QR 1530:398
(CAPITAL CASE)

IN THE
Supreme Court of the United States

ANIBAL CANALES, JR. PETITIONER,

V.

LORIE DAVIS, RESPONDENT.

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

SUPPLEMENTAL APPENDIX

DAVID P. VOISIN
P. O. BOX 13984
JACKSON MS 39236
(601) 949-9486
david@dvoisinlaw.com

JOSEPH J. PERKOVICH
Counsel of Record
PHILLIPS BLACK, INC.
P.O. BOX 4544
NEW YORK, NY10163-4544
(212) 400-1660
j.perkovich@phillipsblack.org

JOSEPH C. WELLING
100 N. TUCKER BLVD., STE 750
ST. LOUIS, MO 63101
(314) 629-2492
j.welling@phillipsblack.org

Counsel for Anibal Canales, Jr.

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CCA Scanning Cover Sheet

CaseNumber: WR-54,789-02
EventDate: 06/29/2007
Style 1: Canales, Anibal Jr.
Style 2:
Event code: 11.071 WRIT RECD

EventID: 2294149
Applicant first name: Anibal
Applicant last name: Canales
Offense: 19.03
Offense code: Capital Murder
Trial court case number: 99F0506-005-B
Trial court name: 5th District Court
Trial court number: 320190005
County: Bowie
Trial court ID: 1168
Event map code: FILING
Event description: Art. 11.071 - Application for Counsel
Event description code: 11.071
Remarks:

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Comment

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APPLICANT ANIBAL CANALES APPLICATION NO. 54,789-02

SUBSEQUENT 11.071 APPLICATION
FOR WRIT OF HABEAS CORPUS XXX

BRIEFS DUE FROM APPLICANT AND STATE WITHIN 60 DAYS FROM THIS DATE.

Catherine Cochran 10/17/07

JUDGE DATE

BILLY FOX
DISTRICT CLERK
BOWIE COUNTY, TEXAS

BOWIE COUNTY COURTHOUSE BOX 248 NEW BOSTON, TEXAS 75570
PHONE (903) 628-6750 OR (903) 628-6751
FAX (903) 628-6761

54789-02

June 19, 2007

Ms. Louise Pearson
Clerk, Court of Criminal Appeals
PO Box 12308, Capitol Station
Austin, TX 78711

RE: Ex Parte Anibal Canales, Jr. Cause No. 99F0506-005-B
Application for Writ of Habeas Corpus

Dear Ms. Pearson:

Per order of the court, enclosed is a certified copy of the Order to Send Subsequent Writ and the Application for Writ of Habeas Corpus (without exhibits).

Sincerely,

Dean Maddox

Dean Maddox, Chief Deputy
Criminal Department

Cc: Meredith Martin Rouintree
Morris H. Moon
Melinda Mayo

Cause No. 99F0506-005-B

EX PARTE	§	IN THE 5th DISTRICT COURT
	§	OF
ANIBAL CANALES, JR. Applicant	§	BOWIE COUNTY, TEXAS

ORDER TO SEND SUBSEQUENT WRIT TO COURT OF CRIMINAL APPEALS

On May 22, 2007, the trial court received the instant application for writ of habeas corpus in *Ex parte Anibal Canales,* cause no. 99F0506-005-B. Previously, the applicant was convicted by a jury in the 5th District Court of Bowie County, Texas, for the felony offense of capital murder in cause no. 99F0506-005. After the jury answered the special issues, the trial court assessed punishment at death. On January 15th, 2003, the Court of Criminal Appeals affirmed the applicant's conviction in cause no. AP-73,998. *Canales v. State,* 98 S.W.3d 690 (Tex. Crim. App. 2003). On December 1, 2003, the United States Supreme Court denied the applicant's petition for writ of certiorari in *Canales v. Texas*, 540 U.S. 1051, 124 S. Ct. 806, 157 L. Ed. 2d 701, 2003 U.S. LEXIS 8650 (2003).

On May 16, 2002, the applicant filed his initial state application for writ of habeas corpus, cause number 99F0506-005-A. On November 14, 2002, the Respondent filed an original answer addressing the allegations raised in the applicant's initial state application for writ of habeas corpus, cause number 99F0506-005-A. On March 12, 2003, the Court of Criminal Appeals denied the applicant habeas relief on his initial state application for writ of habeas corpus, cause number 99F0506-005-A (TCA writ number WR-54,789-01).

On March 23, 2007, the federal district court stayed and abated the federal habeas corpus process. *Canales v. Quarterman,* 2007 U.S. Dist. LEXIS 20782.

On March 23, 2007, the federal district court stayed and abated the federal habeas corpus process. *Canales v. Quarterman,* 2007 U.S. Dist. LEXIS 20782.

Pursuant to the requirements of TEX. CODE CRIM. PRO. art. 11.071 § 5(b), this Court notes that the instant application for writ of habeas corpus, *Ex parte Anibal Canales,* cause number 99F0506-005-B, is a subsequent application for writ of habeas corpus.

