this _26th__ day of November, 2014

COUNTY OF LOS ANGELES)
)
) IN RE: ROBERTO MORENO RAMOS
)
STATE OF CALIFORNIA)

DECLARATION OF DR. RICHARD C. CERVANTES

I, RICHARD C. CERVANTES, Ph.D., declare as follows:

1. I am the Director of Research at Behavioral Assessment, Inc. in Los Angeles, California. In this capacity, I have been retained by Sandra Babcock, an attorney for the Government of Mexico, to evaluate Roberto Moreno-Ramos' social history and background.

2. I currently hold an appointment as Senior Research Fellow at the California State University, Long Beach, in the Department of Psychology, Center for Behavioral Research and Services. I also serve as a consultant to the U.S. State Department, through the United States Embassy in Mexico City, where I advise on topics related to high risk youth, delinquency and crime prevention among Mexican youth, and prevention of gang-related violence in the southern regions of Mexico.

3. I am a member in good standing of the American Orthopsychiatric Association, and the American Association of Applied and Preventive Psychology, the American Psychological Society, and received an American Psychological Association award as "Promising Young Research Scientist" from Division 45. I currently am a member of the Hispanic High Risk Youth Cluster Steering Committee, United States Center for Substance Abuse Prevention, Alcohol Abuse and Mental Health Administration.

4. I received a Bachelor's degree in business administration and psychology in 1978, a Master's degree in clinical psychology in 1982, and a Ph.D in clinical psychology in 1984 from Oklahoma State University.

5. Following my educational training, I was employed as a Staff Psychologist at the Didi Hirsch Community Mental Health Center in Culver City, California for five years. From 1984 through 1989, I was an Assistant Research Psychologist at the Spanish Speaking Mental Health Research Center at UCLA. From 1988 to 1990, I was an Assistant Professor and Coordinator of Community/Clinical Track at the California School of Professional Psychology.

6. From 1990 to 1995, I served as an Assistant Professor in the Department of Psychiatry and the Behavioral Sciences at the University of Southern California. I was also the Associate Director of Clinical Psychology Training at USC Medical Center. As part of my work, I conducted psychological evaluations of police officers for the Los Angeles County District Attorney's Office. My professional clinical experience also included serving as a psychologist

for the Oklahoma Department of Corrections, a Pre-Doctoral Intern at the Didi Hirsch Community Mental Health Center in Culver City, California, and as a Diagnostic Technician for the Tulsa Headstart Program.

7. My professional duties have included providing counseling to survivors of domestic abuse, counseling and referral for poly-substance abuse, and counseling for psychological trauma caused by exposure to violence and stressful situations. In addition, I have conducted over 200 psychological evaluations of patients suffering from severe emotional and psychological problems, learning disabilities, mental retardation, and other mental impairments. My evaluations have been relied upon by courts, social service agencies, and educational institutions to determine the social service needs of clients. In addition, I have assisted the courts by providing expert testimony in over 30 capital murder cases in California, Arizona, Idaho, Oklahoma and Texas.

8. I have published over two-dozen scholarly articles in medical journals, a book and numerous chapters in professional reference books and have presented over three-dozen papers at local, national, and international conferences. My topics of research include addressing mental health issues in culturally diverse populations, drug and alcohol abuse and prevention research particularly within the Hispanic community, family dynamics and stress, and Hispanic gangs. I have also studied and published on issues related to youth and adult violence and violence prevention in the Hispanic and immigrant community. I am one of the principal authors of the Hispanic Stress Inventory, a psychological test for Hispanic adults.

9. I have been retained to evaluate Roberto Moreno-Ramos' social history and background, with particular attention to his family, educational, cultural, and medical/psychiatric history. The overall purpose of this evaluation is to provide an understanding of the impact of Mr. Moreno Ramos' history on his psychological development and mental health. Specifically, I will consider the effects of the trauma and stresses experienced by Mr. Moreno Ramos in four broad areas:

a) Multi-generational physical and emotional abuse within the family;
b) The breakdown of the family structure, including lack of adequate parenting and neglect of basic needs;
c) The stresses associated with family immigration, life in a high risk border city, and multiple family separations.;
d) Extreme poverty and uncertainty in meeting daily material needs such as food and housing.

10. Additionally, I have been asked to consider any specific social, medical, or mental health interventions that were provided to Roberto Moreno Ramos or other members of his family during his childhood in Mexico, and/or his adolescent years in the United States.

11. In developing this expert declaration I have relied upon multiple sources of information including: the affidavit of Nancy S. Pemberton ("Pemberton's Affidavit"), court records, school records, investigator reports, and personal interviews with close family members. These are the sorts of sources typically relied upon by experts in the mental health fields to

develop an understanding of an individual's social history and background for purposes of diagnosis and/or clinical intervention and treatment.

Cycle of Violence

12. Over the past three decades behavioral scientists have documented the negative impact of the family cycle of violence on social, emotional, and overall health development. C. S. Widom was one of the first to study and define the term "cycle of violence," which refers to the transmission of violence from one family generation to the next through genetic and social means.[1]

13. Roberto Moreno Ramos' family history exemplifies a cycle of severe and persistent violence, coupled with abandonment and neglect. My interviews as well as the interviews reflected in Pemberton's Affidavit disclosed a cycle of violence that began at least two generations before Roberto.

14. As described in Pemberton's Affidavit, Roberto's paternal grandmother, Carmen Sandoval, was a harsh disciplinarian who suffered a lot of hunger and misery herself. She treated some of her children, particularly Roberto's father Pedro, in a very abusive manner: insulting them, throwing objects at them and inflicting myriad other forms of punishment. Carmen Moreno, the defendant's mother, described to me how her mother-in-law would beat the children with a big stick, with her shoes, or with any object that was around, hitting them on the head, face and body.

15. Ramiro Ramos, younger brother of Roberto, described similar memories of his grandmother's abuse. She would hit his siblings and him on the head, face and body with any object that she could put her hands on at that moment. If she could not find anything else, she would take off her shoe and hit them with that. She insulted the children and yelled at them. She treated Roberto and his siblings worse than she treated her other grandchildren; for example, if she gave a peso to each one of her other grandchildren, she would give Roberto and his siblings a single peso that they all had to share.

16. Natividad, one of Roberto's younger sisters, also confirmed to investigators and to me the abusive nature of Carmen Sandoval. As a young child, she personally suffered abuse at her grandmother's hands.

17. Pedro Ramos, father of Roberto, continued the cycle of violence into the next generation. By all accounts, he was a violent and abusive father toward most family members. His abusive behavior followed the pattern experienced during his own childhood and many of the specific forms of the abuse seem to have been "passed on" from one generation to the next. For example, Pedro's half-brother, Jose Ceballos, used to hang Pedro from his thumbs when he was a child. As an adult, Pedro hung his own children, Roberto and his brothers, upside down from a beam. Similarly, just as his mother had specific children that she targeted either for

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[1] Widom C.S. (1989). The cycle of violence. Science, 244,160-166.

generous or for abusive treatment, Pedro singled Roberto and his brother Enrique for the most severe forms of abuse.

18. Pedro abused not only his children but his wife. From early in the marriage until the time of their final separation, Pedro would threaten to hit his wife and, when she challenged him to follow through, he would hit the wall with his fists. On one occasion, he hit the wall so hard he broke his fist. Before long, he began to hit Carmen Moreno herself. The children often heard their father yelling and hitting their mother despite Carmen Moreno's efforts to keep it from them. This abuse started before Roberto's birth and continued throughout his childhood and adolescent years.

19. Pedro was emotionally abusive to his wife by participating in sexual relations with others during their marriage, making little or no attempt to hide these affairs from Carmen. His relationships with other women began when the family lived in Guadalajara and continued throughout the marriage. Pemberton's Affidavit describes one instance where the family was confronted by their father's infidelity when a woman appeared on the doorstep. On another occasion, Pedro took one of his sons, Gustavo, to the movies with another woman whom he hugged and kissed in front of Gustavo. The family attributes Pedro's erratic disappearances from the family home, both in Mexico and the United States, at least in part to his infidelity.

20. Pedro's abuse of his children, graphically described in Pemberton's Affidavit, was confirmed in my personal interviews with family members. Carlos, the eldest brother, recounted to me one particular incident that happened to him when he was 9 years of age. He was getting onto a bus with his father, when a watermelon that he was holding fell and broke on the stairway of the bus. His father started yelling at him, insulting and hitting him with his hand and fist in face and body in front of all passengers; inside the bus nobody did nor said anything.

21. Natividad described an incident when Pedro went to pick up a check, leaving all of the children on their knees with several pages of homework to be learned by the time he came back. Natividad got so nervous that she could not learn anything and, when her turn came to recite the lesson, she burst out crying and wet herself. Her father took his belt off and hit her with it on her legs, arms, and body. On another occasion while living in Los Angeles Pedro came home from work and Natividad, who was always trying to win her father's approval, went to pull his boots off. He told her to get away and when pushing her away hit her in the nose. She had to be treated at the Bonnie Beach medical clinic because her nose would not stop bleeding.

22. Ramiro the younger brother recalls his father hitting him with the belt when Ramiro was as young as 4 to 6 years.

Robert Moreno Ramos as a Victim of Abuse

23. Although the entire family experienced physical and emotional abuse, several family members indicated to me that Roberto and his brother Enrique were the most abused and most affected children in the Moreno Ramos family.

24. I learned in my personal interviews that the physical abuse perpetrated on Roberto began at the age of about four. When his father was home, Roberto would be frequently brutalized, sometimes more than 2 – 3 times a week, for both real and imagined misbehavior. The forms of abuse were torturous, including burning their hands on the stove, holding their heads under water, and hanging Roberto and his brother from a beam by their ankles or thumbs. None of these were appropriate forms of parental discipline and many of them could have resulted in permanent and severe brain injury

25. As is often the case in abusive families, Roberto sought his father's attention and approval despite the horrific abuse. By all accounts, the only positive attention Roberto received from his father was when he got into fights with other boys. His father would reward Roberto with compliments when he behaved aggressively. At the same time, he would taunt his older son Carlos, calling him a chicken and urging him to follow his brother's example of defending himself against neighborhood bullies.

26. Natividad said that their mother would not intervene or protect the children because she feared her husband, who insisted he was the boss and the one giving orders in that house. According to Carlos (eldest son) the mother did intercede a few times, but only when the level of violence the father inflicted caused the boys to be lying semi-conscious on the floor. This utter lack of protection, combined with the unpredictable nature of the abuse, created an atmosphere of constant terror for Roberto and his brothers. They never knew when their father would be home, and, if he was home, when he would be violent; they did know that if he became violent, no one would intervene or protect them.

27. The family reported that nobody ever witnessed the abuse that was going on in their house because when Pedro was home nobody was allowed to come to the house and visit or play. Pedro kept his family isolated from the neighbors and other people in the community. This is a phenomenon often found in abusive families. The isolation not only facilitates the abuse, but also interferes with the normal social development of the children and increases their sense of being different and set apart from their peers. In addition to the effects of the abuse, the isolation can leave the child with lifelong fears of loneliness and abandonment, anger, and a belief in their own unworthiness.

28. In the United States, teachers and health care professionals are trained to look for signs of child abuse. That training is virtually non-existent in Mexico, particularly since parents there are given wide latitude in disciplining their children. Thus, even when Roberto began to act out in school, one of the classic signs of a troubled child, no professional even attempted to speak to his family. Similarly, no teacher or health care professional ever referred Roberto to a social worker or counselor. When Roberto and his family emigrated to East Los Angeles, the overwhelmed public school district likewise failed to notice the telltale signs of abuse or reach out to Roberto and his siblings.

29. The cycle of violence in the Ramos family co-existed with a pattern of abandonment and neglect. Pedro's absences from the family were unannounced and erratic. When home, Pedro provided no emotional sustenance, although the family felt more physically secure from

outside dangers with him around. The family needed Pedro, despite his abusive treatment, for both physical safety and economic survival.

Pre, Post-Migration Stress Mental Health

30. A 2001 study by researchers Carola and Marcelo Suarez-Orozco provides insight into the important psychological and social implications of immigration for the individual and the family group[2]. On the eve of departure, immigrants face an uncertain future with potential for both gains and losses. It is an enterprise that is often carefully planned and never taken lightly. It also involves separation from family members left behind; it involves the loss of culture and the need to learn and adapt to new cultures.

31. Only twenty percent of the children in the Suarez-Orozcos' study came to the United States as part of a complete family unit. Most of the families experienced separation from other family members for a few months to a few years. For many immigrant children, family reunification is a long, painful, and disorienting ordeal.

32. Acculturation is the process of learning new cultural rules and interpersonal expectations.[3] Language is not the only form of communication that immigrants must learn. Social interactions are culturally structured, as well.

33. According to one study, family cohesion and the maintenance of a well-functioning system of supervision, authority, and mutuality are perhaps the most powerful factors in shaping the well-being and the future outcomes of all children-immigrant and nonimmigrant alike.[4] Without a strong family structure, the stress of acculturation is acute.

34. Immigrant groups are socially and economically disadvantaged in many ways. Language, cultural and socio-economic differences found in the United States often give rise to severe emotional problems (including psychosis), alcohol/substance abuse problems and other problems of "adaptation" among immigrant groups. The effects on family relationships and children's mental health can sometimes be devastating, especially where pre-migration family problems have been present.[5]

35. The pre-migration stressors in the Ramos family began in Guadalajara where they left the only home the children knew, and were exacerbated by the family's lengthy stay in Tijuana.

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[2] Suárez-Orozco, C. & Suárez.-Orozco, M. Children of Immigration. (Cambridge: Harvard University Press, 2001)

[3] Padilla, A. M. (Ed.) Acculturation: Theory, models and some new findings. (Boulder, CO: Westview Press, 1980); Berry, J.W. "Psychology of Acculturation," in Nancy Goldenberg and Judy B. Veroff, eds., The Culture and Pshychology Reader. (New York: New York University Press, 1998); Flaskerud J.H. & Uman G. (1996). Acculturation and its effects on self-esteem among immigrant Latina women. Behavioral Medicine; 22(3),123-33),

[4] Earls, F. (1997). As quoted in Tighter, Safer Neighborhoods. Harvard Magazine November/December

[5] Berry, J.W. & Annis, R.C. (1988). Ethnic Psychology: Research and Practice with immigrants, refugees, native peoples, ethnic groups and sojourners. Amsterdam: Swets & Zeitlinger.

36. Pedro took his family from Guadalajara to Tijuana in 1967 and left them there for three years while he lived in Los Angeles and returned to Mexico only on weekends. Roberto and his siblings had to fend for themselves in the strange and hostile environment of Tijuana. Photos of the neighborhood, appended to Pemberton's Affidavit, attest to the extreme poverty and harsh living conditions of the family while living there.

37. According to a report by the Institute for Regional Studies, the average annual population growth for the Tijuana region between 1960-1970 was 7.5%. Much of Tijuana's explosive growth can be accounted for by migration from other areas of Mexico. The rapid population growths, coupled with poor infrastructure, resulted in many families living in extreme poverty conditions in makeshift housing. These conditions are often associated with community and social disintegration that includes high rates of crime, drug trafficking, prostitution, isolated families and, more recently, with human trafficking.

38. Pedro moved his family to the U.S. in 1970 (some legally and some illegally.) They moved into a small, two-bedroom house on Gage Street in Los Angeles. The family was separated to hide the younger children, who had been brought into the U.S. illegally, from immigration authorities. Once reunited, they continued to live in the same house with only two bedrooms for 12 people.

39. Even in Los Angeles, Pedro continued to be an absent father. On two occasions during 1974-1975 Carmen, went to Mexico to find Pedro and bring him back. Both times, he stayed with them for about a month and then left again. He was living with a woman who had been his mistress when Carmen and the children lived in Guadalajara. The children were resentful and angry at their father, because he had abandoned them, and their mother could not make the payments on the house. Pedro finally abandoned the family permanently in 1976, when Roberto was twelve.

40. Pedro's absences left a hole in the family structure. His abandonment of the family was so complete that Ramiro Ramos, who was born in 1966 does not remember his father and does not feel anything at all for him. When he was a child he often told people that his father was dead.

Culturally-Specific Factors in Evaluating the Family

41. In evaluating the social and emotional development of a child, it is critical that mental health professionals take into consideration culturally-specific factors and their effect on individual behavior. To fully understand the effects of his life experiences on Roberto Moreno Ramos, we must place those experiences in their cultural context.

42. Traditional Mexican culture has been described by numerous researchers and clinicians over the past three decades so that a body of literature is widely available to practitioners. For Mexican children and adults, a set of traits has been identified and described.[6]

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[6] Madsen (1964). The Mexican Americans of South Texas. New York: Holt, Rinebart & Winston; Salgado De Snyder, V.N., Cervantes, R.C., Padilla, A.M. (1990). Gender and ethnic differences in psychosocial stress and generalized distress among Hispanics. Sex Roles, 22(7/8), 441-453.

Such traits include "fatalism", "machismo" and "familism". Based on my assessment of the Moreno Ramos family, some aspects of Mexican culture were clearly present (e.g. machismo), while other aspects such as strong family values were notably absent.

43. Fatalism is a set of beliefs strongly influenced by Catholicism where individuals may feel that they have very little control over future events, and that such events are predetermined by a higher being. To some extent, lowered educational striving, increased interpersonal and gang violence, and a focus on the present as opposed to the future, among many Mexican immigrants, have all been attributed to "fatalism" by various researchers. In the Moreno Ramos family, it is clear that Carmen failed to act in her own best interest, and that she failed to prevent the child abuse that occurred for many years within her own family. In addition to the phenomena of "co-dependence" faced by battered women of all cultures, and the limited options imposed upon her by extreme poverty, Carmen operated within a set of culturally-specific fatalistic beliefs that made it difficult for her to imagine that she was capable of bringing change to her family. This resigned acceptance of Pedro's abusive treatment effectively taught the Moreno Ramos children that such violence was inevitable and even normal.

44. Although "machismo" is a term commonly associated with negative traits, historically, the term has encompassed both positive and negative values. Among Mexican men, strong emphasis is placed on physical strength, protection of one's family, self-respect, and seeing to the financial security of the family. However, when men, particularly those exposed to violence during childhood, feel unable to fulfill these roles because of economic disadvantage, the "dominant" role reserved for men in Mexican families can often result in destructive and sadistic behavior toward their family members. Such behavior is exacerbated by, alcohol or substance abuse, poverty, and stress.

45. Pedro Ramos was, by all accounts, a violent and domineering man who embodied the worst traits of "machismo." As Roberto's primary male role model he inevitably encouraged these traits in his son. Roberto would have been strongly inclined to emulate his father's behavior, given that his family's isolation precluded Roberto from being exposed to healthier male role models to counteract this influence.

46. "Familism" refers to the strong family values which characterize Mexican culture. Within the culture, children are taught to honor and respect the family regardless of any other outside factors or influences. The needs, wants, expectations and desires of the entire family are put before the individual's needs, and in times of need extended family members can often be counted on to help. "Familism" is considered one of the most positive traits of Mexican culture, and one that is often critical in the Mexican immigrant community particularly during the initial period of cultural and economic adjustment

47. Unfortunately, Roberto's parents failed to impart the values of familism to their children. Indeed, the Moreno Ramos family demonstrated a clear lack of strong family values or strong family ties. Pedro lived a nomadic life style and often spent long periods away from his own family, leaving them destitute, only to return to inflict violence and abuse on his wife and children. Each family member that I interviewed indicated a lack of warmth, nurturing or closeness among family members. The Moreno Ramos family appeared to have no strong social

support network or "extended family ties", making adaptation to a new culture very difficult and emotionally stressful. The process of "acculturation" for the Moreno Ramos family was thus not mitigated by strong family ties as is often the case in immigrant communities. Rather, the dislocation exacerbated the breakdown of this family that had already begun in Mexico, and left the members of the family unprotected in dealing with the stresses and uncertainty of their dislocation.

48. The Moreno Ramos family experienced many painful and disorienting family reunifications.[7] Fear, anxiety and desperation were characteristic responses of the children to reunification upon their father's many returns from Mexico, although as is noted below, the family experienced a similarly paralyzing insecurity when Pedro was away.

49. Recent research now suggests that acculturation problems can serve as the basis of the development of psychiatric conditions and various forms of stress disorders. In my previous research (Cervantes, Padilla, and Salgado, 1991) family related immigration stress was found to be highly correlated with symptoms of depression, anxiety, and somatic problems in recent immigrants. It is my opinion that pre-migration family conflicts among the Moreno Ramos family were worsened by post-migration acculturation difficulties.

50. Information about the unique difficulties of immigration and post-immigration adjustment, particularly as it affects Mexican immigrants, was available at the time of Roberto's original trial in the research of numerous experts dating, for example, back to the 1970's[8], the 1980's[9]), and 1990's[10]. This research could have been relied on to develop mitigation themes and expert testimony on behalf of Mr. Moreno Ramos and to present the jury with evidence of the pre-migration stressors, decisions about immigration, the immigration process, the effect of immigration on the Moreno Ramos family, and on Mr. Moreno Ramos.

Risk Factors Associated with Poverty

51. Psychological research has long established that children in poverty are disproportionately exposed to adverse social and physical environmental conditions. Gary Evans (Evans 2004), in consolidating these findings, has identified a host of risk factors, which children in poverty were more likely to be exposed to than children from wealthier families:

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[7] *See* Carola and Marcelo M. Suárez-Orozco (2001), *supra*

[8] Padilla, A. M., Ruiz, R. A., & Alvarez, R. (1975). Community mental health services for the Spanish speaking/surnamed population. American Psychologist,30, 892-905.

[9] Cervantes, R.C. & Castro, F.G. (1985). Stress, Coping, and Mexican American Mental Health: A Systematic Review. Hispanic Journal of Behavioral Sciences, 7(1), 1-73; Berry, 1980, *supra*; Szapoczink, J. & Kurtines, W.M. (1980). Acculturation, biculturalism and adjustment among Cuban Americans. In A.M. Padilla (Ed.), Acculturation: Theory models' and some new findings. Boulder, CO: Westview.

[10] Cervantes, Padilla, & Salgado de Snyder, 1991, supra note 9; Cervantes, R.C. & Acosta, F.X. (1992). Psychological testing for Hispanic Americans. Applied & Preventive Psychology, 1, 209-219; Vega, W A; Kolody, B Aguilar-Gaxiola, S Alderete, E Catalano, R Caraveo-Anduaga, J. (1998). Lifetime prevalence of DSM-III-R psychiatric disorders among urban and rural Mexican Americans in California. Archives of general psychiatry, 55,9, 771-778.

a) Greater levels of violence, family disruption, and family separation;
b) Greater marital conflict and less warmth and support in the marriage;
c) Unresponsive, harsher more punitive parenting;
d) Smaller social networks, fewer organizational involvements;
e) less cognitive stimulation and enrichment;
f) less residential stability;
g) greater exposure to pollution and toxins in the air and water, in and out of the home;
h) greater likelihood of living in hazardous conditions such as homes with structural defects, rodent infestations, inadequate heating;
i) greater likelihood of living in dangerous neighborhoods.

52. Evans also found that each risk factor has adverse developmental consequences. Exposure to multiple risk factors accelerates and compounds these problems. In the Moreno Ramos family, the children suffered from each and every one of the psychosocial and physical environment risk factors mentioned by Evans.

53. As described in Pemberton's Affidavit and verified by my own interviews with the family, Roberto was raised in extreme poverty. The family did not have enough to eat; the mother often had to resort to selling personal belongings and begging for money from her husband's employer just to put some food on the table. Even after immigrating to the United States, the Moreno Ramos family continued to live in poverty. Carmen had to sell tamales in the streets of Los Angeles, care for other people's children, clean other people's homes, and do piecework in the garment industry to keep a roof over her family's head and food in their stomachs.

54. These dire circumstances were further exacerbated by Pedro's frequent absences. Carmen Moreno was left to fend for herself and her many young children in a home that was not secure from danger as the construction on the home was never completed. In Pedro's absence, the family slept with lights on to ward off potential intruders. The neighborhoods in which they lived exposed them to crime and other physical dangers.

55. This extreme uncertainty and lack of physical safety is extraordinarily damaging to a child and leads to life-long emotional disabilities even if the child manages to escape physical injury. The very first developmental task that all children master is safety and security. As illustrated by Maslow's "Hierarchy of Needs," a child's most fundamental needs must be met before it is possible for him or her to move forward with other aspects of cognitive and emotional development. Children in an environment such as the one survived by Roberto Moreno Ramos don't have the ability to develop cognitively and emotionally in appropriate ways. If a child is not safe and secure, as these children were not, they use all of their psychological resources on the fear and anxiety of their daily lives and learn merely to survive. They cannot learn or develop normal relationships.

56. In the Moreno Ramos family, the children were also exposed to multiple risks for neurological injury. In addition to the violent physical abuse, Roberto was exposed to numerous chemical toxins during early childhood and at a time critical for normal and healthy brain growth. The children were raised in metropolitan areas of Mexico where air and water quality

standards are non-existent. They were exposed to numerous toxins in the home and neighborhood. The children often went hungry and, when food was available, it was not nutritious. Although some of the younger children missed the worst years of this family's deprivation, Roberto was born at such a time that his critical developmental period coincided with some of the family's most difficult years. The poor nutrition, exposure to chemical toxins and traumatic violence spanned over a decade of his childhood.

57. Roberto and his siblings clearly suffered from a chaotic family structure, extreme violence, harsh and unresponsive parenting, and frequent family separations. Many children in such an environment develop symptoms and characteristics of post-traumatic stress disorder. Even if they are not disposed to the full-blown syndrome, such children may learn to dissociate from traumatic events as a means of survival.

58. The children also received little cognitive stimulation or enrichment. When the children were not in school, they were generally expected to be either directly or indirectly contributing to the family's economic survival. Not only were there no resources to provide the stimulation necessary to a child's proper development, neither parent was educated enough to contribute meaningfully to their cognitive development. Moreover, one parent was either absent or uninvolved while the other was overwhelmed with trying to meet the physical needs of her children.

The Cumulative Effect of Abuse, Immigration and Poverty

59. In short, Roberto and the other Moreno Ramos children were exposed to each of the risk factors identified by Evans. While some children can overcome these risk factors if they receive effective intervention, Roberto and his brother Enrique, who suffered the brunt of their father's abuse, were not so lucky. As noted above, school officials and health care professionals failed to provide them with needed services. It is no coincidence that both Roberto and his brother Enrique suffer from mental illnesses. The linkages between childhood exposure to the risk factors listed above and the onset of psychiatric disorders is well established.

60. Both Roberto and his brother Enrique demonstrated emotional problems, odd thinking, and aggressiveness that did not appear to be associated with a conduct disorder, even during their early childhood. For example according to statements made by Ramiro Moreno Ramos, Roberto was so delusional that he would talk about all the possessions he had, while at the same time he was looking for a job and asking for money. He tried to make his siblings believe that he was a successful contractor. According to Ramiro, Roberto was very temperamental and would get mad for no reason, and he acted "weird and psychotic."

61. Ramiro described how Roberto was "weird": Roberto would shave his head for no reason. When he would get upset he would bite his tongue really hard and bang his head with his fists; "he would do really strange things."

62. Natividad told me Roberto had a long history of eccentric thinking, grandiose ideation, and poor regulation of his mood and emotions. For example she reported to me that throughout Roberto's childhood and early adolescence his other siblings would make fun of him

"because of the odd and silly things he would say. He would always tell us that he had lots of money, that he owned lots of property and cars. Even when he was gone for long periods of time as an adult he would come home and tell us unbelievable stories about his material possessions, property and things like that."

63. The oldest sibling, Carlos, told me that during his early adulthood Roberto felt that he had "special power." "Roberto was always 'dreaming', saying things that weren't true. To him his life was an 'illusion.'"

64. Additional incidents in which Roberto acted strangely are described in Pemberton's Affidavit.

65. Based on records appended to Pemberton's Affidavit and the reports of family members, Enrique suffers from schizophrenia and is barely able to care for himself. When he lived at home, he covered his walls with images of the Virgin of Guadalupe, and told his family that he was "Juan Diego, the indigenous who appeared to the Virgin of Guadalupe, in Mexico." His mother had to ask him to leave her home because his behavior scared her. Family members have seen him on the streets, disheveled and talking to himself.

66. While there is ample evidence that both Roberto and Enrique suffered from severe emotional disturbances during their childhood, it is not surprising that neither of them were evaluated for or diagnosed with any mental illness. Given the extreme poverty of the family and the unfamiliarity of immigrant families with any social services which may have been available, it would have been highly unusual for them to have received any treatment at all.

Conclusion

Roberto Moreno Ramos' childhood and young adulthood were defined by multiple, severe and continuous stressors that interrupted his development and placed him at great risk of developing a mental illness as an adult. These risk factors include:

a) Multi-generational physical and emotional abuse within the family. As a child, Mr. Moreno Ramos was subjected to severe physical and emotional abuse. He and his brother Enrique were particularly targeted by their father. All the children witnessed the physical abuse of their mother.

b) The breakdown of the family structure, including lack of adequate parenting and neglect of basic needs. Mr. Moreno Ramos' father was frequently absent and eventually abandoned the family.

c) The stresses associated with family immigration, life in a high risk border city, and multiple family separations.

d) Extreme poverty and uncertainty in meeting daily material needs such as food and housing, particularly while living in Guadalajara, Tijuana and East Los Angeles.

Taken together, these factors greatly increased the risk that Mr. Moreno Ramos would develop a psychiatric disorder as an adult. The abuse meted out by his father, and Mr. Moreno Ramos' exposure to multiple toxins as a child, create conditions conducive to organic brain damage.

My opinion reflects the longstanding conclusions of researchers in this area. There is no question that in 1993, a competent psychologist could have provided this information to defense counsel in the case of Mr. Moreno Ramos for presentation at the penalty phase of his trial.

I swear on pain of penalty of perjury that the foregoing is true and accurate to the best of my knowledge and recollection.

Sworn this 27 day of September, 2004.

Richard C. Cervantes, Ph.D

DAVID SILVERS
Commission # 1360074
Notary Public - California
Los Angeles County
My Comm. Expires Jul 1, 2005

NOTARIZED BY:

On this date, September 27, 2004, in the State of California

County of Los Angeles

References

Berry, J.W. (1998). Psychology of Acculturation. In Nancy Goldenberg and Judy B. Veroff, eds., The Culture and Pshychology Reader. New York: New York University Press, 1998.

Centers for Disease Control (CDC) (1998).Intimate Partner Violence and Sexual Assault. A guide to training materials and program for health care providers. National Center for Injury Prevention and Control.

Cervantes, R.C. & Acosta, F.X. (1992). Psychological testing for Hispanic Americans. Applied & Preventive Psychology, 1, 209-219.

Cervantes, R.C. & Castro, F.G. (1985). Stress, Coping, and Mexican American Mental Health: A Systematic Review. Hispanic Journal of Behavioral Sciences, 7(1), 1-73.

Cervantes, R.C., Padilla, A., Salgado De Snyder, N. (1991). The Hispanic Stress Inventory: A culturally relevant approach to psychosocial assessment. American Journal of Consulting and Clinical Psychology 3(3), 438-447.

Earls, F. (1997). As quoted in Tighter, Safer Neighborhoods. Harvard Magazine November/December.

Flaskerud J.H. & Uman G. (1996). Acculturation and its effects on self-esteem among immigrant Latina women. Behavioral Medicine; 22(3),123-33.

Madsen (1964). The Mexican Americans of South Texas. New York: Holt, Rinebart & Winston.

Padilla, A. M. (Ed.). (1980). Acculturation: Theory, models and some new findings. Boulder, CO: Westview Press.

Padilla, A. M., Ruiz, R. A., & Alvarez, R. (1975). Community mental health services for the Spanish speaking/surnamed population. American Psychologist,30, 892-905.

Salgado De Snyder, V.N., Cervantes, R.C., Padilla, A.M. (1990). Gender and ethnic differences in psychosocial stress and generalized distress among Hispanics. Sex Roles, 22(7/8), 441-453.

Straus, MA. & Yodanis, C.L. (1996). Corporal punishment in adolescence and physical assaults on spouses in later life: What accounts. Journal of Marriage and the Family 58, 4, 825-844.

Szapoczink, J. & Kurtines, W.M. (1980). Acculturation, biculturalism and adjustment among Cuban Americans. In A.M. Padilla (Ed.), Acculturation: Theory models' and some new findings. Boulder, CO: Westview.

Vega, W A; Kolody, B Aguilar-Gaxiola, S Alderete, E Catalano, R Caraveo-Anduaga, J. (1998). Lifetime prevalence of DSM-III-R psychiatric disorders among urban and rural Mexican Americans in California. Archives of general psychiatry, 55,9, 771-778.

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AWARDS AND HONORS:

1992	American Psychological Association (APA-Division 45) Emerging Young Professional Research Award
1979-1983	National Institute of Mental Health Predoctoral Fellowship Oklahoma State University
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PROFESSIONAL AFFILIATIONS:

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PROFESSIONAL POSITIONS:

April 2002 Present	California State University, Long Beach Position: ***Senior Research Fellow, Center for Behavioral Research and Services, Department of Psychology***
August 2000 July 2001	California State University, Northridge Position: ***Co-Director, Latino Health and Wellness Institute***
January 1999 Present	University of Oklahoma Department of Human Relations Position: ***Adjunct Associate Professor***
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July 1990 October 1995	University of Southern California Department of Psychiatry Position: ***Assistant Professor of Psychiatry (Psychology)***
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January 1984 June 1989	Spanish Speaking Mental Health Research Center, UCLA Position: ***Assistant Research Psychologist*** Duties: Conduct basic and applied research on mental health issues affecting Hispanics. Implement research project focusing on stress, coping, and adaptation within the Mexican-American population.
December 1983 September 1989	Didi Hirsch Community Mental Health Center Position: ***Staff Psychologist*** Duties: Conduct individual, family, and group psychotherapy, crisis intervention as well as conduct other patient-related activities including personality assessment, diagnosis, treatment, planning, and supervision of interns.

PROFESSIONAL CONSULTATION EXPERIENCE:

November 2002 Present	Association of Central Oklahoma Governments Oklahoma City, OK Position: ***Evaluator/Research Consultant***
October 2002 Present	State Incentive Grant, Evaluator Austin, TX Position: ***Lead Evaluator***

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October 1998 Present	University of Texas at San Antonio San Antonio, TX Position: ***Evaluator/Research Consultant***
October 1998 Present	Orange County Bar Foundation Santa Ana, CA Position: ***Evaluator/Research Consultant***
October 1997 Present	Bienvenidos Family Services Los Angeles, CA Position: ***Evaluator/Research Consultant***
February 1992 Present	San Fernando Valley Partnership, Inc. San Fernando, CA Position: ***Evaluator/Research Consultant***
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October 1998 August 2000	ASDC Washington, DC Position: ***Evaluator/Research Consultant***

October 1998 March 2000	Border Center Application Prevention Technology (CAPT) Tucson, AZ Position: ***Research Director***
October 1998 November 1999	University of Oklahoma Oklahoma, OK Position: ***Evaluator/Research Consultant***
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CLINICAL EXPERIENCE:

August 1988 Present	***Forensic Consultation*** Duties: Prepare social histories and develop cultural mitigation and relevant testimony in Capital criminal and civil litigation cases.
September 1982 September 1983	Didi Hirsch Community Mental Health Center, Position: ***Pre-Doctoral Intern*** Duties: Conducted supervised individual and group psychotherapy, crisis intervention treatment, and psychological testing Specialized rotation in Community Mental Health Administration.
January 1982 August 1982	Oklahoma Department of Corrections Position: ***Psychologist I***

Duties: Provided psychological services to male and female incarcerates housed in various residential treatment facilities. Conducted supervision of Case managers.

September 1981 — May 1982
Children's Medical Center
Position: ***Practicum Student***
Duties: Provided supervised services to children and adolescents experiencing psychological problems requiring brief hospitalization.

January 1981 — June 1981
Tulsa Headstart Program
Position: ***Diagnostic Technician***
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Stillwater Medical Center-Inpatient Psychiatric Unit
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Psychological Services Center, Oklahoma State University
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TEACHING EXPERIENCE:

May 1994 — October 1995
USC Department of Psychiatry and Behavioral Science
Seminar in Research and Clinical Assessment Instruments for Children
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Cervantes, R.C. (1989) National Conference on Substance Abuse and Gang Violence. ADAMHA, Office for Substance Abuse Prevention.

Cervantes, R.C. (1987-1988). Development of the Hispanic Family Intervention Program. UCLA Program on Mexico.

Cervantes, R.C., Gilbert, M.J. (1986-1987). Alcohol expectancies among Mexican and Mexican American female alcoholic patients. Institute of American Cultures.

Cervantes, R.C., Gilbert, M.J. (1986-1987). Alcohol expectancies, alcohol abuse, and alcohol dependency among Mexicans and Mexican Americans. UCLA Program on Mexico.

Castro, F.G., Cervantes, R.C., & Romero, G. (1986-1987). Women without work: A multilevel analysis of collective displacement. Social Science Research Council.

Cervantes, R.C., Salgado de Snyder, V.N. (1986-1987). Mexican migration: Patterns, policy and mental health implications. UCLA Program on Mexico.

Cervantes, R.C., Cascallar, E.C. (1985-1986). Psychological stress and coping patterns among Mexican immigrants. UCLA Program on Mexico.

Castro, F.G., & Cervantes, R.C. (1985-1986). Stress and Mexican immigrants. UCLA Academic Senate.

Cervantes, R.C. (1985-1986). Development and validation of the Latin American Stress and Coping Inventory. Biomedical Research Support Grant.

PUBLICATIONS:

Cervantes, R.C. & , Kappos, B., Duenas, N. & Arellano, D. (In Press) Culturally Focused HIV Prevention and Substance Abuse Treatment for Hispanic Women. *Addictive Disorders and Their Treatment.*

Cervantes, R.C. & Duenas, N., Valdez, A., & Kaplan, C. (Under Review) Measuring Violence Risk and Outcomes Among Mexican-American Adolescent Females.

Cervantes, R.C. &, Felix-Ortiz, M. (2004) Substance abuse among Chicanos and other Mexican groups. The Handbook of Chicana/o Psychology. Lawrence Erlbaum Associates, Inc.

Cervantes, R.C. & Pratt Peña (1998) Evaluating Hispanic/Latino Programs: Ensuring Cultural Competency, (16) 109-131 Binghamton, NY

Arroyo, W. & Cervantes R.C. (1998) The Mexican American child. In JD Nopshitz (Ed.) Handbook of Child and Adolescent Psychiatry. New York, NY: Basic Books.

Cervantes, R.C. & Pratt Peña, C. M. (1997). Hispanic/Latino Evaluation Handbook. Center for Substance Abuse Prevention (SAMHSA) Department of Health and Human Services, Washington, DC

Amaro, H., Messinger, M., & Cervantes, R.C. (1996) The health of Latino youth and challenges for prevention. In M. Kagawa-Singer, P. Katz, D. Taylor, and J. Vanderryn (Eds.) Health issues for minority adolescents. University of Nebraska Press, Lincoln, NE.

Cervantes, R.C. & Garcia, I. (1995). Alcohol Abuse Prevention in the Hispanic Community. In P. Langton (Ed.) The challenge of participatory research: Prevention of alcohol-related problems in ethnic communities. National Institute on Alcohol Abuse and Alcoholism/ Center for Substance Abuse Prevention, SAMHSA, Washington, D.C..

Cervantes, R.C. & Arroyo, W. (1994) The DSMIV: Implications for Hispanic children and adolescents. Hispanic Journal of Behavioral Sciences, 16 (1) 8-27

Cervantes, R.C. (1993) The Hispanic Family Intervention Program: An empirical approach toward substance abuse prevention. In B. Kail, R. Mayers & T. Watt (Eds.) Hispanic Substance Abuse. Sage Publication, Newbury Park, CA.

Cervantes, R.C. (1992). Occupational and economic stressors among immigrant and U.S. born Hispanics. In S. Knouse, P. Rosenfeld & A. Culbertson (Eds.) Hispanics in the Workplace, Sage Publications, Newbury Park, CA.

Cervantes, R.C. & Acosta, F.X. (1992) Psychological testing for Hispanic Americans. Journal of Applied and Preventive Psychology, 1, 209-219.

Cervantes, R. C. (Ed.)(1992). Substance Abuse and Gang Violence. Sage Publications, Newbury Park, CA.

Hoffer, T. A. & Cervantes, R. C. (1992). Post-Traumatic Stress Symptoms in Latino Gang Members. In R. C. Cervantes (Ed.) Substance Abuse and Gang Violence. Sage Publications, Newbury Park, CA.

Cervantes, R.C., Padilla, A.M., & Salgado de Snyder, N.S. (1991) The Hispanic Stress Inventory: A culturally relevant approach to psychosocial assessment. Psychological Assessment: A Journal of Consulting and Clinical Psychology, 3 (3), 438-447.

Padilla, A.M., Salgado, N.S., Cervantes, R.C., & Baezconde-Garbanati, L. (1991). Self-regulation and risk-taking behavior: Hispanic perspectives. In L.P. Lispsett & L.L.Mednick (Eds.), Self-regulation, impulsively and risk-taking behavior: Causes and Consequences. Norwood, N.J.: Albex Publishing.

Cervantes, R.C., Padilla, A.M., & Salgado de Snyder, N.S. (1990) Reliability and validity of the Hispanic Stress Inventory. Hispanic Journal of Behavioral Sciences, 12 (1), 76-82.

Cervantes, R.C., Gilbert, M.J., Salgado de Snyder, N.S., & Padilla, A.M. (1990). Psychosocial and cognitive correlates of alcohol use in young adult immigrant and U.S. born Hispanics. International Journal of the Addictions, 25, (5/6).

Salgado de Snyder, N.S., Cervantes, R.C., & Padilla, A.M. (1990) Gender and ethnic differences in psychosocial stress and generalized distress in Hispanics. Sex Roles, 20 (7/8), 441-453.

Cervantes, R.C., Salgado de Snyder, N., & Padilla, A.M. (1989). Post-Traumatic Stress Disorder among immigrants from Central America and Mexico. Hospital and Community Psychiatry, 40(6), 615-620.

Gilbert, M.J., & Cervantes, R.C. (1989). Alcohol treatment for Mexican Americans: A review of utilization patterns and therapeutic approaches. In M.J Gilbert Alcohol Consumption and Its Consequences from a Binational Perspective: Mexican and Mexican Americans. Monograph No.12, UCLA Spanish Speaking Mental Health Research Center.

Romero, G., Castro, F.G., & Cervantes, R.C. (1989). Latinas without work: Family, occupational, and economic stress following unemployment. Psychology of Women Quarterly, 12, 281-297.

Padilla, A.M., Cervantes, R.C., & Maldonadoado, M. (unpublished manuscript). Psychosocial stress in Mexican immigrant adolescents.

Padilla, A.M., Cervantes, R.C., Maldonado, M., & Garcia, R.E. (1988). Coping responses to psychosocial stressors in Mexican and Central American immigrants. Journal of Community Psychology, 16, 418-427.

Cervantes, R.C. (1988). Mental health of Hispanic Americans: An epidemiological overview. In Center for Health Policy Development: Hispanic Health Status Symposium. University of Texas Health Science Center.

Gilbert, M.J., & Cervantes, R.C. (1987). Mexican Americans and alcohol (Monograph No. 11). Los Angeles, CA: UCLA Spanish Speaking Mental Health Research Center.

Vargas-Willis, G., & Cervantes, R.C. (1987). Consideration of psychosocial stress in the treatment of the Latina immigrant. Hispanic Journal of Behavioral Sciences, 9(3), 315-329.

Castro, F.G., Romero, G.J., & Cervantes, R.C. (1987). Long-term stress among Latino women after a plant closure. Sociology and Social Research, 71(2).

Cervantes, R.C. (1987). Hispanics in psychology. In P.J. Woods (Ed.), The psychology major: Training and employment strategies. Washington, D.C.: American Psychological Association.

Gilbert, M.J., & Cervantes, R.C. (1986). Patterns and practices of alcohol use among Mexican Americans: A comprehensive review. Hispanic Journal of Behavioral Sciences, 8(1), 1-60.

Gilbert, M.J., & Cervantes, R.C. (1986). Alcohol services for Mexican Americans: A review of utilization patterns, treatment considerations and prevention activities. Hispanic Journal of Behavioral Sciences, 8(3), 191-223.

Castro, F.G., Baray-Losk, A., McCreary, C., Cervantes, R.C., Bolden, N., Shich, G., & Gonsalvez, R. (1986). Rehabilitation compliance in hand-injured Latino immigrant laborers: A multivariate stress-coping model analysis. Journal of Compliance in Health Behavior, 1(2), 111-133.

Cervantes, R.C., & Castro, F.G. (1985). Stress, coping and Mexican American mental health: A systematic review. Hispanic Journal of Behavioral Sciences, 7(1), 1-73.

Cervantes, R.C. (1985). Review of Mental health and Hispanic Americans: Clinical perspectives. Hispanic Journal of Behavioral Sciences, 7(2), 199-205.

PRESENTATIONS:

Cervantes, R.C. (2003, April) Developing a Statewide System for Evaluation of Drug Prevention Services. 15th Annual Southwest Regional Behavioral Health Conference. Albuquerque, NM.

Cervantes, R.C. (2002, July). Preliminary Findings on a Drug Treatment and HIV/AIDS Program for High-Risk Latinas in East Los Angeles. XIV International AIDS Conference. Barcelona, Spain.

Cervantes, R.C. (2001, April). Intervention, Prevention and Treatment: What Works and What Doest. U.S. Drug Policies and Latino Communities. Los Angeles, CA.

Cervantes, R.C. (2001, April). Treatment of Substance Abuse in the Latino Community. El Puente Building Bridges with the Latino Community. Scottsdale, AZ.

Cervantes, R.C. (2001, March). Socio-economic and Cultural Factors in Mitigation. First Annual Texas Capital Defense Conference. Houston, TX.

Cervantes, R.C. (2001, March). Culturally Appropriate Science Based Treatment. University of Texas at Pan American. San Antonio, TX.

Cervantes, R.C. (2000, September). Developing and Promoting Science in the Latino Community. Latino Behavioral Health Institute Conference. Northridge, CA.

Cervantes, R.C. (1999, December). Building a Movement for Health: Taking Back Our Communities from the Alcohol & Tobacco industries Panel: From Research to Practice: Research for Community Action. California Latino Leadership United for Healthy Communities, Symposium. Northridge, CA.

Cervantes, R.C. (1999, April). Hispanic/Latino Substance Abuse Prevention Research-Direction Beyond the Year 2000. Southwest Regional Substance Abuse Conference. Albuquerque, NM.

Cervantes, R.C. (1995, December). Methods for Assessing Alcohol, Tobacco, and Other Drug Use Health Impacts. Substance Abuse and Mental Health Services Administration, (CSAP), Washington, D.C.

Cervantes, R. C. (1995, March). Mental Health Services for Ethnic Minorities. Panel Presentation at the Annual Meeting of the Western Psychological Association, Los Angeles, CA.

Cervantes, R. C. (1994, April). Evaluation Issues for Hispanic Grantees. Presented at the National High-Risk Youth Learning Community Workshop. Dallas, TX.

Cervantes, R. C. (1992, April). DSM-IV: Implications for Hispanic Children and Adolescents. Paper presented at the 9th Biennial National Conference on Hispanic Health and Human Services. Chicago, IL.

Cervantes, R. C. (1992, June). A Key to Making your Grant Successful: Effective Evaluation. Paper presented at the Hispanic Grantee Cluster Meeting, Alcohol, Drug Abuse and Mental Health Administration. San Antonio, TX.

Cervantes, R.C. & Ring, J. (1991, July) High Risk Behavior in Hispanic and Anglo HIV test seekers. Paper presented at the 23rd Inter-American Congress of Psychology. San Jose, Costa Rica.

Cervantes, R.C. (1991, February) Drug abuse and AIDS: Interventions in Hispanic American populations. Panel presentation presented at the National Conference on Drug Abuse Research and Practice. National Institute on Drug Abuse. Washington, D.C.

Cervantes, R.C. (1990, April) Alcohol Abuse in Hispanic Populations. Invited presentation at Workshop on Prevention Research Among Special Ethnic Minority Groups. National Institute on Alcohol Abuse and Addiction (NIAAA). Washington, D.C.

Cervantes, R.C. (1990, February) Trends in Drug use Among Hispanic Youth. Paper presented at the U.S. Office for Substance Abuse Prevention 3rd National Community Learning Conference. Washington, D.C.

Cervantes, R.C. & Porche-Burke, L. (1989, October) Ethnic Minority Mental Health: Perspectives From the Black and Hispanic Communities. Invited paper presented at the Psychology Department, University of New Mexico, Albuquerque, New Mexico.

Cervantes, R.C. (1989, August). Psychosocial and Cognitive Correlates of Alcohol Use in younger Hispanic Adults. Presented at the 97th Annual Convention of the American Psychological Association, New Orleans, Louisiana.

Cervantes, R.C. (1989, June). Hispanic Stress Research: Community Applications. Paper presented at the Community Action and Research Conference, Michigan State University.

Cervantes, R.C. (1988, September). The Development of the Hispanic Stress Inventory. Invited paper presented at the 7th Biennial Conference of the Coalition of Hispanic Health and Human Service Providers, COSSMHO, San Antonio, Texas.

Cervantes, R.C. (1988, August). Stress and Mental Health: An Hispanic Perspective. Paper presented at the 97th Annual Convention of the American Psychological Association, Atlanta, Georgia.

Cervantes, R.C. (1988, February) . Recent Developments in the Study of Hispanics and Alcohol: An epidemiological overview. Invited paper presented at A National Conference on Hispanic Alcohol and Drug Problems, COSSMHO , Miami, Florida.

Cervantes, R.C. (1988, January). Family Stress in the Hispanic Community. Invited paper presented to the Hispanic Medical Education and Training Program (HISMET). Los Angeles, CA.

Cervantes, R.C. (1987, December). Competence and Counter- Transference in Cross-Cultural Professional Practice. Invited paper presented to the Los Angeles Society of Clinical Psychologists, USC Campus, Los Angeles, CA.

Cervantes, R.C. (1987, October). Alcohol Use and Associated Problems Among Hispanic Adults. Paper presented at the National Institute of Health Centennial Minority Biomedical Research Support Minority Access to Research Careers Symposium. Washington, D.C.

Cervantes, R.C., & Robles, L. (1987, August). Psychosocial Stress in Children Survivors of the Mexico Earthquake. Paper presented at the 95th Annual Convention of the American Psychological Association, New York City, New York.

Cervantes, R.C. (1987, August). The Development of the Latin American Stress Inventory. Paper presented at the 95th Annual Convention of the American Psychological Association, New York City, New York.

Cervantes, R.C. (1987, August). New Approaches Towards Assessment with Latinos: The Latin American Stress Inventory. Paper presented at the First Regional North American Conference of the International Association for Cross-Cultural Research.

Cervantes, R.C. (1987, July). An Overview of Alcohol use Among Hispanic Youth. Paper presented at the Texas Commission on Drugs and Alcohol, 30th Annual Meeting, Austin, Texas.

Cervantes, R.C. (1986, September). Alcohol Expectancies Among Recent Latino Immigrant: Implications for Treatment. Paper presented at the COSSMHO's National Conference on Health and Human Services, New York City, New York.

Cervantes, R.C., Cascallar, E.C., Gates, T., & Dezan, C. (1986, August). Levels of Victimization and Psychological Response: The Mexico Earthquake. Poster presented at the American Psychological Association Convention, Washington, D.C.

Cervantes, R.C. (1986, April). Hispanic Mental Health: An Overview. Workshop presented at the Community Counseling Center, Los Angeles, CA

Cervantes, R.C. (1986, May). New Approaches Toward the Assessment and Treatment of Latino Patients. Invited presentation to the Patton State Hospital, San Bernardino, California.

Cervantes, R.C. (1985, September). Mexican American Family Structure and other Strange phenomena. Invited paper presented at the Fourth Annual Wisconsin Conference on the Hispanic Family, Milwaukee, Wisconsin.

Cervantes, R.C. (1985, August). New Approaches to Assessing Psychopathology Among Hispanic Clients using the Stress-Illness Paradigm. Invited paper presented at the American Psychological Association 93rd Annual Convention, Los Angeles, California.

Cervantes, R.C., & Castro, F.G. (1985, March). Evaluating Hispanic Clients within a Stress-Illness Framework. Workshop presented at the Third World Counselors Association Tenth Anniversary Conference, University of California, Los Angeles.

Cervantes, R.C., & Castro, F.G. (1984, October). A Systematic Review of Mexican American Mental Health Research. Invited presentation to the Latino Mental Health Network, Didi Hirsch Community Mental Health Center, Culver City, CA.

Cervantes, R.C., & Castro, F.G. (1984, September). Stress Research: Review of Models, Attitudes and Stereotypes. Workshop presented at the Fifth Biennial Conference of the National Coalition of Hispanic Mental Health and Human Services Organization, Lo Angeles, CA.

Revised 7/03

COUNTY OF SAN DIEGO)
)
) IN RE: ROBERTO MORENO RAMOS
)
STATE OF CALIFORNIA)

DECLARATION OF RICARDO WEINSTEIN, Ph.D.

1. My name is Ricardo Weinstein, Ph.D.. I am a neuropsychologist, licensed to practice psychology in California.

2. I have a Ph.D. in Clinical Psychology, and attended a Post-Doctoral Certificate Program in Neuropsychology at the Fielding Institute in Santa Barbara, California. I am in private practice in San Diego, California, where I specialize in clinical, forensic, and neuropsychology. In addition to maintaining a private practice, I am a member of the San Diego County Superior Court panel of approved psychologists for criminal court referrals.

3. As a neuropsychologist, I am trained to administer tests to measure the relationship between brain injuries and the ability to process and utilize information. The tests are standardized and yield scientifically quantifiable, reproducible results, using scores that can be compared to persons of similar age and demographic background as the person being tested.

4. At the request of attorney Sandra Babcock, I conducted a neuropsychological evaluation of Roberto Moreno Ramos to assess his neuropsychological functioning and identify any neuropsychological deficits due to brain damage. Below is a summary of my findings.

5. I conducted my evaluation at the Texas Department of Criminal Justice Polunsky Unit in Livingston, Texas on July 13 and 14, 2004. The interview and portions of the testing were performed in Spanish, the native language of both Mr. Moreno Ramos and this evaluator. I spent approximately 11 hours with Mr. Moreno Ramos.

6. Prior to the evaluation, I reviewed medical and prison records. I have also reviewed the affidavits prepared by Nancy Pemberton and Richard Cervantes.

7. For the neuropsychological evaluation I utilized the following procedures:

Clinical Interview
Mental Status Examination
Computerized Assessment of Response Bias
Rey 15 Item Test
Word Memory Test
Wisconsin Card Sorting Test
Trails (DKEFS)

Figure Fluency Test (DKEFS)
Word Fluency Test
Stroop Test
Face Recognition Test
Proverbs Test (DKEFS)
CTONI
Weschler Adult Intelligence Scale – Third Edition
WRAT (Arithmetic test)
Soper Neuropsychological Status Examination
Ruff 2 & 7 Selective Attention Test
Rey Complex Figure Drawing Test
Tactual Performance Test
Finger Tapping Test
Grip Strength Test
Rhythm Test
Finger Tip Number writing test
Quantitative Electroencephalogram (QEEG)

8. The test results indicate the presence of significant brain dysfunction. Mr. Moreno Ramos demonstrated significant deficits in his ability to mentally process information, and in his ability to perform tasks that require attention and concentration. He has moderate to significant impairment for abstract reasoning and logical analysis, flexibility of thought for complex stimuli, incidental learning of simple stimuli, and psychomotor actions.

9. The results of the QEEG, a neurophysiological measurement, confirm the presence of brain dysfunction and impaired functioning[1]. The QEEG identified multiple abnormalities indicative of significant brain dysfunction. The nature of the dysfunction is both developmental and acquired. These patterns of brain dysfunction are behaviorally manifested by dysregulation of emotions and behavior, poor judgment and a marked tendency to impulsivity.

10. The primary dysfunction of Mr. Moreno Ramos' brain is in frontal lobe function. This area regulates the group of skills called "executive functioning." This includes judgment and impulse control.

11. Mr. Moreno Ramos' brain impairment would manifest in an inability to control his behavior and/or emotions. He has poor impulse control and poor judgment. Although he is intellectually capable of recognizing cause and effect, and right from wrong, he is unable to operationalize this understanding in order to refrain from acting impulsively without proper consideration for the ultimate consequence of his actions. He is not able to "think twice" before acting on his impulses. This dysregulation of emotion would be exacerbated by stress and by substance abuse.

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[1] The raw data from this procedure, as well as the other testing instruments listed above, have been preserved by my office and are available for inspection by other licensed psychologists.

12. Mr. Moreno Ramos' psychosocial developmental history is replete with risk factors and is consistent with the level of functioning that he exhibits. He grew up in abject poverty, in an extremely violent and destructive environment. He was exposed to what any reasonable person would consider torture (being hanged by your feet for example), he was forced into violent physical confrontations as a child, he was physically abused and neglected. These circumstances, particularly the physical abuse and exposure to environmental toxins, are conducive to brain dysfunction. Further, Mr. Moreno Ramos' family history indicates the possibility that his brain abnormality is genetic.

13. The Wechsler Adult Intelligence Scale, Third Edition, indicate that Mr. Moreno Ramos is not mentally retarded. He obtained an I.Q. of 87, which is in the low-average range.

14. Results of the clinical interview, combined with my review of the documents listed above, also indicated that Mr. Moreno Ramos suffers from emotional disorders manifested in anxiety, depression and dissociative processes.

15. I used the Computerized Assessment of Response Bias to evaluate Mr. Moreno Ramos' truthfulness and cooperation during the testing. The results indicate that Mr. Moreno Ramos was not malingering and that he put in a good effort on the testing. Thus, the results of this neuropsychological evaluation are valid and reliable. There are no indications that he feigned or malingered during the evaluation. He made a sincere effort in all tasks required.

16. The testing materials used in this evaluation are widely accepted as reliable and were easily available to mental health professionals in 1993. I have been informed that the psychologist who was retained to evaluate Mr. Moreno Ramos prior to his trial did not administer a neuropsychological battery such as that listed above. It is my understanding that he administered a Bender Gestalt, a subtest of the MMPI and an IQ test. It is also my understanding that the psychologist did not prepare or have access to a social history of Mr. Moreno Ramos.

17. A comprehensive evaluation of brain function must include tests that tap all cognitive domains i.e: attention, memory, concentration, working memory, visual-spatial coordination, etc. The Bender Gestalt is at best a screening instrument. Although there have been several attempts to standardize the results, none are accepted as valid neuropsychological results.

18. The use of the MMPI is inappropriate with individuals with the background, education and cultural upbringing of Mr. Moreno Ramos. Furthermore it is not a common practice or accepted in the scientific community to perform "a subtest of the MMPI".

19. Furthermore, without obtaining information from collateral sources and investigation of the subject's psychosocial developmental history and cultural background, including his level of acculturation, any conclusion would be greatly lacking if not completely invalid. In forensic evaluations relying exclusively on the reports of the subject is considering below the standard of practice.

20. Specifically in the case of Mr. Moreno Ramos, whose organic deficits and life experiences impair his ability to recall and discuss his own history, it is mandatory that other sources of information be consulted in the process of a psychological evaluation. Any competent psychologist, in 1993 or today, should recognize that Mr. Moreno Ramos' lack of insight into his own psychological makeup is not evidence of mental health or of mental disease, but rather simply a factor that creates the need for further sources of information. The evaluation that has been described to me and the testing that was reportedly performed was not sufficient to identify or measure Mr. Moreno Ramos' significant and debilitating brain damage.

Conclusion

It is my professional opinion that Mr. Moreno Ramos suffers from brain dysfunction and impaired functioning that would have affected his behavior at the time of the crime he has been convicted of committing. His organic deficits would have seriously hampered his judgment. Particularly under stress, his brain cannot process information properly, and his analytical judgment is compromised. These deficits provide, at minimum, an explanation for his bizarre and uncharacteristic behavior.

Further, it is my professional opinion that the mental health expert who examined Mr. Moreno Ramos prior to trial did not administer the appropriate testing instruments, and failed to adequately consider the following factors:

1. Moderate to significant brain impairment.
2. Cultural background and developmental history.
3. Psychological and emotional problems stemming from developmental history.

FURTHER AFFIANT SAYETH NOT

Weinstein, PhD

Ricardo Weinstein, Ph.D. 9/27/04

Subscribed and sworn to before me on this ____ day of September, 2004.

_____
Notary Public

My commission expires: _____

RICARDO WEINSTEIN, PH.D.

Clinical, Forensic and Neuropsychology
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CURRICULUM VITAE

PRESENT PROFESSIONAL ACTIVITIES:

- Licensed Psychologist in Private Practice:
  Clinical, Forensic and Neuropsychology; assessment and treatment.
- Forensic Neuropsychological, Psychological and Cultural Expertise evaluations and consultation to attorneys and their clients in death penalty cases.
- Member of the San Diego County Superior Court Panel of Approved Psychologists for Criminal Court referrals.
- Qualified Expert Witness for Federal Court, Superior Court, Family Court, Juvenile Court.
- Qualified Medical Evaluator of the State of California Industrial Medical Council. (Inactive)
- Consultant and educator in Psychological and Neuropsychological Assessment, Cultural Competency, Child Abuse, Drug Abuse and Suicide Prevention.

EDUCATION:

- Quantitative Electroencephalography (QEEG), trained under the supervision of M. Barry Sterman, Ph.D.; Professor, School of Medicine, University of California Los Angeles 1999-2000
- Post-Doctoral Certificate Program in Neuropsychology. Fielding Institute, Santa Barbara, California – 1998
- Ph.D. Clinical Psychology, International College, Los Angeles, California – 1981
- M.A. Clinical and Humanistic Psychology, Merril Palmer Institute, Detroit, Michigan – 1979
- Licenciado en Administracion de Empresas, Universidad Nacional Autonoma de Mexico, Mexico City, Mexico – 1968

PAST WORK EXPERIENCE:

1992-2000	Baker Elementary School. Psychologist for the Comer Program.
1994 – 1996	Adjunct Professor; San Diego State University
1988 – 1989	Children's Therapeutic Communities. Consulting Psychologist. • Treatment of adolescent sex offenders.
1986 – 1988	Home Start Inc.; SOS Program Director • Assessment and in-home treatment of abused children and their families.
1979-1983	Suicide Prevention Center, Los Angeles, California. Director of the Hispanic Outreach Program • Planned and implemented a demonstration program for the treatment of PCP abuse. • Individual and group psychotherapy. • Crisis intervention trainer.

1978 – 1979	Henry Ford Hospital, Department of Substance Abuse. Detroit, Michigan. • Intern and research assistant.
1977 – 1978	Camelback Hospital, Phoenix, Arizona. • Psychodramatist.
1972 – 1976	Management Consultant. Mexico, Central America, Ecuador, and Dominican Republic

PROFESSIONAL AFFILIATIONS:

- National Academy of Neuropsychology
- American Neuropsychiatric Association
- International Neuropsychological Society
- American Psychological Association, Division 41
- California Psychological Association
- San Diego Psychological Association
- San Diego Psych-Law Society
- The Reitan Society
- Society for Neuronal Regulation
- Coalition of Clinical Practitioners in Neuropsychology

PUBLICATIONS:

Before It's Too Late: Neuropsychological Consequences of Child Neglect And Their Implications For Law and Social Policy. J. Weinstein, J.D. and R. Weinstein, Ph.D. University of Michigan Journal of Law Reform. Volume 33. Summer 2000

Consequences of Child Neglect on Brain Development: A Case Study. Abstract. Journal of the International Neuropsychological Society. Volume 8, Number 4

QEEG in Death Penalty Evaluations. Abstract. Journal of Neuroptherapy. Volume 7, Number 1 2003

The Neuropsychology of Child Neglect: Developmental Consequences, Case Examples and Legal and Societal Implications. Janet Weinstein, J.D. and Ricardo Weinstein, Ph.D. Journal of Neurotherapy. Volume 7, Number 1 2003

Comparison of Skil QEEG and Neuropsychological Evaluation of Death Row Inmates. Abstract. Ricardo Weinstein, Ph.D. and M.B. Sterman, Ph.D. Journal of Neurotherapy Volume 7, Number 1 2003

RECENT PRESENTATIONS:

The Mind Personality, and Brain Development: Its Relevance to Disorder Behavior and the Death Penalty. NASA Conference. Albuquerque, NM (2003)

QEEG in Death Penalty Evaluations. Society for Neuronal Regulation, 10th Annual Conference, Scottsdale, AZ (2002)

Neuropsychological Consequences of Child Neglect and Implications for Social and Legal Policy: A Case Study, International Neuropsychological Society Meeting, Stockholm (2002)

Neuropsychological Consequences of Child Neglect: Implications for Social and Legal Policy, International Congress on Law and Mental Health, Amsterdam (2002)

Neuropsychological Consequences of Child Neglect and Implications for Social and Legal Policy, 13th Annual APSAC Colloquium, New Orleans (2002)

Cultural Competent Evaluations in Death Penalty Cases. Secretaria de Relaciones Exteriores, Mexico City, Mexico (2002)

Neuropsychological Consequences of Child Neglect and Implications for Social and Legal Policy: A Case Study, SABA Society Retreat (organization of professionals engaged in brain research and neurofeedback treatment), Saba, Netherlands, Antilles (2002)

Comparison of SKIL QEEG and Neuropsychological Evaluations of Death Row Inmates. SABA Society Retreat. Saba, Netherlands, Antilles (2002)

Cultural Competent Evaluations in Death Penalty Cases. Consulado General de Mexico. San Francisco, CA (2002)

Neuropsychological Consequences of Child Neglect and Implications for Social and Legal Policy, Thirteenth National Conference on Child Abuse and Neglect, Albuquerque (2001).

Cultural Competent Evaluations in Death Penalty Cases. Consulado General de Mexico. Houston, TX (2001)

Quantitative Electroencephalogram (QEEG) in Death Penalty Evaluations, Society for Neuronal Regulation, Monterey, CA (2001)

Comprehensive, Cultural Competent Neuropsychological Evaluations. San Francisco, CA (2001)

Neuropsychological Consequences of Child Neglect and Social Policy Implications, International Conference of Psychology and Law, Dublin, Republic of Ireland (1999).

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Diplomate, American Board of Psychiatry and Neurology; Adult and Forensic Psychiatry

September 27, 2004

TO: Ms. Danalynn Recer and Ms. Sandra Babcock
The Mexican Capital Legal Assistance Program

RE: Psychiatric Evaluation of Roberto Moreno Ramos

Dear Ms. Babcock/Recer:

Pursuant to your request, I conducted a psychiatric evaluation of Mr. Roberto Moreno Ramos on August 23 and 24, 2004 for a total of approximately 13 hours and 15 minutes at the Texas Department of Criminal Justice Polunsky Unit in Livingston, Texas, where Mr. Moreno Ramos is housed on death row awaiting execution for the murders of his wife and two children.

After explaining the confidential and psychiatric nature of the evaluation to Mr. Moreno Ramos, and informing him that the evaluation would be provided to his legal team, I conducted a clinical interview and administered a series of testing instruments, as described more fully in my Evaluation Report, attached. My report also contains a list of the documents, family interviews and other sources consulted before and after my visits with Mr. Moreno Ramos.

In assessing Mr. Moreno Ramos, I attempted to answer the following questions: Is Mr. Moreno Ramos presently suffering from a psychiatric disorder? Was Mr. Moreno Ramos suffering from a psychiatric disorder during and around the times when his wife and two children were killed? Were the Psychiatric Disorders from which Mr. Moreno Ramos suffered during and around the time of the deaths of his wife and children diagnosable by mental health professionals? Were the Psychiatric Disorders from which Mr. Moreno Ramos suffered during and around the time of the deaths of his wife and children treatable by mental health professionals?

Based upon these evaluations and the source materials provided, I have formed an opinion within a reasonable degree of medical certainty that Mr. Moreno Ramos suffers from a Bipolar Disorder. He also suffers from a Personality Disorder. Mr. Moreno Ramos was suffering from both of these disorders around the time period when his wife and two children were killed and he was tried and convicted of capital murder. Both of these conditions were treatable and diagnosable during that period of time.

I also utilized testing instruments to measure "malingering," or faking. These measures each indicated that Mr. Moreno Ramos was trying in good faith to do his best on the tests administered and to be honest in his responses. Indeed, Mr. Moreno Ramos insists that he is "not

crazy" and reported that he had no history of psychiatric treatment. He also denied that anybody had ever suggested that he was in any need of psychiatric treatment. However, his family members report that they were aware of Mr. Moreno Ramos' bizarre behavior and they were able to describe traits and behaviors that existed long before Mr. Moreno Ramos' incarceration and which verify the findings of recent evaluations. For instance, brother-in-law Mr. Jose Sarabia stated that Mr. Moreno Ramos would frequently change topics without any warning and that Mr. Moreno Ramos did not appear to be aware of these sudden switches in his topics of conversation. Mr. Sarabia stated that the structure of Mr. Moreno Ramos's sentences was logical, but the change in topics was disconcerting. This is an example of hypomania, and is relevant to the diagnosis of Mr. Moreno Ramos' Bipolar Disorder.

Mr. Moreno Ramos' family was also able to provide a history of his grandiose delusions, which are also examples of manic episodes. For example, Mr. Moreno Ramos would describe himself as someone who claimed to have owned an apartment building with tenants that provided a steady source of income. He described himself as claiming to have owned several homes, including a large home that had four car ports and four vehicles. He also said that he owned a large construction company in Chicago that used large numbers of people and was involved in completing large scale projects such as constructing large buildings. He also claimed to have to have traveled to Europe and said that he had sizable monetary funds. When his family confronted him with the fact that these claims were false, Mr. Moreno Ramos would react with indifference, oblivious disregard or with different degrees of hostility when others did not appear to believe him.

My conclusion from the above information, as well as other data detailed in my report is that Mr. Moreno Ramos suffers from a Bipolar Disorder associated with the hypomanic-manic spectrum of psychopathology.

As set forth in my Evaluation Report, Mr. Moreno Ramos is the product of a family with a significant history of serious Mental Disorder. By all accounts, Mr. Moreno Ramos' brother, Enrique, has been diagnosed as schizophrenic. He reportedly suffers from religious delusions of being the indigenous saint, Juan Diego and was obsessed with the *Virgin of Guadalupe* (essentially the mother of Christ in the religious tradition understood by Mr. Moreno Ramos). Ms. Natividad Sarabia related that Enrique claimed to have secured a copyright in order to protect his religious work because he planned to start a business enterprise. She also remembers that Enrique had attempted to recruit her to sell religious art that he had made, but that she had refused because he appeared to be delusional.

There is also a history of behavior and traits strongly suggesting undiagnosed mental diseases in some family members. Mr. Moreno Ramos' mother, Carmen, describes his father, Pedro, as a violent, hypersexual, and highly controlling man who tended to be grandiose in his general outlook of life. She stated that frequently, her husband would interact appropriately and would speak coherently with others, but that he could suddenly change and begin speaking so fast that she would be unable to understand him. She stated that his fast-paced conversation could continue for a long time within a conversation. She said that this rapid speech pattern was highly characteristic of Pedro Ramos, and that their son, Roberto, had the same problem. As

described more fully in my evaluation, Carmen Moreno Ramos also described instances of grandiosity in both Pedro and Roberto.

All the family members also report that Pedro Ramos was an abusive father and husband, and that he singled out Roberto and his brother Enrique for particularly violent treatment. Mr. Moreno Ramos initially denied a history of child abuse. When confronted with the reports of his family, Mr. Moreno Ramos admitted that he had frequently been punished by his father via corporal punishment, including being hung upside down by his feet from a roof beam. However, he qualified this admission by stating that this was not "abuse," because his father's punishments were commonplace for children in Mexico.

In addition to the clinical interview of Mr. Moreno Ramos and the interviews with his family, I reviewed the neuropsychological testing done by Dr. Weinstein, which indicates that Mr. Moreno Ramos suffers from frontal lobe abnormalities. His father's methods of punishment could have resulted in this damage. However, it should be noted that his test results may be consistent with both Bipolar Disorder and a General Medical Condition.

By 1990, effective psychopharmacological and psychotherapeutic interventions were already well established in clinical psychiatric practice to treat Bipolar Disorder. Actually, as early as the 1970's, effective psychopharmacological treatment of Bipolar Disorder had already become available (Goodwin and Jamison, 1990, pp. 603-629). Had these treatments been provided to Mr. Moreno Ramos, his risk of future dangerousness would have been greatly reduced.

All of the diagnostic impressions that I make in the attached evaluation could have been made in 1993 by any competent mental health professional. Had the proper testing and investigation been done, an expert could have testified to the jury that Mr. Moreno Ramos suffers from an organic brain dysfunction that is either genetic or the result of a brain injury; that he suffers from Bipolar Disorder, which is a severe and debilitating mental disease; that he has been psychologically damaged by a lifetime of poverty and physical abuse; that these conditions impaired his judgment and prevented him from coping with stress in normal, healthy ways; that all of these conditions are treatable and that, with treatment, Mr. Moreno Ramos could manage well in the structured world of a prison and that he would pose a very low risk to society.

I have attached a thorough discussion of the data underlying each of these conclusions and appendices outlining the process by which other potential diagnoses were ruled out.

Thank you very much for allowing me the opportunity to evaluate Mr. Moreno Ramos. If I can be of any further help in clarifying this report, please call me at (408) 927-5941.

Very truly yours,

J. Arturo Silva, M.D.

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PSYCHIATRIC EVALUATION AND DIAGNOSITC IMPRESSIONS

SUBJECT: ROBERTO MORENO RAMOS

The following sources of information were reviewed and considered:

TABLE 1. INTERVIEWS WITH MR. MORENO RAMOS CONDUCTED BY J. ARTURO SILVA, M.D.

Id.1. Interview with the Mr. Moreno Ramos conducted in English and Spanish for approximately six hours and 15 minutes, on August 23, 2004.
Id.2. Interview with the Mr. Moreno Ramos conducted in Spanish and English for approximately seven hours on August 24, 2004.

TABLE 2. INTERVIEWS CONDUCTED BY J.ARTURO SILVA, M.D. WITH PERSONS OTHER THAN MR. MORENO RAMOS

Io.1. Telephonic interview with Ms. Natividad Sarabia, sister of Mr. Moreno Ramos, for about 50 minutes on September 7, 2004.
Io.2. Telephonic interview with Mr. Jose Sarabia, brother-in-law of Mr. Moreno Ramos, for about 55 minutes on September 12, 2004.
Io.3. Telephonic interview with Ms. Carmen Ramos, mother of Mr. Moreno Ramos, for about 35 minutes on September 12, 2004.
Io.4. Telephonic interview with Ms. Natividad Sarabia, sister of Mr. Moreno Ramos, for about 25 minutes on September 25, 2004.
Io.5. Telephonic interview with Mr. Ramiro Ramos, brother of Mr. Moreno Ramos, for about 50 minutes on September 25, 2004.

TABLE 3. SOURCES OF INFORMATION (DOCUMENTS)

Doc.1. Benton Facial Recognition Test (BFRT) form dated July 14, 2004.
Doc.2. Wisconsin Card Sorting Test summary with test date provided as July 14, 2004.
Doc.3. Category Test summary with test date provided as July 14, 2004.
Doc.4. Affidavit of Nancy Pemberton dated September 2004.
Doc.5. Topometric report by Ricardo Weinstein, Ph.D. dated August 24, 20054.
Doc.6. Videotape with news story pertaining to the killings of Ms. Leticia Ramos, Abigail Ramos and Jonathan Ramos, undated.
Doc.7. Photographs related to the crime Scene investigation.
Doc.8. TDCJ records for Roberto Moreno Ramos from 1993 to 2003.
Doc.9. Edinburg Hospital records dated April 8, 1992

Doc.10. Declaration of Ricardo Weinstein, Ph.D. dated September 27, 2004.
Doc.11. Los Angeles, California school records for Mr. Moreno Ramos.
Doc.12. Autopsy report of Ms. Leticia Ramos by Ruben C. Santos, M.D. dated April 8, 1992.
Doc.13. Autopsy report of Abigail Ramos by Ruben C. Santos, M.D. dated April 8, 1992.
Doc.14. Autopsy report of Jonathan Ramos Ruben C. Santos, M.D. dated April 8, 1992.
Doc.15. Declaration by Dr. Richard Cervantes, from September 2004.
Doc.16. Report by Investigator John Montemayor dated April 8, 1992.

TABLE 4. OTHER SOURCES OF INFORMATION

Si.1. E-mail letter from Nancy Pemberton dated September 2, 2004.
Si.2. E-mail letter from Nancy Pemberton dated September 2, 2004.
Si.3. Brief telephone conversation with Ms. Nancy Pemberton, on September 9 and 10, 2004.
Si.4. Brief telephone conversation with Ms. Sandra Babcock, on September 10, 2004.
Si.5. Brief telephone conversation with Ms. Danalynn Recer, on September 10, 2004.
Si.6. Brief telephone conversation with Ms. Danalynn Recer, on September 13, 2004.
Si.7. Brief telephone conversation with Ms. Danalynn Recer, on September 24, 2004.
Si.8. Brief telephone conversation with Ms. Danalynn Recer, on September 26, 2004.

The numbers in brackets at the end of a paragraph or block, [1], denote report paragraph or block number beginning with the psychiatric issues section.

