CAPITAL CASE No. _____

IN THE

Supreme Court of the United States

ABEL REVILL OCHOA,
Petitioner
v.
LORIE DAVIS,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Respondent

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

PETITIONER'S APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-70016

United States Court of Appeals
Fifth Circuit
FILED
October 18, 2018
Lyle W. Cayce
Clerk

ABEL REVILL OCHOA,

Petitioner – Appellant,

v.

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

Respondent – Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:09-CV-2277

Before ELROD, GRAVES, and WILLETT, Circuit Judges.

PER CURIAM:*

Abel Revill Ochoa was convicted for the murder of his wife and daughter in Texas state court. After his unsuccessful direct appeal and state habeas petition, Ochoa filed a federal habeas petition under 28 U.S.C. § 2254 in the district court, which denied habeas relief and declined to issue a certificate of appealability (COA). Ochoa also filed a motion requesting funds for a

* Pursuant to Fifth Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

mitigation investigator, which the district court denied. Ochoa now seeks a COA on three claims for habeas relief and appeals the denial of his funding motion. We DENY the COA on all three claims and AFFIRM the denial of Ochoa's funding motion.

I.

Ochoa was convicted of capital murder of his wife and daughter in 2003. The state habeas court found the following:[1]

> 1. The Court finds that the thirty-year-old Ochoa shot several family members after smoking crack cocaine on Sunday, August 4, 2002. The record reflects that, twenty minutes after smoking a ten-dollar rock of crack, Ochoa entered his living room and systematically shot his wife Cecilia, their nine-month-old daughter (Anahi), Cecilia's father (Bartolo), and Cecilia's sisters (Alma and Jackie). Ochoa reloaded his .9mm Ruger and chased his 7-year-old daughter, Crystal, into the kitchen where he shot her four times. Of the six victims, only Alma survived.
>
> 2. The record reflects that, minutes after the shooting, the police stopped Ochoa while driving his wife's Toyota 4Runner. Ochoa told the arresting officer that the gun he used was at his house on the table, that he could not handle the stress anymore, and that he had gotten tired of his life. In a search conducted after arrest, the police found a crack pipe, steel wool, and an empty clear baggie on Ochoa's person. Ochoa gave the police a detailed written statement recounting his actions in the shootings.

After a trial, the jury found Ochoa guilty and sentenced him to death. On direct appeal, the Texas Court of Criminal Appeals (CCA) affirmed his conviction and sentence. *Ochoa v. State*, No. AP-79,663, 2005 WL 8153976, at *1 (Tex. Crim. App. Jan. 26, 2005). Through appointed counsel, Ochoa filed a state application for habeas corpus on February 11, 2005, to which he added a *pro se* supplement. Ochoa then filed an additional *pro se* application on March 19,

[1] These facts are presumed to be correct and entitled to deference under 28 U.S.C. § 2254(e)(1).

2007, to yet again supplement his previous application. The CCA denied state habeas relief. *Ex parte Ochoa*, No. WR-67,495-02, 2009 WL 2525740, at *1 (Tex. Crim. App. Aug 19, 2009). The CCA also rejected Ochoa's subsequent *pro se* application as an abuse of writ under Texas Code of Criminal Procedure Article 11.071, Section 5. *Id.*

Ochoa subsequently filed a federal petition for a writ of habeas corpus under 28 U.S.C. § 2254. Ochoa presented 21 claims for relief, including the three claims pertinent to his COA application, all of which the district court rejected as unexhausted, procedurally defaulted, or meritless. Ochoa alleged in his federal petition—for the first time—that he was shackled during the punishment phase of his trial, his right to due process was violated as a result, and his trial counsel was ineffective for failing to object to shackling. Ochoa attached an affidavit of his trial mitigation investigator who attended his trial, stating:[2]

> I recall being appalled when I saw Mr. Ochoa, who wore leg irons/shackles during his trial, walk to the witness stand. He passed by the jurors, who were sitting in the jury box, shuffling his feet due to the restraint the leg chains imposed. There could be no doubt that Mr. Ochoa was shackled when he walked to the witness stand[.]

The district court rejected Ochoa's due process claim as unexhausted and procedurally defaulted. The district court alternatively rejected this claim onthe merits, because "[t]he record [did] not reflect that Ochoa was even shackled, much less a reasonable probability that the jury was aware of it." As to the shackling-based ineffective assistance of trial counsel (IATC) claim, the

[2] Without deciding the propriety of considering the affidavit, we note that 28 U.S.C. § 2254(e)(2) "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011).

district court concluded that it was unexhausted, procedurally defaulted, and meritless.

Ochoa also alleged that, during *voir dire*, the trial court limited his trial counsel's ability to question the jurors whether they could fairly consider all mitigating evidence, and his trial counsel was ineffective for failing to timely object to such limitations. Ochoa claimed that, because of this error, the jurors were biased against him. Ochoa noted that, three days before jury selection was complete, one of the seated jurors was excused from service after remembering learning through pre-trial publicity that Ochoa shot his entire family and telling the court that she could not be fair and impartial. The district court rejected the *voir dire*-based IATC claim because it was unexhausted and procedurally defaulted. Alternatively, the district court concluded that this claim was meritless because the trial court dismissed the sole juror who had actual bias, and Ochoa merely speculated that the other jurors were biased. After denying relief, the district court declined to issue a COA for any claim.

Along with his § 2254 petition, Ochoa also filed a motion for funds for a mitigation investigator under 18 U.S.C. § 3599 to pursue a *Wiggins* claim based on his trial counsel's alleged failure to investigate mitigation evidence. *See Wiggins v. Smith*, 539 U.S. 510, 534–35 (2003) (concluding that counsel's failure to investigate and discover mitigation evidence can be prejudicial). The district court denied this motion because "Ochoa [did] not complain that trial counsel did not know about the poverty, alcoholism or abuse to be investigated, and [did] not indicate how further investigation of these matters will substantially improve his chances of success."

Ochoa now seeks a COA for the three claims based on alleged shackling and *voir dire*, and appeals the denial of funds under § 3599. Ochoa has not sought a COA for the *Wiggins* claim and concedes that the funding request is

entirely unrelated to the three claims for which he seeks a COA in this proceeding.

II.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal habeas petitioner must obtain a COA before appealing the denial of habeas relief. 28 U.S.C. § 2253(b), (c)(1); *United States v. Williams*, 897 F.3d 660, 661 (5th Cir. 2018). "A COA may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right.' " *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting 28 U.S.C. § 2253(c)(2)). Because the COA is a jurisdictional requirement, "[u]ntil the prisoner secures a COA, the [c]ourt of [a]ppeals may not rule on the merits of his case." *Id.*

"The COA inquiry . . . is not coextensive with a merits analysis." *Id.* The only question at this stage is whether "jurists of reason could disagree with the district court's resolution of [the petitioner's] constitutional claims or . . . conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Nevertheless, "when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious." *Buck*, 137 S. Ct. at 774.

If the district court denies relief on a procedural ground, petitioner must additionally show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

III.

Ochoa contends that reasonable jurists could disagree with the district court's resolution of his shackling-based and *voir dire*-based claims.[3] For the following reasons, we hold that the district court's conclusions are not debatable.

A.

Ochoa argues that the district court's resolution of his due process claim based on alleged shackling is debatable. Because of its inherently prejudicial nature, "[s]hackling a defendant is prohibited unless 'justified by an essential state interest such as the interest of courtroom security.' " *Hatten v. Quarterman*, 570 F.3d 595, 603 (5th Cir. 2009) (quoting *Deck v. Missouri*, 544 U.S. 622, 624 (2005)). If a court erroneously shackles a defendant during the punishment phase of a capital trial, the defendant's appearance in shackles "almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community" and "undermines the jury's ability to weigh accurately all relevant considerations . . . ." *Deck*, 544 U.S. at 633. Thus, ordinarily, the state must prove "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." *Id.* at 635 (alteration in original) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). On collateral review, however, a federal court grants relief only if the shackling error had a "substantial and injurious effect or influence in determining the jury's verdict." *Hatten*, 570 F.3d at 604 (quoting *Fry v. Pliler*, 551 U.S. 112, 121–22 (2007)).

[3] As Ochoa's counsel conceded during oral argument, we can rule on the COA issues regardless of how we decide the funding issue because the two are completely unrelated. Oral Argument at 6:54–7:32; 10:18–43, *Ochoa v. Davis* (No.17-70016), http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings.

Ochoa has presented a highly unusual shackling claim, because, as the district court noted, the record does not show whether Ochoa was even shackled during his trial. If Ochoa was not even shackled, no reasonable jurist can debate whether shackling violated his right to due process.

Assuming *arguendo* that Ochoa was, in fact, shackled, he is still not entitled to a COA. Federal courts may not grant habeas relief on unexhausted and procedurally defaulted claims. 28 U.S.C. § 2254(b)(1)(A); *Norman v. Stephens*, 817 F.3d 226, 231–32 (5th Cir. 2016). "If a claim is merely unexhausted but not procedurally defaulted, then, absent waiver by the state, a district court must either dismiss the federal petition or stay the federal proceeding while the petitioner exhausts the unexhausted claim in state court." *Norman*, 817 F.3d at 231 n.1. Unexhausted claims become procedurally defaulted if "the state court to which the prisoner would have to present his claims in order to exhaust them would find the claims procedurally barred . . . ." *Kittelson v. Dretke*, 426 F.3d 306, 315 (5th Cir. 2005). The district court concluded that Ochoa's unexhausted claim would be barred in state court under Article 11.071, Section 5. Ochoa concedes that "[t]his claim was not raised in state court and, thus, was unexhausted and likely defaulted . . . ." Appellant's Br. 36; *see also id.* at 42 n.5 ("[T]he [IATC] claim, as well as the underlying due process claim, were defaulted . . . ."). Accordingly, no reasonable jurist would debate whether this claim is unexhausted and procedurally defaulted.

B.

Next, Ochoa argues that the district court's resolution of his shackling-based IATC claim is debatable. Again, Ochoa concedes that this IATC claim is both unexhausted and procedurally defaulted. Therefore, it is not debatable that this IATC claim is procedurally defaulted.

Nevertheless, a federal court may review the merits of a procedurally barred claim if the petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law . . . ." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Under the *Martinez/Trevino* exception, the petitioner may establish cause "by showing that (1) his state habeas counsel was constitutionally deficient in failing to include the claim in his first state habeas application; and (2) the underlying ineffective-assistance-of-trial-counsel claim is 'substantial.' " *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir. 2014) (quoting *Martinez v. Ryan*, 566 U.S. 1, 14 (2012)); *see also Trevino v. Thaler*, 569 U.S. 413, 428–29 (2013) (applying *Martinez* to Texas). A claim is "insubstantial" if it "does not have any merit" or "is wholly without factual support." *Martinez*, 566 U.S. at 16.

Reasonable jurists would not disagree that Ochoa cannot overcome the procedural default, because Ochoa's underlying shackling-based IATC claim is insubstantial. *See id.* To establish an IATC claim, the petitioner must show "both that counsel performed deficiently and that counsel's deficient performance caused him prejudice." *Buck*, 137 S. Ct. at 775; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficiency, the petitioner "must overcome a 'strong presumption' that the representation did fall 'within the wide range of reasonable professional assistance.' " *Beatty v. Stephens*, 759 F.3d 455, 463 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice, the petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

The district court rejected this IATC claim because the underlying due process claim was meritless. It persuasively explained:

> Ochoa has not provided the information needed on federal habeas review to show that any shackling, if it indeed occurred, would

> have been unjustified under *Deck*, that an objection at trial would have prevailed, or that a point of error on appeal would have been sustained. Ochoa has not established that the due process complaint [based on shackling] . . . has merit, much less that his counsel was ineffective for failing to assert it in an objection.

Indeed, "[u]nsupported allegations and pleas for presumptive prejudice are not the stuff that *Strickland* is made of." *Sawyer v. Butler*, 848 F.2d 582, 589 (5th Cir. 1988), *reh'g*, 881 F.2d 1273 (1989), *aff'd sub nom. Sawyer v. Smith*, 497 U.S. 227 (1990). Thus, no reasonable jurist would disagree that Ochoa cannot overcome the procedural default.

C.

Ochoa also asserts that the district court's resolution of his *voir dire*-based IATC claim is debatable. Because Ochoa concedes his failure to present this IATC claim in state court, reasonable jurists would not disagree that this claim is unexhausted and procedurally defaulted.

Nor would reasonable jurists debate whether Ochoa can overcome the procedural default. This IATC claim is insubstantial. *See Martinez*, 566 U.S. at 16. As the district court noted, Ochoa cannot establish prejudice. *See Strickland*, 466 U.S. at 687. In *Garza v. Stephens*, this court rejected a habeas petitioner's contention that his trial counsel failed to question the jurors about their views relating to the death penalty and the murder of a police officer. 738 F.3d 669, 675 (5th Cir. 2013). There, the petitioner's claim "rel[ied] solely on speculation" that "the jurors *may* not have been fair and impartial." *Id.* at 676. The petitioner "[did] not even argue that, without the alleged errors, there is a reasonable probability that the jury would not have answered the special issues in the state's favor." *Id.* Here, as in *Garza*, Ochoa's contention is wholly insufficient. Although the trial court removed one juror because she professed her inability to be fair and impartial, Ochoa has provided no reason—other

than his speculation—why other jurors also may not have been fair and impartial.

In addition to his failure to establish prejudice under *Strickland*, Ochoa failed to show his trial counsel's deficiency. 466 U.S. at 687. By his own account, Ochoa's trial counsel objected not once, but twice. After the trial court removed the biased juror, Ochoa's trial counsel sought to question the remaining jurors. *Id.* In doing so, "[c]ounsel made a lengthy objection during which he referenced *an earlier defense request* to question the jurors about the accurate aggravating facts of the case but had been prohibited from doing so by the court." *Id.* (emphasis added). Ochoa's contention that his trial counsel should have objected sooner cannot overcome a strong presumption that the representation fell within the wide range of reasonable professional assistance. *See Beatty*, 759 F.3d at 463. Accordingly, no reasonable jurist would debate that this claim is procedurally barred.

Because no reasonable jurist would disagree with the district court's resolution of these three habeas claims, a COA is unwarranted.

IV.

We now turn to Ochoa's appeal of the denial of his 18 U.S.C. § 3599 motion for funds to pursue his unexhausted *Wiggins* claim.[4] We review a denial of a funding motion under a highly deferential abuse of discretion standard. *Crutsinger v. Davis*, 898 F.3d 584, 586 (5th Cir. 2018). "Section 3599(a) authorizes federal courts to provide funding to a party who is facing the prospect of a death sentence and is 'financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary

[4] As noted above, the funding issue is completely unrelated to the COA issues, and Ochoa has not sought a COA on the *Wiggins* claim.

services.' " *Ayestas v. Davis*, 138 S. Ct. 1080, 1092 (2018) (quoting 18 U.S.C. § 3599(a)).

If the requested services are "reasonably necessary," then a court "may authorize the [applicant's] attorneys to obtain such services on [his] behalf . . . ." 18 U.S.C. § 3599(f). Rejecting this court's "substantial need" test, the Supreme Court explained that "[a] natural consideration informing the exercise of that discretion is the likelihood that the contemplated services will help the applicant win relief." *Ayestas*, 138 S. Ct. at 1094. "Proper application of the 'reasonably necessary' standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Id.* "[T]he touchstone of the inquiry is 'the likely *utility* of the services requested' and that '§ 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone.' " *Crutsinger*, 898 F.3d at 586 (quoting *Ayestas*, 138 S. Ct. at 1094).

The district court denied Ochoa's funding motion under the prior "substantial need" standard before *Ayestas* was decided. Ochoa asks us to remand so the district court may consider his motion under the correct standard. While we have twice remanded funding denials after *Ayestas*, in other cases, we have decided that remand was unnecessary. *Compare Robertson v. Davis*, 729 F. App'x 361, 362 (5th Cir. 2018) (remanding to the district court), *and Sorto v. Davis*, 716 F. App'x 366, 366 (5th Cir. 2018) (same), *with Crutsinger*, 898 F.3d at 586–87 (deciding the funding issue without remanding), *and Mamou v. Davis*, No. 17-70001, 2018 WL 3492821, at *3–*5 (5th Cir. July 19, 2018) (same).

Here, remand is unnecessary, because "the reasons the district court gave for its ruling remain sound after *Ayestas* . . . ." *Mamou*, 2018 WL 3492821,

at *3. The requested funds cannot help Ochoa win relief on his unexhausted, procedurally defaulted, and meritless *Wiggins* claim.

Ochoa concedes that his *Wiggins* claim is unexhausted and procedurally defaulted. As the district court determined, Ochoa cannot overcome the procedural default because he "has not shown a lack of diligence by his original state habeas counsel in those proceedings, but even if he had, such counsel could not be found ineffective for the purpose of the *Martinez* exception for failing to present a meritless claim." *See also Reed*, 739 F.3d at 774. It is unlikely that Ochoa will clear these procedural hurdles. *See Ayestas*, 138 S. Ct. at 1094.

As to the merits, the district court astutely observed:

> In the instant case, even if the claim comes within the exception to procedural bar, the alternative merits analysis is correct. Ochoa's motion focuses on his complaint that trial counsel was ineffective for failing to investigate and present mitigating evidence at his trial. Ochoa does not complain that trial counsel did not present evidence of his background, but merely that he did not present enough of it. But this was not a case where an abusive background could help to explain a long criminal history or other pattern of misbehavior that inexorably led to the crime. This was a case where the defendant was a hard-working, family man who did not have as much as a traffic ticket before the afternoon when he murdered five people, including his wife, her family members and their children. Trial counsel chose to focus on the power of Ochoa's cocaine addiction to explain this sudden anomaly that occurred after his wife refused to buy him more drugs.
>
> At trial, counsel presented evidence from multiple expert and lay witnesses touching on Ochoa's life, background, character, culpability, potential for rehabilitation, and projected conditions of confinement if sentenced to life. Ochoa's complaint does not identify an area or subject that was not generally covered by the evidence trial counsel presented to the jury. Instead, he points to additional evidence of Ochoa's background that may have been cumulative of what was already presented or less relevant than the evidence actually presented. For example, he argues that

> additional evidence should have been presented regarding his early life in Mexico. Ochoa's father testified about their poor living conditions there, but Ochoa testified at trial that his earliest memories were living on a farm in Texas. Ochoa also now argues that additional testimony should have been provided regarding Ochoa's father, specifically regarding his alcoholism and abuse of Ochoa's family. But Ochoa and his brother testified that their father was an alcoholic that would beat their mother, requiring the assistance of Ochoa and his brothers to get their father off of her, and that this upset Ochoa greatly. Ochoa's father also testified about the history of alcohol abuse in their family, and that he used [to] get drunk and beat his family, but that he stopped after he had an accident while driving intoxicated. Defense expert Dr. Edward Nace also testified about the addiction problem in Ochoa's family, including his father's alcoholism and its impact on Ochoa.
>
> Not only is this allegation insufficient to warrant habeas relief, it would be insufficient to grant investigative funding.

We agree with this persuasive analysis. Because extensive mitigation evidence was available to Ochoa's defense and later presented to the jury, it is unlikely that the contemplated services will help Ochoa win relief on the *Wiggins* claim. *See Ayestas*, 138 S. Ct. at 1094. Moreover, Ochoa has not explained how further investigation would yield evidence that is different from what was available at the time of his trial. Instead, Ochoa is simply seeking to "turn over every stone," and § 3599 does not entitle him to do so. *Id.* The district court did not abuse its discretion in denying funding as the funding is not reasonably necessary.

V.

For the foregoing reasons, we DENY Ochoa's application for a COA and AFFIRM the denial of funds under § 3599(f).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ABEL REVILL OCHOA,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civ. Action No. 3:09-CV-2277-K
	§	
LORIE DAVIS, Director,	§	(Death Penalty Case)
Texas Department of Criminal Justice	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is therefore ORDERED, ADJUDGED and DECREED that all relief requested be, and the same is, hereby DENIED.

It is further ORDERED that the Clerk shall transmit a true copy of this Judgment to the parties.

SO ORDERED.

Signed September 21st, 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ABEL REVILL OCHOA,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civ. Action No. 3:09-CV-2277-K
	§	
LORIE DAVIS, Director,	§	(Death Penalty Case)
Texas Department of Criminal Justice	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER DENYING RELIEF

Petitioner Abel Revill Ochoa, sentenced to death for capital murder, petitions the Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, contending that his conviction and sentence are unconstitutional. For the reasons set out below, the Court **DENIES** the petition.

I. PROCEDURAL BACKGROUND

In 2003, Ochoa was convicted and sentenced to death for the capital murder of his wife and seven-year-old daughter during a shooting spree in which he killed five family members and seriously injured another. *State v. Ochoa,* No. F02-53582-M (194th Jud. Dist. Ct., Dallas Cnty., Tex. Apr. 23, 2003). The Texas Court of Criminal Appeals ("CCA") unanimously affirmed the conviction and death sentence. *Ochoa v. State,* No. AP-74,663 (Tex. Crim. App. Jan. 26, 2005). Ochoa's appointed counsel filed an initial post-conviction application for a writ of habeas corpus in the state trial court on

February 11, 2005, and Ochoa filed a *pro se* a "Supplementation to the Initial Writ to be Filed for Post-Conviction Relief" on February 21, 2005. *Ex parte Ochoa,* No. W02-53582-M(A) (194th Jud. Dist. Ct., Dallas Cnty., Tex.). The trial court on habeas review made findings of fact and conclusions of law on May 7, 2009, recommending that relief be denied in W02-53582-M(A). The CCA expressly adopted those findings and conclusions in its order denying relief. *Ex parte Ochoa,* No. WR-67,495-02, 2009 WL 2525740 (Tex. Crim. App. Aug. 19, 2009). Ochoa also filed a *pro se* application to supplement his writ of habeas corpus in cause number W02-53582-M(B) on March 19, 2007, which was construed as a subsequent habeas application. *Ex parte Ochoa,* No. W02-53582-M(B) (194th Jud. Dist. Ct., Dallas Cnty., Tex. Apr. 9, 2007). The CCA found that the claims presented in the subsequent writ application failed to meet the dictates of Article 11.071, § 5 of the Texas Code of Criminal Procedure, and dismissed his subsequent application as an abuse of the writ. *Ex parte Ochoa,* No. WR-67,495-01, 2009 WL 2525740 (Tex. Crim. App. Aug. 19, 2009).

Ochoa then filed his original petition for a writ of habeas corpus in this Court on August 19, 2010 (Doc. No. 8). On December 18, 2012, Ochoa filed a motion to stay these proceedings pending the United States Supreme Court's decision in *Trevino v. Thaler,* which was granted. (Motion, Doc. No. 33; Order, Doc. No. 38.) Following the decision in *Trevino,* this Court reopened these proceedings and ordered supplemental briefing on the impact of *Trevino* on this case. (Order, doc. 40.)

II. FACTUAL BACKGROUND

The state court described the facts of the offense as follows:

> 1. The Court finds that the thirty-year-old Ochoa shot several family members after smoking crack cocaine on Sunday, August 4, 2002. (RR38: 112). The record reflects that, twenty minutes after smoking a ten-dollar rock of crack, Ochoa entered his living room and systematically shot his wife Cecilia, their nine-month-old daughter (Anahi), Cecilia's father (Bartolo), and Cecilia's sisters (Alma and Jackie). (RR33: 32-36). Ochoa reloaded his .9 mm Ruger and chased his 7-year-old daughter, Crystal, into the kitchen where he shot her four times. (State's Exhibit 2A; RR-Examining Trial: 14). Of the six victims, only Alma survived. (RR33: 40-41).
>
> 2. The record reflects that, minutes after the shooting, the police stopped Ochoa while driving his wife's Toyota 4Runner. (RR33: 97-98). Ochoa told the arresting officer that the gun he used was at his house on the table, that he could not handle the stress anymore, and that he had gotten tired of his life. (RR33: 105-06). In a search conducted after arrest, the police found a crack pipe, steel wool, and an empty clear baggie on Ochoa's person. (RR33: 109-110). Ochoa gave the police a detailed written statement recounting his actions in the shootings. (RR34: 35-46; State's Exhibit 2A).

(State Habeas Record ("SHR") at 349.) These findings are entitled to deference. *See* 28 U.S.C. § 2254(e)(1).

III. CLAIMS

Ochoa presents twenty-one claims for relief in ten groups, arguing:

Effective Assistance of Counsel at Punishment

1. His trial counsel was ineffective in failing to investigate and to present significant mitigation evidence in the punishment phase of his trial;

Jury Selection

2. His trial counsel was ineffective in failing to conduct an adequate voir dire of his capital murder trial;

3. His trial counsel were rendered ineffective during the voir dire of his capital murder trial by the trial court's rulings;

4. He was denied the right to be tried by a fair and impartial jury by the lack of an adequate voir dire;

5. His appellate counsel was ineffective in failing to raise the voir dire issues in his direct appeal;

Confrontation Clause

6. His right to confront and cross-examine witnesses as guaranteed by the Confrontation Clause of the Sixth Amendment was violated when the trial court allowed testimonial evidence before the jury;

7. His trial counsel was ineffective in failing to object to the State's use of testimonial statements on the basis that it violated the Confrontation Clause;

Full and Fair Defense

8. His right to present a fair defense under the Sixth and Fourteenth Amendments was violated by the trial court's exclusion of important rebuttal evidence;

9. His trial counsel was ineffective in failing to properly object to the exclusion of important rebuttal evidence at the punishment stage of his trial;

State's Expert Evidence

10. He was deprived of his right to due process by the State's presentation of unreliable psychiatric rebuttal testimony by Dr. Richard Coons;

11. His appellate counsel was ineffective in failing to present the trial court's erroneous admission of Dr. Coons' testimony on direct appeal;

Shacking at Trial

12. His right to due process was violated when he was shackled during the punishment phase of his capital murder trial;

13. His trial counsel was ineffective in failing to object to the trial court's decision to place Ochoa in shackles;

Sufficiency of Evidence of Future Dangerousness

14. The evidence is legally insufficient to support the jury's answer to the first special issue finding that Mr. Ochoa would constitute a continuing threat to society;

Destruction of Evidence

15. He was deprived of rights to due process and to a fair trial when the State destroyed material and exculpatory evidence;

16. His trial counsel was ineffective in failing to preserve evidence in the State's possession or make a timely objection or motion to preserve it;

17. His appellate counsel was ineffective in failing to raise the State's unconstitutional destruction of evidence on direct appeal;

Mitigation Special Issue

18. He was denied due process and the right to be free from arbitrary and capricious punishment by the absence of a burden of proof for the mitigation special issue;

19. He was denied due process and the right to be free from arbitrary and capricious punishment by the absence of a definition of mitigating evidence in the court's charge to the jury;

20. His trial and appellate counsel were ineffective in failing object at trial and present on direct appeal the complaints raised in his eighteenth and nineteenth claims;

Fair Cross Section

21. His Sixth Amendment rights were violated by the empaneling of a jury that was not selected from a fair cross section of the community.