THE CLERK IS HEREBY **ORDERED,** as provided by Article 11.071 § 5(b), to immediately send to the Court of Criminal Appeals certified copies of the following documents:

1. the application for writ of habeas corpus, cause number 99F0506-005-B; and

2. the Court's instant order noting, as required by statute, that the instant application for writ of habeas corpus is a subsequent application for writ of habeas corpus.

THE CLERK is further **ORDERED** to send a copy of this order to applicant's counsel:

Meredith Martin Rouintree

Law Offices of Owen & Rountree, L.L.P.

P O Box 40428

Austin, Texas 78704

Morris H. Moon

Texas Defender Service

412 Main St., Suite 1150

Houston, Texas 77002

and to Respondent: Melinda Mayo

Special Prosecution Unit

P O Box 1744

Amarillo, Texas 79105.

SIGNED this 19th day of June, 2007.

JUDGE PRESIDING
5th District Court
Bowie County, Texas

A CERTIFIED COPY
ATTEST: BILLY FOX
District Clerk, Bowie County, Texas
6-19 20 07
BY Dean Maddox
Deputy
VOL _____ PAGE _____

IN THE
THE 5TH JUDICIAL DISTRICT COURT
OF BOWIE COUNTY, TEXAS

EX PARTE	§	
	§	No. 99F0506-005-B
	§	
ANIBAL CANALES, JR.	§	

SUBSEQUENT APPLICATION FOR A WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE

Meredith Martin Rountree
Law Offices of Owen & Rountree, L.L.P.
Post Office Box 40428
Austin, Texas 78704
TEL (512) 804-2661
FAX (512) 804-2685

Morris H. Moon
Texas Defender Service
412 Main Street, Suite 1150
Houston, Texas 77002
TEL (713) 222-7738
FAX (713) 222-0260

Pro Bono Counsel

IN THE
THE 5TH JUDICIAL DISTRICT COURT
OF BOWIE COUNTY, TEXAS

EX PARTE	§	
	§	No. 99F0506-005-B
	§	
ANIBAL CANALES, JR.	§	

SUBSEQUENT APPLICATION FOR A WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE

Applicant, Anibal Canales, Jr., is currently confined on death row at the Texas Department of Criminal Justice's (TDCJ) Polunsky Unit in Livingston, Texas. Through undersigned counsel[1] and pursuant to the Article 11.071 of the Texas Code of Criminal Procedure, Mr. Canales petitions this Court to issue a Writ of Habeas Corpus and to order his release from confinement on grounds that his custody violates the Constitution and laws of the United States and Texas.

PROCEDURAL HISTORY

Mr. Canales was convicted of capital murder in the 5th Judicial District Court of Bowie County, Texas. The Texas Court of Criminal Appeals affirmed his conviction and sentence on January 15, 2003. *Canales v. State*, 98 S.W.3d 690 (Tex. Crim. App. 2003). The Texas Court of Criminal Appeals denied Mr. Canales' application for writ of habeas corpus on March 12, 2003. *Ex parte Canales*, No. 54,789-01 (Tex. Crim. App. 2003).

[1] Undersigned counsel were appointed to represent Mr. Canales in his federal habeas proceedings. Those proceedings have been stayed and held in abeyance with an order that Mr. Canales exhaust his state court remedies. Undersigned counsel, acting *pro bono*, file this application in order to comply with their duties to the federal court.

On December 1, 2003, the United States Supreme Court denied *certiorari* review of Mr. Canales' direct appeal. *Canales v. Texas*, 540 U.S. 1051 (2003).

OVERVIEW OF FACTS

On the evening of July 11, 1997, Gary "Dirty" Dickerson was found dead on his TDCJ Telford Unit bunk. Officers working the unit that night were alerted to Dickerson's death by his cellmate, Tim Rice. SR 9:69.[2] After a brief examination by the unit nurse, TDCJ concluded that Dickerson had died of natural causes. SR 9:135. Without further inquiry, they allowed several inmates – who would subsequently all become prized witnesses for the State – to scrub Dickerson's cell down. SR 9:299-300.

Only after an autopsy revealed that Dickerson had been strangled did TDCJ begin to make further inquiries into his death. The Telford Unit Internal Affairs Division (IAD) began to interview inmates, and the Special Prosecution Unit (SPU), which prosecutes crimes committed in prison, became involved as well. Not surprisingly, as set forth below, inmates began cultivating IAD, providing various stories in hopes of trading their assistance for benefits from TDCJ and/or SPU.

The State's theory at trial was essentially that, after a bundle of contraband tobacco was discovered by prison authorities, many prisoners, for various reasons, believed that Dickerson had provided the information about the tobacco drop to the prison. SR 9:155. Some of the prisoners who had a financial stake in the contraband tobacco were prison gang members, and one of the gangs, the Texas Mafia (TM), decided to exact its revenge on Dickerson by killing him. SR 9:160-61.