I. PSYCHIATRIC-LEGAL ISSUES

In assessing Mr. Ramos, I attempted to answer the following questions: Is Mr. Moreno Ramos presently suffering from a psychiatric disorder? Was Mr. Moreno Ramos suffering from a psychiatric disorder during and around the times when his wife and two children were killed? Were the Psychiatric Disorders from which Mr. Moreno Ramos suffered during and around the time of the deaths of his wife and children diagnosable by mental health professionals? Were the Psychiatric Disorders from which Mr. Moreno Ramos suffered during and around the time of the deaths of his wife and children treatable by mental health professionals? Would treatments available in 1993 have significantly reduced Mr. Moreno Ramos' likelihood of posing a continuing threat to society? [1]

II. PSYCHIATRIC-LEGAL OPINIONS

Mr. Moreno Ramos is presently suffering from a Bipolar Disorder. He also suffers from a form of Personality Disorder. Mr. Moreno Ramos was suffering from

both of these mental illnesses at the time his wife and children were killed, and any competent mental health professional should have been able to diagnose these disorders using testing instruments that had been widely available for many years. Both of Mr. Moreno Ramos' disorders are treatable and were treatable in 1993. The treatments available for these disorders, both in 1993 and today, would have the effect of significantly reducing the probability that Mr. Moreno Ramos would pose a continuing threat to society. [2]

III. DATA

1. Psychiatric History:

Mr. Moreno Ramos reports no history of psychiatric hospitalizations or outpatient psychiatric treatment prior to the beginning of his current legal problems. Mr. Moreno Ramos also stated that nobody had ever suggested that he was in need of psychiatric treatment. However, Mr. Jose Sarabia stated that around 1990, over a three-month period, he noted that Mr. Moreno Ramos would frequently change topics without any warning and that Mr. Moreno Ramos did not appear to be aware of these sudden switches in his topics of conversation. Mr. Sarabia stated that he had the distinct impression that Mr. Moreno Ramos would frequently not track other people's conversations especially if they required attention to depth and if the focus was on people other than Mr. Moreno Ramos. However, Mr. Sarabia stated that the structure of Mr. Moreno Ramos sentences were logical. He stated that it was the change in topics that was disconcerting to Mr. Sarabia. [3.1]

Mr. Moreno Ramos stated that he never suffered from any problems associated with lability. However his sister Natividad (io.1), his mother (io.3), his brother Ramiro (io.5) and Jose Sarabia, his brother-in-law (io.2) all stated that Mr. Moreno Ramos had problems with mood lability since Mr. Moreno Ramos was young. The report of Nancy Pemberton also provides evidence that Mr. Moreno Ramos suffered from mood instability (doc.11). [3.2]

Ms. Natividad Sarabia remembers that Roberto would lose control of himself when he was angry, and later behave as if he did not remember doing so. [3.3]

Mr. Moreno Ramos stated that he had difficulties sharing his feelings with others. He also stated that his inability to express feelings other than anger had allowed him to cope with his father's violence. He stated that his inability to experience strong feelings of fear and depression helped him deal with life during his childhood. He stated that he was not aware that he acted emotionally inappropriately but acknowledged that he had been involved in many physical fights during his life that were associated with anger. [3.4]

2. Family Psychiatric History:

Mr. Moreno Ramos stated that the only formal history of mental disorder in his family involved his brother Enrique Ramos. According to Mr. Moreno Ramos and his sister, Natividad Sarabia, their brother Enrique suffered from religious delusions of being the indigenous saint, Juan Diego and was obsessed with the *Virgin of Guadalupe (*essentially the mother of Christ in the religious tradition understood by

Mr. Moreno Ramos). Ms. Natividad Sarabia stated that Enrique claims to have secured a copyright in order to protect his religious work because he planned to start a business enterprise. She also remembers that Enrique had attempted to recruit her to sell religious art that he had made, but that she had refused because he appeared to be delusional. [4.1]

Mr. Moreno Ramos' mother, Carmen Moreno Ramos, indicated that Roberto reminded her of his father, Pedro Ramos. Pedro presented with similar behavioral characteristics to those in Mr. Moreno Ramos, except that Roberto had never been as violent as his father. She described Mr. Moreno Ramos' father as a very violent, hypersexual, highly controlling man who tended to be grandiose in his general outlook of life. She said that her husband was excessively interested in sex and, even after ten years of being married, he still desired to engage in sexual intercourse with her four or more times per week. She denied that her husband suffered from any specific abnormal sexual interests. She stated that frequently, her husband would interact appropriately and would speak coherently with others, but could suddenly change and begin speaking so fast that she would be unable to understand him. She remembers that his fact paced conversation could continue for a long time within a conversation. She said that this rapid speech pattern was highly characteristic of Pedro Ramos, and that their son, Roberto, had the same problem. She also stated that her husband would claim to others that he had no economic needs or problems, that he always had good jobs, when in reality, he was economically impoverished. She stated that Mr. Moreno Ramos was "*una y carne*", a term used by her to emphasize that both Pedro Ramos and Roberto Moreno Ramos presented with very similar behavior patterns (io.3). [4.2]

3. Drug and Alcohol History:

Mr. Moreno Ramos essentially denied any significant history of substance abuse. However, his sister stated that the defendant had written a letter to her in which he had stated that he had experimented with multiple drugs. See appendix 1 for more details regarding the defendant's drug history. [5]

4. Family Drug and Alcohol History:

Mr. Moreno Ramos denied any specific history of substance abuse in his family. See appendix 2 for more relevant information in this area. [6]

5. Medical Non-psychiatric History:

With the exception of musculoskeletal pain, Mr. Moreno Ramos denied a history of non-psychiatric medical illnesses. However, he stated that several members of his paternal family including himself were short in stature. See next paragraph and appendix 3 for a more detailed analysis. [7]

6. Family Medical Nonpsychiatric History:

Mr. Moreno Ramos stated that many members from the maternal side of his family were of short stature. He stated that he had short hands and fingers as well

as short toes, a characteristic that he shared with his sister, Natividad. His sister Natividad agreed with him that she and other members of their father's family were very short in stature (i.e. about five feet) and that she had short hands and arms. The significance of these findings must await further evaluation including a consult with an expert on genetic illnesses. Other information regarding Mr. Moreno Ramos family medical history is provided in appendix 4. [8]

7. Developmental History:

Mr. Moreno Ramos' mother remembers him as an irritable and tearful infant. She said that from early childhood, Roberto would frequently have temper tantrums. Her other children were less likely to have temper tantrums. Mr. Moreno Ramos' mother stated that Roberto had no difficulties meeting children and initiating friendships, but that he tended to be intrusive with other children and that this behavior frequently led to interpersonal conflicts. Mr. Moreno Ramos' mother and his sister Natividad stated that from a young age, Roberto tended to be grandiose and would make up stories about having more money and material goods than what the family objectively had. [9]

Mr. Moreno Ramos said that he had no problems making friends during his childhood years. However, he also said that he had a fundamental mistrust of people in general. He said that although he could easily befriend a person, he was "a loner by choice" and that he "enjoyed his solitude". He said "I don't trust a lot of people", but added "I am not a hermit". Mr. Moreno Ramos used the term "compartmentalization" when he described his tendency to act one specific way with a number of people while consistently behaving in a very different way with other people or with himself. His brother-in-law, Mr. Jose Sarabia said that although Mr. Moreno Ramos could easily engage in conversation with others, he had the impression that it was difficult to truly know Mr. Moreno Ramos. Mr. Moreno Ramos said that he did not mind compartmentalizing his life. He stated that he always had a good sense about who he was even though he often compartmentalized his life. However, he stated that he shared most important details of his life with Leticia, his first wife. See also Appendix 5. [10]

8. Psychosexual History:

Mr. Moreno Ramos stated that he first experienced sexual intercourse when he was 14 years of age with a 23 year-old-female who was his girlfriend. Mr. Moreno Ramos stated that he had experienced sexual intercourse with about 15 females in his lifetime. Mr. Moreno Ramos also stated that he had never had any voluntary homosexual experiences and that he had no homosexual inclinations. [11]

Mr. Moreno Ramos said that he was about 17 when he met Leticia, his first wife (id.1 ;(id.2). Mr. Moreno Ramos stated that he married Leticia when he was approximately 18 years of age. Leticia was about 23 years of age at the time that they married. [12]

Mr. Moreno Ramos' brother, Ramiro Ramos, stated that Mr. Moreno Ramos manifested mood lability at least on a weekly basis and that some of this lability was witnessed by him on repeated occasions when Mr. Moreno Ramos was

interacting with Leticia. Mr. Moreno Ramos stated that his second wife was Maria Elena Aguilar and that he had met her in a trip to Mexico. He stated that he married her about one year prior to the death of his first wife and children. He stated that he married Maria Elena in Reynosa, her hometown and that his first wife was aware of his second marriage. This examiner asked Mr. Moreno Ramos if he thought that it was unusual to have married Ms. Aguilar while he was still married to Leticia. He replied that the marriage was legal and that I should be able to find the marriage certificate in Reynosa, the city where he married Maria Elena. He also stated that the cost of the marriage certificate was 30 pesos (id.2). [13.1]

Mr. Moreno Ramos stated that his third wife's name is Marita Robledo. He stated to this examiner that Leticia, his first wife, knew of his affair with Ms. Robledo. Mr. Moreno Ramos says he never told Ms. Robledo that Leticia knew about the affair because he did not think Ms. Robledo would have understood the nature of his relationship with Leticia (id.2). Mr. Moreno Ramos married his third wife a few days after the deaths of his first wife and two children. He stated that he had been dating his third wife for some time prior to the deaths of Leticia Ramos, his first wife and his two children. [13.2]

Mr. Moreno Ramos demonstrated unusual thought content in that he appeared to have some difficulties understanding the inappropriateness of having married Ms. Robledo a few days after the death of his first wife and children. Mr. Moreno Ramos suggested that perhaps he had been influenced by Leticia's philosophy, that her Guatemalan cultural heritage led her to believe that "a bad event must be coupled with a good event". He then stated the death of his wife and two children had to be coupled with a "good" event, namely his marriage to Ms. Robledo. On August 23, 2004, this examiner asked Mr. Moreno Ramos several times if he truly believed this explanation and he replied that he was only attempting to look for an answer but truly did not have one. [13.3]

The next day, Mr. Moreno Ramos volunteered the same explanation, that he had assimilated his wife's cultural religious beliefs of combining a good with a bad event. When this examiner asked Mr. Moreno Ramos about our previous conversation the day before on exactly the same subject, he did not appear to recall that conversation. When this examiner pointed out that Mr. Moreno Ramos himself was not from Guatemala, he did not seem perturbed. He then stated again that he did not have a real answer for his behavior. [13.4]

Mr. Moreno Ramos repeatedly stated that Leticia had been the foundation of his marriage and his home. He also stated that she was responsible for the internal aspects about how their home was run, except when he had to make structural changes such as repairs within their home. [13.5]

Mr. Moreno Ramos denied any sexual dysfunction such as being unable to achieve full penile erections or experiencing recurrent physical pain during sexual intercourse. Mr. Moreno Ramos said that he had never been interested in pornography and that he had never hired the services of prostitutes. [14]

While discussing his relationship with Leticia, Mr. Moreno Ramos repeatedly stated that he trusted her with everything he did, including his extramarital affairs, since relating these affairs appeared to draw her closer to him in a paradoxical way that he himself found peculiar or unusual. [15]

Other aspects of Mr. Moreno Ramos psychosexual history that were completed but yielded negative results can be found in appendix 6. [16]

9. Social History:

Mr. Moreno Ramos said that he was born on May 23, 1954 and is presently 50 years of age. He stated that he was born in the city of Aguascalientes, located in the state of Aguascalientes, Mexico. Mr. Moreno Ramos' mother stated that she was born in Zacatecas but raised mostly in Aguascalientes, Mexico (io.3). Mr. Moreno Ramos was raised by his biological parents. Mr. Moreno Ramos said that he was born and raised in Aguascalientes until approximately age 10 or 11 years, at which time he and his family moved to the city of Guadalajara, Jalisco, Mexico. He stated that he was the second of 10 children born to his biological parents. He said that he has two brothers and four sisters. He stated that he immigrated at about age 16 years to the United States. Mr. Moreno Ramos stated that around 1979 he and his family moved to the city of Chicago, where he lived for a period of about nine years. Mr. Moreno Ramos said that he and his wife decided to move to Puerto Progreso, Texas around 1988. Mr. Moreno Ramos repeatedly stated that Leticia had been the foundation of his marriage and his home. He also stated that she was responsible for the internal aspects of how their home life was run, except when he had to make structural changes such as repairs within their home. Mr. Moreno Ramos stated that in Progreso, Texas, he was never able to find a stable construction job as he had been able to do for most of his adult life. He said that he did not mind living in Texas even though he had no stable job. [17]

10.1. Social History of Having been the Victim of Physical Abuse:

Mr. Moreno Ramos had denied a history of child abuse when asked by previous interviewers. However, his family reported to Nancy Pemberton, Dr. Richard Cervantes and to myself that Roberto had been the victim of severe and frequent abuse at the hands of his father. When confronted with the reports of his family, Mr. Moreno Ramos admitted that he had frequently been punished by his father via corporal punishment but explained that this was not abuse because his father's punishments were commonplace for children in Mexico. He stated that he was not affected in any significant way from a psychological viewpoint because "After a while I learned to take it. . . . I just got used to it. . . I would not cry". Mr. Moreno Ramos stated that he would never forget the physical punishments even though he learned to cope with them". [18]

Ms. Natividad Sarabia, sister of Mr. Moreno Ramos, stated that Mr. Moreno Ramos had been the victim of physical abuse at the hands of their father. According to Ms. Sarabia, Mr. Moreno Ramos and his older brother had been the victims of physical abuse because their father would punish Mr. Moreno Ramos and his brother by hanging them upside down from a beam in order to punish them for alleged transgressions. Ms. Sarabia stated that she would hear her brothers cry while they hang upside down. She also stated that they would cry, laugh and then blame each other, a situation that she recalled as odd and deeply disturbing. She stated that the last time that she recalled that Mr. Moreno Ramos had been punished in this manner, was during their stay in Guadalajara (io.1). Mr. Moreno Ramos stated that he and his older brother had been punished by his father by being hung from their feet upside down and that the time period of punishment

could be long because he recalled that at times he was in need to defecate and proceeded to defecate while he was still tied to a beam. The reports of Nancy Pemberton and Dr. Richard Cervantes provide a similar description of this mode of punishment by Mr. Moreno Ramos' father. [19]

10.2. Social History of Violent Behavior:

Mr. Moreno Ramos stated that he hardly ever disciplined his children via corporal punishment. Mr. Moreno Ramos stated that on one occasion he was bathing his son and attempted to discipline his older son by submerging him in water and complete the bath. Mr. Moreno Ramos stated that his son reacted with extreme fright. Mr. Moreno Ramos stated that he was perplexed that his son reacted in such a way because Mr. Moreno Ramos did not think that he was being particularly inappropriate or abusive toward his older son. He said that his son was still a child and that they were living in Chicago. See also the section on psychosexual history and psychiatric history. [20]

11. Educational History:

Mr. Moreno Ramos stated that he began elementary school in Guadalajara, Jalisco, Mexico. He also stated that he attended two elementary schools in Guadalajara and earned an elementary school diploma. Mr. Moreno Ramos said that he was a fast learner but that he was unable to follow the school structure (id.1; id.2). According to his mother, Mr. Moreno Ramos had substantial difficulties in elementary school largely because Mr. Moreno Ramos was unable to stop interrupting classes. She said that on several occasions, he was expelled from school, and that she had to negotiate with various schools in order to reinstate him in school (io.3). [21]

According to Mr. Moreno Ramos, he attended Belvedere Junior High School in East Los Angeles, California during the evenings and around the time that he was 16 years of age. Mr. Moreno Ramos stated that shortly after he arrived in East Los Angeles, his father helped him start to learn about the construction trade. Mr. Moreno Ramos said that his father soon helped him join the labor union (Local 300). Mr. Moreno Ramos stated that he learned the construction trade on the job. He also said that as a result of working in general construction, he became a very good handy man. Mr. Moreno Ramos said that he had a very difficult time adjusting to East Los Angeles because the social milieu was foreign to him and because he did not speak English. Mr. Moreno Ramos stated that these problems led him to run away from his parent's home without informing them on one occasion. His mother said that he informed her that Mr. Moreno Ramos planned to leave Los Angeles for Tijuana because he "needed to check if his green card" was "authentic". She stated that she thought at that time that his reasoning was odd because his father had arranged for legal residence for the other members of his family of similar age to him. She stated that after a few days, Mr. Moreno Ramos returned to live in his parent's home in Los Angeles, California. [22]

Mr. Moreno Ramos stated that on another occasion he returned to Baja California, Mexico with a female acquaintance of similar age to him and lived there with her for a few months. Mr. Moreno Ramos stated that during those few months,

he lived in Tijuana, Mexicali and Tecate, Baja California. Mr. Moreno Ramos stated that his female friend and Mr. Moreno Ramos developed a sexual relationship that lasted for possibly 2 months. Mr. Moreno Ramos stated that he opted not to pursue the relationship with her, because she wanted to marry him and he thought he was too young and not ready for marriage. [23]

Mr. Moreno Ramos stated that he learned to make ceramic ware and that he was paid much less than he was able to earn with his father in Los Angeles, but felt more comfortable in Mexico. He stated that he felt comfortable living in northern Baja California because that was the sociocultural milieu in which he had been raised during his early adolescence (id.1). He stated that several members of his family were able to locate him and that he returned to East Los Angeles to live with them (id.2). He stated that he attended James Garfield High School for approximately one and one half years but added that he did not complete the 12th grade. He stated that he completed about 11 and one half years of education. Mr. Moreno Ramos said that he quit high school partially because he never fully adjusted to the social milieu of high school. He stated that although most students in Garfield High School were of Mexican ethnic background, he was unable to adjust to the level of assimilation displayed by most of them. [24]

Mr. Moreno Ramos stated that he had always had a difficult time learning within the school structure, and therefore he did not perform well in school. He said that nonetheless, he developed an early passion for reading literature since he was a 10 or 11 years of age. He said that he has enjoyed reading works by Jean Paul Sartre, Federico Garcia Lorca and Gabriel Garcia Marquez. He stated that he likes Mexican Bolero music, mariachi music but that he later gained an appreciation for the opera. He said that he enjoyed attending poetry readings and the theatre since he was an adolescent living in Mexico. [25]

He said that he began collecting stamps and coins when he was living in Mexico but that he became more serious about stamp collecting. He stated that he had a very large stamp collection by 1992, just prior to his current arrest (id.1). Mr. Moreno Ramos said that both Mr. Moreno Ramos and Leticia, his first wife participated in stamp collecting. He said that stamp collecting allowed him to educate himself informally in topics such as history, nature and the geography of the world. [26]

Mr. Moreno Ramos stated that as an adult, he learned about cars by assembling plastic models of cars when he was able to earn money and buy the models. He said that he worked on "less than 100" models. He stated that as an adult he learned that he had the mechanical facility to repair cars but that he did not fully capitalize in this ability. [27]

12. Occupational History:

Guadalajara, Jalisco, Mexico (1964-1967). Mr. Moreno Ramos stated that he was 10 years old when he had his first job was that of an ice cream vendor. He said that he sold popsicles and ice cream from small push cart and that are very common in Mexico. He stated that the job lasted for about two months. Mr. Moreno Ramos stated that he lived most of his childhood in Guadalajara. [28.1]

Tijuana, Baja California (1967-1970). Mr. Moreno Ramos stated that when he lived in Guadalajara he did not work. He stated that he began to work in Tijuana on a regular basis. Mr. Moreno Ramos stated that when he lived in Guadalajara he did not work on a regular basis (id.2) Mr. Moreno Ramos stated that he worked caring and killing goats and preparing their meat that would then be sent to a restaurant. Mr. Moreno Ramos stated that he never worked as a pimp or as a prostitute. (id.2) [28.2]

Los Angeles, California (1970-1980). Mr. Moreno Ramos stated that he worked in the construction industry while he lived in Los Angeles. He stated that his father introduced him to construction. He stated that his father helped him join the labor union and that Mr. Moreno Ramos became very proficient in this trade. [28.3]

According to Jose Sarabia, Mr. Moreno Ramos' brother-in-law, Mr. Moreno Ramos worked for about three months in Los Angeles, with Mr. Sarabia. Mr. Sarabia stated that Roberto Moreno Ramos worked with him caring for mentally ill individuals in a group home. Mr. Sarabia said that he and Mr. Moreno Ramos probably had this job around 1989 or 1990, and that Mr. Moreno Ramos' family was already living in Texas (io.2). [28.4]

Chicago (1980-1990). Mr. Moreno Ramos stated that he arrived with his family in Chicago during the year 1980. He stated that while he lived in Chicago, he continued to work in construction. He stated that he was able to develop a small construction business that did not require heavy equipment. He said that ordinarily he would employ no more than four workers. He stated that he continue to work in the construction field for as long as he lived in Chicago. He stated that he had his own construction company for about 9 years. He said that his construction job was viable at the time that he and his family decided to move to Texas. Mr. Moreno Ramos and his family left Chicago to live in Texas in the late 1980s. [28.5]

Puerto Progreso, Texas (1986-1992). Mr. Moreno Ramos stated that in Texas he soon found out that the economy was not very good. He stated that while he lived in Texas he worked making wood kitchen cabinets. Mr. Moreno Ramos stated that he did not become discouraged by the lack of work opportunities while he lived in Texas. He said that during the first year that he lived in Progreso, Texas. [28.6]

13. Mental Status Examination:

Concerning his appearance Mr. Moreno Ramos was a well-developed, well-nourished male of short stature, who appeared his stated age and was dressed in prison attire. His behavior was consistent with someone who was intermittently mildly anxious. Overall he was cooperative throughout the interview. However, he appeared to be evasive when he was asked about behaviors that were suggestive of abnormal behaviors that may relate to him, whether or not these behaviors were of an antisocial nature. His body kinetics were overall within normal limits. Concerning his sensorium, Mr. Moreno Ramos was alert and oriented to person, place, time, and purpose. Memory was intact for immediate recall, short-term and long-term memory. [27]

In regard to his mood, the Mr. Moreno Ramos stated that his mood was overall "good". Mr. Moreno Ramos affect was intermittently inappropriate throughout his interviews with me. For example, Mr. Moreno Ramos would at times appear rather jovial while discussing his history of having been the victim of abuse

as a child. However, at other times he appeared to be dysphoric while discussing his children's deaths, the death of his first wife or his experiences of having been the victim of abuse while he was a child. Overall, Mr. Moreno Ramos' affect appeared intermittently mildly irritable, intermittently mildly dysphoric and on rare occasion hostile. His thought processes revealed that his thoughts were overall well organized and well-formed. They were devoid of derailing, circumstantiality, tangentiality or loose associations. However his thoughts were at times illogical. Thought content showed no evidence of delusions, suicidal or homicidal ideations. Concerning his perceptions, he denied, and demonstrated no evidence for, auditory or visual hallucinations. He did not endorse abnormal perceptual phenomena suggestive of olfactory, gustatory or tactual hallucinations. There was also no evidence for perceptual illusions. He denied depersonalization and derealization. His attention was overall within normal limits. His insight into major aspects of his life, his legal difficulties and mental problems was often impaired and his judgment ranged from fair to poor. His abstract abilities were overall fair but variable. His general fund of knowledge was within normal limits. [28]

14. Other Psychiatric Data

1. *Measures of Psychopathology.* On the Brief Psychiatric Rating Scale (BPRS), a general measure of psychopathology, administered on August 30, 2004, he scored 30, indicative of a mild degree of general symptoms of psychopathology during the week prior to rating him with the scale. Mr. Moreno Ramos was interviewed with the Structured Clinical Interview for DSM-IV-Axis I Disorder (SCID-I). The SCID-I is a semi-structured interview designed to aid mental health professionals in the comprehensive evaluation of Axis I Disorders. Most Psychiatric Disorders (i.e. Attention Deficit and Hyperactivity Disorder), including the major Psychiatric Disorders such as the Bipolar Disorders are subsumed under Axis I. The revised version of the Structured Clinical Interview for DSM-IV Dissociative Disorders (SCID-D) was used to evaluate Mr. Ramos for Dissociative Disorders. On the observer rated version of the Conners' Rating Scales-Revised (CAARS-O: L), Ms. Sarabia rated Mr. Moreno Ramos as she recalled him in his late adolescence and early twenties and T scores of greater than 70 were obtained in the hyperactivity/restlessness factors, the DSM-IV-Hyperactive-Impulsive Symptoms factor, DSM-IV ADH symptoms total and the ADHD Index, scores that are strongly suggestive of someone with ADHD. Moreover all but one of the remaining factors fell in the 66-69 range. However, it should be noted that the inconsistency Index is 9 and therefore these results need to be interpreted with caution particularly since Ms. Sarabia's is rating him retrospectively and also because the rating was completed telephonically. [29]

Measures of Mood Psychopathology. On the Young Mania Rating Scale (YMRS) administered on August 24, 2004, an observer rated scale for mania, Mr. Moreno Ramos scored 18.5, consistent with a low level of manic symptoms. On the Hamilton Rating Scale for Depression Scale (HRSD) administered on August 23, 2004, he scored 4, consistent with a very low degree of clinical symptoms of depression during the week prior to rating the scale. [30]

Measures for Neuropsychiatric Developmental Psychopathology. On the observer rated version of the Conners' Rating Scales-Revised (CAARS-O: L), Ms.

Sarabia rated Mr. Moreno Ramos as she recalled him in his late adolescence and early twenties and T scores of greater than 70 were obtained in the hyperactivity/restlessness factors, the DSM-IV-Hyperactive-Impulsive Symptoms factor, DSM-IV ADH symptoms total and the ADHD Index, scores that are strongly suggestive of someone with ADHD. Moreover all but one of the remaining factors fell in the 66-69 range. However, it should be noted that the inconsistency Index is 9 and therefore these results need to be interpreted with caution particularly since Ms. Sarabia's is rating him retrospectively and also because the rating was completed telephonically. [31]

On the Asperger Syndrome Diagnostic Scale (ASDS) Mr. Moreno Ramos' results are not suggestive of Asperger's Disorder or a similar disorder. This examiner administered the BarOn Emotional Quotient Interview Research Version (BEQI-RV). This semistructured interview revealed that Mr. Moreno Ramos is experiencing long-term difficulties with emotional self awareness. These problems relate to his self understanding of emotions and how well he can identify the emotions of others. On the BEQI-RV he scored very low in the empathy scale. [32]

Measures of Personality Disorder Psychopathology. Mr. Moreno Ramos was interviewed with the Structured Clinical Interview for DSM-IV-Axis II Personality Disorders (SCID-II). The SCID-II is a semistructured interview designed to aid in the comprehensive evaluation of Personality Disorders. On the SCID-II, Mr. Moreno Ramos scored positive on personality traits for Schizotypal, Borderline, Narcissistic and Schizoid Personality Disorder traits. There are some indications of personality psychopathology that do not reach DSM-IV-TR thresholds that may nonetheless be important in understanding Mr. Moreno Ramos. This examiner administered the BarOn Emotional Quotient Interview Research Version (BEQI-RV). This semi-structured interview revealed that Mr. Moreno Ramos is experiencing long-term difficulties with emotional self awareness. These problems relate to his self understanding of emotions and how well he can identify the emotions of others. On the BEQI-RV he scored very low in the empathy scale. [33]

2. *Measures of Cognition*. On the Mini Mental Status Examination (MMSE) he scored 29/30, within normal limits and not suggestive of gross cognitive deficits. On the CLOX, a screening test for executive dysfunction, the result was not suggestive of executive dysfunction. Both the CLOX and other screening tests such as the Bender Gestalt are far weaker than the measures of executive dysfunction or of Cognition used by Dr. Weinstein. [34]

3. *Measures of Malingering*. The Miller Forensic Assessment of Symptoms Test (M-FAST) is an instrument used to evaluate the possibility that a person may be malingering psychopathology. The M-FAST score of zero is consistent with a person who is not malingering. On the Structured Interview of Reported Symptoms (SIRS) administered on August 23, 2004, Mr. Moreno Ramos profile is that of someone who is not malingering. The SIRS profile scales fall in the "Honest" range. Other supplementary scores are also not suggestive of malingering. On the DS scale, he scored 16, consistent with someone who may minimize everyday problems. [35]

IV. DISCUSSION INVOLVING DIAGNOSTIC IMPRESSION

1. General Considerations Regarding Diagnostic Impression:

General Considerations. The application of psychiatric diagnostic systems in psychiatric-legal contexts often requires added considerations beyond those encountered in clinical non-forensic settings. This is in part why DSM-IV-TR states "When the DSM-IV-categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be used or misunderstood" (DSM-IV-TR, pp. xxxii-xxxiii). Therefore, this examiner has made use of special procedures or considerations in order to deal with problems that may originate from the use of nosological systems in forensic-psychiatric contexts. The following diagnostic analysis was made in accordance with the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, Text Revision (DSM-IV-TR). [36]

2. Evaluation for Bipolar Disorder:

Evaluation for Hypomanic Episode. Mr. Moreno Ramos presented with a history suggestive of both Hypomanic and Manic states. Therefore, I considered the possibility that Mr. Moreno Ramos may have experienced Hypomanic or Manic Episodes. The informants that provided key information for my evaluation of Hypomanic/Manic spectrum illness is provided in appendix 7. Essentially this appendix provides key information relevant for Mr. Moreno Ramos case regarding Bipolar Disorder psychopathology. The + sign represents a positive endorsement for a criterion. The negative sign means that the criterion is not met. The capital letter I means that there is insufficient information to make a rating NA stands for a rating not being applicable for the current situation. In addition, I employed a Likert-like rating system where 2 equals the criterion is met, zero if the criterion is met and 1, if there are noteworthy elements that fulfill the criterion. The first bracket corresponds to a rating for the childhood period (approximately birth to age 12 years. The second bracket stands for about age 13 -18, the adolescence period. The third bracket is a rating for the adulthood period, approximately age 19 and above. The fourth bracket stands for the standard DSM-IV-TR rating. According to DSM-IV-TR the diagnostic criteria for a Hypomanic Episode can be summarized as provided in table 5. Mr. Moreno Ramos presents with a history of hypomanic psychopathology that has varied throughout his lifetime as has been reported by his mother and his sister, Natividad Sarabia. Mr. Moreno Ramos qualified for a history of frequent episodes frequently consistent with Hypomanic-like Episodes. They are not termed Hypomanic episodes because their origin may be partially due to gross brain trauma or a general medical condition. However, it should be noted that the psychopathological structure of these episodes conform with a Hypomanic Episode. [37]

TABLE 5. DSM-IV-TR CRITERIA FOR HYPOMANIC EPISODE:

A. A distinct period of persistently **elevated**, expansive, or **irritable** mood, lasting throughout at least **4 days**, that is clearly different from the usual nondepressed mood

B. During the period of mood disturbance, **three (or more)** of the following symptoms have persisted (four if the mood is only irritable) and have been present to a significant degree:

1. inflated self-esteem or grandiosity [+, 1], [+, 1], [+, 2], [+, 2]
2. decreased need for sleep (e.g., feels rested after only 3 hours of sleep) [I, I], [I, I], [I, I], [I, I]
3. more talkative than usual or pressure to keep talking [+, 1], [+, 1], [+, 1], [+, 1]
4. flight of ideas or subjective experience that thoughts are racing [I, I], [I, I], [I, I], [I, I]
5. distractibility (i.e., attention too easily drawn to unimportant or irrelevant external stimuli) [+, 2], [+, 02], [+, 2], [+, 2]
6. increase in goal-directed activity (either socially, at work or school, or sexually) or psychomotor agitation [I, I], [I, I], [+, 1], [+, 1]
7. excessive involvement in pleasurable activities that have a high potential for painful consequences (e.g., the person engages in unrestrained buying sprees, sexual indiscretions, or foolish business investments) [I, I], [+, 1], [+, 2], [+, 2]

C. The episode is associated with an unequivocal change in functioning that is uncharacteristic of the person when not symptomatic [I, I], [I, I], [+, 1], [+, 1]

D. The disturbance in mood and the change in functioning are observable by Others [I, I], [I, I], [+, 1], [+, 1]

E. The episode is not severe enough to cause marked impairment in social or occupational functioning, or to necessitate hospitalization, and there are no psychotic features [I, I], [I, I], [+, 1], [+, 1]

F. The symptoms are not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication, or other treatment) or a general medical condition (e.g., hyperthyroidism) [-, 1], [-, 1], [-, 1], [-, 1]

Note: Hypomanic-like episodes that are clearly caused by somatic antidepressant treatment (e.g., medication, electroconvulsive therapy, light therapy) should not count toward a diagnosis of Bipolar II Disorder. [38]

Evaluation for Manic Episode. According to DSM-IV-TR the diagnostic criteria for a Manic Episode can be summarized as outlined in table 6. The + sign represents a positive endorsement for a criterion. The negative sign means that the criterion is not met. The capital letter I means that there is insufficient information to make a rating NA stands for a rating not being applicable for the current situation. In addition, I employed a Likert-like rating system where 2 equals the criterion is met, zero if the criterion is met and 1, if there are noteworthy elements that fulfill the criterion. The first bracket corresponds to a rating for the childhood period (approximately birth to age 12 years. The second bracket stands for about age 13 -18, the adolescence period. The third bracket is a rating for the adulthood period, approximately age 19 and above. [39]

Criteria B for Mania are qualitatively the same as those for Hypomanic Episode. However, they are more intense and cause greater disability. Most importantly, Mr. Moreno Ramos' family provides a history of grandiose delusions. For example, he described himself as someone who claimed to have owned an apartment building with tenants that provided a steady source of income. He described himself as claiming to have owned several homes, including a large home that had four car ports and four vehicles. He described himself as someone who owned a large construction company in Chicago that used large numbers of people

and was involved in completing large scale projects such as constructing large buildings. He described himself as someone who claimed to have to have traveled to Europe for vacationing. He also described himself as someone that had sizable monetary funds. However, little objective information has ever been uncovered to substantiate these claims. Moreover, he would react to confrontations on his grandiosity with indifference, oblivious disregard or with different degrees of hostility when others did not appear to believe him. Also, his grandiose cognitions were impervious to change over long spans of time (i.e. they could last days or much longer). [40]

However, because it remains unclear to what extent Mr. Moreno Ramos became further disabled when these states were noted, I term them Manic-like Episodes rather than Manic Episodes. From a clinical perspective of detecting a Bipolar Disorder, it is clear that Mr. Moreno Ramos' Hypomanic-like and Manic-like episodes fall in the Hypomanic-Manic spectrum. Moreover, I emphasize that within this spectrum, Mr. Moreno Ramos experiences grandiose delusional thinking that is recurrent in nature. From a psychiatric-legal perspective it is not important whether Mr. Moreno Ramos' psychopathology is termed Hypomanic versus Hypomanic-like or whether it is termed Manic versus Manic-like. What is important is to recognize that Mr. Moreno Ramos suffers from a Bipolar Disorder associated with the hypomanic-manic spectrum of psychopathology and that such a spectrum of symptoms is associated with recurrent psychotic states, mood lability, aggressive ideation, poor impulse control, agitation, impaired insight and a resulting predisposition towards violent behavior. [41]

In conclusion, given all of the available information relevant to Bipolar Disorder psychopathology, Mr. Moreno Ramos frequently functioned in mental states consistent either with Hypomanic-like Episodes (when his grandiose cognitions were of a non-delusional nature) or Manic-like Episodes (when his grandiose cognitions reached delusional proportions). Given all of the available information, Mr. Moreno Ramos suffers from a DSM-IV-TR Bipolar Disorder Not Otherwise Specified. Also the results of the YMRS, an observer rated scale for mania, are consistent with Bipolar Disorder symptomatology. Mr. Moreno Ramos scored 18.5, consistent with a low but clear level of manic symptoms. [42]

Mr. Ramos was formally evaluated for Schizophrenia because he has a history of suffering from recurrent psychotic states. However, he did not meet criteria for Schizophrenia See appendix 8. [43]

The nature of his Bipolar Disorder may be further clarified if additional sources of collateral information become available for review, if I have the opportunity to interview other family members and if I have the opportunity to evaluate Mr. Moreno Ramos in the future. However any further exploration of Mr. Moreno Ramos' psychopathology will continue to have some limitations in that Mr. Moreno Ramos' psychopathology involves impairment of insight associated with psychological defenses that prevent him from realizing the nature and extent of his psychopathology. This is a frequent finding among people who suffer from Bipolar Disorder, especially those who tend to gravitate toward the Hypomanic-Manic end rather than those who become depressed. Given the nature of his psychopathology, he is more likely to acknowledge and report the nature of his psychopathology to others if he has been appropriately treated and stabilized with psychotropic agents. [44]

TABLE 6. DSM-IV-TR CRITERIA FOR MANIC EPISODE

A. A distinct period of abnormally and persistently elevated, expansive, or irritable mood, lasting at least 1 week (or any duration if hospitalization is necessary).

B. During the period of mood disturbance, three (or more) of the following symptoms have persisted (four if the mood is only irritable) and have been present to a significant degree:

1. inflated self-esteem or grandiosity [+, 1], [+, 1], [+, 1], [+, 2], [+, 2].
2. decreased need for sleep (e.g., feels rested after only 3 hours of sleep) [-, 0], [-, 0], [-, 0], [-, 0].
3. more talkative than usual or pressure to keep talking [+, 1], [+, 1], [+, 1], [+, 1].
4. flight of ideas or subjective experience that thoughts are racing [I, I], [I, I], [I, I], [I, I].
5. distractibility (i.e., attention too easily drawn to unimportant or irrelevant external stimuli) [+, 1], [+, 1], [+, 1], [+, 1].
6. increase in goal-directed activity (either socially, at work or school, or sexually) or psychomotor agitation [I, I], [I, I], [+, 1], [+, 1].
7. excessive involvement in pleasurable activities that have a high potential for painful consequences (e.g., the person engages in unrestrained buying sprees, sexual indiscretions, or foolish business investments) [I, I], [+, 1], [+, 2], [+, 2].

C. The symptoms do not meet criteria for a Mixed Episode. (See linked section) [-, 0], [-, 0], [-, 0], [-, 0].

D. The mood disturbance is sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others, or to necessitate hospitalization to prevent harm to self or others, or there are **psychotic features** grandiosity [I, I], [I, I], [+, 2], [+, 2].

E. The symptoms are not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication, or other treatment) or a general medical condition (e.g., hyperthyroidism) [-, 1], [-, 1], [-, 1], [-, 1].

Note: Manic-like episodes that are clearly caused by somatic antidepressant treatment (e.g., medication, electroconvulsive therapy, light therapy) should not count toward a diagnosis of Bipolar I Disorder.

C. The episode is associated with an unequivocal change in functioning that is uncharacteristic of the person when not symptomatic [I, I], [I, I], [I, I], [I, I].

D. The disturbance in mood and the change in functioning are observable by others [I, I], [I, I], [I, I], [I, I].

E. The episode is not severe enough to cause marked impairment in social or occupational functioning, or to necessitate hospitalization, and there are no psychotic features [I, I], [I, I], [-, 0], [-, 0].

F. The symptoms are not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication, or other treatment) or a general medical condition (e.g., hyperthyroidism) [I, I], [I, I], [I, I], [I, I].

Note: Hypomanic-like episodes that are clearly caused by somatic antidepressant treatment (e.g., medication, electroconvulsive therapy, light therapy) should not count toward a diagnosis of Bipolar II Disorder. [45]

Evaluation for Depressive Psychopathology. With regard to Depressive Disorders, I first considered if Mr. Moreno Ramos had ever suffered from a Major Depressive Episode. I found no evidence that he ever suffered from a Major Depressive Episode. Also I considered if Mr. Moreno Ramos ever suffered from a Depressive Disorder qualitatively similar to Dysthymic Disorder, a chronic but less intense depressive disorder than a Depressive Disorder associated with Major Depressive Episodes. However, my exploration was negative. Therefore, Mr. Moreno Ramos' Bipolar Disorder does not appear to be associated with a significant depressive component. See appendix 7 for more relevant details. [46]

2. Evaluation for Cognitive Disorders:

Mr. Moreno Ramos was administered the WAIS-III by Dr. Weinstein and in the resulting WAIS-III Statistical Report, both Mr. Moreno Ramos' verbal and full IQ are 87, at the low average range (doc.4). This IQ is not consistent with Mental Retardation. However, this IQ may still be consistent with brain abnormalities. Mr. Moreno Ramos was evaluated with the WCST, a well known measure of executive function. According to the Wisconsin Card Sorting Test Computer Version Client Information Sheet, Mr. Moreno Ramos' results are consistent with significant executive dysfunction. Overall these results point to frontal lobe abnormalities. However, it should be noted that these abnormalities may be consistent with Bipolar Disorder or a General Medical Condition. Mr. Moreno Ramos' hypersexuality is more likely to be secondary to the psychological structure of his hypomanic-manic spectrum of psychopathology. However, it should be noted that brain damage may predispose some individuals to become hypersexual or otherwise sexually inappropriate. Abnormalities in the temporal lobe areas may be associated with abnormalities in sexual behavior. From this perspective, the findings of Dr. Weinstein's topometric EEG study are not inconsistent with this possibility. [47.1]

The findings in neuropsychological testing are yet another reason why Mr. Moreno Ramos has been diagnosed by this examiner as suffering from Bipolar Disorder Not Otherwise Specified, rather than just Bipolar Disorder. In other words, Mr. Moreno Ramos' abnormalities in executive dysfunction may be not only associated with hypomanic-manic spectrum psychopathology but may also be related to brain insults independent of the psychopathology originating from a Bipolar Disorder. Mr. Moreno Ramos presents with a long history of multiple beating at the hands of his father which may have resulted in head trauma. For example his father's frequent practice of punishing Mr. Moreno Ramos by hanging him head down from a beam may have resulted in cerebral insults with permanent neuropsychiatric sequelae. [47.2]

Mr. Moreno Ramos presented with deficits in emotional processing and empathy in a setting where psychopathy can not explain the findings. Rather, from a neuropsychiatric perspective, these difficulties point toward deficits associated with frontal lobe and temporal lobe dysfunction, consistent with the type of findings in Dr. Weinstein's testing. Psychotic conditions are also known to present with affective difficulties including inappropriate affect, constricted affect, mood lability and deficits with empathy as well as with abnormalities with temporal and frontal lobe dysfunction. [47.3]

3. Evaluation for Neuropsychiatric Developmental Disorders:

Some neuropsychiatric developmental disorders may be associated with mood psychopathology and antisocial behaviors. Therefore, this examiner evaluated Mr. Moreno Ramos for some of these Disorders but the evidence does not support such a diagnosis. See appendix 9. [48]

4. Evaluation of Personality Disorders:

Mr. Moreno Ramos presented with a history of psychopathology suggestive of various Personality Disorders. The results of this analysis indicate that Mr. Moreno Ramos qualified for a Personality Disorder Not Otherwise Specified with features of Borderline, Schizoid, Narcissistic, and Schizoid Personality Disorder traits. A more detailed summary of these results is found in appendix 11. Other relevant results related to evaluations about personality psychopathology are found in appendix 12. [49]

5. Evaluation for Malingering:

DSM-IV-TR states that, "The essential feature of Malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs". Therefore, this examiner conducted an extensive investigation of the possibility that Mr. Moreno Ramos may be Malingering. The results of this investigation strongly indicate that Mr. Moreno Ramos is not likely to be Malingering. See appendix 13. [50]

IV. DSM-IV-TR CULTURAL FORMULATION

In the present case, there are various psychosociocultural factors that this examiner has taken into account in order to arrive at an optimal psychiatric-legal evaluation. DSM- IV- TR recommends that the cultural factors be taken into account in evaluating individuals with psychiatric difficulties and states, "Diagnostic assessment can be especially challenging when a clinician from one ethnic or cultural group uses the DSM-IV classification to evaluate a person from a different or cultural group. A clinician who is unfamiliar with the nuances of an individual's cultural frame of reference may incorrectly judge as psychopathology those normal variations in behavior, belief, or experience that are particular to the individual's culture" (DSM-IV-TR, pp. xxxiv). Alternatively, failure to take into account cultural parameters may fail to uncover evidence of psychopathology. Accordingly, I have used the DSM-IV-TR Cultural Formulation to analyze important psychosociocultural factors. However, this examiner emphasizes that my analysis of Mr. Moreno Ramos' case was not limited to the use of the cultural formulation of DSM-IV-TR. Application of other paradigms involving neuropsychiatric, developmental, ecological and historical approaches also were of some importance. See appendix 14 for a full detail regarding the cultural formulation analysis. [51]

V. DSM-IV-TR MULTIAXIAL DIAGNOSIS

1. Current DSM Diagnosis (DSM-IV-TR Diagnostic Impression):

Given the available data and the reasoning provided in this report, I provide the current DSM-IV-TR diagnostic impression given in table 7.

TABLE 7. DSM-IV-TR MULTIAXIAL DIAGNOSIS

Axis I. Clinical Disorders/Other Conditions that May Be a Focus of Clinical Attention:

1. Bipolar Disorder Not Otherwise Specified

Axis II. Personality Disorders/Mental Retardation

1. Personality Disorder Not Otherwise Specified Specified with Borderline, Schizotypal, Narcissistic and Schizoid Personality Disorder features.

Axis III. General Medical Conditions

1. Defer to Other Specialists

Axis IV. Psychosocial and Environmental Problems

1. Problems related to interaction with the legal system/crime
2. Problems related to the social environment

Axis V. Global Assessment of Functioning

1. GAF=45 (current).
2. GAF=5 (during instant offense)
3. GAF=48 (highest level past year). [52]

2. Lifespan DSM Diagnoses for Mr. Moreno Ramos:

At the time that Mr. Moreno Ramos' wife and their two children died, Mr. Moreno Ramos was suffering from Bipolar Disorder Not Otherwise Specified. He also met diagnostic criteria for a Personality Disorder. These are the same types and variants of Psychiatric Disorders from which he currently suffers. The Psychiatric Disorders from which Mr. Moreno Ramos suffered during and around the time of the deaths of his wife and children had been diagnosable by mental health professionals a) for at least a period of years prior to the time that Mr. Moreno Ramos wife and two children died (using DSM-III or DSM-II-R), b) during and around the time of the deaths of his wife and children (using DSM-III-R) c) from the times of their deaths until the time that he was arrested (using DSM-III-R), d) from the time that he was arrested until the end of the trial (using DSM-IV-R) and e) from the time period beginning with the end of his trial until the time of my evaluation with Mr. Moreno Ramos (using DSM-III-R, DSM-IV or DSM-IV-TR). The Diagnostic and Statistical Manuals of Mental Disorders of relevance to these considerations discussion are DSM-III published in 1980 (APA, 1980), DSM-III-R (APA, 1987), DSM-IV, published in 1984 (APA, 1984) and DSM-IV-TR (APA, 2000) Other psychiatric and psychological tools necessary or useful for making the above named diagnoses were also available for all for the above mentioned time periods. [53]

VI. TREATMENT ISSUES:

The Psychiatric Disorders from which Mr. Moreno Ramos suffered during and around the time of the deaths of his wife and children have been treatable by mental health professionals for many years, beginning long before the time that Mr. Moreno Ramos' wife and two children died, and continuing until the present. With regard to Bipolar Disorder, it should be clear that by1990, effective psychopharmacological interventions were already well established in clinical psychiatric practice. Actually, as early as the 1970's, effective psychopharmacological treatment of Bipolar Disorder had already become available (Goodwin and Jamison, 1990, pp. 603-629). Moreover, by 1990, psychotherapeutic techniques had long been introduced in the treatment of Bipolar Disorder (Goodwin and Jamison, 1990, pp. 725-745). With regard to the components of Mr. Moreno Ramos' Personality Disorder, there are both biological as well as psychotherapeutic interventions that may be of benefit. See, for example, Soloff, 2000. Many of these interventions were available well before 1990. [54]

Had Mr. Moreno Ramos been properly diagnosed prior to trial, an expert could have testified before the jury that his conditions were treatable and that proper medication would greatly reduce the likelihood of his being violent in the future, particularly if he were living in the controlled environment of a prison. [55]

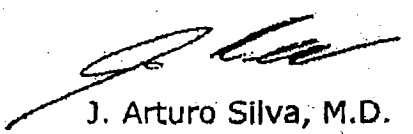
VII. CONCLUSION AND RECOMMENDATIONS

Mr. Moreno Ramos is presently suffering from a Bipolar Disorder Not Otherwise Specified. He also meets criteria for a Personality Disorder Not Otherwise Specified with Borderline Schizotypal, Narcissistic and Schizoid Personality Disorder traits.

All of the diagnostic impressions that I have made could have been made in 1993 by any competent mental health professional. Had the proper testing and investigation been done, an expert could have testified to the jury that Mr. Moreno Ramos suffers from an organic brain dysfunction that is either genetic or the result of a brain injury; that he suffers from Bipolar Disorder, which is a severe and debilitating mental disease; that he has been psychologically damaged by a lifetime of poverty and physical abuse; that these conditions impaired his judgment and prevented him from coping with stress in normal, healthy ways; that all of these conditions are treatable and that, with treatment, Mr. Moreno Ramos could manage well in the structured world of a prison and that he would pose a very low risk to society.

If a psychiatric report of greater depth is desirable, I recommend that Mr. Moreno Ramos be evaluated by a specialist in genetic diseases and that the psychiatric records of his brother, Enrique, be provided to me. Contingent upon the results of those inquiries, additional clinical interviews of Mr. Moreno Ramos and/or his family members could be indicated.

However, the current evaluation is complete and sufficient to make the above diagnoses within a reasonable degree of medical certainty.



J. Arturo Silva, M.D.
September 27, 2004
San Jose, California

VIII. APPENDICES

Appendix 1. Evaluation for Substance Abuse:

Mr. Moreno Ramos provided the following history regarding his pattern of substance abuse during three different time periods (see table 8. The endorsed responses are provided in bold letters). [60]

TABLE 8. SUBSTANCE ABUSE DURING THE LAST FOUR WEEKS, LAST SIX MONTHS AND DURING LIFETIME

Substance used	Last 4 Weeks	Last 6 Months	Lifetime
1. Alcohol	Yes **No**	Yes **No**	**Yes** No
2. Amphetamine	Yes **No**	Yes **No**	Yes **No**
3. Anabolic steroids	Yes **No**	Yes **No**	Yes **No**
4. Cannabis	Yes **No**	Yes **No**	**Yes** No
5. Cocaine	Yes **No**	Yes **No**	Yes **No**
6. LSD*	Yes **No**	Yes **No**	Yes **No**
7. Opioids	Yes **No**	Yes **No**	Yes No
8. Mescaline	Yes **No**	Yes **No**	Yes No
9. MDMA (Ecstasy)*	Yes **No**	Yes **No**	Yes **No**
10. Phencyclidine (PCP)	Yes **No**	Yes **No**	Yes No
11. Solvents	Yes **No**	Yes **No**	Yes **No**
12. Nicotine	Yes **No**	Yes **No**	**Yes** No [61]

Concerning alcohol abuse, Mr. Moreno Ramos stated that he hardly ever drank alcohol. However, Mr. Jose Sarabia husband stated that he had seen Mr. Moreno Ramos buy beer. Mr. Moreno Ramos stated to this examiner that Mr. Moreno Ramos hardly ever used street drugs. Ms. Natividad Sarabia said that he once sent a letter to her in which Mr. Moreno Ramos had explained to her that he had used many types of street drugs (io.1). With regard to marijuana abuse, Mr. Moreno Ramos stated that he had experimented with it a few times when he was young (id.2). Mr. Moreno Ramos' mother stated that she had once found two marijuana cigarettes in Mr. Moreno Ramos when he was still living with her (io.3). [62]

Appendix 2. Evaluation for Family Alcohol and Drug Abuse History:

Mr. Moreno Ramos denied any knowledge of substance abuse history in his original family. However the report of Ms. Nancy Pemberton states that Andrea, sister of Mr. Moreno Ramos had difficulties with substance abuse (doc.11). Mr. Moreno Ramos stated that on rare occasion, Leticia Ramos had smoked marijuana. [63]

Appendix 3. Evaluation of Non-psychiatric Medical Illnesses:

Mr. Moreno Ramos stated that he had been suffering from musculoskeletal problems for at least several years. He stated that he was taking an anti-inflammatory agent on a daily basis because he was experiencing pain in the pelvic area bilaterally. Ramos denied a history of significant head injuries. Mr. Moreno Ramos denied any other history of medical problems secondary to general medical conditions. He said that he had never had any surgeries. He was asked about some specific non-psychiatric medical illnesses and his answers are summarized in table 9. [64]

TABLE 9. HISTORY OF NONPSYCHIATRIC MEDICAL ILLNESSES

Disease	History	Activity
1. Allergies	Absent	NA
2. Blood Related	Absent	NA
3. Cancer	Absent	NA
4. Diabetes	Absent	NA
5. Infectious Diseases	Absent	NA
6. Heart Disease	Absent	NA
7. Kidney Disease.	Absent	NA
8. Lung Disease	Absent	NA
9. Seizure Disorders.	Absent	NA
10. Thyroid Disorders.	Absent	NA [65]

Appendix 4. Evaluation of Family Medical Non-psychiatric History:

Mr. Moreno Ramos' mother said that she suffers from diabetes mellitus, and high blood pressure. According to Ms. Natividad Sarabia, all of her sisters had been diagnosed with systemic lupus erythematosus. She stated that her sister Andrea died of this disease and an associated medical condition called scleroderma. Ms. Sarabia stated that various members of her family suffered from thyroid abnormalities. (io.1). Mr. Moreno Ramos also stated that his sister Andrea died due to complications from systemic lupus erythematosus and scleroderma. (Id.1; Id.2) [66]

Appendix 5. Evaluation for Developmental History:

Mr. Moreno Ramos' Mother was asked about Mr. Moreno Ramos' basic developmental landmarks and her replies are provided in table 10. With regard to item 1, she said that during all of her pregnancies she had retained fluid in her lower extremities but also said that she had retained substantially more fluid in her lower extremities when she was pregnant with Mr. Moreno Ramos, compared to her other pregnancies. [67]

TABLE 10. DEVELOPMENTAL LANDMARKS

Landmark	Nature of the landmark	Comments
1. Pregnancy	Retained excessive edema	None
2. Delivery	Unremarkable	None
3. Speech*	Unremarkable	None
4. Walking*	Unremarkable	None
5. Toilet training *	Unremarkable	None

* Refers to onset of behavior. [68]

Appendix 6. Evaluation of Mr. Moreno Ramos' Psychosexual History:

Mr. Moreno Ramos was asked if he had ever been interested in becoming involved or if he had actually been involved in the types of sexual activities listed in tables 8-9. His affirmative responses (denoted as 'Present') or negative responses (denoted as 'Absent') are also provided in tables 11-12. [69]

TABLE 11. PREVALENCE OF SEXUAL FANTASIES AND ACTIVITIES DURING LAST SIX MONTHS

Sexual Activity	Fantasy	Activity
1. Exhibitionistic	Absent	Absent
2. Fetishistic (inanimate objects)	Absent	Absent
3. Transvestic fetishistic (crossdressing)	Absent	Absent
4. Fetishistic (partialistic)	Absent	Absent
5. Frotteuristic	Absent	Absent
6. Pedophilic	Absent	Absent
7. Masochistic	Absent	Absent
8. Sadistic	Absent	Absent
9. Voyeuristic	Absent	Absent
10. Telephone scatologic	Absent	Absent
11. Necrophilic (cadavers)	Absent	Absent
12. Vampiristic (fresh blood)	Absent	Absent
13. Zoophilistic (animals)	Absent	Absent
14. Coprophilistic (feces)	Absent	Absent
15. Urophilistic (urine)	Absent	Absent
16. Klismaphilistic (enemas)	Absent	Absent
17. Asphyxiophilic	Absent	Absent
18. Coercive	Absent	Absent
19. Hypersexuality	Absent	Absent
20. Paraphilic pyromania	Absent	Absent [70]

TABLE 12. LIFETIME PREVALENCE OF SEXUAL FANTASIES AND ACTIVITIES

Sexual Activity	Fantasy	Activity
1. Exhibitionistic	Absent	Absent
2. Fetishistic (inanimate objects)	Absent	Absent
3. Transvestic fetishistic (crossdressing)	Absent	Absent
4. Fetishistic (partialistic)	Absent	Absent
5. Frotteuristic	Absent	Absent
6. Pedophilic	Absent	Absent
7. Masochistic	Absent	Absent
8. Sadistic	Absent	Absent
9.Voyeuristic	Absent	Absent
10. Telephone scatologic	Absent	Absent
11. Necrophilic (cadavers)	Absent	Absent
12. Vampiristic (fresh blood)	Absent	Absent
13. Zoophilistic (animals)	Absent	Absent
14. coprophilistic (feces)	Absent	Absent
15. urophilistic (urine)	Absent	Absent
16. Klismaphilistic (enemas)	Absent	Absent
17. Asphyxiophilic	Absent	Absent
18. Coercive	Absent	Absent
19. Hypersexualistic	Absent	Absent
20. Paraphilic pyromania	Absent	Absent [71]

Appendix 7. Evaluation for Mood Disorders:

This section provides an overview of most of the Mental Disorders for which Mr. Moreno Ramos was evaluated in order to arrive at a diagnosis of Bipolar Disorder Not Otherwise Specified. [72]

1. Informants who Provided Important Information for the Diagnosis of Hypomanic/Manic Spectrum of Mental Illness:

TABLE 13. INFORMANTS WHO PROVIDED INOFORMATION FOR CONSIDERING A DSM-IV-TR HYPOMANIC/MANIC SPECTRUM ILLNESS.

Informants >	RR	CR	NS	JS	RaR
Criterion					
A.	**Yes**	**Yes**	**Yes**	No	**Yes**
B1.	**Yes**	**Yes**	**Yes**	**Yes**	**No**
B2.	No	No	No	No	No
B3.	**Yes**	**Yes**	**Yes**	**Yes**	No
B4.	No	No	No	No	No
B5.	**Yes**	**Yes**	**Yes**	**Yes**	No
B6.	No	No	**Yes**	**Yes**	**Yes**
B7.	**Yes**	**Yes**	**Yes**	No	**Yes**
C.	**Yes**	**Yes**	**Yes**	No	**Yes**
D.	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**
E.	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**
F.	**Yes**	**Yes**	**Yes**	No	**Yes**

RR= Roberto Moreno Ramos, CR = Carmen Ramos, mother of RR, NS = Natividad Sarabia, sister of RR, JS = Jose Sarabia, brother-in-law of RR, husband of Natividad Sarabia and RaR = Ramiro Ramos, brother of RR.

*: This information was used by this examiner as the basis for evaluating for Hypomanic or Manic Episodes. At no point, did the informants provide any direct ratings for the diagnosis of Hypomanic Episode. [73]

2. Evaluation for Cyclothymic Disorder:

Although Mr. Moreno Ramos may be considered by some diagnosticians to be suffering from DSM-IV-TR Cyclothymic Disorder given the evidence for executive dysfunction, the possibility of a history of brain trauma and the evidence for psychotic states, I conclude that presently Mr. Moreno Ramos can not qualify for Cyclothymic Disorder. [74]

3. Evaluation for Major Depressive Episode.

According to DSM-IV-TR the diagnostic criteria for a Major Depressive Episode can be summarized as provided in table 14. The + sign represents a positive endorsement for a criterion. The negative sign means that the criterion is not met. The capital letter I means that there is insufficient information to make a rating NA stands for a rating not being applicable for the current situation. In addition, I employed a Likert-like rating system where 2 equals the criterion is met, zero if the criterion is met and 1, if there are noteworthy elements that fulfill the criterion. The first bracket corresponds to a rating for the childhood period (approximately birth to age 12 years. The second bracket stands for about age 13 -18, the adolescence period. The third bracket is a rating for the adulthood period, approximately age 19 and above. The fourth bracket stands for the standard DSM-IV-TR rating. Mr. Moreno Ramos does not qualify for a history of DSM-IV-TR Major Depressive Episode. However, further in-depth evaluation may reveal that Mr. Moreno Ramos has suffered from one or more Major Depressive Episodes in the past. [75]

TABLE14. DSM-IV-TR CRITERIA FOR MAJOR DEPRESSIVE EPISODE.

According to DSM-IV-TR, the criteria for Major Depressive Episode is (The + sign denotes that the criterion is met, whereas a - sign means that the defendant did not qualify for that criterion. If there is insufficient information to make a decision regarding a criterion this is designated with the letter I. NA means that the rating of an item is not applicable for the defendant).

A. **Five (or more)** of the following symptoms have been present during the same 2-week period and represent a change from previous functioning; at least one of the symptoms is either (1) depressed mood or (2) loss of interest or pleasure. Note: Do not include symptoms that are clearly due to a general medical condition, or mood-incongruent delusions or hallucinations.

1. depressed mood most of the day, nearly every day, as indicated by either subjective report (e.g., feels sad or empty) or observation made by others (e.g., appears tearful). Note: In children and adolescents, can be irritable mood [+, 1], [+, 1], [+, 1], [+, 1].
2. markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day (as indicated by either subjective account or observation made by others) [-, 0], [-, 0], [-, 0], [-, 0].
3. significant weight loss when not dieting or weight gain (e.g., a change of more than 5% of body weight in a month), or decrease or increase in appetite nearly every day. Note: In children, consider failure to make expected weight gains [+, 2], [+, 2], [+, 2], [+, 2],.
4. insomnia or hypersomnia nearly every day[-/+,L, I, NA].
5. psychomotor agitation or retardation nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed

down) [+, 2}, [+, 2], [+, 2], [+, 2].
6. fatigue or loss of energy nearly every day [-, 0], [-, 0], [-, 0], [-, 0].
7. feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day (not merely self-reproach or guilt about being sick) [I, 1], [+, 1], [+, 1], [+, 1].
8. diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others) [I, 1], [+, 1], [+, 1], [+, 1].
9. recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide [-, 0], [-, 0], [-, 0], [-, 0].

B. The symptoms do not meet criteria for a Mixed Episode (See linked section) {+, 2}, [+, 2], [+, 2], [+, 2].
C. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning [+, 2}, [+, 2], [+, 2], [+, 2].
D. The symptoms are not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition (e.g. hypothyroidism) [+, 2}, [+, 2], [+, 2], [+, 2].
E. The symptoms are not better accounted for by Bereavement, i.e., after the loss of a loved one, the symptoms persist for longer than 2 months or are characterized by marked functional impairment, morbid preoccupation with worthlessness, suicidal ideation, psychotic symptoms, or psychomotor retardation [+, 2}, [+, 2], [+, 2], [+, 2], [76]

4. Evaluation for Dysthymic Disorder:

According to DSM-IV-TR the diagnostic criteria for a Major Depressive Episode can be summarized as provided in table 15. The + sign represents a positive endorsement for a criterion. The negative sign means that the criterion is not met. The capital letter I means that there is insufficient information to make a rating NA stands for a rating not being applicable for the current situation. In addition, I employed a Likert-like rating system where 2 equals the criterion is met, zero if the criterion is met and 1, if there are noteworthy elements that fulfill the criterion. The first bracket corresponds to a rating for the childhood period (approximately birth to age 12 years. The second bracket stands for about age 13 - 18, the adolescence period. The third bracket is a rating for the adulthood period, approximately age 19 and above. The fourth bracket stands for the standard DSM-IV-TR rating. While there is evidence that Mr. Moreno Ramos may suffer at time from low self esteem and clear problems with concentration, there is no clear evidence that he suffers from these symptoms because of an associated depressive mood. Therefore, Mr. Moreno Ramos does not qualify for DSM-IV-TR Dysthymic Disorder or a similar depressive disorder. See table 15. [77]

TABLE 15. DSM-IV-TR DIAGNOSTIC CRITERIA FOR DYSTHYMIC DISORDER

A. Depressed mood for most of the day, for more days than not, as indicated either by subjective account or observation by others, for at least 2 years. Note: In children and adolescents, mood can be irritable and duration must be at least 1 year.

B. Presence, while depressed, of **two (or more)** of the following:
1. poor appetite or overeating [-, 0], [-, 0], [-, 0], [-, 0].
2. insomnia or hypersomnia [-, 0], [-, 0], [-, 0], [-, 0].
3. low energy or fatigue [-, 0], [-, 0], [-, 0], [-, 0].
4. low self-esteem [I, I], [I, I], [I, I], [I, I].
5. poor concentration or difficulty making decisions [I, I], [I, I], [I, I], [I, I].
6. feelings of hopelessness [-, 0], [-, 0], [-, 0], [-, 0].

C. During the 2-year period (1 year for children or adolescents) of the disturbance, the person has never been without the symptoms in Criteria A and B for more than 2 months at a time [NA, NA], [NA, NA], [NA, NA], [NA, NA].

D. No Major Depressive Episode (See linked section) has been present during the first 2 years of the disturbance (1 year for children and adolescents); i.e., the disturbance is not better accounted for by chronic Major Depressive Disorder, or Major Depressive Disorder, In Partial Remission.
Note: There may have been a previous Major Depressive Episode provided there was a full remission (no significant signs or symptoms for 2 months) before development of the Dysthymic Disorder. In addition, after the initial 2 years (1 year in children or adolescents) of Dysthymic Disorder, there may be superimposed episodes of Major Depressive Disorder, in which case both diagnoses may be given when the criteria are met for a Major Depressive Episode [NA, NA], [NA, NA], [NA, NA], [NA, NA].

E. There has never been a Manic Episode (See linked section), a Mixed Episode (See linked section), or a Hypomanic Episode (See linked section), and criteria have never been met for Cyclothymic Disorder [NA, NA], [NA, NA], [NA, NA], [NA, NA].

F. The disturbance does not occur exclusively during the course of a chronic Psychotic Disorder, such as Schizophrenia or Delusional Disorder [NA, NA], [NA, NA], [NA, NA], [NA, NA].

G. The symptoms are not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition (e.g., hypothyroidism) [NA, NA], [NA, NA], [NA, NA], [NA, NA].

H. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning [NA, NA], [NA, NA], [NA, NA], [NA, NA].

Specify if:
Early Onset: if onset is before age 21 years
Late Onset: if onset is age 21 years or older
Specify (for most recent 2 years of Dysthymic Disorder):
With Atypical Features (See linked section). [78]

Appendix 8. Evaluation for Psychotic Disorders:

As previously stated, there is evidence for a psychotic component in Mr. Moreno Ramos' case. This evidence originates from his grandiose cognitions, which intermittently penetrate into the delusional range. Also, during my interviews with him, he presented with evidence of poor reality testing when I asked him about situations that clearly required such abilities. These problems are highlighted by his tendency to ignore or rationalize his unusual behaviors, such as his marriage to his third wife several days after his first wife and children had died. Mr. Moreno Ramos

also acknowledged knowing that his wife and children had died at around the time that they expected to have died. His levels of rationalization and denial concerning these events are highly concrete and more consistent with what I would expect in individuals suffering from Psychotic Disorders or Cognitive Disorders. Another example is his report of having married his second wife while he was still married to Leticia. In such a situation he proceeded attempt to explain that Leticia, his wife, a person that was well known for her jealousy, in a rather perverse way encouraged him to become sexually intimate with other women. This in my opinion represents a very unlikely scenario. [79]

Given Mr. Moreno Ramos' reality testing, I formally considered Schizophrenia as a prototypical Psychotic Disorder. The + signs denote that a criterion is met, - if it is not met, NA if criterion is not applicable and I if there is insufficient information to consider the criterion. See table 16. As previously stated, Mr. Moreno Ramos presents with a history of episodes that are associated with grandiose delusional thinking. These may or may not last up to 1 month. In essence, Mr. Moreno Ramos does not qualify for Schizophrenia. However, as previously stated in my analysis of Bipolar Disorders, it is possible that Mr. Moreno Ramos may have experienced Manic episodes associated with Mania or for a lifetime history of a Psychotic Disorder. [80]

TABLE16. DSM-IV-TR DIAGNOSTIC CRITERIA FOR SCHIZOPHRENIA.

A. Characteristic symptoms: Two (or more) of the following, each present for a significant portion of time during a 1-month period (or less if successfully treated):

1. delusions [I, I], +, 1][+, 1], [+, 1]
2. hallucinations [I, I], [I, I], [I, I], [I, I]
3. disorganized speech (e.g., frequent derailment or incoherence) [I, I], [I, I], [-, 1], [-, 1]
4. grossly disorganized or catatonic behavior [I, I], [I, I], [I, I], [I, I]
5. negative symptoms, i.e., affective flattening, alogia, or avolition [I, I], [I, I], [-, 0], [-, 1]

Note: Only one Criterion A symptom is required if delusions are bizarre or hallucinations consist of a voice keeping up a running commentary on the person's behavior or thoughts, or two or more voices conversing with each other.

B. Social/occupational dysfunction: For a significant portion of the time since the onset of the disturbance, one or more major areas of functioning such as work interpersonal relations, or self-care are markedly below the level achieved prior to the onset (or when the onset is in childhood or adolescence, failure to achieve expected level of interpersonal, academic, or occupational achievement [I, I], +, 1][+, 1], [+, 1].

C. Duration: Continuous signs of the disturbance persist for at least 6 months. This 6-month period must include at least 1 month of symptoms (or less if successfully treated) that meet Criterion A (i.e., active-phase symptoms) and may include periods of prodromal or residual symptoms. During these prodromal or residual periods, the signs of the disturbance may be manifested by only negative symptoms or two or more symptoms listed in Criterion A present in an attenuated form (e.g., odd beliefs, unusual perceptual experiences [I, I], +, 1][+, 1], [+, 1].

D. Schizoaffective and Mood Disorder exclusion: Schizoaffective Disorder and Mood Disorder With Psychotic Features have been ruled out because either (1) no Major Depressive, Manic, or Mixed Episodes have occurred concurrently with the active-phase symptoms; or (2) if mood episodes have occurred during active-phase symptoms, their total duration has

been brief relative to the duration of the active and residual periods [I, I], +, 1], [+, 2], [+, 2].

E. Substance/general medical condition exclusion: The disturbance is not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition [I, I], -, 1][-, 1], [-, 1].

F. Relationship to a Pervasive Developmental Disorder: If there is a history of Autistic Disorder or another Pervasive Developmental Disorder, the additional diagnosis of Schizophrenia is made only if prominent delusions or hallucinations are also present for at least a month (or less if successfully treated) [I, I], +, 2][+, 2], [+, 2].

Classification of longitudinal course (can be applied only after at least 1 year has elapsed since the initial onset of active-phase symptoms): [I, I], [I, I], [I, I], [I, I]

Episodic With Interepisode Residual Symptoms (episodes are defined by the reemergence of prominent psychotic symptoms); also specify if: With Prominent Negative Symptoms

Episodic With No Interepisode Residual Symptoms

Continuous (prominent psychotic symptoms are present throughout the period of observation); also specify if: With Prominent Negative Symptoms

Single Episode In Partial Remission; also specify if: With Prominent Negative Symptoms

Single Episode In Full Remission

Other or Unspecified Pattern. [81]

Appendix 9. Evaluation for Neuropsychiatric Developmental Disorders:

Three neuropsychiatric developmental disorders were formally considered. The results for ADHD are shown in table 17 and are consistent with ADHD Not Otherwise Specified. Mental Retardation was considered elsewhere in this report. Asperger's Disordered was also considered but my exploration for this Disorder was negative. See table 18 for more details. [82]

1. Evaluation for Attention Deficit and Hyperactivity Disorder ADHD:

Attention Deficit and Hyperactivity Disorder (ADHD) was formally explored. According to DSM-IV-TR, the diagnostic criteria for ADHD are provided in table 17. The + signs denote that a criterion is met, - if it is not met, NA if criterion is not applicable and I if there is insufficient information to consider the criterion. I have also used a graded rating system where 2 denotes that the criterion is fulfilled, 0 if the criterion is not met and 1 if some evidence for the criterion is present. The first, second, third and fourth bracketed signs refer to the childhood, adolescence, adult and the standard DSM-IV-TR rating respectively. The most relevant informants with regard to ADHD were Mr. Moreno Ramos' mother, Ms. Natividad Sarabia, sister of Mr. Moreno Ramos and Mr. Moreno Ramos' himself. Essentially Mr. Moreno Ramos presents with many lifetime indicators for ADHD. Also, Mr. Moreno Ramos' sister, Ms. Natividad Sarabia also rated him via the CAARS-O: L), an observer rated instrument for ADHD, and the results are suggestive of ADHD

psychopathology. It should also be stressed that differentiating ADHD from a Bipolar Disorder is a challenging problem, primarily because both Mental Disorders share many symptoms. However, the available evidence indicates that Mr. Moreno Ramos has a long history of suffering from grandiose cognition (nondelusional and delusional) coupled with other evidence of poor reality testing, difficulties with organizing his thoughts, impaired insight and hypersexuality. Deficits in executive functioning may also be present in Bipolar Disorder. In conclusion the current evidence supports a diagnosis of Bipolar Disorder rather than ADHD. [83]

TABLE 17. DSM-IV-TR CRITERIA FOR ATTENTION/DEFFICIT AND HYPERACTIVITY DISORDER (ADHD).

A. Either (1) or (2):

(1) **Six (or more)** of the following symptoms of inattention have persisted for at least 6 months to a degree that is maladaptive and inconsistent with developmental level:

Inattention

(a) often fails to give close attention to details or makes careless mistakes in schoolwork, work, or other activities [+, 1],[+, 1], [+, 1], [+, 1].
(b) often has difficulty sustaining attention in tasks or play activities [+, 2], [+, 2], [+, 2], [+, 2].
(c) often does not seem to listen when spoken directly [I, I] [I, I], [I, I], [I, I].
(d) often does not follow through on instructions and fails to finish schoolwork, chores or duties in the workplace (not due to oppositional behavior or failure to understand instructions) [+, 2], [+, 2], [+, 2], [+, 2].
(e) often has difficulty organizing tasks and activities [I, I] [I, I], [I, I], [I, I].
(f) often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort (such as schoolwork or homework) [+, 1] [+, 2], [+, 2], [+, 2].
(g) often loses things necessary for tasks or activities (e.g., toys, school assignments, pencils, books, or tools) [I, I], [I, I], [-, 0], [-, 0].
(h) is often easily distracted by extraneous stimuli [I, I] [I, I], [I, I], [I, I].
(i) is often forgetful in daily activities [+, 1], [+, 1], [I, I], [I, I].

(2) Six (or more) of the following symptoms of hyperactivity-impulsivity have persisted for at least six months to a degree that is maladaptive and inconsistent with developmental level:

Hyperactivity

(a) often fidgets with hands or feet or squirms in seat [+, 2],[+, 2], [+, 1], [+, 1].
(b) often leaves seat in classroom or in other situations in which remaining seated is expected [-, 0], [-, 0], [-, 0], [-, 0].
(c) often runs about or climbs excessively in situations in which it is inappropriate (in adolescents or adults, may be limited to subjective feelings of restlessness) [+, 1], [+, 1], [+, 1], [+, 1].
(d) often has difficulty playing or engaging in leisure activities quietly [-, 0], [-, 0], [-, 0], [-, 0].
(e) is often "on the go" or often acts as if "driven by a motor" [+, 2], [+, 2], [+, 2], [+, 2].
(f) often talks excessively [+, 1], [+, 1], [+, 1], [+, 1].

Impulsivity

(g) often blurts out answers before questions have been completed [I, I], [I, I], [I, I], [I, I].
(h) often has difficulty awaiting turn [I,I], [I, I], [-, 0], [-, 0].
(i) often interrupts or intrudes on others (e.g., butts into conversations or games) [I, I], [I, I], [I, I], [I, I].

B. Some hyperactive-impulsive or inattentive symptoms that caused impairment were present before age 7 years [+, 2], [+, 2], [+, 2], [+, 2].

C. Some impairment from the symptoms is present in two or more settings (e.g., **at school** [or work] and at **home**) [+, 1][+, 1], [+, 1], [+, 1].

D. There must be clear evidence of clinically significant impairment in social, academic, or occupational functioning [+, 2], [+, 2], [+, 2], [+, 2]

E. The symptoms do not occur exclusively during the course of Pervasive Developmental Disorder, Schizophrenia, or other Psychotic Disorder and are not better accounted for by another mental disorder (e.g. Mood Disorder, Anxiety Disorder, or Dissociative Disorder, or a Personality Disorder) [-, 1], [-, 1], [-, 1], [-, 1].

Code based on type [deferred]:

Attention-Deficit/Hyperactivity Disorder, Combined Type: If both Criteria A1and A2 are met for the past six months
Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive Type: If criterion A1 is met but Criterion A2 is not met for the past 6 months.
Attention-Deficit/Hyperactivity Disorder, Predominantly Hyperactive-Impulsive Type: if criterion A2 is met but Criterion A1 is not met for the past 6 months.

Coding note: For individuals (especially adolescents and adults) who currently have symptoms that no longer meet full criteria, "in partial Remission" should be specified. [84]

2. Evaluation for Asperger's Disorder:

My general impression has been that it is unlikely that Mr. Moreno Ramos suffers from high functioning autistic psychopathology. As previously stated, Mr. Moreno Ramos suffers from some Schizoid Personality psychopathology. Because Asperger's Disorder psychopathology frequently co-occurs with Schizoid Personality Disorder psychopathology, I have formally considered the possibility that Mr. Moreno Ramos may be suffering from mild autistic psychopathology. The DSM-IV-TR diagnostic criteria for Asperger's Disorder are presented in table 18. The + sign represents a positive endorsement for a criterion. The negative sign means that the criterion is not met. The capital letter I means that there is insufficient information to make a rating NA stands for a rating not being applicable for the current situation. In addition, I employed a Likert-like rating system where 2 equals the criterion is met, zero if the criterion is met and 1, if there are noteworthy elements that fulfill the criterion. The first bracket corresponds to a rating for the childhood period (approximately birth to age 12 years. The second bracket stands for about age 13 -18, the adolescence period. The third bracket is a rating for the adulthood period, approximately age 19 and above. The fourth bracket stands for the standard DSM-IV-TR rating. As can be see from table 18, Mr. Moreno Ramos does not come close to meeting criteria for Asperger's Disorder. Nonetheless there are some elements suggestive of this type of psychopathology. [85]

TABLE 18. DSM-IV-TR CRITERIA FOR ASPERGER'S DISORDER.

A. Qualitative impairment in social interaction, as manifested by at least two of the following :

1. marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction [-, 0], [-, 0], [-, 0], [-, 0].
2. failure to develop peer relationships appropriate to developmental level [I, I], [-, 1], [-, 1], [-, 1].
3. a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest to other people) [-, 0], [-, 0], [-, 0], [-, 0].
4. lack of social or emotional reciprocity [I, I], [-, 1], [-, 1], [-, 1].

B. Restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:

1. encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus [I, I], [-, 0], [-, 0], [-, 0].
2. apparently inflexible adherence to specific, nonfunctional routines or rituals [I, I], [I, I], [I, I], [I, I].
3. stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements) [-, 0], [-, 0], [-, 0], [-, 0].
4. persistent preoccupation with parts of objects [-, 0], [-, 0], [-, 0], [-, 0].

C. The disturbance causes clinically significant impairment in social, occupational, or other important areas of functioning [NA, NA], [NA, NA], [NA, NA], [NA, NA].

D. There is no clinically significant general delay in language (e.g., single words used by age 2 years, communicative phrases used by age 3 years) [NA, NA], [NA, NA], [NA, NA], [NA, NA].

E. There is no clinically significant delay in cognitive development or in the development of age-appropriate self-help skills, adaptive behavior (other than in social interaction), and curiosity about the environment in childhood[NA, NA], [NA, NA], [NA, NA], [NA, NA].

F. Criteria are not met for another specific Pervasive Developmental Disorder or Schizophrenia [NA, NA], [NA,NA], [NA,NA], [NA,NA] [86]

Appendix 10. Evaluation for Posttraumatic Stress Disorder:

According to DSM-IV-TR the diagnostic criteria for a Posttraumatic Stress Disorder (PTSD) is provided in table 19. The + sign represents a positive endorsement for a criterion. The negative sign means that the criterion is not met. The capital letter I means that there is insufficient information to make a rating NA stands for a rating not being applicable for the current situation. In addition, I employed a Likert-like rating system where 2 equals the criterion is met, zero if the criterion is met and 1, if there are noteworthy elements that fulfill the criterion. The first bracket corresponds to a rating for the childhood period (approximately birth to age 12 years. The second bracket stands for about age 13 -18, the adolescence period. The third bracket is a rating for the adulthood period, approximately age 19 and above. The fourth bracket stands for the standard DSM-

IV-TR rating. As it can be seen from table 8, Mr. Moreno Ramos does not qualify for PTSD or for an Anxiety Disorder Not Otherwise Specified, with PTSD features. [87]

TABLE 19. DSM-IV-TR DIAGNOSTIC CRITERIA FOR PTSD.

A. The person has been exposed to a traumatic event in which both of the following were present:

1. the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others [+, 2], [+, 1], [I, I], [+, 2].
2. the person's response involved intense fear, helplessness, or horror. Note: In children, this may be expressed instead by disorganized or agitated behavior.

B. The traumatic event is persistently re-experienced in one (or more) of the following ways [I, I], I, I], [I, I], [I,I]:

1. recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. Note: In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.
2. recurrent distressing dreams of the event. Note: In children, there may be frightening dreams without recognizable content.
3. acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). Note: In young children, trauma-specific reenactment may occur.
4. intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
5. physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following [I, I], I, I], [I, I], [I,I]:

1. efforts to avoid thoughts, feelings, or conversations associated with the trauma.
(2). Efforts to avoid activities, places, or people that arouse recollections of the trauma.
(3). Inability to recall an important aspect of the trauma.

(4). Markedly diminished interest or participation in significant activities.

(5). Feeling of detachment or estrangement from others.
(6). Restricted range of affect (e.g. unable to have loving feelings).

(7). Sense of foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span).

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two) or more) of the following [I, I], I, I], [I, I], [I,I]:

(1). Difficulty falling asleep or staying asleep.
(2). Irritability or outbursts of anger.
(3). Difficulty concentrating.
(4). Hypervigilance [-],[-], [-] [-].
(5). Exaggerated startle response.

Duration of the disturbance symptoms in criteria B,C and D) is more than one month.

The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:

Acute: if duration of symptoms is less than 3 months.
Chronic: if duration of symptoms is 3 months or more

Specify if:

With Delayed Onset: if onset of symptoms is at least 6 months after the stressor [-]. [88]

Appendix 11. Evaluation for Personality Disorders Except Antisocial Personality Disorder:

1. Evaluation for Borderline Personality Disorder:

Mr. Moreno Ramos presented with a history of psychopathology suggestive of Borderline Personality Disorder traits. Therefore I formally considered that Mr. Moreno Ramos may be suffering from Borderline Personality Disorder. I rated Mr. Moreno Ramos by using DSM-IV-TR's binary method (i.e. the trait is either present or absent. In table 20, the + signs denote that a criterion is met, - if it is not met, NA if criterion is not applicable and I if there is insufficient information to consider the criterion. I have also used a graded rating system where 2 denotes that the criterion is fulfilled, 0 if the criterion is not met and 1 if some evidence for the criterion is present. The first, second, third and fourth bracketed signs refer to the childhood, adolescence, adult and the standard DSM-IV-TR rating respectively. Mr. Moreno Ramos qualified for four Borderline Personality Disorder traits. He did not qualify for Borderline Personality Disorder traits. Moreover it should also be noted that Mr. Moreno Ramos Borderline Personality Disorder traits may be more indicative of his Bipolar Disorder and not Borderline Personality Disorder per se. [89]

TABLE 20. DSM-IV-TR DIAGNOSTIC CRITERIA FOR BORDERLINE PERSONALITY DISORDER.

A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts, as indicated by **five (or more)** of the following:

1. frantic efforts to avoid real or imagined abandonment. Note: Do not include suicidal or self-mutilating behavior covered in Criterion 5 [-, 0], [-, 0], [-, 0], [-, 0].
2. a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation [+, 1], [+, 1], [+, 1], [+, 1].
3. identity disturbance: markedly and persistently unstable self-image or sense of self [-, 1], [-, 1], [-, 1], [-, 1].
4. impulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex, substance abuse, reckless driving, binge eating). Note: Do not include suicidal or self-mutilating behavior covered in Criterion 5 [I, I], [-, 1], [-, 1], [-, 1].
5. recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior [-, 0], [-, 0], [-, 0], [-, 0].
6. affective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days) [+, 1], [+, 1], [+, 1], [+, 1].
7. chronic feelings of emptiness [-, 0], [-, 0], [-, 0], [-. 0].
8. inappropriate, intense anger or difficulty controlling anger (e.g., frequent

displays of temper, constant anger, recurrent physical fights) [+, 2], [+, 2], [+, 2], [+, 2].
9. transient, stress-related paranoid ideation or severe dissociative symptoms[I, 1], [I, I], [I, I], [I, I]. [I, I]. [90]

2. Evaluation for Narcissistic Personality Disorder:

The DSM-IV-TR diagnostic criteria for Narcissistic Personality Disorder are presented in table 21. The + sign represents a positive endorsement for a criterion. The negative sign means that the criterion is not met. The capital letter I means that there is insufficient information to make a rating NA stands for a rating not being applicable for the current situation. In addition, I employed a Likert-like rating system where 2 equals the criterion is met, zero if the criterion is met and 1, if there are noteworthy elements that fulfill the criterion. The first bracket corresponds to a rating for the childhood period (approximately birth to age 12 years. The second bracket stands for about age 13 -18, the adolescence period. The third bracket is a rating for the adulthood period, approximately age 19 and above. The fourth bracket stands for the standard DSM-IV-TR rating. Although Mr. Moreno Ramos does not qualify for Narcissistic Personality Disorder he has substantial psychopathology suggestive of Narcissistic Personality psychopathology traits. However, I am also of the opinion that his apparent Narcissistic Personality traits are a function of his Bipolar Disorder. [91]

TABLE 21. DSM-IV-TR CRITERIA FOR NARCISSISTIC PERSONALITY DISORDER

A pervasive pattern of grandiosity (in fantasy or behavior), need for admiration, and lack of empathy, beginning by early adulthood and present in a variety of contexts,
As indicated by **five (or more)** of the following:

1. has a grandiose sense of self-importance (e.g., exaggerates achievements and talents, expects to be recognized as superior without commensurate achievements) [+, 1], [+,1], [+, 2], [+, 2].
2. is preoccupied with fantasies of unlimited success, power, brilliance, beauty, or ideal love [+, 1], [+, 1], [+, 1], [+, 1].
3. believes that he or she is "special" and unique and can only be understood by, or should associate with, other special or high-status people (or institutions) [-, 0], [-, 0], [-, 0], [-, 0].
4. requires excessive admiration [+, 1], [+, 1], [+, 1], [+, 1].
5. has a sense of entitlement, i.e., unreasonable expectations of especially favorable treatment or automatic compliance with his or her expectations [I,I], [I,I], [I,I], [I,I].
6. is interpersonally exploitative, i.e., takes advantage of others to achieve his or her own ends [-, 0], [I, I], [I, I], [I, I].
7. lacks empathy: is unwilling to recognize or identify with the feelings and needs of others [I, I], [-, 1], [-, 1], [-, 1].
8. is often envious of others or believes that others are envious of him or her [I, I], [I, I], [I, I], [I, I].
9. shows arrogant, haughty behaviors or attitudes [I, I], [+, 1], [+, 1], [+, 1]. [92]

3. Evaluation for Schizoid Personality Disorder:

According to DSM-IV-TR the diagnostic criteria for Schizoid Personality Disorder can be summarized as provided in table 22. The + sign represents a positive endorsement for a criterion. The negative sign means that the criterion is

not met. The capital letter I means that there is insufficient information to make a rating NA stands for a rating not being applicable for the current situation. In addition, I employed a Likert-like rating system where 2 equals the criterion is met, zero if the criterion is met and 1, if there are noteworthy elements that fulfill the criterion. The first bracket corresponds to a rating for the childhood period (approximately birth to age 12 years. The second bracket stands for about age 13 - 18, the adolescence period. The third bracket is a rating for the adulthood period, approximately age 19 and above. The fourth bracket stands for the standard DSM-IV-TR rating. The results show that Mr. Moreno Ramos meets criteria for one Schizoid Personality Disorder trait. [93]

TABLE 22. DSM-IV-TR DIAGNOSTIC CRITERIA FOR SCHIZOID PERSONALITY DISORDER

A. A pervasive pattern of detachment from social relationships and a restricted range of expression of emotions in interpersonal settings, beginning by early adulthood and present in a variety of contexts, as indicated by four (or more) of the following:

1. neither desires nor enjoys close relationships, including being part of a family [I, I], [-, 0], [-, 1], [-, 1].
2. almost always chooses solitary activities[I, I],[-, 1], [-, 1],[-, 1].
3. has little, if any, interest in having sexual experiences with another person
4. takes pleasure in few, if any, activities [I, I], [-, 0], [-, 0], [-, 0].
5. lacks close friends or confidants other than first-degree relatives [I, I], [-, 0], [-, 0], [-, 0].
6. appears indifferent to the praise or criticism of others [-, 1], [-, 1], [-, 1], [-, 1].
7. shows emotional coldness, **detachment**, or flattened affectivity[-, 1], [+, 1], [+, 1], [+, 1].

B. Does not occur exclusively during the course of Schizophrenia, a Mood Disorder with Psychotic Features, another Psychotic Disorder, or a Pervasive Developmental Disorder and is not due to the direct physiological effects of a general medical condition [I, I],[-, 1],[-, 0],[-, 0].

Note: If criteria are met prior to the onset of Schizophrenia, add "Premorbid," e.g., "Schizoid Personality Disorder (Premorbid)." [94]

4. Evaluation for Schizotypal Personality Disorder

The diagnostic criteria for a Shizotypal Personality Disorder are provided in table 23. The + sign represents a positive endorsement for a criterion. The negative sign means that the criterion is not met. The capital letter I means that there is insufficient information to make a rating NA stands for a rating not being applicable for the current situation. In addition, I employed a Likert-like rating system where 2 equals the criterion is met, zero if the criterion is met and 1, if there are noteworthy elements that fulfill the criterion. The first bracket corresponds to a rating for the childhood period (approximately birth to age 12 years. The second bracket stands for about age 13 -18, the adolescence period. The third bracket is a rating for the adulthood period, approximately age 19 and above. The fourth bracket stands for the standard DSM-IV-TR rating. Mr. Moreno Ramos almost qualified for Schizotypal Personality Disorder. Although Mr. Moreno

Ramos does not meet criteria for this Disorder, he qualifies for four of the five necessary number of traits. This is not a surprising finding, given the earlier finding of a recurrent psychotic component in Mr. Moreno Ramos. [95]

TABLE 23. DSM-IV-TR DIAGNOSTIC CRITERIA FOR SCHIZOTYPAL PERSONALITY DISORDER

A. A pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and reduced capacity for, close relationships as well as by cognitive or perceptual distortions and eccentricities of behavior, beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

1. ideas of reference (excluding delusions of reference) [I, I], [-, 0], [-, 0], [-, 0].
2. odd beliefs or magical thinking that influences behavior and is inconsistent with subcultural norms (e.g., superstitiousness, belief in clairvoyance, telepathy, or "sixth sense"; in children and adolescents, bizarre fantasies or preoccupations) [I, I], [I, I], [I, I], [I, I].
3. unusual perceptual experiences, including bodily illusions [I, I], [I, I], [I, I], [I, I].
4. odd thinking and speech (e.g., vague, circumstantial, metaphorical, overelaborate, or stereotyped) [-, 1], [+, 1], [+, 1], [+, 1].
5. suspiciousness or paranoid ideation [-, 0], [I, I], [+, 1], [+, 1].
6. inappropriate or constricted affect [-, 1], [+, 1], [-, 1], [+, 1].
7. behavior or appearance that is odd, eccentric, or peculiar [-, 0], [-, 1], [+, 1], [+, 1].
8. lacks close friends or confidants other than first-degree relatives [I, I], [-, 0], [-, 0], [-, 0].
9. excessive social anxiety that does not diminish with familiarity and tends to be associated with paranoid fears rather than negative judgments about self [I, I], [I, I], [I, I], [I, I].

B. Does not occur exclusively during the course of Schizophrenia, a Mood Disorder With Psychotic Features, another Psychotic Disorder, or a Pervasive Developmental Disorder [I, I], [-, 1], [-, 0], [-, 0].

Note: If criteria are met prior to the onset of Schizophrenia, add "Premorbid," e.g. [96]

5. Evaluation for DSM-IV-TR Paranoid Personality Disorder:

The DSM-IV-TR the diagnostic criteria for Paranoid Personality Disorder is presented in table 24. The + sign represents a positive endorsement for a criterion. The negative sign means that the criterion is not met. The capital letter I means that there is insufficient information to make a rating NA stands for a rating not being applicable for the current situation. In addition, I employed a Likert-like rating system where 2 equals the criterion is met, zero if the criterion is met and 1, if there are noteworthy elements that fulfill the criterion. The first bracket corresponds to a rating for the childhood period (approximately birth to age 12 years. The second bracket stands for about age 13 -18, the adolescence period. The third bracket is a rating for the adulthood period, approximately age 19 and above. The fourth bracket stands for the standard DSM-IV-TR rating. Mr. Moreno Ramos did not qualify for Paranoid Personality Disorder. [97]

TABLE 24. DSM-IV-TR DIAGNOSTIC CRITERIA FOR PARANOID PERSONALITY DISORDER.

A.-A pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent, beginning by early adulthood and present in a variety of contexts, as indicated by four (or more) of the following:

1. suspects, without sufficient basis, that others are exploiting, harming, or deceiving him or her [-, 0], [-, 0], [-, 1], [-, 1].
2. Is preoccupied with unjustified doubts about the loyalty or trustworthiness of friends or associates [I, I], [-, 0], [-, 0], [-, 0].
3. is reluctant to confide in others because of unwarranted fear that the information will be used maliciously against him or her [I, I], [-, 1], [-, 1], [-, 1].
4. reads hidden demeaning or threatening meanings into benign remarks or events [I, I], [I, I], [I, I], [I, I].
5. persistently bears grudges, [i.e., is unforgiving of insults, injuries, or slights [I, I], [I, I], [-, 0], [-, 0].
6. perceives attacks on his or her character or reputation that are not apparent to others and is quick to react angrily or to counterattack.
7. has recurrent suspicions, without justification, regarding fidelity of spouse or sexual partner [NA, NA], [NA, NA], [-, 0], [-, 0].

B. Does not occur exclusively during the course of Schizophrenia, a Mood Disorder With Psychotic Features, or another Psychotic Disorder and is not due to the direct physiological effects of a general medical condition [+, 2], [+, 2], [+, 2], [+, 2].

Note: If criteria are met prior to the onset of Schizophrenia, add "Premorbid," e.g., "Paranoid Personality Disorder (Premorbid)." [98]

Appendix 12. Evaluation for Antisocial Personality Disorder and Related Disorders:

1. Evaluation for Oppositional Defiant Disorder:

The DSM-IV-TR diagnostic criteria for Oppositional Defiant Disorder are presented in table 25. The + sign represents a positive endorsement for a criterion. The negative sign means that the criterion is not met. The capital letter I means that there is insufficient information to make a rating NA stands for a rating not being applicable for the current situation. In addition, I employed a Likert-like rating system where 2 equals the criterion is met, zero if the criterion is met and 1, if there are noteworthy elements that fulfill the criterion. The rating corresponds to the childhood period. Although there are sufficient criteria for Oppositional Defiant Disorder, Mr. Moreno Ramos does not qualify for a childhood history of this Disorder because he was also suffering from Bipolar Disorder since childhood. [99]

TABLE 25. DSM-IV-TR CRITERIA FOR OPPOSITIONAL DEFIANT DISORDER.

"A. A pattern of negativistic, hostile, and defiant behavior lasting at least 6 months, during which **four (or more)** of the following are present:
(1) often loses temper [+].
(2). often argues with adults [I].
(3). often actively defies or refuses to comply with adults' requests for rules [I].
(4). often deliberately annoys people [+].
(5). often blames others for his or her mistakes or misbehavior [-].
(6). is often touchy or easily annoyed by others [+].
(7). Is often angry and resentful [+].
(8). Is often spiteful or vindictive [-].

Note: Consider a criterion met only if the behavior occurs more frequently than is typically observed in individuals of comparable age and developmental level.

B. The disturbance in behavior causes clinically significant impairment in social, academic, or occupational functioning [NA].

C. The behaviors do not occur exclusively during the course of a Psychotic or Mood disorder [NA].

D. Criteria are not met for Conduct Disorder, and, if the individual is age 18 years or older, criteria are not met for Antisocial Personality Disorder" [NA]. [100]

2. Evaluation for Conduct Disorder:

This examiner also considered that Mr. Moreno Ramos might have suffered from Conduct Disorder earlier in his lifetime. Conduct Disorder is a mental illness that may be found in very young people who display a pattern of chronic antisocial behaviors. The criteria for DSM-IV-TR (pp. 98-99) Conduct Disorder are as given in table 26. The + signs denote that the criterion is met by Mr. Moreno Ramos and the – sign indicates that Mr. Moreno Ramos did not fulfill requirements for that criterion. NA means that for the index case consideration of the item is not applicable while the capital letter I means that there was insufficient information to consider the criterion. There is insufficient history to diagnose Mr. Moreno Ramos as having suffered from Conduct Disorder. The difficulties that he experienced initially after immigrating to the United States are partially explained as an Acculturation Problem. However, part of the reason why he engaged in antisocial activities during adolescence can be traced to his Bipolar Disorder. Given the available information Mr. Moreno Ramos has never suffered from DSM-IV-TR Conduct Disorder. [101]

TABLE 26. DSM-IV-TR CRITERIA FOR CONDUCT DISORDER

"A. A repetitive and persistent pattern of behavior in which the basic rights of others or a major age-appropriate societal norms or rules are violated, as manifested by the presence of three (or more) of the following criteria in the past 12 months, with at least one criterion present in the past six months []:

Aggression to people and animals

(1) often bullies, threatens, or intimidates others [-], [-], [-], [-].
(2) often initiates physical fights [+], [+], [+], [+].
(3) has used a weapon that can cause serious physical harm to others (e.g., a bat, brick, broken bottle, knife, gun) [-], [+], [-], [-].
(4) has been physically cruel to people [-], [I], [I].
(5) has been physically cruel to animals [-], [-], [-].
(6) has stolen while confronting a victim (e.g., mugging, purse snatching, extortion, armed robbery [-], [-], [-].
(7). Has forced someone into sexual activity [-], [I], [-], [-].

Destruction of Property

(8). Has deliberately engaged in fire setting with the intention of causing serious damage [-, 0], [-, 0], [-, 0], [-, 0].

(9). Has deliberately destroyed others' property (other than by fire setting) [-, 0], [-, 0], [-, 0], [-, 0].

Deceitfulness or theft

(10). Has broken into someone else's house, building or car [-], [-], [-], [-].
(11). Often lies to obtains goods or favors or to avoid obligations (i.e., "cons" others) [-], [I], [I], [I].

(12). Has stolen items of nontrivial value without confronting a victim (e.g., shoplifting, but without breaking and entering; forgery) [-], [I], [I], [I].

Serious violations of rules

(13). Often stays out at night despite parental prohibitions, before age 13 years [-], [-], [-], [-].
(14). Has run away from home at least twice while living in parental or parental surrogate home (or once without returning for a lengthy period) [-, 0], [-, 0], [-, 0], [-, 0].
(15). Is often truant from school, beginning before age 13 years [I], [I], [I], [I].

B. The disturbance in behavior causes clinically significant impairment in social, academic, or occupational functioning [NA].

C. If the individual is 18 years or older, criteria are not met for antisocial personality disorder [NA].

Code based on age at onset [NA]:

Conduct Disorder, Childhood-Onset Type: onset of at least one Criterion characteristic of Conduct Disorder prior to age 10 years [NA].

312.82 Conduct Disorder, Adolescent-Onset Type: absence of any criteria characteristic of Conduct Disorder prior to age 10 years [NA].

312.89 Conduct Disorder, Unspecified Onset: age at onset is not known [NA].

Specify severity:

Mild: few if any conduct problems in excess of those required to make the diagnosis and conduct problems cause only minor harm to others.
Moderate: number of conduct problems and effect on others intermediate between "mild" and "severe".
Severe: many conduct problems in excess of those required to make the diagnosis or conduct problems cause considerable harm to others". [102]

3. Evaluation for Antisocial Personality Disorder:

This examiner also considered the possibility that Mr. Moreno Ramos is presently suffering from DSM-IV-TR Antisocial Personality Disorder. The DSM-IV-TR (page 706) criteria for Antisocial Personality Disorder (301.7) is listed in table 27 (the + signs denote that the criterion is met by him and the – sign indicates that the defendant did not fulfill requirements for that criterion. NA means that for the index case consideration of the item is not applicable while I means that there was insufficient information to consider the criterion). Essentially, the available information does not suggest a DSM-IV-TR diagnosis of Antisocial Personality Disorder. The results of the SCID-II are consistent with this impression. [103]

Given that the Mr. Moreno Ramos has a history of antisocial behaviors, this examiner formally considered that Mr. Moreno Ramos may be currently suffering from an Antisocial Personality Disorder. The results of my exploration did not reveal sufficient information consistent with the above mentioned three disorders. See appendix 12 for more details. 1) One of the most important reasons why Mr. Moreno Ramos can not be diagnosed with an Antisocial Personality Disorder is because much of his antisocial behavior can be traced to the Bipolar Disorder construct, especially with regard to his mood lability associated with mania. Moreover, the nature of his spectrum of hypomanic/hypomanic-like states makes the consideration of Antisocial Personality highly problematic. 2) As stated in DSM-IV-TR, the diagnosis of Antisocial Personality and related precursors must take into account the individual in the context of his or her familial, social and cultural environments from a life-span as well as an intergenerational perspective. The

results of the social history of Mr. Moreno Ramos by Dr. Richard Cervantes are consistent with this view. [104]

Dr. Cervantes has analyzed Mr. Moreno Ramos' life trajectory from these perspectives. He points out that Mr. Moreno Ramos antisocial activities are inextricably linked to the intergenerational cycle of violence that can be traced at least since Mr. Moreno Ramos' paternal grandmother, who had been markedly abusive to Mr. Moreno Ramos father. As Dr Cervantes stated "Pedro Ramos, father of Roberto, continued the cycle of violence into the next generation (doc.15, pp. 6)." In situations where the familial, social, and cultural milieus are likely to be strongly predispose offspring to behave antisocially, the clinician must exercise great caution about diagnosing Antisocial Personality Disorder or related constructs such as Conduct Disorder, psychopathy and Oppositional Defiant Disorder. Therefore, I am in agreement with Dr. Cervantes' view that psychosociocultural, life-span and intergenerational factors related to Mr. Moreno Ramos' life trajectory, do not support a diagnosis such as Conduct Disorder. For similar reasons, Mr. Moreno Ramos does not qualify for Antisocial Personality Disorder (io.16). See appendix 12 for more details related to this analysis. [105]

TABLE 27. DSM-IV-TR CRITERIA FOR ANTISOCIAL PERSONALITY DISORDER.