See Pet. at 51-153. Ochoa also requests an evidentiary hearing (Pet. at 129-41, 163). Respondent asserts that Ochoa's first, second, third, fourth, fifth, eighth, ninth, tenth, eleventh, twelfth, thirteenth and twentieth claims are unexhausted and procedurally barred and in the alternative that they lack merit (Ans. at 22-59, 75-97, 122-23), that Ochoa's sixth, fifteenth, eighteenth, nineteenth and twenty-first claims were denied by the state court as procedurally barred and in the alternative that they lack merit (Ans. at 59-70, 100-108, 113-21, 124-34), and that the state court properly adjudicated the merits of Ochoa's seventh, fourteenth, sixteenth and seventeenth claims (Ans. at 70-75, 97-99, 108-13). (The Court applies Ochoa's numbering of claims, which differs from that of Respondent, who combined Ochoa's second and third claim.)

IV. STANDARD OF REVIEW

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

A. Exhaustion

Under this statute, a federal court may not grant habeas relief on any claim that the state prisoner has not first exhausted in the state courts. *See* 28 U.S.C. § 2254(b)(1)(A); *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 787 (2011). However, the federal court may deny relief on the merits notwithstanding any failure to exhaust. *See* 28 U.S.C. § 2254(b)(2); *Miller v. Dretke*, 431 F.3d 241, 245 (5th Cir. 2005).

B. State-Court Procedural Determinations

If the state court denies the claim on state procedural grounds, a federal court will not reach the merits of those claims if it determines that the state-law grounds are independent of the federal claim and adequate to bar federal review. *See Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). If the state procedural determination is based on state grounds that were inadequate to bar federal habeas review, or if the habeas petitioner shows that an exception to the bar applies, the federal court must normally resolve the claim without the deference to the adjudication that 28 U.S.C. § 2254(d) otherwise requires. *See Miller v. Johnson*, 200 F.3d 274, 281 n.4 (5th Cir. 2000) ("Review is *de novo* when there has been no clear adjudication on the merits." (citing *Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir.1997))); *Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir.1999) ("the AEDPA deference scheme outlined in 28 U.S.C. § 2254(d) does not apply" to claims not adjudicated on

the merits by the state court); *Woodfox v. Cain*, 609 F.3d 774, 794 (5th Cir. 2010) (the AEDPA deferential standard of review would not apply to a procedural decision of the state court).

When the state court included an alternative analysis of the merits of the claim, however, AEDPA deference is applied to the state court alternative merits findings. *See Busby v. Dretke,* 359 F.3d 708, 721 n.14 (5th Cir. 2004) (affording deference to merits finding when state court "invoked a procedural bar as an alternative basis to deny relief"); *accord Rolan v. Coleman,* 680 F.3d 311, 319 (3rd Cir. 2012) (holding that "AEDPA deference applies when a state court decides a claim on procedural grounds and, alternatively, on the merits"); *Stephens v. Branker,* 570 F.3d 198, 208 (4th Cir. 2009) ("we agree with our sister circuits that an alternative merits determination to a procedural bar ruling is entitled to AEDPA deference"); *Brooks v. Bagley,* 513 F.3d 618, 624-25 (6th Cir. 2008) (holding that the state "court's alternative merits ruling receives AEDPA deference"); *Zarvela v. Artuz,* 364 F.3d 415, 417 (2d Cir. 2004) (affording deference when state court found "claim to be unpreserved, and, in any event, without merit"); *Johnson v. McKune,* 288 F.3d 1187, 1192 (10th Cir. 2002) (affording deference when "the state court relied on the merits as an alternative basis for its holding"); *Bigby v. Thaler,* No. 4:08-CV-765-Y, 2013 WL 1386667, at *19-*20 (N.D.Tex. Apr.5, 2013) (affording deference to state court's "alternative analysis" of claim on the merits"); *Battaglia v. Stephens,* No. 3:09-CV-1904-B, 2013 WL 5570216, at *24 (N.D. Tex. Oct.

9, 2013), *certificate of appealability denied,* 621 F. App'x 781 (5th Cir. 2015), *cert. denied,* 136 S. Ct. 803 (2016).

C. State-Court Merits Determinations

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

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim——
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In the context of § 2254(d) analysis, "adjudicated on the merits" is a term of art referring to a state court's disposition of a case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997). This provision does not authorize habeas relief, but restricts this Court's power to grant relief to state prisoners by barring claims in federal court that were not first unreasonably denied by the state courts. The AEDPA limits rather than expands the availability of habeas relief. *See Fry v. Pliler*, 551 U.S. 112, 119 (2007); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on

the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Richter*, 562 U.S. at 98. "This is a 'difficult to meet,' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court rulings be given the benefit of the doubt.'" *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal citations omitted) (quoting *Richter*, 562 U.S. at 102, and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

Under the "contrary to" clause, a federal court is not prohibited from granting federal habeas relief if the state court either arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *See Williams*, 529 U.S. at 412-13; *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000). Under the "unreasonable application" clause, a federal court may also reach the merits of a claim on federal habeas review"if the state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case." *White v. Woodall,* — U.S. —, 134 S. Ct. 1697, 1705 (2014) (quoting *Williams*, 529 U.S. at 407-408). "'[C]learly established Federal law' for purposes of § 2254(d)(1) includes only 'the holdings, as opposed to the dicta, of [the United States Supreme] Court's decisions.'" *Woodall,* — U.S. —, 34 S. Ct. at 1702 (quoting *Howes v. Fields,* — U.S. —, 132 S. Ct. 1181, 1187 (2012)). The standard for determining whether a state court's application was unreasonable is an objective one and

applies to federal habeas corpus petitions that, like the instant case, were filed after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

Federal habeas relief is not available on a claim adjudicated on the merits by the state court unless the record before that state court first satisfies § 2254(d). "[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Pinholster*, 563 U.S. at 185. The evidence required under § 2254(d)(2) must show that the state-court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

V. Analysis

A. Ineffective Assistance of Counsel

Throughout his petition, Ochoa contends that he was deprived of the effective assistance of counsel in various ways. Respondent asserts that most of these claims are procedurally barred and that all of them lack merit, frequently making that argument in the alternative. Because the same standard applies to each of these claims, they are reviewed together.

1. **Claims**

Ochoa claims that trial counsel were ineffective in: (1) failing to investigate and present significant mitigation evidence at the punishment phase of his trial (Pet. at 51-88); (2) failing to question potential jurors about their ability to give meaningful consideration to defense mitigation evidence and on their ability to be fair in a case involving five victims (Pet. at 89-102); (3) failing to make proper and timely objections to the State's use of testimonial statements under the Confrontation Clause (Pet. at 104-14); (4) failing to make proper and timely objections to the trial court's ruling excluding important rebuttal evidence (Pet. at 114-17); (5) failing to object to the trial court's decision to place Ochoa in shackles (Pet. at 144-46); (6) failing to preserve evidence in the State's possession or make a timely objection or motion to preserve it (Pet. at 151-53); and (7) failing to object to the failure of the jury charge to define mitigating evidence and to include a burden of proof on the mitigation special issue (Pet. at 154-61). Ochoa claims that his counsel on direct appeal was ineffective in: (1) failing to present the inadequate voir dire complaints on direct appeal (Pet. at 102-103); (2) failing to present the issue concerning the trial court's erroneous admission of Dr. Coons' unconstitutionally unreliable testimony on direct appeal (Pet. at 135-41); (3) failing to raise the issue concerning the State's unconstitutional destruction of evidence on direct appeal (Pet. at 153); and (4) failing to raise the issue concerning the lack of a burden of proof for the mitigation special issue and definition of mitigating evidence in the jury

instructions (Pet. at 154-61).

Respondent contends that all of these claims are procedurally barred except for Ochoa's seventh claim (failure to make Confrontation Clause objection at trial), sixteenth claim (failure to preserve evidence or object at trial), seventeenth claim (failure to raise issue of destroyed evidence on appeal), and that portion of the twentieth claim complaining about appellate counsel (failure to define mitigating evidence and assign a burden of proof to the mitigation special issue), which Respondent asserts were reasonably denied on the merits by the state habeas court. (Ans. at 70-75, 108-13, 123.)

2. Legal Standard

Claims of ineffective assistance of counsel are measured by the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The first prong of *Strickland* requires the defendant to show that counsel's performance was deficient. *Id.* at 687. The second prong of this test requires the defendant to show prejudice resulting from counsel's deficient performance. *Id.* at 694. The court need not address both prongs of the *Strickland* standard if the complainant has made an insufficient showing on one. *Id.* at 697.

In measuring whether counsel's representation was deficient, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88; *Lackey v. Johnson*, 116 F.3d 149, 152 (5th Cir. 1997). "It is well settled that effective assistance is not equivalent to errorless counsel or counsel judged

ineffectively by hindsight." *Tijerina v. Estelle*, 692 F.2d 3, 7 (5th Cir. 1982). A court reviewing an ineffectiveness claim must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional competence or that, under the circumstances, the challenged action might be considered sound trial strategy. *Gray v. Lynn*, 6 F.3d 265, 268 (5th Cir. 1993); *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Richter,* 562 U.S. at 106. In *Richter,* the Supreme Court noted the "wide latitude counsel must have in making tactical decisions" and the need to avoid judicial second-guessing. *Id.* (quoting *Strickland,* 466 U.S. at 689). "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Id.* at 110.

To satisfy the second prong of the *Strickland* test, the petitioner must show that counsel's errors were so egregious "as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The test to establish prejudice under this prong is whether "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability under this test is "a probability sufficient to undermine confidence in the outcome." *Id.*

3. Analysis

a. Exhausted Claims

Ochoa presented his seventh, sixteenth, seventeenth and a portion of his twentieth claims to the state court in his post-conviction habeas proceeding. These claims are reviewed under the deferential standard set out in 28 U.S.C. § 2254(d).

1. **Confrontation Clause**

In his seventh claim, Ochoa claims that trial counsel were ineffective in failing to make proper and timely objections under the Confrontation Clause to the State's use of testimonial statements. (Pet. at 104-14.) Respondent argues that the state court reasonably denied this claim for lack of merit. (Ans. at 70-75.)

This claim was presented to the state court in Ochoa's fourth ground for relief in his state habeas application. In that ground, Ochoa argued that his trial counsel was ineffective for failing to raise a Confrontation Clause objection to the admission of (1) a tape recording of a 1997 telephone conversation between Ochoa and his wife, and (2) testimony by Alma Alvizo that Cecilia reported that Ochoa put a gun to Cecilia's head three weeks before the capital offense. (SHR at 368.)

The state habeas court found that trial counsel obtained a hearing outside of the presence of the jury in which they objected to the admissibility of this evidence and did not perform deficiently based on the law as it existed at the time. (SHR at 368-71, 377-80.) The state habeas court further found that, even if trial counsel was deficient, Ochoa

had not shown prejudice under *Strickland.* (SHR at 371-77, 380-82.) These findings were expressly adopted by the CCA in its order denying relief. *Ex parte Ochoa,* 2009 WL 2525740 at *1.

Ochoa has not shown the state court's adjudication to be contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, or based on an unreasonable determination of facts on the record that was before the state court. As set out in the analysis of Ochoa's sixth claim in subsection (B)(2)(a)(1) below, the Confrontation Clause does not apply to the punishment phase of a capital murder trial, as when this evidence was admitted. *See United States v. Fields,* 483 F.3d 313, 326 (5th Cir. 2007). Ochoa acknowledges that the Supreme Court has not applied the Confrontation Clause to capital sentencing. (Reply at 51.) Counsel could not have been ineffective for failing to make a meritless objection. "Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins,* 19 F.3d 959, 966 (5th Cir. 1994); *Wood v. Quarterman,* 503 F.3d 408, 413 (5th Cir. 2007).

Further, the evidence was largely cumulative of evidence admitted from other sources. Ochoa admitted on cross examination that on the same recording he threatened to shoot Cecilia. *Ochoa,* slip op. at 17. Ochoa's father and his expert on future dangerousness also admitted that Cecilia had reported Ochoa putting a gun to her head. *Id.* at 20-23. The state court found that this rendered any error in admitting Cecilia's

similar statements harmless and not reversible, and that a Confrontation Clause objection would not have changed the outcome of the trial. *Id.* at 17, 23; (SHR at 369, 376-77, 382.) Before this Court, Ochoa has not satisfied either prong of *Strickland,* and has not shown that the state court's adjudication was incorrect, much less unreasonable. Therefore, Ochoa's seventh claim is DENIED for lack of merit.

2. Destruction of Evidence

In his sixteenth claim, Ochoa claims that his trial counsel was ineffective in failing to preserve evidence in the State's possession or make a timely objection or motion to preserve it (Pet. at 146-53). In his seventeenth claim, Ochoa claims that his counsel on direct appeal was ineffective in failing to raise the issue concerning the State's unconstitutional destruction of evidence (Pet. at 153). Respondent argues that the state court reasonably denied these claims for lack of merit. (Ans. at 108-13.)

These claims were presented to the state habeas court as Ochoa's fifth and seventh claims in his application for state post-conviction habeas relief. The state court found that Ochoa had not shown that the evidence in question, drug paraphernalia, was the same that was used in connection with the murders or had any residue to test. (SHR at 383.) The state court also found that trial counsel moved in the trial court to preserve all such evidence and that, even though it was not made soon enough to preserve this evidence, counsel's conduct was reasonably based on his past experience and normal circumstances in accordance with prevailing professional norms. (SHR at 385-86.) The

state court also found based on the record that the evidence was destroyed pursuant to administrative protocol and did not demonstrate what would have been necessary to win such a claim on appeal, specifically including the bad faith of the police. The state court concluded that Ochoa had not satisfied either prong of *Strickland* with respect to either trial or appellate counsel's assistance. (SHR at 386-87, 392-94.) These findings were expressly adopted by the CCA in its order denying relief. *Ex parte Ochoa,* 2009 WL 2525740 at *1.

Ochoa has not shown the state court's adjudication to be contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, or based on an unreasonable determination of facts on the record that was before the state court. Ochoa acknowledges that he "must show that the officer or governmental agent who destroyed the evidence was acting in bad faith." (Pet. at 147 (citing *Arizona v. Youngblood,* 488 U.S. 51, 57-58 (1988) and *California v. Trombetta,* 467 U.S. 479, 488-89 (1984)).)

The record indicates that the trial court conducted a hearing on Ochoa's motion to dismiss the indictment for failure to preserve exculpatory evidence in which Officer Jason Cox testified that he obtained a crack pipe, some brillo and a small clear plastic baggie incident to Ochoa's arrest. (32 State Reporter's Record ("RR") at 7.) Officer Cox informed the detectives about the seized items and the detectives told him to "do what you want to with it," which Officer Cox took to mean to put it in the evidence property

room. (32 RR at 10.) Officer Cox explained how he designated the property on the form.

> A. They told me that -- do what I wanted to with the property, so I had to do like a offense page so you can locate the property. And on the offense page I did a found property, because it was found on his person, but they weren't charging him with possession of crack pipe, so I just put it in found property. And I was unaware in 61 days they were going to destroy it.
>
> Q. Okay. You certainly would not have done that if you had known that they were going to destroy it?
>
> A. No, sir.

(32 RR at 18.)

The officer also testified that there did not appear to be any drug residue on the items.

> Q. Officer, you said you -- you took a -- what looked like a brand new shiny crack pipe off the defendant when you arrested him?
>
> A. Yes, sir.
>
> Q. Did it look like it had any residue on it?
>
> A. No. If it would have had residue on it, I would have to put it in the -- in the actual drug room instead of just found property.
>
> Q. Same with the baggie and the brillo?
>
> A. Correct. If it looks like it has drug residue, the property room won't take it as like found property -- or they'll take it as found property, but you have to put it in a drug baggie and get it sealed and all that. I just put it in like a paper sack.

(32 RR at 20.)

Dallas Police Sergeant Judy Katz testified at the hearing that the evidence was destroyed in accordance with the standard procedures for the Dallas Police Department in retaining and destroying found property. (32 RR at 30.) The trial court denied the motion and later on habeas review found that, "but for Officer Cox's good-faith decision to designate the paraphernalia as found property rather than evidence, the paraphernalia would not have been destroyed." (SHR at 385.)

The evidence before the state court and this court indicates no bad faith in the destruction of the evidence. Therefore, its conclusion that trial and appellate counsel were not shown ineffective in failing to do more to preserve this evidence or raise it on appeal appears correct. Trial counsel moved to protect the evidence and later to dismiss the indictment based on the destruction. Ochoa has not overcome the state court's findings that trial counsel's conduct was not ineffective or that a claim on appeal would not have prevailed. "When the petitioner challenges the performance of his appellate counsel, he must show that with effective counsel, there was a reasonable probability that he would have won on appeal." *Moreno v. Dretke,* 450 F.3d 158, 168 (5th Cir. 2006) (citing *Smith v. Robbins,* 528 U.S. 259, 285 (2000)). Ochoa has not shown that he would have prevailed on appeal or that the state court findings that counsel were not ineffective were incorrect, much less unreasonable. Accordingly, Ochoa's sixteenth and seventeenth claims are DENIED for lack of merit.

3. **Mitigation Special Issue**

Ochoa asserts as a part of his twentieth claim that appellate counsel was ineffective for failing to object to the charge to the jury regarding the lack of a burden of proof to the mitigation special issue. This issue was referenced in his statement of the claim (Pet. at 154), but not in his briefing on the claim. (Pet. at 161.) Respondent argues that this claim should be considered waived because it was inadequately briefed. (Ans. at 123.) This position is well taken, but it is unnecessary to find that this claim is waived because, even reading the allegations to include this claim, Ochoa has not made the showing required by 28 U.S.C. § 2254(d) to obtain relief.

This claim was presented to the state court in Ochoa's seventh ground for state habeas relief and was denied for lack of merit. (SHR at 392-94.) This finding was expressly adopted by the CCA in its order denying relief. *Ex parte Ochoa,* 2009 WL 2525740 at *1.

Appellate counsel's conduct is measured by the same *Strickland* standard, requiring a habeas petitioner to show constitutionally deficient performance and prejudice. *See United States v. Reinhert,* 357 F.3d 521, 525 (5th Cir. 2004). Where the allegation of ineffective assistance of appellate counsel is based on counsel's failure to advance certain issues on appeal, courts have refused to find counsel ineffective when the proposed issues are without merit. *See Williams v. Collins,* 16 F.3d 626, 635 (5th Cir. 1994); *Mendiola v. Estelle,* 635 F.2d 487, 491 (5th Cir. 1981).

As set out in subsection (c)(6) below, this claim has been rejected in this circuit. *See Rowell v. Dretke,* 398 F.3d 370, 378 (5th Cir. 2005). Ochoa has not shown that the state court's finding was incorrect, much less that its adjudication was an unreasonable one. In fact, the state court's finding and adjudication are supported by the record and binding precedent.

That part of Ochoa's twentieth claim complaining that appellate counsel was ineffective for failing to object to the charge to the jury regarding the lack of a burden of proof to the mitigation special issue is DENIED for lack of merit.

b. Procedural Bar

Respondent asserts that Ochoa's first, second, third, fifth, ninth, eleventh and thirteenth claims, and that portion of his twentieth claim complaining about trial counsel, are all unexhausted and now procedurally defaulted. (Ans. at 24-28, 46, 57, 78, 87, 95, 122-23.) Of those allegedly defaulted claims, Ochoa does not dispute that they were not presented to the state court in the original state habeas proceeding. In fact, he lists all but the twentieth claim in his request for a stay to return to the state court to exhaust these claims. (Reply at 54-55.) Because only that portion of his twentieth claim asserting a complaint against trial counsel regarding the burden of proof for the mitigation special issue was presented to the state court, the Court finds that the remainder of Ochoa's twentieth claim along with his first, second, third, fifth, ninth, eleventh and thirteenth claims were not presented to the state courts.

As mentioned above, federal habeas petitioners are required to exhaust their claims by fairly presenting them to the highest state court before asserting them in federal court. *See Richter,* 562 U.S. at 103; *Picard v. Connor,* 404 U.S. 270, 275 (1971); *Deters v. Collins,* 985 F.2d 789, 795 (5th Cir. 1993). This Court cannot grant relief on an unexhausted claim. *See* 28 U.S.C. § 2254(b)(1)(A). Generally, a petition containing both exhausted and unexhausted claims must be dismissed or stayed so that the petitioner may return to state court to exhaust state remedies. *See Rhines v. Weber,* 544 U.S. 269, 277-78 (2005); *Rose v. Lundy,* 455 U.S. 509, 519-20 (1982). Such action would be futile and the federal court should find claims to be procedurally barred if "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman,* 501 U.S. at 735 n.1; *see also Neville v. Dretke,* 423 F.3d 474, 480 (5th Cir. 2005) (holding unexhausted claims ineligible for stay when state court would find them procedurally barred). However, a habeas petitioner may avoid the imposition of this bar by demonstrating a recognized exception. *Coleman,* 501 U.S. at 750.

Texas law precludes successive habeas claims except in narrow circumstances. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5 (West 2015). This is a codification of the judicially created Texas abuse-of-the-writ doctrine. *See Barrientes v. Johnson,* 221 F.3d 741, 759 n.10 (5th Cir. 2000). Under this state law, a habeas petitioner is procedurally barred from returning to the Texas courts to exhaust his claims unless the petitioner

presents a factual or legal basis for a claim that was previously unavailable or shows that, but for a violation of the United States Constitution, no rational juror would have found for the State. *See id.* at 758 n.9. This is an independent and adequate state law ground to bar federal habeas review. *Hughes v. Quarterman,* 530 F.3d 336, 342 (5th Cir. 2008); *Canales,* 765 F.3d at 566. Therefore, unexhausted claims that could not make the showing required by this state law would be considered procedurally barred from review on the merits in this Court unless an exception is shown. *See Beazley v. Johnson,* 242 F.3d 248, 264 (5th Cir. 2001). Ochoa asserts that each of these allegedly defaulted claims come within the exception to procedural bar created in *Martinez v. Ryan,* — U.S. —, 132 S. Ct. 1309 (2012). (P's Supp. Br., doc. 44.)

1. Appellate Counsel

The *Martinez* exception does not apply to claims of ineffective assistance of appellate counsel. *Reed v. Stephens,* 739 F.3d 753, 778 n.16 (5th Cir.), *cert. denied,* 135 S. Ct. 435 (2014). Therefore, this exception would not apply to three of Ochoa's unexhausted and now procedurally barred claims: (1) Ochoa's fifth claim, that his counsel on direct appeal was ineffective in failing to raise on direct appeal the complaints in his second, third and fourth claims before this Court (Pet at 102-103); (2) Ochoa's eleventh claim, that his counsel on direct appeal was ineffective in failing to present the issue concerning the trial court's erroneous admission of Dr. Coons' unconstitutionally unreliable testimony on direct appeal (Pet. at 135-41); and (3) that portion of Ochoa's

twentieth claim complaining that his counsel on direct appeal did not raise the issue concerning the lack of a definition of mitigating evidence in the jury charge (Pet. at 161). These claims were not presented to the state court, and would now be barred by the Texas abuse-of-the-writ rule. Because the *Martinez* exception does not apply to these claims, these three claims are DENIED as procedurally barred.

Further, as shown in the alternative analysis in subsection (c) below, each of these claims lacks merit. Therefore, if these claims were not procedurally barred, they would each be denied for lack of merit.

2. **Trial Counsel**

Ochoa's first, second, third, ninth, thirteenth and a portion of his twentieth claim each assert ineffective assistance of trial counsel claims that were presented to the state court. If these claims were presented to the state court in a subsequent state habeas application, they would be barred by the Texas abuse-of-the-writ rule. To show that any of these claims come within the exception to procedural bar created in *Martinez,* Ochoa must show that it is a substantial claim that was not presented to the state court in the initial-review collateral proceeding because counsel in that proceeding was ineffective. *Martinez*, 132 S. Ct. at 1320. The habeas petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 1318-19 (citing *Miller-El v. Cockrell,* 537 U.S. 322 (2003) (describing standards for certificates of

appealability)). To determine whether a claim has some merit, this Court applies the familiar standard set forth in *Strickland*.

As set out in the alternate merits analysis in subsection (c) below, none of these claims have any merit. Ochoa has not shown a lack of diligence by his original state habeas counsel in those proceedings, but even if he had, such counsel could not be found ineffective for the purpose of the *Martinez* exception for failing to present a meritless claim. *See Garza v. Stephens,* 738 F.3d 669, 676 (5th Cir. 2013) (agreeing with the district court that "habeas counsel was not ineffective in failing to raise [a] claim at the first state proceeding" because "there was no merit to [the petitioner's] claim"), *cert. denied,* 134 S. Ct. 2876 (2014); *Beatty v. Stephens,* 759 F.3d 455, 466 (5th Cir. 2014); *Braziel v. Stephens,* No. 3:09-CV-1591-M, 2015 WL 3454115, at *10 (N.D. Tex. May 28, 2015), *certificate of appealability denied,* 631 F. Appx. 225 (5th Cir. 2015), *cert. denied,* 136 S. Ct. 1825 (May 2, 2016). Therefore, these claims are all DENIED as barred.

c. Alternative Merits Analysis

In the alternative, Ochoa has not shown that any of his procedurally barred claims of ineffective assistance of counsel have any merit.

1. <u>Mitigation Evidence</u>

In his first claim, Ochoa complains that trial counsel were ineffective in failing to investigate and to present significant mitigation evidence at the punishment phase of his trial (Pet. at 51-88). At his trial, Ochoa's attorneys presented evidence that he was

raised in a poor, disadvantaged family that emigrated from rural Mexico, that he had a good school record, that he was a kind and quiet person with strong moral and religious beliefs who did not normally hurt people, threaten people, or even have a criminal record. Instead, he had a good employment record and had been attentive to the needs of his family before the offense. His attorneys also presented lay and expert testimony that Ochoa had a severe drug addiction that resulted in the serious mental health problems that triggered these tragic murders.

Ochoa acknowledges that trial counsel obtained and presented an extensive mitigation case before the jury, but argues that his background and early life were presented in a truncated form that did not properly make the link with the drug-addiction and brain-damage evidence presented to the jury due to counsel's poor preparation and failure to obtain the needed investigative assistance sooner. (Pet. at 82-85, 87-88.)

> Mr. Ochoa's defense counsel presented considerable mitigation evidence of Mr. Ochoa's drug addiction and brain damage, and through expert testimony, linked these factors to his behavior to explain what went wrong with an otherwise peaceable and humble man. But what was lacking in the case was the background that may have explained Mr. Ochoa's fateful choice to try cocaine or placed it in the overall context of Mr. Ochoa's life. There was little evidence presented, other than a few lines of testimony from Abel, Sr., Gabriel, and Javier, as well was some testimony from Mr. Ochoa himself, about his father's alcoholism and abuse Mr. Ochoa and the rest of the family endured during his most important formative years. These witnesses, as well as others in the family, could have presented much fuller and more compelling portraits of what life was like growing up in the Ochoa home.

(Pet. at 87.) Ochoa argues that "the jury heard some of this evidence, it surely did not hear all of it" because the mitigation investigator was not obtained early enough, the witnesses were not prepared well enough, and counsel did not present it well enough. (Pet. at 88.)

In order to prevail on a claim that trial counsel was ineffective for failing to conduct a sufficient mitigation investigation and presentation, a habeas petition must do more than complain that the presentation at trial could have been better. *See Strickland,* 466 U.S. at 689. In order to avoid the "distorting effects of hindsight," the United States Court of Appeals for the Fifth Circuit has cautioned: "We must be particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Carty v. Thaler,* 583 F.3d 244, 258 (5th Cir. 2009) (quoting *Dowthitt v. Johnson,* 230 F.3d 733, 743 (5th Cir. 2000)); *see also Ward v. Stephens,* 777 F.3d 250, 265 (5th Cir.), *cert. denied,* 136 S. Ct. 86, 193 L. Ed. 2d 76 (2015). Ochoa's claim comes down to a matter of degrees, relying upon precisely the sort of judicial second-guessing that *Strickland* was intended to avoid.