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[2] References to record are abbreviated SR (State record) Volume: page number. The clerk's record are abbreviated CR. Exhibits are abbreviated "Exh."

The State called Tim Rice, Dickerson's cellmate, to testify that his cell door had been locked when he returned to it that evening. SR 9:63. The State also called Steven "Beaver" Canida to testify he had seen Mr. Canales and William Keith "StayPuff" Speer walking into Dickerson's cell, and locking the door after they left. SR 10:90. The State's theory, however, required it to prove that Mr. Canales belonged to the TM and that he had committed the murder in furtherance of the prison gang's interests. As a result, the State called witnesses to connect Mr. Canales to the TM. Richard Driver, Jr., Doyle Wayne Hill, and Bruce Ennis[3] all testified about Mr. Canales' supposed gang connection and the gang's connection to the murder. SR 9:289-91; SR 10:159; SR 10:25 et seq.

Crucially, the State had two letters it alleged were written by Mr. Canales. These letters, obtained from Bruce Ennis, contained extremely inculpatory statements. One consisted of a detailed description of the murder and asserted that it was committed to further the TM's interest. SR Exhibit 27. The other, introduced at punishment, suggested that Mr. Canales was trying to organize a "hit" on another TM member. SR Exhibit 25. The State used this letter to argue that Mr. Canales would be a danger in the future.

At the guilt/innocence phase of trial, the defense established that Mr. Canales did not live in the same part of the prison as the victim did, that it would have been a violation of prison rules for him to go there, and presented the testimony of Sergeant Theilen who was stationed that evening at a desk Mr. Canales would have had to pass if he had gone to the victim's housing area. SR 11:28. Sgt. Theilen testified that he did not see Mr. Canales out of place that night. *Id.* Inmate Earwood remembered Mr. Canales being in his cell shortly before the murder occurred. SR 11:38-9. The defense also

[3] Innes' name was misspelled "Ennis" in the court transcript.

presented the testimony of a prison investigator and an inmate named Homer Hughes to suggest that Larry "Bam" Whited had claimed responsibility for the killing.[4] Finally, the defense read a statement of Inmate Melvin Walker who had been with Mr. Canales for about an hour when they learned of the murder. SR 11:97.

The jury received the case on October 27, 2000 and returned a guilty verdict the same day. CR 12.

At the punishment phase, the State presented only two witnesses: Suzanne Hartberger, whom Mr. Canales had been convicted of sexually assaulting, SR 12:10 et seq., and Bruce Innes, who introduced a letter allegedly written by Mr. Canales which purported to be a "hit" on a State's trial witness. SR 12:22 et seq. The State also introduced the "pen packets" from Mr. Canales' prior convictions.

The defense introduced testimony from several inmate witnesses to establish that Mr. Canales was generally a "good guy," peaceable, and a good artist. SR 12:41-42; SR 12:55-56. Several Telford Unit employees were called to tell the jury that Mr. Canales was not a disciplinary problem as far as they knew. SR 12:65; SR 12:69; SR 12:72.

Mr. Canales' entire punishment phase lasted one day and the following morning he was sentenced to death. CR 12.

---

[4] In the course of state habeas proceedings, Hughes and Earwood provided affidavits supporting Mr. Canales' innocence of the crime for which he was convicted. Mr. Hughes recounted a conversation he had with Baker and Driver while waiting to testify in Mr. Canales' case. Exhibit 74 (Affidavit of Homer Hughes). Baker informed Hughes that Mr. Canales' trial was "ironic" because Bam and Driver were actually responsible for Dickerson's death. *Id.* Driver told Hughes that Beaver saw Bam and Driver leaving the cell but was testifying that it was Mr. Canales and Speer. On the way back to the prison after trial, Bam told Baker to keep his mouth shut because "[t]hat Jew bastard finally got his..." *Id.* Earwood also overheard Driver talking about the case on the prison bus. Driver stated, "I don't care if they fry that mother fucking Jew boy; better than a white man. I know who was involved and as along [sic] as they blame a Jew, I ain't got no problems with lying on somebody." Exh. 11 (Affidavit of Earwood). Earwood also heard Canida talking about the deal he got and all he "had to do was lie on that Jew." *Id.*

CLAIMS FOR RELIEF AND ARGUMENT AND AUTHORITIES

I. MR. CANALES WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL'S PERFORMANCE, BECAUSE OF AN UNREASONABLE TRIAL SCHEDULE AND INEXPERIENCE IN THE DEFENSE OF DEATH PENALTY CASES, FELL BELOW THE STANDARD OF PRACTICE IN CAPITAL CASES.