"A. There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:

(1). failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest [-].
(2). deceitfulness, as indicated by repeated lying, use of aliases, or conning others for profit or pleasure [-].
(3). impulsivity or failure to plan ahead [-].
(4). irritability and aggressiveness, as indicated by repeated physical fights or assaults [-].
(5). reckless disregard for safety of self or others [-].
(6). consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations [-].
(7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another[-].

B. The individual is at least age 18 years [NA].

C. There is evidence of Conduct Disorder (see page 98[of DSM-IV-TR]) with onset before 15 years [NA].

D. The occurrence of antisocial behavior is not exclusive during the course of Schizophrenia or a Manic Episode. [NA]" [106]

Appendix 13. Evaluation for Malingering:

According to DSM-IV-TR, "Malingering should be strongly suspected if any combination of four items is noted (pp. 739). See table 28. The + signs denote that a criterion is met, - if it is not met, NA if criterion is not applicable and I if there is insufficient information to consider the criterion. [107]

TABLE 28. DSM- TABLE IV-TR CRITERIA FOR CONSIDERING MALINGERING

"1. Medico-legal context of presentation (e.g., the person is referred by an attorney to the clinician for examination)[+].
2. Marked discrepancy between the person's claimed stress or disability and the objective findings [-].
3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen [-].
4. The presence of Antisocial Personality Disorder [-]". [108]

In the case of Mr. Moreno Ramos, item 1 applies to him because he was evaluated in a psychiatric-legal context. With regard to item 2, his history was overall internally consistent. Independent sources of information often were not consistent with his history because he tended to minimize or deny his psychopathology. Therefore, this inconsistency was in the opposite direction than would be expected of Malingering. In regard to item 3, he was superficially cooperative in providing his history. However, I am of the opinion that he was consciously uncooperative in that he consistently tried to appear more mentally healthy than is objectively true. Therefore this item was scored negative. As previously stated, the defendant does not qualify for Antisocial Personality Disorder. Therefore, he does not qualify for item 4. [109]

In conclusion, from a DSM-IV-TR perspective, Mr. Moreno Ramos is a person that carries a low index of suspicion regarding malingering. The scores of both the M-FAST and the SIRS are consistent with the above DSM-IV-TR analysis on Malingering in that they clearly are not suggestive of Malingering. However, Mr. Moreno Ramos is at somer risk for under-reporting his psychopathology because he is very much interested in appearing to be normal. [110]

Appendix 14. Cultural Formulation:

The cultural formulation of DSM-IV-TR is composed of five categories that are considered in order to "...assist the clinician in systematically evaluating and reporting the impact of the individual's cultural context (DSM-IV-TR, pages 843-844). [111]

Cultural Identity of the Individual.

A. *Cultural Reference Groups*. Mr. Moreno Ramos' stated that his father and grandparents were culturally Mexican. They were born and raised in Mexico. Mr. Moreno Ramos' mother stated that she was born in Zacatecas, Mexico and raised in Aguascalientes, Mexico. Most of Mr. Moreno Ramos' social networks have been of Mexican/other Latin-American origin. His first wife was a woman of cultural Guatemalan heritage. [112]

Mr. Moreno Ramos stated that his second wife was from Mexico. Mr. Moreno Ramos stated that his third wife was also from Mexico. Mr. Moreno Ramos lived the first 16 years of his life in Mexico. All of this information indicates that his cultural identity is robustly Latin-American and mostly Mexican. [113]

B. *Language*. Mr. Moreno Ramos' native language is Spanish and during the first 16 years of his life, while he lived in Mexico, he only spoke Spanish. He

formally began to learn English at age 16, when he immigrated with his family to the United States. Mr. Moreno Ramos consistently stated that he used Spanish far more frequently than English. [114]

Mr. Moreno Ramos said that he feels comfortable speaking both Spanish and English. In most of the homes where he lived, Spanish was the primary language. With his wives, he spoke mostly Spanish. In Mexico he spoke Spanish, his native language. At work he spoke both English and Spanish. [115]

C. *Cultural Factors in Development*. During his childhood and early adolescence he was raised in large Mexican metropolitan centers. As an adult he has lived in the United States. Mr. Moreno Ramos stated that he tended to become involved in fights while he lived in Mexico. He said that although he may have been involved in as many as 100 fights in his lifetime, many of these confrontations were not initiated by him. He also said that although he tended not to start physical fights, he was not the one who would shy away from fights because he was supposed to defend himself, his family or his friends. He said that he never belonged to gangs in part because he never depended in large social groups (id.1; id.2). [116]

Mr. Moreno Ramos said that especially in Mexico, he lived in social milieus where physical fighting was endemic. However, his mother stated that Mr. Moreno Ramos was prone to become involved in physical fights or verbal altercations more than the rest of her children (io.4). Mr. Moreno Ramos' sister Ms. Natividad Sarabia said that her father was an important influence in that he valued physical aggression and he served as a role model for Mr. Moreno Ramos, thereby encouraging Mr. Moreno Ramos to become violent. Ms. Natividad Sarabia, sister of Mr. Moreno Ramos, stated that Mr. Moreno Ramos very much wanted to be liked by his father and that Mr. Moreno Ramos made substantial attempts to emulate him. She said that Mr. Moreno Ramos attempted to be aggressive and to portray a persona of a man who would defend himself and stand for his rights but that their father never considered Mr. Moreno Ramos to be his favorite son (io.1). After Mr. Moreno Ramos settled in Texas, he began to make frequent trips to northern Mexico (id.2). [117]

D. *Involvement with Culture of Origin*. Mr. Moreno Ramos interacted more frequently with people from Mexico or with people in the United States who had a strong affiliation with the Mexican culture or other Latin-American cultures. This process is exemplified by his marriages, all of which involved women of Latin-American background. [118]

E. *Involvement with Host Culture*. The host culture is mainstream American culture. Mr. Moreno Ramos has had moderate to substantial involvement with members of mainstream United States society at school, at work, in social settings and in the prison system. [119]

Cultural Explanations of the Individual's Illness.

A. *Predominant Idioms of Distress and Local Illness Categories*. Mr. Moreno Ramos did not appear to use Mexican culture bound explanations for psychiatric or non-psychiatric medical problems. Ms. Carmen Ramos, mother of Mr. Moreno Ramos stated that her family never entertained the possibility that Mr. Moreno Ramos had been (*embrujado)* bewitched. She also stated that to her knowledge,

no one in her family had been reported as having been bewitched (id.1; id.2; io.3). [120]

B. *Meaning and Severity of Symptoms in Relation to Cultural Norms.* Although Mr. Moreno Ramos did not make use of culture bound illness categories. He did not view most of his mental symptoms of as indicative of a mental disorder or as indicative of a clinical process. He conceptualized most of his symptoms as part of "problems of life". [121]

C. *Perceived Causes and Explanatory Models.* Mr. Moreno Ramos thought that most of his traumatic childhood experiences were not only expected but natural. Mr. Moreno Ramos has a very rudimentary understanding of mental illness. This dearth of knowledge is due not only to cultural reasons but also to psychiatric and socioeconomic factors. [122]

D. *Help Seeking Experiences and Plans.* He was raised in psychosociocultural and especially familial settings where expressing emotional distress in emotions other than anger was incongruent with his role as a man and with his sense of dignity. In this regard, his father but also the socioeconomic milieus where he was raised were powerful shaping influence in the development of help seeking behaviors and strategies. [123]

Cultural Factors Related to Psychosocial Environment and Levels of Functioning:

A. *Social Stressors.* Most of Mr. Moreno Ramos' stressors currently derive from his legal problems and psychiatric Disorders. [124]

B. *Social Supports.* Prior to his incarceration, his social acquaintances and family were mostly of Latin American origin or background. Currently his main support systems are the attorneys and associated legal staff that are helping him with his legal difficulties and related problems. [125]

C. *Levels of Functioning and Disability.* Mr. Moreno Ramos was able to make some positive inroads in his educational, social and educational life. However his difficult upbringing involving , protracted and intense physical abuse, family instability, difficulties inherent in intercultural transition, issues related to adolescent development including poor educational attainment, , economic difficulties, and especially serious psychopathology, have also resulted in significant social, educational and occupational disability. [126]

Cultural Elements of the Relationship Between the Individual and the Clinician:

Mr. Moreno Ramos' mother stated that they hardly ever were evaluated by a physician while they lived in Mexico. For example, she stated that for her pregnancy care and delivery she relied in the *parteras* (midwives). Essentially, Mr. Moreno Ramos has had limited contact with the health care system. Of some interest is that he once worked in a group home, caring for individuals who suffered from serious mental illness. According to Mr. Jose Sarabia, Mr. Moreno Ramos was appropriate with the group home residents (io.2). Available information, including consideration of his interview behavior during my interviews with him (id.12; id.2), indicates that he should be able to derive benefit from psychotherapeutic interventions provided that these are made from a culturally sensitive perspective. [127]

Overall Cultural Assessment for Diagnosis and Care:

In conclusion, psychosociocultural factors are important in arriving at an optimal diagnostic picture. They may also have an important if not crucial role in explicating the nature of the deaths of his wife and two children. However, adequate exploration of this issue is likely to require consideration of more sources of information than were currently available to this examiner. However, I am also of the opinion that cultural factors intrinsic to the Mexican culture are not likely to explain the conduct involved in the deaths of Mr. Moreno Ramos wife and her children. [128]

In my opinion Mr. Moreno Ramos represents a person who has achieved a moderate level of integration in United States mainstream society. However this was dramatically complicated by his history of relentless physical and psychological abuse as a child and as an adolescent, family instability, as well as relative isolation via cultural, educational and economic barriers and serious psychopathology. Both his psychopathology and his psychosocioculturally based limitations have resulted in significant emotional isolation that culminated in no treatment for his serious mental difficulties. This situation in turn could have helped facilitate the chain of events that led crimes such as those for which Mr. Moreno Ramos was convicted. However, as previously stated, his cultural background in and of itself can not explain the antisocial activities encompassed in the chain of events that culminated in the deaths of his wife and children. [129]

Appendix 15. Evaluation for Assessment of Functioning:

Axis V requires that The Global Assessment of Functioning (GAF) Scale be completed. Therefore a complete multiaxial diagnostic impression using DSM-IV-TR must involve one or several ratings, depending on the individual being diagnosed. From a psychiatric-legal perspective the notion of psychological functioning can be very important depending on the nature of disability and the way in which considering this disability may affect specific psychiatric-legal issues. The actual scale as it appears in DSM-IV-TR is provided in table 29. In the case of Mr. Moreno Ramos, he often functions at the 40-60 range. At the time of the deaths of his two children and wife, he was functioning at the 1-10 range. [130]

TABLE 29.GLOBAL ASSESSMENT OF FUNCTIONING SCALE (GAF).

Consider psychological, social, and occupational functioning on a hypothetical continuum of mental health–illness. Do not include impairment in functioning due to physical (or environmental) limitations.

Code
(Note: Use intermediate codes when appropriate, e.g., 45, 68, 72.)

100
|
91
Superior functioning in a wide range of activities, life's problems never seem to get out of hand, is sought out by others because of his or her many positive qualities. No

symptoms.
90
|
81
Absent or minimal symptoms (e.g., mild anxiety before an exam), good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns (e.g., an occasional argument with family members).
80
|
71
If symptoms are present, they are transient and expectable reactions to psychosocial stressors (e.g., difficulty concentrating after family argument); no more than slight impairment in social, occupational, or school functioning (e.g., temporarily falling behind in schoolwork).
70
|
61
Some mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships.
60
|
51
Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers).
50
|
41
Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).
40
|
31
Some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).
30
|
21
Behavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment (e.g., sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) OR inability to function in almost all areas (e.g., stays in bed all day; no job, home, or friends).
20
|
11
Some danger of hurting self or others (e.g., suicide attempts without clear expectation of death; frequently violent; manic excitement) OR occasionally fails to maintain minimal personal hygiene (e.g., smears feces) OR gross impairment in communication (e.g., largely incoherent or mute).
10
|
1
Persistent danger of severely hurting self or others (e.g., recurrent violence) OR persistent inability to maintain minimal personal hygiene OR serious suicidal act with clear expectation of death.
0
Inadequate information." [131]

IX. REFERENCES

American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Washington, DC, American Psychiatric Association, 1980.

American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised, Washington, DC, American Psychiatric Association, 1987.

American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, Washington, DC, American Psychiatric Association, 1994.

American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, Washington, DC, American Psychiatric Association, 2000.

Goodwin FK and Jamison KR: Manic-Depressive Illness. Oxford University Press, New York, NY, 1990.

Soloff PH: Psychopharmacotherapy of Borderline Personality Disorder. Psychiatric Clinics of North America 23 (1): 169-192, 2000.

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B. Education:

1. Undergraduate School:	Stanford University, California, 1968-1972, B.S. Biology, 1973.
2. Graduate School:	University of California, San Diego, Biology. Focus: DNA Replication/neurobiology, 1972-1977
3. Medical School:	Stanford University, California, 1977-1981, M.D., 1981
2. Postgraduate Education:	
1. Internship:	Psychiatry and Medicine, Stanford University Hospital, Stanford, California, 1981-1982. 1981
2. Residency:	Psychiatry, Stanford University Hospital, California, 1982-1984.
3. Fellowship:	Individual Development and Social Change, Center for Advanced Study in the Behavioral Sciences, Stanford, California, summer, 1984.
4. Fellowship:	Postdoctoral Scholar, Focus on Cultural Psychiatry, Department of Psychiatry and the Behavioral Sciences, Stanford University, Stanford, California, July, 1984- June, 1985.

5. Fellowship;	Southern California Institute of Law and the Behavioral Sciences, Los Angeles, California, July, 1985- June, 1986.

C. Certifications and Licensure:

1. Licensure:	California, May 25, 1983, Permit G49996, September 30, 1984.
2. Certifications:	A. American Board Of Psychiatry and Neurology (Psychiatry), April 1987, No. 24235. B. American Board of Psychiatry and Neurology (Forensic Psychiatry) April 5. 1998, No. 593.
3. DEA Number:	BS5936010.

D. Honors and Awards:

1. Ford Foundation Fellow, Biology, University of California, San Diego, 1972-1979.
2. Associate Fellow, Chicano Fellows Program, Stanford University, 1978-1979.
3. Fellow, American Academy of Forensic Sciences, 1991-2004.
4. Excellence in Teaching Award, Department of Psychiatry, The University of Texas Health Science Center at San Antonio, 1994-1995.
5. Selected to the Best Doctors in America, Woodward White, 1996-1997.
6. National Alliance For the Mentally Ill (NAMI) Exemplary Psychiatrist Award, 2002.
7. Selected to America's Top Psychiatrists, Consumers' Research Council of America, 2002-2003.

II. CLINICAL EXPERIENCE

A. Current Clinical Appointments/Interests

1. Private Practice: Forensic Psychiatry, San Jose, California, 1998-2003.

2. Psychiatrist, National Center for Posttraumatic Stress Disorder, Menlo Park Division and Outpatient Psychiatry Service, Veterans Affairs Palo Alto Health Care System, Palo Alto, California, 1997-2003.

3. Clinical Interests:	1.Posttraumatic Stress Disorders/ Other Stress Disorders. 2. High Functioning Autism Spectrum Disorders. 3. Adult and Adolescent Attention Deficit Hyperactivity Disorder. 4. Cultural Issues in Psychiatric illness.

B. Outpatient Clinical Experience

1.Psychiatric Physician, Josefa Narvaez Mental Health Clinic, County of Santa Clara, California, 1984-1985.

2. Staff Psychiatrist, Northeast Clinic, Department of Mental Health, County of Los Angeles, California, 1986-1987.

3. Staff Psychiatrist, Emergency Psychiatry Service, Department of Mental Health, County of Los Angeles, California, Los Angeles County-USC Medical Center, 1987-1988.

4. Staff Psychiatrist, West Los Angeles Veterans Administration Medical Center, Emergency Psychiatry Service, 1988-1990.

5. Staff psychiatrist, National Center for Posttraumatic Stress Disorder, Clinical/Education Division, Veterans Affairs Palo Alto Health Care System, Menlo Park Division, 1997-2003.

C. Inpatient Clinical Experience:

1. Staff Psychiatrist, Psychiatric Intensive Care Unit (COPES), West Los Angeles Veterans Administration Medical Center, 1987-1988.

2. Ward Chief, Inpatient General Psychiatric Unit, West Los Angeles Veterans Administration Medical Center, 1990-1991.

3. Staff Psychiatrist, Regional Acute Psychiatric Treatment Unit (RAPT), West Los Angeles Veterans Administration Medical Center, 1991-1992.

4. Staff Psychiatrist, Psychiatry Research Unit, South Texas Veterans Health Care System, Audie L. Murphy Division, San Antonio, Texas, 1992-1997.

D. Forensic Psychiatry Experience

1. Consultations in Cases of National Interest:

1.1. California v. Cary Anthony Stayner (San Jose, California). Consultant to the Superior Court and the defense (triple murder of visitors to Yosemite National Park), 2002.

2. Expert Testimony in Cases of National Interest:

2.1. California v. Cary Anthony Stayner. Testified at trial during guilt phase on July 29, 30, 31 and August 1, 2002. Testified during the penalty phase on October 1 and 2, 2002.

3. Consultations in Other Cases of Notable Interest:

3.1.California v. Martha Cordero. (Los Angeles, California). Consultant to the defense (Young Mexican woman commits neonaticide raising biopsychosociocultural and developmental issues), 1986.

3.2. California v. Gilberto Sanchez. (Los Angeles, California). Consultant to the defense (Young man from El Salvador commits filicide raising biopsychosociocultural and developmental issues), 1989.

3.3. California v. Rodolfo Hernandez (San Jose, California). Consultant to the defense (man with delusional religious misidentification ritually beheads mother and animals), 2003.

3. Psychiatric-Legal Experience:

Over 1100 Psychiatric-Legal Evaluations in Criminal and Civil Cases.
Over 50 Appearances as Psychiatric Expert Witness in Criminal and Civil Cases.

4. Criminal Psychiatric-Legal Issues:

Criminal Competence
Criminal Responsibility
Cultural and Racial Factors
Abnormal Sexual Behaviors
Autism Spectrum Disorders
Attention Deficit and Hyperactivity Disorder
Posttraumatic Stress Disorder/Other Stress Disorders
Violence Secondary to Psychotic Disorders
Sentencing Issues
Workplace Violence

4. Civil Psychiatric-Legal Issues:

Violence Risk Assessment/Duty to warn or Protect
Autism Spectrum Disorders
Cultural and Racial Issues
Competencies and Capacities
Personal Injury
Workplace Aggression
Workers Compensation

5. Consultantships (present and past):

1. Law Office of the Capital Collateral Regional Counsel, Middle Region, State of Florida, 2003-2004.
1. United States District Court, Northern District of California, 2003
2. Agreed Medical Examiner (A.M.E.) in Psychiatry, Workers Compensation, 1987-1991.
3. Juvenile Court of Los Angeles County, 1988-1990.
4. Municipal Court of the City of Los Angeles, 1988-1991.
5. Member, Superior Court of Los Angeles County Panel of Psychiatrists and Psychologists, 1987-1990.
6. Member, Psychiatric Panel, United States District Court, Central District of California, 1988-1990.
7. Consulting Psychiatrist, Sex Offender Commitment Program, California Department of Mental Health, 2000-2002.

8. Member, Panel of Forensic Evaluators of the Superior Court, Santa Clara County, 1998-2004.
9. Member, Panel of Psychiatrists and Psychologists of the Superior Court, Criminal Division, San Mateo County, 1998-2004.
10. Member, Panel of Psychiatrists and Psychologists of the Superior Court, Monterey County, 1999-2003.
11. Consultant, Superior Court of Santa Cruz County, 2000-2004.
12. Federal Bureau of Prisons, Terminal Island, San Pedro, California, 1985-1986.

E. Other Employment/Information:

1. Summer Research Experience, Department of Pathology, School of Medicine, UCLA, 1967, 1968.
2. Summer Research Experience, Department of Pathology, School of Medicine, UC Irvine. 1969, 1970.
3. Research Experience, Department of Biology, Stanford University, 1968-1969.
4. Hospital Affiliation, Western Medical Hospital, Anaheim, California, 1986-1987.
5. Hospital Affiliation, Ingleside Hospital, Rosemead, California, 1988-1989.

III. ADMINISTRATIVE EXPERIENCE

A. Clinical Directorships:

1. Co-Director of Psychiatry Research Unit, South Texas Veterans Health Care System, Audie Murphy Division, San Antonio, 1992-1997.

2. Co-Director of Regional Acute Psychiatric Treatment Unit, West Los Angeles Veterans Affairs Medical Center, 1991-1992.

B. Committees:

1. Department

1. Member, Residency Education Committee. The University of Texas Health Science Center at San Antonio, 1995-1996.

2. Member, Planning Committee, Forensic Psychiatry Training Program, University of California, Los Angeles. 1991-1992.

2. School

1. Member, Self Study Committee for the Liaison Committee on Medical education. Section on Clinical Science Departments, University of Texas Health Science Center at San Antonio, 1994-1995.

3. Hospital

West Los Angeles Veterans Affairs Medical Center, Brentwood Division

3. Hospital

1. Member, Drug Utilization Evaluation Subcommittee, 1991-1992.

South Texas Veterans Health Care System, San Antonio

1. Member, Bed Census Task Force, 1993
2. Member, Task Force, White Paper on Aggression, 1993.
3. Member, Clozaril Treatment Committee, 1996-1997.
4. Member, Medical Records Committee, 1993-1995.
5. Chairman, Clinical Ethics Committee, 1993-1996.
6. Member, Quality Improvement Committee, 1994-1996.
7. Member, Psychiatric service Total Quality Improvement Team, 1995.
8. Member, Patient Rights and Organizational Ethics Committee, 1995-1996.
9. Member, Prevention and Management of Disturbed Behavior Committee, 1993-1997. Co-Chairman, 1997.

IV. ACADEMIC APPOINTMENTS

1. Teaching Assistant, University of California, Department of Biology, San Diego, 1973-1976.

2. Instructor, Chicano Fellows Program, Stanford University, Stanford, California, 1986.

3. Clinical Instructor, University of Southern California Institute of Psychiatry, Law and the Behavioral Sciences, Los Angeles, California, 1985-1986.

4. Assistant Clinical Professor of Psychiatry and Biobehavioral Sciences, UCLA, 1986-1992.

5. Associate Professor of Psychiatry, University of Texas Health Science Center, San Antonio, 1992-1997.

V. TEACHING EXPERIENCE

A. Classroom/Laboratory:

1. Teaching Assistant, Course: Cell Biology, Department. of Biology, University of California, San Diego, 1973.

2. Teaching Assistant, Course: Microbial Genetics Laboratory, Department.of Biology, University of. California, San Diego, 1975.

3. Teaching Assistant, Course: Introduction to Microbiology, Department.of Biology, University of. California, San Diego, 1976.

4. Teaching Assistant, Course: Biology and the Third World, Department.of Biology, University of. California, San Diego, 1976.

5. Teaching Assistant, Course: Microbial Genetics Laboratory (Section on Plasmid Replication), Department of Biology, University of California, San Diego, 1976.

6. Instructor, Course: Issues in Chicano Health Care, Stanford University, Stanford, California, 1979.

7. Lecturer, Course: Cross-cultural Psychiatry, Stanford University, Stanford, California, 1983.

8. Instructor, Course: Cross-cultural Research-Writing Papers and Grants, Department of Psychiatry and Biobehavioral Sciences, School of Medicine, University of California, Los Angeles, 1988.

9. Lecturer, Course: Ethnicity in Health and Disease, School of Medicine, U.C. Los Angeles, 1988-1990.

10. Lecturer, Clinical Psychiatry Medical Student Clerkship, Medical School, of the U. C. L.A., 1988-1992.

11. Lecturer, Emergency Psychiatry Lecture Series, Department of Psychiatry, West Los Angeles Veterans Affairs Medical Center, 1988-1991.

12.Lecturer, Course: Legal and Ethical Issues in Psychiatry, Department of Psychiatry and Biobehavioral Sciences, University of California, Los Angeles Medical School, 1991.

13. Lecturer, Course: Adult Clinical Syndromes, Harbor-UCLA Psychiatry Residency, Torrance CA, 1991.

14.Lecturer, General Psychiatry Lecture Series, Department of Psychiatry, West Los Angeles Veterans Affairs Medical Center, 1991.

15. Instructor, Course: Cross-cultural Research, Department of Psychiatry and Biobehavioral Sciences, School of Medicine, University of California, Los Angeles, 1991.

16. Lecturer, Forensic Psychiatry Fellowship Program, School of Medicine, U. C. Los Angeles, 1991.

17. Lecturer, Cross-cultural Psychiatry seminar, Sepulveda Veterans affairs Hospital, Psychiatry Residency Program, Sepulveda, CA, 1992.

18. Lecturer, Med. Prep./Biomed-Med Program, University of Texas Health Science Center at San Antonio, 1992-1994.

19. Faculty Discussant, Consultation and Liaison Psychiatry Residency Conference, University of Texas Health Sciences Center at San Antonio, 1993.

20. Discussant and Lecturer, Department of Psychiatry Lecture Series, Audie Murphy VAMC, San Antonio, TX, 1993-1994.

21. Lecturer, Psychiatry Research Unit Lecture Series, Audie Murphy VAMC, San Antonio, TX, 1994-1995.

22. Lecturer/ Discussant, Lectures in Clinical Ethics, Audie Murphy VAMC, San Antonio, TX1984-1985.

23.Instructor, Developmental Models in Psychiatry, Medical Student Elective Course, University of Texas Health Science Center at San Antonio, 1994.

24. Discussant, Department of Psychiatry Journal Club, University of Texas Health Sciences Center at San Antonio, 1995.

25. Instructor, Mental and Evolutionary Models in Psychiatry. Medical Student Elective Course. University of Texas Health Sciences Center, San Antonio, 1996.

26. Lecturer, PRIME psychiatry residency lecture series, South Texas VA Health Care System, 1996.

27. Discussant, Behavioral Sciences Medical Student Groups: Cultural issues in the clinical setting, University of Texas Health Sciences Center at San Antonio, 1996.

28. Discussant, Emergency Psychiatry Residency Conference Series, University of Texas Health Sciences Center at San Antonio, 1996.

29. Co-instructor, Transcultural Psychiatry Residency Seminar, University of Texas Health Science Center at San Antonio, 1995-1997.

30. Discussant, Forensic Psychiatry Residency Seminar, University of Texas Health Science Center at San Antonio, 1997.

31. Guest Lecturer, Lecture Series and Seminar: Ethnicity and Medicine, Stanford University School of Medicine Center of Excellence, Stanford, California, 1999.

B. Clinical Teaching:

1. Supervisor, Year III-IV Medical Students, Clinical Psychiatry Clerkship at 1. Intensive Care Ward and 2. Emergency Psychiatry Division. University of California, Los Angeles, 1988-1989.

2. Clinical Supervisor for forensic psychiatry, University of Southern California Institute of Psychiatry, the Law and the Behavioral Sciences, Los Angeles California, 1985-1986.

3. Lecturer, Course: Clinical Fundamentals, Psychiatry Section, School of Medicine, University of California at Los Angeles, 1991.

4. Clinical Supervisor of Psychiatry Residents. !. Intensive Care Psychiatry and 2. Emergency Psychiatry, Department of Psychiatry and the Behavioral Sciences, University of California at Los Angeles, 1987-1990.

5 . Clinical Supervisor, Minority High School Research Apprentice Program, School of Medicine, University of California, Los Angeles, 1988-1990.

6. Supervisor, Independent Study Mentorship Program, San Antonio North side Independent school District, High School Gifted and Talented Program, San Antonio, Texas, 1992-1993.

7. Oral Examiner, Medical Student Psychiatry Clerkship, The University of Texas Health Science Center, San Antonio, 1992-1993.

8. Clinical Supervisor, Psychiatry Research Unit Medical Student Clerkship, Audie Murphy Medical Center and the University of Texas Health Science Center, San Antonio, 1992-1996.

9. Postdoctoral fellows supervised: One postdoctoral fellow in forensic psychiatry supervised, 1991. Three postdoctoral fellows in biological psychiatry supervised, 1992-1995.

10. Clinical Supervisor, Psychiatry Internship Rotation, Psychiatry Research Unit, Audie Murphy Medical Center/The University of Texas Health Science Center, San Antonio, 1992-1995.

11. Interviewer, Psychiatry Boards Practice Interviews, Wilford USAF Hall Medical Center Psychiatry Residency, San Antonio, Texas, 1993.

12. Career Supervisor, Psychiatry Residency, The University of Texas Health Science Center, San Antonio, 1993-1997.

13. Supervisor, Medical Student Clinical Interviewing Small Groups, University of Texas Health Science Center at San Antonio, 1993-1994.

14. Supervisor, Psychiatry Residents (PGY IV) Forensic Psychiatry, The University of Texas Health Science Center, San Antonio, 1993.

15. Interviewer, Psychiatry Boards Practice Interviews, PGYII, PGYIV Psychiatry Residents, The University of Texas Health Science Center at San Antonio, 1994.

V. RESEARCH

A. Bibliography:

1. Books/Monographs:

1. Griffith, E, Alarcon, RD, Bland, I, Desai, P, Foulks, EF, Jacobsen, F, Lewis-Fernandez, R, Lu, F, Oquendo, M, Ruiz, P, *Silva, JA*, Wintrob, R, Yamamoto, J, Hayden, TF, Harvey, RL, Ndela, JC and Wang, D. Cultural Assessment in Psychiatry, Group for the Advancement of Psychiatry (GAP) Report No. 145, American Psychiatric Publishing, Inc., Washington, DC, 2001.

2. Articles:

1. Burnham, PA, *Silva, JA*. and Varon, S: Anabolic Responses of embryonic dorsal root ganglia to nerve growth factor, insulin, concanavalin A or serum in vitro. Journal of Neurochemistry 23: 689-695, 1974.

2. *Silva, JA* and Yesavage, JA: Covariance of affective and schizophrenic symptoms in schizoaffective psychosis. The Journal of Nervous and Mental Disease 168: 559-561, 1980.

3. *Silva, JA*, Jalali, B and Leong, GB: Delusion of exchanged doubles in an immigrant: a new Capgras variant? The International Journal of Social Psychiatry 33: 299-302, 1987.

4. Leong, GB and *Silva, JA*: Right to refuse treatment. American Academy of Psychiatry and the Law Newsletter 13: 23-24, 1988.

5. Leong, GB and *Silva, JA*: The right to refuse treatment: an uncertain future. Psychiatric Quarterly 59: 293-305, 1988.

6. Leong, GB and *Silva, JA*: Ethical considerations of clinical use of Miranda-like warnings. Psychiatric Quarterly 59: 293-305, 1988.

7. Leong, GB, Shaner,AL and *Silva, JA*: Anti-manic and anti-panic clonazepam use. VA Practitioner 6(1): 65-66, 1989.

8. *Silva, JA*, Leong, GB and Weinstock, R: A case of skin and ear self mutilation. Psychosomatics30: 228-230, 1989.

9. *Silva, JA*, Leong, GB, Weinstock, R and Boyer, CL: Capgras syndrome and dangerousness. The Bulletin of the American Academy of Psychiatry and the Law 17: 5-14, 1989.

10. *Silva, JA*, Leong, GB and Weinstock, R: An HIV-infected psychiatric patient: some clinicolegal dilemmas. The Bulletin of the American Academy of Psychiatry and the Law 17: 33-44, 1989.

11. *Silva, JA*, Leong, GB, Shaner, AL and Chang, CY: Syndrome of intermetamorphosis: a new perspective. Comprehensive Psychiatry 30: 728-730, 1989.

12. *Silva, JA*, Leong, GB, Weinstock, R and Ready, DJ: Factitious AIDS in a Psychiatric Inpatient. Canadian Journal of Psychiatry 34: 728-730, 1989.

13. Leong, GB, Shaner, AL and *Silva, JA*: Narcolepsy, paranoid psychosis and analeptic abuse. Psychiatric Journal of the University of Ottawa 14: 481-483, 1989.

14. Leong, GB, *Silva, JA* and Weinstock, R: Capgras and other misidentification syndromes VA Practitioner 6(10): 52-55, 1989.

15. *Silva, JA*, Leong, GB and Luong, MT: Split body and self: an unusual case of misidentification. Canadian Journal of Psychiatry 34: 728-730, 1989.

16. Leong, GB and *Silva, JA*: Asian American forensic psychiatrists. Psychiatric Annals 19: 629-632, 1989.

17. *Silva, JA*, Leong, GB and O'Reilly, T: An unusual case of Capgras syndrome: the psychiatric ward as a stage. Psychiatric Journal of the University of Ottawa 15: 44-46, 1990.

18. Benson, KL, King, R, Gordon, D, *Silva, JA* and Zarcone, VP: Sleep patterns in borderline personality disorder. Journal of affective disorders 18: 267-273, 1990.

19. Weinstock, R, Leong, GB and *Silva, JA*: Psychiatric patients with AIDS: the forensic clinician perspective. Journal of Forensic Sciences 35: 664-652, 1990.

20. *Silva, JA*, Leong, GB and Shaner, AL: A classification system for misidentification syndromes. Psycho-pathology 23: 27-32, 1990.

21. Leong, GB, *Silva, JA* and Leong, CA: Judicial discharge of involuntary patients. Psychiatric Quarterly 61: 135-141, 1990.

22. Leong, GB, Eth, S and *Silva, JA*: Wharton and the post-Tarasoff erosion of confidentiality. American academy of Psychiatry and the Law Newsletter 15: 87-88, 1990.

23. Leong, GB, *Silva, JA* and Weinstock, R: Dangerous mentally disordered criminals: unresolvable societal fear? Journal of Forensic Sciences 36: 210-218, 1991.

24. *Silva, JA*, Leong, GB, Longhitano, M and Botello, TE: Delusion of fetal duplication in a Capgras patient. Canadian Journal of Psychiatry 36: 46-47, 1991.

25. *Silva, JA*, Leong, GB and Weinstock, R: Misidentification syndromes and pseudocyesis. Psychosomatics 32: 228-230, 1991.

26. *Silva, JA*, Leong, GB and Ferrari, MM: Post-traumatic stress disorder in burn patients. Southern Medical; Journal 84: 530-531, 1991.

27. Leong, GB and *Silva, JA*: Lovesick: the erotomania syndrome. VA Practitioner 8: 39-41, 1991.

28. Leong, GB, Eth, S and *Silva, JA*: The Tarasoff dilemma in criminal court. Journal of Forensic Sciences 36: 728-735, 1991.

29. *Silva, JA*, Leong, GB, Weinstock, R and Ferrari, MM: Misidentified political figures: an underappreciated danger. Journal of Forensic Sciences 36: 1170-1178, 1991.

30. *Silva, JA* and Leong, GB: A case of "subjective" Fregoli syndrome. Journal of Psychiatry and Neuroscience 16: 103-105, 1991.

31. *Silva, JA*, Leong, GB and Shaner, AL: The syndrome of intermetamorphosis. Psychopathology 24: 158-165, 1991.

32. Weinstock, R, Leong, GB and *Silva, JA*: Opinions by APPL forensic psychiatrists on controversial ethical guidelines: a survey. Bulletin of the American Academy of Psychiatry and the Law 19: 237-248, 1991.

33. Leong, GB and *Silva, JA*: The physician as erotomanic object. Western Journal of Medicine 156: 77-78, 1992.

34. *Silva, JA*, Leong, GB and Weinstock, R: The dangerousness of persons with misidentification syndromes. Bulletin of the American Academy of Psychiatry and the Law 20: 77-86, 1992.

35. *Silva, JA*, Sharma, KK, Leong, GB and Weinstock, R: Dangerousness of the delusional misidentification of children. Journal of Forensic Sciences 37: 830-838, 1992.

36. Weinstock, R, Leong, GB and *Silva, JA*: The death penalty and Bernard Diamond's approach to forensic psychiatry. Bulletin of the American Academy of Psychiatry and the Law 20: 197-210, 1992.

37. Leong,GB, Eth, S and *Silva, JA*: The psychotherapist as witness for the prosecution: the criminalization of Tarasoff. American Journal of Psychiatry 149: 1011-1015, 1992.

38. Leong, GB, Weinstock, R and *Silva, JA*: Revisiting diminished capacity in California: ten years after its abolition. American Academy of Psychiatry and the Law Newsletter 17: 59-61, 1992.

39.Leong, GB, *Silva, JA* and Weinstock, R: Reporting dilemmas in psychiatric practice. Psychiatric Annals 22: 482-486, 1992.

40. *Silva, JA*, Leong, GB, Wine, DB and Saab, S: Evolving misidentification syndromes and facial recognition deficits. Canadian Journal of Psychiatry 37: 574-576, 1992.

41. *Silva, JA*, Leong, GB and Weinstock, R: Folie-a-deux: the syndrome of shared delusions. VA Practitioner 9: 45-48, 1992.

42. *Silva, JA* and Leong, GB: The Capgras syndrome in paranoid schizophrenia. Psychopathology 25: 147-153, 1992.

43. Leong, GB, Weinstock, R, *Silva, JA* and Eth, S: Psychiatry and the death penalty: the past decade. Psychiatric Annals 23: 41-47, 1993.

44. Leong, GB and *Silva, JA*: The problem of treatment-refractory insanity acquittee-patients. American Journal of Forensic Psychiatry 14: 41-49, 1993.

45. *Silva, JA*, Leong, GB and Wine, DB: Misidentification delusions, facial misrecognition and right brain injury. Canadian Journal of Psychiatry 38: 239-241, 1993.

46. Yamamoto, J, *Silva, JA*, Sasao, Wang, C and Nguyen, L: Alcoholism in Peru. American Journal of Psychiatry 150: 1059-1062, 1993.

47. *Silva, JA*, Leong, GB, Weinstock, R and Wine, DB: Delusional misidentification and dangerousness: a neurobiologic hypothesis. Journal of Forensic Sciences 38: 904-913, 1993.

48. *Silva, JA* and Leong, GB: Delusions of transformation of the self. Psychopathology 26:181-188,1993.

49. *Silva, JA* and Leong, GB: Delusional misidentification syndromes and prominent figures. American Journal of Forensic Psychiatry 14: 39-44, 1993.

50. *Silva, JA*, Leong, GB and Weinstock, R: The psychotic patient as security guard. Journal of Forensic Sciences 38: 1436-1440, 1993.

51. *Silva, JA* and Leong, GB: I. Misidentification delusion in alcohol withdrawal. The Psychiatric Forum 16: 27-29, 1993.

52. *Silva, JA* and Leong, GB: II. Cotards' syndrome as a misidentification process. The Psychiatric Forum 16: 30-32, 1993.

53. Leong, GB. Eth, S and *Silva, JA*: "Tarasoff" defendants: social justice or ethical decay? Journal of Forensic Sciences 39: 86-93, 1994.

54. Leong, GB and *Silva, JA*: Proposed changes in the insanity defense in the post-Foucha era. American Journal of Forensic Psychiatry 15: 53-61, 1994.

55. Weinstock, JA, Leong, GB and *Silva, JA*: Competence to terminate life sustaining care-ethical and legal considerations. The American Journal of Geriatric Psychiatry 2: 95-108, 1994.

56. *Silva, JA*, Leong, GB, Tekell, JL, Bowden, CL and De Hoyos, J: Erotomania and delusional misidentification as risk factors for aggression. American Journal of Forensic Psychiatry 15: 13-21, 1994.

57. Leong, GB, Eth, S and *Silva, JA*: Silence or death: the limits of confidentiality when a psychotherapist is threatened by the patient. The Journal of Psychiatry and the Law 22; 235-244, 1994.

58. Leong, GB, Weinstock, R and *Silva, JA*: The California legislature accelerates the assault on privilege. American Academy of Psychiatry and the Law Newsletter: 19: 39-40, 1994.

59. *Silva, JA*, Leong, GB, Weinstock, R, Sharma, KK and Klein, RL: Delusional misidentification and dangerousness. Psychopathology 27: 215-219, 1994.

60. *Silva, JA* and Leong, GB: Delusions of psychological change of the self. Psychopathology 27: 285-290, 1994.

61. Leong, GB, *Silva, JA*, Garza-Trevino, ES, Oliva, D,Jr., Ferrari, MM, Komanduri, RV and Caldwell, JCB: The dangerousness of persons with Othello syndrome. Journal of Forensic Sciences 39: 1455-1467, 1994.

62. *Silva, JA*, Leong, GB, Garza-Trevino, ES, Le Grand, J, Oliva, D. Jr., Weinstock, R and Bowden, CL: A cognitive model of dangerous delusional misidentification syndromes. Journal of Forensic Sciences 39: 1455-1467, 1994.

63. *Silva, JA*, Leong, GB and Ferrari, MM: Delusional misidentification of health care professionals. Psychiatric Quarterly 66: 51-56, 1995.

64. *Silva, JA* and Leong, GB: Visual-perceptual abnormalities in delusional misidentification. Canadian Journal of Psychiatry 40: 6-8, 1995.

65. *Silva, JA*, Leong, GB, Weinstock, R and Klein, RL: Psychiatric factors associated with dangerous misidentification delusions. Bulletin of the American Academy of Psychiatry and the Law 23: 53-61, 1995.

66. Leong, GB and *Silva, JA*: A psychiatric-legal analysis of psychotic criminal defendants charged with murder. Journal of Forensic Sciences 40: 570-573, 1995.

67. *Silva, JA*, Leong, GB, Weinstock, R and Penny, G: Dangerous delusions of misidentification of the self. Journal of Forensic Sciences 40: 570-573, 1995.

68. *Silva, JA*, Leong, GB, Ferrari, MM, Tekell, JL and Bowden, CL: The mental health professional as erotomanic object. American Journal of Forensic Psychiatry 16: 31-39, 1995.

69. Leong, GB and *Silva, JA*: Psychiatric-legal analysis of criminal defendants charged with murder: a sample without mental disorder. Journal of Forensic sciences 40: 858- 861, 1995.

70. Leong, GB, *Silva, JA* and Weinstock, R: Another courtroom assault on the confidentiality of the psychotherapist-patient relationship. Journal of Forensic Sciences 40:862-864, 1995.

71. Maas, JW, Miller, AL, Tekell, JL, Funderburg, L, *Silva, JA*, True, J, Velligan, D, Berman, N and Boweden, CL: Clonidine plus haloperidol in the treatment of schizophrenia/psychosis. Journal of Clinical Psychopharmacology 15: 361-364, 1995.

72. *Silva, JA*, Leong, GB, Tekell, JL and Bowden, CL: Visual-perceptual disturbances in delusional misidentification. Israel Journal of Psychiatry and Related Sciences 32: 286-290, 1995.

73. Klein, R, Leong, GB and *Silva, JA*: Employee sabotage in the workplace: a biopsychosocial model. Journal of Forensic Sciences 41: 52-55, 1996.

74. *Silva, JA*, Leong, GB, Weinstock, R and Penny, G: Sexual assault of mothers by by mentally disordered sons. American Journal of Forensic Psychiatry 17: 55-63, 1996.

75. *Silva, JA*, Leong, GB Tekell, JL and Brannan, SK: The antichrist delusion as a dangerous misidentification state. American Journal of Forensic Psychiatry 17: 55-63, 1996.

76. *Silva, JA*, Leong, GB and Miller, AL: Delusional misidentification syndromes: drug treatment options. CNS Drugs 5: 89-102, 1996.

77. *Silva, JA*, Leong, GB, Weinstock, R, Yamamoto, J and Ferrari, MM: A biopsychosociocultural approach for the evaluation of parents who kill their children. American Journal of Forensic Psychiatry 17: 25-36, 1996.

78. *Silva, JA*, Garza-Trevino, ES and Leong, GB: Othello syndrome: a disorder of delusional jealousy. Federal Practitioner 13: 14-16, 21, 1996.

79. *Silva, JA*, Harry,BE, Leong, GB and Weinstock, R: Dangerous delusional misidentification and homicide. Journal of Forensic Sciences 41: 641-644, 1996.

80. Weinstock, R, Leong, GB and *Silva, JA*: California's diminished capacity evolution and transformation. Bulletin of the American Academy of Psychiatry and the Law 24: 347-366, 1996.

81. *Silva, JA*, Ferrari, MM and Leong, GB: The synergistic effect of the delusions of jealousy and erotomania in the development of violent behavior. American Journal of Forensic Psychiatry 17: 5-18, 1996.

82. *Silva, JA* and Leong, GB: The relation of Cotard's syndrome to delusional misidentification. Israel Journal of Psychiatry and Related Sciences 33: 188-193, 1996.

83. *Silva, JA* and Leong, GB: Multi-delusion systems, delusional misidentification and the genesisis of aggression. American Journal of Forensic Psychiatry 18: 1-14, 1997.

84. Mayberg, HS, Brannan, SK, Mahurin, RF, Jarabek, PA, Brickman, JS, Tekell, JL, *Silva, JA*, McGinnis, S, Glass, TG, Martin, CC and Fox, PT: Cingulate function in depression: a potential predictor of treatment response. NeuroReport 8: 1057-1061, 1997.

85. *Silva, JA*, Leong, GB, Rhodes, LJ and Weinstock, R: A new variant of "subjective" delusional misidentification associated with aggression. Journal of Forensic Sciences 42: 406-410, 1997.

86. *Silva, JA*, Ferrari, MM, Leong, GB and Weinstock, R: The role of mania in dangerous delusional misidentification. Journal of Forensic Sciences 42: 670-674, 1997.

87. *Silva, JA*, Leong, GB, Yamamoto, J, Weinstock, R and Ferrari, MM: A transcultural - forensic psychiatric perspective of a mother who killed her children. American Journal of Forensic Psychiatry 18: 39-58, 1997.

88. *Silva, JA*, Leong, GB and Weinstock, R: Violent behaviors associated with the antichrist delusion. Journal of Forensic Sciences 42: 1056-1059, 1997.

89. *Silva, JA*, Leong, GB, Gonzales, C and Ronan, J: Dangerous misidentification of people associated with posttraumatic stress disorder. American Journal of forensic Psychiatry 19: 17- 32, 1998.

90. *Silva, JA*, Leong, GB, Harry, BE, Ronan, J and Weinstock, R; Dangerous misidentification of people due to flashback phenomena in posttraumatic stress disorder. Journal of Forensic Sciences 43: 1107-1111, 1998.

91. *Silva, JA*, Leong, GB, Dassori, A, Ferrari, MM, Weinstock, R and Yamamoto, J: A comprehensive typology for the biopsychosociocultural evaluation of child-killing behavior. Journal of Forensic Sciences 43: 1112-1118, 1998.

92. *Silva, JA*, Ferrari, MM, Leong, GB and Penny, G: The dangerousness of persons with delusional jealousy. Journal of the American academy of Psychiatry and the Law 26: 607-623, 1998.

93. *Silva, JA*, Leong, GB, Doleshal, B and Medina, R: Delusional misidentification and aggression in women. American Journal of Forensic Psychiatry 20: 39-52, 1999.

94. Mayberg, HS, Liotti, M, Brannan, SK, McGinnis, S, Mahurin, RK, Jarabek, PA, *Silva, JA*, Tekell, JA, Martin, CC, Lancaster, JL and Fox, PT: Reciprocal limbic-cortical function and negative mood: converging PET findings in depression and normal sadness. American Journal of Psychiatry 150: 675-682, 1999.

95. Leong, GB and *Silva, JA*: Revisiting arson from an outpatient forensic perspective. Journal of Forensic Sciences 44: 558-563, 1999.

96. *Silva, JA* and Leong, GB: Partition delusions and delusional misidentification of the self: a case of aggressive behavior. American Journal of Forensic Psychiatry 20: 69-77, 1999.

97. *Silva, JA*, Leong, GB and Weinstock, R: Homicidal violence in an ambulatory public job setting: the role of delusional thinking. American Journal of Forensic Psychiatry 21:57-68, 2000.

98. *Silva, JA*, Leong, GB, Weinstock, R and Gonzales, CL: A case of Cotard's syndrome associated with self starvation. Journal of Forensic Sciences 45:77-82, 2000.

99. *Silva, JA*, Derecho, DV, Leong, GB and Ferrari, MM: Stalking behavior in delusional jealousy. Journal of Forensic sciences 45:188-190, 2000.

100. Ganzini, L, Leong, GB, Fenn, DS, *Silva, JA* and Weinstock, R: Evaluation of competence to consent to assisted suicide: views of forensic psychiatrists. American Journal of Psychiatry 157: 595-600, 2000.

101. *Silva, JA*, Leong, GB and Derecho, DV: Dissociative identity disorder: a transcultural forensic psychiatric analysis. American Journal of Forensic Psychiatry 21: 19-36, 2000.

102. Mayberg, HS, Brannan, SK, Tekell, JL, *Silva, JA*, Mahurin, RK, McGinnis, S and Jarabek, PA: Regional metabolic effects of fluoxetine in major depression: serial changes and relationship in clinical response. Biological Psychiatry 48: 830-843, 2000.

103. Leong, GB, *Silva, JA*, Weinstock, R and Ganzini, L: Views of forensic psychiatrists on evaluation and treatment of prisoners on death row. Journal of the American Academy of Psychiatry and the Law 28: 427-432, 2000.

104. *Silva, JA*, Derecho, DV, Leong, GB, Weinstock, R and Ferrari, MM: A classification of psychological factors leading to violent behavior in posttraumatic stress disorder. Journal of Forensic Sciences 46: 309-316, 2001.

105. *Silva, JA*, Leong, GB, Weinstock, R and Ruiz-Sweeney, M: Delusional misidentification and aggression in Alzheimer's disease. Journal of Forensic Sciences 46: 581-586, 2001.

106. Weinstock, R, Leong, GB and *Silva, JA*: Potential erosion of psychotherapist-patient privilege beyond California: dangers of "criminalizing" Tarasoff. Behavioral Sciences and the Law 19: 437-449, 2001.

107. Leong, GB and *Silva, JA*: Sexually violent predator II: the sequel. Journal of the American academy of Psychiatry and the Law 29: 340-343, 2001.

108. *Silva, JA* and Miller, MA: Competency to stand trial in a case of delusional misidentification of the self and delusional therioanthropy. American Journal of Forensic Psychiatry 23: 21-28, 2002.

109. Mayberg, HS, *Silva, JA*, Brannan, SK, Tekell, JL, Mahurin, RK, McGinnis, S and Jerabek, PA: The functional neuroanatomy of the placebo effect. American Journal of Psychiatry 159: 728-737, 2002.

110. *Silva, JA*, Ferrari, MM and Leong, GB: The case of Jeffrey Dahmer: sexual serial homicide from a neuropsychiatric developmental perspective. Journal of Forensic Sciences 147: 1347-1359, 2002.

111. Leong, GB and *Silva, JA*: Neuroleptic-induced akasthisia and violence: a review. Journal of Forensic Sciences 148: 187-189, 2003.

112. *Silva, JA*, Ferrari, MM and Leong, GB: Asperger's disorder and the origins of the Unabomber. American Journal of Forensic Psychiatry 24: 5-43, 2003.

113. *Silva, JA*, Leong, GB and Ferrari, MM: Paraphilic psychopathology in a case of autism spectrum disorder. American Journal of Forensic Psychiatry 24: 5-20, 2003.

114. Miller, MA and *Silva, JA*: Misidentification of the self in a patient with a psychotic disorder and posttraumatic stress disorder. Israel Journal of Psychiatry and Related Sciences 40: 145-149, 2003.

115. *Silva JA*: Commentary: Forensic Psychiatry - Can its pursuit of the truth be color-blind? Journal of the American Academy of Psychiatry and the Law 32: 40-42, 2004.

3. Book Chapters:

1. *Silva, JA* and Liederman, PH: The life-span approach to individual therapy: an overview with case presentation. In Life-Span Development and Behavior 7: 113-134, Edited by Baltes, PB, Featherman, D and Lerner, RM, Lawrence Erlebaum Associates, Publishers, Hilldale, New Jersey, 1986

2. Yamamoto, J and *Silva, JA*: Do Hispanics utilize mental health services? In Health and Behavior: Research Agenda for Hispanics. Gaiviria, M and Arana, JD, Editors. The Simon Bolivar Research Monograph Series No. 1, pp. 267-277, The University of Illinois at Chicago, Chicago, Illinois, 1987.

3. Weinstock, R, Leong, GB and *Silva, JA*: Confidentiality and privilege. In Review of Clinical Psychiatry and the Law 1: 33-119, Edited by Simon, RI, American Psychiatric Press, Washington, DC, 1990.

4. Leong, GB, *Silva, JA*, Latz, S and Weinstock, R: Confidentiality in the era of AIDS. In Review of Clinical Psychiatry and the Law 1: 121-131, Edited by Simon, RI, American Psychiatric Press, Washington, DC, 1990.

5.Weinstock, R, Leong, GB and *Silva, JA*: The role of traditional medical ethics in forensic psychiatry. In: Ethical Practice in Psychiatry and the Law, pp. 31-51. Edited by Rosner, R and Weinstock, R. Plenum Publishing Corporation, New York, NY, 1990.

6. Leong, GB, *Silva, JA* and Weinstock, R: Ethical considerations of giving Miranda-like warnings in psychiatric evaluations in criminal cases. In: Ethical Practice in Psychiatry and the Law, pp. 151-162, Edited by Rosner, R. and Weinstock, R. Plenum Publishing Corporation, New York, NY, 1990.

7. Yamamoto, J, *Silva, JA*, Justice, L, Chang, CY and Leong, GB: Cross-cultural psychotherapy. In Culture, Ethnicity and Mental Illness, pp. 101-124, Edited by Gaw, AC, American Psychiatric Association Press, Washington, DC 1993.

8. Weinstock, R, Leong, GB and *Silva, JA*: Defining forensic psychiatry: role and responsibilities, pp. 7-12. Principles and Practice of Forensic Psychiatry. Rosner, R. Editor, Chapman and Hall, New York, NY, 1994.

9. Weinstock, R, Leong, GB and *Silva, JA*: Forensic psychiatric report writing, pp. 30-33. Principles and Practice of Forensic Psychiatry. Rosner, R., Editor, Chapman and Hall, New York, NY 1994.

10. Weinstock, R, Leong, GB and *Silva, JA*: Ethical guidelines, pp. 59-67, Principles and Practice of Forensic Psychiatry. Rosner, R. Editor., Chapman and Hall, New York, NY,1994.

11.Leong, GB, *Silva, JA* and Weinstock, R; The death penalty, pp. 83-87,. Principles and Practice of Forensic Psychiatry. Rosner, R. Editor, Chapman and Hall, New York, NY,1994.

12. Weinstock, R, Leong, GB and *Silva, JA*: Competence assessments, pp. 97-99. Principles and Practice of Forensic Psychiatry. Rosner, R., Editor, Chapman and Hall, New York, NY, 1994.

13. Leong, GB, *Silva, JA* and Weinstock, R: Dangerousness, pp. 432-437. Principles and Practice of Forensic Psychiatry. Rosner, R., Editor, Chapman and Hall, New York, NY, 1994.

14. *Silva, JA,* Leong, GB and Weinstock, R: Cultural and ethnic minorities, pp. 479-484. Principles and Practice of Forensic Psychiatry. Rosner, R., Editor, Chapman and Hall, New York, NY, 1994.

15. Weinstock, R, Leong, GB and *Silva, JA*: Ethics and forensic psychiatry. Annual Review of Psychiatry 13: 365-388, American Psychiatric Press, Washington DC, 1994.

16. *Silva, JA*, Leong, GB and Weinstock, R: Misidentification syndromes, aggression and forensic issues. In Clinical Syndromes With Forensic Implications, Explorations in Criminal Psychopathology, pp. 33-49. Louis B. Schlesinger, Editor, Charles C. Thomas, Publisher, Ltd, Springfield, Illinois, 1996.

17. Goldfinger, SM and *Silva, JA*: The social context of psychiatric practice. In Psychiatry, pp. 1723-1726. Edited by A. Tasman, J. Kay and JA Lieberman. W.B. Saunders Co., Philadelphia, Pennsylvania, 1997.

18. Yamamoto, J, *Silva, JA* , Ferrari, MM and Nukariya, K: Culture and Psychopathology. In Transcultural Child Development: Psychological Assessment J.
and Treatment, pp. 34-57. Edited by Johnson-Powell. G, Yamamoto, J, Wyatt, GW and Arroyo, W. John Wiley and Sons, Inc. New York, NY, 1997.

19. Yamamoto, J, *Silva, JA* and Chang, CY: Transitions in Asian American elderly. In The Course of Life, Completing the Journey 7: pp.135-159. Edited by Greenspan, SI and Pollock, GH, International Universities Press, Madison, Connecticut, 1998.

20. Weinstock, R, Leong, GB and *Silva, JA*: Ethics. In Encyclopedia of Forensic Sciences, pp. 706-712 Edited by Siegel, J, Knupfer, G and Saukko, P. Academic Press, San Diego, California, 2000.

21. Weinstock, R, Leong, GB and *Silva, JA*: Defining forensic psychiatry: role and responsibilities. Principles and Practice of Forensic Psychiatry, pp. 7-13. Rosner, R. Editor, Arnold, New York, NY, 2003.

22. *Silva, JA,* Weinstock, R and Leong, GB: Forensic psychiatric report writing, pp. 30-33. Principles and Practice of Forensic Psychiatry. pp. 31-36. Rosner, R., Editor, Arnold, New York, NY, 2003.

23. Weinstock, R, Leong, GB and *Silva, JA*: Ethical guidelines. Principles and Practice of Forensic Psychiatry, pp. 56-72. Rosner, R. Editor, 2003.

24. Leong, GB, *Silva, JA* and Weinstock, R; The death penalty. Principles and Practice of Forensic Psychiatry, pp. 79-84. Rosner, R. Editor, Arnold, New York, NY, 2003.

25. Weinstock, R, Leong, GB and *Silva, JA*: Competence assessments. Principles and Practice of Forensic Psychiatry, 85-88. Rosner, R., Editor, Arnold, New York, NY, 2003.

26. Leong, GB, *Silva, JA* and Weinstock, R: Dangerousness. Principles and Practice of Forensic Psychiatry, 565-571. Rosner, R., Editor, Arnold, New York, NY, 2003.

27. *Silva, JA,* Leong, GB and Weinstock, R: Cultural and ethnic minorities, Principles and Practice of Forensic Psychiatry, pp. 631-637. Rosner, R., Editor, Arnold, New York, NY. 2003.

28. Goldfinger, SM, Feldman, JM and *Silva, JA*: The social context of psychiatric practice. In Psychiatry, pp. 2223-2225. Edited by A. Tasman, J. Kay and JA Lieberman. W.B. Saunders Co., Philadelphia, Pennsylvania, 2003.

29. Weinstock, R, Leong, GB and *Silva, JA*: Ethical issues in adolescent psychiatry. In, Textbook of Adolescent Psychiatry. Rosner, R., Editor, pp. 10-18, Arnold, New York, NY. , 2003

30. *Silva, JA* Leong, GB and Weinstock, R: Cultural influences on adolescent development and treatment. In, Textbook of Adolescent Psychiatry, Rosner, R., Editor, pp. 30-35, Arnold, New York, NY. , 2003.

4. Letters:

1. Leong, GB and *Silva, JA*: Carbamazepine use in assaultive patients. Psychosomatics 29: 367, 1988.

2. Leong, GB and *Silva, JA*: THA and FDA. The Psychiatric Times 5(10), 4, 1988.

3. Leong, GB and *Silva, JA*: Videotape recording of assaultive patients. American Journal of Psychiatry 146:287, 1989.

4. Leong, GB and *Silva, JA*: Civil commitment. Hospital and Community Psychiatry 40: 192, 1989.

5. *Silva, JA*, Leong, GB, Shaner, AL and Chang, CY: Reply to SF, Signer's letter on: Syndrome of intermetamorphosis: a new perspective. Comprehensive Psychiatry 31: 84-85, 1990.

6. Shaner, AL, *Silva, JA* and Leong, GB: Sources of patient stress. Hospital and Community Psychiatry 40: 192, 1990.

7. Leong, GB, *Silva, JA* and Weinstock, R: Response to discussion of "Dangerous mentally disordered criminals; unresolvable societal fear?" by JR Meloy. Journal of Forensic Sciences 36: 1281, 1991.

8. *Silva, JA* and Leong, GB: A case of Capgras-Fregoli syndrome. Journal of Clinical Psychiatry 53: 67-68, 1992.

9. *Silva, JA*, Leong, GB, Saab, S and Wine, D: Misidentification syndrome, facial misrecognition and dysmorphic symptoms. Psychosomatics 33: 471-472, 1992.

10. *Silva, JA* and Leong, GB: Fregoli syndrome of the self. Canadian Journal of Psychiatry 38: 68, 1993.

11. *Silva, JA* and Leong, GB: Syndrome of exchanged doubles. Canadian Journal of Psychiatry 38: 386, 1993.

12. *Silva, JA* and Leong, GB: A case of organic Othello syndrome. The Journal of Clinical Psychiatry 54: 277, 1993.

13. Leong, GB, Eth, S and *Silva, JA*: Reply to R.L. Goldstein's comment on The psychotherapist as witness for the prosecution: the criminalization of Tarasoff. American Journal of Psychiatry 150: 1279, 1993.

14. *Silva, JA*, Leong, GB and Wine, DB: Reply to Ennis, JH and Whelton, C commentary on Evolving misidentification syndromes and facial recognition deficits. Canadian Journal of Psychiatry 39: 59, 1994.

15. *Silva, JA*, Leong, GB and Ferrari, MM: Coexistence of misidentification, pseudocyesis and erotomanic delusions. Canadian Journal of Psychiatry 39: 126, 1994.

16. *Silva, JA* and Leong, GB: Letter on New identity for misidentification syndromes by Banov, MD, Kulick, AR, Oepen, G and Pope, HG: In Comprehensive Psychiatry 35: 244, 1994.

17. *Silva, JA*, Wooldridge, M and Leong, GB: Approaches offered for curbing violence in the health care workplace. Texas Medicine 90: 7, 1994.

18. *Silva, JA* and Leong, GB: Studying violent behavior. Psychiatric Services 46: 408, 1995.

19. *Silva, JA*, Tekell, JL, Leong, GB and Bowden, CL: Delusional misidentification of the self associated with nondominant cerebral pathology. Journal of Clinical Psychiatry 56: 171, 1995.

20. *Silva, JA* and Leong, GB: A case of inanimate doubles syndrome. Canadian Journal of Psychiatry 40: 277, 1995.

21. Tekell, JL, Smith, EA and *Silva, JA*: Prolonged erection associated with risperidone treatment. American Journal of Psychiatry 152: 1097, 1995.

22. *Silva, JA*, Leong, GB, Lesser, IM and Boone, KB: Bilateral cerebral pathology and the genesis of delusional misidentification. Canadian Journal of Psychiatry 40: 498-499, 1995.

23. Leong, GB and *Silva, JA*: Reply to commentary by L. Uzych on Leong, GB and Silva, JA: A psychiatric-legal analysis of on psychotic criminal defendants charged with murder. Journal of Forensic sciences 41: 188, 1996.

24. Leong, GB and *Silva, JA*: Civil Commitment and managed care. Psychiatric Services 47: 432, 1998.

25. *Silva, JA* and Leong, GB: Reverse "intermetamorphosis" syndrome. The Canadian Journal of Psychiatry 41: 260-261, 1996.

26. Leong, GB, *Silva, JA* and Weinstock, R: Reply to R. Slovenko commentary on "Another courtroom assault on the confidentiality of the psychotherapist- patient relationship. Journal of Forensic Sciences 41: 551-552, 1996.

27. Tekell, JL, *Silva, JA*, Maas, JA, Bowden, CL and Stark, T: Thioridazine induced retinopathy. American Journal of Psychiatry 153: 1234-1235, 1996.

28. Leong, GB and *Silva, JA*: Disability payments and drug abuse. Psychiatric Services 47: 1266, 1996.

29. Hoyler, C, Tekell, JL and *Silva, JA*: Zolpidem induced agitation and disorganization. General Hospital Psychiatry 18: 452-453, 1996.

30. *Silva, JA*, Tekell, JL, Penny, G and Bowden, CL: Resolution of palinopsia with carbamazepine. Journal of Clinical Psychiatry 58: 30, 1997.

31. *Silva, JA* , Dassori, A and Leong, GB: The antichrist delusion as a delusional misidentification syndrome of the self. Canadian Journal of Psychiatry 42: 90, 1997.

32. *Silva, JA* and Leong, GB: The "delirium" of delusional misidentification: implications for the classification of delusional misidentification syndromes. Canadian Journal of Psychiatry 42: 1997.

33. Mayberg, HS, Brannan, SK, Mahurin, RK, Jarabek, PA, Brickman, JS, Tekell, JL, *Silva, JA*, McGinnis, S, Glass, TG, Martin, CC and Fox, PT: Reply to: Cingulate Function in depression by Larisch, R, Klimke, A, Vosberg, H, Gaebel, W and Mueller-Gaerthner, HW: Neuroreport 8: i-ii, 1997.

34. Dassori, A and *Silva, JA*: PTSD and ethnic violence. Psychiatric Services 49: 108, 1998.

35. Jones, AR, *Silva, JA* and Leong, GB: Delusional physical misidentification in the syndrome of subjective doubles. The Canadian Journal of Psychiatry 43: 308, 1998.

36. *Silva, JA* , Ferrari, MM and Leong, GB: Erotomania in a case of fragile-x syndrome. General Hospital Psychiatry 20: 126, 1998.

37. *Silva, JA*, Leong, GB and Penny, G: Delusion of sexual transformation as delusional misidentification syndrome. The Canadian Journal of Psychiatry 43: 956-957, 1998.

38. *Silva, JA,* Derecho, DV and Leong, GB: A case of partial lycanthropy. The Canadian Journal of Psychiatry 45: 201-202, 2000.

39. *Silva, JA* and Leong, GB: Capgras syndrome during the wake and dream state. The Canadian Journal of psychiatry 45: 299-300, 2000.

40. Leong, GB and *Silva, JA*: Is academic medicine for sale? New England Journal of Medicine 7: 509, 2000.

41. Mayberg, HS, *Silva, JA*, Brannan, SK, Tekell, JL, Mahurin, RK, McGinnis, S and Jerabek, PA: Brain changes and placebo: Dr. Mayberg and colleagues reply. American Journal of Psychiatry 160: 390-391, 2003.

42. *Silva, JA* and Leong, GB: Letter regarding: Maternal Filicide in Quebec by Bourget, D and Gagne, P. Journal of the American Academy of Psychiatry and the Law 31: 143-144, 2003.

5. Reviews:

Book Reviews:

1. Leong, GB and *Silva, JA*: Of: Sexual Homicide by RK Ressler, AW Burgess and JE Douglas, 1988. In: International Bulletin of Law and Mental Health 1: 23, 1989.

6. Other Professional Publications:

1. Leong, GB, Weinstock, R and *Silva, JA*: Confidentiality in special situations: evaluation on behalf of a third party. Southern California Psychiatrist 38: 6, 1990.

2. Leong, GB and *Silva, JA*: U.S. Court decisions. International Bulletin of Law and Mental Health 2: (1), 16, 1990.

3. Leong, GB and *Silva, JA*: The impact of the Tarasoff decision on the psychotherapeutic process. The Psychiatric Times 10: (2), 29, 1993.

4. *Silva, JA*: Beyond Sci-Fi: a slippery sense of self. Letter on Alice Raymer's "Technomonsters; on the edge of humanity." Stanford 23:(1) 10, 1995.

5. Wooldridge, ML and *Silva, JA*: Violence in the workplace: can I help? Primary Views 6: (1), 3, 1995.

6. Leong, GB and *Silva, JA*: Sleep-related violence. American Academy of Psychiatry and the Law Newsletter 24: (1), 22, 1999.

7. *Silva, JA*: Section and program news, psychiatry and behavioral science. Academy News 29: (2), 16, 1999.

8. *Silva, JA*: Section and Program News, psychiatry and behavioral science. Academy News 30: (1), 11, 2000.

9. *Silva, JA*: Section and Program News, psychiatry and behavioral science. Academy News 30: (2), 4-5, ,2000.

7. Newspaper Publications:

1. *Silva, JA* and Ferrari, MM: Combine violence research with larger directives (letter). San Antonio Light, C4, December 7, 1992.

2. *Silva, JA* and Ferrari, MM: Clinton's quota cabinet OK (Letter). San Antonio Express-News, 5B, 1-9-93.

3. *Silva, JA* and Ferrari, MM: Violence in the community-it must be stopped. La Nueva Prensa de California 3:(8), 5, 1993. Published in Spanish in the same issue as La violencia en nuestra communidad-debemos frenarla 3: (8), 10, 1993.

4. Ferrari, MM and *Silva, JA*: Clinton delays to find diversity (Letter), San Antonio Express-News 11A, March 8, 1983.

5. Ferrari, MM and *Silva, JA*: Diversity in Clinton's cabinet - is the key to excellence. La Nueva Prensa de California 3:(10), 5, 1993.

6. *Silva, JA* and Ferrari, MM: Mrs. Clinton balanced, sensitive towards youth (Letter). San Antonio Express-News, 4L, April 18, 1993.

7. *Silva, JA*: Mentor programs open classroom horizons (Letter). San Antonio Express-News, 4L, 6-13-93.

8. Ferrari, MM and *Silva, JA*: Packwoods' actions no childish pranks (Letter). San Antonio Express-M, July 25, 1993.

9. *Silva, JA* and Ferrari, MM: Social problems create violence (Letter). San Antonio Express-News, 5B, December 22, 1993.

10. *Silva, JA* and Ferrari, MM: Euthanasia due open dialogue (Letter). San Antonio Express-News, 17A, March 29, 1994.

11. *Silva, JA* and Ferrari, MM: Protect children with more laws (Letter). San Antonio Express-News, 7B, November 11, 1994.

12. *Silva, JA*: Broaden the discussion (Letter). Stanford Observer 29(4): 2, 1995.

13. *Silva, JA* and Ferrari, MM: Efficacious efforts needed at genesis (Letter). San Antonio Express-News 14A, November 4, 1996.

14. *Silva, JA* and Ferrari, MM: Los acechadores son un problema de la communidad. La Nueva Prensa de California 9:(7), 4, Diciembre 15, 1998 and 9: (8), 4, Enero 1, 1999.

15. *Silva, JA*: Gray Davis and the future of California education. La Nueva Prensa de California 9:(9), 8, 1999. Published in Spanish in same issue as El Gobernador Gray Davis y el futuro de la educacion en California 9:(9),8, Enero 15, 1999.

16. *Silva, JA* and Ferrari, MM : Padres que asesinan a sus hijos. La Nueva Prensa de California 9:(11), 1, 4 Febrero 15, 1999.

17. *Silva, JA*: Lideres academicos apoyan la formacion de una sociedad diversa. La Nueva Prensa de California 9: (15), 4, Abril 15, 1999.

18 *Silva, JA:* La medicina tradicional o casera es finalmente utilizada por la medicina moderna. La Nueva Prensa de California 9: (16),8, Mayo 1, 1999.

19. Ferrari, MM and *Silva, JA*: Haciendole frente a las pandillas. La Nueva Prensa de California 9: (17), 4, Mayo 15, 1999.

20. *Silva, JA* and Ferrari, MM: Ninos y adolescentes que sufren de desordenes que no ponen atencion y son superactivos. La Nueva Prensa de California 10:(5),4, Noviembre 15, 1999.

8. Films:

1.*Silva, JA*: Panelist: In building bridges: psychoses. A.M. Dassori, Producer. The University of Texas Health Science Center at San Antonio, Office of Educational Resources.Television Production Services, 1995.

B. Presentations:

1.Presentations With Abstracts:

1. Arquilla, ER, Lai, GB, *Silva, JA* and Larsen, AD: Intranuclear localization of insulin in normal and diabetic mice. American Journal of Pathology 59: (3) 67a, Abstract No. 34, 1970. Delivered at the 67th Annual Mtg. of the American Association of Pathologists and Bacteriologists, Saint Louis, MO, March 8, 1970.

2. Sharma, KK and *Silva, JA*: Tarasoff and fifth amendment: a unique dilemma in death penalty case. American Academy of Forensic Sciences. 40th Annual Mtg., Philadelphia PA, Abs. I19, 117, AAFS Publication 88-1 Fittge Brothers Printing Co., Colorado Springs, CO, 1988. Presented on February 19, 1988.

3. Yamamoto, J, Chang, C and *Silva, JA*: Cross-cultural issues in mental health and mental illness. New findings and practical applications of mental health research, National Mental Health association, Fifth Annual Scientific Symposium, September 25, 1988, ABS. G2, Los Angeles California.

4.Weinstock, R, Leong, GB and *Silva, JA*: Psychiatric patients and AIDS: the forensic clinician perspective. American academy of Forensic sciences, 41st. Annual Mtg., Presented in Las Vegas, NV, Feb. 18, 1989. Abs. No. I24, 124, AAFS Publication 89-1, Fittje Brothers Printing Co. Colorado Springs, CO, 1989.

5. Leong, GB, *Silva, JA* and Weinstock, R: Dangerous mentally disordered individuals: unresolvable societal fear? American academy of Forensic Sciences, 42nd Annual Mtg., Cincinnati, OH Abs. I24, 151, AFFS Publication 90-2, Fittje Brothers Printing Co., Colorado Springs, CO. 1990. Presented on 2-24-90

6. *Silva, JA*, Leong, GB, Weinstock, R and Ferrari, MM: Misidentified political figures: an underappreciated danger. American Academy of Forensic Sciences, 43rd Annual Mtg., Anaheim, CA. Abs. I2, 159, AFFS Publication 91-2, Fittjes Brothers Printing Co., Colorado Springs CO 1991. Presented February 22, 1991.

7. Leong, GB, Eth, S and *Silva, JA*: The Tarasoff dilemma in criminal court. American Academy of Forensic Sciences 43rd. Annual Mtg., Anaheim, CA. Abs. I9, 161, AAFS Publication 91-2, Fittje Brothers Printing Co., Colorado Springs, CO 1991. Presented on February 23, 1991.

8. Weinstock, R; Leong, GB and *Silva, JA*: Opinions by AAPL members on ethical guidelines. American Academy of Psychiatry and the Law, 22nd Annual Mtg. Orlando, FL. Presented on October 16, 1991.

9. Perlo, S, Nunez, F. Leong, GB and *Silva, JA*: Are psychiatric disability claimants credible? American Academy of Forensic Sciences 44th Annual Mtg., New Orleans LA. Abs. I4, 172, AAFS Publication 92-2, Fittje Brothers Printing Co., Colorado Spring, CO, 1992. Presented on February 20, 1992.

10. *Silva, JA*, Sharma, KK, Leong, GB and Weinstock, R: Dangerousness of the delusional misidentification of children. American Academy of Forensic sciences 44th Annual Mtg. New Orleans, LA. Presented on 2-22-92. Abs. I14, 175,AAFS Publication 92-2, Fittje Brothers Printing Co. Colorado Springs CO 1992.

11. *Silva, JA*, Leong, GB and Weinstock, R: The psychotic patient as security guard. American Academy of Forensic sciences 45th. Annual Mtg., Boston, MA. Presented on February 19, 1993. Abstract I17, 157, AAFS Publication 93-2, Williams Printing Inc., Colorado Springs, CO, 1993.

12. *Silva, JA*, Leong, GB, Weinstock, R, Sharma, KK and Klein, RL: Delusional misidentification syndromes and dangerousness. Ist International Conference on Delusional misidentification Syndromes. Presented on July 22, 1993. Hospital St. Anne, Paris, France.Printed by The School of Psychology, University of walles College of Cardiff, 1993.

13. *Silva, JA*, Leong, GB, Weinstock, R and Klein, RL: Dangerous misidentification delusions. Proceedings of the American Academy of Psychiatry and the Law. 24th Annual Mtg. Prsented on October 21, 1993, San Antonio TX.

14. Weinstock, R, Leong, GB and *Silva, JA*: How diminished is diminished capacity. American academy of Forensic Sciences, 46th Annual Mtg. San Antonio TX. Presented on February 19, 1994. Abs. I11, 176, AAFS Publication 94-2, Williams Printing Company Inc. Colorado Springs, CO 1994.

15. Leong, GB, *Silva, JA*, Garza-Trevino, ES, Oliva, D, Ferrari, MM, Komanduri, RV and Caldwell, JCB: The dangerousness of persons with Othello syndrome. American Academy of Forensic sciences 46th Annual Mtg., San Antonio, TX. Presented on February 19, 1994. Abstract No. I20, 178, AAFS Publication 94-2, Williams Printing Inc., Colorado Springs, CO, 1994.

16. *Silva, JA*, Leong, GB, Garza-Trevino, ES, Le Grand, J Oliva, D, Weinstock, R and Bowden, CL: A cognitive model of dangerous delusional misidentification syndromes American Academy of Forensic Sciences 46th Annual Mtg., San Antonio, TX. Presented on February 19, 1994. Abstract I23, 179, AAFS Publication 94-2, Williams Printing Inc., Colorado Springs, CO, 1994.

17. Mayberg, HS, Mahurin, RK, Brannan, SK, *Silva, JA*, Tekell, JL, Glass, TG, Jarabek, PA, Martin, CC and Fox, PT: Effects on fluoxetine on regional brain glucose metabolism, mood and cognitive tasks in unipolar depressives. Abstracts of Panels an Posters of the 33rd Annual Mtg. of the American College of Neuropsychopharmacology, San Juan, Puerto Rico. Presented on December 16, 1994.

18. Leong, GB and *Silva, JA*: A sample of psychotic criminal defendants charged with murder. American Academy of Forensic Sciences. Abs. 3, 178, Annual Meeting, Seattle, WA. McCormack-Armstrong Co., Colorado Springs, CO, 1995. Presented on February 17, 1995.

19. *Silva, JA*, Leong, GB, Weinstock, R, Yamamoto, J and Ferrari, MM: An inquiry into the classification of childhood homicide. American academy of Forensic Sciences. Abs. I4, 178, Annual Mtg. Seattle WA. Presented on February 17, 1995.mcCormick Armstrong Co., Colorado springs, CO, 1995.

20. *Silva, JA*, Leong, GB, Weinstock, R and Penny, G: Dangerous delusional misidentification of the self. American Academy of Forensic Sciences. Abs. I13, 181, Annual Mtg., Seattle, WA. Presented on February 18, 1995. McCormick-Armstrong Co., Colorado Springs, CO, 1995.

21. Klein, RL, Leong, GB and *Silva, JA*: Sabotage behavior in the workplace. American Academy of Forensic Sciences 1: Abs. I15, 182, Annual Mtg., Seattle, WA. Presented on February 18, 1995.McCormick- Armstrong Co. Colorado Springs, CO, 1995.

22. Tekell. JL, Silva, JA, Bowden, CL, Ingmundson, PT and Royall, DR: Span of apprehension: relation to severity of illness, negative symptoms and executive functioning. Proceedings of the 8th Annual Meeting of the Southern association of research in Psychiatry, New Orleans, LA. Abs. 8, 18. Presented on 5-22-95.

23. Tekell, JL, *Silva, JA* and Bowden, CL: Span of apprehension in schizophrenia: relation to behavioral ratings, negative symptoms and neurochemistry. Abstracts of the 5th International Congress of schizophrenia Research, 137, Warm Springs, Virginia. Presented on April, 1995.

24. *Silva, JA* : Cross-cultural forensic psychiatry. Abstract 3B, Proceedings of the 148th Mtg. of the American Psychiatric Association, Miami, Florida. Presented on May 22, 1995.

25. Brannan, SK, Mahurin, RK, Tekell, JL, *Silva, JA*, and Mayberg, HS: Mood, motor and cognitive variability of depression. Abs. NR296. Proceedings of the 148th Annual Mtg. of the American Psychiatric association, Miami, FL. Presented on May 23, 1995.

26. Mayberg, HS, Brannan, SK, Mahurin, RK, *Silva, JA*, Tekell, JL, Jarabek, PA and Fox, PT: FDG PET in depression: baseline variability and relationship to treatment response . Abstracts of the 42nd Annual MTG. of the Society of Nuclear Medicine, Minneapolis, Minnesota,. Presented on June 1995.

27. Mayberg, HS, Brannan, SK, Mahurin, RK, *Silva, JA*, Tekell, JL, Jarabek, PA, Glass, TG, Martin, CC and Fox, PT: Functional correlates of mood and cognitive recovery in depression: an FDG study.1st Intl. Conference on Functional Mapping of the Human Brain, Satellite Conference of the Society of Cerebral Blood Flow and Metabolism, Paris, France,. Presented on June, 1995. Human Brain Mapping, Suppl.1, 42B, 1995.

28. Tekell, JL, *Silva, JA*, Royall, DR, Ingmundson, PT and Bowden, CL: Span of apprehension in schizophrenia and other psychiatric diagnoses: relation to negative symptoms, executive

function and behavioral ratings. The Journal of Neuropsychiatry and Clinical Neurosciences 7: Abstract P105, 424, 1995. Presented on October 15, 1995.

29. *Silva, JA*, Harry, BE, Leong, GB and Weinstock, R: Delusional misidentification and homicidal behavior. American Academy of Forensic Sciences-Vol.2, Abs. I8, Annual Mtg., Nashville, TN, McCormick-Armstrong Co., Colorado Springs, CO, 1996. Presented on Feb. 22, 1996.

30. *Silva, JA*: Cultural formulation of delusional misidentification. Abs. 63D, 124-125. Syllabus and Proceedings of the 149th. Annual Mtg. of the American Psychiatric Association, New York, New York. Presented on May 7, 1996.

31. Tekell, JL, *Silva, JA* and Bowden, CL: Selective attention, illness duration and symptoms. Abstract NR516, 211. New Research Program Proc of the American Psychiatric Association, New York, NY, Presented on May 8, 1996.

32. Lim, RF, Brainin-Rodriguez, JE, *Silva, JA* and Dassori, AM: Cross-cultural curriculatwo models for training. Workshop No. 38. Proceedings Summary of the 48th Institute on Psychiatric Services. Presented on October 23, 1996, Chicago, Illinois, 178, American Psychiatric Association, Washington, DC, 1996. Presented on October 21, 1996.

33. Mayberg, HS, Brannan, SK, Liotti, M, Mahurin, RK, Brickman, JS, *Silva, JA*, Tekell, JL, Jarabek, PA, Martin, CC and Fox, PT: The role of the cingulate in mood homeostasis. Presented on November 20 1996 The Society for Neurosciences Abstracts 22: Part 1, Abs. 109.13, 1996.

34. Leong, GB and *Silva, JA*: Two cases of uxoricide. American Academy of Forensic sciences- Vo. 3. Abs. I7, 169, Annual Mtg., New York, NY. McCormack-Armstrong Co., Colorado Springs, CO, 1977. Presented on February 20, 1997.

35. *Silva, JA*, Ferrari, MM, Leong, GB and Weinstock, R: The role of mania in the genesis of dangerous delusional misidentification. American academy of forensic sciences Annual Mtg 3: Abs. I15,172-173, McCormick -Armstrong Co., Colorado Springs, CO, 1997. Presented on February 21, 1997.

36. *Silva, JA*: Uxoricide and suicidial behavior in a Mexican male. Syllabus and Proceedings of the Annual Mtg. of the American Psychiatric association. Abs. 109E, 184, 1997. Presented on May, 22, 1997.

37. Barker, LH, Wheatley, R, *Silva, JA* and Holliday, S: The man who mistook his mother for a clone: a case of Capgras syndrome with Fahr's disease. Archives of General Neuropsychology 13: 57, 1998. Presented on November 12, 1997 at the Annual Mtg. of the National Academy of Neuropsychology, Las Vegas, Nevada.

38. Leong, GB, *Silva, JA*, Weinstock, R and Ferrari, MM: Challenges to maintaining psychiatric confidentiality. Annual Mtg. of the American Academy of Forensic Sciences, San Francisco, CA 4: Abs. 4, 217, McCormick-Armstrong Co. Colorado Springs, CO, 1998. Presented on February 12, 1998.

39. *Silva, JA*, Leong, GB, Dassori, A, Ferrari, MM, Weinstock, R and Yamamoto, J: A comprehensive typology for the biopsychosociocultural evaluation of child killing behavior. American Academy of Forensic Sciences 4: Abs. I5, 218-219, Annual MTG, San Francisco, CA, McCormick-Armstrong Co., Colorado Springs, Co, 1998. Presented on February 12, 1999.

40. *Silva, JA*, Leong, GB, Harry, B, Ronan, J and Weinstock, R: Dangerous misidentification of people due to flashback phenomena in posttraumatic stress disorder. American academy of Forensic Sciences 4: Abs. I7, 218, Annual Mtg., San Francisco, CA, McCormick-Armstrong Co., Colorado Springs, CO 1998. Presented on February 12, 1998.

41. *Silva, JA*, Leong, GB and Connolly, RW: Violence in the workplace. American Academy of Forensic Sciences Annual Mtg. 4: Abs. I17, 222, San Francisco, CA. McCormick-Armstrong, Co., Colorado Springs, CO. Presented on February 13, 1998.

42. *Silva, JA*, Derecho, DV, Leong, GB and Ferrari, MM: Stalking behavior in delusional jealousy. Proceedings of the American Academy of Forensic Sciences Annual Mtg. Abs. I17, Orlando, FL. McCormick-Armstrong Co., Colorado Springs, CO. Presented on February 13, 1999.

43. *Silva, JA*, Leong, GB, Weinstock, R and Gonzales, C: A case of Cotard's syndrome associated with self- starvation . Abs. I2, 237-238, Proc. of the American Academy of Forensic Sciences Annual Mtg., Orlando, FL, McCormack-Armstrong Co., Colorado Springs, CO, 1999. Presented on February 17, 1999.

44. Mayberg, HS, Brannan, SK, Mahurin, RK, McGinnis, S, Tekell, JL, *Silva, JA*, Jarabek, PA, Martin, CC and Fox, PT: Fluoxetine effects on regional glucose metabolism in depression. Biological Psychiatry 45(8S): 111S, 1999. Presented at the 54th Annual Convention of the Society for Biological Psychiatry, May 15, 1999.

45. *Silva, JA*, Derecho, DV, Leong, GB and Ferrari, MM: Forensic-psychiatric aspects of the delusional misidentification syndromes. International Association of Forensic Sciences. 15th. Triennial Mtg. Los Angeles, California. Presented on August 26, 1999. Abs. T17, 228, IAFS Publication 99-2, McCormack Armstrong Co., Colorado Springs, CO, 1999.

46. *Silva, JA*, Derecho. D, Leong, GB and Weinstock, R: A classification of psychological factors leading to violent behavior in posttraumatic stress disorder. Abs. I6,243, Proceedings of the American Academy of Forensic Sciences Mtg., Reno, Nevada. Publication Printers, Corp., Denver , CO. Presented on February 24, 2000 .

47. *Silva, JA*, Leong, GB and Weinstock, R: Delusional misidentification and aggression in Alzheimer's disease. Abs. I7, 243-244, Proceedings of the American Academy of Forensic Sciences 52nd Annual Meeting. Reno, Nevada. Publication Printers Corp., Denver, CO. Presented on February 24, 2000.

48. Brannan, SK, Mayberg, HS, McGinnis, S, *Silva, JA*, Tekell, J, Mahurin, RK, Jarabek, PA and Fox, PT: Cingulate metabolism predicts treatment response: a replication. Biological Psychiatry 47 (8S): 107S, Abstract 355, 2000. Presented at the 55th Annual Convention of the Society for Biological Psychiatry on May 12, 2000 at Chicago, Illinois.

49. Tucker, DE and *Silva, JA*: Medication treatment of sexual offenders. Third Annual Training and Treatment Conference of the California Coalition on Sexual Offending, Berkeley, California. Presented on May 19, 2000.

50. Tucker, DE and *Silva, JA*: Psychopharmacologic treatment of sexual offenders. Abstract I28, 293, Proceedings of the American Academy of Forensic Sciences 53rd. Annual Meeting., Seattle, Washington. Publication Printers Corp., Denver, CO. Presented on February 23, 2001.

51. Mayberg, HS, Brannan, SK, *Silva, JA*, Tekell, JL, Mahurin, RK, McGinnis, S and Jerabek, PA: Antidepressant drug response is not the placebo effect: an FDG PET study. Biological Psychiatry 49: 153S, 2001. Presented at the 56th Annual convention of the Society for Biological Psychiatry on May, 2001.