Ochoa has not satisfied either prong of *Strickland.* He has not shown that counsel did not know enough about this mitigating evidence to make a "reasonable strategic decision 'to balance limited resources' and to focus on expensive clinical psychologists and forensic experts rather than on investigators." *Ward,* 777 F.3d at 264 (citing *Richter,*

562 U.S. at 107 ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.")). Further, Ochoa has not shown that presenting more evidence on these points or additional details would have changed the outcome of the trial. "The likelihood of a different result must be substantial, not just conceivable." *Gates v. Davis,* — Fed. Appx. —, 2016 WL 4473230 at *1 (5th Cir. Aug. 24, 2016) (quoting *Richter,* 562 U.S. at 112). Accordingly, if this claim were not procedurally barred, it would be denied for lack of merit.

2. **Jury Selection**

In his second and third claims, Ochoa complains that trial counsel were ineffective in failing to conduct an adequate voir dire made the subject of his fourth claim, specifically that counsel did not question potential jurors about their ability to give meaningful consideration to defense mitigation evidence and to be fair in a case involving five victims and did not properly object to the trial court's ruling limiting questioning of the potential jurors. (Pet. at 89-102.) In his fifth claim, Ochoa asserts that his counsel on direct appeal was ineffective in failing to raise these jury selection issues. (Pet. at 102-103.) In addition to asserting the procedural bar, Respondent argues that these claims lack merit (Ans. at 46-55, 57-59), specifically pointing out that Ochoa has not demonstrated prejudice by showing that any juror was actually biased against him (Ans. at 47, 56).

In support of these claims, Ochoa asserts that prejudice is shown in that the prosecutor argued in the punishment stage that the death sentence should be imposed because there were five victims. (Pet. at 100.) He also argues that prejudice should be presumed. (Pet. at 100-101.)

In *Neville,* 423 F.3d at 482, the United States Court of Appeals for the Fifth Circuit addressed the prejudice required to show that trial counsel was ineffective in failing to question potential jurors during voir dire about their position on an alleged "linchpin defense" that he suffered from lupus. The Court of Appeals held that the habeas petitioner had not satisfied either prong of *Strickland.* Regarding the prejudice prong, Neville had failed to show two things: "First, he failed to show that any particular juror was in fact prejudiced against the lupus defense. Second, he failed to establish that, even if Neville's counsel had indeed questioned the jurors about lupus, the jurors would have found the lupus evidence persuasive enough to affect the outcome." *Id.* at 483. Similarly, in *United States v. Fisher,* 480 F. Appx. 781, 782 (5th Cir. 2012), the Court of Appeals held that trial counsel was not ineffective in failing to question or challenge a potential juror because there was no credible evidence that the juror was biased.

More specifically, in holding that a claim was not shown to be substantial under *Martinez,* the Court of Appeals in *Garza,* 738 F.3d at 675-76, held that an allegation that

trial counsel was ineffective in failing to ask potential jurors about their views on the death penalty failed to sufficiently allege prejudice.

> Garza utterly fails to satisfy *Strickland*'s second prong, relying solely on speculation. Indeed, Garza does not even argue that, without the alleged errors, there is a reasonable probability that the jury would not have answered the special issues in the state's favor. Instead, Garza argues that, because [trial counsel] did not ask what the jurors would do in a case exactly like this one, the jurors may not have been fair and impartial. Garza therefore fails to establish that he suffered prejudice as a result of trial counsel's alleged error.

Id. at 676.

Ochoa points out that a juror who had been seated was excused when she later remembered the pretrial publicity on this case and told the court that she could not be fair. (Pet. at 94.) This may have been a sufficient showing of prejudice if the juror had not been excused. But to find based on this that other jurors were biased against Ochoa, or would have remembered unfavorable pretrial publicity, because of the failure to ask that question would be the kind of speculation that the Court of Appeals has discouraged in opinions like *Garza*.

Because Ochoa has not alleged sufficient prejudice to satisfy the second prong of *Strickland*, Ochoa's second and third claims have no merit. Accordingly, if they were not procedurally barred, these claims would be denied for lack of merit.

In Ochoa's fifth claim, he complains that his counsel on direct appeal was ineffective in failing to raise on direct appeal the complaints in his second, third and fourth claims before this Court. (Pet. at 102-103.) As mentioned above, appellate

counsel's conduct is measured by the same two-prong *Strickland* standard. "[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith,* 528 U.S. at 288 (citing *Jones v. Barnes,* 463 U.S. 745 (1983)). When appellate counsel filed a brief on appeal, a habeas petitioner must show "that a particular nonfrivolous issue was clearly stronger than issues that counsel did present. In both cases, however, the prejudice analysis will be the same." *Id.* at 288. Ochoa has not presented any comparison between the underlying due process claim (his fourth claim) and the ones that were presented on appeal.

The trial court has wide discretion in determining the scope and content of the voir dire. To show a violation of due process from the trial court's limits on a voir dire examination, a complaint must show the deprivation of a question that was constitutionally compelled. To make this showing "it is not enough that requested voir dire questions might be helpful. Rather, the trial court's failure to ask (or permit counsel to ask) the questions must render the defendant's trial fundamentally unfair." *Sells v. Thaler,* Civ. No. SA-08-CA-465-OG, 2012 WL 2562666, at *18 (W.D. Tex. June 28, 2012) (citing *Morgan v. Illinois,* 504 U.S. 719, 730 n.5 (1992); *Mu'Min v. Virginia,* 500 U.S. 415, 425-26 (1991)). Only two specific inquiries of voir dire have been found by the Supreme Court to be constitutionally compelled: inquiries into a juror's racial prejudice, *Mu'Min,* 500 U.S. at 424, and whether a juror in a capital case had "general

objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Morgan,* 504 U.S. at 732 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968)); *see Perez v. Prunty,* 139 F.3d 907, at *1 (9th Cir. 1998). Ochoa has not shown that the questions he sought were constitutionally compelled. Therefore, he has not shown that his underlying fourth claim for relief would have merit.

Ochoa has not shown that any of the claims that were not raised on appeal would have prevailed and has not satisfied either prong of *Strickland* regarding his fifth claim. Accordingly, if this claim were not procedurally barred, it would also be denied for lack of merit.

3. Rebuttal Evidence

In his ninth claim, Ochoa complains that trial counsel were ineffective in failing to make proper and timely objections to the trial court's ruling excluding important rebuttal evidence of Bessie McClendon and Victor Faz from the punishment phase of his trial. (Pet. at 114-17.) Respondent argues that Ochoa has not proven trial counsel's conduct to be deficient and has not proven the content of the excluded testimony. (Ans. at 78-79.)

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973). This constitutional right of criminal defendants to present evidence in their defense is important, but not absolute. It does not include evidence

that is cumulative, confusing, harassing, prejudicial, or only marginally relevant. *See Kittelson v. Dretke,* 426 F.3d 306, 319 (5th Cir. 2005); *Miller v. United States,* No. A-06-CR-125 LY, 2012 WL 727897, at *4 (W.D. Tex. Mar. 5, 2012). "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer,* 523 U.S. 303, 308 (1998). Such rules "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve'" and their application does not infringe "upon a weighty interest of the accused." *Id.* (quoting *Rock v. Arkansas,* 483 U.S. 44, 56 (1987)). "The constitutional right to present a defense is not abridged unless the evidence was so material that it deprived the defendant of a fair trial." *Miller,* 2012 WL 727897, at *5 (citing *Allen v. Howes,* 599 F.Supp.2d 857, 872 (E.D. Mich. 2009)).

The evidence that Ochoa complains was omitted appears to be either cumulative of other evidence that was before the jury or of limited mitigating value. Ochoa complains that trial counsel was not able to get the following testimony admitted through McClendon and Faz: (1) what Cecilia told them about a secret between Cecilia and her mother regarding her first child, Jonathan, that hurt Ochoa when he learned about it and caused their separation; (2) about the close and loving relationship between Cecilia and Ochoa and their children; (3) that Ochoa had not abused Cecilia; and (4) that Cecilia was not afraid of Ochoa. (Pet. at 114-15.) Respondent points out that no

affidavits have been produced to show the missing content of the witnesses' testimony and, therefore, the content of their testimony is completely speculative and insufficient to show a violation of *Strickland.* (Ans. at 79.)

Ochoa's complaint focuses on counsel's examination of witnesses and responses to objections and evidentiary rulings during the trial. Because counsel has wide discretion, "decisions as to whether or not to call certain witnesses to the stand, whether to ask or refrain from asking certain questions, and the like, are tactical determinations. Errors, even egregious ones, in this respect do not provide a basis for post-conviction relief." *United States v. Rubin,* 433 F.2d 442, 445 (5th Cir. 1970). As in complaints regarding counsel's failure to call witnesses, Ochoa's complaint about the failure to get specific testimony from those witnesses before the jury calls the missing testimony into question. Therefore, he should submit the same type of proof required to support those complaints as it pertains to the content of the witness testimony.

"To prevail on an ineffective assistance claim based upon uncalled witnesses, an applicant must name the witness, demonstrate that the witness would have testified, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable." *Gregory v. Thaler,* 601 F.3d 347, 352 (5th Cir. 2010) (citing *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir. 1985)). In construing this requirement, federal courts require habeas petitioners "to provide affidavits or other probative proof to establish the content of the proposed witnesses' testimony." *Sandifer*

v. Stephens, Civ. Action No. H-14-0688, 2015 WL 4207200, at *7 (S.D. Tex. July 2, 2015); *Gregory,* 601 F.3d at 353 ("conclusory statements regarding the content of the uncalled witnesses testimony are insufficient to demonstrate ineffective assistance"); *Gamble v. Stephens,* Civ. Action No. H-14-1492, 2014 WL 5305860, at *5 (S.D. Tex. Oct. 15, 2014) (conclusory allegations that are not supported in the record are insufficient to establish ineffective assistance of counsel); *Koch v. Puckett,* 907 F.2d 524, 530 (5th Cir.1990) ("mere conclusory allegations on a critical issue are insufficient to raise a constitutional issue" in federal habeas review).

Ochoa presents no affidavits or other proof from these witnesses, and offers only his own conclusory allegations regarding what those witnesses would have said. The Court of Appeals has explained that "[w]here the only evidence of a missing witnesses' testimony is from the defendant, this Court views claims of ineffective assistance with great caution." *Sayre v. Anderson,* 238 F.3d 631, 636 (5th Cir. 2001) (quoting *Lockhart v. McCotter,* 782 F.2d 1275, 1282 (5th Cir. 1986)); *see also Evans v. Cockrell,* 285 F.3d 370, 377 (5th Cir. 2002) (reversing district court for assuming that witnesses, from whom no affidavits were presented, would have testified favorably for the defense). Since these witnesses were called by Ochoa's attorney it would appear to have been easy for him to obtain the necessary affidavits. Because Ochoa has not submitted any proof of the content of the proposed testimony, he has not satisfied either prong of *Strickland,* and this claim may be denied on that basis.

Even if Ochoa had submitted supporting proof, however, his allegations do not show that the underlying due process claim would have any merit. The substance of the allegedly excluded evidence was almost entirely cumulative of other evidence admitted at trial. Trial counsel was able to show how Cecilia and her mother kept the secret about Jonathan. Ochoa's father, Abel Ochoa Sr. testified that he did not know the truth about Jonathan either, and when Ochoa found out, he was deeply upset and hurt. (35 RR at 117-118, 120.) Gabriel, Ochoa's brother, testified that he did not know much about the situation with Jonathan, but he knew that Ochoa was hurt by it. (35 RR 137-138.) Javier, another brother of Ochoa, also testified that the only problem Ochoa told him that he had with his marriage to Cecilia was when Ochoa found out the truth about Jonathan, but they didn't talk about it much. (36 RR at 180.) And trial counsel was able to indicate trouble in the relationship between Cecilia and her mother through Faz, who testified that Cecilia confided in him about a recording that she had made of a conversation with her mother and played a portion of it for him. (37 RR at 171-72.) Ochoa himself also testified about this secret, about the argument between Cecilia and her mother that led to him finding out the truth, and how that made him feel. (38 RR at 48-50.)

Regarding the close and loving relationship between Cecilia and Ochoa and their children, trial counsel was able to establish this through many sources. McClendon was able to express her belief that Ochoa and Cecilia had a close, loving relationship (37 RR

at 133), that Ochoa loved her dearly (37 RR at 148), and that they were a normal, caring couple and outwardly appeared affectionate towards one another. (37 RR 134). McClendon saw Ochoa playing with his children in the yard, and he was very proud when Anahi was born. (37 RR at 134, 141.) He carried her around and showed her affection. (37 RR an 141.) He played with Crystal and taught her how to ride a bicycle. (37 RR at 141-42.) McClendon also saw Ochoa playing with Jonathan and treating him like he was Ochoa's own son. (37 RR at 142-43.)

Faz also testified that Ochoa and Cecilia had a loving relationship and loved their children. He believed that Cecilia and Ochoa loved one another and were happy. (37 RR at 159-60.) Faz testified that Ochoa and Cecilia loved their children and took good care of them. (37 RR at 160-61.) They took in Cecilia's father, who had half of his leg amputated, to take care of him. (37 RR at 162-64.) Faz also observed Ochoa treating Jonathan as well as he treated his own daughter. (37 RR at 165-66.) Ochoa's brother Gabriel also testified that Ochoa loved Cecilia and their daughters and would take them to church on Sundays. (35 RR at 138, 143-44.) Gabriel saw them frequently, including every day after Ochoa's daughter was born. (35 RR at 138-39.) Ochoa's brother Javier also testified that Ochoa loved his wife and children. (36 RR at 174.) Ochoa's father, Abel Sr. also testified that he could tell Ochoa and Cecilia were in love and how happy they all were when they married and had a daughter. (35 RR at 116-17.) And, of

course, Ochoa himself testified about his love for Cecilia and the children, and how happy they were together. (38 RR at 29-36, 45-47.)

Regarding the purported missing testimony that Cecilia told others that Ochoa had not abused her and that she was not afraid of him, even if proof of such statements were made, it would add little to the evidence admitted. McClendon also testified that she never noticed any bruises on Cecilia, and she never saw Ochoa abuse his wife in any way. (37 RR at 136.) In the six years she had known Ochoa, she had never seen him do anything violent. (37 RR at 145.) McClendon did not believe that Ochoa was jealous of Cecilia and knew of nothing to suggest that. (37 RR at 147.) In fact, Cecilia had never told McClendon anything in confidence that gave her any reason to believe Cecilia was afraid of Ochoa. (38 RR at 149.) Likewise, Faz testified before the jury that he never saw any evidence of abuse of Cecilia and he believed that Cecilia would have told him if Ochoa were abusing her. (37 RR at 172-73.)

In addition, Gabriel testified that he was constantly around Cecilia and Ochoa and their family, and never saw Ochoa abuse, hit, or slap Cecilia. (35 RR at 138-39.) Gabriel recalled an incident when Ochoa showed restraint after Cecilia slapped a drink from his hand; Ochoa did not get angry but just laughed it off. (35 RR at 148-49.) Javier also testified that he never saw Ochoa react in a violent manner towards Cecilia and confirmed the incident where Ochoa showed unusual restraint when she slapped the drink from his hand. (36 RR at172-73.) Ochoa's friend Mike Barrera also testified that

he worked with Ochoa for three years, socialized with him and Cecilia, and he never saw Ochoa get violent or even talk inappropriately with anyone, including Cecilia, in the three years he worked with Ochoa. (36 RR at 122-24.)

Ochoa's argument exceeds the limits of an accused's right to the effective assistance of counsel. He does not contend that trial counsel failed to adequately investigate, find witnesses, prepare them to testify and present them at the punishment phase of his trial. Indeed, trial counsel did precisely that, but were thwarted in their attempt to get the precise evidence before the jury because of the prosecutor's hearsay objections that were sustained by the trial court. Further, trial counsel pressed the issue with the trial court and argued for leniency in the enforcement of the hearsay rule in light of the testimony of Alma regarding other statements made by Cecilia. (37 RR at 156-57.) And trial counsel worked around the trial court's refusal to allow hearsay evidence by getting the substance of the evidence sought before the jury in other ways and getting the balance of any evidence with mitigating value in through other sources.

Ochoa contends that "trial counsel were deficient for not making the proper and timely objections and securing a proper ruling from the trial court" (Pet. at 117), but he does not specify what further objections counsel could have made. To the extent that Ochoa complains that trial counsel did not make an adequate "proffer of the evidence" to the trial court regarding the content of the excluded testimony (Pet. at 116), his presentation to this Court contains the same deficiency, the lack of an affidavit from the

witnesses showing the omitted testimony, which is "fatal to his claim." *Gregory,* 601 F.3d at 353. Further, Ochoa has not shown that the statements Cecilia allegedly made to these witnesses were not hearsay, or that some other method of getting this evidence admitted would have been more successful. He merely complains about the trial court's mechanistic enforcement of the rules of evidence. (Pet. at 116.)

Ochoa has not shown that his due process rights were violated by the exclusion of hearsay testimony of McClendon or Faz, much less that his trial counsel were in any way ineffective regarding this evidence. Ochoa has not shown that trial counsel performed deficiently or that any omitted testimony would have changed the outcome of the trial. Therefore, if this claim was not denied as procedurally barred, it would be denied for lack of merit.

4. <u>Unreliable Expert Testimony</u>

In Ochoa's eleventh claim, he complains in the alternative that his appellate counsel was ineffective in failing to present on direct appeal the substance of Ochoa's tenth claim complaining about the trial court's erroneous admission of Dr. Coons' testimony as unconstitutionally unreliable. (Pet. at 124, 135-41.) In addition to asserting that both of those claims are procedurally barred, Respondent argues that they lack merit. (Ans. at 79-91.)

Respondent also incorrectly asserts that Ochoa complains that his trial counsel was ineffective in failing to make a proper motion to exclude this testimony. (Ans. at

86-91.) In fact, it is the trial court's denial of trial counsel's motions that forms the basis for Ochoa's tenth claim. In his eleventh claim, Ochoa points out that trial counsel "sought to exclude Dr. Coons' prospective rebuttal evidence through a Motion to Exclude and Memorandum in Opposition to the Testimony of Dr. Richard E. Coons, and which relied on both due process and state evidentiary grounds as a basis for exclusion." (Pet. at 136 (citing 1 State Clerk's Record ("CR") at 124-38).) This motion was taken under advisement before trial and presented in a hearing under Rule 705 of the Texas Rules of Evidence during the punishment stage that was outside of the presence of the jury. (31 RR 8; 38 RR 189-213.) Ochoa argued that "trial counsel submitted a well-researched, thoroughly cited motion and memorandum of law. Review of the memo within the appellate record indicates the memo is legally sound, and certainly not implausible on its face." (Pet. at 137-38.) Ochoa castigates appellate counsel for failing to raise the trial court's denial of this motion in his brief on direct appeal. (Pet. at 136.) "At a minimum, appellate counsel could have simply 'cut and pasted' the contents of the motion into the appellate brief with minor revisions." (Pet. at 138.)

As set out above, appellate counsel's conduct is measured by the same *Strickland* standard. *See Reinhert,* 357 F.3d at 525 (habeas petitioner must show constitutionally deficient performance and prejudice); *Williams,* 16 F.3d at 635 (appellate counsel not ineffective in failing to raise meritless issues); *Mendiola,* 635 F.2d at491. Further,

appellate counsel's performance is "viewed as of the time of counsel's conduct." *Schaetzle v. Cockrell,* 343 F.3d 440, 448 (5th Cir. 2003) (quoting *Strickland,* 466 U.S. at 690).

State and federal courts have upheld the use of Dr. Coons' testimony over similar challenges. Expert psychiatric testimony has been held admissible in capital murder trials over the argument that expert testimony predicting future dangerousness too unreliable. *Fields,* 483 F.3d at 341-45. In that case, the United States Court of Appeals for the Fifth Circuit upheld the admission of Dr. Coons' testimony of future dangerousness in a federal death penalty trial, rejecting "the claim that Dr. Coons's testimony was so unreliable that the district court abused its discretion by admitting it" under the Constitution and the Federal Rules of Evidence. *Id.* at 345.

The CCA also upheld the use of Dr. Coons' testimony in 2008 in *Espada v. State,* No. AP-75,219, 2008 WL 4809235, at *9 (Tex. Crim. App. Nov. 5, 2008). In 2010, the CCA held that the admission of Dr. Coons' testimony violated state evidentiary rules but that such violation of state law was harmless. *See Coble v. State,* 330 S.W.3d 253, 277-86 (Tex. Crim. App. 2010). In federal court, that error in admitting Dr. Coons' testimony at Coble's trial was found to be a matter of state law that did not rise to a "constitutionally cognizable claim for which federal habeas relief may be granted." *Coble v. Stephens,* Civ. Action No. W-12-CV-039, 2015 WL 5737707, at *19 (W.D. Tex. Sept. 30, 2015), *application for certificate of appealability pending,* No. 15-70037 (5th Cir.). This Court has found no state or federal court holding that Dr. Coons' testimony violated the

due process right asserted in Ochoa's tenth claim, and the record before this Court does not make the required showing.

The record indicates that the state called Dr. Coons to rebut the testimony of Ochoa's experts, Dr. Theodore Simon and Dr. Edgar Nace, regarding Ochoa's brain damage from cocaine abuse, that Ochoa committed the offense in a cocaine-induced delirium, and that he did not pose a future danger. (36 RR at 40-105.) The record also indicates that trial counsel filed a motion before trial to exclude this evidence and the trial court conducted a hearing during the trial outside of the presence of the jury under Rule 705 of the Texas Rules of Evidence before allowing this expert to testify before the jury. (38 RR 189-213.) Trial counsel extensively examined Dr. Coons regarding his methods and the existence of studies or literature to support his methods and conclusions. (38 RR 196-213.) The trial court denied the motion to exclude the testimony and allowed trial counsel to cross examine Dr. Coons before the jury regarding all of these asserted deficiencies in his expert opinions and even the fact that Dr. Coons did not comply with a subpoena duces tecum. (38 RR at 243-62, 263-64.)

Federal courts on habeas review do "not sit to review the mere admissibility of evidence under state law." *Little v. Johnson,* 162 F.3d 855, 862 (5th Cir. 1998). "A federal court may grant habeas relief based on an erroneous state court evidentiary ruling only if the ruling violates a specific federal constitutional right or is so egregious that it renders the petitioner's trial fundamentally unfair." *Kittelson,* 426 F.3d at 320 (quoting

Brown v. Dretke, 419 F.3d 365, 376 (5th Cir.2005)). Ochoa asserts a broad due process right to the exclusion of this testimony. He has not supported his argument with authority to show that he has a specific constitutional right to exclude unreliable expert testimony and what the constitutional standard to test such reliability would be. Instead, he argues principles from Rule 702 of the Federal Rules of Evidence and the standard of evidentiary reliability applied in that and subsequent cases construing evidentiary rules. (Pet. at 125-29 (citing *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993)).) This does not provide a sufficient basis to grant federal habeas relief from a state conviction and death sentence. Ochoa's due process claims lacks merit, and appellate counsel could not have been ineffective in failing to raise it.

Because he has not shown that the complaint raised in his tenth claim would have prevailed in his direct appeal, he has failed to show either prong of *Strickland* with respect to his eleventh claim. Appellate counsel does not perform deficiently by failing to make a meritless claim, and failing to raise it would not have any impact on the outcome of his appeal. *See Williams,* 16 F.3d at 635; *Mendiola,* 635 F.2d at 491. Therefore, if Ochoa's eleventh claim was not procedurally barred, it would be denied for lack of merit.

5. Shackles

In his thirteenth claim, Ochoa complains that trial counsel were ineffective in failing to object to the trial court's decision to place Ochoa in shackles. (Pet. at 144-46.) Respondent argues that this claim lacks merit and that Ochoa has not proven that he

was placed in shackles or that, if he was, his attorneys failed to object. (Ans. at 96-97.) Ochoa's reply did not respond to this argument or provide any additional information on this claim.

The Supreme Court stated the rule that,

> [C]ourts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding. The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.

Deck v. Missouri, 544 U.S. 622, 633 (2005).

In conducting this inquiry, a Texas trial court would consider the circumstances of the specific case and an appellate court would evaluate the claim by looking to the record. "[S]hackling error may rise to the level of constitutional error when the record reflects a reasonable probability that the jury was aware of the defendant's shackles." *Bell v. State,* 415 S.W.3d 278, 283 (Tex. Crim. App. 2013). Once a Texas appellate court makes that determination, it must determine whether the shackling was justified.

A federal habeas petitioner carries the burden of proof to show ineffective assistance of counsel, which includes the burden to show both deficient performance and prejudice.

> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the

> proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [*Strickland,* 466 U.S.] at 694, 104 S.Ct. 2052. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.,* at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.,* at 687, 104 S.Ct. 2052.

Richter, 562 U.S. at 104.

The record does not reflect that Ochoa was even shackled, much less a reasonable probability that the jury was aware of it. In fact, both parties point to the lack of any mention of this in the record. (Pet. at 143-44; Ans. at 93-94, 96-97.)

To show that he had been shackled before the jury at the punishment phase of his trial, Ochoa relies upon a second affidavit from his trial mitigation investigator, Tena Francis. This affidavit could be read to assert merely her conclusion that Ochoa must have been shackled because of the way he was walking. (Francis Aff., doc. 8-1, at 12.) Assuming that this affidavit is capable of showing that Ochoa was shackled, however, it does not provide any indication of the reasons for placing him in shackles or whether it was part of any routine.

Ochoa has not attempted to negate any of the justifications that may have existed to place him in restraints. Instead, he relies upon a prior state appellate standard expressed in a CCA opinion that has since been overturned. (Pet. at 142-43 (citing *Long v. State,* 823 S.W.2d 259, 282 (Tex. Crim. App. 1991)).) While counsel's conduct is to be judged under the law existing at the time of the conduct, *Strickland* prejudice "is

measured by current law and not by the law as it existed at the time of the alleged error." *Westley v. Johnson,* 83 F.3d 714, 723 (5th Cir. 1996) (citing *Lockhart v. Fretwell,* 506 U.S. 364, 372-73 (1993)).

Ochoa has not provided the information needed on federal habeas review to show that any shackling, if it indeed occurred, would have been unjustified under *Deck,* that an objection at trial would have prevailed, or that a point of error on appeal would have been sustained. Ochoa has not established that the due process complaint made the basis of his twelfth claim has merit, much less that his counsel was ineffective for failing to assert it in an objection. "Unsupported allegations and pleas for presumptive prejudice are not the stuff that *Strickland* is made of." *Sawyer v. Butler,* 848 F.2d 582, 589 (5th Cir. 1988), *on reh'g,* 881 F.2d 1273 (5th Cir. 1989), *aff'd sub nom. Sawyer v. Smith,* 497 U.S. 227 (1990). Accordingly, if this claim were not procedurally barred, it would be denied for lack of merit.

6. <u>Mitigation Special Issue</u>

In his twentieth claim, Ochoa complains that his trial counsel were ineffective in failing to object to the lack of a burden of proof on the mitigation special issue and to the lack of a definition of mitigating evidence made the basis of his eighteenth and nineteenth claims, and that his appellate counsel was ineffective for failing to raise these complaints in his brief on direct appeal. (Pet. at 161.) In addition to asserting a

procedural bar, Respondent claims in the alternative that this claim lacks merit and that any complaints against his appellate counsel are inadequately briefed. (Ans. at 123.)