A. Factual Background

Mr. Canales was indicted on a charge of capital murder on November 4, 1999, for a crime that occurred on July 11, 1997. CR 2-9. On December 1, 1999, pursuant to Article 26.051(d) of the Texas Code of Criminal Procedure, the trial court formally requested the Texas Board of Criminal Justice to provide counsel to Mr. Canales. CR 13. In January 31, 2000, State Counsel for Offenders, the presumptive counsel for prisoners charged with crimes, moved to withdraw from Mr. Canales' case because of a conflict of interest, and on February 4, 2000, the trial court granted that motion. CR 14-17. On February 7, 2000 – three months after Mr. Canales had been indicted and more than three years after the crime – the trial court appointed Paul Hoover to represent Mr. Canales, and on February 29, 2000, Jeff Harrelson was appointed. CR 19-20. Neither lawyer had ever tried a death penalty case to verdict. Mr. Hoover had been appointed in one case where his client faced the death penalty. In that case, the client pled guilty to a burglary charge. Mr. Harrelson had tried only a handful of cases, and none more serious than arson and burglary. At that point, he had never attended any continuing legal education programs on criminal defense of death penalty cases. Exh. 1 at ¶¶ 3, 5 (Declaration of Harrelson); Exh. 2 at ¶5. (Declaration of Ryder).

The trial court scheduled a pre-trial conference for April 20, 2000, at which an October 16, 2000 trial date was set. CR 21. On August 1, 2000, counsel for Mr. Canales

complained to the court that, despite their request, their client continued to be incarcerated at the Beto Unit in Tennessee Colony, Texas, and that they needed him back at the Telford Unit so that they could prepare for trial. Exh. 3 (8/1/00 Hoover letter to court). On August 2, 2000, the trial court wrote a letter to the Texas Department of Criminal Justice requesting Mr. Canales' transfer. Exh. 4 (8/2/00 trial court letter to TDCJ). On August 18, 2000, the Texas Department of Criminal Justice responded that it would move Mr. Canales to the Telford unit within a few days. CR 42.

Mr. Canales had a health crisis in August, however, and was sent to prison hospitals in Galveston and then in Huntsville, Texas. SR 3:5; SR 3:16. He ultimately arrived at Telford on September 8th, and trial counsel met with him there a few weeks later. SR 3:7-8; Exh. 5 at 5 (Hoover timesheets); Exh. 6 at 5 (Harrelson timesheets). Jury selection was set to begin on October 16, 2000. CR 44. Because of the obstacles to getting Mr. Canales to Texarkana, trial counsel had only four weeks to work face-to-face with their client prior to trial. SR 3:5. On October 5, 2000, trial counsel moved the court for a continuance, citing the lengthy delay in getting Mr. Canales back to Texarkana, the fact that in the various transfers the prison had taken from Mr. Canales information relevant to contacting mitigation witnesses, and that 30 days was insufficient to complete discovery and prepare for a death penalty trial. CR 48-50. Trial counsel reminded the court that both trial counsel were solo practitioners and that the 400-500 mile trips to meet with the client placed an unreasonable burden on them. SR 3:13.

The trial court denied the continuance because, in its view, six months to prepare for a death penalty trial was "plenty of time." SR 3:11; SR 3:21; CR 66. As Mr. Harrelson states simply, this created "significant problems for us in preparing for Mr.

Canales' trial." Exh. 1 (Harrelson Decl. at ¶8). At the time counsel requested the continuance, they had each spent fewer than 30 hours on the case. Exh. 5 at 4-6 (Hoover timesheets); Exh. 6 at 4-6 (Harrelson timesheets). That time was spent primarily reviewing correspondence, pleadings filed in the companion case of William Speer, the case file, and the State's discovery. *Id.* The timesheets reflect little to no independent investigation and no mitigation investigation. *Id.* Counsel had filed no motions, had no investigator, and had met with their client only twice. *Id.*; *see also* CR Index.

By the start of trial on October 16, 2000, they had each worked a total of 96 out of court hours – essentially two weeks of work. Exh. 5 at 4-6 (Hoover timesheets); Exh. 6 at 4-6 (Harrelson timesheets) They had met with their client only four times. *Id.* They had contacted not a single member of Mr. Canales' family. Exh. 1 at ¶¶ 6, 9, 11 (Harrelson Decl.); Exh. 2 at ¶ 6 (Ryder Decl.). They had not consulted with or retained a single expert of any kind, not even a death penalty mitigation specialist. *Id.* By the time trial was over, trial counsel had spent barely more than 230 hours on the case. Exh. 5 (Hoover timesheets); Exh. 6 (Harrelson timesheets).

Pretrial preparation is the key to effective representation. It is "perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

Contrasting counsel's 230 hours with the average attorney hours on capital cases, it is clear that the amount of work trial counsel put into the case fell far "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

> Studies have consistently found that defending capital cases requires vastly more time and effort by counsel than noncapital matters. For example, a study of the California State Public Defender revealed that attorneys there spent, on average, four times as much time on capital representation as on cases with any other penalty, including those involving a maximum possible sentence of live imprisonment without parole. **In terms of actual numbers of hours invested in the defense of capital cases, recent studies indicate that several thousand hours are typically required to provide appropriate representation. For example, an in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that the total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889.**

Exh. 27 (American Bar Association, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), *Commentary to Guideline 6.1* ("Workload") at 968 (emphasis added)).