52. *Silva, JA*, Leong, GB, Tucker, DE, Weinstock, R and Ferrari, MM: A theory of mind model in delusional misidentification associated with aggression. . Abs. I1, Volume 8, 253, Proceedings of the American Academy of Forensic Sciences 54th Annual Meeting. Atlanta, Georgia. Publication Printers Corp., Denver, CO. Presented on February 15, 2002.

53. *Silva, JA*, Leong, GB, Derecho, DV, Baker, C, Tucker, D and Ferrari, MM: A classification of dissociative phenomena involved in violent behavior in posttraumatic stress disorder. Abstract I2, Volume 8, 253-254, Proceedings of the American Academy of Forensic Sciences 54th Annual Meeting. Atlanta, Georgia. Publication Printers Corp., Denver, CO. Presented on February 15, 2002.

54. *Silva, JA*, Ferrari, MM and Leong, GB: What happened to Jeffrey? A neuropsychiatric developmental analysis of serial killing behavior Abs. I11, Volume 8, 257-258, Proceedings of the American Academy of Forensic Sciences 54th Annual Meeting. Atlanta, Georgia. Publication Printers Corp., Denver, CO. Presented on February 17, 2002.

55. *Silva, JA*, Ferrari, MM and Leong, GB: The neuropsychiatric developmental model of serial killing behavior. American Academy of Psychiatry and the Law 33rd Annual Meeting, Newport Beach, California, Abstract S5, pp. 60 Presented on October 26, 2002.

56. *Silva, JA*, Smith, Leong, GB, Hawes, E and Ferrari, MM and Leong, GB: The genesis of serial killing behavior in the case of Joel Rifkin using the combined BRACE/NDM approach. Abs. I10, Volume 9, 285-286. Proceedings of the American Academy of Forensic Sciences 55th Annual Meeting. Chicago, Illinois. Publication Printers Corp., Denver, CO. Presented on February 21, 2003.

57. Maldonado, EE, *Silva, JA*, Leong, GB and Ferrari, MM: A biopsychosocial analysis of the serial sexual crimes of serial killer Richard Ramirez. Abstract I11, Volume 9, 286 .Proceedings of the American Academy of Forensic Sciences 55th Annual Meeting. Chicago, Illinois. Publication Printers Corp., Denver, CO. Presented on February 21, 2003.

58. *Silva, JA*, Leong, GB and Derecho, DV: A transcultural-forensic psychiatric analysis of a filicidal Hispanic man. Abstract I12, Volume 9, 287. Proceedings of the American Academy of Forensic Sciences 55th Annual Meeting. Chicago, Illinois. Publication Printers Corp., Denver, CO. Presented on February 21, 2003.

59. *Silva JA*, Wu JC, Leong GB: Neuropsychiatric developmental an analysis of sexual murder. American Academy of Psychiatry and the Law 34th Annual Meeting, San Antonio, Texas. Abstract T7, pp. 13. Presented on October 16, 2003.

60. *Silva JA* and Leong, GB: The dangerousness of shared psychotic disorder. Volume 10, Proceedings of the American Academy of Forensic Sciences 56th Annual Meeting. Dallas, Texas. Abstract I3, pp. 334. Publication Printers Corp., Denver, CO. Presented on February 19, 2004.

61. *Silva JA* and Leong, GB: The murder case of Cary Anthony Stayner: psychiatric diagnostic issues. American College of Forensic Psychiatry. Presented at the 22nd Annual Symposium in Forensic Psychiatry, San Francisco, California on March 25, 2004.

62. Smith, RL, *Silva JA*, Nair, M and Hawes, E: A profile analysis of spy Robert Philip Hanssen. Presented at the 22nd Annual Symposium in Forensic Psychology, San Francisco, California on April, 3, 2004.

2. Other Symposia Presentations:

1. Yamamoto, J and *Silva, JA*: Do Hispanics underutilize mental health services? Conference on health and behavior: Research Agenda for Hispanics. Chicago, Illinois, May 16, 1987.

2. Yamamoto, J and *Silva, JA*: Psychosocial issues of adult development in Asian and Hispanic Populations. Presented at the joint meetings of the Texas Society of Psychiatric Physicians and the American association of Social Psychiatry, San Antonio, Texas, November 5, 1989.

3. Yamamoto, J and *Silva, JA*: Treatment of patients from traditional backgrounds. Presented at the 34th winter Meeting. of the American academy of Psychoanalysis. San Antonio, Texas, December 7, 1990.

4. Yamamoto, J, *Silva, JA*, Sasao, T, Minobe, S, Kato, M, Perales, A, Warthon, D, Llamos, R, Sogi, C, Telles, C, Hough, C and Loya, F: Alcohol abuse/dependency in Lima, Peru. Society for the Study of Psychiatry and Culture, Annual Mtg., Natchez, Mississippi, October 13, 1991.

5. *Silva, JA*, Leong, GB, Weinstock, R and Wine, DB: Delusional misidentification and dangerousness: a neurobiologic hypothesis. 45th Annual Mtg. of the American academy of Forensic Sciences, Boston, MA.
Presented on February 19, 1993.

6. Weinstock, R, Leong, GB and *Silva, JA*: Ethics and Forensic Psychiatry.Annual Mtg. of the American Psychiatric association, Philadelphia, PA, May 24, 1994.

7. Maas, JW, Miller, AL, Bowden, CL, Funderburg, LG and *Silva, JA*: Effects of clonidine plus haloperidol in schizophrenia. National Clinical drug Evaluation, 34th Annual Mtg. Poster presentation no. 58, Marco Island, FL, June, 1994.

11. *Silva, JA*: Evaluation of the assaultive patient. In: The Prevention and Management of Disruptive Behavior. Audie L. Murphy Veterans Hospital, San Antonio, Texas, September 14, 1994.

12. *Silva, JA*: Violence, the workplace and the nursing profession. University of Texas Health Science Center, San Antonio, Texas, December 16, 1994.

13. *Silva, JA*: The relation between aggression and psychiatric disorders. Behavior Management: Dealing With Disturbed Behavior. Kerville, VA Medical Center, Texas, February 26, 1997.

14. *Silva, JA*: Violence in the workplace: an overview of the problem. Conference on Violence in the Workplace, A Growing Serious Problem. Kerville VA Medical Center, Kerville, Texas, Texas, February 27, 1997.

15. *Silva, JA*, Leong, GB and Connolly, R: Workplace violence: an introduction to the problem. Corpus Christi Veterans Affairs Clinic, June 27, 1997.

16. *Silva, JA*: A neuropsychiatric analysis of serial killing behavior. Psychiatry Grand Rounds. Kaiser Medical Group, Santa Clara, California, September 23, 2002.

17. *Silva, JA*: The psychopharmacology of autism spectrum disorders. The Morgan Center for Autism Spectrum Disorders. October 11, 2002.

18. *Silva, JA*: An adolescent with Asperger's disorder and multiple paraphilic psychopathologies. Kaiser Medical Group, Child and Adolescent Psychiatry Division, Santa Clara, California, February 6, 2003.

19. *Silva, JA*: Asesinos en serie: analysis por el modelo neuropsychiatrico Y del desarroyo. Sociedad Mexicana de Geografia Y Estadisticas en Zamora, Zamora, Michoacan, Mexico, March 26, 2003.

20. *Silva, JA*, Tucker, D and Wilkinson, G (panelists) : The practice of forensic psychiatry; views from four practitioners. Santa Clara County Society of Psychiatric Physicians. Los Gatos, California, December 17, 2003.

21. *Silva, JA*: Psychopharmacological treatment of autism spectrum disorders. The Morgan Center for Autism Spectrum Disorders, May 4, 2004.

4. Public Media Presentations:

1. *Silva, JA* and Reta, C: Talks on Planned Parenthood: focus on stress in the Hispanic community, Radio KALI Presentation, Los Angeles, California. Presented on June 14, 1987.

2. *Silva, JA*: Panelist, Television program: Cara a Cara. Title: Crimes of passion, KVEA, Ch. 52, Glendale, California, November 23, 1988.

3. *Silva, JA*: Panelist, Television Program: Cara a Cara, Title: AIDS, KVEA, Ch. 52, Glendale, CA, July 21, 1988.

4. *Silva, JA*: Panelist, Television Series: Cara a Cara, Title: Stepfathers and stepmothers, KVEA, Channel 52, Glendale, CA, July 21, 1989.

5. *Silva, JA:* Discussant, Psychological aspects of diets. In: A Su Salud. KWEX-TV. Ch. 41, San Antonio, TX. January 17, 1995.

6. *Silva, JA*: Television Series: American Justice. Title: The Yosemite Killer, CA, October 29, 2003.

5. Community Presentations:

1. *Silva, JA* and Gomez, J: Manic-depressive illness. National alliance for the Mentally Ill, East San Gabriel Chapter, La Puente, California, August 25, 1988.

2. *Silva, JA*: Panelist, Addressing gang activity in our community. Lions Club International Sponsored Community Meeting, Livermore, California, March 14, 1999.

3. *Silva, JA*: Panelist, Career choices: passion or paycheck? Ninth Annual Student and Alumni Symposium. El Centro Chicano, Stanford University, Stanford, California, October 15, 1999.

4. Ferrari, MM and *Silva, JA*: Attention deficit hyperactivity disorder. Williams Elementary School/PTA, San Jose Unified School District, San Jose, California, February 9, 2000.

5. Ferrari, MM and *Silva, JA*: The diagnosis and treatment of attention deficit and hyperactivity disorder. Santa Clara Unified School District, Santa Clara, California, March 1, 2000.

6. *Silva, JA* and Ferrari, MM: The origins of childhood aggression. Williams Elementary School/PTA, San Jose Unified School District, San Jose, California, May 25, 2000.

7. *Silva, JA*: Career Presentations (panelist). Hispanic Drop-out rate- business leaders narrowing the gap. Hispanic Chamber of Commerce, Contra Costa County Education and Business Conference, December 14, 2001.

6. Acknowledgments:

1. Kramer, K, Last, B, Getson, A and Reines, S: The effects of a selective D sub 4 dopamine receptor antagonist (L-745,870) in acutely psychotic inpatients with schizophrenia. Archives of General Psychiatry 54: 567-572, 1997.

C. Areas of Research Interest:

Major Area of Research Interest: Psychiatric, Psychosocial and Cultural Aspects of Violence.

Other Areas of Research Interest:
1. Cultural Aspects of Forensic Psychiatry.
2. Forensic-psychiatric Aspects of Autism Spectrum Disorders in Relation to Dangerousness.

3. Psychiatric, Psychosocial and Criminological Factors Associated With the Genesis of Serial Killing Behavior.
4. Forensic Psychiatry of PosttraumaticStress Disorder.
5. Clinical Transcultural Psychiatry
6. Forensic Psychiatry of the Paraphilias.
7.Clinical and Forensic Psychiatry of Stalking Behaviors.

D. Current Projects:

1. Forensic Psychiatry

1. Clinical and psychosocial aspects of child killing behavior (1992-2004).
2. Typology of aggressive behaviors in posttraumatic stress disorder syndrome (1996-2004).
3. Psychiatric-legal aspects of Hispanic Child sexual molesters (1991-2004).
4. Classification of stalking behaviors (1997-2004).
5. A study of violence in United States Postal Service Workers With PTSD (1999-2004).
6. Psychiatric-legal aspects of delusional jealousy (1992-2004).
7. A psychiatric-legal analysis of the Heaven Gate's religious group (1997-2004).
8. A review of sleep related violence (1997-2004).
9. A psychiatric-legal study of psychiatrically ill security guards (1996-2004).
10. Highway stress induced aggression in posttraumatic stress disorder (1998-2004).
11. The evaluation of malingering in PTSD from a psychosociocultural perspective (2000-2004).
12. The relation of command auditory hallucinations to aggressive behavior, (2000-2004).
14. A biopsychosocial and psychiatric-legal study of clinical vampirism, (2000-2004).
15. A single case study of man with coercive sexual behavior toward his mother (2001-2004).
16. A psychiatric-legal study of cannibalistic behavior (2004).
17. Forensic-psychiatric aspects of autism spectrum disorders (2000-2004).
18. A psychiatric-legal analysis of the James Riva case (2001-2004).
19. 20. An analysis of the Organized/Disorganized model of serial killing behavior using the NDM in the case of Jeffrey Dahmer (2002-2004).
21. The Neuropsychiatric Developmental Model (NDM) of serial killing behavior (2000-2004).
22. A Psychiatric developmental analysis of the Unabomber case (2002-2004).
23. Cultural formulation in forensic-transcultural psychiatric settings (1997-2004).
24. An analysis of the case of the serial killing behavior of Richard Ramirez according to the Neuropsychiatric Developmental Model (NDM) (2001-2004).
25. An analysis of the cases of serial killer Joel Rifkin by combined use of the BRICE/NDM methodologies (2002-2004).
26. An analysis of the case of Cary Anthony Stayner Using the Neuropsychiatric Developmental Model (NDM) (2003-2004).
27. A psychiatric-legal study of the case of Cary Anthony Stayner (2003-2004).
28. An analysis of the case of Robert Phillip Hansen Using the Neuropsychiatric Developmental Model (NDM) (2003-2004).
29. Psychiatric-Legal aspects of Shared Delusional Disorder(1996-2004).
30. A historical/psychosocial study of the Ciudad Juarez femicides (2002-2004)

31. The State of Michoacan Forensic Psychiatric Project (2002-2004).

2. Cultural Psychiatry:

1. The Inclusion of Race, Ethnicity, and Culture in Current Psychiatric Literature. (2000-2004).

3. Delusional Misidentification Syndromes, 1987-2004.

1. Phenomenology of the Delusional Misidentification Syndromes.
2.Psychiatric-Legal Aspects of the Delusional Misidentification Syndromes.
3. Neuropsychiatry of the Delusional Misidentification Syndromes.
4. Facial Recognition in the Delusional Misidentification Syndromes.
5. A Theory of Mind Model for the Delusional Misidentification Syndromes.

4. Psychiatric Education:

1. The teaching of research in a psychiatric residency program (1988-2004).

5. Life-Span Psychiatry:

1. Life-span, cultural and ecological approaches in the psychotherapy of posttraumatic stress disorder (1984-2004).

6. Biological Psychiatry:

1. CLOX: Use as a measure of executive functioning in psychiatric inpatients, 1996-2004.

F. Past Participation in Funded Projects:

1. A triple- blind placebo controlled evaluation of remoxepride in the presentation of relapse in schizophrenia, 1991.
2. MRI Assessed brain structures and amine systems in schizophrenia (1992-1993).
3. The study of men in midlife, 1993-1994.
4. Comparison of efficiency and safety of Depakote vs. carbamazepine in the treatment of the manic phase of Bipolar Disorder: a Randomized Single- Blind Study, 1992-1995.
5. The effects of Prozac treatment on Mood, Cognition and Brain Glucose Metabolism in Patients with Primary Unipolar Depression, 1992-2003.
6. Span of Apprehension in Schizophrenia, 1992-1996.
7. The Clinical and Economic Impact of Clozapine Treatment on Refractory Schizophrenia, 1993-1995.
8. Debrisoquin as an Agent for the Study of Psychotic States, 1993-1995.
9. A Double-Blind Placebo Controlled Study, Tolerability and Preliminary Antipsychotic Activity Study of L-745,870 in Hospitalized Schizophrenic Patients, 1995.
10. A Comparative Cost Effectiveness Study of Depakote and Usual Care Versus Lithium and Usual Care in the Treatment of Bipolar Disorder, 1996.
11. The role of the noradrenergic system in schizophrenia, 1993-1996.
12. Biological Aspects of Depression and Antidepressant Drugs, 1996-1997.

VI. SERVICE

A. Professional Affiliations:

1. Current Professional and Scientific Organizations and Societies:

American Psychiatric Association, 1985-2004.
Northern California Psychiatric Society, 1985, 1998-2004.
Santa Clara Society of Psychiatric Physicians, 1998-2004.
California Coalition on Sexual Offending, 2004
Group for the Advancement of Psychiatry, 1995-2004.
American Academy of Forensic Sciences, 1989-2004.
American Academy of Psychiatry and the Law, 1985-2004.
American College of Forensic Psychiatry, 1994-2004.
American Association for the Advancement of Science, 1974-1981, 1989-1999, 2002-2004.

2. Past Professional and Scientific Organizations and Societies:

Children and Adults With Attention Deficit/Hyperactivity Disorder (CHADD), 1999-2003.
The International Society for Traumatic Stress Studies, 2001-2003
Association for Transpersonal Psychology, 1997-1999.
The American College of Physician Executives, 1996-1999.
Society for the Study of Psychiatry and Culture, 1987-1998.
American Society of Hispanic Psychiatry, 1996-1997.
Texas Society of Psychiatric Physicians, 1993-1997.
Behar County Psychiatric Society, 1993-1997.
Hispanic Faculty Association of the University of Texas Health Science Center, San Antonio, 1996-1997.
Association for Academic Psychiatry, 1993-1997.
International Academy of Law and Mental Health, 1992-1995.
Association for the Advancement of Philosophy and Psychiatry, 1994-1995.
Southern California Psychiatric Society, 1985-1992.
American Academy of Psychiatry and the Law-Southern California Chapter, 1989-1992.
The Chicano/Latino Medical Association of California, 1991-1992.
San Antonio Alliance for the Mentally Ill, 1992-1994.

3. Current Positions and/or Offices Held in Professional Organizations:

1. Member, Liaison with American Academy of Forensic Sciences Committee, American Academy of Psychiatry and the Law, 1991-1994, 2000-2004.
2. Chairman, Neuropsychiatric Developmental Disorders Committee, Psychiatry and Behavioral Sciences Section, American Academy of Forensic Sciences, 2003.
3. Chairman, Transcultural Forensic Psychiatry Committee, Psychiatry and Behavioral Sciences Section, American Academy of Forensic Sciences, 2003.
4. Member, Cultural Committee, American Academy of Psychiatry and the Law, 2003-2004.
5. Member, Board of Directors, American Academy of Forensic Sciences, 2003-2004.
6. Member, Committee on Developmentally Disabled, American Academy of Psychiatry and the Law, 2003-2004.

4. Past Positions and/or Offices Held in Professional Organizations:

1. Member, Program Committee, American Academy of Psychiatry and the Law, 1988-1993.
2. Member, Government Affairs Committee, Southern California Psychiatric Society, 1989-1990
3. Member, Psychiatry and Behavioral Sciences Committee, American Academy of Forensic Sciences strategic Planning Project, 1989-1990.
4. Member, Program Committee, American Academy of Forensic Sciences, 1990-1991.
5. Co-Chairperson, Psychiatry and Behavioral Sciences Section, Program Committee, American Academy of Forensic Sciences, 1990-1991.
6. Member, Research Committee, American Academy of Psychiatry and the Law, 1991-1996.
7. Member, Ethics Committee, American Academy of Psychiatry and the Law, 1991-1993, 1995-1996.
8. Member, Task Force on Minority Issues and Recruitment, American Academy of Psychiatry and the Law, 1991-1992.
9. Member, Government Committee, Texas Society of Psychiatric Physicians, 1994-1995.
10. Strategic Planning Profession Oversight Task Force, American Academy of Forensic Sciences, 1995-1996.
11. Member, Scientific Resources Committee, 1993-1997, Vice-Chairman, 1995-1997, Texas Society of Psychiatric Physicians.
12. Member, Criminal forensic psychiatry task force, Texas Society of Psychiatric Physicians, 1993-1997.
13. Member, Psychopharmacology Committee, American Academy of Psychiatry and the law, 1996-1998.
14. Member, Administrative Psychiatry Committee, Texas Society of Psychiatric Physicians, 1996-1997.
15. Chairperson, Committee on Research, American Academy of Forensic sciences Psychiatry and Biobehavioral Sciences Section, 1990-2003.
16. Member, Cultural Psychiatry Committee, Group for the Advancement of Psychiatry, 1995-2003.
17. Member, Criminal Behavior Committee, American Academy of Psychiatry and the Law, 1997-1999.
18. Member, Addiction Committee, American Academy of Psychiatry and the Law, 1997-2002.
19. Member, Psychiatry and Behavioral Sciences Division Awards Committee, American academy of Forensic Sciences, 1998-2002.
20. Secretary, Psychiatry and Behavioral Sciences Division, American Academy of Forensic Sciences, 1999-2000.
21. Member, Council, American Academy of Forensic Sciences, 1999-2002.
22. Member, Membership Committee, American Academy of Forensic Sciences, 1999-2002.
23. Councilor, Santa Clara Society of Psychiatric Physicians (four terms), 1999-2004.
24. Chairman, Psychiatry and Behavioral Sciences Section, American Academy of Forensic Sciences, 2000-2003.
25. Member, Nominating Committee, American academy of Forensic Sciences, 2000-2003.
26. Member, Continuing Education Committee, American Academy of Forensic Sciences, 2000-2003.

27. Member, Committee on Membership and Promotion Requirements/Guidelines for International Applicants, Psychiatry and Behavioral. Sciences Section, American Academy of Forensic Sciences, 2000-2003.
28. Member, Minutes Approving Committee, Psychiatry and Behavioral Sciences Section, American Academy of Forensic Sciences, 2002-2003.

5. Membership in Other Organizations (Past):

1. American Rock Art Research Association, 1992-1996.
2. Institute of Noetic Sciences, 1999.
3. Lions Club International and East Bay Hispanic Lions Club, 1998-2002.
4. The World Future Society, 1996-2001.
5. Hispanic Chamber of Commerce, Santa Clara County, California, 2000-2002.

B. Other Professional Activities:

1. Invited Reviewer:

Professional Journals:

Journal of the American Academy of Psychiatry and the Law, 2004.
Journal of Forensic Sciences, 2002-2004.
Collegium Antropologicum, 2003.
Journal of Clinical Psychiatry, 1995, 1999.
Psychosomatics, 1991

Other:

Brunner-Routledge: Book proposals, 2003.

2. Grant Proposals Reviewer:

South Texas Health Research Center, 1995-1997.

3. Community Activities:

1. Consultant, Texas Math and Science Hotline, 1994-1997.
2. Assistant Coach, Youth Basketball (Grades 1-2), South Valley YMCA, San Jose, California, 1999-2001.

LIEUTENANT APPROVAL	[illegible] COUNTY SHERIFF'S DEPT [illegible] DETENTION CENTER INCIDENT REPORT	SPN NUMBER
REPORTED ( )RADIO ( ) ON SITE ( )PERSON( )PHONE		DATE 4-8-92

TIME CALL RECEIVED ( )HRS. ( )A.M.( )P.M.	TIME OF BEGINNING INCIDENT 2130 ( )HRS. ( )A.M.( )P.M.	TIME OF ENDING INCIDENT ( )HRS. ( )A.M.( )P.M.

NATURE OF VIOLATION: Attempted Suicide

LOCATION: Echo-One Cell #7

SUBJECT(S)NAME: Ramos Roberto Moreno

VICTIM(S)NAME:

RELATED REPORTS
(✓) INCIDENT REPORT
( ) OFFENSE REPORT
( ) MISCONDUCT REPORT
( ) BULL VIOLATION(S)
( ) ( ) ( )

NARRATIVE: On Wednsday April 8, 1992 I officer T. Nicolls at 1400 responded from the booking desk to Echo-section in reference to a 10-33 (Emergency).

Inmate Ramos Roberto Moreno was being escorted from Echo-One with a towel around his wrist. I officer T. Nicolls assisted escorting inmate from the catwalk to the nurse's station. Inmate was then attended to by the nurse a sent to Edinburg General Hospital for cuts on his right arm.

DETENTION OFFICER: Timothy Nicolls D-1400 DETENTION OFFICER I.D.#

09576

LIEUTENANT APPROVAL

HIDALGO COUNTY SHERIFF'S DEPT
JUVENILE DETENTION CENTER
INCIDENT REPORT

SPN NUMBER

REPORTED ( )RADIO ( ) ON SITE
(✓)PERSON( )PHONE

DATE 4/8/92

TIME CALL RECEIVED ( )HRS.
( )A.M.( )P.M.

TIME OF BEGINNING INCIDENT 2200 ( )HRS.
( )A.M.( )P.M.

TIME OF ENDING INCIDENT ( )HRS.
( )A.M.( )P.M.

NATURE OF VIOLATION Transporting an inmate
LOCATION to Hospital
SUBJECT(S)NAME Ramos Roberto Moreno
VICTIM(S)NAME

RELATED REPORTS
(✓) INCIDENT REPORT
( ) OFFENSE REPORT
( ) MISCONDUCT REPORT
( ) RULE VIOLATION(S)
( ) ( ) ( )

NARRATIVE On April 8, 1992 Approximately 2200hrs I D/O Benito Salinas and/o Dale Gordon (1559, 1569) transported an inmate to Edinburg General Hospital after said inmate attempted to commit suicide by cutting his wrists. We transported inmate and said inmate received stiches from the doctor on his wrist. Inmate was later identified as Ramos Roberto Moreno who is housed in Echo One.

D. Salinas 1559

09577

LIEUTENANT APPROVAL	HIDALGO COUNTY SHERIFF'S DEPT ADULT DETENTION CENTER INCIDENT REPORT	SPN NUMBER
REPORTED ( )RADIO ( ) ON SITE (✓)PERSON( )PHONE		DATE March 8, 1992

TIME CALL RECEIVED ( )HRS. ( )A.M.( )P.M.	TIME OF BEGINNING OF SHIFT ( )HRS. ( )A.M.( )P.M.	TIME OF ENDING INCIDENT ( )HRS. ( )A.M.( )P.M.

NATURE OF VIOLATION
Attempted Suicide

LOCATION
Echo - One (1) cell 7

SUBJECT(S)NAME
Ramos, Roberto Moreno

VICTIM(S)NAME

RELATED REPORTS
( )____ INCIDENT REPORT
( )____ OFFENSE REPORT
( )____ MISCONDUCT REPORT
( )____ RULE VIOLATION(S)
( ) ( ) ( )

NARRATIVE

On the 8th day of April 1992 I R/O David Bernal was assigned to Echo section R/O Bernal had a 15min check on 95 Ramos, Roberto. During the 15min check R/O Bernal saw inmate Ramos reading a book. At about 9:30 p.m. R/O Bernal went on break. as R/O Bernal came back to Echo section, Officer Juan Hernander said that inmate Ramos was going up front. Officer Hernandez handed R/O Bernal the Keys, Officers Gorden, Ramirez and Hernandez handled the inmate and found the inmate had cut his right arm. The three Officer then took inmate Ramos up front.

INVESTIGATING OFFICER	D. Bernal	D.# 1507	DETENTION OFFICER	I.D.#

#92-6037

LIEUTENANT APPROVAL	HIDALGO COUNTY SHERIFF'S DEPT ADULT DETENTION CENTER INCIDENT REPORT	SPN NUMBER
REPORTED ( )RADIO ( ) ON SITE ( )PERSON( )PHONE		DATE 4-08-92

TIME CALL RECEIVED ( )HRS. ( )A.M.( )P.M.	TIME OF BEGINNING INCIDENT 9:15 ( )HRS. ( )A.M.(✓)P.M.	TIME OF ENDING INCIDENT 9:30 ( )HRS. ( )A.M.(✓)P.M.

NATURE OF VIOLATION: Attempted Suicide

LOCATION: Echo-1, cell #7

SUBJECT(S)NAME: Roberto Ramos Moreno

VICTIM(S)NAME:

RELATED REPORTS
(✓) INCIDENT REPORT
( ) OFFENSE REPORT
( ) MISCONDUCT REPORT
( ) RULE VIOLATION(S)
( ) ( ) ( )

NARRATIVE On Wednesday, 4-08-92 at approximately 9:15pm, I Detention Officer Juan A. Hernandez was relieving Officer David Bernal in Echo section. Juliette advised me that inmate Roberto Ramos Moreno was needed up front. I opened the door to Echo-1 Dayroom and advised Ramos that he was wanted up front. Inmate Ramos was located in cell #7 and the door was closed. Ramos replied that he did not want to go up front. I advised back up to come to Echo and escort Ramos up front.

Officer Dale Gordon arrived first and I advised him of the situation. He entered Echo-1 dayroom area and the cell of Ramos. Gordon tried to convince the inmate to go up front willingly. At approximately this time Officer Leonel Ramirez arrived and entered Echo-1 dayroom to assist officer Gordon. A little after, officer David Bernal arrived at Echo section too. I handed him the keys and entered Echo-1 dayroom while he remained at the control box. As I entered I noticed inmate Roberto Ramos had his right arm covered and was holding up a religious book with his left hand as of he was reading it. He still attempted to ignore us and seemed only partially willing to go. Officer Bernal asked if we needed some help we replied negatively. We finally began to surround the inmate's back and I wound up close to his head. His right arm became partially uncovered as his gray blanket slipped down. I noticed he had his right arm in his mouth. I became cautious, then I noticed he had blood on his arm and in his head. Officer Leonel Ramirez advised booking of the occurrence and we got him up and escorted him to the nurses's station. He was later taken to the hospital.

DETENTION OFFICER	I.D.#	DETENTION OFFICER	I.D.#
Juan A. Hernandez	1165	Leonel Ramirez Jr.	1540

David Bernal

EDINBURG HOSPITAL

Emergency Room Record

ACCOUNT RECEIVABLE NO. 51611333

DATE OF ADMISSION	TIME ADMITTED	HOSP SVC	FAM PHYSICIAN	ATTENDING PHYSICIAN	DR NO	MEDICAL REC NO	FC	RACE
04/08/92	21:46	EMR	NO PHYSICIAN	GILBERTO DIAZ D	888	156408	K	S

PATIENT NAME (LAST, FIRST, MIDDLE): RAMOS, ROBERT MORENO
PATIENT ADDRESS (CITY, STATE, ZIP): P.O. BOX 8361 WESLACO TX 78596
BIRTHDAY: 05/23/54 AGE: 37 SEX: M

RELIGION: HOME PHONE: WORK PHONE: ARRIVED BY: CAR INFO TAKEN BY: JFA SOC SEC/MEDICARE NO: 566961338 PAT TYPE: ER NOTES - PHYSICAL ADDRESS:

GUARANTOR NAME: ROBERT MORENO RAMOS ADDRESS: P.O. BOX 8361 CITY: WESLACO STATE: TX ZIP: 78596 PHONE:

RELATIONSHIP: SELF GUARANTOR'S EMPLOYER: JAIL INMATE ADDRESS (CITY, STATE, ZIP): PHONE:

INSURANCE CO NAME ADDRESS CITY STATE ZIP: SELF PAY POLICY: CERT NO: GROUP NO:

NEXT OF KIN: NONE GIVEN ADDRESS: PHONE:

TET TOXOID: 1988 ALLERGIES: NKA

CHIEF COMPLAINT: two lac to (R) wrist. 1" & 2" 1° prior to arrival.

VITAL SIGNS ON ADM: T 98 P 72 R 20 B/P 132/90
GR ___ P ___ AB ___ LMP ___
HEIGHT: ___ WEIGHT: ___

M D EVALUATION

37M transfer from Co Jail c "self-inflicted" Laceration to (R) wrist Denies any suicide gesture

PE: (R) wrist c 2 Laceration (one) 4cm two 3cm.
N/ Sensory - intact

Repair { 5-0 nylon, neosporin oint, dressing

88102 1986 86.59 12002

LAB	
TIME ORDER	
TIME DONE	
CBC	☐
H&H	☐
GLUC	☐
LYTES	☐
ABG	☐
S. AMYL	☐
C. ENZY	☐
SMA	☐
UA	☐
C&S	☐
EKG	☐
ICCU	☐
OTHER	☐

X-RAY
TIME ORDER ___
TIME DONE ___

DISPOSITION TIME 2250
ADMITTED ○
HOME ○
OFFICE ○
POLICE ☑
CORONER ○
RM NO.
ADMITTING M D
CONDITION: Stable

ORDERS: [signature] Duricef 1 gm

DX: Laceration (R) wrist

INSTRUCTIONS GIVEN
LACERATION ___
FEVER ___
DIARRHEA ___
HEAD ___

FOLLOW-UP CARE INSTRUCTIONS
1. suicide precautions
2. Laceration care
3. Co Jail Thursday
4. sutures out 7-8 day

09774

[signature] 1559 PATIENT'S SIGNATURE [signature] NURSE'S SIGNATURE [signature] PHYSICIAN'S SIGNATURE

I DO HEREBY GIVE MY CONSENT FOR ANY MEDICAL AND/OR SURGICAL TREATMENT DEEMED NECESSARY BY:

DOY MI CONSENTIMIENTC PARA CUALQUIER TRATAMIENTO MEDICO O QUIRURGICO QUE SE JUZGUE NECESARIO.

DR: _____ _____ _____
PHYSICIAN PATIENT RELATIONSHIP

AUTHORIZATION FOR THE RELEASE OF HEALTH RECORDS

I AUTHORIZE THE RELEASE OF ANY MEDICAL INFORMATION NECESSARY TO ANY INSURANCE COMPANY, IN ORDER TO PROCESS THIS CLAIM. I REQUEST PAYMENT OF INSURANCE BENEFITS TO EDINBURG HOSPITAL. THE EDINBURG HOSPITAL IS HEREBY RELEASED FROM LEGAL RESPONSIBILITY OR LIABILITY FOR THE RELEASE OF THE MEDICAL RECORDS.

YO, AUTORIZO EL TRASPASO DE TODA INFORMACION MEDICA NECESARIA PARA CUALQUIER COMPANIA DE SEGUROS, PARA EL PROCESO DE ESTE RECLAMO, SOLICITO QUE EL PAGO DE BENEFICIOS DEL SEGURO SEAN HECHOS DIRECTAMENTE AL HOSPITAL DE EDINBURG. EL HOSPITAL DE EDINBURG ESTA DESOBLIGADO DE TODA RESPONSIBILIDAD LEGAL O EXPUESTO, POR EL TRASPASO DE ESTA INFORMACION MEDICA.

Witness _____ Patient or Guardian (in case of minor)

Witness _____ Relationship 04-08-92 Date

I UNDERSTAND THAT I WILL BE BILLED SEPARATELY BY THE PHYSICIANS, RADIOLOGIST, ANESTHESIOLOGIST AND PATHOLOGIST. I UNDERSTAND MY HEALTH INSURANCE MAY NOT PAY FOR THIS SERVICE AND AGREE TO PAY ANY PHYSICIANS, ANESTHESIOLOGIST, RADIOLOGIST AND PATHOLOGIST FOR SERVICES RENDERED.

Witness _____ Patient or Guardian (in case of minor)

Witness _____ Relationship 04-08-92 Date

09775

EDINBURG HOSPITAL

NURSES EMERGENCY ROOM ADMISSION FORM

Triage Date: 4/8/92 Time: 2155 Code: 1 (Immediate) 2 (Urgent) 3 (Non-urgent)

Patient: Roberto Ramos Age 37 yr.

ER Physician: ______ Time Notified: 2200

Trauma Room		Holding Area		Treatment		GYN

Private MD: ______ Time Paged ______ Response ______ Time Paged ______ Response ______

coming: YES ☐ NO ☑

Referred to: ______ Time Paged ______ Response ______ Time Paged ______ Response ______

coming: YES ☐ NO ☐

NOTIFIED
- ☐ Relative
- ☐ J.P.
- ☐ Police
- ☐ Animal Shelter
- ☐ Poison Control

TIME: ______

Allergies: NKA

Last T.T. 1987

Chronic Health Hx: none

Home Meds: none

Chief Complaint: two lacerations to (L) wrist one 2" one 1" - happened one hour ago - suicide attempt

Temp 98.2 P 72 R 20 B/P 132/90

Wt 154 lbs

Ambulance ☑ Carried ☐ ō

Stretcher ☐ W/C ☐ ō foot chain

Ambulatory ☐ two police offic

NEUROLOGICAL SYSTEM

Right Pupil: reactive ☑ nonreactive ☐ fixed ☐ dilated ☐ constricted ☐

Left Pupil: reactive ☑ nonreactive ☐ fixed ☐ dilated ☐ constricted ☐

Oriented: time ☑ place ☑ person ☑

Motor Response: obeys ☑ withdraws ☐ flexion ☐ extension ☐ paralysis ☐

Verbal Response: oriented ☑ confused ☐ inappropriate words ☐ none ☐

CARDIOVASCULAR SYSTEM

Heart Rate: 72 Rhythm regular Findings normal

Skin: pallor ☐ flushed ☐ pink ☑ jaundiced ☐ cyanotic ☐ diaphoretic ☐

warm ☐ cool ☐ hot ☐ dry ☐ moist ☐ ulcers ☐

Capillary Return: brisk ☑ prolonged ☐

Pulses: weak ☐ full ☑ bounding ☐ absent ☐

RESPIRATORY SYSTEM

Breath Sounds: clear ☑ crackles ☐ wheeze ☐ absent ☐ diminished ☐ other ______

Respirations: rate 20 regular ☐ labored ☐ assisted ☐ orthopnea ☐ reactions ☐ cough ☐

productive cough ☐ cyanosis ☐ no resp. distress ☐

Airway/Ventilations: 02 L/min. ☐ mask ☐ cannula ☐ intubated ☐ none ☑

GASTROINTESTINAL SYSTEM

Abdomen: soft ☑ firm ☐ distended ☐ No abd. pain ☐ Last meal ______

Bowel Sounds: hypo ☐ hyper ☐ absent ☐ normal ☐

Pain: RUQ ☐ RLQ ☐ LUQ ☐ LLQ ☐ epigastric ☐ suprapubic ☐ flank ☐

Nausea ☐ Vomiting ☐ Diarrhea ☐ last bowel movement ______ color ______

N/A

GENITOURINARY SYSTEM

Voiding: continent ☐ incontinent ☐ dysuria ☐ hematuria ☐ frequency N/A foley ☐

LMP: ______ Pregnant: yes ☐ no FHT: ______

(No urinary problems:) ☐ G: ☐ P: ☐ AB: ☐ normal

IMMOBILIZATION

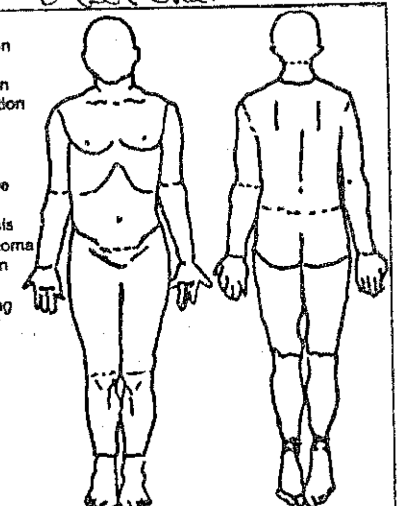
Cervical collar ☐ Sandbags ☐ Board ☐

Splints: Leg (short) ☐ leg (long) ☐ arm ☐

Restraints: ______

gauze to (L) wrist site ō small mod. amt of blood drainage

1 - Abrasion
2 - Burn
3 - Avulsion
4 - Laceration
5 - GSW
6 - Stab Wound
7 - Fracture
8 - Pain
9 - Cyanosis
10 - Hematoma
11 - Foreign Body
12 - Swelling
13 - Other:



ANTERIOR POSTERIOR

M		V		E	
Obeys Command	6	Oriented	5	Spontaneous	4
Localize Pain	5	Confused	4	To Speech	3
Flexion Withdraw	4	Verbalizes	2	To Pain	2
Abnormal Flexion	3	Vocalizes	2	No Eye - Opening	1
Abnormal Extension	2	No Vocalization	1		
No Motor Response	1				

TIME	COMA SCALE M	V	E	PUPILS R	L	Reaction R	L	Hand Grip R	L	Leg Motion R	L
2155	N/A oriented & alert										

Physical Assessment Done By: B. Kinzel

NURSE'S INITIALS B. Kinzel

VALUABLES:

CLOTHING ☐ WALLET ☐ DENTURES ☐

EYEGLASSES ☐ MONEY ☐ JEWELRY ☐

NONE ☐

none

DISPOSITION OF VALUABLES:

SECURITY ☐ FUNERAL ☐ NAME: ______

FAMILY ☐ HOME ☐

09776

TIME	TEMP	PULSE	RESP	B/P
2152	98.2	72	20	1[illegible]/70
2250	98.3	75	18	13[illegible]/72

TIME	TEMP	PULSE	RESP	B/P

TIME	TEMP	PULSE	RESP	B/P

TIME	NURSING INTERVENTIONS
2200	To Rm #7 c HCSD & hand cuffs. physician notified. J[illegible] Suture set.
2230	Xeroform adaptic dressing Kerlix dressing [illegible]
2250	Pt vital signs stable, Pt discharge teaching completed. Pt discharged in care of Hidalgo County Sheriff's Dept.

TIME	PHYSICIAN'S ORDERS

Physician's Signature

Nurse's Signature [illegible] RN

09777

NAME: 51611333 CHART # 04/08/92 PHYSICIAN: DATE:
RAMOS, ROBERT M. M-32 -K
DIAZ
PATIENT POST-CARE INSTRUCTION
EMERGENCY DEPARTMENT
05/23/54

The examination and treatment received here have been rendered on an emergency basis only. They were not intended to be substitutes for complete medical care. Your follow-up doctor will receive a copy of your records and all test results. It is important that you let your doctor check you again, and that you report any problems at that time, because it is impossible to recognize and treat all elements of injury in a single emergency department visit. Follow the directions specified below.

PATIENT INSTRUCTIONS

___ A. Call and make an appointment with your family physician within _____ days.
___ B. You are referred to the following physician. Make an appointment for follow-up treatment with Dr. _____ in _____ days.
___ C. X-rays will be initially reviewed by the emergency physician or your private physician. They will be reviewed by the radiologist the following day. You will be notified if there is a discrepency from the initial interpretation.

MEDICATIONS

___ A. The medications you received may cause drowsiness or dizziness. Do not drink alcohol or operate an auto or other dangerous machinery.
___ B. Take medications as prescribed by the physician.
___ C. If you develop nausea, vomiting, diarrhea, itching, skin rashes, or any other unusual symptoms notify your physician or return to the emergency room.

WOUND CARE

___ Keep dressing intact, wound clean and dry for 21 days.
___ Do not remove dressing for 24 hours.
___ Clean daily with Betadine.
___ Look for unusual redness, purulent drainage, and/or increased pain and tenderness indicating infection. Notify physician of symptoms.
___ Stitches should be removed in 7-8 days.

CAST CARE

___ Elevate above heart level to reduce swelling.
___ Do not get cast wet or soiled.
___ Do not put objects between cast & skin.
___ Wiggle toes or fingers to decrease swelling.
___ If extremity gets cold, blue or numb, or if pain increases markedly, return to E.R.
___ Cast will not be dry completely for 48 hours.

ORTHOPEDIC INJURIES

___ Keep injured part elevated _____ days.
___ Apply dry, cold packs each hour for 20 minutes for _____ hour
___ Apply warm packs/compresses/soaks.
___ Don't bear weight on injured foot/leg
___ Wear splint continuously until you have been rechecked by a physician.

FEVER CONTROL

___ Check temperature every 4 hours
___ For fever take: (every 4 hours)
_____ tylenol: dose: _____
___ Sponge baths using lukewarm water for temp. over 103 degree.
___ Drink plenty of fluids.

EYE INJURY OR FOREIGN BODY

___ Leave patch in place for ____ hours.
___ Do not drive while wearing eye patch.
___ Call doctor for increased pain, redness or drainage.

DIARRHEA AND VOMITING

___ Give frequent small amounts of clear liquid.
___ Avoid milk or milk products for 24 hours.
___ Consult physician for continous vomiting or diarrhea or temp over 103 degrees.

BACK INJURIES

___ Bed rest. Up only to the bathroom.
___ Lie on a firm bed with knees and hips bent for maximum comfort.
___ Avoid lifting, pulling, straining, bending for ____ days.
___ Hot packs/heating pad/ warm tub soaks.
___ If you have difficulty urinating, moving your bowels or developing definite weakness, call your doctor or the E.R.

HEAD INJURY

___ Rest at home 24 hours. Stay with responsible adult.
___ Awaken every 2 hours first 8 hours to assure arousability
___ No alcohol.
___ Report immediately for the following: severe headache, persistent nausea/vomiting, unusual sleepiness, confusion blurred or double vision, uncoordination, unequal pupils, convulsions.

SPECIAL INSTRUCTIONS: Suicide Precautions

DRUG/FOOD INTERACTION: Lacerain cure

ACTIVITY: MD to see at County Jail Thursday

Sutures out 7-8 days

I HEREBY ACKNOWLEDGE THE RECEIPT OF THE INSTRUCTIONS INDICATED ABOVE. I UNDERSTAND THAT I HAVE RECEIVED EMERGENCY TREATMENT ONLY. I WILL ARRANGE FOR FOLLOW-UP CARE.

x Bentolalit #1559

PATIENT/SIGNIFICANT OTHER NURSE ; PHYSICIAN

09778

STATE OF TEXAS)
)
) IN RE: ROBERTO MORENO RAMOS
)
COUNTY OF CAMERON)

AFFIDAVIT OF JACK DUVAL HUNTER, II

1. My name is Jack Duval Hunter, II. I am a resident of Harlingen, Texas. I am the same Jack Hunter who represented Roberto Moreno Ramos in his 1993 capital murder trial.

2. I graduated from St. Mary's University School of Law in San Antonio in May 1986 and was licensed to practice law in Texas on November 7, 1986. I worked as a civil attorney with a law firm in Harlingen for two years, then joined the Hidalgo County District Attorney's office as a prosecutor. I was there for about two years. I then worked for the Immigration and Naturalization Service for approximately a year before opening an immigration law practice in 1991. At the time, I was also accepting court appointments in some criminal cases, though I no longer do so.

3. On August 13, 1992, I was appointed by Judge Fernando G. Mancias to represent Mr. Moreno Ramos as second chair to lead counsel Ricardo Flores. Mr. Flores had already been appointed at arraignment on July 28, 1992. As second chair, my responsibility prior to trial was to prepare motions and research the law. During jury selection, I assisted in keeping track of the potential jurors and in making decisions and preserving error. At trial, Mr. Flores examined the witnesses and it was my job to object and preserve error and to keep track of exhibits.

4. We sought appointment of an investigator and Mr. Flores' assistant, Xavier Guerra, was appointed on January 5, 1993, just before jury selection began. I don't remember everything he did. All I remember is that he went to Austin to take pictures of where Mr. Moreno Ramos stayed when he was there. We raised an issue of pretextual arrest and sent the investigator to collect the court documents. He also went with us when we looked at the crime scene. I don't recall what else he did. I did not personally speak with any witnesses. I do not believe that Mr. Flores spoke with any of the state's witnesses before trial. Both of us met with Mr. Moreno Ramos outside of court many times. I believe we always met with Mr. Moreno Ramos together and that neither of us met with him alone. We spent approximately seventy-five percent of our time preparing for the guilt/innocence portion of the case and twenty-five percent on the penalty phase. Based upon the experience and training I have received since then, I now realize that our priorities should have been the opposite – with most of our time being devoted to sentencing.

5. I had tried many cases as a prosecutor and had done two or three criminal trials as a defense lawyer, but had never participated in the prosecution or defense of a capital

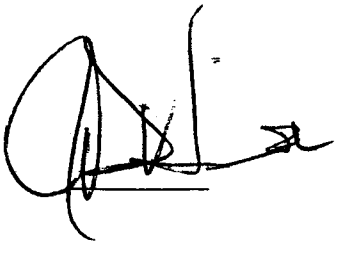
case prior to representing Mr. Ramos. During a CLE course sponsored by the University of Texas, I had attended a session on the legal principles unique to capital cases, and I used many of the course handouts to prepare motions and preserve objections. However, I had never participated in a penalty phase of a capital trial. I had no specialized training to recognize the symptoms of severe mental illness.

6. We did not seek the assistance of a mitigation specialist to prepare for trial. I was not aware of any case in which the courts had provided money for a mitigation specialist at that time. Hidalgo County is not a wealthy county, and we lawyers understood that the court would not give us tens of thousands of dollars to hire experts and investigators. Although we did not file a motion for a mitigation specialist or for mental health experts, we knew from experience and from our off-the-record dealings with the court that funds for experts would not be forthcoming.

7. Nor did I do the work of a mitigation specialist. I did not gather any school, medical, or employment records relating to Mr. Moreno Ramos. I did not speak with Mr. Ramos' family members. We asked Mr. Moreno Ramos for anyone he wanted to testify for him or anyone at all who could say good things about him and he didn't have any names. He did not prohibit us from investigating his background, but could not help us either. We never discussed trying to find former teachers, neighbors, co-workers, or other witnesses on our own. No one on the defense team traveled to Mexico to see where Mr. Moreno Ramos grew up. Nor did either of us travel to California to interview family members there. We never considered or discussed traveling outside of Texas to investigate Mr. Ramos' childhood and background. These avenues of investigation were not rejected for any reason and I believe it would have been a good idea to pursue them. It would have been helpful to the preparation of our defense.

8. Mr. Flores and I did retain a psychologist to meet Mr. Moreno Ramos and administer tests, and we had to pay for him out of our own pockets, but were later reimbursed. The psychologist was Alphonso J. Alamia, an Assistant Professor at the University of Texas, Pan-Am, in Edinburg and a friend of Mr. Flores. I believe we each paid him $400.00 per month during trial. I doubt he was paid more than $3,000.00 total. I'm not sure if he was bilingual.

9. We did not provide Mr. Alamia with any kind of detailed life history for Mr. Moreno Ramos, since we did not have a mitigation specialist and had not investigated his background on our own. Because he didn't tell us, we were not aware that Mr. Moreno Ramos had been severely abused as a child. We had no idea that Mr. Ramos was suffering from brain damage. We did not know anything about his family's medical or mental health history. Because we did not have any of this information, we could not provide it to Mr. Alamia. We did not provide Mr. Alamia with any documentation or ask him to conduct social history interviews with collateral witnesses to support his evaluation of Mr. Moreno Ramos. Nor did we ask Mr. Alamia to develop a social history of Mr. Moreno Ramos using collateral evidence or witnesses.



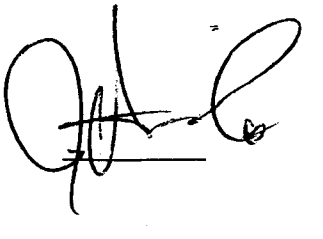
10. The main role Mr. Alamia played was to help us decide whether to put Mr. Moreno Ramos on the stand to tell his version of events in the guilt/innocence phase or, if necessary, penalty phase. Because we were not appointed until months after the murders, no one on the defense team had the opportunity to observe Mr. Moreno Ramos' emotional state around the time of the crime. When we met him, he was very detached and unable to express emotions. We didn't know how to reach him. It wasn't only that he didn't seem to be grieving over his family. He was not emotional about his own plight, either. He did not react to emotional things that happened in the courtroom. Not even when things happened that we felt were unfair to him or prejudicial to his case. He simply didn't seem to have access to any emotions whatsoever and we had no idea how he would react if we put him on the stand. We hoped our psychologist would be able to help us reach out to Mr. Moreno Ramos, but he never made much progress. Nor did he identify what additional evaluation or testing, if any, might reveal the origin of Mr. Moreno Ramos' problems. We did not recognize Mr. Moreno Ramos' behavior as symptomatic of any organic illness and we did not realize that neuropsychological testing was necessary to identify his disability.

11. I do not know if Mr. Alamia administered the tests in Spanish or English. We did not seek out experts with any specialized training in dealing with Mexican nationals. It would have been very helpful to have some assistance in dealing with these practical and social issues that arise from the fact that Mr. Moreno Ramos was born and spent his early childhood in Mexico.

12. From the beginning, everyone involved in Mr. Moreno Ramos' case knew that he was a Mexican national. At that time, I was not aware that the authorities had an obligation to inform my client of his right to seek the assistance of the Mexican consulate. I was also unaware that the Consulate of Mexico would have been able to provide assistance in the investigation of mitigating evidence in our case. I do not remember speaking to or seeing any representative of the Mexican Consulate prior to trial.

13. I have been told that Mexico could have provided funds for a mitigation specialist to travel to California and Mexico to document Mr. Moreno Ramos' life history. I think this would have been very helpful. I know from my experience as an immigration attorney that Mexican witnesses are often afraid of getting involved with "the system," and it helps a lot if you can talk to them personally to reassure them. From my experience, I also know that there are cultural issues that sometimes affect the ability of Mexican witnesses to understand the justice system in this country.

14. I have also been told that Mexico could have provided funding for bilingual mental health experts. I have been informed that a neuropsychologist has concluded that Mr. Moreno Ramos suffers from brain damage. If we had received this kind of expert assistance at the trial, it would have been extremely helpful. If we had presented this information to the prosecution prior to trial, they might not have sought the death penalty. Or, if we went to trial, we would have been able to tell the jury that Mr. Moreno Ramos



suffered from a disability that was beyond his control. This could have made the difference between life and death.

15. I have also recently learned that experts hired by Mexico have conducted a complete evaluation of Mr. Moreno Ramos' background and mental health. I understand that they could have provided expert testimony to counter the state's argument that Mr. Moreno Ramos would be dangerous in the future. This would have been enormously important and I believe this could have changed the outcome of the case.

16. I have also recently learned that experts hired by Mexico have found extensive evidence that Mr. Moreno Ramos suffered from severe physical and emotional child abuse and that there was a long, multi-generational, history of child abuse in his family. They have also collected data concerning the terrible poverty of Mr. Moreno Ramos' family, the disruptions to his development caused by family discord, and the psychological stresses of immigrating to a new country under these conditions. All of this would have been helpful to present to the jury.

17. If we had had these experts available to us at trial, we would have been able to present to the jury an understanding of how Mr. Moreno Ramos became the person they had found guilty of such a horrible crime so that even if they found he was a continuing threat to society, they would have had some compelling and coherent reasons to spare Mr. Moreno Ramos' life. This could have made the difference between life and death. We only needed to convince one juror. As it was, however, with the resources and information we had available to us, there was nothing we could present to the jury on either future dangerous or mitigation.

I have read the seventeen paragraphs above and I hereby swear under the pain and penalty of perjury that the forgoing is true and correct to the best of my knowledge and recollection.

FURTHER AFFIANT SAYETH NOT.

SIGNED: ______________________
Jack D. Hunter, II

DANALYNN [illegible]

[illegible] before me this 20 day of September, 2004.

____
Notary Public

My comm expires 11/05/05.

COUNTY AUDITOR'S FORM SFA-CA-025
HIDALGO COUNTY, TEXAS (REV. 11/87)

ATTORNEY FEES EXPENSE CLAIM

UNDER ARTICLE 26.05, CODE OF CRIMINAL PROCEDURE AS AMENDED

INSTRUCTIONS

1. SHOW ONLY ONE DEFENDANT AND TYPE OF CASE PER CLAIM.
2. BEFORE PAYMENT CAN BE AUTHORIZED, EACH ITEM MUST BE COMPLETED LEGIBLY IN INK.
3. FOR INVESTIGATIONS, PAID BILLS MUST BE SUBMITTED BY THE ATTORNEY FOR EXPENSES CLAIMED.
4. FORWARD COMPLETED CLAIM TO THE PRESIDING JUDGE FOR APPROVAL.
5. TIME CHARGES SHOULD BE ROUNDED TO THE NEAREST QUARTER (¼) HOUR.

COURT NUMBER: 93rd

COURT APPEARANCE INFORMATION

DEFENDANT: Robert Moreno Ramos

CASE NUMBERS: CR-1430-92-B

Interim statement thru Jan. 22, 1993

TYPE OF CASE	HOURLY RATE	NUMBER OF COURT HOURS	AMOUNT
OUT OF COURT HOURLY RATE *(Show detail of hours)*	$40	112.4	$ 4496.00
IN COURT HOURLY RATE *(Show detail of hours)*	70	68.5	4795.00
INVESTIGATION/EXPERT TESTIMONY *(with prior court approval attached)*			
APPEALS AND WRITS - *OUT OF COURT*	40		
- *IN COURT*	70		
* **NOTE:** Total fee not to exceed $500.00 without prior court approval. Attach approval order.	TOTAL	TOTAL	$ 9291.00

DATES, TIME, AND TYPE OF WORK IN AND OUT OF COURT.

DATE	TYPE OF WORK	IN COURT HOURS	OUT OF COURT HOURS
	See attached sheet		
	Total Hours In & Out of Court		

If additional space is needed, use continuation sheet.

PERSONAL INFORMATION

SOCIAL SECURITY NUMBER	TELEPHONE NUMBER	BAR CARD NUMBER
309-76-1784	(210) 423-4672	10317700

MAILING ADDRESS (Number) (Street) (Suite) (City) (State) (Zip Code)

1801 Swan Lane Harlingen Texas 78550

CERTIFICATION

I, Jack D. Hunter, II (Please Print or Type), Attorney at Law, swear or affirm to the Court and to the County Auditor, that the information contained above is true and correct, and payment would not be contrary to the fee schedule adopted by the Board of Judges pursuant to Article 26.05 Code of Criminal Procedure effective September 1, 1987. I further swear or affirm that I have not received nor will I receive any other money or anything else of value for representing the accused, and I further affirm or swear that I have not submitted duplicate time charges for the same hours charged in any other case.

Attorney at Law (Signatu

THE 9th DAY OF Jan A.D., 19 93

Approved: Fernando Ramos
Presiding Judge (Signature)

93rd
COURT NUMBER

FOR USE OF AUDITOR'S OFFICE ONLY

Approved: _____ County Auditor Approved: _____ County Jud

Account No. 010-412.300.43

State of Texas)
) ss.
County of Hidalgo)

AFFIDAVIT OF HUGO ALBERTO GARZA RAMÍREZ

I swear that the following is true and correct:

1. I am a consular official in the Mexican Consulate in McAllen, Texas. The Consulate of Mexico in McAllen is responsible for the welfare of Mexican nationals living in McAllen and the surrounding communities.

2. I have worked for the Mexican Consulate in McAllen since 1987. In mid-February, 1993, I was assigned to the Protection Department. Among other things, the Protection Department is responsible for monitoring the cases of Mexican nationals detained on criminal charges. One of the primary duties of consular officials in the Protection Department is to protect the rights of Mexican nationals who find themselves in trouble with the law in the McAllen area.

3. I remember the case of Mr. Moreno Ramos very well, because it was one of the first cases I handled as a consular protection officer.

4. I have been asked by Roberto Moreno Ramos' current lawyers to describe the role the consulate would have played in Mr. Moreno Ramos' capital case, had the Mexican Government been promptly notified that he was being detained and held to answer capital charges.

5. To answer this question, it is important to emphasize that the plight of Mexicans charged with capital crimes in the United States is a matter of grave consular importance. While Mexico seeks to protect the rights of all its nationals within the United States, those who face the death penalty are uniquely in need of our assistance. The Mexican Government recognizes and embraces its responsibility to assist these nationals. That was our position in 1992-1993, at the time of Mr. Moreno Ramos' arrest and trial on capital murder charges, and it remains Mexico's position today.

6. Mr. Moreno Ramos was reportedly arrested on March 30, 1992. Based on my own clear recollection of this case, and based on my review of our consular files, I can confirm that the consulate received no information from any law enforcement official about Mr. Moreno Ramos' detention.

7. We at the Mexican consulate in McAllen first learned of Mr. Moreno Ramos' detention in February 1993, through media reports surrounding his trial on

capital murder charges. Upon reading these reports, we immediately tried to discover whether Mr. Moreno Ramos was indeed a Mexican national, and made arrangements to visit him in the jail. Our files reveal that the first consular contact with Mr. Moreno Ramos was on February 12, 1993, when he was interviewed by consular officer Rogelio García Garza.

8. Much to our dismay, we learned that Mr. Moreno Ramos' trial had effectively begun. Lawyers had been appointed many months earlier, and the prosecutors had already decided to seek the death penalty. Jury selection was underway (in fact, jury selection had begun one month earlier), and defense counsel was busy interviewing the hundreds of jurors that had been called in the case.

9. Prior to reading the media reports, the consulate had received no notification of Mr. Moreno Ramos' detention. Due to the failure of state authorities to inform us of Mr. Moreno Ramos' detention, we were unable to provide assistance to his defense counsel at the critical pre-trial stage.

10. I was assigned to the Protection Department shortly after the consulate first learned of Mr. Moreno Ramos' case. I went to the library to obtain additional press reports about the case, so that I could learn more about the facts. I also attended his trial every day, and spoke to his defense lawyers on several occasions. By that time it was too late to help in the investigation of Mr. Moreno Ramos' background. Our role was mostly limited to attending the trial.

11. If the Mexican consulate in McAllen had been promptly informed of Mr. Moreno Ramos' detention, we would have immediately notified the Mexican Foreign Ministry of the fact that he was facing the death penalty. We would have also, in accordance with the policies of the Mexican Government at that time, offered substantial assistance to the defense to help Mr. Moreno Ramos avoid the imposition of the death penalty.

12. First, had the consulate known of Mr. Moreno Ramos' detention at the time of his initial arrest, we would have exercised our rights under the Vienna Convention on Consular Relations by visiting Mr. Moreno Ramos in the jail as soon as possible. We would have explained the legal process to him. It should be noted that, although Mr. Moreno Ramos had resided in the United States for quite some time, it appears he was never before arrested, and therefore had never been exposed to the American criminal justice system.

13. Second, we certainly would have advised Mr. Moreno Ramos to speak with an attorney prior to giving any statement or information to law enforcement officials. I understand that Mr. Moreno Ramos was interrogated over a period of days after having been detained for an outstanding warrant on traffic violations. Had the consulate been aware of this situation, we would have explained that he had a right to an attorney who would represent him at no

cost, and that this attorney had a right to be present at all times while the police were questioning him.

14. Consular officials would have continued to visit Mr. Moreno Ramos on a regular basis throughout his detention and to offer assistance wherever possible. We would have maintained contact with his family, as well, to ensure they understood the nature of the proceedings.

15. One of the duties of a consular officer is to monitor legal counsel's activities on behalf of a detained national. In 1992-93, the Mexican consulate in McAllen would frequently consult with local attorneys capable of advising us in complex criminal cases involving Mexican nationals. Also during this time, there were members of the Mexican foreign service who had been trained in U.S. law schools. The consulate could have sought the advice of these experts, had we been notified of Mr. Moreno Ramos' prosecution. These attorneys would have been able to advise McAllen consular officials regarding the standards of representation in capital cases, and could have reviewed the case file and met with Mr. Moreno Ramos' counsel.

16. If the consulate had been involved in Mr. Moreno Ramos' case prior to trial, and we saw that his lawyers were not prepared for trial, or lacked the necessary funding or experience to properly defend him, we would have notified the Foreign Ministry and acted to correct the situation.

17. The consulate could also have provided funds to Mr. Moreno Ramos' lawyers so that they could retain necessary investigators, mitigation specialists, and/or experts. Moreover, we would have been willing to assist Mr. Moreno Ramos' counsel in gathering records, arranging the transport of Mexican witnesses to the trial, and facilitating contact with Spanish-speaking witnesses.

18. In addition to monitoring the quality of Mr. Moreno Ramos' defense, the consulate would have been prepared to intercede with local prosecutors in an effort to persuade them not to seek the death penalty in his case, and to explain to Mr. Moreno Ramos the potential benefits of entering into a plea bargain. We often find that Mexican nationals who are detained on criminal charges do not comprehend the role of plea bargaining in the United States criminal justice system, since the practice is non-existent in Mexico.

19. To summarize, the Mexican consulate in McAllen would have played as active a role as necessary to help ensure Mr. Moreno Ramos avoided the death penalty. Among other things, we would have:

    a. arranged for and assisted counsel with investigations and record-gathering in Mexico;

b. assisted in raising legal issues surrounding the Vienna Convention, if such issues arose;

c. assisted counsel with funding, if he was not able to secure the funds from American courts;

d. assisted counsel in locating witnesses regarding issues of importance to Mr. Moreno Ramos, whether at the guilt or punishment phases;

e. provided affidavits and documentary evidence from Mexico;

f. assisted as needed at all court proceedings, including offering testimony about consular practices or the Vienna Convention;

g. assisted in plea negotiations.

20. Unfortunately, by the time we heard about the case and discovered that Mr. Moreno Ramos was indeed a Mexican national, we had no time to establish rapport with Mr. Moreno Ramos, let alone assist with an investigation of his life in Mexico. We were struggling to learn about the basic facts of the case at the time when trial was beginning, and were effectively limited to acting as observers at trial.

21. If the consulate had been notified of Mr. Moreno Ramos' detention in a timely manner, we would have done everything in our power to assist in his defense and persuade the prosecution not to seek the death penalty in order to maximize the chance that Mr. Moreno Ramos could avoid the imposition of a death sentence.

FURTHER AFFIANT SAYETH NOT.

September 9, 2004
Date

Hugo Alberto Garza Ramírez

CAPITAL SENTENCING STRATEGY:
A Defense Primer

JEFFREY J. POKORAK
St, Mary's University School Of Law
1 Camino Santa Maria
San Antonio, Texas 78228

210/436-3779 -- Phone
210/436-1119 -- Fax

20TH ANNUAL ADVANCED CRIMINAL LAW COURSE

JULY 25-28, 1994

DALLAS, TEXAS

BB

ACKNOWLEDGEMENTS

These materials have been assembled from those currently being prepared and distributed by the Texas Appellate Practice and Educational Resource Center. Therefore, these materials may not be reproduced under any circumstances without express permission of the Texas Resource Center and the author.

Two attorneys at the Center are currently providing additional materials and strategy assistance to trial attorneys involved in capital litigation. These attorneys are:

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The Texas Resource Center
3223 Smith #215
Houston, Texas 77006

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713/522-2733 -- Fax

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INTRODUCTION

The purpose of these materials is to give attorneys representing a capital defendant in Texas some initial tools for preparing the punishment phase of the trial.

As with the guilt/innocence phase of the capital case, the defense attorney must, based on all reasonable inferences, establish a rational theory of defense at punishment. As any attorney now appointed to a capital case should know, this does not mean waiting until the moment the jury returns a verdict of guilty to capital murder to decide what to do. Simply put, lone testimony from your client's mother that she loves her son is not sufficient -- legally or morally -- to secure a life sentence. After the Supreme Court's decision in Penry v. Lynaugh, ___ U.S. ___ (1989), every attorney in Texas is on notice that even minimally adequate representation of someone facing a death sentence includes the investigation, development, and presentation of "mitigating" evidence. What this means in Texas -- both to the Texas Court of Criminal Appeals and ultimately to the United States Supreme Court -- is still up for debate. And debate for defense counsel translates into error on appeal if the outstanding issues are adequately preserved and argued.

What is not really up for debate, however, is the need to fully prepare and carefully think through a punishment presentation that convincingly explains to the jury why your client should be sentenced to life, rather than to death. That said, your goal in most cases will not be to prepare and present this brilliant strategy at the punishment phase of a capital trial. Rather, the primary strategy in almost every capital case currently brought in Texas ought to be a pre-trial resolution of the case that keeps your client alive. The full preparation of a sound punishment strategy only enhances your chances of a good plea agreement. First, a well prepared defense -- at both stages -- increases the defendant's bargaining position by suggesting the real possibility of a punishment phase loss to the prosecution. Second, the Trial Court -- ultimately meaning the county in which your case is being tried -- should be forced to expend the serious money necessary to ensure that your client receives a minimally competent defense. As the costs mount in your pursuit of a fair trial, the chances for a favorable resolution short of trial increase. Finally, if you are forced to go to trial and then to a capital punishment phase, if you are fully prepared to present a coherent defense punishment case, you will be ready -- both factually and legally -- to fight to win.

To get to this winning point in the preparation of a life-saving punishment case, as with the case in chief, requires intense fact development, a keen familiarity with the law, and an ability to put the two together in novel ways that preserve error years into the future. This last point should not be minimized. Death penalty cases are unique in that the litigation of the case often stretches a decade beyond trial. The ability to recognize holes in the law and/or to anticipate legal changes is often the difference between an execution and a commutation in ten years. Therefore, just as your punishment theory is as much a pre-trial strategy as it is a punishment phase presentation preparation, it is also litigation for appellate courts -- state and federal -- who will consider the case long after the jury has rendered a sentence.

I.

OVERVIEW OF THE TEXAS DEATH PENALTY STATUTES

A. The Original Statute: Art. 37.071

In 1973, Texas enacted a unique statute that mandated the death penalty if 12 jurors unanimously agreed that the state proved two or three special issues beyond a reasonable doubt and a sentence of life in prison if ten or more jurors found that one or more of those special issues was not proved beyond a reasonable doubt.[1] The special issues asked:

> 1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.[2]
>
> 2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.[3]
>
> 3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to provocation, if any, by the deceased.[4]

Any "evidence that the court deem(ed) relevant to sentence" could be presented in the punishment phase to prove these special issues, other than "evidence secured in violation of the Constitution of the United States or of the State of Texas."[5] The state could not waive the death penalty[6] and the trial judge could not sentence the defendant to life in prison for capital murder pursuant to a negotiated plea agreement.[7]

Before Penry v. Lynaugh[8] was decided in 1989, the defendant was not entitled to jury instructions about the definition of any of the terms in the special issues[9] or instructions about mitigating evidence.[10] The

[1]See Art. 37.071(b)(c)(e), V.A.C.C.P. (Vernon 1974).

[2]See Art. 37.071(b)(1), V.A.C.C.P. (Vernon 1974).

[3]See Art. 37.071(b)(2), V.A.C.C.P. (Vernon 1974).

[4]Art. 37.071(b)(3), V.A.C.C.P. (Vernon 1974).

[5]See Art. 37.071(a), V.A.C.C.P. (Vernon 1974).

[6]Sorola v. State, 693 S.W.2d 417 (Tex. Crim. App. 1985); Ex parte Bailey, 626 S.W.2d 741 (Tex. Crim. App. 1981).

[7]Ex parte Bailey, 626 S.W.2d 606 (Tex. Crim. App. 1981). However, the statute permitted a plea to the lesser included offense of murder with an affirmative finding of a deadly weapon in exchange for a sentence of life in prison, which meant that the defendant would be eligible for parole in 20 years, as he would if he received a life sentence for capital murder. Ex parte McClelland, 588 S.W.2d 957 (Tex. Crim. App. 1979).

[8]492 U.S. 302 (1989).

[9]King v. State, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977).

law of parties did not apply to the special issues,[11] but the failure to instruct the jury about this in the case of a nontriggerman was not reversible error.[12] The statute gave both sides the right to make jury arguments "for and against the sentence of death,"[13] but this was construed to mean arguments for and against affirmative answers to the special issues.[14]

B. Penry and Art. 37.071: A Square Peg in a Round Hole

Penry v. Lynaugh forced the Texas Court of Criminal Appeals to put a square constitutional peg into the round hole of the special issues. "The discretion to execute or merely incarcerate one convicted of capital murder was purposefully taken from judge and jury alike by the Legislature" when Art. 37.071 was enacted and the "only discretion left to jurors (was) in the mitigating weight which they may assign to relevant evidence bearing upon the special issues."[15] When Penry held that the special issues violated the eighth amendment as applied because they did not give the jury a "vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence,"[16] the Court of Criminal Appeals complained that

> (t)he Supreme Court failed to understand that under Texas law the jury does not 'impose the death penalty.'..As such the high Court failed to inform this Court how the jury is to give 'mitigating effect' to mitigating evidence that is not capable of being considered (by honestly answering) the special issues.[17]

There were only three ways to solve this problem: instruct the jury to render a general verdict of death or life in prison; ask the jury to answer an additional nonstatutory special issue about the appropriate punishment in light of the mitigating evidence[18] or give the jurors an instruction that allowed them to falsely answer the special issues "no." Art. 37.071 did not expressly forbid or permit any of these vehicles for complying with Penry, but Art. 37.07(a), V.A.C.C.P., prohibits the submission of nonstatutory special issues or

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[10]Cordova v. State, 733 S.W.2d 175, 190 (Tex. Crim. App. 1987).

[11]Green v. State, 682 S.W.2d 271, 287 n.4 (Tex. Crim. App. 1984).

[12]Cuevas v. State, 742 S.W.2d 331, 352 (Tex. Crim. App. 1987).

[13]See Art. 37.071(a), V.A.C.C.P. (Vernon 1974).

[14]Rogers v. State, 774 S.W.2d 247, 256 (Tex. Crim. App. 1989).

[15]Hernandez v. State, 757 S.W.2d 744, 751 (Tex. Crim. App. 1988) (plurality opinion), overruled on other grounds, Fuller v. State, 829 S.W.2d 191, 200 (Tex. Crim. App. 1992).

[16]492 U.S. at 326.

[17]Trevino v. State, 815 S.W.2d 592, 621, n.11 (Tex. Crim. App. 1991) (emphasis added).

[18]In Oregon, which had a death penalty statute that was identical to the original Texas law, the Oregon Supreme Court held that a trial judge could comply with Penry by instructing the jury to answer a special issue about the appropriate punishment that was neither required, permitted or forbidden by any Oregon law. State v. Wagner, 786 P.2d 93 (Ore. 1990), on remand from, 492 U.S. 914 (1989).

a general verdict in a capital sentencing trial.[19] Nevertheless, the Texas Court of Criminal Appeals held that in cases where Penry requires a vehicle for the jury to give effect to mitigating evidence with relevance beyond the scope of the statutory issues, the trial court can submit a nonstatutory special issue[20] or give a "nullification" instruction that allows the jurors to impose a life sentence by lying when they answer the statutory special issues of deliberateness, future dangerousness and provocation.[21]

A panel of the Fifth Circuit has said in dicta that a nullification instruction does not satisfy Penry because

> the jury would certainly be confused by instructions that seem to be allowing a 'no' answer even when the question itself called for a 'yes' answer. And if the latter should be given, modifying the plain meaning of the question, and if the jury answers 'yes,' how are we to know that the jury actually considered and rejected all evidence mitigating against the death penalty rather than gave its honest answer to the question asked?[22]

The Court of Criminal Appeals has repeatedly approved of nullification charges in spite of this clear warning from the federal court that will review the cases where they were given.[23]

C. The 1991 Amendment to Art. 37.071

The Texas Legislature solved this problem by adding a Penry special issue to the statute and eliminating

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[19]See Art. 37.07(1)(a), (2)(b), V.A.C.C.P.; McPherson v. State, 851 S.W.2d 846, 848-50 (Tex. Crim. App. 1992); see also Harris v. State, 790 S.W.2d 568, 579 (Tex. Crim. App . 1989) (Art. 37.07 prohibits nonstatutory special issues in guilt stage); Stewart v. State, 686 S.W.2d 118, 124 (Tex. Crim. App. 1984) (same).

[20]McPherson v. State, 851 S.W.2d at 850. The Court of Criminal Appeals reasoned that a Texas trial judge can submit a special issue about the appropriate punishment in light of the mitigating evidence that is not authorized by any Texas law, expressly forbidden by Art. 37.01(1)(a) (2)(b), V.A.C.C.P., and contrary to the intent of the legislature that enacted Art. 37.071(b)(e), V.A.C.C.P. (Vernon 1974), because Penry was an eighth amendment case and the eighth amendment "takes precedence" over Texas statutes under the supremacy clause of the federal constitution. McPherson v. State, 851 S.W.2d at 850. This analysis was plainly wrong. Penry did not tell the Texas Court of Criminal Appeals how to construe or apply Texas law because the Supreme Court did not have the power to do so. The eighth amendment only prohibits certain standards for imposing the death penalty. It is up to the state legislature to create standards that comply with the eighth amendment and up to the state courts to decide what the legislature's enactments mean.

[21]McPherson v. State, 851 S.W.2d at 850; see, e.g., Fuller v. State, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992).

[22]Graham v. Collins, 896 F.2d 893, 896-97 n.3 (5th Cir. 1990), rev'd on other grounds, 950 F.2d 1009 (5th Cir. 1992) (en banc), aff'd, 506 U.S. ___, 113 S. Ct. 892 (1993).

[23]See, e.g., Coble v. State, ___ S.W.2d ___, No.71,084, slip op. at 22 & n.18 (Tex. Crim. App. Nov. 3, 1993) ("a jury nullification charge is sufficient to meet Penry requirements"); San Miguel v. State, ___ S.W.2d ___, No.71,334 slip op. at 4 (Tex. Crim. App. May 26, 1993); Hittle v. State, ___ S.W.2d ___, No.71,138, slip op. at 13 (Tex. Crim. App. 1993) (unpublished); Smith v. State, ___ S.W.2d ___, No. 71,099, slip op. at 2 & nn. 2-3 (Tex. Crim. App. Feb. 24, 1993); Blue v. State, ___ S.W.2d ___, No. 70,912, slip op. (Tex. Crim. App. 1992) (unpublished).

the special issues of deliberateness and provocation in cases where the defendant was accused of committing a capital murder on or after September 1, 1991. The state can waive the death penalty unilaterally or in exchange for a guilty plea to capital murder and allow the court to sentence the defendant to life in prison.[24] The defendant must serve 35 years of a life sentence for capital murder to become eligible for parole.

Under the 1991 law, both sides can introduce "any evidence that the court deems relevant to sentence, including evidence of the defendant's background, character or the circumstances of the offense that mitigates against the imposition of the death penalty," with the exception of unconstitutionally obtained evidence,[25] and the jury must always decide whether the state proved one or two special issues beyond a reasonable doubt:

> 1. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.
>
> 2. in cases where the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.[26]

The court must give the jurors two instructions about how to answer these special issues:

> ¶members of the jury need not agree on what particular evidence supports a negative answer to these issues.[27]
>
> ¶consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offenses that militates against the imposition of the death penalty.[28]

If the jury answers either or both of the special issues "no," the court must sentence the defendant to life in prison.[29] Twelve votes are required for an affirmative answer to an issue and 10 or more votes are required for a negative response.[30]

The jurors must answer the Penry special issue only if they answered the previous special issue or

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[24]See Art. 37.071(1), V.A.C.C.P. (Vernon Pocket Part 1993).

[25]See Art. 37.071(2)(a), V.A.C.C.P. (Vernon Pocket Part 1993).

[26]See Art. 37.071(2)(b)(1) (2)(c), V.A.C.C.P. (Vernon Pocket Part 1993). This special issue will hereafter be referred to as the "anti-parties" issue.

[27]See Art. 37.071(2)(d) (3), V.A.C.C.P. (Vernon Pocket Part 1993); see also Mills v. Maryland, 486 U.S. 367 (1988) (eighth amendment forbids jury instructions that require unanimity about the existence of mitigating circumstances).

[28]See Art. 37.071(2)(d)(1), V.A.C.C.P. (Vernon Pocket Part 1993).

[29]See Art. 37.071(2)(g), V.A.C.C.P. (Vernon Pocket Part 1993).

[30]See Art. 37.071(3)(d), V.A.C.C.P. (Vernon Pocket Part 1993).

issues "yes." The Penry issue asks

> whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[31]

The law does not allocate the burden of proof or persuasion on the Penry special issue, but the court must give the jurors two instructions about how to answer it:

> ¶you need not agree on what particular evidence supports an affirmative response.[32]
>
> ¶You shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.[33]

Twelve votes are necessary for a negative answer to the Penry special issue that results in a death sentence and 10 or more votes are required for an affirmative response that results in a life sentence.[34] The Court of Criminal Appeals must reform a death sentence to a sentence of life in prison "if the court finds that there is insufficient evidence to support" a negative answer."[35]

D. The 1993 Law: Art. 37.0711

In 1993, the legislature enacted Art. 37.0711, V.A.C.C.P., to provide a statutory vehicle for complying with Penry v. Lynaugh in trials that were not covered by the 1991 amendment to Art. 37.071. Art. 37.0711 applies retroactively on or after August 30, 1993, to all trials for capital murders that were allegedly committed before September 1, 1991.[36] The statute allows the state to waive the death penalty unilaterally or as part of a plea bargain.[37] If a defendant is sentenced to life in prison, he must serve 20 years of his term before he is eligible for parole.

Under Art. 37.0711, the jury must always answer the original Texas special issues:

> 1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased would result.

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[31]See Art. 37.071(2)(e), V.A.C.C.P (Vernon Pocket Part 1993).

[32]See Art. 37.071(2)(f) (3), V.A.C.C.P. (Vernon Pocket Part 1993).

[33]See Art. 37.071(2)(f) (4), V.A.C.C.P. (Vernon Pocket Part 1993).

[34]Art. 37.071(3)(f)(2), V.A.C.C.P.

[35]See Art. 44.251(a), V.A.C.C.P.

[36]See Art. 37.0711(1), V.A.C.C.P.

[37]See Art. 37.0711(2), V.A.C.C.P.

> 2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.
>
> 3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to provocation, if any, by the deceased.[38]

If the jury answers one or more of those special issues "no," the court must impose a sentence of life in prison.[39] However, if the 12 jurors answer the original special issues "yes," they must answer the Penry special issue, regardless of what mitigating evidence was introduced:

> 4. whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[40]

The court must give the jury the following instruction about how to answer the Penry special issue:

> you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.[41]

The law does not allocate the burden of proof or persuasion on the Penry special issue, but the Court of Criminal Appeals must reform a death sentence to a term of life in prison if the evidence was insufficient to support a negative answer.[42]

When the defendant was convicted of the capital offense of murdering two or more people during the same criminal transaction or pursuant to the same scheme or course of action,[43] the jury's answers to provocation and Penry special issues must be based only on "the conduct of the deceased individual first named in the indictment."[44] The Court of Criminal Appeals held that an identical limitation on the provocation special issue in Art. 37.071[45] violates Penry as applied in cases where there was evidence that more than one of the

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[38]See Art. 37.0711(3)(b), V.A.C.C.P. The state still has the burden of proving these special issues beyond a reasonable doubt, 12 votes are still required for an affirmative answer to an issue and 10 votes are still required for a negative response. See Art. 37.0711(3)(c)(d), V.A.C.C.P.

[39]See Art. 37.0711(3)(g), V.A.C.C.P.

[40]See Art. 37.0711(3)(e), V.A.C.C.P.

[41]See Art. 37.071(2)(f)(4), V.A.C.C.P. (Vernon Pocket Part 1993).

[42]See Art. 44.251(a), V.A.C.C.P. (Vernon Pocket Part 1994).

[43]See V.T.C.A, Penal Code § 19.03 (a)(6).

[44]See Art. 37.0711(3)(h), V.A.C.C.P.

[45]See Art. 37.071(f), V.A.C.C.P. (Vernon 1974).

victims provoked the defendant.[46] However, a multiple murder defendant greatly benefits from this instruction in a trial that is governed by Art. 37.0711 because it requires the jurors to disregard the fact that he murdered more than one person when they decide whether he deserves the death penalty by answering the Penry special issue.

II.

THE FUTURE DANGEROUSNESS SPECIAL ISSUE

A. Introduction

In every Texas capital sentencing trial, the state must prove beyond a reasonable doubt as a condition precedent to obtaining the death penalty:

> Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.[47]

Justice Truman Roberts described the future dangerousness special issue as "truly execrable" and "absurd."[48] The legislator who drafted the law said that it was intended to "determine whether the defendant "was just a flat mean person."[49] Justice Roberts believed that "the statute would have been much better if that language had been used" instead of requiring jurors to make speculative judgments about what a defendant might do in the future.[50] Under the current formulation of the Texas punishment structure, in most cases this is the death qualifying aggravating factor. That is, the state need only prove this special issue and then your client must meet a burden that convinces the jury that, in spite of this concern, they nonetheless should receive a sentence of life rather than death. This formulation has been the critical prosecution vehicle for heaping aggravating and prejudicial information into the minds of the jurors who consider your client's ultimate sentence. Because of this, every defense attorney must know the "future dangerousness" inquiry cold, attack it mercilessly, and prepare to defend against it on all fronts.

B. The Meaning of the Term "Probability"

The term "probability" does not have a statutory definition. The Texas Court of Criminal Appeals has held that a defendant is not entitled to one in the court's charge because the jurors "are presumed to know and apply" a single commonly understood meaning of any word in the Texas Code of Criminal Procedure that was

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[46]First v. State, 846 S.W.2d 836 (Tex. Crim. App. 1992).

[47]See Art. 37.071(b)(1), V.A.C.C.P. (Vernon 1974); Art. 37.071(2)(b)(1), V.A.C.C.P. (Vernon Pocket Part 1993); Art. 37.0711(3)(b)(2), V.A.C.C.P. (Vernon Pocket Part 1994). Decisions that construed and applied the future dangerousness special issue under the 1973 law are controlling in cases that were tried under the 1991 and 1993 amendments because the language is identical and the Legislature intended to give it the same meaning.

[48]Horne v. State, 607 S.W.2d 556, 565 (Tex. Crim. App. 1980) (Roberts, J., concurring).

[49]Horne v. State, 607 S.W.2d at 565 n.9 (Roberts, J., concurring).

[50]Horne v. State, 607 S.W.2d at 565 n.9 (Roberts, J., concurring).

not defined by the legislature.[51] The Court of Criminal Appeals and the Fifth Circuit have held that the term "probability" does not violate the eighth amendment vagueness and overbreadth doctrines as applied without a definition.[52]

When the Court of Criminal Appeals reviews the sufficiency of the evidence of future dangerousness, it defines the term "probability" to mean "more than a bare chance."[53] This means "something more than a possibility"[54] and something less than "beyond peradventure."[55] In one case, the Court of Criminal Appeals indicated that a 10% chance might not be sufficient to establish a probability.[56] In another case, the court said that the future dangerousness special issue "required the state to prove that (the defendant) would, more likely than not, commit violent criminal acts in the future so as to constitute a continuing threat to society."[57] This sounds like the preponderance of the evidence standard, but the word probability has never been given such a precise definition in any other case. In fact, the Court of Criminal Appeals has described the jury's task in answering the future dangerousness special issue as a "necessarily speculative enterprise."[58] This is the most accurate description of the issue. A scientific study established that 107 Texas capital murderers whose sentences were reduced to life in prison after a jury found that they would pose a continuing threat to society committed fewer violent crimes in prison than a control group of 107 capital murderers who received life sentences because a jury found that they would not be dangerous.[59]

C. Probability of Future Violence and the State's Burden of Proving it Exists Beyond a Reasonable Doubt

The use of the word "probability" does not reduce the state's burden of proving the future

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[51]Cuevas v. State, 742 S.W.2d 331, 346 (Tex. Crim. App. 1987); accord Earhart v. State, 823 S.W.2d 607, 632 (Tex. Crim. App. 1991); Caldwell v. State, 818 S.W.2d 790, 797 (Tex. Crim. App. 1991).

[52]Lewis v. State, 815 S.W.2d 560, 562-63 (Tex. Crim. App. 1991); Barnard v. Collins, 958 F.2d 634 (5th Cir. 1992); see also Jurek v. Texas, 428 U.S. 262, 274-75 (1976) (future dangerousness special issue not void for vagueness on its face).

[53]Ellason v. State, 815 S.W.2d 656, 659 (Tex. Crim. App. 1991).

[54]Hughes v. State, ___ S.W.2d ___, No. 70,901, slip op. at 8 (Tex. Crim. App. Dec. 9, 1992) (on original submission), rev'd on other grounds, ___ S.W.2d ___, (Tex. Crim. App. Jun. 23, 1993) (on rehearing). This may violate the Lockett rule. (E)vidence that the defendant would not pose a danger if spared but incarcerated must be considered" as a mitigating circumstance, Skipper v. South Carolina, 476 U.S. 1, 5 (1986), but the jury can certainly answer the future dangerousness issue "yes" if the defendant proves by a 51% preponderance of the evidence that he will never commit another violent crime.

[55]Burns v. State, 761 S.W.2d 353, 356 (Tex. Crim. App. 1988) (plurality opinion).

[56]In Hughes v. State, a juror was subject to a challenge for cause because he would have answered the future dangerousness special issue yes if there was a "10 percent" possibility of future violence. ___ S.W.2d at ___, No.70,901, slip op. at 6 (on original submission).

[57]Muniz v. State, 851 S.W.2d 238, 250 (Tex. Crim. App. 1993).

[58]Burns v. State, 761 S.W.2d at 358.

[59]Marquart, *Gazing Into the Crystal Ball: Can Jurors Accurately predict Dangerousness in Capital Cases?* 23 Law & Soc. 449 (1989).

dangerousness special issue to anything less than a reasonable doubt.[60] A probability is a lower burden of proof than beyond a reasonable doubt,[61] but the word probability is part of a question of fact about the defendant's future behavior rather than modification of the state burden of proof.[62] The burden of proof beyond a reasonable doubt requires a separate judgment about the credibility and sufficiency of the evidence that was introduced to prove that fact. For example, if the only evidence of future dangerousness was the circumstances of the capital offense and a psychiatrist's opinion that the defendant will commit additional violent crimes, a rational juror might have a reasonable doubt about whether a probability of future violence exists because the capital crime alone was insufficient to prove it and the psychiatrist was not a credible witness.

D. Criminal Acts of Violence

The term "criminal acts of violence" in the future dangerousness special issue does not have a statutory definition.[63] It was borrowed from another statute that criminalizes possession of a firearm by a person who has been convicted of a felony "involving an act of violence or threatened violence to a person or property,"[64] but that statute does not define an act of violence either.[65]

The Court of Criminal Appeals has suggested that violent felon in possession of a weapon cases can be used as precedents to determine whether a criminal act is violent within the meaning of the future dangerousness special issue.[66] Those cases teach that some crimes are violent per se and other crimes may or may not be violent, depending on the facts and circumstances.[67] The test is the defendant's intent rather than the result of his conduct.[68] Criminal mischief is a violent crime per se because it requires the intent to damage

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[60]Sosa v. State, 769 S.W.2d 909, 917 (Tex. Crim. App. 1989).

[61]Compare Strickland v. Washington, 466 U.S. 668, 694 (1984) (a probability is a lower burden than a preponderance of the evidence) and Woolridge v. State, 827 S.W.2d 900, 903 (Tex. Crim. App. 1992) (beyond a reasonable doubt is a higher burden than a preponderance of the evidence).