Respondent is correct that only the title to this section mentions any complaint against appellate counsel. (Pet. at 154.) Ochoa's briefing does not assert how his appellate counsel may have been ineffective. (Pet. at 161.) Therefore, Ochoa has waived his complaint against appellate counsel, but these claims are all procedurally barred and may be denied for lack of merit as well.

Ochoa's argument relies on broad legal principles and does not include authority that would support these specific claims. In fact, the arguments asserted in his eighteenth and nineteenth claims have been previously raised and rejected in this circuit. In *Rowell,* 398 F.3d at 378, the Court of Appeals held that no Supreme Court or Circuit precedent constitutionally requires that Texas' mitigation special issue be assigned a burden of proof. Since then, the Supreme Court has reaffirmed that no particular standard is required to be expressed in the jury instructions regarding the burden to prove mitigating circumstances. *See Kansas v. Carr,* 136 S. Ct. 633, 643 (2016). The Court of Appeals has also repeatedly found that the mitigation special issue sufficiently defines mitigating evidence and allows the jury to give full consideration to it. *See Sprouse v. Stephens,* 748 F.3d 609, 622 (5th Cir.), *cert. denied,* 135 S. Ct. 477 (2014); *Blue v. Thaler,* 665 F.3d 647, 665 (5th Cir. 2011); *Scheanette v. Quarterman,* 482 F.3d 815, 824, 826-27 (5th Cir. 2007); *Beazley,* 242 F.3d at 260.

Because Ochoa's eighteenth and nineteenth claims lack merit, counsel could not have been ineffective for failing to assert them in objections at trial or raise them in claims on direct appeal. *Clark,* 19 F.3d at 966; *Wood,* 503 F.3d at 413; *Williams,* 16 F.3d at 635; *Mendiola,* 635 F.2d at 491. If Ochoa's twentieth claim was not procedurally barred, it would be denied for lack of merit.

B. Other Claims Subject to Procedural Bar

Ochoa presents other claims that were either not presented to the state court or found to be procedurally barred by the state court. Respondent asserts a procedural bar to each of these claims. Because the state procedural grounds appear sufficient to bar federal habeas review and Ochoa has not shown that any of these claims come within an exception to procedural bar, they are all denied as barred.

1. Unexhausted Claims

In addition to claims listed in subsection (A) above, Ochoa presents the following related claims to this Court that were not presented to the state court: (1) his third and fourth claims in which Ochoa complains that he was deprived of his right to be tried by a fair and impartial jury when the trial court did not allow his counsel to ask potential jurors about their ability to be fair in a case involving five victims (Pet. at 89-102); (2) his eighth claim in which Ochoa complains that the trial court's exclusion of important rebuttal evidence denied him the right to present a fair defense (Pet. at 114-17); (3) his tenth claim in which Ochoa complains that he was deprived of his right to due process

of law by the State's presentation of unreliable psychiatric rebuttal testimony (Pet. at 117-35); and (4) his twelfth claim in which Ochoa complains that his right to due process was denied when he was shackled during the punishment phase of his capital murder trial (Pet. at 141-44). To each of these claims, Respondent asserts that they are unexhausted, would be barred by the Texas abuse-of-the-writ rule if they were raised in a subsequent state habeas petition, and therefore are procedurally barred in this Court as well. (Ans. at 46, 55-56, 76, 80-81, 91-92.)

As set out above, this Court cannot grant relief on an unexhausted claim under 28 U.S.C. § 2254(b)(1)(A), and when a stay to exhaust a claim would be futile because the state court would now find the claims procedurally barred, this Court may find the claims procedurally barred as well. *Coleman,* 501 U.S. at 735 n.1; *Neville,* 423 F.3d at 480. The Texas abuse-of-the-writ doctrine would bar these claims in a subsequent state habeas proceeding, and has been recognized as an independent and adequate state ground for imposing a procedural bar in federal court. *See Canales,* 765 F.3d at 566; *Hughes,* 530 F.3d at 342. Because none of these claims were exhausted in the state court, they are all subject to this procedural bar.

Ochoa acknowledges that these claims were not exhausted and expressly did not assert cause and prejudice to excuse the procedural bar of any of these claims. (Reply at 55). He relies upon the exception to procedural bar created in *Martinez* to assert that his prior counsel was ineffective in failing to present these claims to the state courts. (P's

Supp. Br. at 1-26.) He initially argued that this Court should stay these proceedings to allow him to present these claims to the state courts (Reply at 55-76), but withdrew that request as futile. (P's Supp. Br. at 3-15.) Because each of these claims would be barred by the Texas abuse-of-the-writ rule, and no adequate cause and prejudice is shown to excuse the procedural bar, each of these claims is DENIED as procedurally barred.

In the alternative, each of these claims lacks merit. As shown in subsection (A)(3)(c) above, in which this Court conducted an alternative analysis of the merits of each of the related claims of ineffective assistance of counsel for failing to assert these claims at trial and on appeal, the Court found none of these claims have merit. Therefore, if they were not procedurally barred, they would be denied for lack of merit.

2. Claims Denied on State Grounds

Respondent asserts that the following claims were denied by the state court on state procedural grounds: (1) Ochoa's sixth claim that his rights guaranteed by the Confrontation Clause were violated when the trial court allowed testimonial evidence before the jury (Pet. at 104-13); (2) Ochoa's fifteenth claim that he was deprived of rights to due process and to a fair trial when the State destroyed material and exculpatory evidence (Pet. at 146-51); (3) Ochoa's eighteenth claim that the Texas mitigation special issue given in his case failed to assign a burden of proof in violation of his rights (Pet. at 153-57); (4) Ochoa's nineteenth claim that the Texas mitigation special issue given in his case failed to adequately define what is meant by mitigation or

mitigating evidence (Pet. at 157-61); and (5) Ochoa's twenty-first claim that his right to be tried by a jury selected from a fair cross-section of the community was violated (Pet. at 161-62). Respondent asserts that each of these claims were denied by the state court on independent and adequate state grounds to bar federal habeas review and they are now procedurally barred in this Court. (Ans. at 65-69 (no contemporaneous objection), 103-105 (failure to raise on direct appeal), 113-14 (failure to raise on direct appeal), 120 (abuse of the writ), 124-25 (no contemporaneous objection and failure to raise on direct appeal).)

a. Contemporaneous Objection

Respondent asserts that Ochoa's sixth (Confrontation Clause) and twenty-first (Fair Cross-Section) claims are barred by his failure to make a contemporaneous objection at trial. (Ans. at 65-68, 124-25.) "[T]he Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims." *Rowell,* 398 F.3d at 375 (quoting *Fisher v. Texas,* 169 F.3d 295, 300 (5th Cir. 1999)); *see also Cotton v. Cockrell,* 343 F.3d 746, 754 (5th Cir. 2003).

1. <u>Confrontation Clause</u>

In his sixth claim, Ochoa complains of the admission of: (1) a recording of a telephone conversation between Ochoa and Cecilia in which she asks him why he wants to kill them; and (2) the testimony of Cecilia's sister, Alma Alviso, regarding the reason

Cecilia made those recordings and Cecilia's statement that Ochoa had held a gun to her head. (Pet. at 104-105.)

On direct appeal, Ochoa complained that the admission of the recording violated his rights under the Confrontation Clause of the Sixth Amendment. (Appellant's Brief at 35-43.) The Court first notes that only the complaint against the recording was presented on direct appeal. The complaint regarding Cecilia's statements to Alma does not appear to have been presented to the state court outside of a complaint that trial counsel was ineffective for failing to make a Confrontation Clause objection. Respondent does not assert any failure to exhaust regarding this portion of the claim, but both parties clearly allege that trial counsel failed to make an objection to this based on the Confrontation Clause. Since the unexhausted portion of this claim would now be procedurally barred by the Texas abuse-of-the-writ rule if brought in a subsequent state habeas proceeding, this Court may treat this entire claim as subject to a state procedural bar. This Court may also deny this claim on the merits regardless of any failure to exhaust.

The CCA found that trial counsel's objections to this evidence did not assert a violation of the Confrontation Clause, and therefore the error was not preserved for appeal. *Ochoa,* slip op. at 17. Ochoa acknowledges that a contemporary objection was not made at trial on the basis of the Confrontation Clause, but asserts that the ineffective assistance of trial counsel constitutes sufficient cause and prejudice to excuse

the procedural default of this claim. (Reply at 46-49.) As set out in subsection (A)(3)(a)(1) above, however, the state court on habeas review reasonably denied the claim that trial counsel were ineffective for failing to make a Confrontation Clause objection, finding that neither prong of the *Strickland* test had been satisfied. (SHR at 368-82.) Therefore, Ochoa has not shown cause and prejudice to excuse the procedural bar of this claim. Ochoa's sixth claim is DENIED as procedurally barred.

In the alternative, Ochoa has not shown that this claim has merit. As Respondent points out, binding circuit precedent holds that "the Confrontation Clause does not operate to bar the admission of testimony relevant only to a capital sentencing authority's selection decision." *Fields,* 483 F.3d at 326. Because the eligibility decision is resolved in the guilt/innocence phase of a Texas capital murder trial, the punishment phase of Ochoa's trial only concerned the selection decision. Since this evidence was admitted in the punishment phase of his trial, the Confrontation Clause was not violated by its admission.

Ochoa acknowledges that "the Supreme Court has not specifically held at this point that the Confrontation Clause applies to capital sentencing," but argues that the language of the clause and developing case law in other circuits supports his argument. (Reply at 51-53.) Ochoa's argument appears sufficient to preserve the issue for appeal, but not to overcome the circuit precedent that binds this Court. Accordingly, if this claim were not procedurally barred, it would be denied for lack of merit.

2. **Fair Cross Section**

In his twenty-first claim, Ochoa complains that he was deprived of his right to a fair and impartial jury because the venire did not reflect a fair cross-section of the community as required by the Sixth Amendment. (Pet. at 161-62.)

Ochoa raised this as the eighth claim in his post-conviction application for a writ of habeas corpus, which was found by the state habeas court to be procedurally barred for failing to raise it in a contemporaneous objection at trial. (SHR at 394-95.) This finding was expressly adopted by the CCA in its order denying relief. *Ex parte Ochoa,* 2009 WL 2525740 at *1. This was a reasonable finding and sufficient to bar federal habeas review. *See Turner v. Quarterman,* 481 F.3d 292, 301 (5th Cir. 2007). Because Ochoa does not show an exception to procedural bar, this claim is DENIED as procedurally barred.

In the alternative, this claim lacks merit. The state habeas court found in the alternative that Ochoa had not shown: (1) that young adults and persons with low income are a distinctive group; (2) that Hispanics, young adults, and persons with low income are consistently under represented in the venire relative to their members in the community who are qualified to serve; or (3) an operational defect in the County's juror selection process. Instead, Ochoa simply complained that Hispanics, young adults, and persons with low income do not participate in that process. (SHR at 396-404.) This asserts the same claim that has been rejected repeatedly in this Circuit. *See Rivas v.*

Thaler, 432 F. Appx. 395, 402-403 (5th Cir. 2011); *Edwards v. Stephens,* Civ. Action No. 3:10-CV-6-M, 2014 WL 3880437, at *13-14 (N.D. Tex. Aug. 6, 2014), *certificate of appealability denied,* 612 F. App'x 719 (5th Cir.), *cert. denied,* 136 S. Ct. 403 (2015); *Battaglia,* 2013 WL 5570216, at *4; *Doyle v. Thaler,* No. 3:08-CV-138-B, 2012 WL 2376642, at *10-11 (N.D. Tex. June 25, 2012), *certificate of appealability denied sub nom. Doyle v. Stephens,* 535 F. App'x 391 (5th Cir. 2013), *cert. denied,* 134 S. Ct. 1294 (2014); *Escamilla v. Thaler,* Civ. Action No. 3:06-CV-2248-O, 2012 WL 1019605, at *14 (N.D. Tex. Mar. 26, 2012), *aff'd sub nom. Escamilla v. Stephens,* 602 F. App'x 939 (5th Cir.), *cert. denied,* 136 S. Ct. 66 (2015); *see also Berghuis v. Smith,* 559 U.S. 314, 333 n.6 (2010) ("We have also never 'clearly' decided, and have no need to consider here, whether the impact of social and economic factors can support a fair-cross-section claim.").

The state habeas court's alternative findings are entitled to deference. Ochoa has not overcome the presumption of correctness to these alternative findings, much less that the alternative denial of this claim on the merits was unreasonable. Therefore, if this claim were not procedurally barred, it would be denied for lack of merit.

b. Failure to Raise on Direct Appeal

Respondent asserts that Ochoa's fifteenth, eighteenth and twenty-first claims were found procedurally barred by the state habeas court on the state law ground that they could have been presented on direct appeal but were not. (Ans. at 100, 103-105, 113-14, 124-25.)

1. **Destruction of Evidence**

In his fifteenth claim, Ochoa asserts that he was deprived of his right to due process when the police destroyed certain evidence that was seized upon his arrest. (Pet. at 146-53.) This claim was not presented on direct appeal, but in Ochoa's first claim for relief presented in his post-conviction application for a writ of habeas corpus filed in the state court. The state court found that this claim was procedurally barred in state habeas review because it relied upon the record developed at trial and should have been brought in the direct appeal to the CCA. (SHR at 353-54) These findings were expressly adopted by the CCA in its order denying relief. *Ex parte Ochoa,* 2009 WL 2525740 at *1.

The state court relied upon the state procedural rule that "that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal." *Ex parte Nelson,* 137 S.W.3d 666, 667 (Tex. Crim. App. 2004); *see also Ex parte Gardner,* 959 S.W.2d 189, 199 (Tex. Crim. App. 1996) (finding that failure to raise an issue on direct appeal bars consideration of that issue under habeas corpus proceedings). This Texas rule has been recognized as an independent and adequate state ground to bar federal habeas review. *See Brewer v. Quarterman*, 466 F.3d 344, 347 (5th Cir.), *adhered to on denial of reh'g,* 475 F.3d 253 (5th Cir. 2006). This rule was firmly established by the state courts by February of 1998,

well before Ochoa's conviction and direct appeal. *See Busby,* 359 F.3d at 719. Therefore, it is a sufficient independent and adequate state ground to bar this claim.

Ochoa asserts that his trial and appeal counsel were ineffective for failing to preserve this evidence and present this complaint on appeal. The state court denied this on independent and adequate state grounds and Ochoa has not shown cause and prejudice to excuse the procedural bar of this claim. Therefore, Ochoa's fifteenth claim is DENIED as procedurally barred.

In the alternative, this claim lacks merit. As set out in subsection (A)(3)(a)(2) above, Ochoa has not shown that the destruction resulted from any bad faith on the part of law enforcement. The state habeas court, in the alternative, made findings that this claim lacks merit. (SHR at 355-60.) These findings have not been shown to be incorrect. Therefore, if this claim was not procedurally barred, it would be denied for lack of merit.

2. Mitigation Special Issue

In his eighteenth claim, Ochoa asserts that his rights to due process and to be free from arbitrary and capricious punishment were violated when the state failed to assign a burden of proof to the mitigation special issue. (Pet. at 153-61.) This claim was not presented on direct appeal.

In his second claim for relief presented in his state post-conviction application for a writ of habeas corpus, Ochoa complained that the failure of the state law to require

that the state prove the absence of mitigating evidence beyond a reasonable doubt violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (SHR at 25-30 (citing *Apprendi v. New Jersey,* 530 U.S. 466 (2000), *Ring v. Arizona,* 536 U.S. 584 (2002), and *Blakely v. Washington,* 542 U.S. 296 (2004)). The state court found that this claim was procedurally barred in state habeas review because it relied upon the record developed at trial and should have been brought in the direct appeal to the CCA. (SHR at 362.) These findings were expressly adopted by the CCA in its order denying relief. *Ex parte Ochoa,* 2009 WL 2525740 at *1.

As set out above, this rule was well established before Ochoa's direct appeal and has been recognized as an independent and adequate state ground to bar federal habeas review. *See Brewer*, 466 F.3d at 347; *Busby,* 359 F.3d at 719. Ochoa also complains that his trial counsel were ineffective for failing to raise this issue at trial, but it is not clear whether this is being asserted as cause and prejudice to excuse the procedural default. (Pet. at 161.) Even so, this Court found in subsection (A)(3)(c)(6), above, that trial counsel were not ineffective in failing to raise this claim and, in the alternative, that this claim lacks merit.

Ochoa has not shown cause and prejudice to excuse the procedural bar applied by the state court to deny this claim, or that the claim has merit. Therefore, this claim is DENIED as procedurally barred and, in the alternative, for lack of merit.

3. **Fair Cross Section**

As set forth in subsection (a)(2) above, Ochoa's twenty-first claim asserts that his right to a jury drawn from a fair cross section of the community was denied because the venire did not reflect a fair cross-section of the community. He relies upon evidence that was not in the record before the trial court and CCA on direct appeal. This Court has already denied this claim as procedurally barred because it was not raised in a contemporaneous objection before the trial court and found, in the alternative, that it lacks merit. Therefore, it is unnecessary to determine whether it may also be procedurally barred on this state ground as well.

c. Abuse of the Writ

In Ochoa's nineteenth claim, he complains that the Texas mitigation special issue given in his case failed to adequately define what is meant by mitigation or mitigating evidence. (Pet. at 153-61.) Respondent asserts that his claim is procedurally barred and, in the alternative, lacks merit. (Ans. at 119-21.)

This claim was found procedurally barred by the state habeas court because it was not brought in a timely state habeas application and was found to have been brought in subsequent state habeas proceedings that did not meet the requirements of TEX. CODE CRIM. PROC., art. 11.071 § 5. *Ex parte Ochoa,* No. WR-67,495-01, 2009 WL 2525740 at *1. The application of the Texas abuse-of-the-writ doctrine to bar these claims in a subsequent state habeas proceeding is an independent and adequate state ground for

imposing a procedural bar in federal court. *See Canales,* 765 F.3d at 566; *Hughes,* 530 F.3d at 342.

Ochoa also complains that his trial counsel were ineffective for failing to raise this issue at trial, but it is not clear whether this is being asserted as cause and prejudice to excuse the procedural default. (Pet. at 161.) Even so, this Court found in subsection (A)(3)(c)(6), above, that trial counsel were not ineffective in failing to raise this claim and, in the alternative, that this claim lacks merit. Ochoa has not shown an exception to procedural bar for this claim. Therefore, it is DENIED as procedurally barred and, in the alternative, for lack of merit.

C. Claim Adjudicated on the Merits

In his fourteenth claim, Ochoa complains that the evidence is legally insufficient to support the jury's answer to the first special issue in finding that Ochoa would constitute a continuing threat to society. (Pet. at 146.) Respondent asserts that the state court's adjudication of this claim was reasonable. (Ans. at 97-99.)

"Under § 2254(d), the limited question before this court is whether the CCA's decision to reject [the habeas petitioner's] sufficiency of the evidence claim in regard to future dangerousness was an objectively unreasonable application of the clearly established federal law set out in *Jackson [v. Virginia,* 443 U.S. 307, 323 (1979)]." *Martinez v. Johnson,* 255 F.3d 229, 244 (5th Cir. 2001). In *Jackson,* the Supreme Court held that "the relevant question is whether, after viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319.

Ochoa raised this claim in his direct appeal. After thorough review of the evidence in support of the jury's finding, covering 13 of the 24 pages of its opinion, the CCA denied the claim for lack of merit. *Ochoa v. State,* No. AP-74,663, slip. op at 1-13. The CCA explained,

> The evidence shows that on Sunday, August 4, 2002, appellant shot his wife, two of his sisters-in-law, his father-in-law, and his 18-month-old daughter. Appellant reloaded his gun and shot his seven-year-old daughter. This occurred in the home where appellant lived with his wife, his two daughters, and his father-in-law. Everyone was killed except for one of the sisters-in-law (Alma) who testified at appellant's trial that appellant looked "[v]ery mean, very angry" when the shooting began.

Ochoa, slip op. at 2. The state court recounted the testimony, the evidence regarding Ochoa's marriage and family and how his relationship with his wife changed when he found out that the child she told him was her nephew was actually her son. "This caused appellant and his wife to separate for about six months. The prosecution presented evidence that appellant threatened to shoot his wife during this separation. Alma testified that appellant became 'more aggressive' and 'more mean' to his wife after appellant found out about Jonathan." Slip op. at 3.

The CCA also discussed the evidence that Ochoa gave up a good job and got addicted to cocaine, which put additional stress on his marriage. Following the shooing, Ochoa explained to the officer the reason for the shooting was that he "couldn't handle

the stress anymore," and got tired of his life. Slip op. at 3-4. The CCA also recounted his confession that related the events of that day, including his frustration with his wife because she would probably not let him buy more cocaine, and how he got his gun and shot them, returning to reload his gun and then chasing down his daughter to shoot her as well. Then, he took his wife's purse and drove her car to get more money when the police arrested him. Slip op. at 5. Ochoa did not remember many details about the shooting, but he did remember reloading the gun and shooting his daughter. Ochoa suggested on cross-examination that the police suggested some of those details. Slip op. at 6-8.

The CCA also discussed the defense evidence of his good character, his mild brain damage from cocaine use, and diagnosis of cocaine induced delirium. Slip op. at 8-9. One defense expert testified that he did not think Ochoa would be a future danger away from cocaine, but that he "'would expect bad things could happen to' appellant if appellant 'got back to a repetitive pattern of cocaine use.'" Slip op. at 10. The CCA then explained that the prosecution's expert provided testimony from which a jury could infer that Ochoa would be a continuing threat to society, in that he attributed the murders to Ochoa's frustration and anger and not to a "cocaine-induced delirium." Slip op. at 10-11. The state's expert explained,

> ... I don't think it's a delirium. I think it's a matter of anger. I think he was extremely frustrated with his situation. He was married–he had a difficult relationship with his wife, partly because he was continuing to use

> cocaine and not being a husband and father. And partly because of this Jonathan problem that he had never gotten over.
>
> And I think that–if you look at the scene, you know this is–the first thing that comes to your mind is anger. I mean, this was an angry slaughter of people. And [appellant], I don't think, is in–I asked him something about his anger, and I don't think he's in good touch with his–with his angry and frustrated feelings about the situation he was in. He didn't have a job. His–he didn't have any money. He had a cocaine problem. He had made the wrong choice. He didn't take his father's advice and go into this program and get himself detoxified and off of it. Chose to stay on it. And this is a result of it, a frustrated angry man.

Slip op. at 11-12.

The CCA applied the standard in *Jackson* and decided that "a rational jury could find beyond a reasonable doubt that there is a probability that 'a man capable of slaughtering five members of his immediate family' would commit criminal acts of violence that would constitute a continuing threat to society." Slip op. at 12 (citing *Sonnier v. State,* 913 S.W.2d 511, 517-18 (Tex. Crim. App. 1995)). The CCA's determination is supported by the record. Ochoa has not shown that this was contrary to or an unreasonable application of *Jackson*, or based on an unreasonable determination of the facts. Ochoa has not met the standard set it out in § 2254(d). Therefore, this claim is DENIED.

VI. REQUEST FOR EVIDENTIARY HEARING

Ochoa requests an evidentiary hearing. (Pet. at 163.) This Court has discretion to grant an evidentiary hearing if one is not barred under 28 U.S.C. § 2254(e)(2). *See Schriro v. Landrigan,* 550 U.S. 465, 468 (2007). In exercising that discretion, the Court

considers whether a hearing could enable petitioner to prove the petition's factual allegations which, if true, would entitle him to relief. *Id.* at 474. The Court also must consider the deferential standards in § 2254(d), which limit the Court's ability to grant habeas relief. *Id.*

Ochoa argues that a hearing is required because these claims come within the exception to bar created in *Martinez,* and that this Court should review these claims *de novo*, requiring an evidentiary hearing to receive testimony on matters such as trial counsel's strategy. (P's Supp. Br. at 23-33.) The United States Court of Appeals for the Fifth Circuit has declined to hold that *Martinez* mandates an evidentiary hearing or opportunity for evidentiary development in federal court. *See Segundo v. Davis,* — F.3d —, 2016 WL 4056397 at *3-4 (5th Cir. July 28, 2016). Instead, the narrow exception created in *Martinez* "merely allows" federal merits review of a claim that otherwise would have been procedurally defaulted. "Reading *Martinez* to create an affirmative right to an evidentiary hearing would effectively guarantee a hearing for every petitioner who raises an unexhausted IATC claim and argues that *Martinez* applies." *Id.* at *3. And although the cause and prejudice inquiry is fact-specific, that does not entitle habeas petitioners to evidentiary development.

> But there "must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented." *Ayestas,* 817 F.3d at 896. The decision to grant an evidentiary hearing "rests in the discretion of the district court." *See Schriro v. Landrigan,* 550 U.S. 465, 468, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) ("It follows that if the record refutes the applicant's factual

> allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."); *see also McDonald v. Johnson,* 139 F.3d 1056, 1060 (5th Cir. 1998) ("The district court had sufficient facts before it to make an informed decision on the merits ... and, accordingly, did not abuse its discretion in refusing to hold an evidentiary hearing."). Here, the district court thoroughly reviewed the record of the state-court proceedings, and made specific findings of fact in denying relief. Given the extent of the factual development during trial and during the state habeas proceedings, the district court did not abuse its discretion in determining it had sufficient evidence and declining to hold a hearing.

Id. at *4. In light of the record and this Court's own review of the merits of these claims, the request for an evidentiary hearing is DENIED.

VII. CONCLUSION

The Court **denies** Ochoa's petition for a writ of habeas corpus. In accordance with Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), and after considering the record in this case, the Court **denies** Ochoa a certificate of appealability because he has failed to make a substantial showing of the denial of a constitutional right. *See Miller-El,* 537 U.S. at 338; *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000); 28 U.S.C. § 2253(c)(2). If Ochoa files a notice of appeal, he may proceed *in forma pauperis* on appeal.

SO ORDERED.

Signed September 21st, 2016.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70016

ABEL REVILL OCHOA,

Petitioner - Appellant

v.

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

Respondent - Appellee

ON PETITION FOR REHEARING EN BANC

(Opinion 10/18/18, 5 Cir., _____, _____ F.3d _____)

Before ELROD, GRAVES, and WILLETT, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

APPENDIX E

STATE OF NEVADA }}

COUNTY OF CLARK }}

AFFIDAVIT OF TENA S. FRANCIS

Comes the Affiant, Tena S. Francis, after first being duly sworn, states the following.

1. My name is Tena S. Francis. I am over the age of eighteen and can read and write the English language. I have prepared this affidavit, myself. The information contained in this affidavit is true and correct to the best of my knowledge.

2. I am a capital case investigator and mitigation specialist. During my twenty-four year career as a defense investigator, I have provided investigative services for more than two hundred capital cases in various state and federal courts, in both the pre-trial and the post-conviction stages. I have conducted investigations into both the guilt/innocence and the punishment phases of capital cases. During my career I have been employed by state and federally-funded agencies who provide indigent defense services, as well as by private practitioners appointed to defend capitally charged clients. I have developed training materials and have provided training to attorneys and to investigators regarding topics related to capital case defense.