The trial court was half-right about six months being sufficient time to prepare for a capital trial – if both of Mr. Canales' counsel had each been able to devote themselves full time for six months to the preparation for trial, their hours would fall within the average hours. As the trial court knew, however, neither attorney had been working on the case at that rate.

Ultimately, the reasons for trial counsels' ineffective and ineffectual representation are two-fold. First, trial counsel did not spend the time or expertise necessary to prepare for the case. Trial counsel sought - and were denied - the time they needed to prepare when the trial court denied counsel a continuance. Second, trial counsel had only limited access to crucial impeachment evidence. Because they had very limited access to confidential TDCJ gang files on some of the witnesses, they did not have information to use in preparing for the witness examinations. As a result, they were

unable to investigate, develop and present either an effective attack on the State's case or a persuasive case to spare Mr. Canales' life.

B. Governing Legal Standards

The Sixth Amendment guarantees an accused "the guiding hand of counsel at every stage of the proceedings against him." *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (*quoting Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). A defendant is denied effective assistance when trial counsel performs deficiently, *i.e.*, his performance falls below professional norms, and when that deficient performance is prejudicial. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). To establish prejudice, a "defendant must show that there is 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. *Id.*, at 694. If "there is a reasonable probability that at least one juror would have struck a different balance," the petitioner has established prejudice. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *see also* CR 110 (jury must "unanimously find and determine" the answer to the "mitigation" special issue).

In *Wiggins v. Smith*, the Supreme Court pointed to the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* as a guide on what constitutes defense counsel's obligations. 539 U.S. 510, 522 (2003).

The Guidelines begin with a description of the **minimum** components to an adequate defense team in a death penalty case. In Guideline 4.1, entitled "The Defense Team and Supporting Services," the Guidelines specify:

> The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.
>
> The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

Exh. 27 (GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), GUIDELINE 4.1.A.1-A.2. *See also GUIDELINE 10.4.C.2.a-c* ("The Defense Team") *and Commentary* at 1003 (this team "is the minimum")).

As the *Commentary* to *Guideline 4.1* explains:

> The defense [in a death penalty case] must both subject the prosecution's evidence to searching scrutiny and build an affirmative case of its own. Yet investigating a homicide is uniquely complex and often involves evidence of many different types. Analyzing and interpreting such evidence is impossible without consulting experts – whether pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, or others.

Exh. 27 (GUIDELINES at 955).

Regarding the punishment phase, the *Guidelines* state:

> [T]he defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase. Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process. Counsel must compile extensive historical data, as well as obtaining a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood test or genetic studies, and consultation with additional mental health specialists may also be necessary.
>
> Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions (*e.g.*, post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance. Accordingly, Subsection A(2) mandates that at least one member of the defense team (whether one of the four individuals

> constituting the smallest allowable team or an additional team member) be a person qualified by experience and training to screen for mental or psychological disorders or defects and recommend such further investigation of the subject as may seem appropriate.

Exh. 27 (GUIDELINES at 956-57).

The *Commentary* also explains why "the use of mitigation specialists has become part of the existing standard of care in capital cases." Exh. 27 (GUIDELINES at 960).

> A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (*e.g.*, family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf.
>
> Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict. The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.

Exh. 27 (GUIDELINES at 959-60).

The *Guidelines* also outline the expertise required for trial counsel.

> [E]very attorney representing a capital defendant has:
>
> a. obtained a license or permission to practice in the jurisdiction;

b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and

c. satisfied the training requirements set forth in Guideline 8.1.

Guideline 5.1.B.1 ("Qualifications of Defense Counsel").

Guideline 8.1 provides:

Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

1. relevant state, federal, and international law;
2. pleading and motion practice;
3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
4. jury selection;
5. trial preparation and presentation, including the use of experts;
6. ethical considerations particular to capital defense representation;
7. preservation of the record and of issues for post-conviction review;
8. counsel's relationship with the client and his family;
9. post-conviction litigation in the state and federal courts;
10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.

> Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once ever two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.

Exh. 27 (GUIDELINE 8.1.B & C).

> The *Commentary* explains:
>
> [T]he standard of practice requires that counsel have received comprehensive specialized training before being considered qualified to undertake representation in a death penalty case. Such training must not be confined to instruction in the substantive law and procedure applicable to legal representation of capital defendants, but must extend to related substantive areas of mitigation and forensic science. In addition, comprehensive training programs must include practical instruction in advocacy skills, as well as presentations by experienced practitioners.
>
> Once an attorney has been deemed qualified to accept appointments in capital cases, the standard of practice requires counsel to regularly receive formal training in order to keep abreast of the field.

Exh. 27 (GUIDELINES at 979).

Regarding investigation, the *Guidelines* mandate:

> A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.
>
> 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilty, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
>
> 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not be collected or presented.