[62] Horne v. State, 607 S.W.2d 556, 563 (Tex. Crim. App. 1980) (Roberts. J., concurring).

[63]The Court of Criminal Appeals has held that the defendant is not entitled to a jury instruction about the definition of "criminal acts of violence" because the legislature intended to give the term its commonly understood meaning and jurors are presumed to know and apply it. Boyd v. State, 811 S.W.2d 105, 113 (Tex. Crim. App. 1991); King v. State, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977). The Court of Criminal Appeals and the Fifth Circuit have also held that the term does not violate the eighth amendment void for vagueness or overbreadth doctrines without a definition. Goss v. State, 826 S.W.2d 162, 169 (Tex. Crim. App. 1992); Boyd v. State, 811 S.W.2d at 113; Thompson v. Lynaugh, 821 F.2d 1054 (5th Cir. 1987).

[64]See Cockrum v. State, 758 S.W.2d 577, 583 n.9 (Tex. Crim. App. 1988) (quoting V.T.C.A., Penal Code § 46.05).

[65]See Gardner v. State, 699 S.W.2d 831 (Tex. Crim. App. 1985).

[66]Cockrum v. State, 758 S.W.2d at 593. In theory, this means that a defendant is eligible for the death penalty in Texas if there is more than a bare chance that he will intentionally run over fences with a tractor and let the cows behind them escape because that is a criminal act of violence as a matter of law. See Drager v. State, 548 S.W.2d 890 (Tex. Crim. App. 1977).

[67]Ware v. State, 749 S.W.2d 852 (Tex. Crim. App. 1988).

[68]Hamilton v. State, 676 S.W.2d 120 (Tex. Crim. App. 1984).

or destroy property.[69]

Nonviolent offenses can be used to prove that the defendant will commit criminal acts of violence because the defendant's criminal behavior may escalate in the future.[70] Using marijuana is not a criminal act of violence,[71] but it is admissible to prove that the defendant will commit violent crimes.[72] In one case where the evidence of future dangerousness was held to be sufficient, the Court of Criminal Appeals found that it was of "extreme importance" that the defendant "made no effort to rehabilitate himself and no serious effort to secure steady employment" after he was convicted of possessing marijuana.[73] In another close sufficiency case, the defendant's abuse of drugs that were prescribed by a doctor to treat his back pain after he had surgery was considered to be a factor of some significance.[74]

E. Continuing Threat

The future dangerousness special issue requires something more than a probability that the defendant will commit criminal acts of violence: the state must also prove that those violent crimes would constitute a continuing threat to society. However, there is no statutory definition of the term "continuing threat"[75] and the Court of Criminal Appeals has never treated it as a separate fact that must be proved when it reviews the sufficiency of the evidence.

Jackson v. State[76] is the only Texas case that gave the term "continuing threat" a meaning that was distinct from criminal acts of violence. Jackson objected that the prosecutor misstated the law by telling a juror during voir dire that he had to answer the future dangerousness special issue "yes" if he believed that the defendant could be "rehabilitated over the next ten, twenty or thirty years," but would probably commit criminal acts of violence that would constitute a continuing threat to society during that period of time.[77] The Court of Criminal Appeals held that this statement was improper "because it limited a juror's discretion in evaluating what he or she considered to be a continuing threat to society."[78]

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[69]Brimberry v. State, 774 S.W.2d 773 (Tex. App.- 12 Dist. 1989).

[70]Cockrum v. State, 758 S.W.2d at 593.

[71]Cockrum v. State, 758 at 593.

[72]Willis v. State, 785 S.W.2d 378, 387 (Tex. Crim. App. 1990).

[73]Smith v. State, 540 S.W.2d 693, 696 (Tex. Crim. App. 1976); But see Horne v. State, 607 S.W.2d 556, 560 (1980) (unadjudicated past history of giving and selling marijuana was not probative of future dangerousness) (dicta supported by three of nine justices).

[74]Willis v. State, 785 S.W.2d at 387.

[75]The defendant is not entitled to an instructional definition because the Legislature intended to give the words their commonly understood meaning and jurors are presumed to know and apply it. Goss v. State, 826 S.W.2d 162, 169 (Tex. Crim. App. 1992).

[76]823 S.W.2d 18 (Tex. Crim. App. 1990).

[77]822 S.W.2d at 24.

[78]822 S.W.2d at 25.

In Johnson v. Texas,[79] the Supreme Court held that the term continuing threat is a vehicle for giving effect to mitigating evidence. Johnson found that the special issues did not preclude the jury from considering a defendant's youth as a mitigating circumstance in part because the

> crucial term employed in the second special issue--"continuing threat to society"--affords the jury room for independent judgment in reaching its decision. Indeed, we cannot forget that "a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates these answers in a manner similar to that employed by capital juries in 'pure balancing States."[80]

The Court of Criminal Appeals has never used this interpretation of the term "continuing threat to society." In fact, the Court of Criminal Appeals has held that the jury's "attention should be directed only to answering the special issues without regard to the sentence that will ultimately be imposed."[81]

F. Society and Parole

The word "society" does not have a statutory definition. The defendant is not entitled to a jury instruction that defines the term because there is a presumption that all undefined words in the Texas Code of Criminal Procedure have a commonly understood meaning that jurors know and apply.[82] The Texas Court of Criminal Appeals has held that the word 'society" is not unconstitutionally vague as applied without a definition,[83] but many jurors are confused about whether it refers to free society, prison society or society as a whole.[84] If a juror interprets the future dangerousness special issue as a question about whether the defendant is likely to commit violent crimes against members of free society after he is sentenced to life in 100 prison, he must consider the possibility of parole or pardon to answer it.[85] This interpretation is prejudicial to capital defendants who are very dangerous in the free world and not violent in the controlled environment of a prison.[86]

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[79]506 U.S. ___ , 113 S. Ct. 2658 (1993).

[80]506 U.S. at ___, 113 S. Ct. at 2670.

[81]Knox v. State, 744 S.W.2d 53, 64 (Tex. Crim. App. 1987).

[82]Caldwell v. State, 818 S.W.2d 790, 798 (Tex. Crim. App. 1991).

[83] Rougeau v. State, 738 S.W.2d 651, 660 (Tex. Crim. App. 1987); O'Bryan v. State, 591 S.W.2d 464, 475 (Tex. Crim. App. 1979).

[84]See, e.g., Felder v. State, 758 S.W.2d 760, 764 (Tex. Crim. App. 1988).

[85]See Felder v. State, 758 S.W.2d at 762-66.

[86]See Franklin v. Lynaugh, 487 U.S. 164, 186 (1988) (O'Connor and Blackmun, JJ., concurring) (future dangerousness special issue allowed jury to give mitigating effect to fact that defendant was the kind of person who could live in the "highly structured" prison environment without endangering others); Id. 487 U.S. at 189-90 (Brennan, Stevens and Marshall, JJ., dissenting) (future dangerousness special issue allowed jury to consider as mitigating "evidence (which) suggested that a sentence to prison, rather than to death, would adequately protect society from future acts of violence by petitioner); Lackey v. State, 816 S.W.2d 392, 407 n.3 (Tex. Crim. App. 1991) (jurors asked for a definition of 'society" during deliberations because they were uncertain about whether "prison life" was relevant to future dangerousness special issue); Felder v. State, 758 S.W.2d at 764 (prospective juror believed that future dangerousness special issue allowed him to consider that defendant

The Supreme Court believes that "the question of a defendant's likelihood of injuring others in prison is precisely the question posed by the second Texas Special Issue."[87] The Texas Court of Criminal Appeals has agreed with that statement in some cases and disagreed with it in others. For example, the Court of Criminal Appeals has said that:

> ¶"it is obvious to us that in deciding whether to answer the second special issue in the negative the jury would focus its attention on the 'society' that would exist for the defendant and that 'society' would be the 'society' that is within the Texas Department of Corrections."[88]
>
> ¶there is not "a single case which arguably supports (the) theory that a potential juror's view is supposed to be that a defendant sentenced to life in prison will serve the rest of his life in prison."[89]
>
> ¶the question is whether the defendant will pose a continuing threat to society "in or out of prison"[90]
>
> ¶society includes not only free citizens, but also inmates in the penitentiary.[91]

The meaning of the term "society" is further complicated by a similar debate about a standard jury instruction which states that "the mandatory punishment for capital murder is death or confinement in the penitentiary for life"[92] and "you are not to discuss among yourselves how long the accused would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Parole and the Governor and are no concern of yours."[93] The Fifth Circuit believes that this instruction "may aptly be characterized 'as stating that life means life,' "[94] but the Texas Court of Criminal Appeals has held that a juror must somehow put the "possibility of parole" or pardon "completely out of his mind" when he decides whether the defendant would pose a continuing threat to society[95] without presuming

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"may not be a threat to prison society, but if he's given a life sentence and in twenty years he's paroled back into the free society, at that time he will be a threat to the free society").

[87]Franklin v. Lynaugh, 467 U.S. at 179 n.9 (emphasis added).

[88]Rougeau v. State, 738 S.W.2d at 660. This quotation must be read in context to understand what it really means. In Rougeau, the defendant argued that it was improper for the prosecutor to tell prospective jurors that the term "society" includes prison society. 738 S.W.2d at 659. The Court of Criminal Appeals emphasized that the future dangerousness special issue focuses on prison society, but it was apparently only trying to say that society was not limited to the free world. See 738 S.W.2d at 659.

[89]Boyd v. State, 811 S.W.2d 105, 121 (Tex. Crim. App. 1991).

[90]Muniz v. State, 851 S.W.2d 238, 250 (Tex. Crim. App. 1993).

[91]Jones v. State, 843 S.W.2d 487, 495 (Tex. Crim. App. 1992).

[92]See, e.g., Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991) (emphasis added).

[93]See, e.g., King v. Lynaugh, 850 F.2d 1055, 1057 (5th Cir. 1988) (en banc).

[94]Knox v. Collins, 928 F.2d at 662 (quoting King v. Lynaugh, 850 F.2d at 1057).

[95]Felder v. State, 758 S.W.2d at 766.

"that a defendant sentenced to life will serve the rest of his life in prison."[96] It is impossible to perform that mental gymnastic. A juror cannot decide whether the defendant will pose a continuing threat to society in the future without considering where the defendant will be if he is not executed. If a juror does not presume that the defendant will remain in prison, he must acknowledge there is at least a possibility that the defendant will get out. This translates into considering the possibility of parole or pardon, unless there is some evidence that the defendant might escape from prison.

G. The Test for Legally Sufficient Evidence of Future Dangerousness

The Texas Court of Criminal Appeals has held in 11 cases that the evidence was legally insufficient to prove the future dangerousness special issue.[97] Although sufficiency cases are fact specific, the Court of Criminal Appeals treats each of these 11 cases as "a precedent to be carefully considered as a guideline in future cases."[98]

The Court of Criminal Appeals uses the federal due process test[99] to review the sufficiency of the evidence of future dangerousness: whether viewing all of the evidence[100] in the light most favorable to the prosecution, any rational jury could have found beyond a reasonable doubt that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.[101] If the evidence is found to be legally insufficient, the Court of Criminal Appeals must reform the defendant's sentence to life in prison.[102]

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[96]Boyd v. State, 811 S.W.2d at 121.

[97]See Ellason v. State, 815 S.W.2d 656 (Tex. Crim. App. 1991); Smith v. State, 779 S.W.2d 417 (Tex. Crim. App. 1989); Huffman v. State, 746 S.W.2d 212 (Tex. Crim. App. 1988); Marras v. State, 741 S.W.2d 395 (Tex. Crim. App. 1987); Beltran v. State, 738 S.W.2d 382 (Tex. Crim. App. 1987); Keeton v. State, 724 S.W.2d 58 (Tex. Crim. App. 1987); Roney v. State, 632 S.W.2d 598 (Tex. Crim. App. 1982); Garcia v. State, 626 S.W.2d 42 (Tex. Crim. App. 1981); Wallace v. State, 618 S.W.2d 67 (Tex. Crim. App. 1981); Brasfield v. State, 600 S.W.2d 288 (Tex. Crim. App. 1980); Warren v. State, 562 S.W.2d 474 (Tex. Crim. App. 1978). The Fifth Circuit has only found the evidence of future dangerousness to be insufficient in one case. See Vanderbilt v. Collins, 994 F.2d 189 (5th Cir. 1993) (dicta).

[98]Ellason v. State, 815 S.W.2d at 660.

[99]See Jackson v. Virginia, 443 U.S. 307 (1989).

[100]Legally inadmissible evidence must be considered along with the admissible evidence, even if the trial court erroneously overruled an objection to the inadmissible evidence. Lockhart v. Nelson, 488 U.S. 33 (1988). However, if the jurors were erroneously instructed not to consider admissible evidence when they answered the special issue it is not considered in reviewing the sufficiency of the evidence, unless the prosecution objected to the erroneous instruction. Marras v. State, 741 S.W.2d 395, 408 (Tex. Crim. App. 1987); But see Brown v. Collins, 937 F.2d 175 (Tex. Crim. App. 1991) (sufficiency of the evidence must be tested against the statute, regardless of whether the court's charge was correct).

[101]Ellason v. State, 815 S.W.2d at 659 (and cases cited therein).

[102] Brasfield v. State, 600 S.W.2d at 298. If there was a reversible error at the guilt phase and the evidence of future dangerousness is found to be legally insufficient on appeal, the Court of Criminal Appeals must order a new trial for capital murder and the double jeopardy clause bars the state from seeking the death penalty again. Id. (citing Burks v. United States, 437 U.S. 1 (1978)). If the defendant was convicted of the capital murder of one person and the state introduced evidence of the murder of a second person that he committed

The Court of Criminal Appeals considers a "nonexclusive" list of eight factors when it reviews the sufficiency of the evidence of future dangerousness:[103]

1. the circumstances of the capital offense, including the defendant's state of mind and whether he or she was working alone or with other parties;

2. the calculated nature of the defendant's acts;

3. the forethought and deliberateness exhibited by the crime's execution;

4. the existence of a prior criminal record and the severity of the prior crimes;

5. the defendant's age and personal circumstances at the time of the offense;

6. whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;

7. psychiatric evidence

8. character evidence.

The Court of Criminal Appeals has not assigned weights to these factors or held that any one of them is dispositive.[104] The absence of psychiatric evidence does not mean that the evidence as a whole was insufficient[105] and the absence of a criminal record is not a prerequisite to a finding of insufficient evidence. In seven of the 11 cases where the evidence as a whole was legally insufficient to prove future dangerousness, the defendant had committed as least one previous crime.[106]

The Court of Criminal Appeals looks carefully at the facts of the capital murder in isolation to

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during the same criminal transaction, a finding of legally insufficient evidence of future dangerousness collaterally estopps the state from seeking the death penalty if he is separately tried for the capital murder of the second victim. Ex parte Mathes, 830 S.W.2d 596, 597 (Tex.Crim. App. 1992) (citing Bullington v. Missouri, 451 U.S. 430 (1981) and Ashe v. Swenson, 397 U.S. 436 (1970)).

[103]See, e.g., Cockrum v. State, 758 S.W.2d 577, 593 (Tex. Crim. App. 1988); Keeton v. State, 724 S.W.2d at 61.

[104]But cf. Ellason v. State, 815 S.W.2d at 664 ("Youth alone is not particularly probative").

[105]Brooks v. State, 599 S.W.2d 312, 323 (Tex. Crim. App. 1979).

[106]See Ellason v. State, 815 S.W.2d at 659-60 (8 to 10 unadjudicated burglaries, domestic violence and drug use); Huffman v. State, 746 S.W.2d 215-17, 223-25 (two burglaries, unspecified violation of parole, drug use, brief unarmed assaults on police officer and jail guard, domestic violence (Tex. Crim. App. 1988); Beltran v. State, 738 S.W.2d at 288 (two drunk driving convictions and unadjudicated resisting arrest by striking a police officer once with his hand); Keeton v. State, 724 S.W.2d at 60 (possession of marijuana and probation revoked); Roney v. State, 632 S.W.2d at 603 (extraneous robbery on night of capital murder); Wallace v. State, 618 S.W.2d at 69 (unadjudicated attempted armed robbery a month before the capital murder and A.W.O.L. conviction in Army); Warren v. State, 562 S.W.2d at 476 (felony theft conviction and probation revoked because of burglary of a vending machine).

determine whether it was sufficient by itself to prove the future dangerousness special issue.[107] If the facts of the capital offense were insufficient, the Court of Criminal Appeals examines the rest of the evidence, including the mitigating evidence.[108]

The circumstances of the crime can be the most probative evidence of future dangerousness,[109] but the offense must be especially "heinous or evince" an "aberration of character" that is "peculiarly dangerous" to "alone justify an affirmative response"[110] because it "would destroy the purpose of the punishment stage in a capital murder trial" to find that "virtually every" capital murderer poses a continuing threat to society."[111] The Court of Criminal Appeals has also held that an unplanned capital murder must be especially violent, barbaric and cold-blooded to prove future dangerousness by itself,[112] but these pejorative adjectives provide no real guidance for deciding sufficiency claims.[113]

The Court of Criminal Appeals has implied that two edged sword mitigating evidence, such as mental illness or intoxication, that can make the defendant more dangerous and reduce his moral blameworthiness by impairing his ability to control his impulses and understand the consequences of his conduct at the time of the offense, should be given aggravating weight in reviewing the sufficiency of the evidence.[114] This may violate the eighth amendment principle of meaningful appellate review in cases where the defendant presented mitigating evidence of a transient character trait, such as youth, that may rationally call for an affirmative or a negative response to the future dangerousness special issue, depending on the facts of the case.[115] A presumption that a rational jury always considers that evidence to be an aggravating factor would probably deny the defendant "individualized treatment" of his mitigating evidence on direct appeal.[116]

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[107]Kunkle v. State, 771 S.W.2d at 449.

[108]Kunkle v. State, 771 S.W.2d at 449; Brooks v. State, 599 S.W.2d 312, 323 (Tex. Crim. App. 1979).

[109]O'Bryan v. State, 591 S.W.2d 464, 480 (Tex. Crim. App. 1979); But cf. Chambers v. State, ___S.W.2d ___, No. 71, 345, slip op. at 6 (Tex. Crim. App. Oct. 27, 1993) (holding that evidence at the punishment stage alone was sufficient to prove future dangerousness without considering evidence of the crime).

[110]Smith v. State, 779 S.W.2d at 420.

[111]Roney v. State, 632 S.W.2d at 603.

[112]Cantu v. State, 842 S.W.2d 667, 675 (Tex. Crim. App. 1992).

[113]In fact, the "so heinous" test for a crime that proves future dangerousness would violate the void for vagueness and overbreadth doctrines if it was a statutory aggravating circumstance instead of a description of a type of evidence that is sufficient to prove one. See Maynard v. Cartwright, 486 U.S. 356 (1988) ("especially heinous, atrocious or cruel" statutory aggravating circumstance was vague and overly broad).

[114]Richard v. State, 842 S.W.2d 279, 284 (Tex. Crim. App. 1992); Madden v. State, 799 S.W.2d 683, 694 n.17 (Tex. Crim. App. 1990); Burns v. State, 761 S.W.2d 353, 355 n.3 (Tex. Crim. App. 1988) (plurality opinion); But see Ellason v. State, 815 S.W.2d at 664 ("Youth alone is not particularly probative of whether one will or will not commit criminal acts of violence...However, when youth is intertwined with other evidence,...its significance as a (mitigating) factor becomes clearer").

[115]Cf. Johnson v. Texas, ___ U.S. ___, 113 S. Ct. 2658, 2669 (1993) ("the fact that a juror might view the evidence of youth as aggravating, as opposed to mitigating, does not mean that the rule of Lockett is violated").

[116]See Parker v. Dugger, 498 U.S. 308, 322 (1991).

The Court of Criminal Appeals has never held that the evidence of future dangerousness was legally insufficient because the mitigating evidence of the defendant's character, background and record would have persuaded any rational jury that he will not commit violent acts in the future. In Felder v. State,[117] the evidence at the defendant's second trial for a capital murder showed that he was convicted of three burglaries before he stabbed the deceased during a robbery to prevent her from identifying him, but there was no evidence that he had committed a single violent act during the 12 years that had elapsed since he was arrested for that capital offense. The Court of Criminal Appeals held that the evidence was sufficient to prove that Felder was a continuing threat to society in spite of this because he did not introduce any affirmative proof of his nonviolent record in prison.[118]

III.

INVESTIGATING THE PUNISHMENT PHASE OF A CAPITAL TRIAL

With this information regarding the Texas sentencing structure, and what you can expect from the State on the future dangerousness inquiry, it is critical that you meet their fire with your consoling waters. In the current death penalty statute, the vehicle given by the legislature to combat the State's future dangerousness tool is:

> whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[119]

As this special issue implies, everything about the circumstances of the underlying offense (or other prior bad acts), the defendant's character, and the defendant's record (read "history") is relevant to the jury's final determination of this issue. Therefore, this section is designed to present an initial list of essential people to talk to and records to obtain. Each person and document will have information that will lead to additional people and records that you will need to talk to or obtain. Each case will have its own unique set of records, people and events to investigate. This list is best used as an inspirational guide intended to provoke your own ideas for avenues of inquiry.

A. Life History Investigation

1. A thorough intergenerational life history must be developed, incorporating all life history documents and interviews with all first and second degree relatives, friends, peers. As relatives with histories of relevant physical illness (diabetes, endocrine/hormonal, and neurological) and mental illnesses are

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[117] 758 S.W.2d 760, 771 (Tex. Crim. App. 1988).

[118] 758 S.W.2d at 771. The federal constitution allows the state to place the burden on the defendant to introduce mitigating evidence of his law abiding or nonviolent record in a capital sentencing trial, Delo v. Lashley, 507 U.S. ___, 113 S .Ct. 1222 (1993), but the Supreme Court has not decided whether this rule applies in reviewing the sufficiency of the evidence of a statutory aggravating circumstance issue like future dangerousness that the state must prove.

[119] See Art. 37.071(2)(e), V.A.C.C.P (Vernon Pocket Part 1993).

identified, obtain their medical and life history documents.

* Where were grandparents and parents from? How did they support themselves through the years?

* What kind of housing, medical care, nutrition, and education did grandparents and parents have?

* Find the folks (aunts, cousins, neighbors) who knew that sexual, physical, or psychological abuse occurred in the family.

* Investigate anyone who had the opportunity to abuse your client in any way. If parents worked, investigate the people who cared for your client and had access to him.

2. Find schoolmates, cousins, neighbors, or others -- including family members and caretakers -- who would have known your client and/or the family during his developmental years. Check for:

* Nightmares, sleep disturbances, fear of the dark;

* Rocking, biting, head banging during early childhood (Look at symptoms of Pervasive Development Disorder in Psychiatric Textbook, 5th edition);

* Withdrawal, quietness, shyness;

* Peculiar concern about food, weight loss;

* Difficulty reading, speech impediments;

* Anxiety, nervousness, crying, hiding;

* Superstitions;

* Fears, responses to crises.

3. Birth Certificates. Get birth certificates for your client and all family members. Family includes siblings, parents, step-parents, grandparents, children, spouse, significant other. Birth certificates are available from the Department of Vital Statistics in each state -- some states require a signed release. Be sure to obtain from your client and each member of her family signed releases for this and for other records listed below. You will need each person's full name, birth date, social security number and any other names previously used.

4. Birth records. Obtain birth records from hospital, doctors, midwives. This includes prenatal (i.e., the mother's) and birth (i.e., the client's) records. You will need these records for your client as well as all siblings.

5. Obtain a thorough pregnancy history with mother for each child: drugs, alcohol, beatings/physical abuse, accidents, bleeding, nutrition, edema, nerves, sleep patterns, length of labor, anesthetic during labor, forceps, any trauma, home remedies, nausea, weight gain/loss. This will complement the prenatal and birth records you receive.

6. Church records. Did your client go to Church? Is so, what church? Do they have records? Were there people in the church who remember him and things about it? Interview these people.

7. School records. Get all school records for your client, his parents, siblings and children. Check with each school attended as well as the school board. Ask the school board and each school if outside private or public agencies conducted psychological evaluations or special testing. Contact those agencies and obtain their records. Review school yearbooks and publications and copy all pages related to your client or a family member.

8. Adult Education Records. Obtain all adult education records on your client. Check with Job Corps, Urban league, private agencies, community colleges, GED programs, vocational programs.

9. Locate teachers and counselors who remember your client and/or his family. Talk to them.

10. Childhood photographs. Ask family, relatives, friends for these.

11. Were the homes he lived in near industry -- what toxins was he exposed to through his environment?

12. Medical records. Get all of your client's, your client's parents', siblings', spouse or significant other's, and children's medical records for any hospitalization or hospital, public and private clinic or doctor's office treatment. Check every hospital for every person regardless of whether anyone a family member was treated there. Separately check at each emergency room in every geographic area where your client lived. Ask specifically for films of x-rays, CT scans, MRIs as well as narrative reports.

13. Mental health records. Has a psychiatric evaluation ever been made of your client or anyone in her family? If so, get all records, including any testing, raw data, interview notes, tapes, photos, preliminary reports, memos from attorneys, and any material whatsoever in file. If any person was hospitalized involuntarily, obtain the court records and talk to the attorneys involved.

14. Talk to your client and family members about any history of mental illness, mental retardation, physical illnesses or disability in the family? If so, get records. Find out from your client and family members the names of family doctors, dates of hospitalization, etc. Talk to the family doctor or any other doctor who treated the family member.

15. Has your client, or anyone in his family ever tried to commit suicide? Document any occasion and get thorough history. Are there police records? Hospital/ER records?

16. Death Certificates. Get death certificates for any close family members who have died. Obtain all related medical and hospital records, the autopsy report and the obituary.

17. Work records. Get any work-related records available. Look especially for injuries, worker's compensation, performance evaluation, salary. Talk to former employers and co-workers, especially those who worked with your client prior to the offense.

18. Police response calls and incident reports. Check police files for any incident reports and dispatches to parents' home and any other place where your client lived. Look for domestic disturbances, alcohol or drug-related incidents, bizarre conduct by parents or caretaker, visitors.

19. Jail, court, and police records for offenses by family members. Obtain these records on all arrests and convictions for your client's family -- parents, siblings, children, spouse, significant other, etc. This includes attorney files for any attorney who represented any of these persons at trial, on appeal, in collateral proceedings, etc. Check for records at any place that the family has lived. Jail records

should include classification reports, psychological reports, medications administered, disciplinary reports, medical records, visitor logs, etc.

20. Civil Proceedings. Check all civil court proceedings to see if your client or parents were sued or sued anyone including divorce proceedings initiated and abandoned or completed. Obtain all child support orders, custody decrees, and peace bonds/temporary restraining orders. Get the attorney files on any divorce (from both parties if possible).

21. Marriage Certificates. Get marriage certificate for client, parents and grandparents. This includes previous and subsequent marriages.

22. Social service agencies. Was your client's family ever on welfare or some other form of government aid. Check with social services to see if family has any records or reports for neglect, abuse, special needs. Obtain home study reports, referrals and results of testing or counseling, intervention, placement in foster home, termination of parental rights. Check this information for client, siblings, parents, children.

23. Texas Youth Commission. For your client and all siblings obtain records, reports, evaluations, tests including counseling conferences, intervention reports, foster placement records, any other form of treatment or placement.

24. Juvenile courts and facilities. Obtain all juvenile court records for your client and siblings. You may need a court order. Check each juvenile facility in every state your client lived for all medical, intake, evaluation, disciplinary and school records.

25. Parole and probation. Get all parole and probation records, including juvenile. Check with the local parole office as well as regional and central offices.

26. Private social service agencies. Check with Catholic Social Services, private juvenile shelters, Big Brothers, Boys' Clubs and other private agencies for any records on your client, siblings, or family.

27. Military records. Obtain complete file for client and any family member. If a parent served in the military, also obtain all medical and school records the military has for your client.

28. Jail, court, and police records for client's prior offenses. Obtain these records on all arrests and convictions for your client. Check for records at any place that the family has lived. This includes:

a. Attorney files for any attorney who represented your client at trial, on appeal, in collateral proceedings, etc. ((Use a release signed by your client which includes the release of all work product);

b. Jail records (classification reports, psychological reports, medications administered, disciplinary reports, medical records, visitor logs, etc.);

c. Public court records;

d. Prosecutor's file;

e. News clips about your client and the offense;

f. For every co-defendant, court, prosecutor, jail, attorney records.

If any priors involved a police officer, obtain that officer's personnel file, the internal affairs division

investigation and report, and the citizen review board report.

29. What is your client's alcohol, drug history, including when he first inhaled glue, organic solvents, gasoline, freon, paint, paint thinner, etc. The drug/alcohol history needs to be as detailed as possible: age first used, amount, frequency, circumstances, street name, effect on behavior, physiological effects. This needs to be done with particular detail for the few days prior to and including the offense.

30. Develop a diet (including alcohol and drugs) history of your client for week of offenses. What did he eat, when, how much? When did he sleep -- how many hours, where. What was his sleep pattern around time of offenses. Did his weight fluctuate? How much time was there between the death in his family and the offenses?

31. Prison records. Get the Texas Dept. of Criminal Justice files for prior incarcerations. Include administrative, classification, employment, educational, and medical, psychiatric, disciplinary records.

B. Trial Investigation

Often, the investigation of the trial issues will itself lead to information necessary to the development of your punishment theory of defense.

1. Attorney files for every attorney who may have represented your client pre-trial, or at a previous trial or appeal if applicable.

2. Prosecution and police files in this case. Make sure that police lab reports, incident reports, witness statements, etc. are included.

3. Jail, court, and police records for this offense. Obtain these records for your client. Jail records should include classification reports, psychological reports, medications administered, disciplinary reports, medical records, visitor logs, etc. Ask for these records by name. If this offense involved a the shooting of a police officer, obtain that officer's personnel file, the internal affairs division report, and the citizen review board report.

4. Autopsy records for all victims. This includes photos, bench notes, tape recordings, memos from prosecution, and any other material whatsoever in pathologist's files.

5. Investigate the medical examiner's background. Sources to contact include professional regulation agency, criminal and civil courts, universities and schools attended, employment records. Compare his testimony about qualifications with actual qualifications. Look for fraud and misrepresentation. Also investigate the qualifications of the pathologists who actually performed the autopsies.

6. Victim Court Records. Check criminal and civil courts for any proceedings involving the victim. Check every county where they are known to have lived.

7. Were any previous attorneys in prior cases disciplined, disbarred, drug abusers, alcoholics?

8. Co-defendants in this offense. Get prior (and subsequent?) criminal records including arrest records, court files, incarceration records, state law enforcement rap sheets, FBI rap sheets. Be sure to check juvenile proceedings and police records.

Obtain court, police and incarceration records for co-defendants on this offense. If the co-defendant was tried, get a copy of the trial transcript. Obtain the attorney file.

C. Developing a Defense Theory of Punishment

Once you have assembled everything -- both information and records -- regarding your client's life, you must create a defense. Although all this may be presented at trial to overwhelm the jury, just as with a guilt/innocence strategy, your punishment strategy will be most effective if it is constructed carefully. Although each case is unique, the most successful punishment strategies seem to perform several functions at once:

1. Humanize your client. Don't just make him out to be a fellow human being, make him out to be a unique human being. Everyone has positive character traits and people who know them to be good and valuable individuals. Present him as someone who, although flawed, is valuable and loved.

2. Do not shy away from negative evidence (mental illness, abuse, drug addiction, etc.). Although your client's past might increase the likelihood of his future dangerousness, you're mistaken if you believe the State won't find it or use it.

3. Use all your mitigating evidence and relate it to the criminal act. Negative qualities are often the primary source of explanatory evidence. For example, in Eddings v. Oklahoma, the defendant's child abuse at the hands of his police officer father was directly linked through expert testimony to Edding's murder of a police officer. Likewise, some people are on death row for acts that they performed out of loyalty to or love of another person.

4. Present a theory that allows the good and bad to coexist in your client. Jurors recognize the potential for evil in themselves and, if properly presented, may understand it in your client.

5. Explain as much as possible. Facts in a vacuum are what prosecutions are made of. They would like to portray the most superficial version of your client as a mean dog who needs to be put down. DON'T LET THEM! If your client is a drug or alcohol addict, explain why he is addicted and when he began using; if your client is schizophrenic; explain why he is mentally ill and why the State previously failed to treat him, if he is loved, explain why and how; if he was previously convicted, explain the surrounding circumstances.

6. Use your witnesses to fully develop the picture of a person who is life-worthy. Present all your witnesses as you would a cohesive alibi or insanity defense -- aim with each piece of evidence toward the telling of a unified vision of your client's value and worth. Psychiatrists, psychologists, other doctors, prison or corrections experts, all can create the ultimate picture of how your client can be productive and helpful even if incarcerated.

Ultimately, you must present a defense that demonstrates and conveys how much you believe that your client should live and why he should not die for the crime for which the jury has just convicted him. These defenses are daily winning in Texas because, as much as people want to have the death penalty, those same people, once jurors, actually do think long and hard before sentencing a fellow traveler to die.

IV.

GETTING THE COURTS TO WORK (AND PAY!) FOR YOUR CLIENT

A. The Rule of Ake v. Oklahoma

In the landmark case of Ake v. Oklahoma,[120] the Supreme Court held that an indigent defendant is entitled to the assistance of a psychiatrist as a matter of due process, if he made an "ex parte threshold showing to the trial judge that his sanity" or future dangerousness is likely to be a significant factor at his trial. The Supreme Court gave trial judges discretion to implement this requirement of due process without allowing the defendant "to choose a psychiatrist of his personal liking" or giving him "funds to hire" one, but "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."[121]

The Texas Court of Criminal Appeals has adopted a liberal view of an indigent defendant's constitutional right to the assistance of experts under Ake v. Oklahoma.[122] This is a valuable right because expert testimony plays a major role in almost every capital murder trial. Counsel can use a well planned Ake motion to obtain substantial funds to retain an expert of his own choice in almost any subject who can function as a real defense consultant and keep his work product and communications with the defendant confidential until he testifies. The most astute capital defense attorneys use Ake motions as a plea bargaining chips. They request funds for many costly experts and persuade the judge and the prosecutor that the county cannot afford to pay for a fair trial.[123]

B. The Threshold Showing of Need that Counsel Must Make to Obtain the Assistance of an Ake Expert

In Caldwell v. Mississippi,[124] the Supreme Court held that a defendant is not entitled to the assistance of an expert under Ake v. Oklahoma if his lawyer made nothing "more than undeveloped assertions" of need for an expert.[125] In Caldwell and most of the lower court cases where an Ake claim was rejected, counsel filed a skeletal request for an expert that did not even attempt to show that his assistance was likely to be a significant factor at the trial.[126]

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[120]470 U.S. 68, 69, 83 (1985).

[121]470 U.S. at 83.

[122]470 U.S. at ___.

[123]See W. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 2 Univ. Ill. L.Rev. at 329.

[124]472 U.S. 320 (1985).

[125]472 U.S. at 323-24 n.1.

[126]See DeFreece v. State, 848 S.W.2d 150, 156-57 (Tex. Crim. App. 1993) (collecting cases); Volson v. Lynaugh, 874 F.2d 243 (5th Cir. 1989) (counsel did not demonstrate that he needed a psychiatrist by merely giving formal notice of intent to present an insanity defense)..

In Jordan v. State,[127] the Texas Court of Criminal Appeals held that an Ake motion with a bit of meat on its bones failed to allege sufficient facts to make a threshold showing of need. Jordan's attorney stated in his motion that he wanted the court to order a CAT Scan test at "a hospital" because Jordan was an indigent person who had "suffered a severe blow to the head," "brain damage may have resulted from the blow" and the test would enable him to show that "he did suffer a physical as well as a mental illness."[128] The Court of Criminal Appeals found that this offer of proof was inadequate because it did not reflect the extent of the injury that Jordan sustained from the blow, when the injury occurred, the effect of the injury, the availability of an expert to perform the CAT Scan, the cost of the test, when it could be made or enough information about the evidence that counsel hoped to develop if the test was positive.[129] In all likelihood, Jordan's lawyer had access to these simple facts and carelessly failed to include them in his motion because he did not know that Ake requires a detailed showing of specific need for an expert.

Ake v. Oklahoma provides some guidance about what counsel must do to make an adequate threshold showing of need for an expert. The Supreme Court held that Ake was entitled to the assistance of a psychiatrist on the issue of his sanity because "Ake's mental state at the time of the offense was a substantial factor in his defense and...the trial court was on notice of that fact when the request for a court-appointed psychiatrist was made."[130] The court identified six facts that supported this conclusion:

> For one, Ake's sole defense was that of insanity. Second, Ake's behavior at arraignment, just four months after the offense, was so bizarre as to prompt the trial judge, sua sponte, to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when he was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day, during trial. Fifth, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that this mental illness might have begun many years earlier. Finally, Oklahoma recognizes a defense of insanity, under which the initial burden of producing evidence falls on the defendant. Taken together, these factors make clear that the question of Ake's sanity was likely to be a significant factor in his defense.[131]

The Supreme Court expressed "no opinion as to whether any of these factors, alone or in combination, is necessary to make (that) finding" in any case,[132] but two important propositions emerge from the court's application of the law to the facts: 1) a defendant's mental illness can show that his sanity is likely to be a significant factor at his trial, even if there is no direct evidence that it affected him at the time of the offense and 2) a reviewing court can consider all of the evidence that was presented at the trial to determine whether the trial judge erroneously denied a pretrial request for an expert.

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[127]707 S.W.2d 641, 645 (Tex. Crim. App. 1986).

[128]707 S.W.2d at 645.

[129]707 S.W.2d at 645.

[130]470 U.S. at 85.

[131]470 U.S. at 85.

[132]470 U.S. at 86 n.12.

In DeFreece v. State,[133] the Texas Court of Criminal Appeals held that direct evidence of insanity at the time of the offense is not necessary to show that the defendant's sanity is likely to be a significant factor at his trial. DeFreece was examined by two neutral psychiatrists before he filed an Ake motion for the assistance of his own expert on the issue of his sanity. One of the neutral doctors found that DeFreece was sane at the time of his offense. There was no evidence that directly contradicted this doctor's opinion, but the Court of Criminal Appeals held that DeFreece made an adequate threshold showing of need for the assistance of a psychiatrist because the second neutral expert found that he suffered from schizophrenia without expressing an opinion about his sanity and the facts of the offense were "fairly bizarre."[134]

Other courts have placed a much greater burden on the defendant to establish that his sanity is likely to be a significant factor. In Williams v. Collins,[135] the Fifth Circuit held that a defendant must demonstrate to the trial judge that there is a reasonable probability that he was insane at the time of the offense to show that he is entitled to the assistance of a psychiatrist on that issue. The Tenth Circuit requires a showing to the trial judge that there is a reasonable ground to doubt the defendant's sanity at the time of the offense.[136] In the Eighth Circuit, the defendant must show "a reasonable probability that an expert would aid in his defense and the denial of expert assistance would result in an unfair trial."[137] Under these tests, counsel must present a substantial insanity defense to the trial judge without the help of a psychiatrist to show that he needs the assistance of a psychiatrist to present an insanity defense.

This Catch-22 exists to some degree in any case where counsel files an Ake motion. Counsel must have a working knowledge of the scientific subject that he wants an expert to advise him about to demonstrate to the trial judge that the assistance of an expert in that subject is likely to be helpful to the defense. A lawyer's ignorance of a scientific subject may therefore paradoxically prevent him from showing that he needs an expert to advise him about it. When the state relies on highly complex or novel scientific testimony, the most scientifically astute lawyer may need the advice of an expert just to determine whether an expert could possibly be of any assistance to the defense.

In Williams v. Collins, counsel's ignorance of psychiatry may well have been the cause of his failure to demonstrate that he was entitled to the assistance of a psychiatrist on the issue of insanity. Counsel supported his Ake motion with evidence of Williams' history of mental illness, but when Williams testified at a hearing on the motion he did not claim that his mental illness affected his thoughts or behavior at the time of his offense. The Fifth Circuit held that Williams was not entitled to the assistance of an Ake psychiatrist because his own testimony established that he could not mount a viable insanity defense.[138] A forensic psychiatrist could have

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[133]848 S.W.2d 150 (Tex. Crim. App. 1993).

[134]848 S.W.2d at 158-59.

[135]984 F.2d 841, 845 (5th Cir. 1993).

[136]Liles v. Saffle, 945 F.2d 333, 336 (10th Cir. 1991).

[137]Little v. Armontraut, 835 F.2d 1240, 1243 (8th Cir. 1987). The Texas Court of Criminal Appeals used this draconian test in an unpublished opinion. See White v. State, ___ S.W.2d ___, No.69,861, slip op. at 4 (Tex. Crim. App. June 3, 1992) (unpublished). It is fortunate that White is not a precedent for deciding other cases because the defendant would have to meet the impossible burden of showing actual prejudice before the trial to obtain the assistance of an expert. ___ S.W.2d at ___, No.69,861, slip op. at 5-6.

[138]989 F.2d at 845; But cf. Ake v. Oklahoma, 470 U.S. at 85 (diagnosis of severe mental illness four months after the offense and defendant's bizarre behavior during the trial established that his sanity was likely to be a significant factor, even though there was no expert or lay testimony about his state of mind at the time of

advised Williams' lawyer that some people who suffer from episodic mental illnesses are adept at concealing their symptoms when they are in remission because they are ashamed of their disability or afraid that they will be confined in a mental hospital.[139]

There a split of authorities about whether the evidence at the trial may be considered by a reviewing court to determine whether the denial of a pretrial request for the assistance of an expert violated Ake v. Oklahoma. The Texas Court of Criminal Appeals implied in DeFreece v. State, that the fact that the defendant's sanity actually "turned out to be" a significant issue at his trial was not dispositive of his Ake claim, but it could be considered on appeal.[140] The Eleventh Circuit has held that the a reviewing court must only consider the facts that the trial judge was aware of at the time that he denied the Ake motion.[141] In the Tenth Circuit, a reviewing court must examine the entire record, including the evidence that was presented after the Ake motion was denied.[142] The question is still open in the Fifth Circuit.[143]

The test for a threshold showing of need for a future dangerousness expert is very different than the test that applies to a request for the assistance of a psychiatrist on the issue of sanity. In Ake v. Oklahoma, the Supreme Court found that Ake was entitled to psychiatric assistance on the issue of future dangerousness because his

> future dangerousness was a significant factor at the sentencing phase. The state psychiatrist who treated Ake at the state mental hospital testified (for the defense) at the guilt phase[144] that, because of his mental illness, Ake posed a threat of continuing criminal violence. This testimony raised the issue of Ake's future dangerousness, which is an aggravating factor under Oklahoma's capital sentencing scheme,...and on which the prosecutor relied at sentencing.[145]

This means that a capital defendant in Texas is always entitled to the assistance of a psychiatrist to rebut psychiatric testimony about future dangerousness because future dangerousness is always a significant

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the offense); DeFreece v. State, 848 S.W.2d at 160 ("fairly bizarre" facts of the offense, defendant's history of mental illness and diagnosis of schizophrenia established that his sanity was likely to be a significant factor).

[139]See generally Gribble v. State, 808 S.W.2d 65, 76 (Tex. Crim. App. 1991) (Gribble "was able to keep (his) sexual aberrations secret from his family and friends over an extended period of time" and "(v)irtually all persons with whom he was acquainted...regard him as stable, sensible, hardworking, polite and generous. But at times...he suffered from a true psychosis in which episodes of violent criminal behavior were typically followed by feelings of intense remorse").

[140]848 S.W.2d at 160.

[141]McKinley v. Smith, 838 F.2d 1524, 1529-30 (11th Cir. 1988).

[142]Liles v. Saffle, 945 F.2d at 336.

[143]Williams v. Collins, 989 F.2d at 844.

[144]Ake's counsel made an unsuccessful attempt to establish an insanity defense at the guilt stage by introducing the testimony of the neutral psychiatrist who performed a court ordered competency examination. 470 U.S. at 72-73; 470 U.S. at 94 (Rehnquist, J., dissenting). The Supreme Court's opinion does not indicate whether the psychiatrist made his prediction of future dangerousness on direct or cross-examination or why it was admitted at the guilt stage of the trial.

[145]470 U.S. at 86.

aggravating factor at the sentencing phase. The Supreme Court apparently concluded that it is not necessary to show that the defense expert might give a favorable opinion about the individual defendant's propensity for violence because any psychiatrist's opinion about the future dangerousness of a defendant can be attacked with expert testimony about the general unreliability of such predictions.[146] The American Psychiatric Association believes that it is unethical and unscientific for a psychiatrist to predict future dangerousness and scientific studies have shown that these predictions are "wrong most of the time."[147] In fact, requiring a defendant to show that a psychiatrist might give favorable testimony about his future dangerousness is as senseless as requiring him to show that he can find a tarot card reader to disagree with the opinion of a carnival fortune teller who used a crystal ball.

The same argument can be made whenever the state relies on the testimony of an expert in a controversial subject, such as hair identification, odontology and rape trauma syndrome, that is not accepted by a substantial part of the relevant scientific community. In such a case, the defendant needs an expert to testify that the state's expert's opinion was unscientific, regardless of whether the defense expert might be able to offer a favorable opinion.[148]

The safest way to make a threshold showing of need for an expert's assistance is to support an Ake motion with an affidavit from that expert, stating that he has reviewed the relevant evidence and can probably provide a favorable opinion for the defense. Many experts can be persuaded to sign such an affidavit for free, if counsel provides a moderate amount of well organized material for them to review. Experts who frequently accept court appointments view the time spent preparing the affidavit as an investment that may earn them a substantial fee. Some experts do pro bono work in high profile capital cases to advance the cause of justice, obtain free publicity, gain experience or satisfy their egos.

Counsel should write the affidavit for the expert, if the expert will allow this. The affidavit should be a persuasive document, rather than a scientific treatise. The accuracy of the expert's opinion is almost irrelevant because his affidavit cannot be cross-examined, rebutted or discovered by the state.[149]

D. The Right to the Assistance of a Partisan Defense Expert

The Texas Court of Criminal Appeals and the Fifth Circuit disagree about whether Ake v. Oklahoma can be satisfied by appointing neutral psychiatrist to perform a sanity examination and giving the defendant and the state equal access to him.

In Granviel v. Lynaugh,[150] the Fifth Circuit held that a neutral psychiatrist is sufficient to satisfy Ake

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[146]470 U.S. at 71, 73, 84; But see White v. State, ___ S.W.2d at ___, No.69,861, unpublished slip op. at 4-5 (defendant was not entitled to psychiatric assistance on the issue of future dangerousness because his lawyer filed a pretrial motion for such an expert without making a particularized showing of need before the state introduced the testimony of a psychiatrist who found that White had an antisocial personality disorder and a "high possibility of recidivist activity").

[147]Barefoot v. Estelle, 443 U.S. 880, 901 (1983).

[148]This does not relieve the defendant of his burden of making a threshold showing of need: he must still satisfy that requirement by making an offer of proof to the trial judge that a defense expert may be able to testify that the state's expert used an unscientific standard, method or test to arrive at his opinion.

[149]DeFreece v. State, 848 S.W.2d at 161 n.8; Brooks v. State, 385 S.E.2d 81, 84 (Ga. 1989).

[150]881 F.2d 185 (5th Cir. 1989).

on the issue of sanity because a psychiatric "examination is not an adversary proceeding" and a neutral expert gives the defendant the "ability to uncover the truth."[151] In DeFreece v. State, the Court of Criminal Appeals agreed that a sanity "examination is not an adversarial proceeding," but the court refused to follow Granviel because the trial at which the state adduces evidence of that examination most certainly is" an adversarial proceeding.[152]

DeFreece v. State held that Ake requires

> more than just an examination by a neutral psychiatrist. It also means the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and identify weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts. We recognize that the accused is not entitled to a psychiatrist of his choice, or even to one who believes the accused was insane at the time of the offense. Ake makes that much clear. But even a psychiatrist who ultimately believes the accused was sane can prove invaluable by pointing out contrary indicators and exposing flaws in the diagnoses of the state's witnesses.[153]

This reasoning applies to an Ake expert in future dangerousness,[154] mitigation[155] or any other subject. One of the most important functions of a defense expert is to advise counsel about "the probative questions to ask of the opposing party's" expert.[156] A neutral expert obviously "cannot effectively prepare counsel to cross-examine herself" if she is called as a witness for the state[157] and "offer a well-informed expert's opposing

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[151]881 F.2d at 192.

[152]DeFreece v. State, 848 S.W.2d at 159 (emphasis added).

[153]848 S.W.2d at 159 (emphasis added). In Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990), the Ninth Circuit gave a detailed explanation of the difference between a neutral psychiatrist and the kind of "adversarial" expert that a defendant is entitled to under Ake. A neutral psychiatrist performs whatever test or examination the court orders, discloses his opinion to the lawyers for both sides before the trial, responds to their questions outside the courtroom and testifies for any party who calls him. An adversarial psychiatrist performs whatever test or examination is most likely to be of benefit to the defense; reviews evidence and interviews witnesses under counsel's direction; discloses his opinion to counsel only; helps counsel to determine whether his testimony will be of any value to the defense; advises counsel about how to expose any weaknesses in the opinion of the state's doctor even if he agrees with it; refuses to discuss the case with the prosecutor outside of the courtroom; helps counsel to prepare his direct testimony, if any, and cross-examination of the state's expert; and advises counsel about how to explain the scientific evidence to the jury in his summation.

[154]Hood v. State, No. 71,167, unpublished slip op. at 2-3 (Tex. Crim. App. Nov. 24, 1993). Texas law does not permit a trial judge to appoint a neutral psychiatrist to perform a future dangerousness examination. Bradford v. State, ___ S.W.2d ___, No. 71,048, slip op. at 9 (Tex. Crim. App. June 9, 1993) (and cases cited therein).

[155]Smith v. McCormick, 914 F.2d at 1158-59.

[156]Ake v. Oklahoma, 470 U.S. at 80.

[157]DeFreece v. State, 848 S.W.2d at 160.

view."[158]

The trial court can satisfy the defendant's right to the assistance of an Ake psychiatrist on any issue by appointing a large state owned mental hospital, such as the Rusk Institute in Galveston, to serve as a defense consultant.[159] Many psychiatrists at these facilities are ill suited for the job of advising a defense attorney about how to evaluate, prepare and present his case because they perform standardized court ordered sanity and competency examinations on an assembly line basis and almost always testify for the prosecution. It is futile to object that the doctors at a state hospital like the Rusk Institute are biased in favor of the state,[160] but they must be replaced if they are unable or unwilling to perform all of the duties of a true defense expert.

In Buttrum v. Black,[161] a trial judge denied a capital defendant's request for funds to hire her own Ake psychiatrist and appointed the doctors at a large state hospital to be the defense experts in a case where the prosecution introduced psychiatric testimony at the punishment stage about future dangerousness and an unusual sexual disorder called paraphilia. The judge told counsel that a psychiatrist at the state hospital would be "glad to sit down and explain any psychiatric terms" and submit to an interview, but they would not have to "sit at counsel table" if they chose not to.[162] The state hospital gave Buttrum a standardized psychiatric evaluation that was ordinarily used for the purpose of determining a defendant's competency to stand trial. Defense counsel requested additional tests about dangerousness and paraphilia, but the trial court refused to order them. The Eleventh Circuit found that this was not "the level of assistance required by Ake," primarily because the trial judge gave the doctors at the state hospital "discretion" to decide "their level of involvement" in the case.[163]

E. Ake Applies to Experts in Almost Any Subject

Many courts have held or assumed for the sake of argument that an indigent defendant is entitled to an Ake v. Oklahoma expert in any subject whose assistance is likely to be a significant factor at his trial,[164]

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[158]470 U.S. at 84. The Fifth Circuit has not decided whether Ake can be satisfied by appointing a neutral psychiatrist to assist the defendant on the issue of future dangerousness. See James v. Collins, 986 F.2d 1116, 1124 (5th Cir. 1993).

[159]See DeFreece v. State, 848 S.W.2d at 156 (and cases from other states cited therein).

[160]See DeFreece v. State, 848 S.W.2d at 156 ("many courts have denied Ake claims where the accused has received an examination in a state mental institution pursuant to a court order").

[161]721 F.Supp. 1268 (N.D. Ga. 1989), opinion adopted and aff'd, 908 F.2d 695 (11th Cir. 1990).

[162]Buttrum v. Black, 721 F.Supp. at 1313.

[163]Buttrum v. Black, 721 F.Supp. at 1313.

[164]See, e.g., Caldwell v. Mississippi, 472 U.S. at 323-24 n.1 (implying that Ake applies to ballistics and fingerprint experts); Terry v. Rees, 985 F.2d 283, 284-85 (6th Cir. 1993) (applies to pathologist); Yohey v. Collins, 985 F.2d 222, 227 (5th Cir. 1993) (applying Ake to ballistics expert); McKinley v. Smith, 838 F.2d 1524,1528 (11th Cir. 1988) (assuming Ake applies to pathologists); Little v. Armontraut, 835 F.2d 702, 711 (18th Cir. 1987) (en banc) (applies to hypnotist); DuBose v. State, ___ So.2d ___, 1993 Ala. Crim. App. LEXIS 1091 at *74-76 (Ala. Crim. App. Sept. 10, 1993) (applies to all experts); State v. Ballard, 428 S.e.2d 178, 180 (N.C. 1993) (applies to all experts); State v. Edwards, ___ S.W.2d ___, 1993 Tenn. Crim. App. LEXIS 228 at *40 (Tenn. Crim. App. March 25, 1993) (all experts); Tibbs v. State, 819 P.2d 1372, 1376 (Okla. Crim. App. 1991) (applies to all experts); Hansen v. State, 592 So.2d 114, 125 (Miss. 1991) (assuming

including a psychiatrist to develop mitigating evidence.[165] Ake has not been extended to experts in subjects that relate to the selection of juries or private investigators, but the case probably applies to any subject that an expert could testify about at a trial or hearing on a motion to suppress evidence. Of course, the defendant is not entitled to the assistance of an expert in a subject that experts are not permitted to testify about because that subject cannot possibly be a significant factor at the trial.[166]

In McBride v. State,[167] the Texas Court of Criminal Appeals held that an indigent defendant was entitled to the assistance of a chemist under Ake v. Oklahoma because he could not afford to exercise his right under Article 39.14, V.A.C.C.P., to have his own expert perform a qualitative analysis of the controlled substance that he was convicted of possessing.[168] McBride did not make any factual showing to the trial judge that the state's chemist might have been mistaken about the identity of the drug before the judge denied his motion for his own expert, but the Court of Criminal Appeals still accepted his argument that he was "denied due process and effective assistance of counsel."[169]

McBride did not extend Ake very far from its facts because the case only applies to an expert whose assistance is needed to exercise a defendant's very narrow right under Article 39.14, to inspect and independently test tangible evidence that is "indispensable" to the state's case.[170] The Court of Criminal Appeals has only held that this right was violated in cases where the defendant wanted a chemist to test the drugs that he was accused of possessing. Former Presiding Judge Onion stated in his commentary to Article 39.14 that when "it is known that the state is planning to base its case on a fingerprint, bullet, pistol or rifle, book or record, the defendant can have his own expert examine the same,"[171] but these kinds of evidence are rarely "legally indispensable" to the state's case.[172] In Quinones v. State, the Court of Criminal Appeals held that a defendant did not have a right to have his own expert test the authenticity of a "very incriminating"

Ake applies to pathologists); State v. Asberry, 581 N.E.2d 592, 595 (Ohio App. 1989); State v. Coker, 412 N.W.2d 589, 593 (Iowa 1987); Cargill v. State, 340 s.e.2d 891, 905 (Ga. 1986); Schultz v. State, 497 N.E.2d 531, 533 (Ind. 1986); In re Allen, 506 A.2d 329,331 (N.H. 1986).

[165]Smith v. McCormick, 914 F.2d 1153, 1158-59 (9th Cir. 1990).

[166]Wunnenberger v. State, 844 S.W.2d 864, 869 (Tex. App.- Amarillo 7th Dist. 1992).

[167]McBride v. State, 838 S.W.2d 248, 252 (Tex. Crim. App. 1992).

[168]848 S.W.2d at 250-252.

[169]848 S.W.2d at 251 & n.7.

[170]848 S.W.2d at 251. Article 39.14 states that upon a showing of good cause, the court may order the state to allow the defendant to inspect any tangible evidence that the state possesses. The Court of Criminal Appeals has construed this statute to require an opportunity for the defendant to inspect any tangible evidence in the state's possession that is material to his defense and reasonably available for inspection. McBride v. State, 848 S.W.2d at 251 & n.6. The identity of a drug is always material to the defense in a drug possession case because the state must prove that it is a controlled substance to obtain a conviction. Id.

[171]McBride v. State, 848 S.W.2d at 250.

[172]McBride v. State, 848 S.W.2d at 251 (quoting Quinones v. State, 592 S.W.2d 933, 942-43 (Tex. Crim. App. 1980)).

tape recorded confession because it was legally possible for the state to obtain a conviction without it.[173]

Counsel should file an Ake/McBride motion for an expert to test any piece of tangible evidence that was made available for an inspection pursuant to Article 39.14, regardless of whether it is legally indispensable to the state's case. Judges routinely exercise their broad discretion under the statute to permit the defense to inspect such evidence[174] without objection from the state because they know that the district attorney will simply remove the items from the evidence locker and spread them out on a table for a meaningless visual inspection by counsel.[175] The trial court's refusal to provide the defendant with an expert to test evidence that he had no right to inspect would probably not be a reversible error under Article 39.14,[176] but McBride teaches that it is fundamentally unfair to limit an indigent defendant to a "visual examination" of evidence that would "not divulge anything of probative value" by denying his request for an expert to test it.[177] That principle should apply, regardless of whether the evidence was made available for an inspection as a matter of right or as a matter of discretion.

F. The Right to Confidential Assistance From an Ake Expert

Counsel does not lose his "opportunity to prepare the defense in secret" when he requests the assistance of an expert under Ake v. Oklahoma.[178] It would "thwart the Supreme Court's attempt" to give indigent defendants "equality with non-indigent defendants" if counsel had to disclose any facts or work product to obtain that assistance.[179] Counsel must therefore be permitted to file his Ake motion without serving the prosecutor with a copy, exclude the prosecutor from a hearing on the motion and have the court seal every part of the record where it was discussed ex parte.[180]

An Ake v. Oklahoma expert's work product and communications with the defendant and his attorney are covered by the same rules of confidentiality that apply to an expert who was retained with the defendant's own money.[181] In Texas, an Ake expert is considered to be an agent of counsel.[182] This means that counsel can

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[173]592 S.W.2d at 942-43.

[174]Quinones v. State, 592 S.W.2d 933, 940 (Tex. Crim. App. 1980).

[175]See Pabst v. State, 721 S.W.2d 438 (Tex. App.- 1st Dist. 1986).

[176]See Quinones v. State, 592 S.W.2d at 940 (Tex. Crim. App. 1980).

[177]McBride v. State, 838 S.W.2d 250 n.5 (quoting Detmering v. State, 481 S.W.2d 863, 864 (Tex. Crim. App. 1972).

[178]Brooks v. State, 385 S.E.2d 81, 84 (Ga. 1989).

[179]McGregor v. State, 733 P.2d 416 (Okla. Crim. App. 1987).

[180]Ake v. Oklahoma, 470 U.S. at 82; Brooks v. State, 385 S.E.2d 81 (Ga. 1989); McGregor v. State, 733 P.2d 416 (Okla. Crim. App. 1987); State v. Poulsen, 726 P.2d 416 (Okla. Crim. App. 1987); State v. Hickey, 346 S.E.2d 646, 654 (N.C. 1986); Wall v. State, 715 S.W.2d 208, 209 (Ark. 1986); But cf. Williams v. Collins, 989 F.2d at 845-46 (Ake claim rejected because counsel waived his right to exclude the state from the hearing and prosecutor elicited evidence that rebutted the defendant's threshold showing of need).

[181]Smith v. McCormick, 914 F.2d at 1158-59.

invoke the attorney-client privilege and the work product doctrine to keep the expert's opinions, report, notes and mental impressions secret until he testifies.[183] Counsel can use the expert to explore possible defenses without disclosing harmful evidence or his strategy to the prosecution.[184]

The right to keep an Ake psychiatrist's opinion and work product secret gives counsel an important tactical advantage at the punishment stage of a capital trial in Texas. Counsel can surprise the state with psychiatric mitigating evidence and prevent the state's psychiatrist from performing an examination of the defendant to rebut it. The state has no right to discover evidence in Texas.[185] A trial judge has no authority under Texas law to order a psychiatrist to examine the defendant on any issue other than sanity and competency to stand trial. The defendant has a right under the fifth amendment to refuse to submit to an examination by the state's psychiatrist and that right is not waived by presenting psychiatric mitigating evidence.[186]

The defendant does not waive his right to keep an Ake psychiatrist's opinion and work product secret until he testifies by giving notice of intent to present an insanity defense. The federal constitution would not be offended if the prosecution and the defense had a reciprocal duty to disclose the reports and opinions of experts,[187] but "(d)iscovery in Texas criminal cases (is) a 'one way proposition' with the focus on requests by defendants."[188] Article 46.03(3)(a)(d), V.A.C.C.P., only allows the court to grant the state's motion to have a neutral psychiatrist perform a sanity examination and give the state a copy of his report when the defendant gave notice of intent to present an insanity defense.[189] Article 46.03(f), V.A.C.C.P., gives the defendant a right to be examined by his own psychiatrist as well as the neutral expert, without requiring him to disclose his expert's opinion or work product to the state.[190] Of course, Ake provides no protection against disclosure of any

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[182]DeFreece v. State, 848 S.W.2d at 161 n.8.

[183]DeFreece v. State, 848 S.W.2d at 161 n.8; see also Ballew v. State, 640 S.W.2d 237 (Tex. Crim. App. 1980) (on rehearing) (attorney-client privilege applies to defense expert); Washington v. State, ___ S.W.2d ___, No. 65-92, slip op. (Tex. Crim. App. June 23, 1993) (work product doctrine applies to defense investigator).

[184]Smith v. McCormick, 914 F.2d at .

[185] Washington v. State, ___ S.W.2d at ___, No. 65-92, slip op at 3.

[186]Bradford v. State, ___ S.W.2d ___, No. 71,048, slip op. (Tex. Crim. App. June 9, 1993). In Hood v. State, the court agreed to grant the defendant's request for the assistance of his own psychiatrist only if he submitted to a joint future dangerousness examination by his doctor and the state's doctor. ___ S.W.2d at ___, No.71,167, slip op. at 1-5 (unpublished). The court would have allowed Hood to keep his expert's opinion confidential, but this procedure was clearly unconstitutional because it forced him to waive his fifth amendment right not to answer the state's doctor's questions to obtain the assistance of his own psychiatrist. Hood's lawyer waived any error by objecting that he was entitled to funds to hire his own expert because he was not entitled to that relief under Ake and he did not object to the violation of the fifth amendment. Id. at 4-5 & n.3.

[187]See Williams v. Florida, 399 U.S. 78 (1970).

[188]Washington v. Texas, ___ S.W.2d at ___, No. 65-92, slip op. at 3.

[189]Granviel v. State, 552 S.W.2d 107, 115-16 (Tex. Crim. App. 1976).

[190]In Granviel v. Lynaugh, the Fifth Circuit held that Ake was satisfied in a case where the trial court granted the defendant's request to appoint a psychiatrist of his own choosing, who had already examined him, as a neutral expert under Art. 46.03, and denied his request to keep the psychiatrist's report confidential. DeFreece v. State did not directly address the confidentiality of an Ake expert's report, but the Court of

information that a defense expert relied upon it to form his opinion if he takes the stand.[191]

The state cannot call an Ake expert to testify against the defendant because he is an agent of counsel and cannot be forced to testify against his own client.[192] This rule applies even if the defendant presented evidence from another witness about the subject that his Ake expert advised him about.[193] However, the state can present the testimony of a psychiatrist who was appointed as a neutral expert at the defendant's request.[194] did not hold to the contrary.

When an Ake expert testifies for an indigent defendant, he may not have to disclose an affidavit that he created at counsel's request for the sole purpose of persuading the court to provide funds for counsel to retain him.[195] It would frustrate the Supreme Court's attempt to put poor defendants on equal footing with their wealthier counterparts if the affidavit could be used to impeach an Ake expert because a wealthy defendant could obtain an expert's assistance without creating such a document. Moreover, the affidavit is precisely the kind of document that should be covered by the work product doctrine because it was prepared in anticipation of litigation and contained counsel's theories.[196]

G. The Right to a Competent Expert and an Appropriate Examination

Ake v. Oklahoma held that a defendant is entitled to "competent psychiatric assistance in preparing his defense" and an "appropriate examination" when he makes the requisite showing of need.[197] The author of the Supreme Court's opinion in Ake v. Oklahoma, Justice Thurgood Marshall, argued in a subsequent dissent from denial of certiorari that this means that a defendant has a due process right to reasonably effective assistance from his Ake expert.[198] That right is separate from the sixth amendment right to effective assistance of counsel.

Criminal Appeals declined to follow Granviel in part because counsel must have the option of deciding whether to "offer his own expert('s) diagnosis at trial if is favorable to the defense." 848 S.W.2d at 159 (emphasis added).

[191]Smith v. McCormick, 914 F.2d at ___.

[192]See generally Acres of Land in New Castle County, 193 A.2d 799 (Del. Super. 1963); Annot. 139 A.L.R. 1250; Friendenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan.L.Rev. 455 (1962).

[193]Miller v. District Court, 737 P.2d 834 636-37 (Colo. 1987) (and cases cited therein).

[194]Shippy v. State, 556 S.W.2d 246, 253-55 (Tex. Crim. App. 1977).

[195]There are two rules that the prosecutor can use to obtain a defense psychiatrist's report or information about its contents. If a defense psychiatrist used a document to prepare his testimony or refresh his recollection on the stand, the prosecutor is entitled to a copy of it before he cross-examines the doctor. Ballew v. State, 640 S.W.2d at 242-44 (on rehearing). The defense psychiatrist must also answer the prosecutor's questions about any underlying facts or data that he relied upon to form his opinion. See Tex.R.Crim.Evid., 705(a).

[196]See Washington v. State, ___ S.W.2d at ___. No. 65-92, slip op. at 5.

[197]470 U.S. at 77, 82.

[198]Brown v. Dodd, 96 L.Ed.2d 164 (1987) (Marshall and Brennan. JJ., dissenting from denial of cert.).

An attorney's ineffective use of an expert can violate the sixth amendment,[199] but the defendant is not entitled to a lawyer who has sufficient scientific knowledge to recognize all of an expert's mistakes and omissions.

The Florida Supreme Court is the only court that has adopted Justice Marshall's interpretation of Ake.[200] The Texas Court of Criminal Appeals has not addressed this issue. The Eleventh Circuit has held that an expert's mistakes are grounds for reversal under the rule of Ake v. Oklahoma only if they made the trial "so evidently and fundamentally unfair as to threaten to render the trial a mockery of justice."[201] This test makes the right to a competent expert almost meaningless because a defendant can usually prevail on a claim of ineffective assistance of counsel if his lawyer failed to ask the trial judge to replace an expert who made such obvious prejudicial blunders.[202]

The Seventh and Fourth Circuits have held that a psychiatrist is "competent" within the meaning of Ake if he is licensed and qualified to testify in a court of law.[203] These courts reasoned that a constitutional right to effective assistance of a psychiatrist would create a never ending battle of the experts because psychiatrists frequently disagree with each other.[204]

In Buttrum v. Black, the Eleventh Circuit held that psychiatrist violated Ake by effectively performing an inappropriate examination. Buttrum's counsel requested the assistance of a psychiatrist on the issues of future dangerousness and a rare disorder called paraphilia. The trial court gave him access to the psychiatrists who had effectively evaluated Buttrum's competency to stand trial, but it refused to pay for any additional tests. The doctors who performed the competency examination conceded that it was not an appropriate test for future dangerousness and paraphilia.[205]

Counsel can use the defendant's right to an appropriate examination to persuade the trial judge to order the most sophisticated, expensive scientific tests, if he requests the tests in a second Ake motion after the court grants his initial request for funds to hire an expert. The second motion should contain an affidavit from the expert recommending every additional test that could conceivably be helpful to the defense in his judgment. If the judge refuses to pay for any of the additional tests, counsel should demand an ex parte hearing and put the expert on the stand to explain why they are needed. If the judge denies the request, the record will show that he arbitrarily rejected the uncontradicted opinion of the expert he approved of to assist the defense.

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[199]Ex parte Guzmon, 730 S.W.2d 724, 731 (Tex. Crim. App. 1987) (defense psychiatrist testified that Latins like defendant generally cannot take responsibility for their actions and counsel highlighted this damaging testimony in his punishment summation); Waters v. Zant, 979 F.2d 1473 (11th Cir. 1992) (ineffective use of psychiatrist); Lloyd v. Whitley, 977 F.2d 149, 158 (5th Cir. 1992) (failure to use expert testimony about mental illness as a mitigating factor); Troedel v. Wainwright, 667 F.Supp. 1456 (S.D.Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987) (failure to consult with gun powder residue expert); Curry v. Zant, 371 S.E.2d 647 (Ga. 1988) (failure to use available funds for psychiatric assistance).

[200]Sireci v. State, 502 So.2d 1221 (Fla. 1987); Mason v. State, 489 So.2d 734 (Fla. 1986).

[201]Clisby v. Jones, 960 F.2d 925, 934 n.12 (11th Cir. 1992).

[202]Clisby v. Jones, 960 F.2d at 934 n.12.

[203]Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990); Waye v. Townley, F.2d (4th Cir. 19).

[204]Silagy v. Peters, 905 F.2d at 1013.

[205]721 F.Supp. at 1313, aff'd, 908 F.2d 695 (11th Cir. 1990).

H. Article 26.05(a) and *Ake*

Art. 26.05(a), V.A.C.C.P., is the only provision of Texas law that authorizes a trial judge to disburse funds to pay an expert to assist an indigent criminal defendant. The statute states that when an attorney is appointed to represent a poor person in a criminal case, he "shall be reimbursed for reasonable expenses[206] incurred with prior court approval for purposes of investigation and experts." Counsel must therefore pay the expert's retainer and seek reimbursement from the court after the expert submits his bill or persuade the expert to take the risk of performing services without receiving any money in advance.[207] The court's refusal to authorize counsel to incur the expense of hiring an expert is not reversible error if counsel failed to make a particularized factual showing of need[208] and actual prejudice.[209]

In DeFreece v. State, the Texas Court of Criminal Appeals sent a signal to trial judges that they must provide an indigent defendant with an Ake expert when he is entitled to one, even if his attorney cannot afford to take the financial risk of paying the expert's retainer and seeking reimbursement for the expense under Article 26.05 (a).[210] DeFreece held that once a defendant shows that he is entitled to the assistance of an expert under Ake, "the trial court abuses its discretion in failing to appoint or to give 'prior approval' to 'reasonable expenses incurred' by counsel for the accused to obtain" that assistance.[211] A Texas trial judge technically has no power to "appoint" a defense expert, but he can advance funds to counsel to pay his retainer.

I. When to File an Ake Motion

Counsel should file an Ake v. Oklahoma motion as soon as he can make a showing of need for an expert because mid-trial requests for the assistance of an expert are strongly disapproved in Texas.[212] A premature Ake motion may be denied if counsel is not ready to make an adequate factual showing of need for an expert, but this problem can be solved by making a record of diligent attempts to acquire the necessary facts and renewing unsuccessful Ake motions when new facts to support them become available. For example, counsel can object that he needs a ruling on his motion for discovery, his motion to inspect tangible evidence and a list of the expert witnesses that the state intends to call, in order to determine whether he needs Ake experts. Counsel can renew an unsuccessful pretrial request for an Ake expert when he receives an expert's report during discovery, a witness list from the state that contains the name of an expert, after the state's expert testifies on voir dire, after he completes his direct testimony, after he testifies on cross-examination and when the prosecutor makes a closing argument about his testimony.

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[206]In 1987, the legislature removed the statutory cap of $500 for experts and investigation. See Acts 1987, 70th Leg., ch. 979, § 3, eff. Sept. 1, 1987.

[207]DeFreece v. State, 848 S.W.2d at 154 n.3 (and cases cited therein).

[208]Stoker v. State, 788 S.W.2d 1, 17 (Tex. Crim. App. 1988); Quin v. State, 608 S.W.2d 937 (Tex. Crim. App. 1980); Day v. State, 704 S.W.2d 438 (Tex. App. 7 Dist. 1986).

[209]Reed v. State, 644 S.W.2d 479 (Tex. Crim. App. 1983); Cherry v. State, 488 S.W.2d 744 (Tex. Crim. App. 1972); Ventura v. State, 801 S.W.2d 225 (Tex. App. 4 Dist. 1990).

[210]848 S.W.2d at 154 n.3.

[211]848 S.W.2d at 159 (quoting Art. 26.05(a), V.A.C.C.P.).

[212]See, e.g., Stoker v. State, 788 S.W.2d at 17; Hammett v. State, 578 S.W.2d 699, 707 (Tex. Crim. App. 1979).

It is especially important to take advantage of the opportunity to renew an Ake motion for the assistance of a psychiatrist on the issue of future dangerousness as soon as the prosecutor discloses that he intends to present psychiatric testimony about it. The state's use of psychiatric testimony about the defendant's future dangerousness is sufficient by itself for the defendant to make a threshold showing of need for the assistance of a psychiatrist,[213] but a defendant may not be able to prove that the prosecutor intends to present this evidence until the name of a killer shrink appears on the state's witness list.

In Stoker v. State, a meritorious request for a defense psychiatric expert in predicting future dangerousness was denied because counsel did not take these precautions to protect the record.[214] Stoker's counsel needlessly announced during a pretrial proceeding that he did not want to have his client examined by a psychiatrist or present psychiatric evidence.[215] At the conclusion of voir dire, after counsel had learned that Dr. James Grigson was listed as a witness for the state, he filed a motion for funds to retain an expert in psychiatry and a continuance without using that fact to make a showing of need. He waited until Grigson completed his testimony to ask for a ruling on his motion. When the trial court asked him to explain the delay, he made an unfounded assertion that he was surprised by the state's introduction of evidence of extraneous drug offenses before Grigson took the stand.[216] Grigson's name of the witness list would have been sufficient to establish that Stoker needed a psychiatrist,[217] but the Court of Criminal Appeals held that his request for one was properly denied because he appeared to be trying " 'to manipulate his asserted rights in such a manner as to obstruct the orderly administration of justice.' "[218]

In White v. State, a meritorious request for an expert in predicting future dangerousness was rejected in an unpublished opinion because counsel made it before he could demonstrate that he needed this assistance. White's lawyer made an unsuccessful pretrial request for a psychiatrist to assist him without making any factual showing of need. When the state presented psychiatric testimony about White's future dangerousness, his attorney did not renew his Ake motion and ask for an expert to rebut it. The Court of Criminal Appeals held that White failed to make a showing of need for the assistance of a psychiatrist.[219]

Counsel should never give notice of intent to present an insanity defense before he files Ake v. Oklahoma motion for the assistance of a psychiatrist and obtains a ruling on it.[220] When the counsel gives notice of intent to present an insanity defense, the court has discretion to order a sanity examination by a neutral

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[213]Ake v. Oklahoma, 470 U.S. at 84-86.

[214]788 S.W.2d at 17.

[215]Texas law does not require a defendant to give notice of intent to present psychiatric evidence at the punishment stage.

[216]788 S.W.2d at 16-17.

[217]See Ake v. Oklahoma, 470 U.S. at 84.

[218]788 S.W.2d at 17 (citation omitted).

[219]___ S.W.2d at ___, No.69,861, slip op. at 4-5.

[220]In Lowenfeld v. Phelps, 671 F.Supp. 423, 435-36 (D. La. 1987), counsel forfeited an Ake claim by withdrawing his notice of intent to present an insanity defense before the trial judge ruled on his request for the assistance of a psychiatrist because this demonstrated to the judge that the defendant's sanity would not be a significant factor at his trial.

psychiatrist[221] and the defendant has no fifth amendment right to refuse to speak to him.[222] The court can find that the defendant is not entitled to the assistance of his own psychiatrist under Ake if the neutral doctor reported that his sanity is not likely to be a significant factor at the trial.[223] The court cannot order a sanity examination by a neutral psychiatrist if counsel filed an Ake motion without giving notice of intent to present an insanity defense.[224]

V.

CAPITAL VOIR DIRE STRATEGY: PRESERVING CURRENT ISSUES FOR APPEAL

The following suggests a strategy for a capital voir dire in Texas. While the following does not purport to exhaust every relevant issue of law and fact that conscientious counsel should cover in selecting a capital jury, it does describe some of the current federal and state constitutional issues that should be raised during a capital voir dire.

A. Introduction: Error Preservation

Voir dire is probably the single most difficult area to master in a death penalty case. At the same time, however, voir dire is potentially the most fertile area for appellate reversal -- at least under Texas' post-Penry capital sentencing statute. Thus, the time and effort invested in familiarizing oneself with basic principles is well spent.

Particularly if you have a case with "bad facts" (and few capital cases offer strong prospects for the defense), the single most important thing to keep in mind is error-preservation -- in particular, objecting on federal and state constitutional grounds (e.g., on Sixth, Eighth, and Fourteenth Amendments grounds or TEX. CONST. Art. I, § 10 grounds). More than any other area of Texas death penalty law, preserving voir dire error requires that counsel jump through numerous "hoops;" this section will set out those steps and explain how to follow them.

Although there are innumerable possible claims that arise during voir dire, every attorney should be automatically prepared to preserve at least the following four main types of claims:

1. An allegation that a juror (or a prospective juror that defense counsel was forced to remove with a peremptory strike) should have been excused "for cause."

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[221]See Art. 46.03(2)(a) (3)(a), V.A.C.C.P.

[222]Buchanan v. Kentucky, 483 U.S. 402 (1987).

[223]848 S.W.2d at 159. However, if a neutral expert finds that there is no question about the defendant's sanity in an Art. 46.03 examination, the defendant may still be able to make a threshold showing of need for his own psychiatrist by introducing medical records, reports of previous psychiatric examinations or lay testimony about his bizarre behavior.

[224]See Ex parte Hodges, 314 S.W.2d 581 (Tex. Crim. App. 1958) (court committed reversible error by ordering sanity examination over the objection of defendant who did not give notice of intent to present an insanity defense); Battie v. Estelle, 655 F.2d 692, 700-01 (5th Cir. 1981) (defendant has a waivable fifth amendment right not to participate in a court ordered sanity examination).

2. An allegation that a prospective juror was wrongly excused "for cause" by the trial court on the prosecutor's motion.

3. An allegation that the trial court refused to permit defense counsel to ask a "proper question" to one or more prospective jurors.

4. An allegation that the prosecutor misinformed one or more members of the venire about some relevant principle of law.

Different rules govern the preservation of each type of claim.

1. Preserving the first type of claim is the most difficult. The claim is not preserved merely by your making a motion to excuse the prospective juror "for cause," which the trial court then denies. In order to argue on appeal that the trial court should have removed a member of the venire "for cause," you *must* also do the following:

(a) Make your "for cause" challenge on any and all grounds that you can think of -- most importantly, constitutional grounds, where applicable (see below); be sure to mention more than just the constitutional or statutory provision upon which you are relying; also give your specific theory or theories about why the prospective juror should be struck "for cause";

(b) Once your "for cause" challenge is denied, you must use a peremptory challenge to remove the veniremember and state that you have been "forced" to do so because the trial court has wrongly denied your challenge "for cause";

(c) At this point (whether or not you have any of your original peremptory strikes remaining), ask for an extra peremptory; on the record, state that any extra peremptories that you may receive after you've ultimately exhausted your 15 allotted peremptories will not be as helpful to you as an extra one would be at this juncture;

(d) Ultimately, exhaust all 15 of your allotted peremptories and any extra peremptories that you may have been granted -- do not finish voir dire if you have any peremptories remaining, even if you have to exhaust them on people who are not necessarily as bad as you think subsequent members of the array may be;

(e) After you've exhausted all of your peremptories and you are forced to proceed to select jurors without having any peremptories left, clearly object on the record that at least one juror who is ultimately seated is "objectionable" and state why. There is no voir dire error if there is no one on the jury who is objectionable. The "objectionable" juror doesn't have to be someone who is challengeable for some legally sufficient reason (such as bias against the law). Rather, by "objectionable" you only mean a juror whom you would have struck with a peremptory if you had any left. The larger point is that that you were unnecessarily forced to use one or more peremptories on a prior member(s) of the array (i.e., one who should have been struck for cause), with the result that you are now stuck with someone you find "objectionable." This is how the trial court's prior erroneous failure to strike a prospective juror "for cause" -- which forced you to use a peremptory strike -- harms you at the end of voir dire.

2. Error preservation regarding the second type of voir dire error is considerably easier. If the prosecutor moves to excuse a prospective juror "for cause" and the trial court erroneously grants the challenge, then you

simply need to object to the trial's granting of the motion. The key is to clearly articulate the reasons why the trial court erred -- including the constitutional or statutory provisions upon which your argument is based. The leading example is a Witherspoon challenge (discussed below). A related error is the trial court's refusal to permit you a reasonable opportunity to rehabilitate the prospective juror.

3. Preserving the third type of claim described above requires an understanding of the relevant legal principles in your particular case. That is, you are permitted to voir dire about any area of the law that might reasonably pertain to the trial. In a Texas capital case, a potentially limitless number of legal issues could come into play at trial. The more you know about the underlying substantive law and the more issues that are potentially applicable to your case, the more questions that are proper during voir dire.

The main legal basis for this type of error is Article I, § 10, of the Texas Constitution, although federal constitutional provisions may also apply. The Court of Criminal Appeals has repeatedly held that a trial court's failure to permit defense counsel to voir dire on a permissible area of the law violates Article I, § 10 by interfering with defense counsel's "intelligent exercise" of his peremptory challenges and, to a lesser degree, his assertion of "for cause" challenges. As Judge Miller stated in his concurrence in the most definitive case on this issue:

> The concept of allowing a defendant's counsel to effectively and intelligently exercise his peremptory challenges [and "for cause" challenges] is one of greatest importance under the Texas Constitution... With few exceptions, counsel is permitted to question venirepersons on virtually any area which aids in the intelligent use of peremptory challenges, as long as the trial judge considers the question proper. "A question is proper if its purpose is to disclose a juror's views on an issue applicable to the case." [citation omitted].... Generally, a trial court reversibly errs when it denies a proper question because that denial interferes with a defendant's intelligent exercise of peremptory challenges.

Maddux v. State, 862 S.W.2d 590, 593-99 (Tex. Crim. App. 1993) (Miller, J., concurring) (emphasis added).

The U.S. Constitution may also come into play when the trial court forbids questioning about issues that implicate federal rights -- such as questions about a jurors' views on racial prejudice or the general propriety of the death penalty. See, e.g., Turner v. Murray, 476 U.S. 28 (1986) (Fourteenth Amendment permits defense counsel to question prospective jurors about their racial views in capital case involving inter-racial crime); Morgan v. Illinois, 112 S. Ct. 2222 (1992) (Fourteenth Amendment permits defense counsel in a capital case to question prospective jurors about whether they would automatically impose the death penalty in a case where the defendant is convicted of capital murder).

Be creative. the main thing you want to look in proposed questions is sentencing bias that would violate some provision of the Constitution. For instance, in a case where the victim is female, ask the trial court to permit you to voir dire prospective jurors about whether they would be inclined to punish a convicted capital defendant more severely (i.e., be more inclined to impose the death penalty) if the victim was female rather than male. If the trial court denies the proposed questions, object on Fourteenth Amendment grounds as well as Art. I, § 10 grounds, since such a biased juror -- if they were discovered through the proposed questioning -- would be subject to excusal "for cause." Another good question (in a case with a minority defendant) is whether white venirepersons view minorities as more violence-prone than white jurors.

4. Preserving the fourth type of voir dire claim set out above is relatively easy and is related to the technique for preserving the first type of claim (discussed above). If you believe that the prosecutor has misinformed a prospective juror about the applicable law during voir dire, immediately object and ask the trial court to tell the jury to disregard the prosecutor's mistaken interpretation of the law. Also ask the trial court to inform the prospective juror of the correct law. If the trial court refuses, then you must move that the juror be excused for cause, since the prosecutor -- and trial court, by refusing to correct the mistake -- have "biased" the

prospective juror against the law. If the "for cause" challenge is denied, use a peremptory on the juror and clearly state that you are using the peremptory because the trial court denied your challenge for cause. If you don't have any available peremptories left, ask for an additional one. If the trial court refuses to give you an extra peremptory strike, be sure to state that "an objectionable juror is being seated."

B. Questions about a Prospective Juror's Views on the Death Penalty

1. Witherspoon

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment is violated by a trial court's removal of a prospective capital juror "for cause" if that prospective juror was removed simply because of her moral "scruples" against the death penalty although she could have set aside those personal views and "followed the law" on the death penalty. The Supreme Court has discussed the Witherspoon rule in numerous subsequent cases. See, e.g., Adams v. Texas, 448 U.S. 38 (1980); Wainwright v. Witt, 469 U.S. 412 (1985).

The Witherspoon rule has traditionally been the best known issue in capital voir dire. It is also one of the most difficult to win. In Wainwright v. Witt, supra, the Supreme Court held that a trial court has extremely broad discretion to determine whether a prospective juror can "set aside" his or her personal bias and follow the trial court's instructions. With the new post-Penry capital sentencing statute -- which makes a jurors' views on the death penalty critically important -- it is unlikely that an anti-death penalty juror will survive a prosecutor's questions. Nevertheless, your goal should be to rehabilitate any anti-death penalty juror so that they can repeatedly say that they will not "automatically" vote for a life sentence in answering the special issues and that they key thing for them will be whether there are "sufficient mitigating circumstances"[225] supporting a life sentence.

If you are lucky enough to get a potential juror who favors life in most circumstances, you may convey to him or her that there will always be some mitigating evidence and what constitutes "sufficient" mitigating evidence is up to each individual juror. For obvious reasons, you can't have such a juror "commit" to this expectation -- that is, the juror cannot state that she will always answer the "Penry issue" in favor of the defendant. Rather, simply make it clear that the Penry issue affords sentencing jurors a great deal of discretion to determine what does and what does not constitute "sufficient" mitigating circumstances. A generally pro-life juror could perhaps agree that in rare cases with no mitigating evidence -- e.g., "Ted Bundy" -- a life sentence would not be appropriate. The thing to really push is that even a scintilla of mitigating evidence can be legally "sufficient" if the juror concludes that it justifies a life sentence rather than the death penalty. A smart juror will realize that she can abide by her oath and still vote for life in 99.9% of cases.

This type of claim can easily be preserved by simply saying that the removal of a prospective juror for cause "violates Witherspoon."

2. Reverse-Witherspoon: Morgan v. Illinois

In Morgan v. Illinois, 112 S. Ct. 2222 (1992), the Supreme Court held the converse of Witherspoon: a prospective capital juror should be excused "for cause" if that person has a pro-death bias that would prevent the juror from following the law during the capital sentencing phase. As with Witherspoon, presumably appellate courts will afford trial courts much discretion here. Again, the key thing is to "lock" the prospective

[225]The new Penry statutory special issues asks whether the jury believes that are "sufficient" mitigating circumstances supporting a life rather than death sentence.

juror into a position that admits that his or her bias is so strong in favor of the death penalty that the juror could not set aside that bias during the punishment phase. A good question along these lines is, "Could I change your mind about this?" Another good question to ask is whether that person would believe that someone like him could fairly sit in judgment of a close friend or loved one who was convicted of capital murder.

It should be noted that Morgan offers more hope for injecting error into the case than Witherspoon does. Witherspoon usually boils down to a single question -- would the prospective juror's anti-death penalty bias, as a general matter, cause the juror, if selected, to automatically vote against the death penalty, irrespective of the facts of the case. Morgan is a little more complicated. Rather than simply asking the pro-death penalty prospective juror whether he or she would automatically vote for the death penalty if a person is convicted of capital murder, you should specifically inquire about the prospective juror's views regarding different types of capital murder. For instance, if your client is charged with murder of a police officer, you need to ask the prospective juror whether they are going to automatically vote for the death penalty in that type of case, when they might not automatically vote for death in all cases of intentional murder in the course of a felony. Some jurors will say that in certain types of cases -- but not in all capital cases -- they will automatically vote for the death penalty if the defendant is convicted. Those prospective jurors should be struck under Morgan.

In order to preserve this type of claim, specifically object on "Sixth, Eighth, and Fourteenth Amendment grounds" to the court's refusal to excuse such a juror (that is, don't just object that the juror is "biased against the law"). Also, be certain to "follow through" as discussed above (exhausting peremptories, asking for additional peremptories, identifying an objectionable juror, etc.), or you will waive any error.

C. Questions on Mitigating/Aggravating Evidence

1. Mitigating Evidence

There is currently a conflict between the Texas Court of Criminal Appeals and the United States (and several of the Federal Courts of Appeals) that presents excellent opportunity for reversible error after trial.

The Texas Court of Criminal Appeals has stated:

> "We do not believe that the law requires a juror to consider youth as mitigating...."[226]

> "[T]his Court has recently determined that it is not error for a trial court to overrule a challenge for cause where it is shown that a juror will not or may not give a particular variety of 'mitigating evidence' any consideration."[227]

The United States Supreme Court has stated:

> "Any juror to whom mitigating factors are ... irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the

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[226]Robertson v. State, ___ S.W.2d ___, No. 71,224, slip op., at 16, n. 13 (Tex.Crim.App. Dec. 8, 1993).