3. On February 12, 2003, I was appointed by the194th Judicial District Court in Dallas County, Texas, to provide investigative services in the case styled State of Texas vs. Abel Revilla Ochoa. As the court appointed mitigation investigator, I worked with Abel Ochoa's attorneys, Michael Byck and Stephen Miller. I had no relationship with these attorneys prior to working on Mr. Ochoa's case.

4. At the time of my appointment to assist with Mr. Ochoa's defense, I had a significant amount of experience conducting mitigation investigations. Information obtained during a social history investigation is used to identify factors in the client's background and current situation that help trial counsel assess the need for, identify, and consult with appropriate expert witnesses. This same social history information is used by the expert witnesses when conducting evaluations of the client. The value of a thorough social history investigation is obvious.

5. One role I assumed as a member of Mr. Ochoa's defense team was to help coordinate efforts between trial counsel and those who were attempting to assist them. A go-between was a necessity due to trial counsel being in court nearly every day I was involved with the case. They had few opportunities by that time to consult with learned counsel. During my work on the case I had frequent contact with Phil Wischkaemper, the Capital Assistance Coordinator for the Texas Criminal Defense Lawyers Association. I

remember Mr. Wischkaemper met with Michael Byck and Stephen Miller prior to the beginning of voir dire and that he provided them with discs containing materials for attorneys representing capitally charged clients. During my work on the case, Mr. Wischkaemper offered the defense team suggestions regarding their representation of Mr. Ochoa as well as various kinds of support. For example, he supplied the attorneys draft motions relevant to Mr. Ochoa's case and assisted with the identification of experts who could present Mr. Ochoa's defense to a jury. As it turned out, Mr. Wishckaemper was also a sounding board for me to vent my frustrations about the case and how ill-prepared the defense was for trial.

6. I first became aware of the efforts of Mr. Ochoa's defense team in November, 2002. At that time, no investigation had been conducted in preparation for Mr. Ochoa's capital murder trial. With the assistance of Mr. Wischkaemper, I attempted to educate Michael Byck and Stephen Miller as to the necessity of conducting a comprehensive social history investigation for Mr. Ochoa. It was my understanding that neither of Mr. Ochoa's attorneys had ever been involved in such an undertaking before this case. I knew from experience that the information obtained during a social history investigation is important to each stage of capital litigation: from pre-trial motions, to questioning potential jurors, and to developing a theory of defense at both stages of the trial proceeding, as well as to the possible negotiation of a plea agreement. Based on my experience, I knew it was important to provide Mr. Ochoa's counsel as much information about their client as possible, as quickly as possible, so the information could be used in their considerations for pre-trial motions and jury selection. In the case of Mr. Ochoa, this was particularly important. There was no question that Mr. Ochoa killed five people, two of whom were children, and wounded a sixth the night of the offense. His guilt of being the shooter was not a point of contention. However, presenting evidence regarding Mr. Ochoa's mental state at the time he killed his family was crucial. Because the investigation was not begun until the eve of their voir dire of potential jurors, Mr. Ochoa's attorneys were inadequately prepared at that stage of the proceeding.

7. In late November, 2002, Mr. Byck and Mr. Miller agreed to have me appointed to work on the case. However, my getting started on the investigation was delayed because they did not have an order of my appointment signed until almost three months later. I remember speaking to Mr. Byck several times, trying to arrange a meeting with him about the case. Mr. Byck kept postponing the meeting and failed to send me materials about the case even though he promised he would do so. On December 2, Mr. Byck sent me, via fax, the Indictment, Affidavit of Probable Cause, Mr. Ochoa's statement, the offense report, and a transcript of the examining trial. Although I was not yet appointed to work on the case, I read the materials he sent and conducted research on the issue of crack cocaine addiction. It was imperative that the investigation begin right away, as the trial date was just months away.

8. During the three months between our first conversation about the case and when I was finally appointed to work on the case, I expressed frustration to trial counsel and to Mr. Wischkaemper about the lack of movement of Mr. Ochoa's attorneys in getting me appointed. I was very concerned about being able to complete a mitigation investigation prior to the scheduled trial date. If trial counsel planned to present mitigation on Mr. Ochoa's behalf, then they needed to allow me to get to work immediately.

9. After making several efforts to schedule a meeting with Mr. Ochoa's attorneys, I was finally able to sit down with Mr. Byck on January 28, 2003. We had a brief discussion about the case and Mr. Byck allowed me to view his file. In addition to the materials he faxed to me, the only thing in Mr. Byck's case file was a folder containing photos from the crime scene and three pages of hand-written notes of his October 7 meeting with Mr. Ochoa. There were no investigation reports, no witness interviews, and no other evidence that Mr. Ochoa's defense team had begun working on the case at all. Although he previously told me his investigator was collecting records and interviewing witnesses for the guilt phase of the trial, on this day Mr. Byck told me that he did not want the fact investigator to do too much on the case because he did not trust him. He claimed he had only hired the investigator, David Kinney, because Mr. Kinney's wife had recently died and he felt sorry for him. Based on that conversation and the fact that after two months he had yet to file a motion to have me appointed, it was apparent to me that Mr. Byck had, in essence, decided to forego any meaningful investigation of the case.

10. During our meeting, I suggested to Mr. Byck that examining Mr. Ochoa's crack pipe might provide valuable evidence about Mr. Ochoa's state of mind on the day he killed his family. Examination of the crack pipe might prove that Mr. Ochoa smoked something even worse than crack cocaine on that day. I knew from my research on crack cocaine that sometimes adulterants are mixed with the drug and that such adulterants can have devastating consequences for the user. Mr. Byck told me that he would file the appropriate motion to have the crack pipe tested for adulterants. I continued to be concerned that I would not have adequate time to provide Mr. Ochoa and his attorneys with a comprehensive investigation. After all, general voir dire was scheduled to begin in just eleven days. I asked Mr. Byck if he would be seeking a continuance of the trial. I remember Mr. Byck was adamant that a continuance would never be granted, saying that in Dallas County once a case is scheduled for trial – it goes to trial. I had the impression he preferred to not even ask for a continuance. During this meeting I again discussed with Mr. Byck the fact that I was not yet appointed to work on the case.

11. After meeting with Mr. Byck on January 28, I again assessed the lack of time I would have to develop a mitigation case between that date and the beginning of Mr. Ochoa's jury selection. And, I was coming to the conclusion, based on my conversations with Mr. Ochoa's attorneys, that they did not have a good grasp of the relevance of mitigation in a capital case, nor did they understand the time it would take to complete an investigation prior to the trial. It was also clear that neither understood the importance of completing

the investigation, as well as expert evaluations, prior to the voir dire of jurors. On February 3, 2003, I met with Mr. Miller's secretary and learned that trial counsel were preparing an array of pretrial motions for filing. I was dismayed to see that a motion to appoint the mitigation investigator was not among the motions the secretary was working on. I asked that she relay a message to Mr. Miller that he or Mr. Byck still needed to file a motion to have me appointed so I could begin work.

12. I met with both trial attorneys on February 10. During the meeting I again expressed my concern that the crack pipe be tested. Again, trial counsel agreed they would file a motion to send the crack pipe for analysis. During this meeting, Mr. Byck and Mr. Miller asked me to call David Kinney and press him to complete a report of his investigation. It was not clear to me what investigation Mr. Kinney had done. When I eventually spoke to him about the reports, Mr. Kinney advised he had interviewed a few neighbors of the client. He told me that he also had attempted to impress trial counsel with the importance of sending the crack pipe for analysis or with securing a sample of Mr. Ochoa's hair for analysis, which would provide information as to substances he ingested prior to killing his family. Mr. Kinney's concerns about this piece of evidence seemed to fall on deaf ears, which mirrored my own experience.

13. Two days after my meeting with Mr. Ochoa's attorneys, the trial court signed an order appointing me as Mr. Ochoa's mitigation investigator. At that point, less than a week remained until individual voir dire was scheduled to begin. Prior to that date, I had conducted very little work on the case, other than talking to Mr. Ochoa and meeting with trial counsel. The investigation into Mr. Ochoa's life and social history had not begun.

14. The lack of time to complete the investigation was just one of the challenges I faced in my work on this case. My ability to interact with trial counsel was hampered by the fact that during my work on the case they were in court almost every day, all day. Not being able to have contact with Mr. Ochoa's counsel during the investigation was almost debilitating with regard to certain issues. I often had to resort to speaking with trial counsel via emails in order to communicate with them. I had practically no communication with Mr. Byck after voir dire began because he did not use email and did not respond to messages I left for him. Mr. Miller, however, responded to my emails during the night time hours after he finished with court. On March 10, I found myself asking Mr. Miller, by way of email, to encourage Mr. Byck to return my repeated calls to his office. I told Mr. Miller that my questions for Mr. Byck pertained to things he had promised to do during our meeting on February 10: contacting experts about analyzing the crack pipe, determining the location of the crack pipe, and whether there was a Spanish-speaking person at the public defender who could accompany me on interviews. The following day, I again found myself explaining to Mr. Miller the reason I was so concerned about the crack pipe. I reiterated what had been said to counsel previously, that evidence of adulterants in the crack Mr. Ochoa smoked was not just mitigation, it could be used in the guilt phase of the trial as well. I heard back from Mr. Miller that

same night. He advised that he and Mr. Byck had asked the State to send the crack pipe to the SWIFS lab for analysis.

15. There is a painstaking, time-intensive process to conducting a thorough social history investigation. Each interview conducted and record collected adds to our understanding of the client, his life and what lead him to the point of committing the crime for which he is charged. My first task was to initiate records collection for all relevant documents in Mr. Ochoa's history. I quickly requested school records, work history records, medical records, credit reports, financial records, and so forth. Because the collection of records is largely dependent on the availability of the persons with possession of the records to respond to the request, this process can be time-consuming. After the life history records are collected, they must be analyzed and organized in a way that put events of the client's life into context. Life history records have the potential to be as important to the social history investigation and to the expert witnesses hired to assist trial counsel as any witness interview. In this case, because of time constraints, only those records that were easy to access were collected and made available to the defense team and their experts. Even so, my process to collect even the most minimal records was still taking place after the trial had begun. Because of the lack of time to conduct the investigation, the records collection for Mr. Ochoa's case was incomplete.

16. Another aspect of a mitigation investigation is the research of issues that are specific to the client. In Mr. Ochoa's case, that he lived in Durango, Mexico until age two or three is a fact from his history that demanded investigation. Persons who reside in areas such as Durango when Mr. Ochoa was a child were exposed to many adverse medical and environmental conditions, including malnutrition and developmental issues related to exposure to neurotoxins. An investigation into what Mr. Ochoa was exposed to while in his mother's womb and throughout his early developmental years was not conducted. Furthermore, I was unable to gather much, if any, information about the type or availability of neonatal care Mr. Ochoa's mother had with respect to Mr. Ochoa and her other children who were born in Mexico. Malnutrition during pregnancy is always a concern. Although I made an initial effort to contact officials in Durango, I did not have time to follow up with the contact and conduct this research.

17. During a social history investigation, the client is often the most important witness in the investigation. Having multiple interviews with the client allows a relationship of trust and mutual respect to be built. As trust between the client and his defense team is established, it becomes easier for him or her to reveal often painful information that enables our understanding of the client and his behavior. In this case, I spent very little time with my client. For most of the time I worked on the case, Mr. Ochoa sat in court with his attorneys while they selected a jury. Due to procedures of the jail staff, Mr. Ochoa had to remain at the courthouse for a long period even after court completed for the evening and I was not permitted to visit with him there. During the few conversations I had with Mr. Ochoa, I found him to be very depressed and saddened by what he had

done, to the point of being overly focused on his own death, at which time he believed he would be reunited with his wife and children. At the beginning of the investigation, I hoped to be able to spend more time with Mr. Ochoa, in order for him to develop trust in me and perhaps get him more engaged in his legal representation. Because of the limitations on how much time I could spend with Mr. Ochoa, and because there was so much else to do in order to prepare a social history for Mr. Ochoa, my attention was devoted to my efforts to develop a positive relationship with his family and other witnesses.

18. Establishing a working relationship with family members of the defendant is crucial during a mitigation investigation. Their cooperation allows us to discover information about the client's early life and the location of records and witnesses valuable to the investigation. Even after a relationship of trust is developed, family members must be interviewed individually in order for them to feel comfortable discussing events that involve other family members. A persistent and diligent effort is required, through a series of interviews, to convince witnesses to share private and sometimes painful memories of their past. Once familiarity is established with the interviewer, witnesses must be convinced to make their revelations of sensitive issues public by testifying in front of a jury. Mr. Ochoa's immediate family resided in the Dallas area. During my first meeting with them I learned that many of the family members, including Mr. Ochoa's mother and father, did not speak English. I did not speak Spanish and required the assistance of an interpreter in order to conduct interviews. Although I was eventually (after March 11) provided access to an interpreter on staff at Mr. Byck's office, the interview process with Mr. Ochoa's parents remained difficult. It was a much more laborious task having to work through a translator, and I was concerned that I could not spend adequate time with each witness in order to develop the sort of relationship necessary with this type of investigation. I also found that by speaking to witnesses through a translator I was not certain I was gathering, with accuracy, all the information each witness could provide. The fact that I had to coordinate my efforts to speak to witnesses with whatever time the interpreter had available was somewhat problematic. Due to time constraints and the availability of both the interpreter and the witnesses, I ended up only speaking to Mr. Ochoa's parents a couple of times and while they were together. His mother always became very upset during the conversations and left the room before I had a chance to speak to her. The situation with all members of Mr. Ochoa's family was emotionally charged; after all the witnesses were the parents of the alleged killer and yet were very close to the victims – including the daughter-in-law and grandchildren they loved dearly. Mr. and Mrs. Ochoa were very traumatized by the deaths of their loved ones, and the few limited interviews I was able to conduct were woefully inadequate. I am certain that with adequate time, I could have gained Mrs. Ochoa's trust and interviewed her. I did not feel that she was uncooperative or evasive with me; she was simply too distraught, and I had too little time to spend with her. As a result, Mr. Ochoa's mother did not testify at his trial. The absence of Mr. Ochoa's mother's input into his social history was, in my opinion, was a critical gap in my

investigation.

19. Members of the Ochoa family were not the only witnesses in this case that presented challenges to interview. Mr. Ochoa was very well-liked by his co-workers, neighbors, and friends. They knew him to be a loving father and a hard worker. However, the crimes for which he was arrested were horrible. This loving father was accused of killing his wife, their two children, and members of his wife's family. His behavior was incomprehensible to the people who knew Mr. Ochoa. Additionally, many of these witnesses felt torn between their desire to help Mr. Ochoa by speaking on his behalf and not wanting to further hurt his wife's family, who were determined to see Mr. Ochoa receive a death sentence. It was a difficult situation for everyone who knew Mr. Ochoa and his family. In order to obtain information from them, I first had to work with each witness regarding how they felt about what he had done. It was only when they were informed of and understood his drug addiction that the witnesses could reconcile the man they knew Mr.Ochoa to be and the crime he was accused of committing. This type of interview process requires that an incredible amount of time be devoted to each witness. That was simply not the situation I found myself in, due to the fact that my first contact with all of the witnesses occurred after the trial had begun. I was pressed to quickly find information that could be passed on to a defense expert or experts and that could be used in a presentation to Mr. Ochoa's jury.

20. The investigation I attempted to conduct was not only required for Mr. Ochoa's punishment phase, but was also important to the guilt phase of the trial. Many of the witnesses interviewed and records collected provided evidence regarding Mr. Ochoa's addiction to crack cocaine and demonstrated how this addiction led to the deterioration of his life and eventually to the events of the day he killed his family.

21. On March 18 Mr. Kinney provided a report of his interviews of Mr. Ochoa's neighbors. The next day, I prepared a report concerning the status of my investigation. My intent was to demonstrate to trial counsel the need for a continuance in order to complete the investigation. I urged Mr. Byck and Mr. Miller to seek a continuance because I knew I could not conclude a thorough mitigation investigation by the April 14 trial date. I believed more time was essential and a matter of effective representation.

22. Sometime around March 21, we were informed that the crack pipe had been destroyed by the Dallas County Jail because it was booked as Mr. Ochoa's personal property and not preserved as evidence by the police. Again, Phil Wischkaemper attempted to assist trial counsel with suggestions as to how to handle this situation. I do not recall whether Mr. Ochoa's attorneys took any action regarding the destruction of this important evidence.

23. Between the date of the status report and the beginning of the guilt phase of trial, I continued the process of locating and interviewing witnesses. On Sunday, March 23, I met with trial counsel. The defense had received a motion from the State concerning

additional extraneous unadjudicated offenses, specifically that Mr. Ochoa had held a gun to his wife's head a few weeks prior to the murders. These aggravating facts that the State raised so close to trial required investigation and presented an additional reason for needing a continuance.

24. It was during this meeting that I learned Mr. Byck had hired Dr. Ed Nace, and that tests were being performed on Mr. Ochoa at Parkland Hospital that weekend. Mr. Byck told me that Dr. Nace was a neuropharmacologist and also a psychopharmacologist, which was the type of expert I had suggested trial counsel consider hiring. Based on the facts of this case, it was clear that only an addiction expert could help the jury understand Abel's medical and psychological condition at the time he killed his family. An expert with regard to brain trauma could also help put Mr. Ochoa's behavior into perspective. Without such an understanding, the jury who decided Mr. Ochoa's fate was left to guess as to his motive for killing his loved ones. I did not know anything about Dr. Nace and had no prior contact with him. My ultimate concern was that Dr. Nace was not able to tie his testimony about brain dysfunction and addiction to Mr. Ochoa's bio-psycho-social history. But in the days leading up to trial after Dr. Nace was retained as an expert, this was a moot point, because I was still working on the development of Mr. Ochoa's social history. Although defense counsel asked for names of addiction experts, to my knowledge trial counsel never contacted the experts I provided them phone numbers for. When I attempted to reconcile the conflict between what I was told would take place with regard to experts and what was actually happening, Mr. Miller told me he had no say in the decision and that I needed to speak to Mr. Byck.

25. At some point around this time, during a conversation when I discussed the need for more time to work on the case, I told Mr. Byck that I wanted to prepare an affidavit for trial counsel, detailing how much investigation was left to be done. I suggested such an affidavit could be used as an exhibit to a motion for continuance. Mr. Byck told me that he believed my plan was to use the affidavit as a weapon against him (during habeas corpus proceedings) for not asking for a continuance. I reiterated my belief that an affidavit describing the investigation that remained to be completed would be a tool to help Mr. Ochoa's defense team get more time to work on the case.

26. On March 25, I learned Mr. Miller hired another investigator, Jeanne Horn, to assist with our efforts on the case. I asked Mr. Miller for more details as to what the State claimed happened to Mr. Ochoa's crack pipe, so Ms. Horn and I could investigate the issue and provide trial counsel information as to whether what happened to the pipe was common practice in Dallas County. Mr. Miller responded to my request, saying the District Attorney claimed the pipe was logged in as "found property" and then destroyed as "unclaimed property" in October, 2002. Mr. Miller said he had questioned the detective at the examining trial about the pipe, but did not ask the police to preserve it as evidence. He assumed they would preserve the pipe as evidence.

27. On March 31, I sent an email to Mr. Miller and informed him of my difficulty in interviewing Mr. Ochoa because he was returned to the jail from court very late each evening. I asked if arrangements could be made to interview him at the courthouse during breaks in voir dire. After my request was granted, I met with Mr. Ochoa at the court house on April 2.

28. Also on April 2, Mr. Miller and I received an email from Phil Wischkaemper regarding the extraneous, unadjudicated offenses recently alleged by the State, the exclusion of Hispanics from the jury, and other issues of interest. He noted he had previously provided Mr. Byck with a manual that would assist him in dealing with the issue of exclusion of Hispanics from the jury. Mr. Wischkaemper also advised Mr. Miller of ways to deal with the State's mental health expert. In another email, Mr. Wischkaemper sent Mr. Miller and me a Motion for Continuance in which he added specific language regarding the issue of the destroyed crack pipe. Mr. Wischkaemper noted the case was not even a year old and that Mr. Ochoa was entitled to more time to develop a defense. I told Mr. Wischkaemper that on this same day Mr. Miller asked Mr. Byck, in my presence, whether he had prepared a motion for continuance and Mr. Byck replied, "There ain't gonna be no continuance in Dallas County." Mr. Wischkaemper noted he hoped the attorneys would file a motion for continuance in order to make a record for Mr. Ochoa's appeal.

29. On this same day, I learned that the new fact investigator, who I had assumed was doing the work we agreed she would do for the past ten days, had done nothing due to not having a car to drive.

30. The following day, along with Philip Wischkaemper, I once again discussed the need for a continuance with trial counsel. Mr. Wischkaemper and I urged them to seek a postponement of the trial in order to allow me to complete the investigation. I remember Mr. Byck informing me, in no uncertain terms, that there would be no continuance in Dallas County. I came away from the conversation believing that trial counsel was unwilling to even make the attempt to obtain a continuance or do something as rudimentary as make a record for their client.

31. On April 4, Mr. Ochoa underwent a PET scan, and the defense team received a report three days later. During the trial, I learned that the doctor who performed the PET scan mostly did oncology PET scans, and so could provide only very general information about the abnormalities that showed up on Mr. Ochoa's test. The doctor confirmed my belief we needed a neuro-psychologist to testify regarding Mr. Ochoa's PET scan.

32. At that time I began preparing a detailed affidavit for the defense to use in support of a motion for continuance. In this affidavit, I described my efforts of the previous 51 days and detailed what remained to be done and why additional time was needed. I identified several themes of mitigation that required further development, including Mr. Ochoa's neurological impairment, a personal and family history of addiction disease, childhood

trauma, social and cultural factors, and evidence of Mr. Ochoa being a peaceful and rule-abiding prisoner. I noted information for the social history is collected in three ways and described efforts undertaken as of that date. Records had been requested but not all had been received. No records from Mexico had been obtained. Research of issues related to Mr. Ochoa's early childhood in Mexico had not been completed. I described the process necessary to obtain private and painful information from witnesses and how the process had been hindered by a lack of time and the fact that one of our most important witnesses, Mr. Ochoa, was unavailable due to his presence in court.

33. During the week leading up to the trial, I continued to struggle to obtain Mr. Ochoa's jail records. The Dallas County Jail kept putting off responding to my request and it was not until April 11 that I obtained the records. These records were vital to proving Mr. Ochoa was not a future threat to society, even prison society, as he was not a problem inmate. I also knew that it was possible that the jail records would document Mr. Ochoa's devastating depression and suicidal thoughts regarding his killing his family. Such evidence, especially if presented through a corrections officer, could be important to the jurors. I recall that during a meeting on April 13 with the attorneys, I was frustrated that I could not get them to address the issue of future dangerousness at all. After the trial began, I continued to locate records maintained by the jail. The Suicide Log was missing from the documents the jail had finally provided to me. After more requests to the jail for this information, on April 15 I was told that the jail had lost, destroyed, or misplaced the Suicide Log. This potentially invaluable piece of evidence, like the crack pipe, had been made unavailable due to actions of the State.

34. I continued to investigate the case even after then the guilt phase of the trial began. I did not see witness testimony during the two-day guilt phase, as I spent my time looking for and interviewing witnesses we could present. I continued interviewing witnesses, and pouring through the records I received from various agencies. Trial counsel asked me to prepare a condensed version of the social history report, which would be a synopsis that summarized my findings. On April 14, the first day of the guilt phase, I prepared a list of potential defense witnesses for the punishment phase and made recommendations to the order in which they should testify, so the mitigation story flowed and would be easy for the jurors to follow. I also provided a list as to what each witness could contribute to the defense presentation.

35. Unfortunately, Mr. Ochoa's attorneys were not as prepared as they could have been for the presentation of evidence at his trial. This is not surprising, considering the limited time that had been spent preparing the case for trial. The investigation was not complete, the witnesses we had were not adequately prepared to testify, and our expert witnesses were not provided all of the information needed to complete their evaluations.

36. If the investigation had been complete, Mr. Ochoa's jury would have learned of mitigating factors that were relevant to the offense as early as voir dire and the guilt phase of the trial. By the time the punishment phase began, jurors would have been educated about his drug addiction and how this extremely debilitating disease led to problems within Mr. Ochoa's family. Some of this information was even available by way of the State's own witnesses. The jury could have been provided an understanding of the physiological process of addiction and how the police finding Mr. Ochoa at an ATM machine after he killed his family, trying to get money with which to buy more crack cocaine, was very telling of the stage of addiction he was in at the time. Instead, this information was presented by the State as evidence that Mr. Ochoa's efforts to obtain cocaine were voluntary, even callous, considering he had just killed his family.

37. During the punishment phase the jurors should have been provided a deeply moving and humanizing narrative of Mr. Ochoa's life, which should have included detailed information about his birth and early childhood in Mexico and the impact of growing up with an abusive and alcoholic father in Texas. But at the time punishment phase began, trial counsel had spent little time digesting the material I had provided them and virtually no individual time with the defense witnesses before they took the stand and testified.

38. Even though trial counsel made an effort to educate the jury as to the effects of crack cocaine addiction and the reason such an addiction is mitigating, the jurors were told by the State's expert that Mr. Ochoa's addiction was, in fact, aggravating.

39. Instead of a cohesive and compelling story of Mr. Ochoa's life, the defense punishment phase presentation lacked the details that would have made it clear to jurors what Mr. Ochoa's life was like as a child and teenager, so the jurors would understand the relevance of those events to his behavior as an adult. In order for the jury to fully appreciate the significance of the trauma to which Mr. Ochoa was exposed as a child, the evidence of those events should have been presented in excruciatingly detailed stories, told by witnesses who survived and were affected by the events themselves. Putting together such a presentation is a time-consuming endeavor, especially in this situation where cultural factors were also at play.

40. The presentation of our witnesses was rather haphazard, due to the judge forcing trial counsel to call witnesses out of the preferred order. The judge wanted the trial to move at a certain pace, and so the defense found it necessary to put on witnesses whose testimony would have made more sense if they came at a specific time in the presentation.

41. None of the defense witnesses were adequately prepared to reveal to the jury the painful and sometimes embarrassing memories they shared with me during our brief contact prior to trial. There simply was not time to prepare the witnesses for what they could expect on the witness stand and to reassure them that their testimony was crucial. Additionally, in a case where loyalties and sympathies to the victims' family were such huge factors, our

witnesses had even more reasons to be hesitant on the witness stand. Because we had not had the time to spend with the witnesses, they had no reason to trust either the necessity or the reason for us wanting them to testify. I specifically recall that when Mr. Ochoa's former brother-in-law, Victor Faz, took the witness stand, his former wife – with whom he was involved in a nasty custody battle – came into the courtroom and sat in the front row, as close to him as possible when he testified. Mr. Faz was clearly intimidated by the overwhelming presence of his former wife's family and he had no reason to trust Mr. Ochoa's attorneys would take care of him as a witness.

42. I remember Mr. Ochoa cried throughout the trial, and was even more emotional when members of his family testified during the punishment phase. Mr. Ochoa was also a witness during this phase of the trial. I was present in the courtroom for this testimony and took several pages of notes. I recall being appalled when I saw Mr. Ochoa, who wore leg irons / shackles during his trial, walk to the witness stand. He passed by the jurors, who were sitting in the jury box, shuffling his feet due to the restraint the leg chains imposed. There could be no doubt that Mr. Ochoa was shackled when he walked to the witness stand

43. The defense team failed Mr. Ochoa in many ways. Perhaps most important was our failure to provide the jury enough information about addiction. The medical science regarding addiction was not covered adequately during witness testimony. And, given that the jury asked, during their deliberations, for a definition of "personal culpability", it seems obvious they were interested in having heard more about addiction disease versus personal choice.