Exh. 27 (GUIDELINE 10.7 ("Investigation")).

> The *Commentary* elaborates:
>
> Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed

desires of a client. Nor may counsel sit idly by, thinking that investigation would be futile.

Because the sentencer in a capital case must consider in mitigation "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history. In the case of the client, this begins with the moment of conception. Counsel needs to explore:

(1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);

(2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (*e.g.*, failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

(3) Educational history (including achievement, performance, behavior, and activities), special educational need (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

(4) Military service (including length and type of service, conduct, special training, combat exposure, health and mental health services);

(5) Employment and training history (including skills and performance, and barriers to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

...

It is necessary to locate and interview the client's family members (who may suffer form some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others. ... Records should be required concerning not only the client, but also his parents, grandparents, siblings and children.

Exh. 27 (GUIDELINES at 1021-23, 1024 (internal punctuation omitted)). *See also* GUIDELINE 10.11 *generally and* F ("The Defense Case Concerning Penalty").

The *Guidelines'* mandate echoes some of Texas' standards for capital defense counsel. An attorney appointed to a death penalty case must:

> (A) be a member of the State Bar of Texas;
>
> (B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;
>
> (C) have at least five years of experience in criminal litigation;
>
> (D) have tried to a verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offense punishable as second or first degree felonies or capital felonies;
>
> (E) have trial experience in:
>
> > (i) the use of and challenges to mental health or forensic expert witnesses; and
> >
> > (ii) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial; and
>
> (F) have participated in continuing legal education course or other training relating to criminal defense in death penalty cases.

TEX. CODE CRIM. PROC. art. 26.052 (d)(2).

C. Trial Counsel's Deficient Performance at the Guilt/Innocence Phase Denied Mr. Canales His Constitutional Right to Effective Assistance of Counsel.

1. Trial Counsel Elected to Pursue a "Reasonable Doubt" Theory, Yet Failed to Mount an Aggressive Challenge to the State's Case.

The State's case at guilt/innocence had essentially three components. First, it presented supposed eyewitnesses who testified to seeing Mr. Canales meeting with gang members and either going into or out of the victim's cell at the time he was believed to

have been killed. Second, it presented witnesses to Mr. Canales' supposed confessions. Third, it presented a confessional letter supposedly written by Mr. Canales.

Defense counsel essentially sought to present a reasonable doubt case, highlighting the State's reliance on inmate testimony, the improbability of a man of Mr. Canales' size being able to move from one part of the prison to another without being seen by a correctional officer, and the fact that there were four or five other viable suspects in the murder. SR 9:33-35.

After embracing that theory, however, trial counsel failed to do what they had to do to present that defense: aggressively attack the State's case. Instead, they took a superficial, scattershot, and uninformed approach to the State's evidence that not only failed to challenge the State's proof, but in fact conceded an essential element of the State's case.

Competent counsel would have exposed the witnesses' self-interest and prejudices and the many inconsistencies in their statements, and would have used available documents to prove to the jury that these witnesses were lying to them. Competent counsel would have debunked the handwriting analyst's claim that he had the expertise to identify Mr. Canales as the author of the confessional letter. Competent would have understood the law under which Mr. Canales was indicted and being tried and not presented an inculpatory "defense" to the jury.

a. Trial Counsel Failed to Impeach Critical Witnesses Effectively

Defense counsel correctly identified the importance of attacking the credibility of the prisoner witnesses, by demonstrating that they were untrustworthy and just out to help themselves. Unfortunately, defense counsel failed to use readily available evidence to

expose their lies. Competent counsel would have confronted the witnesses with evidence of their bias and the discrepancies in their statements and trial testimony. *See, e.g., Sparman v. Edwards*, 26 F.Supp.2d 450 (E.D.N.Y. 1997) (counsel ineffective for failing, *inter alia*, to cross-examine child sex abuse victims with prior inconsistent statements), *aff'd* 154 F.3d 51 (2nd Cir. 1998); *Tucker v. Prelesnik*, 181 F.3d 747, 757 (11th Cir. 1999) (counsel was ineffective in failing to impeach victim with medical records reflecting his faulty memory of the crime); *Driscoll v. Delo*, 71 F.3d 701, 711 (8th Cir. 1995) (counsel ineffective in failing to impeach the testimony of an important State witness using witness' prior inconsistent statements), *cert. denied*, 519 U.S. 110 (1996); *Smith v. Wainwright*, 799 F.2d 1442 (11th Cir. 1986) (counsel ineffective for failing to use prior inconsistent statements to impeach State witness whose credibility was essential to the State's case).

For example, defense counsel asked Stephen "Beaver" Canida – a supposed eyewitness to Mr. Canales' entry into the victim's cell – about whether the State had made any promises to him:

Q: -- they said they were going to try to help you, didn't they?

A: Yes, sir, but I was still scared.

Q: I understand, but they told you, we're going to do everything we can for you?

A: No, I don't know if they said that or not.

Q: Contact the D.A., talk about your cases?