[227]Johnson v. State, 773 S.W.2d 322, 330-31 (Tex.Crim.App. 1989), citing Cuevas v. State, 742 S.W.2d 331 (Tex.Crim.App. 1988), and Cordova v. State, 733 S.W.2d 175 (Tex.Crim.App. 1987). See also Allridge v. State, 850 S.W.2d 471, 481-82 (Tex.Crim.App. 1991) (citing Cuevas, Cordova, and Johnson).

> merits of the case without basis in the evidence developed at trial."[228]
>
> "The sentencer ... may determine the weight to be given to relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."[229]
>
> "The sentencer may not refuse to consider ... any relevant mitigating evidence."[230]

Morgan v. Illinois, supra, is important for reasons other than the one discussed above. The Supreme Court's holding in Morgan that a prospective capital juror who would automatically vote for the death penalty in a capital case should be excused for cause was based on the assumption that seating such a capital juror would necessarily violate the Eighth Amendment principle that a capital sentencer must be willing to at least consider any and all types of constitutionally relevant mitigating evidence, such as child abuse or mental illness, before deciding punishment. Presumably, according to Morgan's reasoning, a prospective juror who refuses at least to be willing to "consider" any particular type of constitutionally relevant mitigating evidence in mitigation of punishment should be removed "for cause" under the Sixth, Eighth, and Fourteenth Amendments.

Strategically, you should be aware that the Court of Criminal Appeals' cases are in sharp conflict with the Supreme Court's decision in Morgan, and that the Court of Criminal Appeals has not yet confronted the issue or attempted to reconcile its cases. Indeed, the Texas Court of Criminal Appeals has never even cited Morgan in a case. Thus, the presence of their potentially mistaken precedent may well "seed" error in numerous cases that will have to be reversed somewhere down the road on appeal. Accordingly, during voir dire, you can easily set up this appellate error by informing the trial court of the CCA's cases and then asking for a bill of exception. This strategy will be explained further below.

(a) Background: The CCA's Confused Jurisprudence

The most recent case on this subject is Robertson v. State, ___ S.W.2d ___, No. 71,224, slip op., at (Dec. 8, 1993). In Robertson, the CCA overruled Trevino v. State, 815 S.W.2d 592 (Tex.Crim.App. 1991), rev'd on other grounds, ___ U.S. ___ (1992), and Teague v. State, ___ S.W.2d ___, 1993 Tex.Crim. App. LEXIS 132 at *8-*9 (Tex.Crim.App. 1993). Trevino and Teague had silently overruled the CCA's Johnson-Cuevas-Cordova line of cases (quoted above). In Trevino, the CCA had stated: "Clearly, ... the law [citing, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982)] provides that youth is a mitigating factor which must be considered [by a capital sentencing juror]. Failure of the trier of fact at least to consider youth in their determination of punishment constitutes error . ..." Trevino, 815 S.W.2d at 613-14. In Robertson, which overruled Teague and Trevino, the CCA conversely stated that, "[w]e do not believe that the law requires a juror to consider youth as mitigating. . . ."[231]

Note that although some of these cases specifically spoke of a capital defendant's youth as a mitigating

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[228] Morgan v. Illinois, 112 S.Ct. 2222, 2235 (1992).

[229] Eddings v. Oklahoma, 455 U.S. 104, 114 (1982); *see also id.* at 117 * (O'Connor, J., concurring) ("Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, ... it is our duty to remand for resentencing.").

[230] Skipper v. South Carolina, 476 U.S. 1, 4 (1987).

[231] Robertson v. State, ___ S.W.2d ___, No. 71,224, slip op., at 16, n. 13 (Tex.Crim.App. Dec. 8, 1993).

factor,[232] their holdings obviously extend to any and all types of constitutionally relevant mitigating evidence -- such as history of child abuse, mental illness, positive character traits, intoxication at the time of the crime, history of substance abuse, et cetera. Keep that in mind in formulating your voir dire strategy.

Another relevant case is Hood v. State, ___ S.W.2d ___, No. 71,167, slip op. (Tex. Crim. App. Nov. 24, 1993), which went well beyond the Robertson line of cases. In Hood, the Court of Criminal Appeals held that capital defense counsel is not even entitled to ask prospective jurors whether they "could" or "would" "consider" certain types of mitigating evidence -- including child abuse and a good prison record -- in mitigation of punishment. Slip op., at 7-8 & footnote #5. In the Roberston line of cases, the court only held that prospective capital jurors need not be removed for cause if they state that they stated that they would not "consider" certain types of mitigating evidence. Hood permits a trial court to prevent such questioning altogether. The Hood court reasoned that with such questions, defense counsel was attempting to have jurors "commit" to finding specific evidence to be mitigating in a given case.

Hood seems to directly conflict U.S. Supreme Court jurisprudence on this point. Asking someone in the abstract to promise that he "would consider" a type of mitigating evidence in some cases does not mean that he will necessarily give any weight to the mitigating evidence in "considering" it in mitigation of punishment. The court misunderstood the meaning of "consider." The court's misunderstanding of the term "consider" is critically important to this claim. Hood is currently pending before the Supreme Court on a petition for certiorari and will be conferenced in October. Regardless of the Court's action at that time, it is a powerful issue that might save your client years down the road.

(b) Suggested Approach

Currently, it seems the best approach is to be completely candid with the trial court and the prosecution. Bring in copies of the slip opinions in Robertson v. State and Hood v. State and call the relevant portions of the opinions to the trial court's attention. Recognizing that Robertson and Hood are presently the law in Texas, and accordingly that they might bind the trial court, argue against the CCA's position. You might say something quite general like, "*Robertson* and *Hood* appear to conflict with the U.S. Supreme Court's capital sentencing and voir dire jurisprudence, which has stressed the consideration of mitigating evidence" -- and say that you simply want "to preserve any potential state and federal constitutional error" for the future. Cite to the relevant federal constitutional Amendments -- the Sixth, Eighth, and Fourteenth.

Assuming that the trial court does not permit the requested questioning -- "could you consider" -- ask to make a bill of exception regarding every single member of the venire. Be very specific about the questions that you would ask, and about the fact that you would pose them, if permitted to do so, to each member of the venire. Remember, the questions should not seek to "commit" prospective jurors to do anything except "consider" any and all types of relevant mitigating evidence during the punishment phase. "Consider" does not mean that a juror will necessarily vote for a life sentence simply because mitigating evidence is introduced. Nor does it mean that the juror will necessarily credit the defendant's evidence (*e.g.*, the juror may decide, based on the evidence actually presented at trial, that the defendant was not drunk at the time of the crime). The bottom line is, *if* such evidence is introduced and the juror does find the existence of a mitigating factor, the juror must at least be willing to "consider" it in mitigation of punishment. Do this for every venire member presented for questioning.

(c) Some Specific Questions to Ask:

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[232]With respect to "youth" as a mitigating circumstance under the Eighth Amendment, the Court of Criminal Appeals and Supreme Court recognize a person in their early twenties as "youthful."

The first necessary thing to do is define "mitigating" evidence, as it is most broadly defined by the Supreme Court: any evidence relating to the circumstances of the crime, the defendant's background or character, that suggests that a life sentence may be appropriate rather than a death sentence.[233] The trial court may be approached for an instruction on this issue later considering its specific articulation in Tex. Code Crim. Proc., Art. 37.071. Next you could inform the juror that "the U.S. Constitution" requires that they be willing to "consider any and all relevant mitigating evidence" in mitigation of punishment.[234] "Consider" being the operative term.

Then ask the following questions:

> Without yet knowing the facts of this particular case, could you promise me at this juncture that at least in some cases you would be willing to 'consider' the following types of mitigating evidence in deciding whether a convicted capital murder defendant receives a life or death sentence (if you believe that such is worthy of belief in a particular case):
>
> (i) A capital defendant's youth at the time of the crime.
>
> Explain that, according to the courts, "youth" at least includes the early twenties or so and below, and definitely 19. Be sure to ask the venireperson if he or she would possess those views even though a capital defendant was old enough to be in the Army, vote, get married, hold a job, go to college, buy liquor, etc., at the time that he allegedly committed the crime.
>
> Experience suggests that probably some venirepersons will say that a person over 17 should be treated like a 45-year old in every case. Try to get a venireperson to admit to such a "cut off" age in their mind -- that is, below the legal age of 18 at the time of the crime. Then object that such a "cut off" age is grounds for a removal for cause.
>
> (ii) A capital defendant was suffering from mental or emotional problems at the time of the crime.[235]
>
> (iii) A capital defendant was emotionally/physically neglected or abused as a child.
>
> (iv) A capital defendant has various positive character traits -- hypothetically describe the types of "good guy" evidence that you think that you'll introduce in the case -- so long as there is any support for such evidence.
>
> (v) A capital defendant played a lesser role in a crime than other co-defendants or

---

[233]If the trial court or prosecutor attempts to tie mitigating evidence solely to a defendant's "personal moral culpability" or "blameworthiness" for the capital murder -- as Article 37.071 does -- then object on Eighth and Fourteenth Amendment grounds. The basis of this objection will be explained below.

[234]If the trial court refuses to permit this statement, then object on federal (Eighth and Fourteenth Amendment) grounds and State (Art. I, § 10) grounds.

[235] Just because you might not ultimately put on such evidence is not necessarily relevant to preserving the error. If the trial court prohibits such questioning in the first place, on appeal you can argue that the reason that you didn't introduce such evidence to jurors is that you were afraid that they might view mental/emotional problem evidence as aggravating rather than mitigating. To fully preserve this issue, you should try to make an informal bill of exception saying that you "might" be putting such expert evidence, or at least you otherwise would plan on making that argument based on your own assessment of his social history, etc.

accomplices.

(vi) The defendant has suffered from a history of alcoholism or other substance abuse.

(vii) Any other type of mitigating evidence that might arguably apply to your case -- even based on evidence that you think, in good faith, you only might discover later. Intoxication evidence will be discussed separately below.

Be clear on the record that you are not trying to get prospective jurors to "commit" to returning a life sentence based on any particular species of mitigating evidence. Rather, you are only trying to weed out prospective jurors who state that under no circumstances will they give any "consideration" or mitigating weight to such types of mitigating evidence.

(d) Preserving Two Distinct Types of Errors

You should seek to preserve two types of voir dire error with this line of questioning:

(i) Federal constitutional error: (a) if the trial court does not permit such questioning, or (b) if he permits the questioning, but refuses to strike prospective jurors who say they won't consider certain species of mitigating evidence in any case.[236] In either situation, object on Sixth, Eighth, and Fourteenth Amendment (due process) grounds. Note that this particular type of error is related to "for cause" challenges -- not the "intelligent exercise of peremptory challenges." Of course, also follow the ordinary Texas preservation rules here.

ii) Texas constitutional error: This applies only if the trial court does not permit such questioning in the first place. Such state constitutional error is under Texas Constitution, Art. I, section 10 -- trial court's impairment of intelligent use of peremptory challenges.

(e) Moving for a "Cause" Strike.

Assuming that the trial court permits you to ask the above questions and a member of the venire states that they would never consider one or more types of constitutionally relevant mitigating evidence (e.g., youth, mental illness) to be "mitigating," then move that the prospective juror be struck for cause. Make sure that you have first informed -- or attempted to inform -- prospective jurors that "the U.S. Constitution" requires them to "consider" any and all types of relevant mitigating evidence in mitigation of punishment in a capital case. If the challenge for cause is denied, then jump through all of the hoops discussed above in order to preserve for appeal the trial court's denial of the challenge for cause.

(f) Voir Dire Questions about Voluntary Intoxication -- Texas Penal Code § 8.04.

Evidence of voluntary intoxication at the time of the crime -- which the Supreme Court has repeatedly recognized as constitutionally relevant mitigating evidence -- presents a special situation in Texas. There is a Texas statute, Texas Penal Code § 8.04(b), which provides that evidence of a defendant's intoxication at the time of the crime cannot be considered as mitigating evidence during the punishment phase unless the intoxication rises to the level of "temporary insanity," as defined by Texas Penal Code § 8.01 (i.e., that the defendant did not know right from wrong). This statute is a straight-forward violation of the Eighth and Fourteenth Amendments, at least as applied in a capital case, because it entirely precludes a jury's consideration

[236]Note that Morgan v. Illinois, supra, dealt with both types of error.

of voluntary intoxication evidence unless jurors believe that the defendant was so intoxicated (drunk, stoned, high, etc.) that he was legally insane (which will be rare, if ever). As explained below, this statute presents an interesting approach to both voir dire.

In addition to the general mitigation voir dire strategy explained above, you also should do the following regarding mitigating evidence of voluntary intoxication. At the very beginning of voir dire, request that the trial court permit you to ask all prospective jurors whether, in a given case, they "could consider" voluntary intoxication in mitigation of punishment even if the defendant was not so intoxicated that he was legally insane under Texas law. Argue to the trial court that § 8.04(b) does not permit such questioning, but that you think § 8.04(b) is an Eighth Amendment violation and that "the law" about which you wish to inform prospective jurors -- that is, the U.S. Constitution -- requires that jurors must at least be willing to "consider" voluntary intoxication as mitigating evidence even if it does not rise to the level of temporary insanity.

Assuming that the trial court denies you the right to question jurors about the fact that their obligations under the Eighth Amendment trump the barrier of § 8.04, object on both federal grounds (Sixth, Eighth, and Fourteenth Amendments) and state grounds (Art. I, § 10). Assuming such questioning is permitted, move to excuse "for cause" any juror who will not at least be willing "to consider" non-insane voluntary intoxication as mitigating evidence.

(g) The Possibility of a "Nexus" Requirement

In many post-Penry cases, the Court of Criminal Appeals has held that the introduction of certain types of mitigating evidence (such as child abuse and substance abuse history) did not cause Penry problems under the old, pre-Penry special issues unless the defendant's mitigating evidence established a precise "nexus" between the evidence and the crime. For instance, the CCA held, unless evidence of child abuse somehow explained why the defendant committed the crime, there is no Penry violation.

Of course, the new capital sentencing statute renders these cases inapplicable in terms of Penry violations under Art. 37.071. However, the CCA's reasoning in these cases might be applied by trial courts and prosecutors to either keep out certain mitigating evidence entirely or, during voir dire, might lead the prosecutor or trial court to instruct jurors about the "nexus" requirement. That is, a trial court or prosecutor may tell prospective jurors that they can consider things such as child abuse evidence in mitigation of punishment only if the evidence establishes a "nexus" between the evidence and the crime. If this happens, strenuously object that the Supreme Court's Eighth Amendment cases say nothing about a precise "nexus" requirement and that it is solely up to the jury to infer about whether mitigating evidence is relevant in a given case. If the trial court overrules your objection, challenge the prospective juror(s) for cause on the ground that they have been misinformed of the law. If that is denied, use available peremptories on at least one prospective juror so as to preserve the error for appeal.

2. **Aggravating Evidence**

Although aggravating evidence is the tool of the prosecution, there are ways to inform jurors or inject error into your voir dire through creative questioning and vigilant objections.

Ask the trial court to permit you to voir dire prospective jurors about whether they would, in any case, consider various types of relevant mitigating evidence -- youth, mental/emotional problems, race, religion, troubled social history, etc. -- as aggravating evidence rather than mitigating evidence. If the trial court does not permit such questioning, object on state and federal constitutional grounds and ask to make a bill of exception. If a trial court does permit such questioning and a venireperson says that he or she would consider things such as mental illness or child abuse to an aggravating factor, move to strike the juror for cause under the Sixth, Eighth, and Fourteenth Amendments. See Zant v. Stephens, 462 U.S. 862, 885 (1983) (capital

sentencing procedure constitutionally invalid if it "attaches the 'aggravating' label to factors [that] actually should militate in favor of a lesser penalty," such as "mental illness").

If the prosecution informs jurors that traditional types of mitigating evidence (such as mental illness or youth) can be considered as aggravating evidence as well as mitigating evidence, object on the ground that the prosecutor is misstating the applicable law. Follow all the procedural requirements discussed above.

D. The Definition of "Mitigating Evidence"

The post-Penry sentencing statute defines "mitigating evidence" as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." Tex. Code Crim. Pro. Art. 37.071, § 2(f)(4) (emphasis added). The term "blameworthiness" links the larger definition of "mitigation" to the use of the term "personal moral culpability" as contained in the Penry statutory special issue.[237] The common dictionary definition of "culpable" is "deserving blame or censure; blameworthy." Webster's Encyclopedic Unabridged Dictionary of the English Language, at 353 (emphasis added).

Art. 37.071(f)(4)'s limiting definition of "mitigation" is unconstitutional, since it ties the concept of mitigation only to mitigating factors that reduce the defendant's moral blameworthiness (presumably) for the capital murder -- or at least that is how a typical juror could interpret the statutory definition of "mitigating evidence." The defendant's culpability for the capital crime of which he was convicted is only one relevant factor in the larger aggravation/mitigation scheme. The defendant's character -- at least the aspects of his character independent of whatever characteristics were displayed during the crime -- is a wholly separate area of mitigation. For instance, the fact that a capital defendant who committed a brutal, senseless murder may have extraordinary artistic talents or may have always been good to his family members in no way relates to his "moral culpability" for the crime. Rather, it relates to the larger notion of whether he deserves to die in view of the totality of mitigating and aggravating circumstances, not just those factors that relate to his blame or culpability (or lack thereof) for committing the capital murder itself.

Thus, in addition to attacking the statutory definition of "mitigating evidence" as unconstitutional during the charge conference at the punishment phase, you should request to voir dire prospective jurors about their own definitions of "mitigating evidence" and attempt to explain that the Eighth and Fourteenth Amendments do not narrowly define "mitigation" in the manner that the statute does. In all likelihood, the trial court will prohibit such questions. If so, object on both state grounds (Art. I , § 10) and federal grounds (Sixth, Eighth, and Fourteenth Amendments).

E. Other Types of Questions

1. Racial Prejudice

As noted above, in addition to Art. I, § 10 of the Texas Constitution, the U.S. Constitution -- the

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[237]That special issue asks:

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

Tex. Code Crim. Pro. Art. 37.071, § 2(e) (emphasis added).

Sixth, Eighth, and Fourteenth Amendments -- gives you the right to question prospective jurors about their views on race, at least regarding a multi-racial crime (typically black-on-white crimes). See Turner v. Murray, 476 U.S. 28 (1986). Assuming that you've got a multi-racial crime or even if the defendant is a minority in a minority-on-minority case, make race an issue during voir dire. In particular, in view of the "future dangerousness" special issue, you want to ask white venirepersons whether they view Blacks and Hispanics as generally more violence-prone than whites. Numerous studies have shown that whites do view minorities, particularly young black males, as more violence-prone than whites. If a venireperson is unable to state under oath that she will absolutely disregard the defendant's race, and the race of the deceased, in answering the "future dangerousness" issue, she should be removed "for cause" and you should object to any refusal by the trial court to do so.

2. Gender of Defendant and Victim

Like race discrimination, gender discrimination implicates the Equal Protection Clause of the Fourteenth Amendment. Studies also show that capital juries are more likely give the death penalty to people who kill women and are more likely to give the death penalty to men rather than women. Particularly if you have a male-on-female crime, attempt to ask prospective jurors about whether they believe that a person who kills a female is, as a general matter, more deserving of the death penalty than a person who kills a male. Also ask whether the prospective juror would be more likely to give the death penalty to a male, as opposed to a female, if an otherwise identical case.

If the trial court denies you the right to ask this type of question, object on state (Art. I, § 10) and federal (6th, 8th, and 14th Amendment) grounds -- in the form of a running objection -- and make a bill of exception. If the prospective jurors' answers indicate a gender bias, move to strike the venireperson for cause.

3. Religious Views

There are two reasons to ask a prospective capital juror about his or her views on religion. First, it permits you to identify jurors whose religious views would make them more likely to vote for the death penalty ("an eye for an eye"; "he that smiteth a man shall surely be smiteth"). Second, it permits you to identify jurors whose religious views would make them more likely to vote against a life sentence ("thou shall not kill"; "vengeance is mine, sayeth the Lord"). A handy indirect way of determining a prospective juror's views here is to ask the juror whether her religious views are more dictated by the Old Testament or the New Testament. "Old Testament Christians" are more likely to favor the death penalty; "New Testament Christians" are less likely to.[238] (Obviously, this line of questioning only applies to Christians, but they will constitute 95% of your array.). Strict Catholics are also more likely to be anti-death penalty, since the Catholic Church publicly opposes the death penalty as a general matter.

During voir dire, you obviously want to move to strike any prospective juror who indicates that her religious views make her more prone to vote for death. However, don't view this as simply an occasion to use peremptories. If you get a prospective juror to admit that their religious views make them more prone to vote for death, ask the trial court to strike that juror for cause on federal Constitutional grounds. Specifically, object on the First, Sixth, Eighth, and Fourteenth Amendment grounds. Even if the prosecutor or trial court rehabilitates the prospective juror and gets them to agree to set aside their personal beliefs and "follow the law,"

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[238] The "eye for an eye" passage comes from Holy Bible, Old Testament, Book of Exodus, XXI: 12. But see Holy Bible, New Testament, Gospel of Matthew, V: 38-44, in which Jesus says "Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you . . . whoever shall smite thee on they right cheek, turn the other also . . . . " Thus, it is arguable that the "eye for an eye" maxim in the Old Testament was "overruled" by "turn the other cheek" maxim in the New Testament.

object that a person's religious views are too powerful to assume that a mere juror's oath will actually keep the person's religiosity in check. Argue that religion is something that runs very deep in a person's belief system and that subconscious religious bias in favor of the death penalty is more likely to be a factor regarding religion than in other areas.

One last note on voir dire -- in Knox v. Collins, 928 F.2d 657 (5th Cir. 1991), the Fifth Circuit reversed a Texas capital murder conviction on the grounds that the defendant was deprived of his federal constitutional right to intelligently use his peremptory challenges. In that case, the trial court had promised defense counsel during voir dire that the jury instructions would instruct jurors on Texas parole law; however, the trial court ultimately refused to submit such an instruction to the jury. Defense counsel relied to his detriment on the trial court's promise during voir dire by basing his peremptory challenges in part on prospective jurors' views on parole.

The rule in Knox can be extended to a great number of situations. If the trial court permits you to voir dire on some area of the law and promises that he will instruct the jury in a certain way and then ultimately refuses to instruct the jury as promised, object on state (Art. I, § 10) and federal (Sixth and Fourteenth Amendment) grounds.

E. Applying Simmons V. South Carolina in Texas

On June 17, 1994, the U.S. Supreme Court handed down its landmark decision in Simmons v. South Carolina, ___ U.S. ___, No. 9059 (U.S. Sp. Ct. June 17, 1994). In Simmons, a South Carolina capital defendant argued that he was denied his rights under the Eighth and Fourteenth Amendments to the United States Constitution when the trial court refused to permit the jury to be informed that, as a matter of state law, a capital defendant convicted of capital murder would be ineligible for parole if he were sentenced to "life." A majority of the Court only reached the Fourteenth Amendment (due process) argument and held -- at least in cases where the State has argued that the defendant would be a future danger to society cases[239] -- that failure to so inform a capital sentencing jury required the invalidation of the death sentence. See Simmons, slip op., at 7-15 (plurality op.); id. at 1-4 (opinion of O'Connor, J., concurring, joined by Rehnquist, C.J. & Kennedy, J.).

The plurality opinion in Simmons also criticized the trial court's instruction that informed jurors that they should not consider South Carolina's parole law in their sentencing deliberations. By instructing jurors that they should not consider the possibility of parole in the event that the capital defendant were sentenced to "life," the trial court actually invited speculation about parole. See Simmons, slip op., at 17 (plurality op.).

Justice Souter's concurrence, which was joined by Justice Stevens, went further and contended that, in addition to whatever the due process clause required in such cases, the Eighth Amendment requires a capital sentencing jury to be informed of the meaning of "life" imprisonment under state law because the Eighth Amendment's "need for heightened reliability ... mandates recognition of a capital defendant's right to require instructions on the meaning of legal terms used to describe the sentences ... when a jury is required to consider[] in making a reasoned moral choice between sentencing alternatives." Id., slip op., at 2 (opinion of Souter, J., concurring, joined by Stevens, J.).

1. Youth and the Simmons Rationale.

Although Texas law does not currently not require convicted capital defendants to serve "life" sentences without the possibility of parole, as in South Carolina, that difference may be constitutionally immaterial in certain cases. Texas law did require that defendants, if convicted of capital murder and sentenced to "life," had

[239]The State necessarily makes this argument in all Texas death penalty cases, including at your defendant's trial. See Tex. Code Crim. Proc. Art. 37.071 (Vernon 1993).

to serve at least 35 calendar years (and now 40) before even being eligible for parole. If your client was at all youthful (that is, 24 or less years old) at the time of the crime, and was facing trial within a year or two, if convicted and given a life sentence, he would be between 55 and 65 before he was eligible for parole! Because the State must argue and prove that your client will be a future threat to "society" if not sentenced to death, jurors will be led to believe that Petitioner would be a threat to free society. Under the Eighth and Fourteenth Amendments, your client is entitled to "deny or explain" this "future dangerousness" argument. See Simmons, slip op., at 15 (plurality).

In this regard, it is widely recognized that persons with a history of violent criminal activity rarely engage in violent criminal behavior once they reach their middle-age years. See Johnson v. Texas, 113 S. Ct. 2658 (1993). In Johnson, the Supreme Court, in explaining "[t]he relevance of youth as a mitigating factor," recognized that youth's mitigating force "derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness [i.e., violence-prone tendencies] that may dominate younger years may subside." Id. at 2669 (emphasis added).

Flipping the Eighth Amendment coin over to its aggravating side, this very same recognition arguably requires a Texas capital sentencing jury -- which in the majority of cases assesses a "youthful" defendant's prospects for being a "future danger to society"[240] -- to know that a life-sentenced capital defendant will be definitely be in a maximum security prison during the time that his violent-prone tendencies associated with youth still exist (i.e., before his middle-aged years in most cases). If the violence-prone aspects of youth are indeed "transient," as the Johnson Court recognized, then surely that "transience" does not extend past 35 years in many, if not most, cases. Hence, in order to "deny or explain" a Texas prosecutor's "future dangerousness" arguments, Simmons, slip op., at 15 (plurality), a Texas capital defendant such as Defendant in this case has a constitutional right to tell the jury about the 35-year parole ineligibility requirement in the event of a life sentence. This is particularly true when the trial court's own instructions have invited speculation about parole, as this Court's instructions did. As Judge Frank so aptly stated in United States v. Antonelli Fireworks, 155 F.2d 613, 656 (2nd Cir. 1946) (Frank, J., dissenting), in a related context, the belief that such speculation can be removed by an instruction telling jurors not consider parole "is like the Mark Twain story of the little boy who was told to stand in the corner and not to think about white elephants." Such speculation is anathema to the Eighth Amendment's requirement of heightened reliability in the capital sentencing phase. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

By denying a "youthful" capital defendant the right to inform the jury that the defendant will be ineligible for parole for 35 years if sentenced to "life," a Texas capital defendant is not permitted to "explain or deny" the prosecutor's "future dangerousness" argument and, more importantly, the State invites the jury to speculate that the defendant will be paroled during the time while his "youthful" violent qualities still remain. In practical terms, that is, the jury in cases with a "youthful" defendant will believe that such a defendant may be paroled while he still is "youthful" -- i.e., in as little as a few years. In this way, the jury is by inference "misled" about the operation of Texas' parole law. Simmons, slip op., at 17 (plurality).

2. Preserving Error In Voir Dire

Throughout the voir dire, defense attorneys should attempt to question members of the venire about the operation of Texas parole law in capital cases. In light of the current express statutory prohibition, the trial court is unlikely to permit the defense to inform jurors that, if Defendant were convicted of capital murder and sentenced to "life," he would be ineligible for parole for 35 calendar years. However, throughout the same voir dire, the State will likely question members of the venire in a manner that would lead them to think that your client, if he were sentenced to "life," would be a future danger to free (as opposed to only prison) society. Although the record is as yet unavailable, Defendant believes that the record will bear out his characterizations of the voir dire questioning to date.

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[240]The median age of persons on Texas' death row -- at the time of the crime -- is 25.

Under Simmons, a capital defendant has a constitutional right to question all prospective capital jurors about their preconceptions of "life" sentences in capital cases in view of the operation of the parole laws and inform jurors who have a mistaken notion of parole about what Texas law in fact requires. Because you will be prevented from asking, informing or arguing, you can argue at trial and on appeal that you were thus unable to use your peremptory strikes in an intelligent manner. Further, Simmons makes it clear that such misinformation will likely taint the juror's role in sentencing. Ultimately, a prospective capital juror who has a mistaken pre-conception of parole law in a capital case must be informed of the actual law, particularly when the State is has implied that the defendant will be a danger to free society of sentenced to "life." If not, that juror very well will render an unreliable sentencing verdict in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

3. Request a Hearing

You may wish to further pursue this issue by requesting a hearing and, if denied, presenting a bill of exceptions on this issue. At the hearing you should introduce evidence and expert testimony on the issue of Texas citizens' perceptions of the operation of Texas' parole law in capital cases. You could also present evidence regarding the likelihood -- even after 35 or 40 years -- that the Texas parole board would actually grant parole to a capital sentenced inmate. The Supreme Court recognized in the Simmons case that such empirical studies are highly relevant in determining the merit of such a claim.

4. Request an Instruction

To fully preserve this issue, you should also request, before voir dire begins and before the punishment phase begins, an instruction that explains exactly what the parole eligibility requirements are for your client if the jury chooses a life sentence rather than a death sentence. See Tex. Code Crim. Pro. Art. 42.18 §8.

CONCLUSION

Hopefully, the suggestions and information in these materials will aid you in developing a defensive theory of punishment in the capital case to which you have been assigned. Absent favorable plea negotiations, a well investigated, fully prepared and well presented defense at punishment is your clients best chance for life. In the absence of a jury sentence that spares your client's life, you must have paved the way for appellate counsel -- and later state and federal habeas counsel -- to present and win points of error in post-trial litigation.

Look for friends. Although this requires near super-human efforts on your part as appointed counsel in a death case, don't forget that there are hundreds of attorneys who have blazed the trail before you -- most of whom are willing to help with advice and ideas. For those who have 'gone before,' remember what your first death penalty trials were like and assist those new attorneys each day receiving appointments in these ultimate cases. And while you are casting about for sympathetic ears, don't forget the many attorneys in this state -- and throughout the country -- who specialize in the appellate and post-conviction representation of death-sentenced defendants. These folks possess a wealth of ideas and are the most likely to be on top on the always radically developing death penalty law.

Finally, GOD BLESS! Many in this time and place are filled with respect and awe at the work you all do for the most forsaken among us.

APPENDIX

SAMPLE MOTIONS

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IN THE COUNTY OF HIDALGO)
)
) IN RE: ROBERTO RAMOS
)
IN THE STATE OF TEXAS)

STATEMENT OF MARIA OROZCO

1. My name is Maria Orozco. I was a juror in the 1993 trial of Roberto Ramos for the 1992 capital murder of his wife and two children.

2. The deliberations were longer at the guilt part because we went through all the evidence and everything. They didn't have any DNA evidence. They couldn't even tell us if the blood on the mallet was human or animal, so we didn't have any way to know if that was the murder weapon.

3. There were one or two witnesses who spoke in Spanish. There was a translator who was supposed to be there, but he only came for one day and then had to leave and so they had the court bailiff do it. Most of us spoke Spanish, so if there had been any really major discrepancy, we would have explained it to the others, but I think the bailiff did okay. There are some things that you just can't translate between languages.

4. The whole thing was a big deal on the news. There was press there all the time from the newspapers and TV. The courtroom was packed everyday. We had to wear badges that said juror on them and so people could tell what we were doing and they would ask us what trial we were on and we would tell them we couldn't say. We went to lunch together and were told to stick together. It's a poor county so we had to buy our own lunch – unless you lived nearby then you could go home for lunch. One time we went out to lunch and a guy saw us and asked what trial we were from. We wouldn't tell him so he said oh you're from that guy who killed his kids and he started yelling "guilty, guilty." So we just decided to go to another restaurant.

5. The trial was so boring at some points that we had to keep waking this one lady up every day. We had to do things to keep each other awake.

6. The main thing that I remember about the sentencing was that he didn't have any defense. For the sentencing he didn't have anyone testify. I mean he didn't have anyone on his side, no family, no employers, there were no relatives in court with him at all. No one to speak on his behalf or to talk about his behavior.

7. But, the government had lots of evidence. There was a lady from Reynosa who said that he had married her daughter and the daughter had disappeared and never been found. There also was an older son who spoke about how cruel his father was and that he punished him in terrible ways, tortured him basically. He seemed like a very cruel person.

8. So, we got the impression that he was very cruel and cold and there was nothing on the other side. No one from his family testified about how he was when he was younger, or his behavior, we only heard about his cruelty. If we had heard information like that it might have made a difference at the sentencing part.

9. At the life-death part is didn't take us that long to deliberate, maybe a couple of hours. Then we just sat in the jury room for a long time, about and hour and a half, because we didn't want to make that decision. We just sat there quietly for a long time. He just had no one on his side, no one to talk about how he was as a little boy, his psychological problems, nothing. That surprised me. I was sitting there waiting for a defense but there wasn't one. When they rested their case we were all surprised because we were expecting a defense. When we went back and discussed there was nothing we could do, we had no information to use to give life. When they gave us the instructions and we had to answer those questions there was just nothing. We really had no choice. The life-death was the worst part, we didn't want to make that kind of decision, but we had no choice.

10. We didn't have any doubt that he would be a future danger, because of what he did to his son and also that poor woman whose daughter had been missing. And, we didn't have any mitigating evidence at all for the other question, so we had to say there wasn't any. But, we would have answered differently if there had been some evidence.

11. I have recently been informed by Mr. Ramos' defense that he was abused as a child and suffers from a dissociative disorder as a result. This would have made a difference to us. It would have been evidence for that question and it also would have help us to understand why he didn't show any emotion in court. I couldn't see him from my vantage point, but the other jurors talked about how he showed no emotion and that made us believe that he was cruel and not sorry for what he had done. If we knew that he had an emotional disorder this would have explained his behavior in the courtroom.

12. I have also recently been informed by Mr. Ramos' defense that he has been diagnosed with brain damage. This would have given us evidence to vote for a life sentence. This is the kind of thing we wanted to know. ~~There's a nephew who is like mentally disabled or something.~~ He ~~may have the potential to hurt someone, so I know that makes a difference.~~ His attorney could have done a better job. He had no defense. Knowing some other things about Ramos might have helped because all we heard was that he was mean and we never got any explanation about why he was like that.

Having read the foregoing, I swear upon pain of perjury that it is true and complete to the best of my knowledge and recollection.

7-18-04
Date

Maria Orozco

Witnessed this 18th day of July, 2004.

Witness

IN THE COUNTY OF HIDALGO)
)
) IN RE: ROBERTO RAMOS
)
IN THE STATE OF TEXAS)

STATEMENT OF TERESA ESPINOZA

O. Alvarado

1. My name is Teresa Espinoza. I was a juror in the 1993 trial of Roberto Ramos for the 1992 capital murder of his wife and two children.

2. After we convicted Mr. Ramos, there was a penalty phase. We were expecting the defense to put on witnesses, but they didn't. We wondered about him and would have wanted to know more about him.

3. I have recently learned from defense counsel for Mr. Ramos that he has been diagnosed with brain damage and that he had a long history of childhood abuse. I wish that we had known this at trial.

4. It definitely would have made a difference at the penalty phase if we had known that he was abused as a child or if we knew about his brain damage. I know that in the spur of the moment, someone can snap. We would have wanted to see a psychiatric report.

5. Knowing that Mr. Ramos grew up in an abusive would have made the crimes more understandable. It doesn't condone or justify anything, but it could have been a reason for voting for life.

6. We watched Mr. Ramos in court and wondered about him. When his lawyers talked to him, he just spaced out. He looked out of his mind, like he was in shock. When they were playing the video, he didn't look shocked or emotional. He looked angry, he had bloodshot eyes. It would have been good for him to show emotion, these were his kids. He was scary looking. To see him like that, we thought he was cold and scary. If we had known that these are symptoms of a dissociative disorder, it would have made a big difference in how we thought of Mr. Ramos. It's not his fault if he can't express emotion, but we didn't know that.

Having read the foregoing, I swear upon pain of perjury that it is true and complete to the best of my knowledge and recollection.

July 18, 2004
Date

Teresa Espinoza Alvarado

Witnessed this 18 day of July, 2004.

Katherine Black, Witness

Exhibit "A"

CAUSE NO. CR-1430-92-B

THE STATE OF TEXAS	§	IN THE 93RD DISTRICT COURT
VS.	§	OF
ROBERT MORENO RAMOS	§	HIDALGO COUNTY, TEXAS

TRIAL COURT'S FINDINGS BASED ON TEX. CODE CRIM. PROC. ANN. Art. 11.071 (Supp. 1996)

On this, the 18th day of October, 1996, this Court held a hearing in the above-referenced case pursuant to TEX. CODE CRIM. PROC. Art. 11.071 (Supp. 1996). Defendant ROBERT MORENO RAMOS appeared in his own proper person. The STATE was represented by Assistant Criminal District Attorney THEODORE C. HAKE. JOSEPH A. CONNORS, III, who had been one of Defendant Garcia's attorneys on direct appeal of this case, also appeared at said hearing.

At the outset of the hearing this Court determined that this is a capital murder case in which Defendant Robert Moreno Ramos had been sentenced to death after the jury had given affirmative re-esponses to the death penalty special issues.

This Court also noted that automatic appeal of this sentence to the Texas Court of Criminal Appeals led to affirmance of the conviction and sentence on June 26, 1996. See Ramos v. State, ___ S.W.2d ___ (Tex.Crim.App., No. 71,714, June 26, 1996).

This court further found that the Court of Criminal Appeals had denied a motion for rehearing in this case on September 11, 1996.

Pursuant to TEX. CODE CRIM. PROC. Art. 11.071, Sec. 2 (c) (Supp. 1996), this Court then determined that Defendant Ramos had been represented at trial by Ricardo Flores, whose address is 106 South 12th Street, Edinburg, Texas 78539 and whose telephone number is (210) 381-0514, and Jack D. Hunter, whose address is 706 North 1st Street, Harlingen, Texas 78550 and whose telephone number is (210) 423-4672. This Court also determined that Joseph A. Connors, III, whose address is 212 Nolana or P.O. Box 5838, McAllen, Texas 78502-5838 and whose telephone number is (210) 687-8217; Dorina Ramos, whose address is P.O. Box 720879, McAllen, Texas 78504 and whose telephone number is 682-1918; Mark Alexander, whose address is 804 Pecan or P.O. Box 4136, McAllen, Texas 78502-4136 and whose telephone number is (210) 682-0228; and David A. Schulman, whose address is Schulman & Krug, 607 West 9th Street, Austin, Texas 78701 and whose telephone number is (512) 474-4747, had been Defendant Ramos' attorneys on direct appeal of this case.

This Court further noted that TEX. CODE CRIM. PROC. Art. 11.071, Sec. 2 (E) (Supp. 1996) provides that the Court of Criminal Appeals may not appoint any of these individuals to represent Defendant Ramos unless both Ramos and the attorney request the appointment on the record or said Court finds good cause to make the appointment.

However, Defendant ROBERT MORENO RAMOS specifically requested, on the record, that JOSEPH A. CONNORS, III be appointed as one of his attorneys for purposes of this habeas corpus proceeding. Mr. Connors also requested to be appointed for this purpose on the record.

Having made all the necessary findings called for by TEX. CODE CRIM. PROC. Art. 11.071 (Supp. 1996), this Court directs Ruben del Bosque, Appeals Clerk for the Hidalgo County District Clerk's Office, to immediately prepare and transmit to the Court of Criminal Appeals: (1) a certified copy of the judgment in this case; (2) a certified copy of these findings; (3) the original transcription of the court reporter's notes of the hearing on this matter; (4) a certified copy of Defendant's Application for Appointment of Counsel; (5) a certified copy of Defendant's Application for a Bench Warrant, and its accompanying proposed order; and (6) a certified copy of the bench warrant issued by this Court on October 14, 1996.

This Court still further directs the court reporter who reported this hearing to prepare a transcription of her notes of this hearing and to deliver an original and a copy thereof to Mr. del Bosque.

This Court also directs Mr. del Bosque to file the copy of the transcription of the court reporter's notes as part of the trial court record of this case.

SIGNED AND ENTERED on this, the 18th day of October, 1996.

FERNANDO G. MANCIAS
Judge Presiding
93rd District Court
Hidalgo County, Texas

DATE: OCT 18 1996
PAULINE G. GONZALEZ
DISTRICT CLERK HIDALGO COUNTY TEXAS
BY _____ DEPUTY

ROBERT MORENO RAMOS, Appellant

NO. 71,714 v. Article 11.071, V.A.C.C.P. Proceeding from HIDALGO County

THE STATE OF TEXAS, Appellee

ORDER APPOINTING COUNSEL
UNDER ARTICLE 11.071, SEC. 2, V.A.C.C.P.

Applicant was convicted of the offense of capital murder in Cause No. CR-1430-92-B, styled The State of Texas v. Robert Moreno Ramos, in the 93rd District Court of Hidalgo County. Punishment was assessed at death. The cause was affirmed on direct appeal in our Cause No. 71,714, Ramos v. State, (Tex.Cr.App. delivered June 26, 1996).

This Court has received documents from the convicting court requiring the appointment of counsel for purposes of a writ of habeas corpus under Article 11.071, V.A.C.C.P. Upon due consideration, Kyle Blair Welch, is appointed for the purpose of representing applicant on a writ of habeas corpus. Accordingly, an application for a writ of habeas corpus, returnable to this Court, must be filed in the convicting court no later than the one hundred and eightieth day after the date of this appointment.

IT IS SO ORDERED THIS THE 22ND DAY OF NOVEMBER, 1996.

PER CURIAM

En banc
Do Not Publish

Denied Wallace J.D. Dec 6, 96

NO. 71,714 (WRIT NO. 1)

COURT OF CRIMINAL APPEALS OF TEXAS

ROBERT MORENO RAMOS, Appellant.	§	RECEIVED IN COURT OF CRIMINAL APPEALS
v.	§	DEC 6 1996
THE STATE OF TEXAS, Appellee.	§	Troy C. Bennett, Jr., Clerk

RAMOS' REQUEST FOR APPOINTMENT OF JOSEPH A. CONNORS III AS ONE OF RAMOS' ATTORNEYS UNDER ARTICLE 11.071, V.A.C.C.P.

TO THE COURT OF CRIMINAL APPEALS:

ROBERT RAMOS, the above defendant, requests the court to appoint attorney Joseph A. Connors III of McAllen, Texas as one Ramos' own attorneys for purposes of representing Robert Ramos as an applicant for purposes of preparing, filing and litigating an application for writ of habeas corpus under Article 11.071, V.A.C.C.P. As grounds, Robert Ramos shows:

(1) in the trial court on the record in October, 1996, Robert Ramos requested the appointment of Joseph A. Connors III, as one of his attorneys for purposes of representing applicant for purposes of preparing and filing a writ of habeas corpus under Article 11.071, V.A.C.C.P.;

(2) attorney Joseph A. Connors III, who represented Robert Ramos on direct appeal, agreed on the record in the trial court in October, 1996, to accept such an appointment; and

(3) attorney Joseph A. Connors III hereby requests he be so appointed as one of Robert Ramos' attorneys for purposes of representing applicant for purposes of preparing and filing an

application for writ of habeas corpus under Article 11.071, V.A.C.C.P.

ARGUMENT

Under Stearnes v. Clinton, 780 S.W.2d 216 (Tex.Cr.App. 1989), a writ of mandamus will be issued directing the trial court to vacate an order removing relator's "court appointed counsel of choice" from the criminal case which had not yet been tried, for the trial court was without authority to do so and should not be able to discriminate between retained and appointed counsel without a semblance of rationality.

Considering said trial courtroom request on the record in this case by Robert Ramos and attorney Connors' above request on the record and Connors' trial courtroom agreement to accept such appointment, it appears the Court of Criminal Appeals should also appoint Robert Ramos' "counsel of choice," for the failure to do so discriminates without semblance of rationality other than fiscal reasons which should have no place in this Court's decision whether or not to appoint in this matter attorney Connors whom Robert Ramos trusts, for due process and equal protection guarantees under the Fourteenth Amendment to the U.S. Constitution demand no less than the court make that "requested appointment" now that there has been full compliance with the "requests" feature of Section 2(e) of Article 11.071, V.A.C.C.P. (1995).

WHEREFORE, PREMISES CONSIDERED, Robert Ramos and Joseph A. Connors III request on the record that pursuant to Article 11.071, V.A.C.C.P., the Court of Criminal Appeals of Texas "shall appoint"

attorney Joseph A. Connors III as one of Robert Ramos' attorneys for purposes of representing applicant in the above cause for purposes of preparing and filing an application for writ of habeas corpus under Article 11.071, V.A.C.C.P.

Respectfully submitted
for Defendant by:

Robert Ramos with authority by Joseph Connors
ROBERT RAMOS PRO SE
Defendant

Joseph A. Connors III
JOSEPH A. CONNORS III
Formerly Appointed Counsel
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(210) 687-8217 FAX 687-8230

CERTIFICATE OF SERVICE

I, Joseph A. Connors III, certify that I had delivered or mailed a copy of the foregoing to the office of all A.D.A. attorneys of record on this the 5th day of DEC, 1996.

J. A. Connors III

THE STATE OF TEXAS §

COUNTY OF HIDALGO §

Before me, the undersigned authority, on this day personally appeared Joseph A. Connors III, who being by me duly sworn, on oath stated:

My name is Joseph A. Connors III. I am over eighteen years of age and in good health. I have read Applicant ROBERT MORENO RAMOS' foregoing Request For Appointment Of Joseph A. Connors III As One Of Ramos' Attorneys Under Article 11.071, V.A.C.C.P., and I hereby swear that true and correct are the facts contained in the above request.

Joseph A. Connors III
JOSEPH A. CONNORS III

SWORN AND SUBSCRIBED before me today, December 4, 1996.

Lisa Michelle Gomez
Notary Public In and For
The State of Texas

LISA MICHELLE GOMEZ
MY COMMISSION EXPIRES
November 17, 1999

IN THE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

ROBERT MORENO RAMOS

VS. CAUSE NO. 71,714

STATE OF TEXAS

ORDER

On this 6th day of December, 1996, came on to be considered the motion of the appellant's counsel requesting appointment of Joseph A Connors III as one Ramos' attorneys under Article 11.071, V.A.C.C.P..

AND SUCH MOTION is hereby denied.

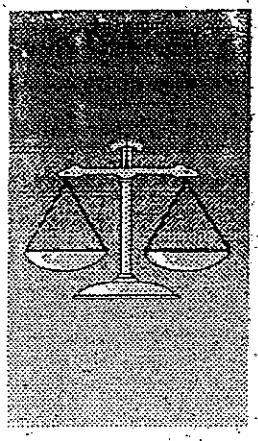
IT IS SO ORDERED.

PER CURIAM

A TRUE COPY ATTEST:

Troy C. Bennett, Jr., Clerk
Court of Criminal Appeals

By: Louise Pearson
Louise Pearson, Deputy Clerk



Schulman and Krug

Lawyers

607 West 9th Street
Austin, Texas 78701
Tel. 512/474-4747
Fax: 512/474-8597

Karyl Jean Krug

David A. Schulman
Board Certified in Criminal Law
Texas Board of Legal Specialization

Dec 17, 96
Denied
Date

December 13, 1996

Hon. Troy Bennett, Clerk
Court of Criminal Appeals
Post Office Box 12308
Austin, Texas 78711

RECEIVED IN
COURT OF CRIMINAL APPEALS
DEC 16 1996
Troy C. Bennett, Jr., Clerk

Re: Ex parte Robert Moreno Ramos; No. 71,714

Dear Mr. Bennett:

I am receipt of the Court's Order in the above styled and numbered cause, denying the request of attorney Joseph A. Connors III, to be appointed as Mr. Ramos' *habeas* counsel under Article 11.071, V.A.C.C.P. As one of Mr. Ramos' attorneys on direct appeal, I feel compelled to seek reconsideration of the Court's Order, on behalf of Mr. Ramos. Please accept this letter brief as a motion for reconsideration of the Court's ruling.

The relevant facts in this case appear to be as follows:

1. Mr. Ramos is indigent.

2. Mr. Connors has been representing Mr. Ramos' pursuant to a court-appointment.

3. As a result of the court appointment, Mr. Ramos and Mr. Connors developed an attorney-client relationship.

4. Mr. Ramos is entitled to court-appointed counsel under Art. 11.071, V.A.C.C.P.

5. As evidenced by his motion, his statements on open court on October 18, 1996, and the trial court's findings, entered of record the same day (see Exhibit "A"), Mr. Connors wishes to remain on as Mr. Ramos' attorney, and continues, in fact, to represent Mr. Ramos in this case. Presently, application for writ of certiorari is pending at the United States Supreme Court.

6. As evidence by his statements on open court on October 18, 1996, and the trial court's findings, entered of record the same day (see Exhibit "A"), Mr. Ramos wants Mr. Connors to remain on as his court-appointed attorney and prosecute his writ application under Article 11.071, V.A.C.C.P.

In *Buntion v. Harmon*, 827 S.W.2d 945 (Tex.Cr.App. 1992) and *Stotts v. Wisser*, 894 S.W.2d 366 (Tex.Cr.App. 1995), trial courts attempted to prevent court-appointed trial counsel from remaining on as court-appointed counsel on

appeal. In each case, this Court held that trial courts were powerless to prevent court-appointed counsel from remaining on as the defendant's court-appointed counsel on appeal over the objection of both counsel and the defendant when the only justification for such replacement is the trial judge's personal practice, experience, feelings or preference. Rather, there must be some principled reason, apparent from the record, to justify the trial judge's sua sponte replacement of appointed counsel. *Buntion, supra*, at 949.

In those two cases, the defendant had developed an attorney-client relationship with his court-appointed attorney and was entitled to court-appointed counsel in further proceedings. Each defendant wanted his court-appointed attorney to remain on as his attorney and represent him on appeal. Each trial court removed counsel without principled reasons. This Court Ordered each trial court to vacate the Order removing court-appointed trial counsel.

There appears to be no difference in the circumstances of this case and *Buntion* or *Stotts*, save and except the language in Article 11.071 § 2(e), which appears to presume that direct appeal and *habeas* counsel will be different, which statute is discretionary in the instant case. In this case, Mr. Ramos is entitled to court-appointed counsel in further proceedings, and wants his present court-appointed attorney to remain on as his attorney.

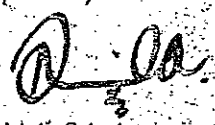
The undersigned respectfully suggests that as both Mr. Ramos and Mr. Connors have requested Mr. Connors' appointment on the record, the Court *could* appoint Mr. Connors. See Art. 11.071 § 2(e)(1), V.A.C.C.P. Given this Court's acknowledged shortage of (a) attorneys available for representation of indigent death row inmates, and (b) money to pay such attorneys, appointing Mr. Connors makes the most sense.

Mr. Connors is the attorney most familiar with Mr. Ramos' case. By appointing Mr. Connors, the Court will not have to pay another attorney to become familiar with the client and/or the facts of this case. Based on the $100 per hour fee the Court has announced, it will cost the Court in excess of Six Thousand Dollars ($6,000) simply to have another attorney read with the eighty-eight (88) volume statement of facts in this case.

The ends of justice will be best served by reconsidering and granting Mr. Connors' request to act as Mr. Ramos's Art. 11.071 *habeas* lawyer. I hereby pray for such relief on behalf of Mr. Ramos.

I certify that a true and correct copy of the above and foregoing letter brief / motion for reconsideration have been this day transmitted, via telecopier (*fax*), to the office of the Hidalgo County District Attorney's office.

Respectfully submitted,



David A. Schulman
State Bar No. 17833400

DAS:tc
cc: Robert Moreno Ramos; Joseph A. Connors, III

IN THE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

ROBERT MORENO RAMOS

VS. CAUSE NO. 71,714

STATE OF TEXAS

ORDER

On this 17th day of December, 1996, came on to be considered the motion of the appellant's counsel for reconsideration of appellant's request that Joseph A. Connors III be appointed as one of Ramos' attorneys under Article 11.071.

AND SUCH MOTION is hereby denied.

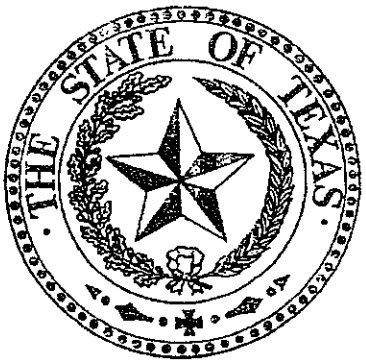
IT IS SO ORDERED.

PER CURIAM

A TRUE COPY ATTEST:

Troy C. Bennett, Jr., Clerk
Court of Criminal Appeals

By: Louise Pearson
Louise Pearson, Deputy Clerk



COUNTY OF TRAVIS)
)
) **IN RAMOS V. QUARTERMAN**
)
STATE OF TEXAS)

AFFIDAVIT OF DAVID SCHULMAN

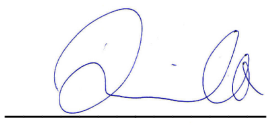
1. My name is David A. Schulman. I am licensed to practice law in the State of Texas and carry bar card number 17833400, issued on May 16, 1986.

2. I practice criminal law in Austin, Texas. I have been Board Certified in Criminal Law since 2001 and Criminal Appellate Law since 2011.

3. I have tried approximately 75 jury trials and been lead counsel in hundreds of appeals and post-conviction *habeas corpus* proceedings.

4. Since 1996, I have represented, as either lead or co-counsel, approximately 25 death row inmates on their appeals and in state and federal post-conviction proceedings. I have attended numerous state and national CLE programs for capital post-conviction counsel and am well familiar with the prevailing norms for capital representation.

5. As early as the late 1980s, capital counsel in Texas were expected to investigate and develop evidence about the client's life history. The process was not a formal as it is now and the title of "mitigation specialist" wasn't necessarily used, but somebody on the capital defense team was tasked with the responsibility of investigating the client's life history and any possible mental illness or other evidence that we would now call mitigating circumstances.



6. After Texas added the mitigation special issue to the statute in 1991, there was a proliferation of articles, training materials and CLE courses emphasizing the investigation, development and presentation of life history evidence at trial, and the re-investigation of mitigating evidence by post-conviction counsel.

7. It had always clear in Texas that post-conviction writs and direct appeals were vehicles for very different kinds of claims. It was commonly understood by capital counsel in Texas that record claims should be presented on direct appeal and that it was not necessary to raise those claims again in state post-conviction in order to preserve them for federal *habeas corpus*. It was also commonly understood by Texas capital counsel in the 1980s and 1990s that post-conviction writs were not an appropriate vehicle for record-based claims and that investigation should be conducted to present extra-record evidence during post-conviction proceedings.

8. Before September 1995, there were not many lawyers specializing in capital post-conviction work at the state level in Texas because the representation was not always funded. The Texas Resource Center (hereinafter TRC) provided federal *habeas corpus* representation and resources such as training manuals, sample pleadings and legal research to capital counsel in both state post-conviction and federal *habeas corpus*.

9. During this window of time, the State Bar of Texas was also active in providing training and resources to capital counsel. The Bar disseminated a capital defense primer, published in 1994, at CLE courses which explained to capital trial counsel in Texas that the new mitigation question and the Supreme Court caselaw that lead to it meant that the defense team was obligated to develop and present evidence of the defendant's background and character in mitigation of punishment for defendants convicted and found to constitute a future danger. The primer was also available through TCDLA, TRC and the law clinics at University of Texas, St. Mary's and University of Houston.

10. Effective in September, 1995, the Texas Legislature replaced Article 11.07 of the Texas Code of Criminal Procedure with Article 11.071, which provided a right to counsel for all indigent death row inmates sentenced after September 1, 1995 and all indigent inmates sentenced before September 1, 1995 who did not already have an initial application for a writ of *habeas corpus* under Article 11.07 pending.

11. There were not many lawyers in Texas with post-conviction experience. Although the Court of Criminal Appeals was charged with creating and maintaining a list of lawyers qualified to represent a death row inmate in a post-conviction *habeas corpus* proceeding, very few qualified attorneys signed up, because the Presiding Judge of the Court announced a "cap" of $7,500 per case. As a result, many of the lawyers appointed to provide post-conviction representation had never done post-conviction work before and approached the cases as if they were direct appeals.

12. In August 1995, TCDLA sponsored a training for state post-conviction counsel in Texas to prepare them for the implementation of 11.071. This CLE included instruction on how to get funding for investigative and expert assistance to develop extra-record evidence.

13. Article 11.071 § 3 explicitly provided a mechanism for funding:

> **Investigation of Grounds for Application**
>
> Sec. 3. (a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.
>
> (b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for

prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

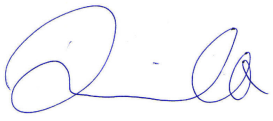
(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement.

(e) Materials submitted to the court under this section are a part of the court's record.

14. In 1996, the Criminal Justice Section of the State Bar produced a Texas Criminal Appellate Manual for capital defense counsel that clearly set out the obligation of state post-conviction counsel to investigate, to seek funds for experts and investigative assistance and to investigate, develop and present extra-record evidence challenging the constitutionality of a death row inmate's conviction and sentence.



15. In the summer of 1995 and the summer of 1997, I helped organize CLE events for TCDLA on capital post-conviction counsel that was held in Houston (1995) and Galveston (1997). This training included sessions on life history investigation, record collection, developing mental health evidence and similar tasks required of post-conviction counsel.

16. As a post-conviction *habeas corpus* practitioner in Texas during the 1990s, I knew that the prevailing standard of care for representation of death-sentenced petitioners in state post-conviction required that the defense team conduct investigation into both phases of the trial, including a life history investigation. By 1995, it was common for Texas capital post-conviction counsel to raise claims of ineffective assistance of trial counsel for failure to conduct a sufficiently thorough life history investigation even for trials that took place in the late 1980s and early 1990s.

17. Along with Joseph A. Connors III, Mark Alexander, and Dorina Ramos, I represented Roberto Moreno Ramos on direct appeal in 1995. I was brought into the case by lead counsel Joe Conners, who had a good working relationship with Mr. Moreno Ramos.

18. The Court of Criminal Appeals denied relief on June 26, 1996.

19. Mr. Ramos asked the trial court to allow Joe Connors to represent him in state post-conviction despite the fact that he had been direct appeal counsel. Article 11.071 provided for this possibility if both the inmate and the lawyer requested the appointment on the record. Both Mr. Moreno Ramos and Mr. Connors did so on October 18, 1996 and the trial court made the necessary findings in support of Mr. Connor's appointment.

20. However, the CCA appointed Kyle Welch to represent Mr. Moreno Ramos in state post-conviction *habeas corpus* proceedings. Mr. Moreno Ramos then filed a *pro se* motion asking the CCA to appoint Joe Connors, which was denied.

21. I knew Mr. Welch, although not very well. Additionally, although I but knew of him as a well qualified practitioner in federal court, I also knew that he was not experienced in post-conviction *habeas corpus* work.

22. On the other hand, I knew that Joe Connors had the necessary experience to be appointed as state *habeas* counsel. For this reason, on December 13, 1996, I wrote to the CCA seeking reconsideration of the denial of Mr. Moreno Ramos' request continue his ongoing attorney-client relationship with Mr. Connors, citing to *Buntion v. Harmon*, 827 S.W.2d 945 (Tex.Cr.App. 1992) and other relevant case law. See attached.

23. This request was also denied.

David A. Schulman

SIGNED and SWORN to before me, the undersigned authority, on this the 30th day of May, 2013.

MADGIE HOLLINGSHEAD
Notary Public, State of Texas
My Commission Expires
December 22, 2015

Printed Name: Madgie Hollingshead

My Commission Expires: December 22, 2015

TEXAS CRIMINAL APPELLATE MANUAL 1996

VOLUME I

CRIMINAL JUSTICE SECTION

INTRODUCTION

to the

1996 TEXAS CRIMINAL APPELLATE MANUAL

The first edition of this manual was published by the Criminal Justice Section in 1986, shortly before the Rules of Appellate Procedure went into effect, and the second edition was published in 1989, after many of the questions left open in the rules had been answered by the courts. Now, in 1996, this third edition is published in response to the many changes in appellate practice that have occurred over the past seven years.

One subject area in particular has changed a lot. In 1989, it was only necessary to include one section on post-conviction writs of habeas corpus under Art. 11.07 of the Texas Code of Criminal Procedure. Since then, that statute has been amended and a wholly new statute governing post-conviction writs in capital murder cases, art. 11.071, has been enacted. As a result, this edition contains five articles on writs, including capital writs, competency, and federal writs.

Some things have not changed, however. Most of the articles are co-authored by a prosecutor and a defense attorney, and most include forms or sample documents. As before, there is no article on certiorari practice in the United States Supreme Court and no copies of the various local rules enacted by some of the courts of appeals. Practitioners should contact those courts to see if any local rules might alter the information in this manual.

We hope this manual will be a helpful guide to the lawyers and judges practicing appellate law in the State of Texas, although it should always be used in conjunction with the applicable statutes and rules and most recent case law. We solicit your comments and suggestions.

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CRIMINAL JUSTICE SECTION

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STATE CAPITAL WRITS:
A VIEW FROM THE APPLICANT'S PERSPECTIVE

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State Bar of Nebraska
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Member, Court of Appeals for the Fifth, Eighth, and Tenth Circuits
Member, United States District Court, Southern and Northern Districts of Texas, Northern District of Oklahoma, District of Nebraska
Texas Criminal Defense Lawyers Association

PROFESSIONAL ACTIVITIES

Staff Attorney, Texas Resource Center, 1991-present
Assistant Oklahoma Appellate Public Defender, 1989-1991, specializing in state and federal capital post-conviction practice
Private practice, Nebraska, 1980-1989

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I. INTRODUCTION.

Representing a death row inmate in state capital writ litigation is some of the most difficult legal work there is. The stakes are literally life or death. Many procedural pitfalls can derail a promising writ application. The hours are often long, the pay will often be disappointing, and attorneys representing people on death row will never win popularity contests. Writ practice is not for the faint of heart.

Nonetheless, there is no more important criminal defense work. The Great Writ of habeas corpus has long served as a bulwark of personal liberty in the United States and the State of Texas. The writ is constantly under attack by those who view it as an example of the rights of criminals being more important than the rights of victims. In fact, by energizing the writ to protect those persons now most in need of its help on death row, we maintain its vitality for all of us, should we ever need to rely on it. If you believe the writ to be worth the price it will exact to defend it and the people who need it, you should read on. If not, I suggest that you turn your attention to some other legal practice area.

There are some essential ideas to bear in mind as you consider the writ process from the applicant's perspective. They will be discussed again below, but I touch on them now for emphasis.

1. State habeas litigation is not the same as a direct appeal. Habeas litigation concentrates on developing and presenting facts outside the appellate record which, in conjunction with facts in the record, raise important constitutional claims. Habeas counsel must know the appellate record, but cannot be bound to it, or they will offer their clients nothing more than another attempt at a direct appeal.

2. Writ practice requires investigation. You can't learn about, develop, and present facts outside the record if you don't investigate the case. Investigation for a writ can be as intensive as investigation in preparation for trial. This must be so particularly where habeas counsel believes that trial counsel may have rendered ineffective assistance of counsel. It is impossible to accurately evaluate the effectiveness of counsel without knowing what the counsel in question knew or could have known.

3. You have to talk with your client. Your client is an indispensable source of information for your investigation. Visiting your client can also provide valuable insight into mental conditions or limitations that may have played an important role in the offense or the trial, but received little notice.

4. The applicant has the burden of proof. The State does not have to prove anything initially in writ litigation. This is the inmate's lawsuit and the inmate has the burden of going forward with evidence of significant constitutional violations that affected the trial or sentence.

5. Know the state habeas procedural rules cold. New legislation was passed last year which substantially changed capital writ procedure. Many of these changes were to the detriment of applicants, placing more obstacles that must be negotiated in the path to habeas relief. Lawyers can't avoid what they don't know about and there is a lot that is new to know about writ procedure now.

6. Understand the relationship between the state and federal habeas processes. What happens in state habeas can dramatically affect the ability of federal courts to apply the federal habeas corpus remedy to your client's case should the state writ application be unsuccessful. State capital writs must be litigated with an eye toward federal litigation that may become necessary later.

7. Be imaginative. Many of the important United States Supreme Court decisions upholding habeas corpus writ protection resulted from imaginative approaches by writ counsel. There is a new statute in Texas that offers much room for challenge and imagination. The law relevant to habeas litigation continues to develop in state and federal court; try to stay near the cutting edge.

8. Do not underestimate the opposition. Opposing counsel will almost always be a district attorney with significant experience with state habeas practice or with access to someone who has that experience. There is almost never any incentive to "deal" these cases. The fight will be very hard and you can expect the opposition to use every advantage state habeas procedure gives them.

9. Don't try to do this alone. You will likely be the only person appointed to represent your client in state capital writ proceedings, but it is impossible to know enough on your own to provide the most effective litigation strategy for your client. Many experienced criminal defense and habeas lawyers can offer invaluable advice on various issues of procedural and substantive law you will face. Seek them out and ask questions. Trying to be the Lone Ranger endangers your mental health and your client's life.

10. Your client will probably be executed. There is no nice way to put it. You can work hard and have good issues, but the system is not friendly to death row inmates. They know that and most are realistic about their chances, though they very much want to live. You have to be realistic too. If you cannot face the possibility of your client being executed, you should not be involved in this litigation. At the same time, remember that your client is a person, not the animal the local media so often like to portray. Deal with a person on death row as a person, with dignity, and many serious client communication problems can be avoided.

11. You are only human. You will make mistakes. There will be some things left undone that you regret. You may wonder at times why you ever got into this. All anyone can ask of you is that you engage all your abilities in the fight for your client's life. Active, dedicated advocacy is at the heart of the protection the Great Writ provides.

II. NATURE AND SCOPE OF THE WRIT.

A. Nature of the Remedy

A writ of habeas corpus is a procedural vehicle which can be used by someone whose liberty is restrained, before or after conviction, to challenge the legality of his or her conviction and sentence. The writ is an order "issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint." TEX. CODE CRIM. PROC. ANN. art. 11.01.

Depending upon the type of error alleged, relief that could be granted through a writ could include release, with an order that the prisoner not be retried, retrial of both guilt/innocence and penalty phases of a trial, retrial of only the sentencing phase, or a new direct appeal.

B. Constitutional and Statutory Bases

The statutory provisions governing habeas corpus, found in Article 11 of the Code of Criminal Procedure, are based upon TEX. CONST. art. I, § 12, which says: "The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual." (An informative history of the writ in Texas in found in James Harrington & Anne Burnham, *Texas' New Habeas Corpus Procedure for Death Row Inmates: Kafkaesque -- and Probably Unconstitutional*, 27 ST. MARY'S L. J. 69-102 (1995), attached as Appendix A.)

Before September 1, 1995, all state capital and non-capital writs were governed by TEX. CODE CRIM. PROC. ANN. art. 11.07. On that day a new capital writ procedure established in Article 11.071 of the code took effect. Prior to this change, the Court of Criminal Appeals had held that Article 11.07, § 2 was the exclusive vehicle for obtaining relief in a felony situation where the applicant was confined. *Ex parte Alexander*, 861 S.W.2d 921 (Tex. Crim. App. 1993). There is no reason to believe that the Court would rule differently regarding the application of Article 11.071 to capital writs now, unless it finds that the new procedure does not pass constitutional muster. Only the Court of Criminal Appeals has the authority to release persons from confinement as a result of a final felony conviction. *Ex parte Hoang*, 872 S.W.2d 694 (Tex. Crim. App. 1993).

C. Issues that can be Raised in State Writs

The Court of Criminal Appeals has written that state habeas should not be used to litigate matters which should have been raised on appeal. *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989). In *Ex parte Bravo*, 702 S.W.2d 189, 193 (Tex. Crim. App. 1982), the Court declared that it was "well established" that the habeas corpus process could be used "to review jurisdictional defects or denials of constitutional rights." Though the Court indicated in *Ex parte Dutchover*, 779 S.W.2d 76 (Tex. Crim. App. 1989), that claims based on the Texas Constitution are not cognizable on habeas, a later habeas decision concerning a capital case, determined that state constitutional errors so "exceptional or fundamental that they are not susceptible to a harm analysis," or that "so fatally infected" the trial procedure that due process was denied or a resulting sentence was rendered invalid and the judgment void, are cognizable in state post-conviction proceedings. *Ex parte McKay*, 819, S.W.2d 478, 481 (Tex. Crim. App. 1990).

The Court has also recently held that the state habeas remedy is available to death row inmates who can produce newly discovered evidence to prove innocence, asserting that the execution of an innocent person would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Texas ex rel. Holmes v. Court of Appeals for Third Dist.*, 885 S.W.2d 389 (Tex. Crim. App. 1994).

Though the Court has suggested cognizability

limitations in some of its decisions, the conventional wisdom among many writ counsel has been to include all constitutional claims they can identify and believe to be meritorious. This includes all claims that may have been raised on direct appeal, but did not utilize all the available state and federal provisions that they could have been based upon. Habeas counsel should make sure that all federal constitutional claims that are arguably meritorious be included so that they are preserved for federal habeas proceedings.

III. THE NEW STATE HABEAS PROCEDURE.

As has been previously noted, a new state habeas procedure for capital writs went into effect on September 1, 1995. Counsel filing capital writs must study and know well TEX. CODE CRIM. PROC. ANN. art. 11.071, which sets out the process. It provides resources which can aid the development and presentation of issues in state habeas applications, but includes significant time limitations and is unforgiving of incomplete initial applications. ***The process is much different and more detailed than its predecessor; the previous experience of judges, attorneys, and court personnel with habeas procedure will not be a reliable guide upon which to rely.*** For this reason, this chapter will discuss the new statute in detail. The discussion will begin by highlighting some of the most important differences between the new procedure in 11.071 and the old process in the former 11.07. A detailed discussion of the process established by the new provisions will follow.

A. Overview of Differences Between Old and New State Habeas Procedures.

The major changes occur in the following areas (page numbers for this article's detailed discussion of the new statute's provisions in each of these areas follow the brief descriptions):

Timing of State Habeas. Under the former 11.07, the state post-conviction process started after the direct appeal was concluded. 11.071 requires the state habeas remedy and direct appeal to be pursued simultaneously. See pp 16-17.

Provision of Counsel. Counsel was neither required nor routinely provided in many counties under the former 11.07. The new statute provides, through appointment by the Court of Criminal Appeals, counsel for death row inmates for the state habeas process. See pp. 8-15.

Provision of Investigative and Expert Assistance. Such assistance was rarely, if ever, provided under the former procedure and the necessity for investigation was often challenged by writ opponents. Article 11.071 recognizes the necessity of reasonable investigation and provides funds for it, upon a sufficient, *ex parte* showing of need to the Court of Criminal Appeals by the applicant. See pp. 14-16.

Time Limitations. There were few time limits in the former 11.07. Those that existed did not apply to applicants and were routinely ignored. There were no deadlines for the filing of state habeas applications and no requirement that counsel move a case to federal court at the conclusion of the state post-conviction process, within any specified period of time. The new statute includes time limits for almost every step of the process, including the filing of the writ application, with

substantial penalties for applicants who fail to file on time. State habeas counsel are now required to start any federal habeas corpus process within a specified time after the state habeas process is concluded. See pp. 16-24.

Amendment of Writ Applications. Under the former 11.07, there were no restrictions on amendments. Art. 11.071 now imposes time limits on the filing of such amendments. If amendments or supplements to writ applications are filed out of time, the facts and issues contained in them may be waived and lost to the inmate for the balance of the state and federal habeas process. See p. 17.

Subsequent Applications. The former 11.07 did not bar the filing of later habeas applications after an initial application was denied. A judicially created bar to successive applications was not applied to capital cases by the Court of Criminal Appeals. State district courts made the initial determination about whether a successive application could be allowed. Article 11.071 bans successive applications, which it refers to as "subsequent applications," absent a strong showing that claims in the successive application could not have been raised earlier. The Court of Criminal Appeals now must make an initial determination of whether a successive application may be considered by the courts. See pp. 24-25.

Setting of Execution Dates. The ability of district courts to set execution dates was unlimited by the old statute, so long as no stay from another state or federal court had been entered. The statute did not regulate the timing of execution dates, other than to require that a date had to be at least 30 days after the date of the order setting the execution date. There was some doubt under the old process about the ability of a district court to withdraw an execution date it had previously imposed. The new 11.071 bars district courts from setting execution dates before the Court of Criminal Appeals denies relief on the first writ application, so long as that application is timely filed. An inmate's first execution date must be set no less than 90 days after the date of the order setting it, and any later date must be set no less than 30 days after the date-setting order. The statute expressly give district courts the authority to withdraw execution dates. See pp. 25-26.

Time of Executions. Though not a part of the state habeas statute, a related statute under the former process provided that executions would be carried out between midnight and sunrise on the day on which the execution was scheduled. That statute has now been amended to provide for executions to take place anytime after 6 p.m. on the scheduled execution day. See pp. 26-27.

A timeline for major phases of the state habeas process under the new statute is included as Appendix B.

B. APPOINTMENT OF COUNSEL

The appointment of counsel under Article 11.071 is a good place to start exploring the new habeas procedure because it is of most immediate importance to counsel who will be filing state habeas applications and because some of the important filing deadlines imposed by the new statute are keyed to counsel appointment dates.

1. Creation of a Right to Counsel.

Article 11.071 § 2(a) says that a habeas

applicant ***shall*** be represented by ***competent*** counsel. This right is subject to limitations, based upon where an applicant is in the process at the time counsel is requested.

Initial Habeas Application has not been Denied Previously and is not Pending on September 1, 1995. The right to counsel is absolute in this posture. 11.071 § 2(b) & (d).

Initial Habeas Application is Pending on September 1, 1995. An attorney representing an inmate in this situation may request appointment. 11.071 § 2(i). It would seem that the combination of this section with § 2(a) should guarantee that counsel is appointed if a proper application is made. Appointment can be denied, however if the application for appointment is not filed with the convicting court or if that court does not enter the findings required by 11.071 § 2(a), (b) & (i). *Ex parte Briseno*, Writ No. 29,819-01 (Tex. Crim. App. Oct. 30, 1995) (Attached in Appendix C).

Subsequent and Untimely Applications. There appears to be no right to appointed counsel for an untimely or subsequent application unless the Court of Criminal Appeals first determines that the application may be properly considered. Article 11.071 § 2(b) & (i) regarding situations where a habeas application is and is not pending, both refer to "initial" applications. Sec. 2(h) requires the Court of Criminal Appeals to appoint a lawyer for representation in a subsequent or untimely application situation *if* it determines that the requirements of 11.071 § 5 allowing consideration of such applications have been satisfied.

This provision will certainly discourage the filing of subsequent writ applications, as attorneys wishing to do so will have to prepare and file the application before they know whether they will be appointed or paid for their services. The Court of Criminal Appeals may read the new statute to bar all appointed representation for subsequent applications. In an unpublished order entered in November, 1995, the Court considered and rejected a pre-filing request for investigative funds concerning a third writ application being prepared by a death row inmate. The basis of the writ was to be that the inmate was not competent to be executed, an issue that may not always be evident at the time of an initial writ application. In entering its order, the Court found that no appointment of counsel is required if it had denied a previous writ application filed under the former state habeas procedure. *Ex parte Duhamel*, Writ No. 17,001-05 (Tex. Crim. App. Nov. 6, 1995)(unpublished)(Attached as Appendix D). Though this was an unpublished order concerning a somewhat unusual procedural situation and was entered with four dissents, it is fair warning that attorneys should never assume that they will be appointed or paid to litigate a subsequent habeas application, regardless of the issues it may present.

2. Waiver of the Right to Counsel.

Inmates may proceed pro se. The art. 11.071 § 2(a) right to counsel allows inmates to elect to proceed pro se, so long as the convicting trial court finds, "after a hearing on the record, that the applicant's election is intelligent and voluntary." *See also* subsections 2(c)(3) & (d). It has yet to be determined whether 11.071 § 3, which concerns prepayment of investigative and expert expenses, will apply to pro se applicants. The statutory language refers to "counsel" requesting such payment. Though

pro se applicants would be acting as their own counsel, the statute, which so carefully mentions such applicants in other places, omits them here.

Waiver without proceeding pro se. This situation will likely arise only when an inmate is "volunteering" to be executed and wishes to waive the state habeas process. The statutory language relevant to such a situation is somewhat murky. Article 11.071 § 2(b) & (i) (depending on the procedural posture of the case) require the convicting court to determine whether an inmate who has not yet had an initial state writ application denied, "desires the appointment of counsel for the purpose of a writ of habeas corpus." Following receipt of this information from the convicting court, the Court of Criminal Appeals "shall ... appoint competent counsel at the earliest practicable time," "unless an applicant elects to proceed pro se or is represented by retained counsel." 11.071 § 2 (d).

Electing to proceed pro se and waiving one's appeals are not synonymous. The statute does nothing to clarify what process a convicting court must follow to determine that an inmate is waiving appeals, unless one reads the requirement of a record hearing regarding whether an inmate's election to proceed pro se is intelligent and voluntary applies equally to "volunteer" situations. *See* 11.071 § 2(a). If § 2(d) is not read to treat inmates volunteering to be executed as though they were proceeding pro se, then counsel must be appointed to represent such inmates, at least long enough to allow the court to determine their competency to waive the filing of a writ application and whether their decision was intelligent and voluntary.

Waiver by untimely filing of initial writ. An inmate can lose his or her right to counsel for the state writ process if the initial writ application is filed too late. Article 11.071 § 2(h) allows the Court of Criminal Appeals to decline to appoint or compensate counsel if a writ application is filed too late and is considered untimely under the statute because good cause for the late filing is not shown, *See* § 4(c) & (d), or is filed so late that good cause cannot be shown. *See* § 4(f). Subsection 2(h) appears to require appointment of counsel for an untimely application if the requirements for 11.071 § 5 are met (see discussion at pp. 17-18), but those requirements are very strict. Thus if the initial application is filed late, it could cost an inmate not only all of his or her legal claims, *see* 11.071 § 4(g), but also appointed counsel to argue that the inmate is entitled to have the claims considered that were or could have been in that writ application.

3. How Counsel is Appointed.

For a defendant sentenced to death on or after September 1, 1995. Immediately after judgment is entered by the convicting court, that court determines if the defendant is indigent, and if so, whether he or she wants counsel appointed for purposes of filing a writ of habeas corpus. 11.071 § 2(b). Presumably, this is also the time at which the convicting court would hold a hearing on the record to determine whether a defendant who indicated a desire to proceed pro se was making that decision intelligently and voluntarily. Immediately after the convicting court makes these findings, the clerk of the court is required to forward to the Court of Criminal Appeals a copy of the findings, the judgment of conviction and sentence, and a list showing each counsel of record for the defendant on trial and direct appeal. § 2(c). Unless the

defendant is proceeding pro se or with retained counsel, the Court of Criminal Appeals must appoint competent counsel "at the earliest practicable time" after the receipt of the information from the convicting court. § 2(d).

For a defendant sentenced to death before September 1, 1995, who had not filed an initial state habeas application by that date. The convicting court is required, "as soon as practicable," to determine whether the defendant is indigent and if so whether he or she wants counsel appointed for purposes of filing a state writ application. 11.071 § 2(b). This information is forwarded to the Court of Criminal Appeals and that Court appoints counsel as described earlier, pursuant to Subsections 2 (c) & (d).

For a defendant who was sentenced to death before September 1, 1995 and who had an initial writ application pending on that date. The attorney representing the inmate (or presumably, the inmate, if proceeding pro se to that point), may request that the convicting court determine whether the inmate is indigent and, if so, whether the inmate desires appointment of counsel to litigate the writ of habeas corpus. This information is forwarded to the Court of Criminal Appeals and that Court appoints counsel as described earlier, pursuant to Subsections 2 (c) & (d).

Before the new statute was passed, some convicting courts in Texas were routinely appointing and paying counsel in state habeas cases. Apparently some of those courts are continuing that practice despite the existence of the new statute. It is unclear whether the limits on compensation contained in the Court of Criminal Appeals' rules have any relevance to those situations.

Practice Note. *Whether it is preferable for counsel who has been appointed by a convicting court to continue that appointment or to seek appointment through the Court of Criminal Appeals depends upon the circumstances of each case. Counsel should make the choice that allows the most resources to be devoted to the client's case.*

For an inmate filing an untimely or subsequent writ application. The clerk of the convicting court receiving such an application "immediately" sends to the Court of Criminal Appeals the application, the notation that it was untimely or subsequent, any order scheduling an execution date, and any other order the convicting court judge directs to be attached to the application. 11.071 § 5(b). After receiving this information, the Court of Criminal Appeals decides whether the requirements of subsection 5 (a) limiting the circumstances under which such writs can be considered on the merits, have been satisfied. If not, the Court must dismiss the application as an abuse of the writ. § 5(c). If the requirements have been satisfied, notice of that fact is given to the convicting court, § 6(c), and the Court of Criminal Appeals is required to appoint counsel. § 2(h). There is no time limit imposed on the Court concerning the speed with which it must appoint counsel in this instance.

Practice Note. *Presumably, if the Court does not dismiss a subsequent application as an abuse of the writ, it should pay counsel for the time spent in preparing and filing that writ, subject to the Court's judgment about reasonable expenditures of time. Counsel appointed on subsequent application should not hesitate to include in his or her billing the pre-appointment time spent in preparing that*

application for filing.

It is not clear that pre- or post-filing appointment of counsel by convicting courts for subsequent applications is prohibited by 11.071. It is uncertain whether any limitations the Court of Criminal Appeals may adopt regarding payment of fees in its rules would apply to convicting courts who appoint.

4. Who Can be Appointed.

Rules and standards governing appointment. Counsel appointed by the Court of Criminal Appeals is required to be "competent." 11.071 § 2(a) & (d). The Court is to adopt "rules and standards" to govern who it appoints. § 2(d). No rules or standards regarding competence are set out in the statute.

The Court has yet to publish any rules or standards concerning attorney qualifications. It has recently, however, disseminated application forms to lawyers indicating interest in being appointed pursuant to 11.071. The application, see Appendix E, asks for the names and addresses of lawyers and judges familiar with the applicant's practice who can attest to the applicant's competence in criminal law. It also gathers general educational and criminal practice background information, including information concerning CLE courses and Texas board certification. The application asks for details about any cases in which the applicant has been found to have rendered inadequate representation in a criminal law case, and seeks information about grievances filed against the applicant with any bar association and the applicant's criminal history. The Court may adopt appointment standards, for applicants are required to say that they have read those rules, that they qualify for appointment, and that they agree to abide by them, in the application. It remains to be seen how extensively the Court will check the information provided in the applications.

Practice Note. *If the Court does adopt appointment standards, it is unclear whether they will apply to counsel who may continue to be appointed by convicting courts to litigate writ applications.*

If you are appointed to a capital habeas case and feel that you do not have the time, experience, or resources to properly represent your client at any point in the proceedings, you must make a record about that with the convicting court and the Court of Criminal Appeals. In doing so, you are both trying to acquaint the courts with your situation that is rendering adequate representation difficult, and you are preserving the problems for later consideration by federal courts in federal habeas corpus proceedings. Motions raising these matters should be as factually specific as possible. They should be filed ex parte, as counsel for the state should have no influence over conditions and compensation for, or the experience of, appointed habeas counsel.

Can attorneys who represented an inmate at trial or on direct appeal be appointed to represent the inmate for state writ purposes? This is allowed but seemingly discouraged by 11.071 § 2(e). That provision prohibits the Court of Criminal Appeals from appointing an attorney as state writ counsel if the attorney represented the inmate at trial or on direct appeal unless the inmate and the attorney request the appointment on the record ***or*** the Court finds good cause to make the

appointment. What constitutes good cause is not defined.

Article 11.071 § 2(f) says that if the person appointed as writ counsel is the same person appointed as appellate counsel under article 26.052, the Court must appoint a second counsel to assist in the preparation of the appeal and the writ of habeas corpus. 26.052 was added to the Code of Criminal Procedure by the same legislation that changed the state habeas process. It prohibits the convicting court from appointing trial counsel to be direct appeal counsel for a defendant unless the defendant and the attorney request the appointment on the record ***and*** the court finds good cause for making the appointment. 26.052(k).

The combination of 11.071 § 2(f) and 26.052(k) appear to mandate that at least two counsel must be involved in the preparation and filing of an inmate's direct appeal and state writ application. The Court of Criminal Appeals has already indicated, however, that the requirement of two counsel only applies when the direct appeal and the state habeas remedy are being pursued simultaneously. In *Ex parte Briseno*, Writ No. 29,819-01 (Tex. Crim. App. Oct. 30, 1995) (Appendix C), counsel who had represented an inmate on direct appeal had also filed a writ application that was pending at the time the new statute went into effect. Counsel sought the appointment of a second counsel pursuant to the dual counsel provisions previously discussed. The Court denied his motion in part because the direct appeal was no longer pending and current habeas counsel had not been appointed by the Court of Criminal Appeals.

Practice Note. *If the new statute works as designed, lawyers will be working on direct appeal and writ application almost simultaneously. Writ counsel should identify the counsel on direct appeal and try to forge a good working relationship. Direct appeal counsel will be very familiar with the record and may have some very helpful thoughts about possible claims to be made in state habeas proceedings. Two heads will be better than one, particularly where the two heads are looking at much of the same information initially.*

Of course, writ counsel must remember that it may be necessary to raise ineffective assistance of appellate counsel claims against direct appeal counsel who does not raise state law claim that would have been meritorious on direct appeal, but not cognizable in state habeas proceedings. The possibility of a conflict of interest developing if state habeas counsel works too closely with direct appeal counsel must be carefully considered and avoided by writ counsel.

5. Compensation and Reimbursement of Counsel.

Attorneys' fees. Article 11.071 § 2(h) requires the Court of Criminal Appeals to "reasonably compensate" counsel it appoints for the state writ process, from state funds. The statute contains no other guidance regarding payment of attorney fees.

The Court of Criminal Appeals has filled this void by adopting guidelines and rules for attorneys' fees and expenses. The guidelines and attachments to them are found at Appendix F.

The Court has established a fee for its appointed habeas counsel of $100.00 per hour

for services performed and $50.00 per hour for travel time. There is however, a limitation on fees. On page 1 of the guidelines, the following language appears:

"If after incurring $7500.00 in counsel's fees, counsel determines it is necessary to incur additional fees for which he or she plans to seek reimbursement from the Court, counsel must seek and obtain prior authorization from the Court. ***As a general rule, the Court will not compensate counsel for fees in excess of $7500.00."*** (emphasis added).

The guidelines do not indicate how Court will determine whether additional requested fees are appropriate, whether applications for authorization to exceed the fee limit may be made *ex parte*, or what happens if counsel's request for fees in excess of the limit is denied, but the capital writ process is not yet completed.

Time must be reported on a worksheet provided by the Court with the guidelines, which give specific information about the calculation of time. Claims for fees are to be submitted on a 90 day cycle.

Practice Note. *The Court's benchmark of $7500.00 is likely to be unrealistic for many cases. In late 1994, the Texas State Bar Legal Representation for Those on Death Row Committee estimated that the average state habeas corpus case would require 375 lawyer hours of work. Appendix G at 2. While the committee noted that the procedural reforms contained in the new statute might reduce this number, it also assumed the continuing existence of the Texas Resource Center or its equivalent to aid lawyers in research, decision-making and understanding the habeas process. The committee said that if the Resource Center were not in existence, the number of attorney hours required would increase. Id. at 3. The Resource Center has been de-funded and will cease to exist some time in 1996. The 375 hour figure is therefore, probably still a reasonable one.*

What this means for writ counsel is a likely struggle with the Court over attorney fees. Attorneys must be particularly careful to fully document their time through maintenance of complete hourly records. If the Court denies fee requests before the case is completed, or substantially reduces compensation amounts below what is requested, counsel will be faced with difficult decisions about going forward with the case. Care should be taken to preserve for the federal court record all disputes about fees. Of utmost importance, however is taking action which will protect the client's interest. What action that may be will depend upon the circumstances of each case.

Expenses. Article 11.071 § 3(b)-(d) provide for the prepayment or reimbursement of expenses involved in the investigation of the factual and legal grounds for the filing of a state writ application.

A request for prepayment of expenses must be filed at least 30 days before the writ application is filed. It may be an ex parte, verified, confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request must identify the claims to be investigated, specific facts that suggest a claim of possible merit may exist, and an itemized list of anticipated expenses for each claim. The Court is required to grant the request in whole or in part if it is timely and reasonable. If it denies any part of the request, it must

briefly state the reasons for the denial in a written order provided to the applicant. 11.071 § 3(b) & (c). The rules governing payment of fees recently adopted by the Court of Criminal Appeals do not acknowledge the possibility of prepayment of expenses, though prepayment is not explicitly prohibited.

Article 11.071 § 3(d) authorizes appointed counsel to incur expenses for habeas corpus investigation, including expenses for experts, "without prior approval by the Court of Criminal Appeals." Claims for reimbursement may be presented ex parte. The Court is required to grant those claims, if the expenses are "reasonably necessary and reasonably incurred." If the Court denies any part of the request, it must briefly state the reasons for the denial in a written order given to the applicant. An applicant may request reconsideration of the denial for reimbursement.

The rules adopted by the Court concerning expenses incurred by counsel directly contradict the statute in two ways. First, they require pre-approval of any individual expense item in excess of $500.00 and any out-of-state travel. Second, using the same language they employ in limiting attorneys' fees, the rules limits total expenses to $2500.00. These rules of limitation have been adopted in the absence of any statutory provision inviting the Court to supply them and in the face of Section 6 of the enacting legislation which withdraws rulemaking authority from the Court with respect to rules of appellate procedure relating to habeas matters to the extent that those rules conflict with 11.071. The guidelines do not indicate how the Court or who within the Court will determine whether many expenses are reasonable or reasonably incurred.