44. I was not appointed to begin work on Mr. Ochoa's case until three months after trial counsel first contacted me. Unfortunately, those three months represented a missed opportunity; the delay in having an investigator appointed was crucial when it came to preparing a social history for Mr. Ochoa. Not having a completed, painstakingly investigated social history for Mr. Ochoa prevented trial counsel from having the benefit of expert witness assistance at every stage of the pre-trial and trial proceedings. This was relevant to the defense of Mr. Ochoa because his fate absolutely depended on the jury understanding addiction disease and how it affected his behavior on the day he killed his family.

45. There were only sixty-eight days from the date of my appointment on the case until the day his jury returned a death sentence for Mr. Ochoa. As noted in preceding paragraphs of this Declaration, prior to my appointment on the case no investigation had been completed. At little more than two months prior to Mr. Ochoa's trial, no witnesses were interviewed, no records were collected, and no research had been done specific to Mr. Ochoa's situation – his addiction to crack cocaine. In my opinion, one of the most glaring omissions by Mr. Ochoa's attorneys was the fact that they did not locate and have analyzed the pipe Mr. Ochoa used to smoke crack on the day he killed his family. To

find, mid-trial, that the crack pipe had been destroyed months before the defense finally made the request to have it analyzed was characteristic of the entire investigation into Mr. Ochoa's case: too little, too late.

I affirm the foregoing paragraphs, numbered one through forty-five, are true and correct to the best of my knowledge.

FURTHER AFFIANT SAYETH NOT.

Tena S. Francis

Tena S. Francis

SWORN TO and SUBSCRIBED before me by Tena S. Francis this 18th day of August, 2010, to certify which witness my hand and seal of office, in the capacity therein stated.

JEREMY KIP
Notary Public-State of Nevada
APPT. NO. 04-91405-1
My App. Expires August 20, 2012

Notary Public, State of Nevada

My commission expires: August 20, 2012

CAUSE NO. F02-53582-M

FILED
2003 APR -7 AM 8:55
DISTRICT CLERK
DALLAS CO. TEXAS
DEPUTY

THE STATE OF TEXAS	§	IN THE 194TH JUDICIAL
	§	
VS.	§	DISTRICT COURT OF
	§	
ABEL R. OCHOA	§	DALLAS COUNTY, TEXAS

DEFENDANT'S FIRST MOTION FOR CONTINUANCE

NOW COMES Steve Miller, lead counsel for the Defendant, Abel Ochoa, and pursuant to the 4th, 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article 1, Sections 3, 10, 13 & 19 of the Texas Constitution and Tex. C. Crim. P. Art. 29.03, 29.06 and 29.08 respectfully moves this Court to continue the trial of this cause and in support thereof would show:

1. The Defendant has been indicated by the Dallas County grand jury for the offense of capital murder. Texas Penal Code Section 19.03.

2. Lead counsel for the Defendant was appointed by this Court on the 6th day of August, 2002, co-counsel Michael Byck was appointed soon thereafter.

3. In order for the Defendant to receive a fair trial it will be necessary to conduct an extensive investigation into the circumstances of the offenses, the defendant's character and background and any other evidence that would mitigate against a sentence of death or would otherwise relate to the moral blameworthiness of this Defendant, should he be found guilty of capital murder. This investigation, designated to develop mitigating evidence for the penalty phase of the trial, is mandated by the *American Bar Association's Guidelines in Death Penalty Representation*, Section 11.4.1(B).

4. This vital mitigation investigation has not been completed at the time of the filing of this motion because:

(a) counsel has hired a mitigation specialist, however, the investigation has not been completed because of the facts and circumstances alleged in the attached affidavit of Tina Francis, mitigation specialist, incorporated by reference for all purposes herein as Exhibit 'A'.

Should this motion not be granted by the Court, the Accused will be denied the effective assistance of this counsel and he will be prejudiced by counsel's inadequate preparation time in the following respects:

(a) Counsel for the Accused will not be able to offer evidence of the Accused's background or his character nor any of the circumstances of the offense the will reduce the Accused's moral blameworthiness such that would justify a sentence less than death.

Specifically, Movant has identified the following areas of the Accused's background and character and those circumstances of the offense that must be investigated:

(i) "good inmate" evidence

(ii) evidence of childhood trauma

(iii) personal and family history of addictive disease

5. The prosecution has provided counsel for the Defendant continuing discovery; and, on the 20th day of March, 2003 and thereafter. This new discovery reflects that evidence relating to the following will be offered at trial:

Extraneous offenses: documentation being found in several State's notices filed int his cause, listing several alleged incidents of domestic difficulties between Defendant and deceased Cecilia Ochoa. These incidents must be fully investigated to provide defendant due

process and a fair trial, and adequate time has not been provided since notice has been received.

6. The State's evidence that is presently known to the Defendant is alleges that Mr. Ochoa committed this offense after smoking a quantity of Crack Cocaine from a "crack pipe." It has been defense counsel's intent to gain access to that crack pipe and have it tested for substances which could assist in explaining defendant's behavior that led to the instant offense. Counsel for defendant was informed on March 21, 2003, during jury selection for this case, that the crack pipe had not been preserved as evidence and had, indeed, been destroyed some sixty (60) days after defendant's incarceration on the instant offense. Counsel for the defendant was truly surprised by this revelation because of the connection of this evidence to the state's case. Because of actions of the State in destroying this critical piece of evidence, counsel needs more time to investigate and consult with potential experts in the field of toxicology to develop this defensive theory. Without this additional time, counsel for defendant cannot be effective in his representation of defendant as required by the sixth amendment of the United States Constitution as applied to the states through the 14th amendment.

In addition, it will necessary for counsel to retain expert assistance to review and evaluation the other evidence in the case so that any appropriate challenges to the validity of the evidence can be made at trial. Expert assistance is necessary regardless of the expert's field of expertise as there is no principled way to distinguish between psychiatric and non-psychiatric experts. The denial of the appointment of an expert under *Ake* amounts to "structural error which cannot be evaluated for harm. *Rey v. State*, 897 S.W.2d 333 (Tex. Crim. App. 1995). Should this Motion for Continuance not be granted by the Court, the

Defendant will be denied the effective assistance of this counsel and he will be prejudiced by counsel's inadequate preparation time.

7. At the same time the State informed the defense of the destroyed crack pipe (see #6 above). The State also informed the defense that a "Brillo" like material, akin to steel wool, or a metallic scrubbing pad, which was taken from the Defendant at his arrest and was with the Crack Pipe when, destroyed by the State. Counsel for Defendant was truly surprised by this revelation because of the connection of this evidence to the state's case. Because of actions of the State in destroying this critical piece of evidence, counsel needs more time to investigate and consult with potential experts in the field of toxicology to develop this defensive theory. Without this additional time, counsel for defendant cannot be effective in his representation of defendant as required by the sixth amendment of the United States Constitution as applied to the states through the 14th amendment.

AND

The late notice of the State's intent to offer such evidence unfairly surprises the Accused and his counsel. Such late notice violates the Accused's right to a fair trial and due process of law *Spence v. State*, 795 S.W.2d 743 (Tex. Crim. App. 1990). Should this motion for continuance be denied by the Court, the State should be prohibited from offering evidence as to these alleged offenses.

8. Counsel for the Defendant has not the time or the resources the prosecution has had to prepare this case for trial. The State has chosen to seek the ultimate punishment against the Defendant. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). However, counsel

has not had the time or the resources the prosecution has had to prepare this case for trial. The state has had the aid and assistance of the state police, the FBI, location authorities and cooperative witnesses. Some of these witnesses may have even been offered inducements in exchange for their testimony.

WHEREFORE PREMISES CONSIDERED, Movant prays that upon hearing that the trial of this case be continued and that he have such other or further relief to which he may be entitled.

Respectfully submitted on this the 7th day of April, 2003.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

SWORN TO BY Stephen Miller on this 7th day of April, 2003.

P. LATHAM
Notary Public State of Texas
Commission Expires
FEBRUARY 26, 2006

Notary Public

CERTIFICATE OF SERVICE

I hereby certify to the Court that a true and correct copy of the above and foregoing Motion was served on the Dallas County District Attorney's Office by personal delivery on the same date of filing herewith.

MICHAEL BYCK/STEPHEN H. MILLER

ORDER

On the 7th day of April, 2003, the Court having considered the above and foregoing Motion finds the same is hereby ~~GRANTED~~ / ~~DENIED~~. Denied

Judge Presiding

F02-53582-M APPENDIX F

FILED

STATE OF TEXAS }

EXHIBIT 2003 APR -7 AM 8:55

COUNTY OF COLLIN }

JIM HAMLIN
DISTRICT CLERK
DALLAS CO. TEXAS
DEPUTY

Affidavit of Tena S. Francis

Comes the Affiant, Tena S. Francis, after first being duly sworn, states the following.

1. My name is Tena S. Francis. I am over the age of 18 and can read and write the English language. I have prepared this affidavit, myself. The following information is true and correct to the best of my knowledge.

2. I am a Mitigation Specialist with an office located in Little Elm, Texas. I have provided criminal defense and mitigation investigative services to attorneys since 1987. Recently, I have been appointed to provide defense investigative services in Criminal Cause Number F02-53582-M, styled State of Texas vs Abel Revilla Ochoa. This court order was signed by Judge Mary Miller of the 194th Judicial District Court on February 12, 2003. As the court-appointed Mitigation Specialist, I am working with Mr. Ochoa's attorneys, Stephen Miller and Michael Byck.

3. As the Mitigation Specialist, my role on the defense team is to assist in the identification of punishment phase issues and in the preparation of mitigating evidence. This type of investigation is commonly referred to as a "social history investigation".

4. ***The development of a social history for any person facing capital punishment is one of the most important roles of his defense team.*** The goal of preparing a social history of Abel Ochoa and his family's background is to identify possible genetic, social, and interpersonal factors that affected his development, mental status, and psychological functioning. A review of this social history by defense experts will increase their ability to offer valid opinions and render accurate diagnoses. This information is relevant in order for mental health and other experts to determine: the client's cognitive functioning; the presence and course of any addictive disease; the likelihood of the presence, severity, and effect of neurological deficits; the effects of addiction and intoxication on those deficits; and any other factors that would have influenced or controlled Abel Ochoa's thought processes and behavior at the time of the offense.

5. Mental health experts also require social history information to weigh and assess lay witness reports of Mr. Ochoa's behavior surrounding the offense and during his interrogation by police, as well as during their own pre-trial clinical interviews with him. A well-prepared social history offers insight into factors and circumstances that affected Mr. Ochoa's behavior over the course of his life. At the trial, it will be relevant to the presence, significance, and weight of mitigating factors.

6. Information obtained during the social history investigation is important to each stage of the capital litigation: from pre-trial motions, to jury selection, to the development of the theory of defense at both stages of the trial proceeding, and to the possible negotiation of a plea agreement. Abel Ochoa's defense team was at a disadvantage for not having had this investigation completed prior to the commencement of Voir Dire, as the information developed during the social history investigation could have been used to structure the questioning of potential jurors. The information could also have been used to formulate strategies for the filing of pre-trial motions.

7. In essence, the social history investigation details every aspect of the client's life: pre-natal care, birth, medical and psychological histories, education / academic achievements, religious background, employment history, military service experience, criminal activity, incarceration history, incidents of substance abuse, family background information, cultural considerations, inter-personal relations, the development of social skills, and many other factors. It is necessary for the mitigation investigator to collect multi-generational data about the client and his family in order to identify patterns of behavior and medical history that influenced or affected the client development and behavior. Records collected offer objective documentation about the client's life history. Witnesses to be interviewed not only include the client and close members of his family, but also persons who are/were in a position to be more objective about the client and his surroundings. Other witnesses contacted are those persons who are able to provide professional assessments of the client and his family situation.

8. During the ***fifty-one days*** since the Court appointed me to work on this case, I have devoted many hours to the investigation of Mr. Ochoa's pre-trial defense. My time has been spent: reviewing case materials provided by defense counsel; meeting with defense counsel; meeting with the client; identifying, collecting, and reviewing life history records; conducting research; identifying, locating, and interviewing witnesses; report writing; and identifying and contacting potential expert and lay witnesses to add to the

defense team who might help educate the jury about a number of complicated issues.

9. This investigation has just begun, and for a number of reasons, cannot be completed prior to the scheduled trial date of April 14, 2003. In a case such as this, where the client confessed to killing five people and critically wounding another after smoking crack cocaine, ***the information developed during the social history investigation is directly relevant to evidence presented at the guilt phase of the trial as well as the punishment phase***. So, obviously, the investigation should be completed prior to the commencement of the guilt phase. Likewise, the defense expert witnesses must have their work completed prior to the beginning of the guilt phase, so defense counsel may consult with them prior to any evidence being presented on behalf of their client.

10. Based on my preliminary investigation into Abel Ochoa's background, I find there are many, many factors in his social history that are important for defense experts (and ultimately, the judge and the jury) to know about. In essence, this is basis for the presentation of evidence at both stages of this trial. A unique set of biological and social factors, including genetic heritage and environmental influences, converged on Abel Ochoa from a very early age, leaving him vulnerable to develop significant emotional, social, and mental impairments. I have identified several themes of mitigation evidence that may be developed and presented to the jury. They include: possible neurological impairment, a personal and family history of addictive disease, social and cultural factors, evidence of childhood trauma, and *Skipper* or "good inmate" evidence. I am hesitant to provide more detailed information about the results of the investigation to date, since this affidavit is not to be given *ex parte*. The information developed thus far is compelling, but lacking the necessary detail that can be presented only after the completion of a comprehensive investigation.

11. Information is obtained for the social history investigation in three ways: through the collection of records that document and illustrate every aspect of the client's life, through witness interviews, and through research of literature that specifically pertains to the client's situation. Although the methods used to obtain social history information may be similar from one case to the next, the needs of each client are as individual as the clients themselves.

12. Collecting records is always the first task initiated during an investigation such as this. Because it often takes a substantial amount of time to actually receive the records once

they are identified and requested, and because the names of potential witnesses are found in these documents, the records must be sought immediately. And, as witnesses provide more information about other records that may exist, the records collection effort is an on-going process. In this case, the records collection effort has been complicated by the fact that many of the much-needed documents are maintained by organizations and agencies outside the United States. To date, all of the U.S.- based records that document Abel's life (that are available) have been requested. Not all of them have been received, however. I have done what I can to expedite the process to receive the records, but much of this is out of my control. Some of the most important records are those not yet located, which will be found in various locations in Mexico. These records could be vital to the work to be completed by our expert witnesses during their assessments of the client, as they pertain to medical and environmental conditions that affected the client and his family during his early developmental years.

13. An effective punishment phase defense is presented to the jury by way of three kinds of witnesses: members of the client's family, non-family witnesses who know the client and details of his life, and expert witnesses. The names of potential witnesses are collected during a review of life history records collected and during interviews of family members and the client. To date, immediate family members have been interviewed. Several others, including Abel's extended family, have been located but not yet interviewed.

14. The following paragraphs are devoted to describing the steps that are necessary to complete the social history investigation in reference to this client's case.

15. More time needs to be spent with the client. The best possible source of information with regard to this investigation is Abel Ochoa. The amount and kind of information needed from Mr. Ochoa, like most clients in similar situations, must be obtained during a series of interviews during which a relationship of trust and mutual respect must be established. I find this client extremely easy to communicate with; he wants to assist in his own defense. However, this interview process has been hampered by the fact that Mr. Ochoa has been in court, for Voir Dire, almost every day since the date of my appointment to the case. The time I have had to spend with him has been limited by this and other factors.

16. Although I have met with each member of Mr. Ochoa's immediate family on at least one occasion, the interview process has really just begun. These witnesses, through diligent effort, must be convinced to discuss the very private and painful memories of what

happened when Mr. Ochoa was a child. There were problems within the family, and these issues are of a sensitive nature to the family members. Such information is usually only developed after a significant amount of time is spent with the witnesses, in order to establish the relationship of familiarity and trust required for such revelations to be made in public. These witnesses must be painstakingly prepared to testify as to actual events in open court, to make it clear to all members of Mr. Ochoa's jury what his life was like as a child and teen, so those jurors will understand the relevance of those events to his behavior as an adult. In order for members of the jury to fully understand the significance of the trauma to which Abel Ochoa was exposed, the evidence of these events must be presented in excruciatingly detailed stories, by witnesses who survived the events themselves. Putting together such a presentation of witnesses and evidence is a time-consuming endeavor, especially in this situation where cultural factors have also come into play.

17. There remain several family members who need to be interviewed, including several aunts and uncles who, like Mr. Ochoa's parents were raised in Mexico but now reside in the Dallas area. Each of these witnesses are very important with regard to having an understanding of Mr. Ochoa's development and behavior. Other witnesses who can assist us in telling "Abel's story" include school teachers, neighbors, employers, co-workers, etc. This information will be added to that which has already been collected and placed in a format that is helpful to the expert witnesses who will assist defense counsel.

18. Another very important phase of the defense investigation is to carefully look at every allegation of prior misconduct by the client that the State intends to introduce as an "extraneous offense". ***Just a few days ago***, I was provided a list of extraneous offenses provided to defense counsel by the prosecutor. The vagueness of the allegations on this list makes them nearly impossible to investigate. Under normal circumstances, witnesses to alleged extraneous offenses would need to be interviewed. In many cases, some intended aggravators can be excluded as evidence before the trial. It is also possible that the alleged prior misconduct will substantiate the themes of mitigation that are to be presented at the trial, concerning the client's patterns of behavior and explanations of this behavior. If that proves to be true, the aggravators can actually be presented as mitigation. This cannot be accomplished without time to investigate the alleged extraneous offenses. That the District Attorney has provided no discovery concerning these allegations severely hampers any effort by the defense to investigate them during

the week left before the trial begins. Again, this is a defendant with no prior arrest history. Until the State provided this list of extraneous offenses, Abel Ochoa's defense team understood the only aggravators to be presented were the other victims of the August 4, 2002, shooting. By providing a list of alleged assaults against one of the shooting victims, the State has now accused Abel Ochoa of violent behavior dating as far back as 1996. The allegations must be investigated. Specifics of the incidents must be alleged and discovered, the names of the witnesses must become known, and the credibility of their information must be investigated. After all, this recently provided information could change the nature of Abel Ochoa's defense altogether.

19. A most important aspect of this investigation is the development of evidence of Abel Ochoa's addictive disease. A crucial element of his defense was to establish the nature of the adulterants in the crack cocaine he smoked on August 4, 2002. Just recently, Mr. Ochoa's defense attorneys learned the best way of proving exposure to such adulterants was no longer available to them: the crack pipe taken from Mr. Ochoa on the day of his arrest had been destroyed by the State. It remains a crucial element of his defense to establish the possibility that Mr. Ochoa ingested more than crack cocaine on the day of the shooting. More time is needed to develop other ways to investigate this issue.

20. Abel's good behavior at the Dallas County Jail must be established, through records and witness interviews, as such evidence is directly relevant to his so-called potential for future dangerousness. This is a man with no prior criminal history. The basis for a finding of future dangerousness may depend largely on the facts of the current offense and on his behavior at the jail during his pre-trial incarceration. Since the future dangerousness special issue is critical to the assessment of a sentence for Abel Ochoa, this aspect of the investigation must not be overlooked. The investigation will require identifying and interviewing several persons on staff at the Dallas County Jail. I anticipate being able to identify potential witnesses after seeing records of Abel's incarceration. Although I submitted a request to the Dallas County Jail for records nearly a month ago, I have not yet received those records. Having this evidence developed for the trial is critical for the above-noted reasons.

21. Other tasks to be completed prior to the commencement of trial include the following. Expert witnesses must be consulted and retained for the purposes of presenting the social history information, educating the jury about the effects of crack cocaine addiction, educating the jury as to the cultural factors relevant to the lives of Abel and Cecelia

Ochoa, and other important issues that we have yet to decide upon. The lay witnesses who are chosen to testify must be prepared for the experience of being a witness. Many of them do not speak English, which makes preparing them for the court experience even more of a challenge. Demonstrative evidence must be developed in order to make the punishment phase evidence presentable to the members of the jury.

22. The importance of the social history investigation cannot be overlooked, especially in a case like this where the information obtained during the investigation will clearly have an impact on the defense theory and strategy at every stage of the proceeding. In all capital cases, the defense team must be given the time and resources required to conduct a comprehensive investigation. In this case, the Court generously authorized 200 hours for the mitigation investigation, but there simply was not enough time to devote that many hours to the case prior to the date the presentation of evidence is scheduled to begin. This social history investigation is not yet complete. Without this information, it will be impossible for defense counsel and their expert witnesses to make educated and competent decisions concerning the presentation of evidence on Mr. Ochoa's behalf.

I affirm that the foregoing paragraphs, numbered one through twenty two, are true and correct to the best of my knowledge.

FURTHER AFFIANT SAYETH NOT.

Tena S. Francis

Tena S. Francis

Signed and sworn to before me
by Tena S. Francis, this 5th day
of April, 2003.

Kristi Hedgcoxe

Notary Public, State of Texas
My Commission Expires: _____

KRISTI HEDGCOXE
Notary Public
State of Texas
My Commission Expires
February 4, 2006

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

ABEL REVILL OCHOA,	§	
	§	
Petitioner,	§	
	§	
	§	
-v-	§	**USDC NO. 3:09-cv-02277-K**
	§	
	§	
	§	
WILLIAM STEPHENS,	§	
Director, Texas Department of Criminal	§	
Justice, Correctional Institutions Division,	§	**CAPITAL CASE**
	§	
Respondent.	§	

PETITIONER'S SECOND AMENDED MOTION FOR AUTHORIZATION FOR FUNDING AND APPOINTMENT OF A MITIGATION INVESTIGATOR

Respectfully submitted,

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APPENDIX G

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ABEL REVILL OCHOA,	§	
	§	
Petitioner,	§	**USDC No. 3:09-cv-2277-K**
	§	
v.	§	**Capital Case**
	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
Respondent.	§	

PETITIONER'S SECOND AMENDED MOTION FOR AUTHORIZATION FOR FUNDING AND APPOINTMENT OF A MITIGATION INVESTIGATOR

NOW COMES, Petitioner Abel Revill Ochoa ("Mr. Ochoa"), in accordance with 18 U.S.C. § 3599(f), and requests this Court to approve funding in the total amount of $7,500, for a mitigation investigator to assist his counsel in efforts to demonstrate cause and prejudice under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), to prove his entitlement to relief on the underlying ineffective assistance of counsel ("IAC") claims, and to obtain any other relief that may be available to him. As outlined below, the mitigation expert's services "are reasonably necessary for the representation of the defendant." *See* 18 U.S.C. § 3599(f).

I. Background.

Mr. Ochoa was sentenced to death in *State of Texas v. Abel Revill Ochoa* by the 194th District Court of Dallas County on April 23, 2003. The Texas Court of Criminal Appeals affirmed the conviction and sentence. *Ochoa v. State*, No. 74,663, slip op. (Tex.Crim.App., Jan. 26, 2005). Represented by new counsel, Mr. Ochoa filed a petition for writ of habeas

corpus in this Court on August 19, 2010. (Docket No. 8). Mr. Ochoa raised a number of claims in the federal habeas corpus petition that had not been uncovered or presented by state habeas counsel, including numerous claims that trial and direct appeal counsel had provided ineffective assistance of counsel. As a result, the claims were unexhausted and potentially procedurally defaulted.

Respondent filed an answer and motion for summary judgment on December 17, 2010, arguing that each of the underlying IAC claims were unexhausted and procedurally defaulted, and that the default was unexcused. (Docket No. 14). In the wake of *Martinez* and *Trevino*, Mr. Ochoa asserted that he could now excuse his default by establishing cause and prejudice for defaulting the underlying IAC claims. He pointed out that he was required to establish two layers of IAC—at both the trial level (to establish a constitutional violation) and the state habeas level (to excuse forfeiture). For those reasons, he argued that he should be entitled to evidentiary development, through investigation, discovery, and an evidentiary hearing. This is particularly true because the facts pleaded and the evidence attached to those pleadings demonstrate that Mr. Ochoa might be entitled to relief if allowed to prove his claims. *Petitioner's Supplemental Briefing on the Effect of* Martinez v. Ryan *and* Trevino v. Thaler *on the Issues in this Case*, at 16-26 (Docket No. 44). Respondent has consistently asserted that Mr. Ochoa's claims are defaulted, that Mr. Ochoa is not entitled to any evidentiary development, regardless of *Martinez* and *Trevino*, and that, therefore, any investigatory efforts would be futile. (Docket Nos. 34, 43, & 50).

Mr. Ochoa filed an application for funding in order to obtain investigatory services, and he filed a motion to proceed *ex parte* and under seal. (Docket Nos. 48 & 49 (*Sealed Motion*)). Respondent opposed Mr. Ochoa's motion. (Docket No. 50) On December 17,

2013, this Court denied Mr. Ochoa's motion to proceed *ex parte* and under seal. *Order Denying Leave to Proceed* Ex Parte (Docket No. 51). Mr. Ochoa then filed a motion to reconsider this ruling, along with a first amended sealed and *ex parte* motion for funding, which Respondent again opposed. (Docket Nos. 52, 53 (*Sealed Motion*), and 54). On April 1, 2014, the Court denied Mr. Ochoa's motion for reconsideration. *Order Denying Reconsideration of Leave to Proceed* Ex Parte. (Docket No. 55).

In accordance with the Court's most recent order, Mr. Ochoa files this second amended motion for funding. Those parts of the motion that the Court held could be presented *ex parte* and under seal, namely the identity of the proposed investigator, are referred to the Court through the prior motion and incorporated exhibits.

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

The federal habeas statute authorizes the district courts to grant funds for investigative and other expert services in the course of federal post-conviction litigation. 18 U.S.C. § 3599(f). In *McFarland v. Scott*, 512 U.S. 849 (1994),[1] the Supreme Court explained that, in addition to counsel, "[t]he services of investigators and other experts may be critical in the pre-application phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *Id*. at 855. "[E]stablished habeas corpus and death penalty precedent suggests that Congress intended to provide prisoners with 'all resources needed to discover, plead, develop, and present evidence determinative of their "colorable" constitutional claims . . . [because] [t]he determination of a habeas claim often depends on the

[1] *McFarland* addressed the predecessor funding provision contained in 21 U.S.C. § 848(q), which utilized similar language as the current statute.

full development of factual issues, and experts play an important role in the fact-finding process.'" *Patrick v. Johnson*, 48 F. Supp. 2d 645, 646 (N.D. Tex. 1999) (citation omitted). The standard for securing investigative or expert assistance is whether such assistance is "reasonably necessary." 18 U.S.C. § 3599(f) ("Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant . . .").