A: No.

Q: See what we can do for you – move you someplace else?

A: No, they didn't say that. I don't recollect them saying that.

Q: Didn't tell you they were going to help you?

A: Huh, uh (no) – no.

SR. 10:112.

A juror could reasonably conclude from this testimony that Canida was afraid and had come forward after deciding it was "right." SR 10:115. Had trial counsel simply shown the jury a short videoclip of Canida's first interview with prison investigators, they would have seen him as the canny, self-serving, three-time convict he is. On the videotape, Canida asserts, "I would like to talk to a prosecuting attorney or Federal prosecuting attorney, or have a lawyer to me - I got seven years on a fifty," clearly seeking a deal from the State in exchange for his information and testimony. *State v. Speer*, 99-F-0506-005, SR 9:177)

The cross-examination of Richard Driver, Jr., is another example of trial counsel's missed opportunity. Driver was culpable as an accomplice – at the request of Michael Constandine, he tried to distract the roving correctional officer during the murder – and he was critical to the State's case since he drew a connection between Mr. Canales and a meeting among Constandine, Barnes, and Speer at which those three allegedly planned the murder. SR 9:304-6. Another prisoner had also seen Driver near the victim's cell around the time of the murder, so he had ample reason to try to inculpate others. Exh. 7 at 2 (Henson statement)

Trial counsel, however, did not take advantage of his multiple, continuously embellished statements. On July 16, 1998, Driver made the following statement:

> On Friday July 11th at approximately 9:00 PM Inmate Constidine [sic] asked if I could lure inmate Dickerson to my cell I said, "Why, are ya'll going to beat him up?" He said that no one was going to get beaten up. I then told him that I wouldn't be a part of it, he said O.K. I then observed

> Inmate Speer, Inmate Canales, Inmate Barnes, and Inmate Constidine [sic] talking in two section day room, about 4 to 5 minutes later Inmate Canales and Inmate Speers went to three section and up the stairs to three row.

Exh. 8 at 1 (7/16/98 Driver statement)

Driver's July 24, 1998, recollection of events is inconsistent with his July 16th statement, and considerably more embroidered:

> At 6:00 PM on the Friday that Inmate Dickerson was killed, Inmate Constadine[5] approached me while standing in the necessitie [sic] line and told me to be ready to go on lock down, I asked him whats [sic] up and he said don't worry about it, and not to tell any one. I then proceeded to go to get my clothes from necessetie [sic] and afterward went to the sgt. desk and told Sgt. Thielen to watch out tonight because I had been informed something was going to happen. He said what is going to happen. I told him I wasn't sure but stay on your toes tonight.

Exh. 9 at 1 (7/24/98 Driver statement)

Driver then gave an explanation for why he happened to be in Dickerson's cell around the time of the murder, and, further modifying his original account, explained that what he really saw was:

> Inmate Constandine followed me to my cell. He asked me if "this" doesn't work could I get Inmate Dickerson to come in my cell. I was not aware of what "this" meant but I asked Inmate Constandine if he was going to beat Inmate Dickerson up. He told me that no one was going to get beat up. I told him I would not bring him to my cell. Then Inmate Speer and Inmate Barnes showed up at my cell and Inmate Constandine gave Inmate Speer a cigarette, Inmate Speer then asked to use my pencil lead which is used for lighting cigarettes from the wall socket. Inmate Speer then left to go to three section. Inmate Constandine and Inmate Barnes then went to two section and sat down and watched T.V. At about 9:20 PM or 9:25 PM Inmate Constandine came back to my house and asked if I could get Ms. Dunn to leave three section. I then went to three section and started talking with Officer Dunn. ... I then walked to two section, and stood and watched Inmate Speer and Inmate Canales come out of inmate Dickerson's cell.

Exh. 9 at 2-3 (7/24/98 Driver statement)

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[5] Apparently, in the week between his statements, Driver learned how to spell Constandine's name correctly.

Driver then added information about his conversations the day after the murder in which Constandine, Barnes, and Speer supposedly made incriminating and callous statements about Dickerson's death. *Id.* at 4.

Driver's two statements vary in four important respects. First, he has eliminated the Constandine/Barnes/Speer/Canales meeting in the day room prior to the meeting. Second, he has added greater detail of conversations he supposedly had with Constandine and Speer that dovetail nicely with the State's theory of the murder. Third, he is inconsistent as to whether he saw Canales walking toward or away from Dickerson's cell. Fourth, he has gone to greater lengths to exculpate himself, adding his portentious warning to Sgt. Thielen.

Driver's testimony at trial reflected even further refining. This time, the first meeting he witnessed involved Constandine, Speer and Barnes meeting in Driver's cell. SR. 9:287. He then saw Canales speaking with Constandine, Speer and Barnes in the dayroom of the adjoining section. SR 9:289-90. Contrary to his first statement, he reports seeing Canales **leaving** rather than **going to** Dickerson's cell, though under further questioning, he retracts that statement as well. SR 9:291; SR 9:308.