The rules are more helpful regarding travel expenses, which are keyed to limitations placed on state employees. Claims in excess of $50.00 must be substantiated by proof of payment. Rates are set for copy expenses and there is a limit of 25 cents per page for copying not done in-house. All claims for copy expense must be itemized by date and number of copies.

A worksheet provided by the Court with the guidelines is required to be used when seeking reimbursement. Claims are to be submitted on a 90 day cycle.

***Practice Note**. Ask for what you need, even if you do not think you are going to get it. Make a record of why you need what you have requested, through your submissions to the Court, for use later if federal habeas corpus proceedings, if necessary.*

Counsel should take full advantage of the opportunity to present requests for prepayment of expenses, particularly for experts. Counsel should also not hesitate to seek more than the $2500.00 the Court has established as a benchmark for expenses, if it will cost more than that for necessary and reasonable expenses. Expert assistance, particularly when provided by medical or mental health experts, can easily cost more than $2500.00.

Counsel should identify as quickly as possible the expert assistance and associated expenses that will be required and submit a request to the Court for the same. If the Court denies the request due to insufficient information or some defect in the pleading, counsel should try to fix the problem and resubmit the request. If the Court denies the amended request, or denies a request because it believes that the information could not lead to

a valid claim, counsel should file a written objection with the Court to its action, succinctly setting out why the Court is in error and asking it to reconsider. This will help to preserve the record regarding the Court's failure to provide necessary resources for the case, for federal court review of the fairness of the state court proceedings. If the Court denies a request based upon those portions of its rules which conflict with 11.071, counsel should object that the conflicting rule sections are void, based on the plain words of the statute.

Expense requests should always be submitted ex parte, as allowed by the statute. They should be as specific factually as possible, to give the Court a good picture of why expert assistance or other special expenses are necessary. It is also a good idea to attach a curriculum vitae from any experts you want to use and a description of specifically they will do if you are able to hire them. A copy of a sample request for prepayment of expenses is attached as Appendix H.

It is unknown how the continuing practice of some convicting courts of appointing and paying writ counsel may affect the applicability of the statutory provisions governing compensation for expenses or the Court of Criminal Appeals' rules limiting the same. If counsel is denied resources that could have been available according to the statute, by virtue of being appointed and paid by a convicting court, counsel should object to the denial of resources in ways that will preserve that matter for later consideration in federal habeas proceedings.

C. THE NEW STATE HABEAS TIME LINE.

The new legislation dramatically changed the law regarding the timing of many actions required by the process by imposing deadlines on them. The following will track these deadlines through the state habeas process.

1. Filing the initial application.

An inmate convicted on or after September 1, 1995 must file a state writ application in the convicting court, returnable to the Court of Criminal Appeals, no later than 45 days after the appellee's original brief is filed on the inmate's direct appeal with the Court of Criminal Appeals. 11.071 § 4(a). This subsection must presume that counsel will have been appointed very shortly after the appointment of direct appeal counsel, though no time limitations are imposed on the Court of Criminal Appeals regarding the length of time it can take in appointing counsel under the new statute.

An inmate convicted before September 1, 1995 who did not have an original writ application under the former 11.07 pending on September 1, 1995, and who had not previously filed an application under that statute, must file a state writ application by the 180th day after the date on which the Court of Criminal Appeals appoints counsel to represent the inmate pursuant to 11.071 § 2 or within 45 days after the appellee's original brief is due on direct appeal, whichever is later. 11.071 § 4(a).

2. Amending the application.

Amended or supplemental applications are allowed by 11.071 § 4(h), but they must be filed within the time limits for filing an original application, or they will be treated as untimely, unless the applicant can establish:

(1) good cause be showing particularized justifying circumstances for not raising the facts or claims contained in the amended or supplemental application, in the original application; and

(2) the amended or supplemental application is filed within 90 days after the due date for the original application under 11.071 § 4(a).

The consequences of filing an untimely amendment or supplement can be serious, as the facts and legal claims contained in them could be considered, by operation of the statute, to be waived by the applicant for the balance of state and federal habeas proceedings.

3. Untimely applications.

A state writ application filed after the filing date applicable to the inmate as described above, is presumed to be untimely, unless the inmate establishes good cause for the late filing by showing "particularized justifying circumstances." 11.071 § 4(b). The statute does not suggest what might or might not constitute such circumstances.

If counsel has been appointed and a timely application has not been filed on or before the date identified in § 4(a), the convicting court must, before the 11th day after the filing deadline, conduct a hearing to determine whether good cause exists for either the untimely filing or "other necessary action." 11.071 § 4(c).

If the convicting court finds that the applicant has established good cause for the delay, it proceeds as if the application was timely filed. § 4(e).

There can never be good cause shown for an application filed more than 91 days after the applicable filing deadline in § 4(a). 11.071 § 4(f). A filing that untimely results in a **waiver of all grounds for relief that were available to the applicant before the last date on which an application could have been timely filed,** except as allowed under 11.071 § 5.

If the convicting finds that the applicant failed to establish good cause, the court must make appropriate findings of fact, enter an order to that effect, direct the clerk of the court to enter a notation that the petition is untimely, and send a copy of the application, findings, notation, order scheduling the inmate's execution , if it has been scheduled, and any order the convicting court directs to be attached to the application, to the Court of Criminal Appeals. 11.071 § 4(d) & 5(b). In such circumstances, the convicting court cannot consider the merits of the application, but must wait for further action by the Court of Criminal Appeals. § 5(c).

To allow consideration of an untimely original application, the Court of Criminal Appeals must find that the application contains sufficient specific facts establishing one of the following:

(1) The current claims and issues have not been and could not have been presented previously in a timely original application because the factual or legal basis for the claim was unavailable on or before the last date for timely filing of an original application. 11.071 § 5(a)(1). A legal basis for a claim is unavailable on or before a date described by § 5(a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States

Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction in Texas, on or before that date. § 5(d). A factual basis of a claim is unavailable on or before a date described by § 5(a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date. § 5(e).

(2) That by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt. 11.071 § 5(a)(2).

(3) That by clear and convincing evidence, but for a violation of the United States Constitution, no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711. 11.071 § 5(a)(3).

If the Court of Criminal Appeals determines that at least one of these three factors has not been shown, the Court is required by statute to dismiss the untimely application as an abuse of the writ. 11.071 § 5(c). If the Court determines that the applicant has met the § 5(a) burden of proof, it shall issue an order to that effect. 11.071 § 5(c). This allows the application to proceed through the convicting court as though it were timely filed.

The statute does not prohibit the Court, in the case of an untimely original application, from finding that some claims meet the requirements of § 5(a) and some do not. The claims that did not pass muster could be dismissed while the remaining claims could be cleared for consideration by the convicting court. Whether the Court takes this approach or instead dismisses an entire petition even if some of the claims satisfy § 5(a) remains to be seen.

4. Issuance of the writ.

If an original application is timely filed, or if an untimely or subsequent application is cleared for consideration by the Court of Criminal Appeals, a writ of habeas corpus, returnable to the Court of Criminal Appeals, issues by operation of law. 11.071 § 6(a). The clerk of the convicting court then must make an appropriate notation that a writ of habeas corpus was issued, assign a case number to it that is ancillary to that of the conviction being challenged, and send a copy of the application by certified mail to the attorney representing the state in that court. 11.071 § 6(c). The clerk is also required to promptly deliver copies of documents submitted to the clerk pursuant to the habeas process to the applicant and the attorney representing the state. § 6(d). Counsel should not assume, because the statute does not say, that this relieves them of the responsibility to serve a copy of every pleading filed in a state habeas case upon opposing counsel.

5. The state's answer.

The State's answer must be filed within 30 days after the date the State receives notice of the issuance of the writ of habeas corpus. The convicting court may grant an extension of time for the answer if the State shows "particularized justifying circumstances" for the extension. 11.071 § 7(a) The answer must be served on counsel for the applicant, or on the applicant personally if the applicant is proceeding pro se. *Id.* Matters alleged in the writ application and not admitted by the State are deemed denied. § 6(b).

Practice Note. The new statute will likely have little effect on previous habeas practice regarding the State's answer. Attorneys representing the State in habeas actions under the former procedure were able to routinely gain extensions of time in many courts for whatever periods they have requested. Note that there is no limitation on the length or number of extensions that can be granted.

6. Reply to the state's answer.

This is neither authorized nor prohibited by the statute.

Practice Note. There will be a small window of opportunity to submit such a pleading before the convicting court determines whether further fact-finding procedures are necessary. If applicant's counsel feels strongly that there are statements or factual matter in the answer which should be contradicted, counsel should submit a reply with a motion seeking leave to file the same. Factual development is so important in the initial application that no opportunity to enhance that presentation or rebut the state's response to it should be lost.

7. Determination of the need for fact-finding proceedings.

By the 20th day after the last date on which the State may answer the application, the convicting court must determine whether controverted, previously unresolved factual issues material to the legality of the inmate's confinement exist, and will issue a written order of that determination. 11.071 § 8(a). That determination controls the future course of the proceedings in the convicting court.

Practice Note. Counsel for an inmate should urge the convicting court to allow at least brief oral argument regarding this determination because it is so important to the future course of the proceedings. If writ counsel with strong factual issues loses this determination issue, there will be no further opportunity to develop and present facts in state court, unless the Court of Criminal Appeals remands the case to the convicting court for further factual development. Unless the factual issues are so well developed and proven in the application itself that counsel is convinced they cannot be reasonably refuted, further factual development will be critical to preserving any opportunity to prevail on the writ application. Oral argument is not prohibited by the statute. As an alternative, counsel might wish to submit a memorandum to the court highlighting the need for further fact-finding procedures.

8. Burden and standard of proof in state habeas proceedings.

Though 11.071 does not specifically address the burden of proof for writ applications, previous decisions of the Court of Criminal Appeals indicate that the burden is on the applicant to allege and prove facts, which, if true, would entitle the applicant to relief. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). The applicant must plead and prove that the complained of error did, in fact, contribute to the conviction or punishment. *Ex parte Barber*, 879 S.W.2d 889 (Tex. Crim. App. 1994). The standard of proof in habeas actions is proof by a preponderance of the evidence. *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989); *Ex parte Kunkle*, 852 S.W.2d 499 (Tex. Crim. App. 1993).

9. If there is no need for further fact-

finding procedures.

If the convicting court determines that unresolved factual issues of the sort described in § 8(a) do not exist, the court will offer the parties the opportunity to file proposed findings of fact and conclusions of law for the court to consider, by a date specified by the court that is within 30 days of its determination that further fact-finding procedures are not necessary. 11.071 § 8(b). The court may request argument of counsel, after which it will enter written findings of fact and conclusions of law. These findings and conclusions must be entered not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date of the court's determination that further fact finding procedures were not necessary, ***whichever occurs first.*** § 8(c). If the convicting court does not issue findings and conclusions by the statutory deadline, this automatically constitutes a finding that controverted, previously unresolved factual issues material to the legality of the applicant's confinement do not exist. § 8(e).

Practice Note. *It has not been uncommon in some counties for state's attorneys to file proposed findings of fact and conclusions of law with the state's answer, and for the convicting court to sign those findings almost as soon as the answer is filed. The new procedure may slow this somewhat by appearing to require an opportunity for applicant's counsel to submit proposed findings. The statute also requires the clerk of the court to immediately send to applicant's counsel or a pro se applicant personally, all orders entered by the convicting court, proposed findings of fact and conclusions of law, and final findings and conclusions entered by the convicting court. § 8(d)(2). Counsel should not be surprised, however if the time allowed is very short, and should begin preparing proposed findings as soon as the writ application is filed.*

Throughout the process in the convicting court, the clerk of the court is required to immediately send to the Court of Criminal Appeals a copy of the application, the answer, orders entered by the convicting court, proposed findings and conclusions, and final findings and conclusions entered by the convicting court. § 8(d)(1).

10. If further fact-finding procedures are needed.

If the convicting court determines that further fact-finding procedures are necessary with respect to one or more claims in the application, it must enter an order within 20 days after that last date the state could answer the application, designating the issues of fact to be resolved and the manner in which they will be resolved. The court can require affidavits, depositions, interrogatories and evidentiary hearings as fact-finding techniques, and may also rely on personal recollection to resolve issues of fact. 11.071 § 9(a).

Practice Note. *The practice of allowing convicting court judges to rely on personal recollection in the resolution of factual issues is one of long standing in Texas habeas procedure. It is, nonetheless, troubling from the standpoint of applicant's counsel, because counsel is generally given no opportunity to test the recollection of the court through traditional advocacy techniques and frequently does not know what recollections the court may be relying upon until they are revealed in written fact-findings. It also presents a curious situation in which a*

supposedly impartial fact-finder is allowed and encouraged to act as a witness.

A fair fact-finding process should prohibit a witness from acting as the ultimate finder of fact and should allow the applicant to know what testimony in the form of the court's recollection is relied on in helping to resolve his factual claims, so that he or she has the opportunity to test that recollection. As is discussed in a later topic addressed in this manual, the fairness of state proceedings is critical to determinations in federal court about whether state court fact-findings should be presumed correct for federal habeas purposes.

To preserve this issue, state habeas counsel should consider imaginative motion practice. For example, counsel might, with the habeas application, file a motion asking the convicting court to reveal, within a certain time, what recollections of its own the court would be relying upon to help resolve the factual issues raised by the application. If counsel believes, based on contact with the court, that the court's recollection will be critical to the resolution of the claims, counsel should consider filing a motion to recuse the judge who presided at trial or a motion to allow that judge to be deposed or examined in open court regarding the factual issues in dispute.

There is probably no diplomatic way to do these things, but the issue of fairness of the state court process is highly important to an applicant's chances to have his or her claims properly heard and considered.

If the convicting court orders an evidentiary hearing, it is required to give the parties not less than 10 days to prepare for the hearing. This preparation time may be waived by agreement of the parties. Either the state or the applicant may request that an evidentiary hearing be held within 30 days after the date the court ordered the hearing. If such a request is made, the court must hold the hearing within the 30 day period unless it states, on the record, good cause for delay. 11.071 § 9(b).

Practice Note. *The minimal hearing preparation time allowed by the statute is very short, particularly if you will be presenting live testimony from witnesses located at some distance from the court. You should ask the convicting court for the time you need to adequately prepare for the hearing, carefully documenting the reasons the additional time is needed, even if you believe the court will deny the request. The purpose of this is both to get the time you need and to preserve the issue of inadequate hearing preparation time, if your request is denied, for later consideration in federal habeas proceedings.*

The presiding judge of the convicting court will conduct the hearing unless another judge presided over the original capital felony trial. If so, and the other judge is qualified for assignment as a visiting judge under TEX. GOV'T CODE ANN. §74.054 or 74.055, the other judge may preside at the hearing. 11.071 § 9(c).

Practice Note. *For the reasons mentioned above, if the presiding convicting court judge attempts to bring in the original trial judge to preside at the habeas hearing, counsel should object to that change, doing whatever is necessary to preserve that objection for later consideration by a federal court.*

The Texas Rules of Criminal Evidence apply to evidentiary hearings on state writ applications. 11.071 § 10. The court reporter is required to prepare a transcript of the hearing within 30 days after the date the hearing ends and to file the transcript with the clerk of the convicting court. § 9(d).

The parties may file proposed findings of fact and conclusions of law for the consideration of the convicting court on or before a date set by the court that is not later than 30 days after the transcript is filed. The court may request argument of counsel, after which it must make written findings of fact necessary to resolve the previously unresolved facts and make conclusions of law. This must be done within 15 days after the date the parties filed proposed findings or within 45 days after the transcript is filed, whichever occurs ***first.***

Throughout the factfinding process, the convicting court clerk must immediately transmit the following the to the Court of Criminal Appeals: a copy of the application, the answers and motions filed, the transcript, the documentary exhibits introduced into evidence, the proposed findings of fact and conclusions of law, the findings and conclusions entered by the court, sealed materials such as confidential requests for investigative expenses, and any other matters used by the convicting court in resolving issues of fact. 11.071 § 9(f). The clerk must also immediately send to counsel for applicants or directly to pro se applicants a copy of any orders entered by the convicting court, proposed findings and conclusions, and the findings of fact and conclusions of law entered by the court. 11.071 § 9(g).

11. Review in the Court of Criminal Appeals.

The Court is required to "expeditiously" review all writ applications submitted under the new procedure. The statute says the Court may set the cause for oral argument and may request further briefing of the issues by either side. After reviewing the record, the Court will enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify. 11.071 § 11.

There is no indication that the Court will not continue to follow TEX. R. APP. P. ANN. 213 regarding its handling of habeas applications. That rule notes that each writ application will be assigned by the administrative staff of the Court to a judge, in rotation. The judge is responsible for making an initial review and reporting on the case to the Court. The rule says the Court may deny relief upon the findings and conclusions of the trial court with or without an evidentiary hearing. The Court may also deny relief based upon its own review of the application or may issue such other instructions or orders as may be appropriate. Rule 213(a).

If at least five members of the Court are of the tentative opinion that the case should be filed and set for submission to the Court, the cause will be docketed and heard as though originally presented to the Court or as an appeal. No motions for rehearing or reconsideration are entertained from a denial of relief without docketing of the cause. The court, however, may on its own motion, reconsider such initial disposition.

Practice Note*. The Court generally moves very quickly to dispose of writ applications; it is not unusual for the Court to conclude its review in less than one month. An applicant's counsel may want to file objections to the final findings and conclusions of the*

convicting court, in the Court of Criminal Appeals, to highlight unfairness of process or substantial errors in the lower court's analysis of the claims. Objections are neither authorized nor prohibited by the statute or Rule 213 and the Court has routinely accepted them when filed under the former habeas procedure. If nothing else, objections serve to highlight unfairness in the lower court state process for federal habeas purposes. The usefulness of objections depend upon the degree of error one discerns in the actions of the convicting court and whether counsel has the time to prepare the objections. Because objections are not specifically authorized by statute, it is possible that the Court would not compensate counsel for the time necessary to prepare them.

While the Court will not consider a motion for rehearing if the writ application was not docketed, it is possible to file a motions suggesting that the Court reconsider its resolution of a writ, on its own motion, tracking the last sentence of Rule 213(b). The Court has occasionally agreed to reconsider a writ decision in the past.

When the Court renders it decision regarding a writ application, do not expect a detailed opinion, unless the case has drawn unusual interest from the Court. The Court has typically denied relief in capital writ cases, in orders of just a few paragraphs which frequently comprise no more than one page.

12. Counsel's duties after relief denied.

Article 11.071 § 2(g) requires a lawyer appointed pursuant to 11.071 to seek to be appointed as counsel in federal habeas review under 21 U.S.C. § 848(q) or move for the appointment of other counsel under that statute, within 15 days after the Court of Criminal Appeals denies relief or, if the case was set for submission, issues its mandate.

21 U.S.C. § 848(q)(5) requires counsel appointed in federal district court in habeas matters to have been admitted to practice in the appointing federal court not less than five years and to have had not less than three years experience in the actual trial of felony prosecutions in that court. Federal district courts may, for good cause, appoint an attorney whose background, knowledge, or experience would otherwise enable that lawyer to properly represent a habeas petitioner, with due consideration for the seriousness of the penalty and the unique and complex nature of the litigation. 21 U.S.C. § 848(q)(7).

***Practice Note**. There is no explicit enforcement mechanism in the statute if a lawyer does not do this, but presumably the Court could rely on inherent powers to fashion some way to punish a lawyer who did not comply with the statute.*

If at all possible, a federal court will appoint a lawyer who represented an inmate in state habeas proceedings due to that lawyer's familiarity with the case.

There are no mandatory deadlines at present, in federal law, relating to the speed with which one must move from state habeas denial to federal court. The practice of many district attorneys has been to encourage convicting courts to set execution dates at the conclusion of the state habeas process to encourage an inmate's lawyer to move rapidly into federal court. If faced with such a strategy, counsel should bring the court's attention to the 15 day requirement of the state statute and urge that an execution date

is unnecessary.

D. SUBSEQUENT OR SUCCESSIVE APPLICATIONS

A subsequent state writ application is any writ application filed after an original application has been filed (not including timely filed applications which amend or supplement an original application, that are filed in conformity with 11.071 § 4(h).

As noted earlier, a lawyer will not be appointed in advance to prepare and file a subsequent application; only if the Court of Criminal Appeals concludes that the application may be considered, may counsel be appointed and paid. 11.071 § 2(e).

If a subsequent application is filed with a convicting court, the clerk of the court must enter a notation that the application is a subsequent application, and immediately send a copy of the application, notation, order scheduling the inmate's execution , if it has been scheduled, and any order the convicting court directs to be attached to the application, to the Court of Criminal Appeals. 11.071 § 5(b). The convicting court cannot consider the merits of the application, but must wait for further action by the Court of Criminal Appeals. § 5(c).
To allow consideration of subsequent application, the Court of Criminal Appeals must find that the application contains sufficient specific facts establishing one of the following:

(1) The current claims and issues have not been and could not have been presented previously in a timely original application or in a previously considered application filed under 11.071 or the former 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application. 11.071 § 5(a)(1). A legal basis for a claim is unavailable on or before a date described by § 5(a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction in Texas, on or before that date. § 5(d). A factual basis of a claim is unavailable on or before a date described by § 5(a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date. § 5(e).

(2) That by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt. 11.071 § 5(a)(2).

(3) That by clear and convincing evidence, but for a violation of the United States Constitution, no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711. 11.071 § 5(a)(3).

If the Court of Criminal Appeals determines that none of these three factors have been shown, the Court is required by statute to dismiss the subsequent application as an abuse of the writ. 11.071 § 5(c). If the Court determines that the applicant has met the § 5(a) burden of proof, it shall issue an order to that effect. 11.071 § 5(c). This allows the application to proceed through the convicting court as a timely filed, original application.

The statute does not prohibit the Court, in the case of an subsequent application, from finding that some claims meet the requirement of § 5(a) and some do not. The claims that did not pass muster could be dismissed while the remaining claims could be cleared for consideration by the convicting court. Whether the Court takes this approach or instead dismisses an entire petition even if some of the claims satisfy § 5(a) remains to be seen.

E. EXECUTION DATES

1. Date settings.

If an initial application is timely filed under Article 11.071, the convicting court cannot set an execution date before the Court of Criminal Appeals denies relief or, if the case is filed and set for submission, the Court of Criminal Appeals issues a mandate in the case. TEX. CODE CRIM. PROC. ANN. art. 43.141(a).

If an original application is not timely filed under 11.071 or good cause is not shown for an untimely application under 11.071, the convicting court may set an execution date. 43.141(b).

The first execution date an inmate receives may not be earlier than the 91st day after the date the convicting court enters the order setting the execution date. A later execution date cannot be earlier than the 31st day after the date the convicting court enters the order setting the execution date.

2. Modification or withdrawal of execution dates.

The convicting court may modify or withdraw the order of the court setting a date for execution if the court determines that additional proceedings are necessary on a subsequent or untimely application filed under 11.071. 43.141(d). If the convicting court withdraws a date setting order, the court must recall the warrant of execution. If the court modifies the execution date, it must recall the previous warrant and the clerk is required to issue a new warrant. 43.141 (e).

Practice Note. Though convicting courts are not supposed to set execution dates for inmates who have an initial application pending under 11.071, you should not be surprised if they do so. Previous practice allowed convicting courts to set execution dates at any time that they were not specifically stayed from doing so, and some courts may assume that they retain that power under the new statute. If a date is set in violation of the statute, counsel should immediately contact the district attorney who is opposing the writ to get his or her agreement that the date should not have been set and that it should be withdrawn, and to work out how to communicate this information to the court. Though the statute governing withdrawal of dates does not specifically say that a court can withdraw an execution date it has improperly set during the pendency of an original application, that power must be inherent in the court, particularly if it can withdraw dates in other circumstances.

If the convicting court will not withdraw an execution date that has been set in violation of the statute, counsel should file a motion with the Court of Criminal Appeals to stay the execution.

Note that 43.141(a) could be interpreted as allowing a convicting court to schedule an execution date before an initial application is

filed. Though 43.141(b) could easily be read to say that no date can be set until the time for filing a timely original application has passed, it does not explicitly says so. Though setting a date before the filing of an initial application would seem rather foolish under the new process, convicting courts have been known to set execution dates almost immediately after conviction. Dates set before an original application is due should be stayed with little difficulty by the Court of Criminal Appeals, but counsel should try to derail such date settings before they take place, if possible.

Even when a convicting court can properly set an execution date, habeas counsel should discourage the court from doing so, if federal habeas relief has yet to be sought. The setting of a date dramatically affects the conditions of an inmate's confinement. Work capable inmates who receive execution dates are removed from the work program so long as the date is scheduled. Every inmate receiving a date is placed under tighter restraint and restriction of movement throughout the facility. As an execution date nears, the restrictions increase. Execution dates are particularly stressful for inmates and counsel should always discourage courts from setting them if they are doing so just to ensure that a case progresses. Likewise, counsel should discourage state courts from modifying, rather than withdrawing, execution dates, whenever possible.

3. Timing of executions.

The legislation that changed state habeas procedure also changed the time of executions from anytime before sunrise on the execution date to any time after 6 p.m. on the execution date. TEX. CODE CRIM. PROC. ANN. art. 43.14.

Practice Note. *Though all warrants of execution issued by convicting courts are to use the new time, some, apparently through oversight, have not. Counsel whose client receives an execution date should check with the convicting court clerk to determine what time was set in the warrant. Many warrants will allow execution anytime after 12:01 a.m. on the execution date. The Texas Department of Corrections will follow the wording of the execution warrant unless the court instructs it otherwise. Assuming that an execution will not occur until 6 p.m. of the date for which it is set, when the warrant says otherwise, could have drastic consequences.*

F. APPLICABILITY OF NEW STATUTE TO EXISTING WRIT APPLICATIONS.

At the time of this writing, some inmates have pending initial writ applications and are awaiting appointment of counsel by the Court of Criminal Appeals. Still others have had one habeas application denied before the effective date of the legislation. The legislation changing the state habeas process is silent on the applicability of those changes to inmates in the above circumstances.

In the absence of express language in the legislation making it retroactive, it is presumed to be prospective in its operation. TEX. GOV'T CODE ANN. § 311.022. The revision, amendment, or repeal of a statute also does not affect any right or privilege previously acquired or accrued under it, nor any remedy concerning any privilege or obligation under it. TEX. GOV'T CODE ANN. § 311.031(a)(2) & (4).

It would seem, therefore, that the new provisions of 11.071 should not apply to writ applications that were pending on September 1, 1995 where the counsel who was representing the inmate on that date is continuing. Less certain is the situation where an application was pending on September 1, 1995, but counsel who filed the application has withdrawn and application for appointment of replacement counsel has been made to Court of Criminal Appeals pursuant to the new statute. It is unknown whether the timing provisions for amendments or supplements or any of the other deadlines of 11.071 will apply in that situation.

Another situation which may raise questions about the applicability of the new statute is the continuing practice in some counties of appointing writ counsel. If counsel is not appointed by the Court of Criminal Appeals, but by the convicting court, how much of the new statute and the rules the Court of Criminal Appeals has adopted regarding fees and expenses applies? Might it be unconstitutional for convicting courts to deprive an applicant of certain rights under the statute (such as to ex parte applications for fees, prepayment of expert expenses, etc.) by themselves controlling the appointment of counsel without giving the applicant an opportunity to elect to have the Court of Criminal Appeals appoint habeas counsel? Could the intent of the new process be frustrated by convicting courts waiting to appoint counsel until shortly before the writ application is due under the statute? At present these questions are unanswered, but may require resolution in the near future.

G. CONSTITUTIONALITY OF THE NEW STATUTE.

The new statute may be open to both state and federal constitutional challenge.

Some writers have suggested that it violates TEX. CONST. art. I, § 12, the Texas Constitution's habeas provision, the open courts and due course of law provision of Article I, § 13, and the Article I, § 3 equal rights guarantee in the Texas Constitution. *See* James Harrington and Anne Burnham, *Texas' New Habeas Corpus Procedure for Death Row Inmates: Kafkaesque -- and Probably Unconstitutional*, 27 ST. MARY'S L. J. 69-102 (1995) (Appendix A). The Court of Criminal Appeals has just ordered the writ application of a death row inmate to be set for submission, apparently to consider challenges it contains to the new statute that are based in part on arguments made in the Harrington article. *Ex parte James Carl Lee Davis*, No. 21,7000-2 (Tex. Crim. App. order entered Jan. 2, 1996).

As noted earlier, some of the Court of Criminal Appeals' rules regarding compensation of counsel and payment of expenses may be void because they are in conflict with the statute and the Court lacked rule-making authority to impose its will over that of the Legislature.

It may similarly be argued that the limitations of the new procedure violate federal constitutional rights of due process, meaningful access to the courts, the right to habeas corpus contained in Article I, Section 9 of the United States Constitution, and equal protection. Those arguments are well described in an excellent and thorough treatise by James S. Liebman regarding federal habeas corpus litigation, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 166-189 (2d ed. 1995).

A particularly interesting problem may be presented by the courts which are continuing to appoint writ counsel, even after the effective date of 11.071. If the resources, in terms of compensation or funds for experts, investigators, etc. vary significantly between the Court of Criminal Appeals' appointment system and the systems of appointing convicting courts, there may be grounds for Texas equal rights and federal equal protection constitutional challenges to the statute.

Practice Note. Habeas counsel may want to challenge the constitutionality of the process when coming up against the limitations on fees and resources that the statute imposes, or when its time limits are operating to prevent counsel from developing information vital to a full and fair presentation of an inmate's constitutional claims. Remember that it is critical to make a record for federal court review if the inmate loses in state habeas, of all unfair, unconstitutional aspects of the state habeas system.

IV. WHAT ISSUES ARE YOU LOOKING FOR?

Counsel deciding what issues to raise in a state writ application must be guided by three principles:

(1) Issues must be based upon serious state and federal constitutional error.

(2) The writ process is not direct appeal. The trial record is a springboard for, not the boundary of, the search for issues that can and should be raised.

(3) Any issue not raised on federal constitutional grounds on direct appeal or in state habeas proceedings is lost to the inmate and cannot be raised in federal court. As long as an issue can be supported by the record and/or factual investigation, it should be raised if it has not been raised on direct appeal.

Courts have formulated various tests for serious constitutional error. For purposes of preparing a writ application, habeas counsel should assume it to be error that could reasonably have affected that outcome of either phase of a capital trial. If you have doubts about the seriousness of an error, include it in the writ; later research or factual development may show it to be more serious than it initially appeared. If you don't include it in the initial writ application and it was not raised on direct appeal, the issue is almost certainly lost to the inmate forever.

If you identify a constitutional error that direct appeal counsel should have raised, but did not, raise it in the writ application. Though habeas corpus proceedings focus on issues developed largely through extra-record investigation, constitutional errors that could have been raised on direct appeal, but were not should be raised in the writ application to give state courts and chance to correct them and to preserve the errors for later federal review if necessary.

If direct appeal counsel fails to raise an error based solely on the violation of a state statute that would result in automatic reversal of a conviction or sentence, habeas counsel should raise that error as in ineffective assistance of counsel on direct appeal claim.

Issue-spotting resources. It is beyond the scope of this article to identify and discuss all the possible errors that would be appropriate

in a state habeas application. An extensive listing and brief discussion of possible issues that can be raised is found in a manual published by the American Bar Association for attorneys who are litigating death penalty cases in post-conviction proceedings: MANUAL FOR ATTORNEYS REPRESENTING DEATH SENTENCED PRISONERS IN POSTCONVICTIN PROCEEDINGS. Writ counsel should get this manual immediately after being appointed. It is available free of charge to attorneys representing a person on death row by contacting:

American Bar Association
Postconviction Death Penalty Project
1800 M. Street N.W.
Washington, D.C. 20036

Telephone: (202) 331-2273
Fax: (202) 331-2220

Other listings of claims are found in 2 JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 709-36 (1st ed. 1988)(Appendices C and D) and 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 303-26 (2nd ed. 1994). The second edition of this two-volume treatise would can be a valuable resource for state habeas counsel.

Some discussion of the issues the Texas Court of Criminal Appeals has confronted in writ applications is found in [the Teague book - give reference]

Examples of issues that could be raised. If counsel reviews the above sources, it will be evident that there is a wide variety of issues that can legitimately be raised in state habeas writs applications. Examples of issues that appear in cases that counsel should watch for are:

(a) Issues arising from state misconduct, such as failure to reveal exculpatory information, including information that could have been used to cross-examine vital state's witnesses, or that the state knowingly used perjured testimony or failed to correct perjured testimony by a prosecution witness (most frequently snitch witnesses);

(b) Claims revolving around the applicant's mental health at the time of the offense and the time of the trial. These may include claims of incompetency to stand trial, lack of specific intent for the capital murder, or claims of ineffective assistance of counsel for failing to develop and present mitigating evidence of mental defects or diseases during the punishment phase of the trial.

(c) Claims arising from the denial of or failure to use expert assistance that would have provided critical evidence in support of the applicant at trial.

(d) Claims arising from racial discrimination in the composition and selection of the petit or grand jury, or from discriminatory actions or comments toward the defendant at trial by the court, prosecutors, or court personnel;

(e) Claims arising out of jury misconduct, such as visiting the scene of the crime against court instructions, conducting experiments with the evidence or at the scene, or using a Bible or other resources not supplied by the court to

guide jury deliberations;

(f) Claims of ineffective assistance of trial or appellate counsel, bases on unreasonable, prejudicial actions or omissions. In cases where important issues have been not been preserved at trial due to failure to object or through other procedural default, this may be the only way to draw the court's attention to them.

Counsel must know the law. It is obvious, but bears saying that counsel must know state criminal law and state and federal constitutional law, or know where to readily find it, to identify the existence of claims and what will be required to prove them. Continuing Legal Education seminars and publications concerning criminal law issues are excellent sources of information on the law. As long as it exists, the Texas Resource Center can also be a good source of information on current legal developments and sample issues. That organization can be contacted through Eden Harrington in Austin at (512) 320-8300 or Lynn Lamberty in Houston at (713) 222-7788.

Don't be afraid to be imaginative. There is no formula for the statement of a meritorious issue or the law supporting one. Some of the best state writ work done is by lawyers who are willing to put forward issues that have not been previously considered by the courts or in a way that has not been foreclosed by them. This is not to say that lawyers should make up claims; the legal foundation for any issue presented to Texas courts must be sound. It never hurts and may help to catch the courts' attention to be interesting and creative in claim statement and formulation.

Facts win cases. In limited instances, straight legal claims in a writ application may be successful. If a good job has been done on direct appeal, however, the errors of law based on the record will have been raised there. Claims in state habeas most often must be based on extensive and careful factual development and presentation to be successful. As is clear from the earlier discussion of the new statute, it is critical that the initial application state facts, as well as law, upon which relief can be granted. There is little opportunity to amend and virtually no meaningful opportunity to raise issues that have been missed, in a later application. The state writ process will likely move relatively quickly once it starts. Habeas counsel needs to find out what facts are necessary early so that efforts can be made to fight for the opportunity to develop and present those facts to the courts.

A word about innocence.... Experienced criminal and state habeas lawyers know that the majority of capital murder defendants they have represented have said at one time or another that they were innocent. The frequency of that claim, often in the face of what appears to be powerful contradictory evidence, causes many lawyers to become so skeptical about claims of innocence that they are reluctant to pursue them, particularly in the context of state habeas proceedings. Nonetheless, every year stories surface in Texas and across the country of innocent defendants who have been wrongfully convicted and have spent significant time in prison. Innocent people can be convicted of capital murder. Habeas counsel owe it to their clients to hear out their innocence claims and to check them out to the extent necessary to determine whether there is any reasonable chance that they could be true. Proving

innocence is a terribly difficult thing, but the new statute allows such a claim to be raised, even in a subsequent application. Doing what you can to ensure that a horrible mistake is not made is worth the effort.

V. INVESTIGATION

A. The Need for Investigation.

Facts outside the record are critical to a successful writ application. Those facts must be sought out through investigation. The investigation required of habeas counsel is more extensive than that required of trial counsel. Because of the nature of habeas claims, habeas counsel must investigate not only the client's background and the facts that gave rise to the offense, but also the investigation by police and defense counsel and the actions of the jury. There is no quick and easy way to do this and counsel will almost certainly need the help of a trained investigator to do an efficient and complete job, particularly in view of the time limits on filing and amending or supplementing an application in the new statute.

Courts should expect you to energetically investigate habeas claims because habeas counsel has the legal duty to do so after being appointed. Article 11.071 § 3 requires counsel to "investigate expeditiously, before and after the appellate record is filed in the Court of Criminal Appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus." There are many sources of information potentially available to you. A partial listing of those sources appears in Appendix I. Some more specific suggestions about how to approach investigation follow.

B. Starting Points

1. Read the Record.

You have to know what happened at trial to have any idea of what habeas issues might be available. Remember that you are looking not only for error on the record, but also indications of things going on outside the record that should be investigated. Two examples will help to make the point.

If you see a letter in the record indicating that your client was examined to determine competency to stand trial, you will want to know why and how that occurred. You will also want to watch the record for any other indications that the client was having difficulty understanding the proceedings or assisting trial counsel with the defense.

If you see testimony from a jailhouse informant, you should immediately determine to investigate that person's background, the charges pending against him or her before, at the time of, and after the trial, and all circumstances leading to the informant testifying at trial. Informants are frequently relied upon at trial to give evidence of damaging admissions allegedly made by defendants and it is not uncommon for juries and defense counsel to be unaware of important information regarding the scope of the deals they received for their testimony.

Capital records are voluminous and habeas counsel must review the entire record, including voir dire. Often suppression hearings are conducted during the weeks that jury selection is progressing, and those hearings are often reported in the voir dire volumes. As mentioned earlier, counsel will also want to be looking for possible

constitutional error in jury selection, or hints of things that went unreported in the record, but were affecting the ability of the defendant to receive a fair trial. Some suggestions about record review are included in Appendix J.

2. Talk to your client.

There is no one who knows the facts of your client's involvement in the offense or the trial better than your client. Your first meeting with him or her should take place shortly after you are appointed.

Visiting arrangements. Male death row inmates are housed at the Ellis Unit near Huntsville, and female inmates at the Mountainview Unit near Gatesville. Both institutions now require you to make arrangements for legal visits by noon of the day before you plan to visit. The Ellis unit will not allow an investigator or paralegal to visit an inmate or accompany an attorney, unless that person has written authorization from the lawyer to visit the client and has been cleared by the prison. The clearance is a one-time process for anyone that the prison is not familiar with, and will take about a week for the prison to process.

You make arrangements for a prison visit by calling the Ellis Unit at (409) 295-5756 or the Mountainview Unit at (817) 865-7226 and telling the person who answers that you want to set up an attorney visit with a death row inmate. That person will forward you to the appropriate department, where someone will take your name, the inmate's name and identification number, and the day you wish to visit.

Contact visits are not allowed except under highly unusual circumstances. You will need permission from the warden to take a tape recorder in with you. Expect that any briefcases or containers you take with you will be searched. No food or beverages can be taken into the prison, but vending machine fare is available in the visiting room. When you arrive at the prison, you must check in with the guard tower in front of the front gate. At that time you will be asked for photo identification, your Texas or other state bar card, and the names and numbers of the inmates you are there to visit. The guard will call inside to verify your visit. Once inside, you will be asked to sign a special TDC form that requires your name, address, and the client's name.

Don't expect that you will allowed visitation in a separate room; attorneys and all other visitors are together in a large U-shaped visiting room with the inmates seated behind plexiglass and steel mesh walls on the inside of the U. Having private conversations can be difficult, depending on how close the prison places others to you.

While it may be necessary in some emergency situations to try to contact your client by telephone, do not substitute this for personal contact. It can take hours or even days for the prison to arrange for an inmate to return a phone call. You will virtually never be able to wait on the line and have the prison bring the inmate to the phone to speak with you, unless that person's execution is imminent. Phone calls to the Ellis Unit are always monitored by prison personnel. It is not clear whether this happens at Mountainview, but you should assume that it does, for the protection of your client.

Topics to cover. (1) Your clients version of the facts of the offense; (2) his or her relationship with the trial and direct appeal

lawyers; (3) anything the client found strange, unusual or objectionable about the trial or direct appeal; (4) your client's social history, including his or her background, education, family history, medical history, drug abuse history, etc. You should strive to know more about your client and his or her history than any other lawyer has known, and perhaps more than his own family has known, to ensure that you are aware of and can use all beneficial information that might come from that knowledge.

Why do you want to know anything about your client's social history? Of course, an obvious reason is to identify possible mitigating evidence that could have been, but was not, presented at trial. Knowing your client's history also gives you perspective on mental limitations or disorders that may have contributed to the offense, to a confession, or to the client's inability to understand what was happening at the trial. Just sitting and talking with your client in a general way will allow you to observe how he or she responds to questions and may indicate to you the presence of mental problems that the record might not have suggested.

There has been considerable litigation in recent years in Texas surrounding "double-edged" mitigating evidence, that is, evidence that could paint the defendant in a bad light, making the defendant appear dangerous, while at the same time reducing his or her moral culpability or blameworthiness for the offense. If you are considering raising an issue that deals with such evidence, it is important to remember that courts now seem to require that there be a nexus between such evidence and the commission of the offense. The evidence at issue must have some causal link to the offense. Expert assistance will be needed to supply this link.

As is the case with a review of the trial record, what your client tells you must serve as the beginning, not the end, of your investigation. Death row inmates are almost always considered incredible by courts unless their accounts are well supported with other evidence. If you can't find other support for what your client says and you have had adequate resources to do so, you should think carefully before including a claim based solely on your client's account in a habeas application.

As you have probably concluded from the comments in this section, the information you need from your client cannot be obtained in just one interview. Obviously there are limits to how many times you can travel to the prison to see the inmate, but the more conversations you have, the more likely it is that you will win the inmate's trust and uncover additional helpful and highly relevant information.

Make sure that your client signs many general releases of information for your use in the investigation. Notary service is often available free of charge at the prisons, but you must make the front desk aware of the need for a notary when you arrive, so that appropriate arrangements can be made.

3. Interview your client's family members.

They may shed light on mitigating evidence that was not presented at trial, or guilt/innocence phase evidence that was suggested to trial counsel, but not presented. They will certainly have things to tell you about your client's background that you can get nowhere else that could contribute

substantially to the development of claims concerning mental disorders, mental limitations, or drug abuse. You will also want to ask them about their contacts with trial counsel, as part of your investigation into trial counsel's investigation.

4. Interview the trial lawyers.

Some experienced habeas litigators might disagree with interviewing trial counsel before one has a clear idea of what the claims will be. I think it can be very beneficial to do so, however, to get their files, their impressions of the trial, of the client, and any extra-record matters that should be investigated, before things may become adversarial.

Trial counsel are keenly aware that ineffective assistance of counsel is almost always considered and is often raised in state habeas proceedings. Many trial lawyers seem to believe that every lawyer preparing a capital writ who approaches them has a hidden agenda and is trying to wring damaging admissions from them. I think is often very wise to approach trial counsel when you have no preconceived notions of the issues and can simply sit and talk about the case in a non-threatening manner. You might find eventually that any ineffective assistance claim you could make would be far less powerful than another claim the trial lawyers will help you on, if you are not attacking them. They are more likely to trust you and your promises of no ineffective assistance claim if they have had a previous, positive meeting with you.

Of course, before you decide not to file an ineffective assistance claim, you must investigate it as fully as possible. If you think that such a claim should be raised, interview the lawyers again, this time with the idea of getting answers to specific questions that are troubling you about the representation. If you are asked whether an ineffective assistance claim will be filed, you should be honest about your thoughts in that regard and assure the lawyers that the filing of such a claim is not a personal vendetta against them, but is a necessary part of your job as habeas counsel. Angry trial lawyers will often submit affidavits to courts opposing ineffective assistance claims. Much of that anger can be subdued or prevented by being up front with them about the likelihood of an ineffectiveness claim.

One final note concerning trial lawyers is that you should always, at the first meeting with them, request their files. The files and all the notes in them belong to the client, not the lawyer, and you should insist on them being turned over to you. It is not unreasonable for a trial lawyer to ask for a copy of the file, or to ask that the original be returned when the client's case is finished, but having access to the file is vital, for it will tell you a lot about what information the lawyers had and what they were doing before, during and after the trial. Be sure that the file you receive includes all notes of the lawyers as well, for those notes are also the property of the client. If you can, it is good idea to have someone sequentially number each page in the lawyer's trial files in the order that they appeared when you received them. This aids in proof later of what documents were in the file and the order they were in.

C. Expanding the Investigation.

Your record review, and interviews of your client, his or her family, and trial counsel will give you a pretty good idea of what some of the important issues may be in the case. That will allow you to focus your energy on

developing information relevant to those issues. You can develop information through use of the following resources:

1. Obtaining records

A wide variety of records can be valuable to you in proving claims. Appendix I contains a partial listing of some of these records. The records you will want to pursue will vary according to the claims you are attempting to develop.

It is vital to start gathering records as early in your writ preparation process as possible. Records collection is time consuming and is sometimes contested by agencies who are the custodians of records. When a dispute develops, expect considerable wrangling before you are successful, and there will be times when you are not successful. It is preferable to deal with these disputes early in the investigation rather than in the last weeks or days before the writ application is due.

Many records can be obtained through use of general release forms signed by your client. Examples appear in Appendix K. Some records custodians, such as the military, require special releases of their own design to be completed. Generally, those custodians can readily supply you with the necessary documentation for your client to complete.

Be sure to request all prison records from every previous incarceration of your client in any institution, as well as his or her time on death row. The general release form in Appendix K should be sufficient to allow you to gain access to those records. Those records may contain very important information concerning your client's mental and medical condition. These should be requested directly through the prison in which the inmate is housed. Medical records are kept separately from the other institutional records regarding each individual and you will have to write two separate checks, one for the medical records and one for the rest of them. Get as many of the prison records as you can. You can get access to almost everything, if you are reasonable and persistent.

School records are another valuable source of information. Through them you can find out about learning and mental difficulties your client was having throughout school that your client may be too embarrassed to tell you about or does not think are important. The records may include I.Q. tests or other testing that is quite helpful in learning how your client was able to function as he or she developed. When obtaining school records, you will need the names of all schools your client attended. Sometimes records in a school system will be stored in more than one place. Again, be persistent, and keep trying if you are met with an initial statement that no records exist.

Medical and mental health records should be sought from any care provider who treated your client. When getting these records, particularly from mental health professionals, make sure you specifically request all the records the care provider has, including handwritten or dictated notes made at or shortly after interviews or times of testing.

Criminal records of all important witnesses at the trial should be checked in the county of conviction and any counties where they have spent substantial time. You may find that some non-law enforcement witnesses had good reason to cooperate with the state at the trial, due to pending charges against them. You may also find that some witnesses had

prior convictions that could have been used to impeach their testimony at trial.

Criminal and civil records concerning all members of the jury should be checked, to identify anything that would disqualify them from jury service, conflicts for any of the attorneys who may have previously dealt with a juror in some capacity, or any dishonest voir dire answers.

While you are checking criminal records, it is always a good idea to check on records concerning your client. Some inmates are poor historians and you need to know all that you can about your client's history with law enforcement before the capital offense.

Generally, when attempting to obtain any records, it is best to have someone go personally to the records custodian to make the request and follow up on it. It is much easier and quicker to resolve misunderstandings or to explain the nature of the need for the records in person rather than by letter or telephone. Of course, with out of state records, this may not always be possible, but the personal touch is often the most effective.

If some records custodians refuse to provide copies of records to you without a court order, seek one. If you have already filed your writ application, you may be able to subpoena the documents you need. Another approach is to file a motion for discovery with the court. See the discussion of discovery motions *infra* at p.38.

2. Information in the files of the prosecution, law enforcement agencies and other government agencies.

Always seek access to the district attorney's files and law enforcement agency files regarding the capital offense and any other offenses that you believe will be relevant to any of your claims, including offenses committed by key state's witnesses, such as jailhouse informants. You should not assume that prosecutors files contain copies of every document generated by law enforcement regarding your client or whoever you are attempting to investigate. Thus, it important to energetically seek access the files of every law enforcement agency that may have generated information regarding your client. Sometimes prosecutors and other agencies will let you see and copy things from them upon request. If not, there are two ways to try to get access.

a. The Open Records Act.

Though recent legislation has changed the terminology from "open records" to "public information," TEX. GOV'T CODE § 552.001 et. seq. continues to provide a valuable tool to lawyers seeking to investigate state habeas issues. It is not within the scope of this article to describe in detail the workings of the act, but counsel should review Appendix L, which contains a recent article written about the Act as it can be applied to habeas proceedings (minus the attachments that accompanied the original article, except for a sample Open Records Act request). Though the article was keyed to practice in Harris County, most of the information in it is applicable to the Act as a whole. (As long as it exists, the Texas Resource Center can also provide helpful information concerning the Act and how to proceed under it. The Resource Center may contacted through Eden Harrington at (512) 320-8300 or Lynn B. Lamberty at (713) 222-7788)).

Since the time that the article in Appendix L was prepared, the Legislature has amended the statute. The text of those amendments follows the article in the appendix. The most important issue presented by the changes is whether the new 552.027(a), which exempts agencies from responding to ORA requests from people who are incarcerated, effectively ends the usefulness of the ORA to habeas counsel.

It should not do so, given the text of another new provision, 552.023, which gives a person *and a person's authorized representative* "a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." More simply put, people should be able to get information concerning them that is held by governmental agencies or subdivisions, themselves, or through their lawyers. The vesting of this right in part in the representatives of individuals may provide the antidote to the poison pill of 522.027(a). No doubt, this will be hotly litigated and habeas counsel should not shrink from the battle to protect this important avenue of investigation.

b. Motions for discovery.

Though the new habeas statute does not talk about discovery motions, it imposes a heavy burden on habeas counsel to investigate possible claims in a timely matter and it authorizes the convicting court to use a wide variety of tools to resolve factual disputes. Also, Tex. Gov't Code § 21.001(a) grants a district court "all powers necessary for the exercise of its jurisdiction ... including the authority to issue the writs and orders necessary or in proper aid of its jurisdiction." From this, it should follow that a habeas applicant is arguably entitled to discovery in state court. Texas courts have not, to this author's knowledge, ever comprehensively addressed the right to, or scope of, discovery for the applicant in the state habeas process. The right to get discovery through the courts is worth litigating if it is the only way you have to get information vital to your case.

Counsel should seek discovery as early as possible in the process, but should not simply make blanket requests for discovery that courts will almost certainly deny. Once counsel has identified the likely claims and has tried to develop information about them, discovery should be used in those situations where nothing short of a court order will cause someone or some agency or institution to provide the information you seek.

3. Talk with witnesses.

As you begin to focus on the claims you want to pursue, you will identify people who have important information about those claims. Some may have testified at trial. Others may never have been called or perhaps were even unknown at the time of trial. You or your investigator need to interview these people in person, if at all possible. If someone does have information that is helpful to you in proving a claim in the writ application, get an affidavit from that person immediately, if possible. This preserves the information in case something happens to the witness and helps to tie the witness down to the account they have told you. It is not uncommon to receive information orally from a witness that is helpful, only to find that at a later time when you want to reduce it to writing, the witness has had second thoughts about vital parts of the information or about being helpful at all.

Don't be hesitant to talk with witnesses who testified for the state. They may refuse to talk with you, but often they are happy to tell you what they remember, so long as you are cordial to them. It is always best to review a witness' testimony at trial before an interview, so that you can ask about any differences between the trial account and the present one, or can follow up on things that were unclear or not covered in the testimony. Of course, habeas counsel should always be sure that witnesses understand who counsel is working for and why they are being interviewed. It is a good idea to have people you or your investigator interview sign a form in which they say they understand who you are working for and have agreed to talk with you.

After an interview the person who conducted it should write a quick memo about it for the file. This will not only help compensate for memory lapses later, but provides some protection from any claims that may be made later of misconduct by writ counsel.

4. Seek expert assistance.

From what has been said thus far about investigation, it should be clear that the services of an experienced criminal or habeas investigator are invaluable in efficiently and comprehensively gathering the information necessary for a writ application. Consult with other experienced writ counsel if you are uncertain about who to hire. Because of the limited period of time in which you have to prepare a writ application, you have to give considerable guidance to an investigator working with you. Habeas investigation cannot be a matter of giving someone a file and telling them to see what they can find and report back. The investigation must be guided by what you identify as the likely issues, and remain sufficiently flexible to respond to unexpected information that could dramatically change the focus of one or many issues you intend to raise.

Other experts will likely be needed, too. It seems that mental health and medical experts are the focus of many writ counsel, as battles are fought over the mental condition of the applicant at the time of the crime and at trial. You should not lose sight, however, of the benefit that you can gain from other experts. If, for example, issues arise about some physical items of the guilt phase evidence, you may wish to employ experts to evaluate that evidence again, if it is still available. Crime scene reconstruction experts can help determine whether the offense could have occurred in the way the state's witnesses described. Any expert that you might consider using at trial to fight the state's case can be valuable in habeas proceedings to challenge the conviction.

This is not to say that habeas litigation is about sufficiency of the evidence, though it may at times feel like one has to prove a client innocent to attract the attention of some courts. The issues must still center around significant constitutional violations. Expert testimony can be critical in persuading a court that the facts the jury heard were unreliable, which is a substantial contribution to most claims of constitutional violations.

One should take care in choosing experts. Just as there are experts in various fields who predictably testify for the state, there are others who very regularly do so for the defense. Regular defense experts in habeas cases bring the advantage of knowing what burden of proof the lawyers have to meet and structuring their reports and examinations in

ways that are responsive to that. The disadvantage of such experts is that courts probably know them as "defense" experts and accordingly assign them significantly reduced credibility. Finding experts who are sufficiently independent to be credible, and yet understand what is relevant in a habeas context, is difficult, but worth the effort. If you can't find someone who fits the latter description, use one of the more familiar defense faces anyway if expert testimony is critical; developing the facts is what this process must be about. Matters of credibility arising from the frequency with which someone testifies for one side or another can be dealt with later when arguing over the facts.

Experts are expensive. If you use one or more than one, you will likely easily outstrip the limited funding the Court of Criminal Appeals appears to be willing to provide. It is critical, therefore, that you assert your need for expert assistance as soon as you can identify specifically enough to be able to explain in detail why the expert would assist in the development of facts for a claim or particular class of claim for your case. You have to convince the Court that there is some reason to believe such claims may reasonably be made, if the facts can be developed. Your requests therefore, must be detailed and structured to what the actual costs will be as given to you by the expert. Don't underestimate what this assistance will cost for the Court. That is a recipe for disaster when the expert's bill comes due and the Court refuses to pay it, leaving you holding the bag. If expert assistance is denied, make a record of it for federal court review later and present the claim the best way you can with whatever assistance you are allowed, making the point regularly that you are not able to fully present the issue because of a denial of resources.

You can give information to experts to assist them. Their activities and product can be far more relevant to your needs or questions if they understand the context in which their findings may be used. They may require certain preliminary information to meaningfully conduct their examinations or arrive at their opinions. Just remember that anything you give to an expert may well be discoverable at a hearing if it serves as the basis for his or her opinion.

Finally, there is a difference of opinion among some habeas counsel about the desirability of having experts write reports about their activities and findings. The worry is that unhelpful or harmful reports could become the target of discovery efforts on behalf of the state. You have to evaluate the dangers of that in each case, but it is important to factor in the possibility that you may not be representing your client to the end of his or her legal challenges to the capital conviction and sentence. It is not unusual for counsel to change in habeas cases for various reasons. If that happens in your case, your successor will have no way of knowing what the expert did if some written record is not kept of it. There is no right answer that applies to every case; just be sure to weigh the relevant factors.

If you do have an expert write a report, there is nothing wrong with asking for a draft of the report and suggesting changes that make it more responsive to the relevant issues in your case. This doesn't mean you are telling the expert what to say; you are simply focusing the report on the important issues the findings were intended to address.

5. Investigation is never done.

Though you will reach a point where you have

to take the information you have gathered and mold it into a writ application, you should not assume that all investigation is done then. There will likely be some things you could not finish before writing the application. Some matters may surface in the state's answer that require exploration. Some information just may not surface until you are beyond the filing of the initial application. In such situations, you have a responsibility to try to find ways of bringing the additional information to the courts' attention. If you run afoul of the deadlines in the new statute governing amendments or supplements, so be it. You must try to include the additional relevant facts you have found in the state litigation before the case goes to federal court, because if you don't try, those facts are lost to your client during the rest of the client's legal struggles. Make a record of how the facts came to your attention, why they could not be included earlier and how they are relevant to the issues in the case. If state courts are unsympathetic, you might find a more attentive audience in federal court when you argue about the unfairness and unreliability of the state post-conviction process.

VI. WRITING THE APPLICATION AND ASSOCIATED DOCUMENTS.

When you file a writ application, you may file other pleadings, such as motions for evidentiary hearing, for discovery, and for stay of execution, if an execution date has been scheduled. The formal requirements for these documents are discussed below.

A. The Application.

There are not many formal requisites that govern the appearance of an application for a writ of habeas corpus. Though 11.071 purports to describe the procedure in a death penalty case, it says nothing about the physical appearance of an application. The only formal procedural matters it mentions are that habeas applications are to be filed with the convicting court, and they must be returnable to the Court of Criminal Appeals. 11.071 § 4(a). To be safe, lawyers should assume that TEX. CODE CRIM. PROC. art. 11.14, which applied to writ applications under the former procedure, still applies. It provides the following relevant requirements:

(1) The petition must "state substantially" that the applicant is illegally restrained in his liberty, and by whom, naming both parties;

(2) A copy of the order by virtue of which the applicant is restrained is to be attached to the application;

(3) There must be a prayer in the application for a writ of habeas corpus; and

(4) The applicant must verify the allegations of the application under an oath saying they are true, according to his belief.

From this one can see that the form of capital writ applications is not tightly governed. It may be helpful, however, to review basic elements of form that a number of applications have followed in the past or that applications should now follow in light of the few statutory requirements that exist. A copy of a writ application including a couple of sample claims is found at Appendix M.

1. Heading.

Practice has varied somewhat on this. Many lawyers use only the district court heading. Some others have given applications a dual heading, showing both the Court of Criminal Appeals and the district court. The only thing the new statute says about this is that the application must be filed in the district court, returnable to the Court of Criminal Appeals. Counsel can continue to use either approach to heading the document until the Court indicates a preference.

2. Style of the case.

As a matter of practice, this is always, Ex parte [applicant's name], Applicant, rather than versus the director of the prisons or the State of Texas. *Ex parte Williams*, 799 S.W.2d 304 n. 1 (Tex. Crim. App. 1990).

3. Page limits.

There are none, but this does not eliminate the need for concise, interesting writing. Write enough so that all facts and legal arguments are thoroughly explained. You do not want the state to argue in federal court that you did not raise certain facts or legal arguments in state court, before you took them to federal court.

4. Paragraph numbering.

There is no requirement for this, but it makes referencing specific parts of the application much easier. It is a good idea.

5. Attachments.

There are no limits on the number or length of exhibits you may attach to a capital writ application. You should not attach copies of pages from the trial record, but you should attach copies of any other factual evidence you wish to present, such as affidavits and copies of records, to the petition.

Some attorneys may disagree with this, saying that habeas applications are pleadings, and as such it is enough to plead the facts and prove them up at any hearing, or in some later document. This argument does not give sufficient weight to the fact that the writ application is the central document for the entire state habeas process; the courts reviewing it will have to decide whether the facts shown in it are sufficient to justify relief, if they are true, and whether the application demonstrates the existence of unresolved issues of material fact that require further fact development. You have to take the best shot you can at persuading the court the first time it sees your application. Holding anything back in habeas proceedings can have disastrous consequences for the future use of the withheld information.

6. Printing, binding, cover color, font styles and margins.

Habeas applications do not have to be printed and there are no formal requirements that have been applied to these facets of their appearance. It would probably be wise to prepare writ applications in conformity with any font and margin requirements the Court of Criminal Appeals demands in briefs presented to it. Applications are always filed on standard white paper and often do not have a formal cover page. The Court of Criminal Appeals prefers to have large documents that are presented to it bound on the left so that they can lie flat when open. Binding requirements may vary with local practice and rules.

7. Contents.

Many capital writ applications are filed without tables of contents or tables of authorities, but I suggest that you incorporate both of these into your application. They ease the courts' task in finding claims and cited authority. Anything you can do to focus the courts' attention on the substance of the claims rather than problems with the form of the application is worthwhile.

An accepted format to use for the body of the petition is to start with a preliminary statement identifying the parties and complying with Art. 11.14, followed by a statement of the case or procedural history section, and a statement of facts. Of course, if you want to draw the courts' attention to a particularly striking constitutional violation, you may wish to talk about that as the first thing in the application. You can use these introductory sections of the application to establish a theme for your client's case. Perhaps most of the constitutional violations arise out of serious state misconduct, or from the failure of law enforcement, trial court, and trial counsel to adequately recognize and explore serious mental disorders suffered by the defendant. If a theme is possible that ties together many of the claims, describe it for the courts at the outset. It will make the application more interesting to read and remember. Claims which affect each other or combine to magnify the prejudice to a defendant make a stronger case for habeas relief.

The claims can be stated in the same format as one would state an assigned error in a direct appeal brief. It is critical, however, that you specifically identify the state and federal constitutional provision(s) you allege were violated in each claim. Each claim should be separately numbered and discussed, though you may occasionally want to use a common description of the facts for a group of claims growing out of the same facts. Argue all applicable facts and the law that applies to them. Once you file the writ application, you may not get another meaningful opportunity to do that before the court decides whether further fact development is necessary.

The prayer of the application should request the issuance of a writ of habeas corpus, a full evidentiary hearing on all fact-based claims in the application, and any discovery you haven't received or even requested, but desire. If there is some other special relief to be requested, such as a stay of execution, it should also be included in the prayer.

Following the signature page should be a separate page containing the verification. The Court of Criminal Appeals has devoted some attention to the issue of verifications required by the former 11.07. The bottom line seems to be that a verification saying that the allegations of the application are true, according to the belief of the applicant, is sufficient. TEX. CODE CRIM. PROC. ANN. Art. 11.14(5); *Ex parte Johnson*, 811 S.W.2d 93 (Tex. Crim. App. 1991).

Verifications need not be notarized. Texas allows inmates in state prisons or in a county jail to make unsworn declarations under the penalty of perjury without going before a notary. TEX. CIV. PRAC. & REM. CODE ANN. §§ 132.001 - 132.003.

As a practical matter, the need for verification means that you need to complete the application soon enough so that your client can read it and sign the verification page before your filing deadline.

There is no set rule on the number of copies to

be provided to the convicting court. Consult the local rules of that court for the number of copies necessary. Presumably, when the application and other documents are forwarded to the Court of Criminal Appeals, that Court or the lower court will make the necessary copies of all the documents.

8. Objections to procedural unfairness.

Though the primary purpose of the application is to present the constitutional claims to be reviewed, it should also be used as an opportunity to raise objections to the unfairness of the state habeas process in your case, if you feel that the process has been unfair. You might choose to discuss the problems you have encountered together, or with respect to each claim, emphasizing in either case that the application is not the product of a full and fair opportunity to develop necessary facts to support the claims. Do what you can to make the record about the unfairness of the process, for later federal court review.

B. Other Documents

1. In forma pauperis motion.

Under the former procedure, an application would always be accompanied with such a motion. Given the new statute's insistence on a finding of indigency and appointment of counsel well before the application is filed, it would seem superfluous to file another motion asking the convicting court to reiterate its earlier finding of indigency. If you are filing a subsequent application, you may wish to include this motion because no finding of indigency is made before that application is filed. A form for this motion is found at Appendix N.

2. Motion for stay of execution.

This should be unnecessary for initial applications under the new statute, but in any other situation, you may be filing an application with an execution date pending. Use the stay motion to marshall your strongest arguments in favor of the merits of your strongest claims, as well as the need for further factual development by the court. This motion is sometimes combined with a motion for evidentiary hearing.

3. Motion for evidentiary hearing.

You don't have to file this motion with your application, but it may be very helpful to do so. It will allow you to highlight the claims that you believe call for factual development pursuant to the statute. There is no magical form to be followed for this motion. An example is included in Appendix O.

4. Motion for discovery.

As discussed earlier, discovery is not explicitly addressed in the habeas statute, but strong arguments can be made in favor of it. If there is still discovery to be done when the application is filed, a motion for discovery should accompany the application or be filed very soon after the application is filed.

5. Motion to require court to engage in independent fact-finding.

Many lawyers representing inmates on capital writs have had the experience of judges signing the fact-findings provided by the prosecutor's office without changing anything except the title of the document. A considerable body of case law, including some from the Supreme Court, requires courts to

engage in independent factual determination. You should strive to have your convicting court do that, rather than sign off on an order presented by the state. If the court does merely sign off on such an order, you should object to that in a pleading filed with the Court of Criminal Appeals, to protect the record.

6. Proposed findings of fact.

Courts are encouraged by the new statute to allow proposed findings of fact to be submitted by both sides. Some habeas counsel have argued that preparing proposed findings is a waste of time when it seems clear that the convicting court will be ruling against the inmate. The argument has also been made that filing such proposed findings may be harmful because it alerts the court to issues the applicant considers particularly important and allows the court to be sure to make negative findings on those issues.

The case to be made for proposed fact-findings is that they may help the court to focus on the issues and to enter a ruling that is at least in some respects, beneficial to the applicant. You simply cannot know that a court will rule against your client on all issues until you see the ruling. If providing a proposed order to the court can encourage even a partially favorable ruling, it may be worth the effort. This is a decision to be made on a case by case basis.

VII. CLIENT RELATIONS.

Death row is a hard place to live. Conditions are cramped, your client is surrounded by others who are also labelled killers, some of whom are exceptionally violent, some of whom are mentally deranged, and some of whom are convinced that there is no hope for any of them. The prison system often acts to dehumanize inmates. Death row is a living nightmare for many there, and probably for your client.

Your client wants to believe that you are his way out, but has seen too many people executed who had lawyers to allow him much confidence. He hopes that you are good, that you will try hard and that you will listen to what he has to say. He hopes that no matter how you may feel about the facts of the crime that brought him to death row, you will treat him with the basic dignity befitting his humanity.

Doing that can be a tall order for a lot of us. We are affected by what the victim suffered. We are affected by the fact that most people can't understand why anyone would want to defend the life of someone on death row. We are told by the media, politicians and perhaps even our families and friends that the men and women on death row are getting what they deserve and should be getting it faster.

What we have to remember in dealing with our clients is that we are all that stands between them and the death chamber. Each lawyer representing a death row inmate is likely the only advocate that person has with even a remote chance to derail the train that is taking that person to his execution. If we are to be more than window dressing on that train, we must come to view our clients from a different perspective, apart from the judgments of others. We must view them as people and must try to glimpse life as they have lived it, through their eyes.

Death row inmates are constantly faced with their own mortality. As we work with them, it is inevitable that their situation reminds us of

our mortality, and a natural reaction is to distance ourselves from them. That distance can prevent us from forming the bond that we must with our clients to represent them properly and zealously within the bounds of the law.

Little things matter a lot to the people on death row. Don't promise anything that you can't or won't do. When you visit your client, offer to buy him something from one of the vending machines in the visiting room. Send him copies of everything that is filed by either side in the case, and all orders entered by courts. Be willing to respond to requests from his family for information about his case if he gives you permission to do so. Talk with him about what you see the issues in his case to be and why.

Don't come to your client with false bravado about how the case will go. He knows better; he knows how many people have been executed since he came to death row. Don't guarantee your client any result, particularly a stay of execution. Every execution date in Texas should be treated as a date that could be kept.

Some clients will ask their lawyers for money. Others will ask for certain favors to be done on the outside. It is every individual's judgment call as to what to do in these situations. They can present opportunities to do good things for people and can also be the source of destructive misunderstandings.

The men's prison has a media day every Wednesday, when reporters can come into the prison and ask to see any of the death row inmates in the visiting room. Counsel are not allowed to be present. Inmates do not have to respond to such a request, but many do, believing that what their cases really need is some publicity to show how unjustly they have been treated. Talk with your client early and clearly about media visits and strategy in his case. If you think media interviews, particularly in the absence of counsel, are a mistake, tell him so and advise him as strongly as you can against doing them.

Beware of people who try to get close to death row inmates to write crime books about them. Be alert to any comments by your client about people who want to write up his story or think he has an interesting case. Be prepared to see those people ignore your protests to their writing about your client's case.

Remember that every execution date is stressful for a person on death row and that person's family. He has no way of knowing what is happening on his case as the date creeps closer, unless you tell him. Many inmates are more difficult to deal with when they are under that stress. We would probably react the same way.

Don't assume that because you learn of a stay of execution, your client or the prison have received similar information. When you receive word of a stay, always call the prison your client is in to verify that it has received the same information and that your client has been told. If the information has not been communicated to the prison, contact the court that stayed the execution and the state's representative in your case to ask that the information be forwarded to the prison immediately. Prison officials will not believe that a date has been stayed until they receive that word through official channels, which usually means the Attorney General's office. Sometimes it is a struggle to see that the word gets through.

Executions are not carried out at the prisons which house death row inmates, but at "The Walls," also known as the Huntsville Unit, located in downtown Huntsville. If he or she has not received a stay, your client will be moved to "The Walls" several hours before the scheduled execution. You will now know exactly when the move takes place; TDCJ-ID refuses to reveal that information on grounds of security. Once your client is at "The Walls," all contact with your client and communication regarding stays of execution goes through the warden's office there. It is possible to visit your client there and to talk to him or her by telephone, so long as there is a legitimate legal reason for the contact. The warden's office at "The Walls" may be contacted at (409) 295-6371.

Above all, be willing to listen. Some of the people on death row have had no one from the outside world who was willing to really listen to what they had to say for years. You may hear a lot of things that are irrelevant to what you want to know, but you may also gain valuable insights to your client and how he came to be convicted. Many inmates are articulate, interesting, and a pleasure to talk with. My experience has always been that if I treat an inmate as a person with some worth, it is far easier to forge a sound and productive working relationship.

VIII. YOUR MENTAL HEALTH.

Capital writ litigation carries with it much responsibility and stress. It is demanding of time, energy and intellect. It is surely the equal of any other litigation in difficulty.

No matter how much you do concerning a case, you will probably never feel like everything is done. No matter how much law you assimilate, you may never feel that you know enough. No matter how much time you have, it will never seem sufficient.
This may be characteristic of much complex litigation, but is particularly true of capital writ practice.

For all these reasons, it is important that you do not try to litigate one of these cases alone. The Court will not appoint second counsel to assist you, but you can use informal networks of other lawyers as sounding boards and sources of material help. You may know who has been involved in writ litigation before. If not, ask around and find out, or call the people at the Texas Criminal Defense Lawyers Association, who can guide you to some experienced lawyers. Make contacts with them and find attorneys who are willing to take the time to help talk you through one of these cases when difficulties come up. There are a lot of good lawyers who have experience in this area who are willing to help.

As long as the Texas Resource Center exists, you can call either of its offices to obtain advice, sample pleadings, or a copy of its two volume manual on post-conviction litigation. Contact Eden Harrington at (512) 320-8300 or Lynn Lamberty at (713) 222-7788.

Watch for seminars on capital murder or post-conviction practice sponsored by organizations inside and outside Texas and go to them. Check your local law libraries for relevant books or manuals. When you consult materials be sure to remember the change in the habeas procedure and make sure the information is addressing current procedure.

Don't be hesitant to tell the courts what you need in terms of time and resources to represent your client. If the courts won't

supply what you requested, make a record of that for later review; continue to bring up your need for time or resources at every opportunity.

Though you want to raise all constitutional claims that you can in the state writ application, you will need to prioritize your time and focus your efforts on those claims that you believe have the best chance of success. Sometimes that calls for tough choices. Good advice can help you navigate through the options.

No one expects you to be a miracle worker. You can't create facts that don't exist. You can't change the body of law that informs much of habeas litigation, though writ practice often gives you the chance to make law that can be helpful to others. You can't let a case take over your life. Develop all the relevant facts you can find and bring all the law to bear that you can find. Hope for the best and don't be surprised by the worst. Never stop believing that you can and are doing something of great value not only for your client, but also for the criminal justice system.

IX. CONCLUSION.

Capital writ litigation is some of the most important work you can do as a lawyer. Be ready for the ride of your life, if you take one of these cases on. Good luck.

ACKNOWLEDGMENTS.

I am indebted to the many Texas criminal defense lawyers from whom I have learned so much that is reflected in this article. Michael Charlton and James Harringtonn have been particularly helpful in their contributions of materials for the appendices. This article would not have been possible without the continuing support and encouragement of past and present colleagues at the Texas Resource Center, whose commitment to excellence in state and federal capital writ litigation has been unflagging. I trust that their contributions to that process and the ability of Texas writ counsel to litigate zealously and well will survive the organization that brought them together.

COUNTY OF TRAVIS

STATE OF TEXAS

DECLARATION OF RICK WETZEL

1. My name is Rick Wetzel. I am over the age of 18, sound of mind and competent to make this declaration.

2. I am a lawyer licensed in the State of Texas. I worked as General Counsel at the Texas Court of Criminal Appeals ("TCCA") from 1987 until 2003. I was employed in this capacity at the time that Article 11.071 was passed by the Texas Legislature in 1995.

3. In 1997, Article 11.071 included a mandate for the TCCA to make post-conviction attorney appointments. It also included a provision for the TCCA to formulate and follow guidelines regulating such appointments.

4. To the best of my recollection, these guidelines were not formally created. Instead, the TCCA solicited a group of attorneys, mainly comprised of appellate lawyers familiar to TCCA Judges, who were interested in post-conviction appointments in capital cases. Acting on a case-by-case basis, a panel of TCCA Judges determined who would receive the appointments to capital habeas proceedings under the new statute. There were few, if any, predetermined

qualification criteria other than a "good feel" for the attorney to be appointed under the new statutory provision.

5. I attribute the ad hoc approach to appointments to the lack of specificity in Article 11.071 and the way it was thrust on the TCCA, combined with the absence of a statutory plan for smooth implementation. The years following its passage in 1995 were thus defined a lack of cohesive oversight.

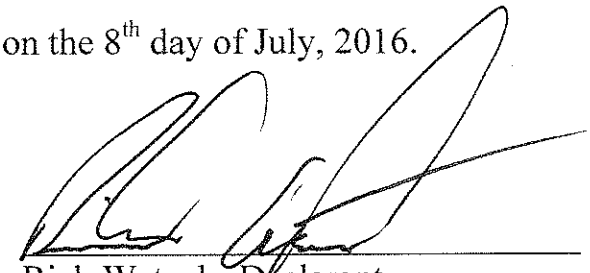
6. Because there was no statutory implementation plan and because the TCCA Judges were themselves operating under the statute for the first time, they did their best in an isolated role to exercise effective quality control over the attorney appointments. Most of the attorneys appointed to prepare state habeas petitions under Article 11.071 at that time had little familiarity with capital post-conviction practice in state court and certainly no familiarity with the manner in which habeas practice in state court would ultimately be impacted by the passage of the 1996 Anti-Terrorism and Effective Death Penalty Act. State habeas petitions were rarely filed by counsel prior to the enactment of Article 11.071. In the years following the statute's passage, it was not uncommon for attorneys to be removed from their appointments or the list of those attorneys though to be qualified for such appointements for missing deadlines, maintaining an oversized case-load, or failing to work within what the TCCA felt to be an appropriate budget on a capital

habeas case. Removal of attorneys from further appointments was simply on an ad-hoc basis.

7. The overall experience at that time was akin to shooting in the dark, with all of us – Judges, court staff, and fiscal managers alike – necessarily learning on the fly. We adjusted as time went by. By 1997, I do not believe anyone involved in the process understood or had learned how to ensure competent counsel were appointed to represent defendants in their post-conviction proceedings under Article 11.071 or that they were provided adequate funding to undertake such an endeavor.

My name is Rick Wetzel, my date of birth is October 22, 1952, and my address is 1411 West Ave., Ste. 100 Austin, Texas, 78701. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Travis County, State of Texas, on the 8th day of July, 2016.



Rick Wetzel - Declarant

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MAY 22 1997

NO. CR-1430-92-B

(CAUSE NO. 71,714 IN THE COURT OF CRIMINAL APPEALS)

ROBERT MORENO RAMOS	*	IN THE 93RD DISTRICT COURT
	*	
VS.	*	OF
	*	
STATE OF TEXAS	*	HIDALGO COUNTY, TEXAS

MOTION FOR EXTENSION OF TIME TO FILE APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGES OF THE 93RD DISTRICT COURT:

COMES NOW ROBERT MORENO RAMOS, Applicant, by and through his undersigned attorney, and moves the Court for an extension of time to file his Application For Writ Of Habeas Corpus, and in support shows the following:

I.

Applicant was convicted in the 93rd District Court of Hidalgo County, of the offense of Capital Murder, and was sentenced to death on March 23, 1993. The cause was affirmed on direct appeal to the Court of Criminal Appeals in cause number 71,714 on June 26, 1996 and a timely motion for rehearing was denied on September 11, 1996.

II.

Applicant's petition for writ of certiorari was filed in the Supreme Court of the United States in cause number 96-7119 on December 10, 1996, and placed on the docket on December 18, 1996.

III.

Prior to that, on November 22, 1996, the Court of Criminal Appeals appointed the undersigned to represent Applicant for the

purpose of preparing and filing an application for writ of habeas corpus in the trial court, pursuant to Article 11.071, V.A.C.C.P. This Court ordered that an application be filed no later than one hundred and eighty days from the date of appointment. Accordingly, the current deadline for filing the application is May 22, 1997.

IV.

Applicant's direct appeal was not finally concluded until April 28, 1997, when the Supreme Court of the United States entered an order denying his petition for writ of certiorari.

V.

Although the undersigned has done substantial work on the application, there is substantial work to be done. The record is approximately six thousand pages. In addition, it has been impossible to work on certain aspects of the application for writ of habeas corpus, while applicant's appellant counsel was litigating his direct appeal in the United States Supreme Court.

VI.

Since Applicant's petition for writ of certiorari on direct appeal was not denied until April 28, 1997, the one year federal statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 did not begin to run until that time. Sec. 28 U.S.C. sec. 2244(d)(1).

VII.

Applicant requests an extension of 90 days to file an application for writ of habeas corpus.

WHEREFORE PREMISES CONSIDERED, Applicant prays this motion be granted and the Court order that the time to file an application

for writ of habeas corpus be extended 90 days beyond May 22, 1997 in accordance with Article 11.071, sec. 4, V.A.C.C.P.

Respectfully submitted,

JONES & WELCH
817 Pecan
McAllen, Texas 78501
(210) 687-9090

By: _____
Kyle B. Welch

Texas Bar No. 21124300
Federal Bar # 6155
Attorney For Defendant

NO. CR-1430-92-B

(CAUSE NO. 71,714 IN THE COURT OF CRIMINAL APPEALS)

ROBERT MORENO RAMOS	*	IN THE 93RD DISTRICT COURT
	*	
VS.	*	OF
	*	
STATE OF TEXAS	*	HIDALGO COUNTY, TEXAS

ATTORNEY'S VERIFICATION

Before me, the undersigned authority, on this day personally appeared, Kyle B. Welch, who being by me duly sworn, upon his oath states as follows:

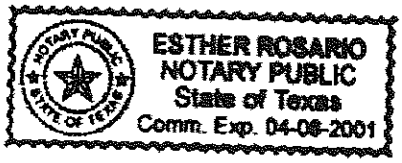
"My name is Kyle B. Welch. I am the attorney for the Appellant in the above-entitled and numbered cause. I have read the foregoing factual allegations contained within the Motion For Extension Of Time To File Application For Writ Of Habeas Corpus, and they are true and correct."

Signed, this the 21st day of May, 1997.

Kyle B. Welch

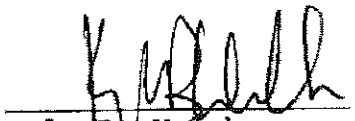
Subscribed and sworn to before me on this, the 21st day of May, 1997.

Esther Rosario
Notary Public in and for
Hidalgo County, Texas



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion was hand delivered or sent certified mail to the Office of the District Attorney, Hidalgo County Courthouse, Edinburg, Texas 78539, on this the 21st day of May, 1997. I further certify that a true and correct copy of the foregoing motion was sent certified mail to the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, on this, the 21st day of May, 1997.



Kyle B. Welch

NO. CR-1430-92-B

(CAUSE NO. 71,714 IN THE COURT OF CRIMINAL APPEALS)

ROBERT MORENO RAMOS	*	IN THE 93RD DISTRICT COURT
	*	
VS.	*	OF
	*	
STATE OF TEXAS	*	HIDALGO COUNTY, TEXAS

ORDER

Came to be heard on this, the 21st day of May, 1997, the Applicant's Motion For Extension Of Time To File Application For Writ Of Habeas Corpus, and the Court having considered the same, it is therefore ORDERED:

(1) Applicant is granted an extension of 90 days to file an application for writ of habeas corpus, until August 22, 1997.

(2) In accordance with Art. 11.071, sec. 4, V.A.C.C.P.

Signed and Entered on this 21st day of May, 1997.

JUDGE PRESIDING, 93RD DISTRICT COURT

AT 4:50 P

No. CR-1430-92-B AUG 22 1997

EX PARTE

VS.

ROBERT MORENO RAMOS

* IN THE 93RD DISTRICT COURT
*
* OF
*
* HIDALGO COUNTY, TEXAS

MOTION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

TO THE HONORABLE FERNANDO MANCIAS, JUDGE, 93RD DISTRICT COURT ;

COMES NOW Robert Moreno Ramos, Applicant, and files this Application For Post-Conviction Writ Of Habeas Corpus pursuant to Article 11.071 of the Code of Criminal Procedure and shows the following:

JURISDICTION

This action is brought under Article 11.071 of the Texas Code of Criminal Procedure.

PROCEDURAL HISTORY

Applicant was convicted in this cause on March 18, 1993 for the offense of Capital Murder alleged to have been committed on February 7, 1992. Based upon the jury's answers to the two special issues at the punishment phase returned on March 19, 1993, Applicant was sentenced to death on March 23, 1993.

Applicant's Motion For New Trial was denied. The cause was affirmed on direct appeal to the Texas Court of Criminal Appeals on June 26, 1996 in cause number 71,714. A motion for rehearing was denied on September 11, 1996. On April 28, 1997 the United State Supreme Court denied Applicant's petition for writ of certiorari.

The undersigned counsel was appointed by the Texas Court of Criminal Appeals on November 22, 1997 to file an application for

post-conviction writ of habeas corpus. On May 22, 1997, this court granted Applicant's Motion For Extension Of Time to file this application pursuant to Art. 11.071, sec. 4 of the Texas Code of Criminal Procedure, until August 22, 1997.

CLAIMS FOR RELIEF

I.

THE TRIAL COURT WRONGLY EXCUSED VENIREPERSON OLGA LINDA PEREZ FOR CAUSE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF TEXAS CONSTITUTION.

Venireperson Perez, in the course of her examination on voir dire, affirmed that she would follow the law and consider the entire range of punishment if she were chosen as a juror and Mr. Ramos were found guilty:

> Q. And if you sat on the jury, would you be able to listen to the evidence and then decide if the State met its burden of proving everything beyond a reasonable doubt?
>
> A. Yes.
>
> Q. I know that you told us that your moral or your religious teaching was that one does not sit in judgement others, is that right?
>
> A. Yes.
>
> Q. If you were asked to sit on the jury, would you be able to answer the questions asked on guilt and innocence as to whether or not the State has proven its case beyond a reasonable doubt, based on the evidence?
>
> A. Yes.
>
> Q. If you sat on a jury in a capital murder case, and got into the punishment phase, would you be able to answer Special Issues No. 1 and No. 2, based on the evidence presented honestly?
>
> A. Yes.

...

Q. Would you be able to set aside your opinions and religious scruples about the death penalty and, follow you oath and duty as a juror, and answer Special Issues No. 1 and No. 2 honestly, based on the evidence presented?

A. Yes.

(45 R. 4060-61).

On the basis of her answers, Ms. Perez was qualified to serve as a juror in Mr. Ramos's case. Hernandez v. State, 757 S.W.2d 744 (Tex. Crim. App. 1988). The trial court, however, excused Ms. Perez for cause on the State's motion. (45 R. 4066). Ms. Perez' removal for cause thus violated Mr. Ramos' rights under the rule articulated in Hernandez, supra, and Witherspoon v. Illinois, 391 U.S. 510 (1968), and violated his rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and under the Constitution of the State of Texas.

Hernandez establishes the burden of proof which the prosecution must shoulder in Texas to succeed in a challenge for cause based on a venireperson's inability to follow the law in discharging her duty as a juror. The State may challenge for cause any venireperson who "has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment." Texas Code of Criminal Procedure, Art. 35.16(b), subd. 3; see, e.g., Woolls v. State, 665 S.W.2d 455 (Tex. Crim. App. 1983). However, the State may not so challenge a venireperson simply because her "personal beliefs or opinions concerning the wisdom or propriety of a statute or statutory scheme," so long as

those views do not "prevent or substantially impair" her from following the law. Hernandez, supra, at 750 (quoting in part from Wainwright v. Witt, 469 U.S. 412 (1985). A prospective juror thus may never be disqualified from jury service merely because she possesses beliefs or scruples generally against the imposition of the death penalty, Witherspoon, supra, but only when her ability to apply the law is unmistakably impaired. Hernandez applies this standard to the context of the Texas death penalty statute to determine when a challenge for cause to a prospective juror may be sustained.

In Hernandez, the Court of Criminal Appeals made clear that under Texas law,

> [u]nlike criminal juries generally, a capital jury is never called upon assess punishment. In fact, nobody assesses punishment in a capital case. The law has predetermined what the punishment will be depending only on certain conditions. The jury, as factfinder, only determines whether those conditions exist. The judge then pronounces sentence as the law requires. Neither is vested with any discretion in this regard. Indeed, the discretion to execute or merely incarcerate one convicted of capital murder was purposefully taken from judge and jury alike by the Legislature....

Hernandez, 757 S.W.2d at 751. Thus, the answers of a prospective juror on voir dire to questions regarding her ability to "assess" or "impose" the death penalty do not alone indicate whether that venireperson may be challenged for cause. Indeed, under Texas law as elaborated in Hernandez, supra, those misleading questions only cloud the real issue: whether the venireperson can follow the law in serving as a factfinder. As long as the prospective juror is able honestly in answering the relevant Special Issue questions to perform the task of "the determination of reasonable doubt and the weighing of evidence to support factual conclusions," she is not

subject to challenge for cause regardless of her "personal beliefs concerning the propriety or desirability of capital punishment."

II.

The trial court erred in denying applicant's challenge for cause of venireperson OMAR REYNA, in violation the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Texas Constitution.

Venireperson Omar Reyna, in the course of his examination on voir dire stated that he would not be able to consider mitigating evidence with regard to special issue number two. (26R. 2133). He also stated clearly that he could not consider the minimum punishment for the offense of murder. (26R. 2136). A fuller excerpt of his voir dire examination is found in Exhibit A.

In a situation analogous to this Omar Reyna scenario in Morgan v. Illinois, 504 U.S.__, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the Court found that answers both to general questions and "follow the law" questions were not adequate to insure a defendant a fair trial. Federal constitutional law requires as juror to consider mitigation evidence, but does not require the juror to give any weight to any specific evidence. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Morrow v. State, 910 S.W.2d 471 (Tex.Cr. App. 1995). Being able to set aside his bias, can not resurrect Omar Reyna's eligibility to serve as a juror because he was biased as a matter of law. Green v. State, 840 S.W.2d 394 (Tex.Cr.App. 1992).

Because appellant had to use a peremptory challenge to remove Omar Reyna from serving on this jury after the district court denied the cause challenge, appellant had no peremptory to strike

juror Cynthia Roberts, who served on this jury but was expressly objectionable to appellant (2R 272; 26R 2151-2157, 2142-2143; 54R 5064-5060). This reversible error precludes this death sentence.

III.

The trial court erred in denying applicant's challenge for cause of venireperson JEAN Y. ESQUIVEL, in violation of the Sixth, Eighth, and Fourteenth Ammendants to the United States Constitution and Article I, Section 10 of the Texas Constitution.

Venireperson Jean Y. Esquivel, in the course of her examination on voir dire stated that she would not be able to consider the minimum punishment for the offense of murder. (51R 4700, 4747). (Exhibit B). Although her answers vacillated, her unambiguous statements established her bias as a matter of law. Green v. State, 840 S.W.2d 394 (Tex.Cr.App. 1992).

Because applicant had exhausted his preemptory challenges at the time of voir dire, applicant was forced to accept her as the twelfth juror over his objections.
(51R. 4760).

IV.

The trial court erred in denying applicant's challenge for cause of venireperson Bruce H. Kolberg, in violation of Sixth, Eighth, and, Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Texas Constitution.

Venireperson Bruce H. Kolberg, in the course of his examination on voir dire stated clearly that he would not be able to consider the minimum punishment for the offense of murder (11R. 409). A fuller excerpt of his voir dire examination is found in Exhibit C.

In Morgan v. Illinois, 504 U.S. ____, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the Court found that answers both to general questions and "follow the law" questions were not adequate to insure a defendant a fair trial. Federal constitutional law requires a juror to consider mitigation evidence. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Morrow v. State, 910 S.W.2d 471 (Tex.Cr.App. 1995). Being able to set aside his bias, can not resurrect his eligibility to serve as a juror because he was biased as a matter of law. Green v. State, 840 S.W.2d 394 (Tex.Cr.App. 1992).