In order to show investigative assistance is reasonably necessary under the statute, the Fifth Circuit requires an applicant to demonstrate a "substantial need" for the services. *See Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004); *Clark v. Johnson*, 202 F.3d 760, 768 (5th Cir. 2000). Though the court has not delineated the level of substantially needed to secure funding, it is clear that an applicant must at least demonstrate a real, rather than a speculative, need for investigative assistance to develop potentially meritorious claims in federal court. A court does not abuse its discretion in denying a request for funding when the applicant has not pleaded a viable constitutional claim that is not barred from review, when the underlying claim is facially meritless, or when the proposed investigation would only produce evidence that is cumulative of evidence presented to the jury. *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005) (citing *Barraza v. Cockrell*, 330 F.3d 349, 352 (5th Cir. 2003); *Hill v. Johnson*, 210 F.3d 481, 486 (5th Cir. 2000); and *Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir. 1997)). Accordingly, the Fifth Circuit has routinely denied investigative resources to develop procedurally defaulted and unexhausted claims because any proposed investigation of such claims would be futile. *See Smith*, 422 F.3d at 288; *Riley*, 362 F.3d at 307-08; *Fuller*, 114 F.3d at 502. Prior to *Martinez* and *Trevino*, this made sense because, according to long-standing circuit precedence, ineffective

assistance of state post-conviction counsel could never under any circumstances constitute sufficient cause to excuse a procedural default. *See Cantu v. Thaler*, 632 F.3d 157, 166 (5th Cir. 2011); *Williams v. Thaler*, 602 F.3d 291, 308-09 (5th Cir. 2010); *Matchett v. Dretke*, 380 F.3d 844, 849 & n.1 (5th Cir. 2004); *Martinez v. Johnson*, 255 F.3d 229, 240-41 (5th Cir. 2001).

However, *Martinez* and *Trevino* overruled the Fifth Circuit's categorical rejection of cause based upon ineffective assistance of state post-conviction counsel and, in turn, pulled the rug out from the court's precedent relating to funding. In other words, petitioners who allege IAC claims that were defaulted in state court because of ineffective assistance of state habeas counsel may now excuse the default and obtain merits review of the underlying claims. *See Trevino v. Thaler*, 133 S. Ct. at 1921; *Martinez v. Ryan*, 132 S. Ct. at 1318-19. Under this new procedural regime, a petitioner's efforts to investigate defaulted IAC claims are no longer *per se* futile; instead, such efforts often will give rise to reasonably necessary requests for ancillary services as contemplated by the Supreme Court in *McFarland*. *See Patterson v. Johnson*, 3:99-CV-0808-G, 2000 WL 1234661, at *2 (N.D. Tex., Aug. 31, 2000) (not designated for publication) (holding that investigative services are generally reasonably necessary in order to establish the factual predicate needed to prove cause and prejudice).

III. Prevailing standards of practice require having a mitigation specialist as part of the defense team and these standards apply at all stages of capital litigation, including state and federal post-conviction proceedings.

Prevailing professional norms require that a defense team have a mitigation specialist at all stages in capital litigation, which includes federal post-conviction proceedings. The Texas Guidelines and Standards for Texas Capital Counsel sets out the comprehensive nature of the investigation required of post-conviction counsel and admonishes that counsel may not rely on the previously compiled record and must conduct a full and independent investigation. *See*

State Bar of Texas: 2006 Guidelines and Standards for Texas Capital Counsel, Guideline 12.2.B.1.b.[2] Importantly, counsel should seek the services of a trained mitigation specialist, who must be qualified to do the following tasks:

> (i.) compile a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation, interviews, and collection of documents; (ii.) analyze the significance of the information in terms of impact on development, including effect on personality and behavior; (iii.) find mitigating themes in the client's life history; (iv.) identify the need for assistance from mental health experts; (v.) assist in locating appropriate experts; (vi.) provide social history information to experts to enable them to conduct competent and reliable evaluations; and (vii.) work with the defense team and experts to develop a comprehensive and cohesive case in mitigation that could have been presented at trial.

Id. at Guideline 12.2.B.5.c. The investigation required is exhaustive and probes every aspect of the client's life and background, including medical history, family and social history, experience of traumatic events and exposure to criminal violence, educational history, military history, and prior juvenile and adult criminal history. *Id*. at Guideline 12.2.B.5.d. Document collection and witness interviews are comprehensive and require considerable effort and time to perform. *Id*. at Guideline 12.2.B.5.f. & g. Habeas counsel is required to "locate and interview the capital client's family members . . . , and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors," and so forth. *Id*.

The ABA Guidelines are in accord with the Texas Guidelines and similarly admonish that a trained mitigation specialist is essential to a mitigation investigation. *See* 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.7 (reprinted in 31 HOFSTRA L. REV. 913 (2003)) (setting out the investigation requirements and requiring use of a mitigation specialist as essential to the efforts).

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

Mitigation specialists are a required and essential component of any capital defense team, and those without one fail to meet the requisite standard of care owed to their clients. *See id*. at Guideline 4.1.A (requiring at least two attorneys, an investigator, and a mitigation specialist).[3] As a result, "[t]he defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history." *See* 2008 ABA SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 5.1.B (reprinted in 36 HOFSTRA L. REV. 677, 689-90 (2008)) [hereinafter 2008 ABA SUPPLEMENTARY GUIDELINES].

A mitigation specialist must be able to "identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information." 2008 ABA SUPPLEMENTARY GUIDELINES, Guideline 5.1.C. Because much of the evidence that a mitigation investigation entails is sensitive, private, and often-times painful, a mitigation specialist must be able to establish rapport with the client and witnesses. *Id*. (admonishing that a mitigation specialist must be able to "establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures."). A mitigation specialist also must be able to "recognize and elicit information about mental health signs and symptoms . . . ." *Id*. This is particularly important in developing evidence that can later be used by a mental health professional in providing expert assistance. *Id*. at Guideline 5.1.E (noting the specialized training required "in identifying,

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

documenting and interpreting symptoms of mental and behavioral impairment . . . ."). *See also* 2006 Guidelines and Standards for Texas Capital Counsel, Guideline 12.2.B.5.b. *See generally* Richard G. Dudley, Jr., et al., *Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963 (2008). Finally, mitigation specialists must "possess the knowledge and skills to obtain all relevant records pertaining to the client and others." 2008 ABA SUPPLEMENTARY GUIDELINES, Guideline 5.1.F.

As these guidelines demonstrate, a mitigation investigation requires that the investigator have particular skill sets and training in developing and implementing an investigation plan that few attorneys have.

IV. Mr. Ochoa has a substantial need for the services of a mitigation specialist to conduct a thorough punishment phase investigation, to assist counsel in developing evidence and formulating a defensive strategy for addressing the claims related to the State's use of unscientific and unreliable expert testimony, to assist counsel in determining whether to use expert witness assistance, and to assist in locating necessary experts and in developing and framing referral questions.

As demonstrated in the pleadings before this Court, trial counsel conducted a profoundly flawed investigation into mitigation. *See generally Petition for a Writ of Habeas Corpus by a Person in State Custody*, at 51-88; *Affidavit of Tena S. Francis, dated August 18, 2010*, and *Affidavit of Tena S. Francis, dated April 5, 2003*, attached to the *Petition for a Writ of Habeas Corpus by a Person in State Custody*, as Exhibits "A" and "B." (Docket Nos. 8-1 & 8-2). First, the trial investigation did not commence until approximately two months before the trial started, which is extraordinarily late. Second, because of trial counsel's scheduling conflicts—most notably, the ongoing *voir dire* and guilt-phase proceedings—the mitigation investigator, Tena Francis, had considerable difficulty interacting with, providing in depth information to, and receiving investigative guidance from trial counsel. Third, the delayed

onset of the punishment phase investigation deprived the defense of relevant and valuable information concerning Mr. Ochoa that could have been provided to the defense's expert witnesses.

As a result, the scope and depth of the investigation was limited, and it fell well short of the comprehensive mitigation investigation required by prevailing professional norms. Francis was unable to conduct interviews beyond the immediate family and a few of Mr. Ochoa's friends and acquaintances; she was unable to investigate a large period of time in his life, including his childhood and adolescence in South Texas and Mexico; and she was unable to complete the collection of documentary evidence, such as hospital records, school records, employment records, and so forth. Further, as a result of the limited time, Francis only interviewed a few family members, the interviews were of limited scope, there was no time for adequate follow-up, and her efforts to interview some of the critical family witnesses were frustrated because of language differences, which required that Francis work through an interpreter. As a result of these circumstances, Francis did not have sufficient time to gain the trust of the witnesses, and, thus, she was unable to get complete and reliable information from them. This proved to be particularly devastating with respect Mr. Ochoa's mother, who has proved to be a critical source for important information regarding Mr. Ochoa upbringing and character, because Francis was unable to talk with her at all. Additionally, Francis was unable to develop a full witness list, which is typically developed through records and witness interviews. Consequently, many witnesses in Mr. Ochoa's extended family, as well as his neighbors, friends, co-workers, employers, health-care providers, and so forth, were not discovered, much less interviewed, by the trial team.

Contrary to prevailing professional norms, state habeas counsel wholly failed to investigate this case. *See Petitioner's Response to Respondent's Answer*, at 63-75, *Petitioner's Reply Brief to Respondent's Supplemental Brief Concerning the Effect of* Trevino *and* Martinez *to this Case* at 4-8. (Docket Nos. 19 & 47). State habeas counsel's billing records reflected that he spent minimal time investigating (12.5 hours), and he did not retain a mitigation specialist, much less seek funds for one from the trial court. The hallmark of any capital post-conviction representation, particularly because habeas is not a redo of the direct appeal, is investigation, and the record clearly reflects that state habeas counsel did not discharge this duty. Moreover, the state habeas petition reflects no scrutiny of trial counsel's investigation into guilt and punishment phase issues, it contained numerous non-cognizable record-based issues, and the few cognizable issues that were included lacked any meaningful evidentiary support.

Because no prior defense team, at trial and in state habeas, had conducted a complete, comprehensive investigation, considerable work was required of the federal habeas team, and much of it remains to be done. Prior to filing the original petition raising the unexhausted IAC claims, undersigned counsel conducted an initial investigation, individually and with the assistance of an in-house mitigation specialist working for the Texas Defender Service ("TDS"). Through these efforts, counsel uncovered significant factual support for each of the claims raised in the original petition, which demonstrate the substantiality of the underlying claims. Nevertheless, TDS did not have the resources to conduct a full investigation pre-petition, and because of pre-*Martinez*/*Trevino* Fifth Circuit precedent prohibiting funding for ancillary assistance for investigating procedurally defaulted claims, Mr. Ochoa could not turn to this Court for needed resources. Consequently, the investigation was not complete at the time of filing the original petition.

Because of these inherent limitations, the pre-petition investigator was only able to interview a handful of witnesses, including Mr. Ochoa's mother, father, and two brothers; however, there were at least two dozen additional witnesses that had been identified. Furthermore, much of the document collection tasks remain to be done. Nevertheless, unlike Francis, who was rushed through her investigation and had to work through an interpreter with many witnesses, the pre-petition investigator was able to spend significant time with each witness through multiple interviews, which, in addition to her ability to speak Spanish, enabled her to establish sufficient rapport with them and to obtain crucial and compelling mitigation evidence. Consequently, the evidence presented to the Court illustrates the importance of a culturally competent, trained investigator and likewise highlights why a proper and full investigation is laborious and time consuming.

The efforts of building a mitigation case do not cease with the filing of a petition and continue throughout the federal litigation.[4] This is particularly true in this case, because as demonstrated in Mr. Ochoa's post-*Trevino* pleadings, he will likely be entitled to an evidentiary hearing in order to establish cause and prejudice under *Martinez* and *Trevino* and entitlement to relief on his underlying IAC claims. Thus, it is necessary to retain the assistance of a mitigation specialist.

Counsel has located a qualified investigator, who is available to undertake the proposed investigation into mitigation. The average mitigation investigation typically requires many

[4] *See generally* Eric M. Freedman, *Introduction: Re-Stating the Standard of Practice for Death Penalty Counsel: The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 663, 664 (2008) ("[T]he task of imagining, collecting, and presenting what is generally called 'mitigation' evidence pervades the responsibilities of defense counsel from the moment of detention on potentially capital charges to the instant of execution.").

hundreds of hours to complete.[5] In this case, some of the work has been accomplished through the pre-petition investigatory efforts, but as demonstrated, considerable work remains to be done. The proposed investigator will review the documents from the previous investigation initiated in the federal proceedings, update or revise investigation plan as needed, prepare a documents list and issue needed records requests, locate and interview witnesses, prepare memoranda detailing the results of the interviews and investigation, consult with counsel, and secure affidavits from witnesses as needed. The investigator will assist counsel in developing evidence and strategy for demonstrating that the State utilized unreliable expert testimony on the future dangerousness issue, will assist counsel in assessing the need for expert assistance, and, if needed, will assist in locating qualified expert witnesses and in formulating referral questions for such experts. Finally, the investigator will assist counsel in preparing for an evidentiary hearing on the claims that require resolution of material and disputed issues of fact. The requested assistance is reasonably necessary to develop the needed facts in order to establish the underlying merits of

[5] *See* Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1143, 1154 (2003) (noting that because "it takes hundreds of hours to conduct a thorough social history investigation, hiring a mitigation specialist generally results in a substantial reduction in the overall costs of [capital] representation"); Sean D. O'Brien, *When Life Depends On It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, *supra* n.3, at 758-59 ("An effective case in mitigation—one that genuinely humanizes a capital defendant—requires deep commitment to one's client, a moderately sophisticated grasp of human psychology, and hundreds of hours to assemble."); *id*. at 760 ("In any case, '[d]eveloping mitigation evidence through life-history investigation [will] involve[] hundreds of hours of work—with meticulous attention to detail, painstaking efforts to decode and decipher old records, patience and sensitivity in eliciting disclosures from both witnesses and the client.'") (quoting Russell Stetler, et al., *Dimensions of Mitigation*, Champion, June 2004, at 39)). *See also Trevino v. Thaler*, 133 S. Ct. at 1923 (Roberts, C.J., dissenting) (noting that a claim of ineffectiveness of counsel for failing to investigate mitigation in a capital case is "a particular species of ineffectiveness claim that depends on time-consuming investigation of personal background and other mitigating circumstances").

the IAC claims and that the default of those underlying claims is excused under *Martinez* and *Trevino*.

In its order denying leave to proceed *ex parte* and under seal, the Court expressed concern that post-petition factual development might produce evidence that would not "relate back" to the claims before the Court. *Order Denying Leave to Proceed* Ex Parte, at 6-7 (citing *United States v. Saenz*, 282 F.3d 354, 356 (5th Cir. 2002); and *Rodriguez v. Adams*, 545 Fed. App'x 620 (9th Cir. 2013)). Presently, Mr. Ochoa only anticipates developing evidence in support of the IAC claims pleaded in the original petition. He does not anticipate developing evidence that lies outside of the common core of operative facts as set forth in those claims; thus, the proposed investigation would not run afoul of the relation back doctrine. However, Mr. Ochoa must remain sensitive to the fact that as an evidentiary picture is developed and refined and new evidence is obtained, new directions may present themselves. Furthermore, it is always possible that he will discover new claims that may not relate back to the original claims. But speculation about such possibilities does not undercut Mr. Ochoa's substantial need to develop the evidence in support of the claims currently before the Court, and, as stated, Mr. Ochoa is not aware of any evidence that would support a new, previously unplead claim.

The going rate for a qualified mitigation specialist to conduct the proposed investigation in this case is $100/hour. Though a reasonable estimate of the total cost of a mitigation investigation may, and likely will, exceed $7,500, at this point, Mr. Ochoa is seeking only $7,500 (or 75 hours of investigative time), which is provided by statute without additional authorization from the Fifth Circuit. 18 U.S.C. § 3599(g)(2). If this sum is exceeded, Mr. Ochoa will at that time explain why additional amounts are needed and why the additional services constitute an "unusual character or duration" under the statute. *Id*.

V. Conclusion.

Mr. Ochoa respectfully requests that this Court grant his application for authorization for funding and appointment of mitigation specialist; authorize him to expend up to $7,500 to retain identified mitigation specialist, or any other similarly qualified mitigation specialist, in accordance with 18 U.S.C. § 3599(f); and grant him any and all other relief to which he may be entitled.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX G

Certificate of Service

I certify that on May 16, 2014, I served, by ECF, a true and correct copy of the second amended motion for authorization for funding and appointment of a mitigation investigator upon opposing counsel at the following address:

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

/s/ Paul E. Mansur
Paul E. Mansur

APPENDIX G

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

ABEL REVILL OCHOA	§	
	§	
	§	
Petitioner,	§	
	§	**USDC No. 3:09-cv-2277-K**
v.	§	
	§	**Capital Case**
WILLIAM STEPHENS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER

Before the Court is Petitioner Abel Revill Ochoa's Motion For Authorization For Funding And Appointment Of Mitigation Investigator. WHEREFORE all things considered, the Motion is **GRANTED**. Mr. Ochoa is authorized to retain the proposed mitigation specialist, or a similarly qualified mitigation specialist, and to expend up to $7,500 under 18 U.S.C. § 3599(f) and (g).

ORDERED this _____ day of _____, 2014

_____
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ABEL REVILL OCHOA,	§	
Petitioner,	§	
	§	
V.	§	Civil Action No. 3:09-CV-2277-K
	§	
WILLIAM STEPHENS, Director,	§	(Death Penalty Case)
Texas Department of Criminal Justice	§	
Correctional Institutions Division,	§	
Respondent.	§	

ORDER DENYING MOTION FOR FUNDS

Petitioner Abel Revill Ochoa ("Ochoa") has filed a post-petition application for funding and appointment of a mitigation investigator ("Motion", Doc. No. 56). Respondent has filed his response in opposition ("Response", Doc. No. 57). For the reasons set out below, the Court **DENIES** the Motion.

I

More than three years after his original habeas petition was filed and the limitations period under 28 U.S.C. § 2244(d) expired, Ochoa filed a motion to fund a mitigation investigator (Doc. No. 49). The current motion requests the same relief, but is filed after the denial of leave to proceed ex parte on the funding motion. It is not necessary to allow investigative funding for the Court to consider the claims already presented, and any new claims would now be time barred under 28 U.S.C. § 2244(d).

II

Ochoa was convicted and sentenced to death in 2003 for the 2002 murders of his wife and seven-year-old daughter during a killing spree where he also killed his eighteen-month-old daughter, his sister-in-law, and his father-in-law. *Ochoa v. State,* No. AP-74,663 (Tex. Crim. App. January 26, 2005). At his trial, Ochoa's attorneys presented evidence that he was raised in a poor, disadvantaged family that emigrated from rural Mexico, that he had a good school record, that he was a kind and quiet person with strong moral and religious beliefs who did not normally hurt people, threaten people, or even have a criminal record. Instead, he had a good employment record and had been attentive to the needs of his family before the offense. His attorneys also presented lay and expert testimony that Ochoa had a severe drug addiction that resulted in the serious mental health problems that triggered these tragic murders.

His conviction and sentence were upheld by the Texas Court of Criminal Appeals ("TCCA") on direct appeal. *Ochoa v. State,* No. AP-74,663. Petitioner filed a post-conviction habeas-corpus petition in the trial court that held an evidentiary hearing and entered findings of fact and conclusions of law that relief be denied. *See Ex parte Ochoa*, WR-67,495-01, 2009 WL 2525740 (Tex. Crim. App. 2009). The TCCA adopted these findings and denied postconviction habeas relief on August 19, 2009. *Id.*

In this Court, Petitioner's motion for appointment of federal habeas counsel was granted on January 22, 2010 (Doc. No. 2), and co-counsel was appointed on January 25, 2010 (Doc. No. 3). Petitioner filed his petition for federal habeas relief in this court on

August 19, 2010 (Doc. No. 8). On March 20, 2012, the United States Supreme Court issued its opinion in *Martinez v. Ryan*, 132 S.Ct. 1309, creating a limited exception to procedural bar for ineffective-assistance-of-counsel claims that were not exhausted due to the ineffective-assistance of state habeas counsel. On May 28, 2013, the Supreme Court issued its opinion in *Trevino v. Thaler*, 133 S. Ct. 1911, applying the *Martinez* exception to Texas cases.

Relying on these new opinions, Petitioner filed a motion for leave to proceed ex parte on an application to fund a mitigation investigator on October 7, 2013 (Doc. No. 48), that was denied on December 17, 2013 (Doc. No. 51) after a response in opposition (Doc. No. 50) was filed, and Ochoa was permitted to either withdraw his funding motion tendered ex parte (Doc. No. 49), or proceed with a motion served on Respondent. Ochoa filed a motion to reconsider on January 29, 2014 (Doc. No. 52), accompanied by an amended motion for funding tendered ex parte (Doc. No. 53). That motion (Doc. No. 52) was denied after opposition on April 1, 2014 (Doc. No. 55), and Ochoa was allowed one final opportunity to either withdraw his amended motion tendered ex parte (Doc. No. 53) or serve it on Respondent. Ochoa then filed the instant motion (Doc. No. 56) that appears to replace his amended motion previously tendered ex parte (Doc. No. 53). Therefore, Ochoa's amended motion previously tendered ex parte (Doc. No. 49) is **denied as moot**.

III

Ochoa seeks funds for another mitigation investigation in support of the claim presented in his original petition. (Motion at 13.) Although he "only anticipates developing

evidence in support of the IAC claims pleaded in the original petition," Ochoa suggests that if funding is granted, he might also use it to develop new claims. Any new claims, however, would appear to be time barred by the provisions of 28 U.S.C. § 2244(d).

Ochoa acknowledges that much of the sought information was before the jury, but claims that his background and early life were presented in a truncated form that did not properly make the link with the drug-addiction and brain-damage evidence presented to the jury due to counsel's poor preparation and failure to obtain the needed investigative assistance sooner. (Petition at 82-85, 87-88.)

> Mr. Ochoa's defense counsel presented considerable mitigation evidence of Mr. Ochoa's drug addiction and brain damage, and through expert testimony, linked these factors to his behavior to explain what went wrong with an otherwise peaceable and humble man. But what was lacking in the case was the background that may have explained Mr. Ochoa's fateful choice to try cocaine or placed it in the overall context of Mr. Ochoa's life.

(Petition at 87.) He complains about the lack of sufficient details of his father's alcoholism and abuse, and of what life was like for him growing up in his poor home conditions. (Petition at 87-88.) Ochoa argues that "the jury heard some of this evidence, it surely did not hear all of it" because the investigation did not start early enough, the witnesses were not prepared well enough, and counsel did not present it well enough. (Petition at 88.)

Respondent opposes this motion, arguing that funding should be denied because the claims are unexhausted and procedurally barred from review in this Court, and that *Martinez* provides him no relief. (Response at 6-11.)

IV

This Court "may authorize ... [and] order the payment of fees and expenses" for "investigative, expert, or other services" upon a finding that they "are reasonably necessary for the representation of the defendant." 18 U.S.C. § 3599(f). In this Circuit, the term "reasonably necessary" is construed to mean that a petitioner must demonstrate "a substantial need" for the requested assistance. *Riley v. Dretke,* 362 F.3d 302, 307 (5th Cir. 2004) (quoting *Clark v. Johnson,* 202 F.3d 760, 768 (5th Cir. 2000)) (internal quotation marks omitted). The denial of funding "has been upheld 'when a petitioner has (a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (b) when the sought after assistance would only support a meritless claim, or (c) when the sought after assistance would only supplement prior evidence.' " *Woodward v. Epps,* 580 F.3d 318, 334 (5th Cir. 2009) (quoting *Smith v. Dretke,* 422 F.3d 269, 288 (5th Cir. 2005)).

In order to prevail on a claim that trial counsel was ineffective for failing to conduct a sufficient mitigation investigation and presentation, a habeas petition must do more than complain that the presentation at trial could have been better in hindsight. *See Strickland v. Washington,* 466 U.S. 668, 689 (1984). Ochoa does not complain that trial counsel did not know about the poverty, alcoholism or abuse sought to be investigated, and does not indicate how further investigation of these matters will substantially improve his chances of success. *See Wilkins v. Stephens,* 560 F. App'x 299, 315 (5th Cir. 2014). "[S]trategic

choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland,* 466 U.S. at 690.

> Further, the United States Court of Appeals for the Fifth Circuit has held that *Martinez* does not mandate funding to develop an otherwise procedurally barred claim. Finally, Crutsinger makes a far-reaching argument that *Martinez* "obligated the district court to provide pre-petition funding" because it "tacitly acknowledges that litigating IAC claims requires not merely an effective attorney, but also one that had adequate resources to demonstrate the underlying claim is a substantial one in order to overcome procedural default." *Martinez,* however, does not mandate pre-petition funding, nor does it alter our rule that a prisoner cannot show a substantial need for funds when his claim is procedurally barred from review. It provides only that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez,* 132 S.Ct. at 1315. Without both a showing under *Strickland* that state habeas counsel was ineffective and a demonstration that the underlying IAC claim "has some merit," *id.* at 1318, *Martinez* offers no relief from a potential procedural default.

Crutsinger v. Stephens, 2014 WL 3805464 (5th Cir. Aug. 4, 2014).

Petitioner has not shown an entitlement to funding under 18 U.S.C. § 3599(f). Petitioner's opposed motion to appoint an investigator (Doc. No. 56) is **DENIED**. Petitioner's amended motion previously tendered ex parte (Doc. No. 53) is **DENIED** as moot.

SO ORDERED.

Signed this 15th day of October, 2014.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ABEL REVILL OCHOA,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action No. 3:09-CV-2277-K
	§	
LORIE DAVIS, Director,	§	(Death Penalty Case)
Texas Department of Criminal Justice	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER DENYING MOTION

Petitioner Abel Revill Ochoa has filed a "Motion to Amend Judgment Pursuant to Fed. R. Civ. Proc. 59(e) and Memorandum of Law in Support" (Rule 59 Motion, doc. 61). Respondent has filed a response in opposition to the motion (Response, doc. 62). The motion is denied because the Court properly addressed the arguments Ochoa presented in his pleadings and his new arguments do not warrant relief from the judgment.

I

Ochoa asserts that this Court erred in denying his unexhausted claims of ineffective assistance of trial counsel without affording a hearing on cause and prejudice under *Martinez v. Ryan,* 132 S. CT. 1309 (2012), and *Trevino v. Thaler,* 133 S. CT. 1911 (2013). He asserts that "the requisite preliminary showing of substantiality can rarely

ever be made without an initial evidentiary hearing." (Mot. at 3.) In support, Ochoa makes three arguments. First, Ochoa complains that this Court applied an overly stringent standard while depriving him of an evidentiary hearing. (Mot. at 3-6.) Second, Ochoa argues that courts within this district have granted evidentiary hearings to demonstrate the underlying substantiality of the claim under *Martinez* and *Trevino* along with its subsequent entitlement to consideration on the merits. (Mot. at 6-9.) Finally, Ochoa argues that the Court erred in determining the substantiality of his claim that trial counsel was ineffective in failing to investigate and present mitigating evidence at the punishment phase of trial by considering the amount of mitigation evidence that trial counsel presented. (Mot. at 9-35.)

Respondent presents three arguments in opposition to the motion. First, Respondent asserts that, to the extent that Ochoa re-urges the merits of his claim, his motion is an impermissible successive habeas petition that this Court lacks jurisdiction to consider. (Resp. at 6-8.) Second, Respondent argues that Ochoa fails to present a sufficient ground to authorize relief under Rule 59, specifically that any manifest injustice resulted from the lack of an evidentiary hearing. (Resp. at 8-13.) Finally, Respondent argues that an evidentiary hearing is barred under 28 U.S.C. § 2254(e)(2). (Resp. at 13-14.)

II

Rule 59(e) of the Federal Rules of Civil Procedure allows a court "to rectify its own mistakes in the period immediately following entry of judgment." *White v. New Hampshire Dept. of Employment Sec.,* 455 U.S. 445, 450 (1982). Although district courts have discretion as to whether or not to reopen a case under Rule 59(e), "[r]econsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.,* 367 F.3d 473, 479 (5th Cir. 2004) (citing *Clancy v. Employers Health Ins. Co.,* 101 F.Supp.2d 463, 465 (E.D. La. 2000)).