Because appellant had to use a peremptory challenge to remove Bruce Kolberg from serving on this jury after the district court denied the cause challenge, appellant had no peremptory to strike juror Cynthia Roberts, who served on this jury but was expressly objectionable to appellant (2R 272; 26R 2157-2157, 2142-2143; 54R 5054-5060). This reversible error precludes this death sentence.

V.

The trial court erred in denying applicant's challenge for cause of venireperson Maria A. Moreno, in violation of the Sixth, Eighth, and, Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Texas Constitution.

Venireperson Maria A. Moreno, in the course of her voir dire examination stated clearly, unequivocally, and repeatedly that she could not consider the minimum punishment for the offense of murder (14R. 785-788). An except of her voir dire examination is found in Exhibit D.

In Morgan v. Illinois, 504 U.S. ____, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the Court found that answers both to general

questions and "follow the law" questions were not adequate to insure a defendant a fair trial. Federal constitutional law requires a juror to consider mitigation evidence, but does not require the juror to give any weight to any specific evidence. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Morrow v. State, 910 S.W.2d 471 (Tex.Cr.App. 1995). Being able to aside her bias, can not resurrect her eligibility to serve as a juror because she was biased as a matter of law. Green v. State, 840 S.W.2d 394 (Tex.Cr.App. 1992).

Because appellant had to use a peremptory challenge to remove Maria Moreno from serving on this jury after the district court denied the cause challenge, appellant had no peremptory to strike juror Cynthia Roberts, who served on this jury but was expressly objectionable to appellant (2R 272; 26R 22151-2157, 2142-2143; 54R 5054-5060). This reversible error precludes this death sentence.

VI.

The trial court erred in denying Defendant's Special Requested Instruction No. One at the guilt - innocence phase.

In Defendant's Special Requested Instruction No. One, attached as Exhibit E, applicant requested that the jury be instructed on the lessor included offense of voluntary manslaughter with regard to the death of Leticia Ramos. The trial court denied the request, as noted on Exhibit E. The trial court's jury charge, see Exhibit F, instructed the jury on the offense of capital murder and the lesser included offense of murder, but did not permit the jury to consider voluntary manslaughter.

It is well-established that if there is evidence in the record

-from any source- that if believed would show that the accused is guilty only of a lesser included offense, then it is reversible error to refuse a properly requested charge. Branham v. State, 583 S.W.2d 782 (Tex.Crim.App. 1979).

In Woodfox v. State 742 S.W.2d 408 (Tex.Crim.App. 1987) (en banc) the Court established that the right to an instruction raised by the evidence is not contingent on the defendant testifying.

> "In determining whether any defensive charge should be given, the credibiltiy of evidence or whether it is controverted or conflicts with other evidence in the case may not be considered. When a defensive theory is raised by evidence from any source and a charge is properly requested, it must be submitted to the jury." Gavia v State, 488 S.W.2d 420, 421 (Tex.Cr.App. 1972).
> (Citations omitted).
> ...
>
> This rule is designed to insure that the jury, not the judge, will decide the relative credibility of the evidence. Gauthier v. State, 496 S.W.2d 584, 585 (Tex.Cr.App.1993). When a judge refuses to give an instruction on a defensive issue because the evidence supporting it is weak or unbelievable, he effectively substitutes his judgment on the weight of the evidence for that of the jury. Id. The weight of the evidence in support of an instruction is immaterial. E.g., Booth v. State, supra.
> Woodfox at 408

In Woodfox, as here, the source of the evidence was police officer testimony relating statements of the accused. The refusal to grant the instruction was, and is here, a violation of the rights of the accused under the Fifth Amendment, United States Constitution, and Article I., Sec 10, Texas Constitution.

> This departure further implicates an accused's right not to testify, pursuant to Article I, sec. 10 of the Texas Constitution and the Fifth Amendment to the United States Constitution. Predicating a defendant's right to a jury instruction upon his taking the stand suggests, at the very least, a mild form of compulsion to testify. As this court has stated:

> The right of an accused party to be free from the fear compelled self-incrimination and to remain silent is a vital protection which our society provides a citizen accused of a criminal offense. This personal right cannot in any way be abridged....
>
> Jones v. State, 693 S.W.2d 406, 407 (Tex.Cr.App.1985)

Woodfox at 410.

VII.

The trial court erred in denying Defendant's Special Requested Instructions Nos. Two, Three, Four, Five, and Six at the guilt - innocence phase.

In Defendant's Special Requested Instructions Numbers Two, Three, Four, Five and Six, attached as Exhibit G, applicant requested jury instructions on essential elements of the offenses submitted to the jury, to-wit: capital murder and murder. The trial court denied these instructions, as reflected on the documents in Exhibit 6.

The trial court's charge did not adequately instruct the jury on the elements requested in the foregoing instruction. The accused is entitled to have the jury charge on all essential elements of the offenses submitted to the jury, and the denial of these instructions violated applicant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Secs. 9 and 10 of the Texas Constitution.

VIII.

The Trial Court Erred In Denying Applicant's Requested Instructions At The Punishment Phase

At the penalty phase, Applicant's attorney properly and timely requested the following instruction concerning Applicant's ineligibility for parole:

> "Your are further instructed that anyone convicted of of capital murder and sentenced to life in prison is not eligible for parole until he has been imprisoned for thirty-five calendar years, provided under the parole laws of the state."

84R. 58

The trial court denied the request. 84R. 59. Instead, in the Charge Of The Court On Punishment, attached as Exhibit H, the trial court instructed the jury that they could not consider the parole laws, "or how long the Defendant would be required to serve to satisfy a sentence of Life imprisonment." This was done after the concept and existence of parole had been repeatedly discussed in the voir dire examination.

Thus, in attempting to decide the two questions which would determine whether applicant would live or die - the probability of future dangerousness and mitigating circumstances - the jurors were denied perhaps the most important information of all in helping them make the right decision. The jury knew of the existence of parole laws, they were certainly left with the impression that "life" did not mean "life", but they were not permitted to know what it did mean.

At the time of trial, Mr. Ramos was thirty-eight years of age. In his case, a life sentence meant he wouldn't be eligible for parole until he was seventy-three, if indeed he lived that long.

Mr. Ramos was entitled for the jury to have this information which was extremely relevant to its determination of special issues.

Furthermore, the jury wanted to know. Despite the court's instructions, there is clear evidence that the jury did in fact discuss parole. One of the juror notes at the first phase, attached as Exhibit I, asked: "If a person get life in prison for capital murder does he ever get parole?"

The refusal of the trial court to grant the requested instruction violated Mr. Ramos' right to due process of the law under the Fifth Amendment, United States Constitution effective assistance of counsel, Sixth Amendment, to be free from cruel and unusual punishment, Eighth Amendment, due process and equal protection, Fourteenth Amendment, as well as Article I, sections 10, 13, 15 and 19 of the Texas Constitution. The analysis in Simmons v. South Carolina, 114 S.Ct. 2187 (1994) clearly encompasses the circumstances here, and compels a finding that Applicant is illegally confined and restrained of his liberty.

CONCLUSION

In view of the foregoing, Robert Moreno Ramos requests that this Honorable Court:

(1) Upon a determination that here are controverted previously unresolved facts material to the legality Applicant's confinement, order and conduct an evidentiary hearing at which proof may be offered as to the allegations of this petition.

(2) Vacate Mr. Ramos's conviction for capital murder and death sentence or, in the alternative vacate the judgment affirming his conviction and death sentence on direct appeal;

(3) Issue a write of habeas corpus releasing Mr. Ramos from custody, unless the State grants him a new trial or, in the alternative, a new direct appeal;

(4) Grant any other relief as law and justice may require.

Respectfully submitted,

JONES & WELCH
817 Pecan
McAllen, Texas 78501
(956) 687-9090

By: _____
KYLE B. WELCH

Texas Bar No. 21124300
Federal Bar No. 6155

ORIGINAL

FILED AT ___

PAULINE G. GONZALEZ, DISTRICT CLERK
By ___

CAUSE NO. CR-1430-92-B (1)

EX PARTE	§	IN THE 93RD DISTRICT COURT
ROBERT MORENO RAMOS	§	OF
APPLICANT	§	HIDALGO COUNTY, TEXAS

PROPOSED ORDER NOTING THAT THE APPLICATION FOR WRIT IN THIS CASE WAS NOT TIMELY FILED, DIRECTING THE CLERK TO ACT ACCORDINGLY, AND RECOMMENDING THAT THE APPLICATION BE DISMISSED

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COMES THE STATE OF TEXAS and files the attached Proposed Order Noting that the Application for Writ in this Case Was Not Timely Filed, Directing the Clerk to Act Accordingly, and Recommending that the Applicant be Dismissed, noting that the statute precludes consideration of the merits of the claims asserted in Applicant Ramos' application for writ in the above-referenced case for the basic reason that said application was not timely filed.

The State would also inform this Honorable Court that this proposed order has been typed on equipment having a memory capability. Accordingly, it should be possible for any additions, deletions, or changes this Court may wish to make in preparing its findings and recommendation to be made without need to retype the document in its entirety.

Theodore C. Hake

THEODORE C. HAKE, Assistant
Criminal District Attorney
Hidalgo County, Texas

State Bar No. 087167800

Hidalgo County Courthouse
Edinburg, Texas 78539

Telephone # 956/318-2300
Telecopier # 956/381-5127

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, THEODORE C. HAKE, certify that I have personally mailed a copy of the foregoing Proposed Order Noting that the Application for Writ in this Case Was Not Timely Filed, Directing the Clerk to Act Accordingly, and Recommending that the Application be Dismissed to Kyle B. Welch, JONES & WELCH, 817 Pecan, McAllen, Texas 78501, Attorney for Applicant.

Dated this, the 11th day of September, 1997.

Theodore C. Hake

THEODORE C. HAKE, Assistant
Criminal District Attorney
Hidalgo County, Texas

CAUSE NO. CR-1430-92-B (1)

EX PARTE	§	IN THE 93RD DISTRICT COURT
ROBERT MORENO RAMOS	§	OF
APPLICANT	§	HIDALGO COUNTY, TEXAS

ORDER NOTING THAT THE APPLICATION FOR WRIT IN THIS CASE WAS NOT TIMELY FILED, DIRECTING THE CLERK TO ACT ACCORDINGLY, AND RECOMMENDING THAT THE APPLICATION BE DISMISSED

Applicant's Petition for a writ of Habeas Corpus in the above-referenced case was filed on August 22, 1997.

The attorney for Respondent, The State of Texas, accepted service of a copy of said application for writ from the deputy district clerk assigned to handle appeals on September 5, 1997, rendering the State's response due on or before October 6, 1997 (the 30th day, October 5, 1997, falling on a Sunday).

The State has timely filed Respondent's Original Answer.

Accordingly, this Court is now in a position to evaluate Applicant's application for writ.

At the outset of this effort, the Court would note that analysis of TEX. CODE CRIM. PROC. ANN. Art. 11.071 (Supp. 1997) in terms of the facts involved in this case clearly shows that the merits of the claims raised on behalf of Applicant Robert Moreno Ramos in his application for writ cannot be considered.

This observation derives from the following findings of fact, and conclusions of law, and ultimate recommendation, based on consideration of the record of this case and the record of the under-

lying criminal case, trial court cause number CR-1430-92-B (hereinafter, "the primary case"):

A. FINDINGS OF FACT:

1. Applicant ROBERT MORENO RAMOS was charged by indictment in cause number CR-1430-92-B with the offense of Capital Murder, based on allegations that he murdered more than one person during the same criminal transaction.
2. On March 18, 1993 the jury returned a verdict finding Applicant Ramos guilty of said charge.
3. On the following day the jury answered "Yes" to the future dangerousness special issue and "No" to the mitigating circumstances issue.
4. This court, accordingly, sentenced Applicant Ramos to death.
5. Automatic appeal of this death sentence to the Court of Criminal Appeals, which assigned it cause number 71,714, resulted in a June 26, 1996 ruling affirming the conviction and death sentence in the primary case. See Ramos v. State, 934 S.W.2d 358 (Tex.Crim.App. 1996).
6. Applicant Ramos' motion for rehearing was denied by the Court of Criminal Appeals on September 11, 1996.
7. On that same date the Court of Criminal Appeals granted Applicant Ramos' motion to stay issuance of its mandate of affirmance and stayed issuance of said mandate until December 10, 1996.

8. On October 18, 1996 the 93rd District Court of Hidalgo County, Texas held a hearing on this case pursuant to TEX. CODE CRIM. PROC. ANN. Art. 11.071 (Supp. 1997).

9. At that hearing, the court determined that Applicant had not yet filed a petition for writ of certiorari to the U.S. Supreme Court or an application for writ of habeas corpus under TEX. CODE CRIM. PROC. ANN. Art. 11.07; that he was indigent, and that he wished to have counsel appointed for the purpose of filing a writ of habeas corpus further challenging his conviction and sentence.

10. On November 22, 1996, pursuant to Article 11.071, the Court of Criminal Appeals appointed attorney Kyle Blair Welch to represent Ramos in regard to filing of an application for writ of habeas corpus and directed that said application be filed in the convicting court no later than the 180th day after the date of the appointment.

11. On December 19, 1996 the Court of Criminal Appeals issued its mandate in the primary case.

12. On April 28, 1997 the United States Supreme Court denied Robert Moreno Ramos' petition for writ of certiorari in regard to the primary case.

13. On May 22, 1997, which was the 181st day after his appointment by the Court of Criminal Appeals, Mr. Welch filed a "Motion for Extension of Time to File Application for Writ of Habeas Corpus".

14. In said pleading, Mr. Welch mistakenly refers to his current deadline for filing an application for writ in this

case as being May 22, 1997, indicates that he needs additional time to work on this matter, remarks that it had been impossible to work on certain aspects of the application while Applicant's direct appeal to the U.S. Supreme Court was still being litigated, and notes that the one year federal statute of limitations under the Anti-Terrorism and Effective Death Penalty Act of 1996 did not begin to run until Applicant's petition for writ of certiorari was denied on April 18, 1997.

15. This motion then states that Applicant is requesting a 90 day extension to file an application for writ and prays that the Court grant the request and order that the time to file an application be extended 90 days beyond May 22, 1997 in accordance with TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 4 (Supp. 1997).

16. The trial court did not hold a hearing on said request that it find good cause for the failure to file an application within 180 days of Mr. Welch's appointment, as required by TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 4 (c) (Supp. 1997).

17. Instead, on May 22, 1996 Judge Fernando G. Mancias signed an order indicating that the motion had come on to be heard on that date and ordering that Applicant be granted "an extension of 90 days to file an application for writ of habeas corpus, until August 22, 1997" "(i)n accordance with Art. 11.071, Sec. 4, V.A.C.C.P.".

18. On August 22, 1997 Applicant Ramos, through counsel, Mr. Welch, filed what they called their "Motion for Post-Conviction Writ of Habeas Corpus" in this case.

19. No order scheduling Applicant Ramos' execution has been entered to date.

B. CONCLUSIONS OF LAW:

1. This case deals with a situation in which the Applicant was convicted before September 1, 1995, does not have an original application for writ of habeas corpus under TEX. CODE CRIM. PROC. ANN. Art. 11.07 pending on that date; and has not previously filed an application under Article 11.07.

2. TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 4 (a) (Supp. 1997) provides that, in such situations, "the applicant's original application must be filed not later than the 180th day after the date the court of criminal appeals appoints counsel under Section 2 or not later than the 45th day after the date the appellee's original brief is due on direct appeal, whichever is later".

3. Subsection 4 (b) indicates that an application filed after the filing date that applies under Subsection (a) "is presumed untimely unless the applicant establishes good cause by showing particularized justifying circumstances"

4. Subsection 4 (c) provides that, if counsel has been appointed and a timely application is not filed on or before the applicable filing date under Subsection (a), the

convicting court shall, before the 11th day after the applicable filing date under Subsection (a), conduct a hearing a determine if good cause exists for either the untimely filing of an application or other necessary action.

5. Subsection 4 (d) then lists the actions the court shall take if it finds that the applicant has failed to establish good cause for the delay, while Subsection 4 (e) indicates that the convicting court shall proceed as if the application was timely filed if it finds that the applicant has established good cause for the delay.

6. Significantly, Subsection 4 (f) of the statute categorically states as follows:

> Notwithstanding Subsection (b), (c), or (e), an applicant cannot establish good cause for the untimely filing of an application filed after the 91st day after the applicable filing date under Subsection (a).

7. Subsection 4 (g) of the statute then provides as follows:

> A failure to file an application before the 91st day after the filing date applicable to the applicant under Subsection (a) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 5.

8. TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (a) (Supp. 1997), in pertinent part, indicates that a court may not consider the merits of or grant relief based on an untimely original application unless the application contains sufficient specific facts establishing one of three exceptions spelled out therein.

9. In particular, the first exception, listed in Subsection 5 (a)(1)(B), involves situations where the current claims and issue have not been, and could not have been, presented previously in a timely original application because the factual or legal basis for the claim was unavailable on or before the last date for the timely filing of an original application.

10. The second exception, mentioned in Subsection 5 (a)(2), covers situations in which the applicant establishes by a preponderance of the evidence that, but for a violation of the United States Constitution, no rational juror could have found him guilty beyond a reasonable doubt.

11. The third exception, listed in Subsection 5 (a)(2), involves situations in which the applicant establishes by clear and convincing evidence that, but for a violation of the United States Constitution, no rational juror would have answered in the State's favor one or more of the death penalty special issues.

12. TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (b) (Supp. 1997), indicates that the clerk of a convicting court which receives an untimely original application is to attach a notation that the application is an untimely original application, assign the case a file number ancillary to that of the underlying case, and immediately send to the court of criminal appeals a copy of the application; the notation; the order scheduling the applicant's execution, if it is scheduled; and any order the

judge of the convicting court directs to be attached to the application.

13. Finally, Subsection 5 (c) of the statute provides as follows:

> On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

14. Application of these statutory provisions to the facts in this case conclusively demonstrates that Applicant Ramos and his attorney simply miscalculated the time frames involved and that the application for writ they filed on August 22, 1997 was untimely and cannot be considered.

15. Since Mr. Welch was appointed by the Court of Criminal Appeals on November 22, 1997, under TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 4 (a) (Supp. 1997) Applicant's application had to be filed on or before May 21, 1997[1].

16. Accordingly, May 21, 1997 is, for purposes of this case, "the applicable filing date under Subsection (a)" referred to in remaining subsections of Article 11.071.

17. Since Applicant's application for writ was not filed until August 22, 1997, it must, under Section 4 (b), be

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[1] This date is based on calculations that November of 1996 had 8 more days after the 22nd, that December had 31 days, that January had 31 days, that February had 28 days, that March had 31 days, and that April had 30 days, for a total of 159 days up to the end of April, making May 21, 1997 the 180th day after November 22, 1996.

considered untimely unless Applicant established good cause for the late filing by showing particularized justifying circumstances.

18. Applicant Ramos, through counsel, Mr. Welch, clearly made an attempt to obtain additional time by filing a motion seeking an extension of time to file their application.

19. Moreover, Judge Mancias, the judge of the convicting court, clearly intended to grant said request, as evidenced by the fact that he signed an order so providing.

20. However, the fact remains that no hearing has held on the matter of whether Applicant had established good cause for allowing the application to be filed beyond the 180 day deadline, as required by TEX. CODE CRIM. PROC. ANN. Sec. 4 (c) (Supp. 1997).

21. More importantly, this case fits squarely within the ban on ability to establish good cause for the untimely filing of an application filed after the 91st day after the applicable filing date under Subsection (a).

22. In particular, careful time calculations show that August 22, 1997, the date Applicant Ramos, through counsel, Mr. Welch, filed his application for writ, was the 93rd day after May 21, 1997, the initial filing deadline under Article 11.071, Sec. 4 (a).[2]

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[2] This date is based on calculations that May of 1997 had 10 more days after the 21st, that June had 30 days, and that July had 31 days, for a total of 71 days up to the end of July, which makes August 20, 1997 the 91st day after May 21, 1997 and August 22nd the 93rd day after that date.

23. The dictates of TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 4 (g) (Supp. 1997) also clearly apply to this situation involving an application for writ not filed before the 91st day after the initial filing deadline.

24. Accordingly, all grounds for relief that were available to Applicant before the last date on which an application could be timely filed in this case are waived, except as provided by Section 5 of Article 11.071.

25. Applicant Ramos, through counsel, has not even mentioned any of the exceptions contained in Section 5, much less met the requirement that the application contain sufficient specific facts to fit within one of those exceptions.

26. Accordingly, under Subsection 5 (a), the courts may not consider the merits of, or grant relief based on, the untimely original application for writ filed on August 22, 1997.

27. Under the statutory provisions governing applications for post-conviction habeas corpus relief in death penalty cases, the actions which must be taken under the facts described above are clear.

28. The clerk of this trial court must make a notation that the application for writ filed on Applicant's behalf on August 22, 1997 is untimely and then immediately send the Court of Criminal Appeals copies of the application, the notation, and any order the judge of the convicting court directs to be attached to the application. See TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (b) (Supp. 1997).

29. Pursuant to the second sentence of Subsection 5 (c) this court may not take any further action on the application until the Court of Criminal Appeals evaluates the timeliness issue.

30. Upon receipt of the items sent by the trial court, the Court of Criminal Appeals must determine whether the time requirements of Subsection (a) have been satisfied.

31. In doing so in this case, it must necessarily conclude that they have not been met.

32. Accordingly, under the clear dictates of the third sentence of Subsection 5 (c), it must then issue an order dismissing the application filed in this case as an abuse of the writ.

33. While this remedy may, at first blush appear harsh, particularly in a case involving a death sentence, the fact remains that it is compelled by clear-cut language contained in the statute.

34. Moreover, the bottom line is that the failure to file the application in a timely manner derives from the basic fact that Applicant's attorney or a member of his staff miscalculated in determining the time frames involved.

35. In particular, they simply erred in setting forth the extended deadline as part of the proposed order granting additional time they submitted to Judge Mancias.

36. Accordingly, this court must conclude that the application for writ submitted on behalf of Applicant Ramos on August 22, 1997 was not timely filed.

37. This court must further conclude that it is thus compelled to direct Ruben del Bosque, the appellate clerk for the Hidalgo County District Clerk's Office, to comply with TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (b) (Supp. 1997) by attaching a notation that the application is an untimely original application and immediately sending to the Court of Criminal Appeals a copy of the application; the notation; and this order.

C. RECOMMENDATION

Based on the findings of fact and conclusions of law set forth above, it is this Court's recommendation that the Court of Criminal Appeals, upon receipt of the items mentioned above, determine whether the time requirements spelled out in TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (a) (Supp. 1997) have been met; conclude, upon doing so, that they have not; and, accordingly, issue an order dismissing the application filed by Applicant as an abuse of the writ, all pursuant to TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (c) (Supp. 1997).

WHEREFORE, MR. DEL BOSQUE, the Appeals Clerk for the Hidalgo County District Clerk's Office is ORDERED to immediately comply with TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (b) (Supp. 1997) by attaching a notation that the application for writ filed in this case is an untimely original application and immediately sending to the Court of Criminal Appeals a copy of the application; the notation; and this order.

Mr. del Bosque is further ordered to provide a copy of this Order to the Honorable Kyle B. Welch, JONES & WELCH, 817 Pecan, McAllen, Texas 78501, Attorney for Applicant, via certified mail, return receipt requested, and to the Honorable Theodore C. Hake, Assistant Criminal District Attorney, Hidalgo County, Texas, either via certified mail, return receipt requested, or by personal delivery, with an acknowledgment of receipt.

SIGNED and ENTERED on this, the _____ day of September, 1997.

FERNANDO G. MANCIAS
Judge Presiding
93rd District Court
Hidalgo County, Texas

ORIGINAL

RENE GUERRA

CRIMINAL DISTRICT ATTORNEY
HIDALGO COUNTY

FILED
AT 4:35 O'CLOCK P M
SEP 22 1997
PAULINE G. GONZALEZ, CLERK
District Courts, Hidalgo County
By _____ Deputy

September 22, 1997

Ruben del Bosque
Appeals Clerk
District Clerk's Office
Hidalgo County Courthouse
Edinburg, Texas 78539

RE: Cause No. CR-1430-92-B (1),
styled Ex parte Robert Moreno Ramos

Dear Ruben:

As you are aware, the above-referenced case involves an application for writ in a capital murder/death penalty case.

Kyle Welch, the attorney appointed to represent Applicant Robert Moreno Ramos in this matter, filed the application for writ on August 22, 1997.

On September 11, 1997 I filed the State's Original Answer and a "Proposed Order Noting that the Application for Writ in this Case Was Not Timely Filed, Directing the Clerk to Act Accordingly, and Recommending that the Application be Dismissed".

I remain convinced that those documents accurately reflect the results compelled by the applicable statute and that Judge Fernando G. Mancias should, accordingly, sign the proposed order I filed back on September 11th.

However, I realize the harshness of the result thus required and understand that perhaps equitable considerations compel that the merits of the application should be considered despite the failure to timely file that document.

As I mentioned to you last week, both Kyle Welch and I had a brief conference about this matter in chambers with Judge Mancias last Monday.

It is Mr. Welch's position that the trial court can decide to grant equitable relief and consider the application despite the fact that it was not timely filed.

My position is that perhaps equitable relief is called for, but that the law clearly calls for the Court of Criminal Appeals to address matters concerning whether the merits of the application may be considered.

Therefore, my suggestion to overcome harsh application of the statute, if Judge Mancias felt that it should not be literally applied, would call for him to add language to the proposed order directing you to comply with the law by sending up the matter, while recommending that the Court of Criminal Appeals determine that the merits should be considered based on the equities of the situation despite the fact it was not timely filed.

Following our bench conference, Mr. Welch drafted a proposed order based on his suggested approach.

I have discussed its contents with Mr. Welch and he has now drafted a version which I am willing to approve as to form, although obviously not as to substance.

Mr. Welch's proposal should be filed with you shortly, if it has not already been filed.

Enclosed with this letter, you will find a proposed order entitled "Proposed Order Noting that the Application for Writ in this Case Was Not Timely Filed, Directing the Clerk to Act Accordingly, and Recommending that the Court of Criminal Appeals, Based on the Equities Involved in this Matter, Direct this Honorable Court to Consider the Merits of Applicant's Application Anyway".

As the title of this document indicates, it contains some of the language found in my earlier proposed order, but then goes on to suggest that the Court of Criminal Appeals not adopt a strict, literal interpretation of the statute and instead conclude that the equities in this case dictate that it allow the merits of Applicant's claims to be considered.

In a nutshell, it is designed to provide Judge Mancias with a proposed order which follows that approach the State believes that any effort to overcome the harshness of the statute must take.

The bottom line is that you now have, or will shortly have on file, an application for writ, an answer, a proposed order following the literal language of the statute, and proposed orders covering each side's suggested approach to any effort to end up with a determination that the merits of Applicant's claims should be considered despite the fact they were filed too late.

Therefore, once you have received all of these items, you will be in a position to submit them to Judge Mancias so that he may make a determination which of the three proposed orders he wishes to sign.

My only advice concerning this matter, with which Kyle Welch incidentally concurs, is that, when you take the file to Judge Mancias, you remind him that this is a death sentence case and that he might, accordingly, wish to study the documents on file carefully before making a decision.

By copy of this letter, with enclosures, Mr. Welch has been notified of this filing and provided a copy of the document mentioned above.

Thank you for your attention to this matter.

Respectfully,

Theodore C Hake

THEODORE C. HAKE, Assistant
Criminal District Attorney
Hidalgo County, Texas

xc: Kyle B. Welch
JONES & WELCH
817 Pecan
McAllen, Texas 78501

ORIGINAL

FILED
AT 4:30 O'CLOCK P M
SEP 22 1997
PAULINE G. GONZALEZ, CLERK
District Courts, Hidalgo County
By [illegible] Deputy

CAUSE NO. CR-1430-92-B (1)

EX PARTE	§	IN THE 93RD DISTRICT COURT
ROBERT MORENO RAMOS	§	OF
APPLICANT	§	HIDALGO COUNTY, TEXAS

PROPOSED ORDER NOTING THAT THE APPLICATION FOR WRIT IN THIS CASE WAS NOT TIMELY FILED; DIRECTING THE CLERK TO ACT ACCORDINGLY; AND RECOMMENDING THAT THE COURT OF CRIMINAL APPEALS, BASED ON THE EQUITIES INVOLVED IN THIS MATTER, DIRECT THIS HONORABLE COURT TO CONSIDER THE MERITS OF APPLICANT'S APPLICATION ANYWAY

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COMES THE STATE OF TEXAS and files the attached Proposed Order Noting that the Application for Writ in this Case Was Not Timely Filed, Directing the Clerk to Act Accordingly, and Recommending that the Court of Criminal Appeals, Based on the Equities Involved in this Matter, Direct this Honorable Court to Consider the Merits of Applicant's Application Anyway.

This proposed order is being filed at this time for the following reasons:

1. Applicant's Petition for a Writ of Habeas Corpus in the above-referenced case was filed on August 22, 1997.
2. The attorney for Respondent, The State of Texas, accepted service of a copy of said application for writ from the deputy district clerk assigned to handle appeals on September 5, 1997.

3. On September 11, 1997 the State filed Respondent's Original Answer in this case.

4. On that same date the State also filed a document labelled as "Proposed Order Noting that the Application for Writ in this Case Was Not Timely Filed, Directing the Clerk to Act Accordingly, and Recommending that the Application be Dismissed".

5. In said answer and proposed order, the undersigned attorney for the State pointed out that the clear, albeit rigid, language of TEX. CODE CRIM. PROC. ANN. Art. 11.071 (Supp. 1997) precluded consideration of the merits of the claims asserted in Applicant Ramos' application for writ in the above-referenced case for the basic reason that said application was not timely filed.

6. The State further pointed out that TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (b) (Supp. 1997), indicates that the clerk of a convicting court which receives an untimely original application is to attach a notation that the application is an untimely original application, assign the case a file number ancillary to that of the underlying case, and immediately send to the court of criminal appeals a copy of the application; the notation; the order scheduling the applicant's execution, if it is scheduled; and any order the judge of the convicting court directs to be attached to the application.

7. The State also noted that Subsection 5 (c) of the statute provides that the Court of Criminal Appeals, upon receipt

of the documents from the clerk, shall determine whether any of the limited exceptions to the rule precluding consideration of untimely filed claims have been met.

8. The State, through the undersigned attorney, thus informed this Court that the statute, as written, clearly leaves any question of ability to consider the merits of an untimely filed application to the Court of Criminal Appeals.

9. Subsequent to the filing of Respondent's Original Answer and proposed order, the undersigned attorney for the State and the Honorable Kyle Blair Welch, the attorney appointed by the Court of Criminal Appeals to represent Applicant Ramos in this Article 11.071 action, have discussed the harsh nature of Article 11.071, as written.

10. In particular, we have spoken of the fact that the statute, passed to expedite consideration of state habeas claims in death penalty cases, does not include any explicit exception for inadvertent, unintentional deadline miscalculations such as occurred in this case.

11. Both Mr. Hake and Mr. Welch also agreed that the trial court had failed to recognize the fact that the deadline it had imposed by signing the proposed order granting Applicant additional time which Mr. Welch had submitted to it had exceeded the statutory deadline.

12. The State of Texas recognizes that the statute, as enacted by the Legislature, is extremely strict, imposes rigid deadlines, and does not contain any explicit excep-

tions allowing the merits of claims raised in an application that does not meet those deadlines which do not fit within the limited narrow categories listed in TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (a) (Supp. 1997).

13. The State further recognizes that it is at least arguable that the statute, as applied to the situation which arose in this case, is so rigid that equitable considerations dictate that it not be literally applied, and that the merits of Applicant's contentions be addressed.

14. In fact, while Mr. Hake and Mr. Welch were discussing the harshness of the position literal application of the statute would end up leading to under the facts of this case, both attorneys acknowledged that basic fact.

15. Recognizing the difficult position the facts of this case and the statute as written has placed his client, a death row inmate, in, Mr. Welch has suggested that this court decide that equitable considerations call for it to go ahead to consider the merits of the application for writ he filed on behalf of Applicant Ramos.

16. The State recognizes and sympathizes with the dilemma Applicant and his attorney have been placed in, although it also recognizes that the bottom line is that it derives from their own mistake.

17. The State is even willing to concede that perhaps the equities involved in this case, involving an inadvertent miscalculation carried over into an extension order

signed by this court, provide a valid reason why ultimately a ruling that the merits of the application should be considered.

18. However, based on the clear language of the statute, the State continues to take the position that any attempt to engraft some type of equitable exception to the literal requirements of the statute must come from the Court of Criminal Appeals, rather than a trial court.

19. After all, the law is clearly crafted in language leaving preliminary questions whether a claim may be considered on the merits to the Court of Criminal Appeals.

20. Having explained the precise area where the two sides disagree in regard to the proper approach which any effort to ameliorate the harshness of rigid application of the statute should take, the State would next note that it does not waive its earlier position that the statute clearly precludes consideration of the merits of Applicant's contentions.

21. Having so noted, the State would next observe that it does, however, recognize the fact that this court has, during a brief conference in chambers with both Mr. Hake and Mr. Welch, indicated a willingness to consider the merits of Applicant's claims, based on a belief that the equities involved in this case call for doing so.

22. The State also realizes that Mr. Welch has drafted a proposed order suggesting that this court will do so, for those reasons, which Mr. Hake has reviewed and approved

as to form, although obviously he continues to disagree as to the substance thereof.

23. The State's purpose in filing this second proposed order is simply to make a record of its position concerning the issue of how any equitable relief which might be called for in this case should be granted.

24. In particular, this proposed order suggests a way to advocate that an equitable exception to literal interpretation of the rule might be provided in this case, should this court wish to do so under the facts of this case, while recognizing that the law clearly leaves such questions of ability to consider an untimely claim to the Court of Criminal Appeals.

Having extensively explained the reasons the State has felt it necessary to submit this proposed order for the Court's consideration, the State would also inform this Honorable Court that this it has been typed on equipment having a memory capability.

Accordingly, should this court wish to adopt the State's suggested approach in attempting to avoid the harsh, literal language of the statute, but want to make any changes to this proposed order, it should be possible to do so without needing to retype the document in its entirety.

THEODORE C. HAKE, Assistant
Criminal District Attorney
Hidalgo County, Texas

State Bar No. 087167800

Hidalgo County Courthouse
Edinburg, Texas 78539

Telephone # 956/318-2300
Telecopier # 956/381-5127

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, THEODORE C. HAKE, certify that I have hand-delivered a copy of the foregoing Proposed Order Noting that the Application for Writ in this Case Was Not Timely Filed, Directing the Clerk to Act Accordingly, and Recommending that the Court of Criminal Appeals, Based on the Equities Involved in this Matter, Direct this Honorable Court to Consider the Merits of Applicant's Application Anyway to Kyle B. Welch, JONES & WELCH, 817 Pecan, McAllen, Texas 78501, Attorney for Applicant.

Dated this, the 22nd day of September, 1997.

Theodore C. Hake

THEODORE C. HAKE, Assistant
Criminal District Attorney
Hidalgo County, Texas

CAUSE NO. CR-1430-92-B (1)

EX PARTE	§	IN THE 93RD DISTRICT COURT
ROBERT MORENO RAMOS	§	OF
APPLICANT	§	HIDALGO COUNTY, TEXAS

ORDER NOTING THAT THE APPLICATION FOR WRIT IN THIS CASE WAS NOT TIMELY FILED; DIRECTING THE CLERK TO ACT ACCORDINGLY; AND RECOMMENDING THAT THE COURT OF CRIMINAL APPEALS, BASED ON THE EQUITIES INVOLVED IN THIS MATTER, DIRECT THIS HONORABLE COURT TO CONSIDER THE MERITS OF APPLICANT'S APPLICATION ANYWAY

Applicant's Petition for a writ of Habeas Corpus in the above-referenced case was filed on August 22, 1997.

The attorney for Respondent, The State of Texas, accepted service of a copy of said application for writ from the deputy district clerk assigned to handle appeals on September 5, 1997, rendering the State's response due on or before October 6, 1997 (the 30th day, October 5, 1997, falling on a Sunday).

The State has timely filed Respondent's Original Answer.

Accordingly, this Court is now in a position to evaluate Applicant's application for writ.

At the outset of this effort, the Court would note that analysis of TEX. CODE CRIM. PROC. ANN. Art. 11.071 (Supp. 1997) in terms of the facts involved in this case clearly shows that literal application of the statute dictates that the merits of the claims raised on behalf of Applicant Robert Moreno Ramos in his application for writ cannot be considered.

This observation derives from the following findings of fact, and conclusions of law, and ultimate recommendation, based on consideration of the record of this case and the record of the underlying criminal case, trial court cause number CR-1430-92-B (hereinafter, "the primary case"):

A. FINDINGS OF FACT:

1. Applicant ROBERT MORENO RAMOS was charged by indictment in cause number CR-1430-92-B with the offense of Capital Murder, based on allegations that he murdered more than one person during the same criminal transaction.
2. On March 18, 1993 the jury returned a verdict finding Applicant Ramos guilty of said charge.
3. On the following day the jury answered "Yes" to the future dangerousness special issue and "No" to the mitigating circumstances issue.
4. This court, accordingly, sentenced Applicant Ramos to death.
5. Automatic appeal of this death sentence to the Court of Criminal Appeals, which assigned it cause number 71,714, resulted in a June 26, 1996 ruling affirming the conviction and death sentence in the primary case. See Ramos v. State, 934 S.W.2d 358 (Tex.Crim.App. 1996).
6. Applicant Ramos' motion for rehearing was denied by the Court of Criminal Appeals on September 11, 1996.
7. On that same date the Court of Criminal Appeals granted Applicant Ramos' motion to stay issuance of its mandate

of affirmance and stayed issuance of said mandate until December 10, 1996.

8. On October 18, 1996 the 93rd District Court of Hidalgo County, Texas held a hearing on this case pursuant to TEX. CODE CRIM. PROC. ANN. Art. 11.071 (Supp. 1997).

9. At that hearing, the court determined that Applicant had not yet filed a petition for writ of certiorari to the U.S. Supreme Court or an application for writ of habeas corpus under TEX. CODE CRIM. PROC. ANN. Art. 11.07; that he was indigent, and that he wished to have counsel appointed for the purpose of filing a writ of habeas corpus further challenging his conviction and sentence.

10. On November 22, 1996, pursuant to Article 11.071, the Court of Criminal Appeals appointed attorney Kyle Blair Welch to represent Ramos in regard to filing of an application for writ of habeas corpus and directed that said application be filed in the convicting court no later than the 180th day after the date of the appointment.

11. On December 19, 1996 the Court of Criminal Appeals issued its mandate in the primary case.

12. On April 28, 1997 the United States Supreme Court denied Robert Moreno Ramos' petition for writ of certiorari in regard to the primary case.

13. On May 22, 1997, which was the 181st day after his appointment by the Court of Criminal Appeals, Mr. Welch filed a "Motion for Extension of Time to File Application for Writ of Habeas Corpus".

14. In said pleading, Mr. Welch mistakenly refers to his current deadline for filing an application for writ in this case as being May 22, 1997, indicates that he needs additional time to work on this matter, remarks that it had been impossible to work on certain aspects of the application while Applicant's direct appeal to the U.S. Supreme Court was still being litigated, and notes that the one year federal statute of limitations under the Anti-Terrorism and Effective Death Penalty Act of 1996 did not begin to run until Applicant's petition for writ of certiorari was denied on April 18, 1997.

15. This motion then states that Applicant is requesting a 90 day extension to file an application for writ and prays that the Court grant the request and order that the time to file an application be extended 90 days beyond May 22, 1997 in accordance with TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 4 (Supp. 1997).

16. The trial court did not hold a hearing on said request that it find good cause for the failure to file an application within 180 days of Mr. Welch's appointment, as required by TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 4 (c) (Supp. 1997).

17. Instead, on May 22, 1996 Judge Fernando G. Mancias signed an order indicating that the motion had come on to be heard on that date and ordering that Applicant be granted "an extension of 90 days to file an application for writ

of habeas corpus, until August 22, 1997" "(i)n accordance with Art. 11.071, Sec. 4, V.A.C.C.P.".

18. On August 22, 1997 Applicant Ramos, through counsel, Mr. Welch, filed what they called their "Motion for Post-Conviction Writ of Habeas Corpus" in this case.

19. No order scheduling Applicant Ramos' execution has been entered to date.

B. CONCLUSIONS OF LAW:

1. This case deals with a situation in which the Applicant was convicted before September 1, 1995, does not have an original application for writ of habeas corpus under TEX. CODE CRIM. PROC. ANN. Art. 11.07 pending on that date; and has not previously filed an application under Article 11.07.

2. TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 4 (a) (Supp. 1997) provides that, in such situations, "the applicant's original application must be filed not later than the 180th day after the date the court of criminal appeals appoints counsel under Section 2 or not later than the 45th day after the date the appellee's original brief is due on direct appeal, whichever is later".

3. Subsection 4 (b) indicates that an application filed after the filing date that applies under Subsection (a) "is presumed untimely unless the applicant establishes good cause by showing particularized justifying circumstances"

4. Subsection 4 (c) provides that, if counsel has been appointed and a timely application is not filed on or before the applicable filing date under Subsection (a), the convicting court shall, before the 11th day after the applicable filing date under Subsection (a), conduct a hearing a determine if good cause exists for either the untimely filing of an application or other necessary action.

5. Subsection 4 (d) then lists the actions the court shall take if it finds that the applicant has failed to establish good cause for the delay, while Subsection 4 (e) indicates that the convicting court shall proceed as if the application was timely filed if it finds that the applicant has established good cause for the delay.

6. Significantly, Subsection 4 (f) of the statute categorically states as follows:

> Notwithstanding Subsection (b), (c), or (e), an applicant cannot establish good cause for the untimely filing of an application filed after the 91st day after the applicable filing date under Subsection (a).

7. Subsection 4 (g) of the statute then provides as follows:

> A failure to file an application before the 91st day after the filing date applicable to the applicant under Subsection (a) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 5.

8. TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (a) (Supp. 1997), in pertinent part, indicates that a court may not consider the merits of or grant relief based on an un-

timely original application unless the application contains sufficient specific facts establishing one of three exceptions spelled out therein.

9. In particular, the first exception, listed in Subsection 5 (a)(1)(B), involves situations where the current claims and issue have not been, and could not have been, presented previously in a timely original application because the factual or legal basis for the claim was unavailable on or before the last date for the timely filing of an original application.

10. The second exception, mentioned in Subsection 5 (a)(2), covers situations in which the applicant establishes by a preponderance of the evidence that, but for a violation of the United States Constitution, no rational juror could have found him guilty beyond a reasonable doubt.

11. The third exception, listed in Subsection 5 (a)(2), involves situations in which the applicant establishes by clear and convincing evidence that, but for a violation of the United States Constitution, no rational juror would have answered in the State's favor one or more of the death penalty special issues.

12. TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (b) (Supp. 1997), indicates that the clerk of a convicting court which receives an untimely original application is to attach a notation that the application is an untimely original application, assign the case a file number ancillary to that of the underlying case, and immediately

send to the court of criminal appeals a copy of the application; the notation; the order scheduling the applicant's execution, if it is scheduled; and any order the judge of the convicting court directs to be attached to the application.

13. Finally, Subsection 5 (c) of the statute provides as follows:

> On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

14. Application of these statutory provisions to the facts in this case conclusively demonstrates that Applicant Ramos and his attorney simply miscalculated the time frames involved, which, under a literal application of the statute, dictates that the application for writ they filed on August 22, 1997 was untimely and cannot be considered.

15. Since Mr. Welch was appointed by the Court of Criminal Appeals on November 22, 1996, under TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 4 (a) (Supp. 1997) Applicant's application had to be filed on or before May 21, 1997[1].

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[1] This date is based on calculations that November of 1996 had 8 more days after the 22nd, that December had 31 days, that January had 31 days, that February had 28 days, that March had 31 days, and that April had 30 days, for a total of 159 days up to the end of April, making May 21, 1997 the 180th day after November 22, 1996.

16. Accordingly, May 21, 1997 is, for purposes of this case, "the applicable filing date under Subsection (a)" referred to in the remaining subsections of Article 11.071.

17. Since Applicant's application for writ was not filed until August 22, 1997, it must, under Section 4 (b), be considered untimely unless Applicant established good cause for the late filing by showing particularized justifying circumstances.

18. Applicant Ramos, through counsel, Mr. Welch, clearly made an attempt to obtain additional time by filing a motion seeking an extension of time to file their application.

19. Moreover, Judge Mancias, the judge of the convicting court, clearly intended to grant said request, as evidenced by the fact that he signed an order so providing.

20. However, the fact remains that no hearing was held on the matter of whether Applicant had established good cause for allowing the application to be filed beyond the 180 day deadline, as required by TEX. CODE CRIM. PROC. ANN. Sec. 4 (c) (Supp. 1997).

21. Literal application of the statute to the facts of this case compels a conclusion that this case fits squarely within the ban on ability to establish good cause for the untimely filing of an application filed after the 91st day after the applicable filing date under Subsection (a).

22. In particular, careful time calculations show that August 22, 1997, the date Applicant Ramos, through counsel, Mr.

Welch, filed his application for writ, was the 93rd day after May 21, 1997, the initial filing deadline under Article 11.071, Sec. 4 (a).[2]

23. The literal dictates of TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 4 (g) (Supp. 1997) would also appear to clearly apply to this situation involving an application for writ not filed before the 91st day after the initial filing deadline.

24. Accordingly, under the statute, literally read and applied, all grounds for relief that were available to Applicant before the last date on which an application could be timely filed in this case are waived, except as provided by Section 5 of Article 11.071.

25. Applicant Ramos, through counsel, has not even mentioned any of the exceptions contained in Section 5, much less met the requirement that the application contain sufficient specific facts to fit within one of those exceptions.

26. Accordingly, under a literal reading of Subsection 5 (a), the courts may not consider the merits of, or grant relief based on, the untimely original application for writ filed on August 22, 1997.

27. Under the statutory provisions governing applications for post-conviction habeas corpus relief in death penalty

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[2] This date is based on calculations that May of 1997 had 10 more days after the 21st, that June had 30 days, and that July had 31 days, for a total of 71 days up to the end of July, which makes August 20, 1997 the 91st day after May 21, 1997 and August 22nd the 93rd day after that date.

cases, the procedural actions which must be taken under the facts described above are clear.

28. The clerk of this trial court must make a notation that the application for writ filed on Applicant's behalf on August 22, 1997 is untimely and then immediately send the Court of Criminal Appeals copies of the application, the notation, and any order the judge of the convicting court directs to be attached to the application. See TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (b) (Supp. 1997).

29. Pursuant to the second sentence of Subsection 5 (c) this court may not take any further action on the application until the Court of Criminal Appeals evaluates the timeliness issue.

30. Upon receipt of the items sent by the trial court, the Court of Criminal Appeals must determine whether the time requirements of Subsection (a) have been satisfied.

31. In doing so in this case, it must necessarily conclude that the situation presented in this case does not fit within any of the explicit exceptions listed in the statute.

32. Accordingly, unless it opts to adopt a further exception to rigid application of the statute based on the equities involved in this case, under the clear dictates of the third sentence of Subsection 5 (c), the Court of Criminal Appeals must then issue an order dismissing the application filed in this case as an abuse of the writ.

33. While recognizing that the statute, passed to expedite consideration of state habeas claims in death penalty cases, does not include any explicit exception for inadvertent, unintentional deadline miscalculations such as occurred in this case, this court respectfully suggests that the equities involved in this case require the Court of Criminal Appeals to allow consideration of the merits of the application for writ filed in this case.

34. After all, while the inadvertent miscalculation originated with Applicant and his attorney, the fact remains that this court failed to recognize the fact that the deadline it had imposed by signing the proposed order granting Applicant additional time had exceeded the statutory deadline.

35. Moreover, the statute, as enacted by the Legislature, is extremely strict, imposes rigid deadlines, and does not contain any explicit exceptions allowing the merits of claims raised in an application that does not meet those deadlines which do not fit within the limited narrow categories listed in TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (a) (Supp. 1997).

36. Accordingly, it may arguably be subject to constitutional attack based on the fact that it is overly strict, and does not provide any mechanism by which to attempt to mitigate the consequences of the type of mistake made in this case.

37. This court believes that the facts of this case and basic concepts of equity compel recognition of another exception to the time requirements of the statute not explicitly spelled out in the statute.

38. However, this court recognizes that the clear language of the statute dictates that any attempt to engraft some type of equitable exception to the literal requirements of the statute must come from the Court of Criminal Appeals, rather than a trial court.

39. After all, the law is clearly crafted in language leaving preliminary questions whether a claim may be considered on the merits to the Court of Criminal Appeals.

40. Accordingly, this court must conclude that the application for writ submitted on behalf of Applicant Ramos on August 22, 1997 was not timely filed.

41. This court must further conclude that it is thus compelled to direct Ruben del Bosque, the appellate clerk for the Hidalgo County District Clerk's Office, to comply with TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (b) (Supp. 1997) by attaching a notation that the application is an untimely original application and immediately sending to the Court of Criminal Appeals a copy of the application; the notation; and this order.

42. This court further concludes that Subsection 5 (c) of the statute mandates that the Court of Criminal Appeals, upon receipt of these items from the clerk, promptly consider the timeliness issue presented in this case.

43. This court also realizes that said subsection precludes it from taking any further action on the application until the Court of Criminal Appeals issues an order finding that the merits of the application may be considered.

44. Recognizing the fact that the statute thus gives the Court of Criminal Appeals jurisdiction over the matter of whether the merits can be considered, but convinced that the equities of the situation compel that they be addressed, this court respectfully suggests that the Court of Criminal Appeals adopt the position that equitable considerations involved under the facts of this case compel consideration of the merits of the contentions asserted in the application for writ in this case and then issue an order directing this court to proceed accordingly.

C. RECOMMENDATION

Based on the findings of fact and conclusions of law set forth above, it is this Court's recommendation that the Court of Criminal Appeals, upon receipt of the items mentioned above, determine whether the time requirements spelled out in TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (a) (Supp. 1997) have been met; conclude, upon doing so, that they have not; further conclude, however, that equitable considerations involved under the facts of this case compel consideration of the merits of the claims asserted in the instant application; and, accordingly, issue an order to that effect, rather than dismiss the application as an abuse of the writ.

WHEREFORE, MR. DEL BOSQUE, the Appeals Clerk for the Hidalgo County District Clerk's Office is ORDERED to immediately comply with TEX. CODE CRIM. PROC. ANN. Art. 11.071, Sec. 5 (b) (Supp. 1997) by attaching a notation that the application for writ filed in this case is an untimely original application and immediately sending to the Court of Criminal Appeals a copy of the application; the notation; and this order containing this court's recommendation that the Court of Criminal Appeals consider the equities involved in this situation and, accordingly, allow the merits of the application, although untimely, to be considered.

Mr. del Bosque is further ordered to provide a copy of this Order to the Honorable Kyle B. Welch, JONES & WELCH, 817 Pecan, McAllen, Texas 78501, Attorney for Applicant, via certified mail, return receipt requested, and to the Honorable Theodore C. Hake, Assistant Criminal District Attorney, Hidalgo County, Texas, either via certified mail, return receipt requested, or by personal delivery, with an acknowledgment of receipt.

SIGNED and ENTERED on this, the _____ day of September, 1997.

FERNANDO G. MANCIAS
Judge Presiding
93rd District Court
Hidalgo County, Texas

Jones and Welch
ATTORNEYS AND COUNSELORS AT LAW
817 PECAN • McALLEN, TEXAS 78501

KNOX JONES
BOARD CERTIFIED - CRIMINAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

KYLE BLAIR WELCH
BOARD CERTIFIED - CRIMINAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

(210) 686-1119
(210) 687-9090
FAX (210) 686-5064

FILED
AT_____O'CLOCK_____M
SEP 2 2 1997
PAULINE G. GONZALEZ, CLERK
District Courts, Hidalgo County
By_____Deputy

22d VRB

September ~~17~~, 1997

Mr. Ruben del Bosque
Deputy District Clerk
Hidalgo Court District Clerk's Office
Hidalgo County Courthouse
Edinburg, Texas 78539

Re: Ex Part Roberto Moreno Ramos, CR-1430-92-B(1)

Dear Ruben:

Enclosed please find a proposed Order for presentation to Judge Mancias which I have prepared after consultation with Ted Hake, attorney for the State. Please forward this along with the Court's file, to Judge Mancias for his consideration.

Very truly yours,

Kyle B. Welch

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CAUSE NO. CR-1430-92-B (1)

EX PARTE	§	IN THE 93RD DISTRICT COURT
ROBERT MORENO RAMOS	§	OF
APPLICANT	§	HIDALGO COUNTY, TEXAS

ORDER

The Court has considered Respondent's Original Answer filed on September 11, 1997 in response to Claimant's Application For Post-Conviction Writ of Habeas Corpus filed on August 22, 1997. The Court finds that the Court Order entered on May 22 granting Claimant's Motion For Extension of Time constitutes a finding of "good cause for delay" under Art. 11.071, Sec.4(e), C.C.P. and extended the time for filing the application until August 22, 1997. The Court further finds that Claimant complied with the Court ordered by filing his application on August 22, 1997. The Court further finds that Claimant acted in good-faith reliance on the Order of the Court and the Application For Post-Conviction Writ of Habeas Corpus was filed in substantial compliance with the requirements of Art. 11.071, C.C.P. The Court further finds that, at the time an objection to the Application was filed, the clerk of the Court had already processed the Application in compliance with Art. 11.071, Sec. 6, C.C.P. The Court further finds that all considerations of equity require the Court to consider the merits of the Application. The Court will consider the merits of the Application pursuant to Art. 11.071, Secs. 8 and 9 and make the

required findings. The Respondent may file an answer addressing the merits of the Application pursuant to Art. 11.071, sec. 7, C.C.P., and if Respondent intends to file an additional answer, then on or before October 6, 1997, the original filing deadline, the Respondent shall file the answer or a request for an extension of time to file the answer.

SIGNED AND ENTERED, on this 24 day of ~~September~~ Oct, 1997.

FERNANDO G. MANCIAS
Judge Presiding
93rd District Court
Hidalgo County, Texas

RENE GUERRA

CRIMINAL DISTRICT ATTORNEY
HIDALGO COUNTY

October 6, 1997

FILED
AT 3:47 O'CLOCK M
OCT 6 1997
PAULINE G. GONZALEZ, CLERK
District Courts, Hidalgo County
By Deputy

Ruben del Bosque
Appeals Clerk
District Clerk's Office
Hidalgo County Courthouse
Edinburg, Texas 78539

RE: Cause No. CR-1430-92-B (1),
styled Ex parte Robert Moreno Ramos

Dear Ruben:

As you are aware, the above-referenced case involves an application for writ in a capital murder/death penalty case.

Kyle Welch, the attorney appointed to represent Applicant Robert Moreno Ramos in this matter, filed the application for writ on August 22, 1997.

On September 11, 1997 I filed the State's Original Answer and a "Proposed Order Noting that the Application for Writ in this Case Was Not Timely Filed, Directing the Clerk to Act Accordingly, and Recommending that the Application be Dismissed".

Subsequent to the filing of this answer and proposed order Mr. Welch and I had a conference in chambers with Judge Fernando G. Mancias. The topic under discussion at that meeting was whether there was any method by which the harshness of literal application of the statute governing these matters could be overcome.

As I explained in the letter I sent you on September 22, 1997, Mr. Welch took the position that the trial court could decide to grant equitable relief and consider the application despite the language to the contrary contained in TEX. CODE CRIM. PROC. ANN. Art. 11.071 (Supp. 1997) and the fact that said document it was not timely filed.

As I also noted in my earlier letter, the State's position was that equitable relief was perhaps called for, but that the statute clearly required the Court of Criminal Appeals to address matters concerning whether the merits of the application may be considered.

Therefore, my suggestion to overcome harsh application of the statute, if Judge Mancias felt that it should not be literally applied, was that Judge Mancias add language to the proposed order directing you to comply with the law by sending up the matter, while recommending that the Court of Criminal Appeals determine that the merits should be considered based on the equities of the situation despite the fact it was not timely filed.

In order to provide the court with a proposed order adopting this suggestion, on September 22, 1997, I submitted a proposed order entitled "Proposed Order Noting that the Application for Writ in this Case Was Not Timely Filed, Directing the Clerk to Act Accordingly, and Recommending that the Court of Criminal Appeals, Based on the Equities Involved in this Matter, Direct this Honorable Court to Consider the Merits of Applicant's Application Anyway".

On that same date, Mr. Welch also submitted a proposed order.

His proposed order states that Judge Mancias believes that Applicant had complied with his earlier order granting a deadline extension by filing his application on August 22, 1997; that, in doing so, Applicant had acted in good faith reliance on said order; that his application for writ had been filed in substantial compliance with the requirements of the applicable statute; and that "all considerations of equity" require the court to consider the merits of the application. It then indicates that the court will consider the merits of the application and make the required findings.

Applicant's proposed order concludes with statements that the State may file an answer addressing the merits of the application and that, if it intended to do so, it needed to file either said answer or a request for an extension of time to do so on or before October 6, 1997.

Judge Mancias signed the proposed order submitted by Mr. Welch on October 2, 1997.

The State remains convinced that this trial court decision to consider the merits of Applicant's application for writ is directly contrary to the dictates of the relevant statute.

Despite its continuing belief that Judge Mancias erred in taking the position that he has authority to consider the merits of Applicant's application without first being directed to do so by the Court of Criminal Appeals, the State has decided that the most prudent approach to take at this point is to nonetheless prepare a supplemental answer addressing the merits of Applicant's application.

Having decided to go ahead and evaluate the merits of Applicant's application for writ, I now find myself faced with a situation in which Judge Mancias has just signed an order telling the State to file another answer or an request for an extension of time to do so on or before October 6, 1997.

I obviously had no way to knowing of this directive prior to the time it was signed late last week.

Moreover, since shortly after filing my original answer and first proposed order in this case, I have been busy diligently drafting a response to the claims contained in the application for writ L. Aron Pena filed in trial court cause number CR-171-90-C, styled Ex parte Robert Andrew Lookingbill.

Although the State has certainly met any statutory deadline for filing pleadings in this case, it realizes that it is also subject to any deadline the trial court might impose based on its inherent power to schedule matters for consideration.

Therefore, since I intend to file a brief answer to the merits of Applicant's application and have not yet had time to do so, I have drafted a deadline extension request.

Accordingly, enclosed for filing you will find Respondent, The State of Texas', Motion for Extension of Time to File a Supplemental Answer Addressing the Merits of the Contentions Asserted in Applicant's Application for Writ and a proposed order granting said extension request.

By copy of this letter, with enclosures, Mr. Welch has been notified of this filing and provided a copy of the items mentioned above.

Thank you for your attention to this matter.

Respectfully,

Theodore C. Hake

THEODORE C. HAKE, Assistant
Criminal District Attorney
Hidalgo County, Texas

xc: Kyle B. Welch
JONES & WELCH
817 Pecan
McAllen, Texas 78501

Jones and Welch
ATTORNEYS AND COUNSELORS AT LAW
817 PECAN • McALLEN, TEXAS 78501

(210) 686-1119
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TEXAS BOARD OF LEGAL SPECIALIZATION

KYLE BLAIR WELCH
BOARD CERTIFIED - CRIMINAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

September 29, 1997

Mr. Troy C. Bennett, Jr.
Clerk, Court of Criminal Appeals
P.O. Box 12308
Capital Station
Austin, Texas 78711

Re: Robert Moreno Ramos, No. 71,714

Dear Mr. Bennett:

Enclosed please find my Claim For Services on Mr. Ramos's application for the time period of November 22, 1996 through September 29, 1997. If anything further is needed in this regard, please let me know.

Very truly yours,

Kyle B. Welch

KBW/er

encl.

CLAIM FOR SERVICES AND/OR EXPENSES FOR TEX. CODE CRIM. PROC. ANN. ART. 11.071 APPOINTMENT

1. *Name of Person Represented:*

   Robert Moreno Ramos

2. *Date of Court of Criminal Appeals Appointment:*

   November 22, 1996

FILED IN
COURT OF CRIMINAL APPEALS
OCT 01 1997
Troy C. Bennett, Jr., Clerk

3. *Court of Criminal Appeals Cause No.:*

   71,714

4. *Full Name of Counsel:*

   Kyle Blair Welch

5. *Counsel's Mailing Address:*

   817 Pecan
   McAllen Texas 78501

   1401 W. Polk Ave.
   Pharr, TX 78577

6. *Counsel's Telephone/Fax Numbers:*

   Phone: 956-687-9090
   Fax: 956-686-5064

7. *Counsel's Social Security Number:*

   [redacted]

8. *Comptroller Vendor Identification Number (if any):*

_____

9. *Date of Pre-Approval for Claimed Expenses:*

_____

10. *Claim Covers Period of:*

November 22, 1996 *to* September 28, 1997

11. *This Claim is:*

X *An Interim Payment*

_____ *Final Payment*

12. *Amount of Previous Payments/Claims:*

N/A = *Expenses*

N/A = *Appointed Counsel Fee*

13. *Amount of this Claim:*

_____ = *Expenses*

51.5 x 100=$5,150 = *Appointed Counsel Fee (Hours x $100.00)*

_____ = *Appointed Counsel Travel Time (Hours x $50.00)*

I hereby submit this claim for services and/or expenses under my Art. 11.071, V.A.C.C.P. appointment. The information provided in this claim and supporting worksheet is to the best of my knowledge, true and correct.

_____ Sept. 29, 1997

Signature of Counsel/Payee *Date*

APPROVAL FOR PAYMENT
ON THIS CLAIM

14. *Expenses:*

$_____

15. *Appointed Counsel Fee:*

$_____

16. *Appointed Counsel Travel Time:*

$_____

17. *Total Amount Approved:*

$_____

_____ _____

Signature of Approving Official *Date*

APPOINTED COUNSEL HOURLY WORKSHEET

Applicant's Name_____

Court of Criminal Appeals Cause No.:_____

Date Submitted:_____

Date	Brief Description of Services	Appearances in Convicting Court	Interviews and Conferences	Obtaining and Reviewing Records	Legal Research and Writing	Travel Time (Actual)	Investigative and other work
1-5-97	Review of Appellate Briefs, Opinions			1.5			
1-16-97	Interview with Appellate Counsel		1.0				
2-4-97	Interview with Trial Counsel		2.0				
3-7-97	Interview with Appellate Counsel		.5				
5-13-97	Review of Trial Record			1.5			
5-14-97	" "			2.0			
5-17-97	" "			2.0			
5-20-97	" "			3.5			
5-21-97	" "			2.0			
6-3-97	" "			4.0			
6-4-97	" "			2.0			
6-11-97	" "			4.0			
6-12-97	Interview with Trial Counsel		1.0				
6-16-97	Legal Research - Jury Selection Issues				3.0		
	Page Total		4.5	22.5	3.0		
	Grand Total						

APPOINTED COUNSEL HOURLY WORKSHEET

Applicant's Name _____

Court of Criminal Appeals Cause No.: _____

Date Submitted: _____

Date	Brief Description of Services	Appearances in Convicting Court	Interviews and Conferences	Obtaining and Reviewing Records	Legal Research and Writing	Travel Time (Actual)	Investigative and other work
6-20-97	Legal Research - Jury Charge Issues				3.5		
8-6-97	Review of Trial Record			2.0			
8-7-97	Preparation of Application				2.0		
8-16-97	Preparation of Application				3.0		
8-17-97	Legal Research				1.5		
8-17-97	Preparation of Application				1.5		
8-20-97	Preparation of Application				6.0		
8-21-97	Preparation of Application				2.0		
	Page Total			2.0	19.5		
	Grand Total		4.5	24.5	22.5		

Ramos, Robert
#862

ATTORNEY APPLICATION TO VISIT
TDCJ INMATE

#F23

Ellis
(Institution)

I, Kyle Welch, a licensed attorney in the State of Texas, with offices at 1401 W. Polk, Pharr, Tx. 78539, visiting ROBERT RAMOS ~~DAVID CASTILLO~~, on 8th, JAN., 19 98, affirm that my visit with this inmate is for the purpose of assisting me in matters related to the attorney-client or attorney-witness relationship and for no other purpose. I agree that any tape recording made by me will be used only to assist this relationship.

(Signature)

21124300
(State Bar No.)

0000000134

I - 163 (Rev. 11/90)

J1005

ATTORNEY APPLICATION TO VISIT
TDCJ INMATE

_____
(Institution)

I, Kyle B. Welch, a licensed attorney in the State of Texas, with offices at 1401 U. Polk, Pharr, Tx. 78577, visiting Robert M. RAMOS, on 9 April 9, 19 99, affirm that my visit with this inmate is for the purpose of assisting me in matters related to the attorney-client or attorney-witness relationship and for no other purpose. I agree that any tape recording made by me will be used only to assist this relationship.

Kyle B Welch
(Signature)

21124300
(State Bar No.)

0000000133

J1005

ATTORNEY APPLICATION TO VISIT TDCJ OFFENDER

INSTITUTION: TDCJ TERRELL UNIT

I, Kyle Welch, a licensed attorney in the State of Texas, with offices in _____, will be visiting offender Robert Ramos, TDCJ # 999062 on (day/date) January 9, 2001 (Tuesday), 2001, affirm that my visit with this offender is for the purpose of assisting me in matters related to the attorney-client or attorney-witness relationship and for no other purpose. I agree that any tape recording made by me will be used only to assist this relationship.

Kyle B Welch
(Signature)

_____
(State Bar No.)

cc: Offender's file

TE[redacted]LL COUNTROOM MANAGEMENT S[redacted]TEM 01/04/2001
L[redacted]N - BROWSE/CHANGE/DELETE 14:19:04

A	TDC#	NAME	T	PER./TIME	REASON	AUTHORITY	START	DAYS	END
_	00997062	RAMOS, A		1245 1300	ATTORNEY VISIT	L. WALDREP	01092001	001	01092001

ENTER TDC _____ OR SID _____ TYPE _ REASON _____ OPTIONS _ ___

00000000131

Visitor arrived 1305

REQUEST FOR ATTORNEY / INMATE VI

#9

DATE: 1-4-01 PREPARED BY: [signature] LAY-IN: ✓

NAME OF INMATE Ramos, Robert TDCJ-ID # 999062

INMATE HOUSING 12EA-13 *RACE/STATUS* B DR1

NAME OF INMATE _____ TDCJ-ID # _____

INMATE HOUSING _____ *RACE/STATUS* _____

NAME OF INMATE _____ TDCJ-ID # _____

INMATE HOUSING _____ *RACE/STATUS* _____

NAME OF INMATE _____ TDCJ-ID # _____

INMATE HOUSING _____ *RACE/STATUS* _____

NAME OF INMATE _____ TDCJ-ID # _____

INMATE HOUSING _____ *RACE/STATUS* _____

1/09 to 1/09 Completed KC

NAME OF PERSON CALLING: Welch, Kyle

ATTORNEY NAME: Welch (LAST) Kyle (FIRST) (MI)

ADDRESS: 1401 Polk CITY: Plano STATE: Tx

OTHERS: _____

TELEPHONE#: 512-454-6470 BAR CARD #: 21124300

ACTIVE AND IN GOOD STANDING (CIRCLE ONE): (YES) NO

DATE OF VISIT: Jan. 9, Tues 2001 TIME OF VISIT: 1:00 p.m

[signature]
WARDEN'S SIGNATURE

APPROVED (CIRCLE ONE): (YES) NO

VISIT COMPLETED: 1/09/01 (DATE) ~~1300~~ 1435 KC (TIME) KC (INITIALS)

Electronically Filed
8/15/2018 5:05 PM
Hidalgo County District Clerks
Reviewed By: Alexandra Gomez

IN THE 93rd DISTRICT COURT
HIDALGO COUNTY, TEXAS

EX PARTE	**§**	
	§	
	§	**CAUSE NO. CR-1430-92-B**
	§	
ROBERTO MORENO RAMOS	**§**	

OPPOSITION TO STATE'S REQUEST THAT AN EXECUTION DATE BE SET
AND
MOTION FOR SCHEDULING ORDER

Now comes Robert Moreno Ramos, by and through undersigned counsel, to respectfully move that this Court enter the attached Scheduling Order rather than setting an execution date at this time.

Robert Moreno Ramos has been sentenced to death for capital murder and, on July 12, 2018, the State asked this Court to schedule his execution for November 14, 2018. *Motion Requesting That An Execution Date Be Set*.

The Court held a brief phone conference with undersigned counsel and ADA Ted Hake on Friday, July 13, 2018 during which undersigned indicated an intention to oppose the motion and explained that she would need time to revisit the case and prepare a motion for the Court. The Court indicated that it would not sign the State's proposed order until the 91st day prior to the requested date, which will be Thursday, August 16, 2018. Undersigned indicated she would prepare a motion as quickly as possible. No date for a hearing was set.

Below, Mr. Moreno Ramos requests a limited period of time to file a viable claim that has never been heard before and for which there is now a procedural vehicle for merits review that was not available at the time of his last petition.

Undersigned understands the state's position that the case should not languish unnecessarily so any claims that Mr. Moreno Ramos has remaining should be filed expeditiously and does not ask that the Court decline to impose any schedule at all. Rather, as set out below, undersigned asks that, in lieu of an execution date, the Court set a date upon which all remaining state post-conviction claims must be filed and has asked for the shortest possible time in which a successor petition could reasonably be prepared.

All Legal Challenges Have Not Been Completed

Although no petition is currently pending to challenge Mr. Moreno Ramos' conviction or sentence, not all state and federal challenges have been "completed" as the State has indicated.

Mr. Moreno Ramos has a compelling constitutional claim of ineffective assistance of trial counsel that has never been heard or considered on the merits by any state or federal court, but which will now be presented in a Successive Application for Post-Conviction Relief for merits consideration through a procedural vehicle that did not exist at the time of his last state post-conviction petition. Texas Code of Criminal Procedure 11.071 §5(a).

The decision to take Mr. Moreno Ramos' life was made and has since been repeatedly accepted without any of the decision-makers ever engaging in the "constitutionally indispensable"[1] process of considering powerfully mitigating evidence of his cognitive impairment, brain dysfunction, debilitating symptoms of severe life-long mental illness and childhood characterized by shocking brutality and desperate poverty.

Mr. Moreno Ramos was sentenced to die in a one (1) day penalty phase during which the

1 "[I]n capital cases the fundamental respect for humanity underlying the eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death" *Woodson v. North Carolina*, 428 U.S. 280 (1976).

state presented three (3) witnesses and the defense presented none. His trial counsel had conducted no life history investigation whatsoever. At penalty phase, trial counsel made no opening statement, cross-examined only one of the state's witnesses, offered no evidence and made an almost incomprehensible five page closing argument in which he failed to offer even one reason to oppose a death sentence and never once asked the jury to spare his client's life. Penalty Phase Tr. Vol. 84, pp. 76-80, March 19, 1993. The jury burdened with deciding whether Mr. Moreno Ramos should live or die knew absolutely nothing about the life they were asked to take, imposing a death verdict under conditions that pose an intolerable risk that "the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586 at 604-605 (1978).

Unfortunately, this complete abdication by trial counsel was not raised in the first Application for state post-conviction relief, nor his initial federal habeas petition. Indeed, Mr. Moreno Ramos was constructively unrepresented in the initial state and federal habeas proceedings that set the stage for everything that has happened since.

Subsequent investigation has revealed a compelling and undeniably mitigating life history of the sort courts have repeatedly found to have been sufficient to establish prejudice under prevailing constitutional norms. However, by the time this evidence was investigated and developed, it could not be presented to either the state or federal courts through an ineffectiveness claim because it had been previously defaulted by his state post-conviction attorney, but that counsel's ineffectiveness was not yet recognized as a defense to procedural bars in state or federal court. By the time Mr. Moreno Ramos met a mitigation specialist for the very first time, virtually all of his substantive constitutional rights had been waived, defaulted or trampled by counsel he had no hand in choosing.

No state or federal court has ever considered the substance of the claim. Mr. Moreno Ramos has sought a merits review of his ineffectiveness claim for four years now and been denied review on procedural grounds at each juncture.

Despite Dozens of Filings Over Many Years, No Issues of Substance Have Been Considered by Any Court

There has not been as much process as it might appear from the listing of docket events in the motion.

The initial state and federal habeas petitions – both filed by the same lawyer whose appointment Mr. Moreno Ramos had opposed[2] – contained not one single properly framed legal challenge between them so that the Courts declined to even address a single issue raised.

The Court of Criminal Appeals appointed a solo practitioner who had never handled a capital post-conviction case and admits he "did not have the experience, training, assistance, resources or time to do what [was] necessary" and "was simply not equipped to handle this case the way it should have been handled" to represent Mr. Moreno Ramos. Declaration of Kyle Welch, supra, at 2.

He never sought funding for investigative or expert services, never conducted any investigation on his own, and developed no extra-record claims. After missing the filing deadline twice, he finally filed a twelve (12) page Application for Post-Conviction Relief, raising eight (8) entirely record-based claims, none of which were even cognizable in post-conviction and five (5) of which had already been denied on direct appeal.

The CCA found that no post-conviction claims had been raised, held that the claims raised "will not be addressed" and quickly disposed of the Application in a paragraph. *Ex Parte*

2 Motion for Stay and Abeyance, D.E. 64, Exh. 2 Affidavit of David Schulman, May 30, 2013, Ramos, No. 7:07-cv-0059 (S.D. Tex., 11/25/2014).

Ramos, 977 S.W.2d 616 at 616-17 (Tex. Crim. App. 1998). Dissenting, CCA Judge Overstreet recognized that holding Mr. Moreno Ramos accountable for the failures of the lawyer the Court had itself selected effectively denied him any representation at all:

> If a lawyer's actions deny an indigent death row applicant meaningful review of his claims, then I question whether the inmate standing in line to be executed has received effective assistance of counsel. Common-sense tells me that if you do not have effective assistance of counsel, with all due respect, I consider that worse than having no lawyer at all because having an ineffective lawyer gives a sense of legitimacy to the proceeding, yet the degree of assistance may be equivalent to not having a lawyer at all.

Id. at 619 (Overstreet, J., dissenting).

Shockingly, the same attorney who had failed to file a single cognizable claim in state post-conviction proceedings was then appointed to represent Mr. Moreno Ramos in federal habeas corpus proceedings, and filed the same eight (8) record-based claims in the federal petition that he had filed in state court. Unsurprisingly, the District Court granted the State's motion for summary judgment on all claims, Order, D.E. 15, Ramos v. Johnson, No. 7:99-cv-134 (S.D. Tex. 2000), the Fifth Circuit Court denied a certificate of appealability, *Ramos v. Cockrell*, No. 00-40633 (5th Cir. 2002) (per curiam), and the Supreme Court denied certiorari. *Ramos v. Cockrell*, 537 U.S. 908 (2002).

Mr. Moreno Ramos's chances for any state or federal review of his conviction and death sentence had been squandered by counsel whose appointment he vehemently opposed and he has spent the next 18 years buffeted about by changing procedural rules, litigating whether any court would ever consider the evidence that should have been considered by the sentencers.

Once an investigation was conducted and dramatic evidence in support of a life sentence had been developed, there was no Court to hear it. None of the long list of pleadings in state and federal court involved disputes over the facts or substantive law regarding this viable claim.

Rather, for over a dozen years the State of Texas has fought to prevent any court from considering the merits of the various claims raised regarding why and how Mr. Moreno Ramos' jury was denied any information regarding the "diverse human frailities" of the life they were asked to take.

The state has never argued that the performance of trial counsel was adequate or that the compelling evidence later developed would not have been persuasive to fact finders. Rather, the Texas AG has fought tooth and nail to prevent any court from hearing or considering the evidence.

Mr. Moreno Ramos first presented that evidence to the state court after the International Court of Justice ruled in Avena and Other Mexican nationals (Mex. v. U.S.), No. 128 (I.C.J. Mar. 31, 2004) [hereinafter "Avena"] that the United States had violated the Vienna Convention on Consular Relations by failing to notify him of his right to consular assistance. The new life history evidence was presented for purposes of demonstrating what the government of Mexico could have provided had they been notified. It could not have been presented in that petition as a claim of ineffective assistance of trial counsel because such a claim was not previously unavailable, as the State of Texas has frequently pointed out.

Neither the trial court or the CCA considered the substance of the evidence at that time because the successive petition was found to be procedurally barred. *Ex parte Ramos*, No. 35,938-02 (Tex. Crim. App. 2007).

In federal Court, there was no vehicle for presenting the ineffective assistance of trial counsel claim until the Supreme Court opinion in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013) holding that ineffectiveness of initial-review state habeas counsel may excuse procedural default of ineffective assistance of trial counsel claims in federal court. *Id*. at 1921. Pending in federal

district court on his Avena claim at the time, Mr. Moreno Ramos immediately sought leave to amend with a trial counsel ineffectiveness claim, arguing that he can now establish cause under *Trevino.* Motion for Leave to File Amended Petition, D.E. 38, Ramos, No. 7:07-cv-0059 (S.D. Tex., 5/30/2013).

The past five years of litigation in federal court have all related to whether or not Mr. Moreno Ramos would be permitted amend his federal petition with the ineffectiveness claim, not about the substance of the claim itself.

Ridiculously, the state attempted to distinguish Mr. Moreno Ramos' case from the failures of state post-conviction counsel in *Medina* and *Trevino* by comparing the 8 non-cognizable record claims filed by his state habeas counsel to the "complete abandonment of counsel experienced by Martinez" (the Arizona petitioner in the Supreme Court holding that was ultimately extended to Texas in Trevino).[3]

This ignored that Mr. Moreno Ramos' state habeas counsel had been more deficient and filed fewer cognizable claims that the counsel in either of the relevant Texas cases of Trevino and Medina.

The State further argued that Mr. Moreno Ramos' ineffective assistance of trial counsel claim could not be heard by the federal courts because it had not yet been heard in state court and the state courts should get the first opportunity to consider the claim.[4]

However, when Mr. Moreno Ramos sought to go back into State Court to allow Texas that "first bite at the apple", pointing to legal developments in the CCA regarding consideration

3 Respondent's Opposition to Petitioner's Motion for Stay and Abeyance, Case 7:07-cv-00059 (TXSD), Doc. 66 at 4-5 (12/17/2014).
4 *Id.* at 9.

of the merits of a successive petition in light of Trevino[5], the State argued from the other side of its mouth that the federal court should not grant his Motion to Stay and Abey because raising the claim in the CCA would be "futile".

> Here, even if Ramos were given another opportunity to return to state court, there is no question that the Court of Criminal Appeals would dismiss any application as successive pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5.[6]

In the end, the claim was never heard: the Federal District Court declined to Stay and Abate to send the case back to state court but also denied leave to amend so that the claim could be heard in federal court[7]; the Fifth Circuit denied a Certificate of Appealability on procedural grounds and never reached the question of whether Mr. Moreno Ramos had stated a denial of a significant constitutional right[8]; and the United States Supreme Court denied Certiorari.

Thus, despite the appearance of a great deal of activity and legal process, Mr. Moreno Ramos' compelling life history has still never been considered in deciding the fairness of his death sentence. No Court has addressed how and why the jury that sentenced him to die heard neither evidence nor argument as to why his life should be spared. And no court has yet provided any merits review of the serious constitutional issues raised by these facts.

There is Now No Barrier to Consideration of Mr. Moreno Ramos' IAC Claim by the CCA

The only question regarding whether Mr. Moreno Ramos' ineffective assistance of trial counsel claim will now finally be heard and considered on the merits is whether there is a procedural route for raising the claim today that was not available when he was last before the Court. Article 11.07 §4(a)(1); *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009).

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5 Motion to Stay and Abey, Case 7:07-cv -00059, Doc. 64 at 1-2, (11/28/2017).
6 Opp., *supra*, at 10.
7 Final Judgment, D.E. 73, Ramos, No. 7:07-cv-0059 (S.D. Tex., 4/22/2015).
8 Opinion Order, Doc. 08-70044, Ramos, No. 08-70044 (5th Cir., 6/30/2016).

The operative facts necessary to meet the requirements of Article 11.071 §5(a) are only: What was the date of his last state habeas petition?; What rule would allow him back into state court?; and When did that procedural vehicle become available?

The CCA will adjudicate the merits of Mr. Moreno Ramos' argument that he was denied the effective assistance of counsel at trial because his last state habeas petition was denied in 2007 and a new rule, applied for the first time in 2011, provides for merits review.

In 2007, it was virtually impossible for Mr. Moreno Ramos to receive merits consideration in a subsequent application. Indeed, the CCA held that Mr. Moreno Ramos' VCCR claim was procedurally barred in March 2007, *Ex parte Cardenas et al.*, 2007 Tex. Crim. App. Unpub. LEXIS 691 (Tex. Crim. App. 2007).

However, CCA has since found that non-statutory exceptions to the Section 5 procedural bar do exist, and that it has the authority to apply judicially created doctrines when interpreting the plain language of Article 11.071, Section 5 of the Texas Code of Criminal Procedure.[9]

In 2011, the CCA found an initial application for writ of habeas corpus filed on behalf of a capital prisoner to be so deficient that it was not, "in fact, 'an application for writ of habeas corpus' under Article 11.071 of the Texas Code of Criminal Procedure." *Ex parte Medina,* 361 S.W.3d 633, 634 (Tex. Crim. App. 2011). The CCA remedied that constructive denial of counsel by exercising its discretion under Article 11.071 § 4A(b)(3) to appoint new counsel and granted the applicant 180 days to prepare and file a new state habeas application. *Id.* at 643.

In that case, where appointed counsel had conducted investigation and raised ten claims

9 *See Ex parte Granados,* No. WR-51, 135-01 (Tex. Crim. App. Jan. 10, 2007); Ex parte Hood, 211 S.W.3d 767 (Tex. Crim. App. 2007); Ex parte Moreno, No. WR-25, 897-01, 2007 WL 2019745 (Tex. Crim. App. 2007); Ex parte Ruiz, No. WR-27-328-03 (Tex. Crim. App. July 6, 2007).

but refused to plead the facts "because he did not want the State to know what his evidence was." *Id.* at 635-36, the CCA ordered briefing on the potential impact that the CCA's decision would have on "past, present and future 11.071 writ applications," *id.* at 637 n.8, and ultimately determined that counsel's deficient performance had deprived the applicant of his "one full and fair opportunity to present his constitutional or jurisdictional claims . . . . Not full because he is entitled to one bite at the apple, i.e., one application, and the document filed was not a proper writ application. Not fair because applicant's opportunity, through no fault of his own, was intentionally subverted by his habeas counsel." *Id.* at 642. Accordingly, the applicant was entitled to an entirely new "bite at the apple."

As the Fifth Circuit has since noted, *Ex parte Medina*, "allowed a mulligan after finding it was not the client's fault that [state habeas counsel] had filed an incomplete application." *Hall v. Thaler*, 504 Fed.Appx. 269, 284 (5th Cir. Dec. 21, 2012).

Merits review of Mr. Moreno Ramos's ineffective assistance of trial counsel claim by state post-conviction courts is exactly what the state of Texas always urged federal courts to ensure until they actually started doing it.

When urging the United States Supreme Court not to permit federal court review of claims defaulted by ineffective state post-conviction lawyers, the State of Texas represented that such oversight was unnecessary because Texas courts "have proven willing to forgive or ignore procedural defaults in response to developments in federal-habeas doctrine." Brief for the Respondent, *Trevino v. Thaler*, No. 11-10189, 2013 WL 179940 at *59 (Jan. 14, 2013). Respondent specifically invoked the CCA's decision in *Ex parte Medina*, 361 S.W.3d 633 (Tex. Crim. App. 2011), as a pre-*Trevino* basis for returning to the Texas court based on initial habeas counsel's ineffective assistance. Respondent informed the Supreme Court that:

> Texas courts likewise have a proven track record of hearing once-defaulted claims on the merits under appropriate circumstances. For example, the CCA has created equitable exceptions to the state-law bar on successive petitions—*including an exception for ineffective assistance of state-habeas counsel. See, e.g., Ex parte Medina*, 361 S.W.3d 633, 642-643 (Tex. Crim. App. 2011) (per curiam); *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000); *Ex parte Evans*, 964 S.W.2d 643, 647 (Tex. Crim. App. 1998). And the CCA has allowed prisoners to reopen their habeas applications and raise defaulted claims. *See, e.g., Ex parte Matamoros*, 2011 WL 6241295 (Tex. Crim. App. Dec. 14, 2011) (per curiam); *Ex parte Moreno*, 245 S.W.3d 419, 420 (Tex. Crim. App. 2008).

Brief for Respondent at 59, *Trevino v. Thaler*, No. 11-10189 (Jan. 14, 2013) (emphasis added).

The State of Texas assured the Supreme Court that "[i]f this Court changes the rules now, equity demands at a minimum that the [Court of Criminal Appeals] have an opportunity to reevaluate its procedural ruling and adjudicate Trevino's *Wiggins* claim on the merits." Brief for the Respondent, *Trevino v. Thaler*, No. 11-10189, 2013 WL 179940 at *59.

The Supreme Court did rule in favor of Mr. Trevino. And, Respondent is quite right that equity does demand that the CCA "adjudicate [Mr. Moreno Ramos'] *Wiggins* claim on the merits."

In other post-*Trevino* cases, Respondent has asked that the federal courts "force" a petitioner "to give the state courts what AEDPA demands—namely, *a fair opportunity to adjudicate his IATC claim on the merits*," by sending his claim back to state court for exhaustion. The Director's Supplemental Briefing Respecting the Petition for Rehearing En Banc at 4 (emphasis added), *Ibarra v. Thaler*, No. 11-70031 (5th Cir. June 4, 2013).

For Texas to now urge that an execution date be set without allow full and fair adjudication of this claim is inconsistent with the representations that the State has made to the U.S. Supreme Court and other federal and state courts presented with the ineffectiveness of state post-conviction counsel as a defense to procedural bars.

Mr. Moreno Ramos' Request

It is simply a fact that a new avenue for raising Mr. Moreno Ramos' ineffective assistance of trial counsel claim has been created since his last petition. Once filed, the petition will not be easily dismissed.

The facts here are unique – that the same lawyer represented Mr. Moreno Ramos in both state post-conviction and federal habeas denied him critical checks and balances present in virtually every capital case and is a circumstance that cannot possible happen again because the system has changed to avoid it. Texas has created mechanisms for appointment of capital state habeas counsel as well as the Office of Capital Writs. And, the federal Courts created a solution for those petitioners who had slipped through the system earlier by providing for appointment of "*Martinez/Trevino* counsel" in federal court to reconsider whether there were IAC claims that should have been raised – even where the initial federal habeas petition has already gone through district court but not yet been dismissed. *Speer v. Stephens*, No. 13-70001 (5th Cir., 2015). But the uniquely tragic timing placed Mr. Moreno Ramos outside the protection of these changes as he had already completed his initial post-conviction litigation in both state and federal courts.

That Mr. Moreno Ramos' first review state post-conviction attorney filed no cognizable claims whatsoever so that every Court at every level of state and federal proceedings found nothing to be addressed is a virtually unheard of circumstance, more egregious even than the deficits in *Medina*. And, that Mr. Moreno Ramos had actually opposed the appointment of that counsel in written pleadings submitted to the CCA and denied is extraordinarily unusual.

Further, that Mr. Moreno Ramos' trial counsel so completely abdicated the sentencing trial offering no witnesses, no evidence and no argument is equally rare and horrifying.

Under these facts, neither the trial ineffectiveness claim nor the assertion that Mr.

Moreno Ramos' subsequent petition will be authorized for review is a frivolous "Hail Mary" pass. These are substantive constitutional issues that have not been heard and that the State has been aware, since at least 2014, would be raised and litigated in state court once federal litigation was exhausted.

The next step for Mr. Moreno Ramos is to file a Successive Application for Post-Conviction Relief. Pursuant to 11.071 Sec. 5(c), the clerk of this Court will then forward the petition to the Court of Criminal Appeals as a successor petition to determine whether the claims meet the requirements of Art. 11.071§5. The CCA will then to consider it and either allow the successive litigation. Given the unique circumstances here and that the CCA will be seeing this claim for the first time, it is critically important that the Court have time to review and consider the complex procedural history and fact-intensive basis of the claim. The date requested by the State would not allow full and fair consideration of the petition.

Declining to set that specific date is no hardship to the State as the Texas Department of Corrections routinely provides courts and State officials with available dates for execution. There is no urgency to adopt this specific date at this time.

The State's larger concern, that this case not languish and that any remaining litigation begin to move expeditiously, can be address by setting a schedule.

It is not necessary to set an execution date in order to insure that Mr. Moreno Ramos seeks review in Texas state courts. Rather than setting an execution date now, this Court should issue an order setting a date by which Mr. Moreno Ramos must file any remaining state post-conviction litigation or the Court will then set an execution date.

Factoring in case deadlines and other pre-existing obligations, and considering the amount of work to be done, undersigned can commit to filing the petition by October 26, 2018.

CONCLUSION

Thus, for reasons stated above and any others that appear to the Court, Mr. Moreno Ramos asks that in lieu of setting an immediate execution date, this Court issue an order requiring that Mr. Moreno Ramos file any state post-conviction challenges to his conviction or sentence that he wishes to raise with the Texas Court of Criminal Appeals no later than October 26, 2018, and that this Court further order undersigned counsel to file a status report with this Court every 30 days after the filing of any subsequent petition to notify this Court of the status of the litigation. Should Mr. Moreno Ramos decline to file any further petition or should any such litigation be concluded without a grant of sentencing relief, this Court will then set an execution date for the next date available through TDCJ.

Respectfully Submitted,

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