> "A motion to alter or amend the judgment under Rule 59(e) 'must clearly establish either a manifest error of law or fact or must present newly discovered evidence' and 'cannot be used to raise arguments which could, and should, have been made before the judgment issued.' " *Rosenzweig [v. Azurix Corp.,* 332 F.3d 854, 863-64 (quoting *Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir.1990)]. Relief under Rule 59(e) is also appropriate when there has been an intervening change in the controlling law. *See In re Benjamin Moore & Co.,* 318 F.3d 626, 629 (5th Cir.2002).

Schiller v. Physicians Resource Group Inc., 342 F.3d 563, 567-68 (5th Cir. 2003) (footnote omitted).

In determining whether to grant Rule 59 relief, the Fifth Circuit has set forth a balancing test between "two important judicial imperatives relating to such a motion: 1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts. The task for the district court is to strike the proper balance between these competing interests." *Templet,* 367 F.3d at 479 (citations omitted).

The district court, however, has no jurisdiction to consider a successive habeas

petition, even if it is couched as a motion filed under Rule 59, unless the petitioner first obtains the required authorization from the court of appeals. A motion to reopen under Rule 59 is considered a successive habeas petition under 28 U.S.C. § 2244(b) when it raises a claim that was or could have been raised in the petition. *See Hardemon v. Quarterman,* 516 F.3d 272, 275 (5th Cir. 2008).

In determining whether a motion to reopen under Rule 59(e) is actually an impermissible successive habeas petition, this Circuit applies the same framework of *Gonzalez v. Crosby,* 545 U.S. 524 (2005), that is used to determine whether a motion to reopen under Rule 60(b) of the Federal Rules of Civil Procedure is a second or successive habeas petition, and thus subject to AEDPA's additional jurisdictional requirements. *See Williams v. Thaler,* 602 F.3d 291, 304 (5th Cir. 2010).

> In most cases, determining whether a Rule 60(b) motion advances one or more "claims" will be relatively simple. A motion that seeks to add a new ground for relief ... will of course qualify. A motion can also be said to bring a "claim" if it attacks the federal court's previous resolution of a claim ***on the merits***, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.

Gonzalez, 545 U.S. at 532 (emphasis in original) (footnotes omitted). "More specifically, a petitioner does not make a habeas corpus claim 'when he merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.'"

Williams, 602 F.3d at 305 (quoting *Gonzalez,* 545 U.S. at 532 n. 4).

III

A. Jurisdiction

Respondent argues that although Ochoa's motion is couched as a Rule 59(e) motion, it should be construed as a successive petition because it attacks this Court's resolution of the merits of his ineffective assistance of counsel claim. (Resp. at 6-8.) She points out that Ochoa's motion challenges the standard used to evaluate the merits of his claim (Resp. at 6-7), and the conclusion that his claim was insubstantial based on the fact that trial counsel "presented some mitigation evidence." (Resp. at 7.) Respondent argues that this Court "reached the merits of Ochoa's IATC claim after finding it procedurally defaulted" by pointing to this Court's alternative analysis revealing that the claim did not have any merit. (Resp. at 7.)

Respondent's argument is rejected. In order to determine whether a claim comes within the *Martinez* exception to procedural bar, the Court must determine whether it is "substantial" in that in has any merit. Although this requires a review of the potential merits of the claim under the same *Strickland* standard that governs a review of its merits, this remains part of the procedural determination.

Therefore, while Ochoa's motion attacks this procedural element, it does not depart from challenging the procedural resolution of his claim. In fact, his complaint is that this Court made a premature determination of substantiality without affording him the evidentiary hearing that he needed to make that showing. (Mot. at 5-6.) Ochoa

argues that the determination of substantiality "is not dependent upon whether it appears, upon full development of the facts, that the petitioner would be likely to prevail on the merits." (Mot. at 4-5 (citing *Miller-El v. Cockrell,* 537 U.S. 322, 337 (2003)).) Accordingly, Ochoa's motion is properly asserted under Rule 59(e) and is within this Court's jurisdiction to resolve.

B. Rule 59

1. Evidentiary Hearing

The Supreme Court has set forth the standard for when an evidentiary hearing is required.

> In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.
>
> * * *
>
> It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.

Schriro v. Landrigan, 550 U.S. 465, 474 (2007) (internal citations and footnote omitted). "Additionally, '[n]o evidentiary hearing is required" if a prisoner is unable to satisfy the cause and prejudice standard for overcoming a procedural bar.' " *United States v. Reedy,* 393 F. App'x 246, 247 (5th Cir. 2010) (quoting *Woods v. Whitley,* 933 F.2d 321, 323 (5th Cir.1991)); *Barrientes v. Johnson,* 221 F.3d 741, 758 (5th Cir. 2000) (evidentiary hearing on merits of claim only required if district court finds cause and prejudice to

overcome procedural default).

Specifically in the context of the *Martinez* exception, the United States Court of Appeals for the Fifth Circuit has held that an evidentiary hearing is not required before finding that a claim does not fall within the exception.

> With respect to the denial of an evidentiary hearing, we decline to hold that *Martinez* mandates an opportunity for additional fact-finding in support of cause and prejudice. The Supreme Court, in *Martinez,* created a narrow exception to procedural default that "merely allows" federal merits-review "of a claim that otherwise would have been procedurally defaulted." 132 S.Ct. at 1320. *Martinez* and *Trevino* protect Texas habeas petitioners from completely forfeiting an IATC claim; neither entitles petitioners to an evidentiary hearing in federal court in order to develop such a claim. Reading *Martinez* to create an affirmative right to an evidentiary hearing would effectively guarantee a hearing for every petitioner who raises an unexhausted IATC claim and argues that *Martinez* applies.

Segundo v. Davis, 831 F.3d 345, 351 (5th Cir. 2016), *cert. denied,* 137 S.Ct. 1068 (2017).

After this Court's judgment denying relief and the briefing on the current motion was completed, the Supreme Court issued a new opinion discussing the application of the *Martinez* exception to procedural bar. In *Buck v. Davis,* 137 S. Ct. 759 (Feb. 22, 2017), the Supreme Court reversed the decision of the United States Court of Appeals for the Fifth Circuit that had affirmed the denial of relief under Rule 60(b) of the Federal Rules of Civil Procedure. The Supreme Court held that the district court abused its discretion in refusing to grant relief because the claim of ineffective assistance of trial counsel had some merit and state habeas counsel was ineffective in failing to raise it. *Id.,*

137 S. Ct. at 780. This does not appear to alter the standard for applying the *Martinez* exception, but even if it did, it would not change the outcome of this case.

In the instant case, even if the claim comes within the exception to procedural bar, the alternative merits analysis is correct. Ochoa's motion focuses on his complaint that trial counsel was ineffective for failing to investigate and present mitigating evidence at his trial. Ochoa does not complain that trial counsel did not present evidence of his background, but merely that he did not present enough of it. But this was not a case where an abusive background could help to explain a long criminal history or other pattern of misbehavior that inexorably led to the crime. This was a case where the defendant was a hard-working, family man who did not have as much as a traffic ticket before the afternoon when he murdered five people, including his wife, her family members and their children. Trial counsel chose to focus on the power of Ochoa's cocaine addiction to explain this sudden anomaly that occurred after his wife refused to buy him more drugs. (39 RR at 55-65.)

At trial, counsel presented evidence from multiple expert and lay witnesses touching on Ochoa's life, background, character, culpability, potential for rehabilitation, and projected conditions of confinement if sentenced to life. (Mem. Op., doc. 59, at 26-29.) Ochoa's complaint does not identify an area or subject that was not generally covered by the evidence trial counsel presented to the jury. Instead, he points to additional evidence of Ochoa's background that may have been cumulative of what was already presented or less relevant than the evidence actually presented. For example, he

argues that additional evidence should have been presented regarding his early life in Mexico. (Pet. at 87-88.) Ochoa's father testified about their poor living conditions there (35 RR at 106-10), but Ochoa testified at trial that his earliest memories were living on a farm in Texas. (38 RR at 5-6.) Ochoa also now argues that additional testimony should have been provided regarding Ochoa's father, specifically regarding his alcoholism and abuse of Ochoa's family. (Pet. at 88.) But Ochoa and his brother testified that their father was an alcoholic that would beat their mother, requiring the assistance of Ochoa and his brothers to get their father off of her, and that this upset Ochoa greatly. (38 RR at 8-9; 36 RR 159-60.) Ochoa's father also testified about the history of alcohol abuse in their family, and that he used get drunk and beat his family, but that he stopped after he had an accident while driving intoxicated. (35 RR at 113-16.) Defense expert Dr. Edward Nace also testified about the addiction problem in Ochoa's family, including his father's alcoholism and its impact on Ochoa. (36 RR at 64-65.)

Not only is this allegation insufficient to warrant habeas relief, it would be insufficient to grant investigative funding. *See Smith v. Dretke,* 422 F.3d 269, 288-89 (5th Cir. 2005) (finding district court properly denied expert funding that "would only supplement prior evidence" already admitted before jury); *Ward v. Stephens,* 777 F.3d 250, 266 (5th Cir.), *cert. denied,* 136 S. Ct. 86 (2015) ("The district court reasonably determined that the sought-after funding would have supported a meritless claim or would only supplement prior evidence."); *Jackson v. Dretke,* 181 F. App'x 400, 414 (5th

Cir. 2006) (funding properly denied when testimony of proposed expert "would merely have supplemented other evidence already available to and considered by the jury."). As this Court previously found, Ochoa's complaint essentially boils down to a matter of degree, which is precisely the sort of judicial second-guessing that this Court must avoid in reviewing such claims. (Mem. Op. at 28.)

Ochoa attempts to overcome this by alleging that the Court applied a standard that was too stringent. He argues that this Court went too far in determining that he had not presented a substantial claim of ineffective assistance of counsel in that it reviewed all of the factual allegations instead of just taking a "quick look." (Mot. at 4-5.) He also argues that the Court did not go far enough so as to conduct a full evidentiary hearing to develop his claims before making that determination of substantiality. (Mot. at 6-9.) Finally, he argues that this Court erred in finding that he had not shown trial counsel to be ineffective based on the fact that trial counsel had presented "some" mitigation evidence. (Mot. at 9-11.) Ochoa's arguments mischaracterize the Court's determinations.

Contrary to Ochoa's current allegation, this Court did not merely find that trial counsel presented "some" mitigation evidence. (Mot. at 9, 11.) This Court found, and Ochoa previously acknowledged, that trial counsel presented an extensive mitigation case before the jury. (Mem. Op. at 27 (citing Pet. at 82-85, 87-88 (trial counsel presented "considerable mitigation evidence" including lay and expert testimony))). While Ochoa argues that he should have been allowed to further develop the evidence needed to make

this showing at an evidentiary hearing, *Martinez* does not confer such a right. *See Segundo,* 831 F.3d at 351. Instead, this Court should only allow further evidentiary development or an evidentiary hearing if it finds that Ochoa has made specific factual allegations that, if true, would entitle him to federal habeas relief. *See Schriro v. Landrigan,* 550 U.S. 465, 474 (2007). Ochoa's allegations did not make this showing, and whether further evidentiary development might eventually allow Ochoa to make the required showing would be irrelevant. Because Ochoa's existing allegations, even if true, would not establish that he was deprived of the effective assistance of counsel, the Court correctly denied the claim without an evidentiary hearing.

IV

Petitioner Abel Revill Ochoa's Motion to Amend Judgment Pursuant to Fed. R. Civ. Proc. 59(e) (Rule 59 Motion, doc. 61) is **DENIED**.

SO ORDERED.

Signed this 20th day of June, 2017.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE

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Q. When you're talking to him, does he have any slurred speech or anything like that?

A. No.

Q. Is he responding to your answers?

A. Yes, sir.

Q. Okay. When you take him to the PES office for the hand washings, while you're waiting there, does he say anything while y'all are waiting for the detectives to show up?

A. He asked how his kids were.

Q. And did you tell him at that point?

A. I didn't say anything. I believe Corporal Kaminske stated she didn't know.

Q. And on the way to the Crimes Against Persons, does he make any other type of a statement to you?

A. Yes, he did. I believe he -- I'd have to look at the notes to be sure. I know he said something, but I don't want to quote something that's not right.

Q. Did you write down notes about your contact with the defendant that evening?

A. Yes.

(Documents handed to witness.)

A. Yes, these would be my notes. Okay. When we were at PES, his actual statement was, "Is my baby okay?" And then on the way to Capers, Crimes Against Persons, he began crying and that's when he said, "I can't believe I did that."

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and him being tired of his life, were those made at the scene of the stop?

A. Yes, sir.

Q. Was he sitting on the curb at that time, or was he actually in a vehicle?

A. I believe he was on the curb where we sat him, and I wanted to ask him about the gun.

Q. So he was still outside of any vehicle at that time?

A. I think so.

Q. And that was shortly after you had made your arrest?

A. Yes, sir.

Q. When he was at the Physical Evidence Section having the hand washings taken is when he asked about his baby?

A. Yes, sir.

Q. And then the other statement he made was -- was it at the Capers office or on the way to the Crimes Against Persons office?

A. On the way.

Q. And when was he crying?

A. On the way to Capers.

Q. During any of the time that you handled Mr. Ochoa, was he a problem?

A. No, sir.

Q. Was he cooperative with you the entire time you had access to him and had him in your custody?

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A. Yes, sir.

Q. Does that include the book-in process as well?

A. Yes, sir.

Q. Was he polite and respectful to you and your partner?

A. Yes, he was.

Q. And did he recognize your authority as Dallas Police officers?

A. He seemed to.

MR. MILLER: We pass the witness, Your Honor.

THE COURT: Mr. Blackmon.

REDIRECT EXAMINATION

BY MR. BLACKMON:

Q. Officer Cox, I take it then with these hundreds of drug arrests that you've made, you've seen intoxicated people before?

A. Yes, sir.

Q. And that evening when you come into contact with the defendant, in your opinion he wasn't intoxicated?

A. In my opinion, I couldn't tell of any signs that he was intoxicated.

Q. Did he have any signs of intoxication, stumbling around, anything like that?

A. No, sir.

Q. When you -- when you're talking about a crack pipe,

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Q. What's a dime rock?

A. A dime would be just like the tip of this, like a small little tiny pebble.

Q. When you come in contact with the defendant, he makes a statement about I couldn't handle the stress and I got tired of my life. Is that what you're saying he told you --

A. Yes, sir.

Q. -- when you came into contact with him?

A. Yes.

Q. And then he says, I can't believe I did it later on?

A. Yes.

Q. Did he ever mention anything to you about drugs or crack or anything?

A. Not to me.

Q. You didn't arrest him for a drug offense, did you?

A. No, sir.

Q. What did you arrest him for?

A. Murder.

Q. And you're coming into contact with him within about 20 minutes of this shooting?

A. If that.

Q. If that much?

A. (Nods head.)

Q. This drug paraphernalia charge that could have been placed on the defendant, is that a Class C ticket?

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THE COURT: You may.

(Jury Present, Defendant Present.)

ABEL OCHOA, SR.,

was called as a witness by the Defendant, and after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q. Sir, would you tell the jury your name?

A. Abel Ochoa.

Q. And are you the father of our client, Abel Ochoa?

A. Yes, sir.

Q. Do you have other children besides your son Abel?

A. Yes, I have two more.

Q. And what are their names?

A. One is Gabriel, and the other one is Javier.

Q. And were they with you a few minutes ago when you got sworn in by the Judge?

A. Yes, they were here.

Q. Mr. Ochoa, do you have any other children that are no longer living?

A. Yes, two girls died when they were young girls.

Q. Did they die in childbirth?

A. Yes.

Q. Where are you from originally, sir?

A. From a little town named Nombre de Dios Durango.

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Q. Is that in Mexico?
A. Yes, sir, in Mexico.
Q. What part of the country is that, Mr. Ochoa?
A. It's near Torreon, Chihuahua -- down Chihuahua.
Q. Do you have brothers and sisters?
A. Yes, sir.
Q. How many?
A. Let me see, I have a brother named Leonardo, another one named Ernesto, the other one named Juan Carlos, the other one is Jose. One of my sisters we call Nina, and another sister named Kuka.
Q. Are you the oldest of the eight children?
A. That's right.
Q. And what is your age, sir?
A. Fifty-three years old.
Q. Mr. Ochoa, are you a married man?
A. Yes.
Q. And what is your wife's name?
A. My wife name is Belen Ochoa.
Q. Who raised you as a boy?
A. With my grandparents.
Q. Is that because your father died when you were young?
A. Yes, I was a little boy.
Q. How much education do you have?

A. Fourth.
Q. Fourth grade?
A. Yes.
Q. Would you describe your family growing up as a family of money or little means?
A. We were poor.
Q. And how many children come from your wife's family?
A. Only the three boys and the two girls that pass away.
Q. Okay. I didn't ask the question properly. Your wife had how many siblings?
A. You mean my wife's family?
Q. Yes.
A. I don't know very well.
Q. She come from a large family?
A. Yes.
Q. How long have you been married?
A. Thirty-three years.
Q. I'm sorry, I didn't hear?
A. Thirty-three years.
Q. And when you were living in Mexico, what did you do to support your family?
A. Agriculture.
Q. And can you describe that for us?
A. We would plant chilis, tomatoes, corn.

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Q. Did you grow these crops and sell them to support your family, or did you do this for someone else and get paid to do it?

A. Two other people.

Q. You did it for two other people?

A. Yes.

Q. The daughter that you had, what was her name?

A. The eldest was Patricia.

Q. And how old was she when she passed away?

A. Eight months.

Q. And your other daughter that passed away, how old was she?

A. She was dead already before she was born.

Q. Did she ever have a name?

A. No.

Q. Of your sons who is the oldest?

A. Gabriel.

Q. And how old is he?

A. Thirty-two years old.

Q. And how old is Javier?

A. Twenty-six years old.

Q. So Abel is your middle son?

A. Yes.

Q. When did you emigrate to the United States?

A. Long time ago. I can't remember. It was about 27

years ago.

Q. But it was after your son Abel was born?

A. Yes.

Q. What was life like for you and your children when you still lived in Mexico before you moved to the United States or emigrated to the United States?

A. It was fine.

Q. Did you have a lot of money?

A. No.

Q. Did you always have enough to eat, or were there times when there was not enough for the family?

A. Sometimes we didn't have anything.

Q. Did you -- did you have any other occupation to support your family besides farming?

A. No.

Q. Did you ever serve in the military?

A. Yes, for three years.

Q. Was that in Mexico?

A. Uh-huh, yes, sir.

Q. What work did you do for the military?

A. Soldier only.

Q. In the Army?

A. Yes.

Q. And what was -- what did you do in the Army? Did you patrol the border, or what did do you?

A. Patrolling, yes.

Q. Did you spend time away from your family when you were a soldier?

A. No.

Q. Who took care of the children while you were in the service?

A. My wife.

Q. And where -- where did your family live at that time?

A. In Durango.

Q. When you were a soldier, was part of your responsibility to look for drug traffickers and people of that nature?

A. Yes.

Q. Was that a dangerous occupation?

A. Yes.

Q. How would you describe the living conditions that your sons and your wife had during that period you were in the service?

A. Fine.

Q. Did they go through tough winters?

A. No.

Q. Was there ever a period of time that they were without food or water?

A. No.

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Q. When you got out of the service, did you have enough money to support the family?

A. Yes.

Q. Did you move to the States for a reason?

A. Yes. Do you want me to tell you? Yes.

Q. Yes.

A. Yes, because when I get out from the service, then I did not have a lot of work.

Q. You didn't have enough work to support your family?

A. I didn't have any.

Q. Did your family stay behind when you first came to the United States?

A. Yes.

Q. So your wife stayed with the boys?

A. Yes.

Q. Did you emigrate to Texas?

A. Yes.

Q. How long did you work here in Texas before your family joined you?

A. Year and two months.

Q. And when your family came to live with you here, what kind of work were you doing then?

A. In a milk company.

Q. What kind of a company?

A. In a farm.

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Q. A dairy farm?
A. Yes.
Q. Where was that farm located, do you know?
A. It was on Highway 90.
Q. Okay.
A. And this town called Hamtel, Texas. Hamtel.
Q. Did you do any other jobs besides work on a dairy farm?
A. No.
Q. Did you ever work at any -- did you ever work in Oklahoma?
A. For about a month.
Q. What did do you there?
A. Harvesting watermelon.
Q. Did you ever live in Frankston, Texas?
A. Yes.
Q. What did do you there?
A. Same thing, harvesting watermelons.
Q. How old was your son Abel when your wife and boys came to join you here in Texas?
A. About two years old.
Q. Did your wife stay home with the boys while you worked?
A. Yes.
Q. So you were the only means of support for your

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family at that time?

A. Yes, sir.

Q. Mr. Ochoa, were there days that you earned as little as $3?

A. Yes, sir.

Q. For a day of work?

A. Yes, sir.

Q. When you started your life here in the States, besides your family, what belongings did you bring with you?

A. Nothing.

Q. And you came here initially as an illegal, correct?

A. Yes, sir.

Q. Are you now a citizen?

A. Yes, sir.

Q. What's the first decent paying job that you had after you came to Texas?

A. At the dairy farm.

Q. And how long did you work at that dairy farm before you had to look for work elsewhere?

A. Eleven years.

Q. And why did that job end or terminate? What happened?

A. Because my boss died, pass away.

Q. Were you living on that farm at the time with your family?

A. Yes.

Q. And as a result of the owner passing away, did you have to move your family and go somewhere else?

A. Yes, sir.

Q. Do you recall how old your son Abel was when that happened?

A. No.

Q. What kind of work did you find after the owner of that dairy farm passed away?

A. Same kind of job, but in a different place.

Q. Did it take awhile to find another job like that?

A. Yes.

Q. How long did that dairy job last?

A. A year and a half.

Q. And what happened to that job?

A. I left it -- left.

Q. Why?

A. Because I moved to live here in Dallas.

Q. And why did you move to Dallas?

A. To have a better life.

Q. Mr. Ochoa, can you tell us how many different places you lived? Just give me an approximate number before you finally moved to Dallas with the family.

A. Four.

Q. And were there times when your children were not in

school?

A. Yes.

Q. Does your wife speak English?

A. No.

Q. Your sons speak English?

A. Yes.

Q. At least some?

INTERPRETER: I'm sorry, sir?

Q. (BY MR. MILLER) At least some English?

A. Yes.

Q. Before you moved to Dallas to find a better life for your family, what's the longest period of time in Texas that you went without work?

A. For about a week.

Q. The longest period you were without employment during that time was a week?

A. Yes, sir.

Q. How old was Abel when you moved to Dallas?

A. I don't know.

Q. Was he in high school?

A. Yes.

Q. Did your son Gabriel graduate from high school?

A. No.

Q. Did Javier graduate from high school?

A. No.

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Q. Did your son Abel graduate from high school?
A. Yes, he did.
Q. So he's the only child you have that has a high school education?
A. Yes.
Q. Mr. Ochoa, are you an alcoholic?
A. No.
Q. Did you used to be a heavy drinker?
A. Yes. Before, yes.
Q. For how long?
A. For about five years.
Q. You sure about that?
A. Yes.
Q. Did your life-style at that time involve violence in your household?
A. Yes.
Q. And was that violence committed by you?
A. Yes.
Q. And was that violence committed by you directed mostly at your wife?
A. Yes.
Q. Would you describe that as part, at least during your lifetime, of Hispanic culture?
A. Yes.
Q. Were your sons, including Abel, a witness to this

behavior?

A. Yes, sir.

Q. Mr. Ochoa, can you tell the jury what kinds of things you did to your wife when you came home drunk?

A. One time I would hit them. Sometimes I would offend them verbally. That's it.

Q. Did you ever hit your children?

THE INTERPRETER: I'm sorry?

Q. (BY MR. MILLER) Did you ever hit your children?

A. Yes.

Q. Did you ever hit your son Abel?

A. Yes.

Q. Is it fair to say that you didn't think about that at the time, did you?

A. No.

Q. Did you ever beat your son Abel?

A. Not a lot.

Q. When you did, what would you hit him with?

A. With a band.

Q. A belt?

A. Yes, a belt.

Q. Did you ever use a switch on him?

A. Switch, no.

Q. Did you ever use a stick or a branch or anything of that nature to hit him with?

A. Yes.
Q. And that wasn't because of anything he had done, was it?
A. Yes.
Q. You -- you did it because you were drunk?
A. Yes.
Q. In other words, you beat Abel not because he had done something wrong, but because you were drunk and you were taking your rage out on him?
A. Yes.
Q. Mr. Ochoa, do you recall how old you were when you finally stopped drinking?
A. About 29 or 30 years old.
Q. And how old are you now?
A. At this time I'm 53.
Q. Your drinking result in being prosecuted?
A. Not a lot, no.
Q. Did you get arrested?
A. Yes.
Q. For driving while intoxicated?
A. Yes.
Q. How many DWI convictions do you have?
A. About three.
Q. What made you stop drinking, Mr. Ochoa?
A. An accident that I had.

APPENDIX J

Q. An accident that you had as a result of being drunk?
A. Yes, sir.
Q. Was anyone in that accident hurt besides yourself?
A. Yes, another guy.
Q. Was he in your vehicle or in another vehicle?
A. In mine.
Q. Was he hurt badly?
A. Yes.
Q. And that's what convinced you to stop drinking?
A. Yes, sir.
Q. You or any other members in your family who had or have a problem with alcohol?
A. Yes, one brother -- one of my brothers.
Q. Does he live in the States?
A. Yes.
Q. What about on your wife's side of the family, is there any history of alcohol abuse there?
A. Yes.
Q. And your son Abel and your other boys were a witness to this?
A. Yes, sir.
Q. Do you recall, Mr. Ochoa, the first time you met Cecilia?
A. Yes.
Q. Were your son and Cecilia in love with each other?

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

ABEL REVILL OCHOA	§	
	§	
Petitioner,	§	
	§	
	§	
-v-	§	**NO. 3:09-CV-02277-K**
	§	
	§	
	§	
LORIE DAVIS,	§	
Director, Texas Department of Criminal	§	
Justice, Correctional Institutions Division	§	**CAPITAL CASE**
	§	
Respondent.	§	

Petitioner ABEL REVILL OCHOA'S Notice of Appeal
and Request for Certificate of Appealability.[1]

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COMES, Petitioner, ABEL OCHOA, by and through the undersigned counsel, and files this Notice of Appeal to the United States Fifth Circuit Court of Appeals from the District Court's order granting summary judgment and denying relief, as well as the District Court's denial of Mr. Ochoa's post-judgement motions in this case.

Respectfully submitted,

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[1] Through the filing of this notice of appeal, Petitioner also requests the District Court to grant or deny a certificate of appealability on the issues ruled upon by the Court. *Slack v McDaniel*, 529 U.S. 473, 483 (2000) ("As AEDPA applied, the Court of Appeals should have treated the notice of appeal as an application for a COA.")

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

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

Attorneys for Petitioner, Abel Revill Ochoa

Certificate of Service

I certify that on July 19 , 2017, I served a true and correct copy of the motion to release habeas record upon opposing counsel at the following address by filing the motion in the CF/ECM system:

Ken Paxton
Attn: Stephen M Hoffman
Texas Attorney General
Postconviction Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548

/s/ *Alex Calhoun*
Alex Calhoun