Defense counsel did try to cross-examine Driver on his multiple inconsistent statements, but the examination was so unfocused that it succeeded only in confusing Driver into advancing – largely unchallenged - a third version of events. At trial, counsel suggested to Driver that he had made statements that he had had a conversation with Constandine, Barnes and Speer about the murder at either 6 o'clock p.m. or at 9 o'clock p.m., when in fact his statements reflect that he had stated only that at 6 o'clock on July 11, 1997, he had had a conversation with only Constandine while waiting in line for his

clothes ("necessities"). SR 9:305-06; Exh. 9 at 1 (7/24/98 Driver statement). The group conversation occurred later in the evening after count. *Id.*

Further, defense counsel missed another opportunity to expose Driver's improvised testimony when he allowed Driver to testify without impeachment that on the night of the murder he had been near Dickerson's cell at about 6 p.m., and not at 9 p.m., the time the murder was believed to have happened. SR 9:308-09; Exh. 9 at 1 (7/24/98 Driver statement).

In his July 24th statement, Driver said that after having his ominous conversation with Constandine in the necessities line, he returned to his cell (after passing the warning on to Sgt. Thielen) where he remained until after count, *i.e.,* until about 8:30 p.m. *Id.* After count cleared, he smoked a cigarette with Dickerson, and, according to Driver, returned to his cell at about 9 p.m. *Id.*

Finally, Sgt. Thielen makes absolutely no mention of Driver's supposed warning in either of his July 11, 1997 and his July 21, 1997, statements. Exh. 77. One would think that had he received such a warning, Sgt. Thielen would have noted it in his report and informed the investigating officers that, in a remarkable coincidence, on the evening of Dickerson's death a prisoner told him to "watch out tonight" and "stay on [his] toes" because "something was going to happen." Indeed, Tim Rice, Dickerson's cellmate, relates having a disagreement with Sgt. Thielen about the cause of Dickerson's death:

> Approx. [sic] 10 min later Sgt. Thelan[SP] came up there he looked at Dickerson and said he had a heart attack. That's when I told him my suspisions [sic] of Foul play. He told me It couldn't be Foul play Because the only time you lose body Fluids (Bowels & urine bladder) was only if it was natural death. I then told him he was not a very bright Individual.

Exh. 10 at 2 (7/21/98 Rice statement).

This discrepancy would have revealed how self-serving Driver's statements were. Well aware that he was seen by Dickerson's door around the time of the murder, and that he was an accomplice because of his agreement to try to distract an officer while the crime was being committed, he sought to make all his connections to the crime appear innocent. Given how critical Driver's statements were to link Canales to a conspiracy, trial counsel correctly recognized the importance of impeaching him effectively, but were unprepared to do so. Competent counsel would have shown the jury that Driver was lying and that, as an alternative suspect, he sought to affix blame for the crime on others.

Similarly, on cross-examination, trial counsel elicited Driver's allegedly former membership in the Aryan Circle, yet did nothing to educate the jury regarding the racist beliefs animating that gang.

Q: Would you stand up and turn your back to this jury?

A: (Does so.)

Q: Would you lower your collar, sir?

A: (Does so.)

Q: What kind of tattoo is that, sir?

A: That is a covered up Aryan Circle patch.

Q: And Aryan – and please – you may sit down.

A: (Does so.)

Q: And do you have a tattoo on your upper body?

A: Yes, sir, I do.

Q: And what is it, sir?

A: It's a covered up Aryan Circle patch.

Q: Aryan Circle is what, sir?

A: It is a prison gang.

Q: Alright...

...

Q: At the time of this event, your Aryan Circle tattoo was not covered up, was it, sir?

A: No, sir.

Q: Anybody in the penitentiary knows what that tattoo is, don't they, sir?

A: Yes, sir.

Q: And to whom it relates?

A: Yes, sir.

Q: Alright.

SR 9:303.

While everyone in the penitentiary might have known the significance of this tattoo, there was no reason to believe the jury knew. Competent counsel would have made sure the jury understood the radical racism espoused by the Aryan Circle. Given Canales' Mexican-American and Jewish heritage, Driver's racism would have offered a rich source of impeachment. Indeed, Driver's racism was on full display at the time of Mr. Canales' trial. According to Jason Earwood, as the prisoner witnesses traveled together to testify at the trial, Driver made several derogatory comments about Mr. Canales being a Jew, saying, "as along [sic] as they blame a Jew, I ain't got no problems with lying on somebody." Exh. 11 (Earwood Decl.).

Aryan Circle materials complain about ZOG (the "Zionist Occupation Government") and its tattoos consistently feature Nazi emblems. Exh. 12 at 13, 16, 18

(FBI Aryan Circle materials). The Aryan Circle believes in "separatism," "the rights of the White race," "only in the support of our race." *Id.* at 12. The "White race" is defined as "descendant of white europeans, be that Germanic, Slavic, or, in some cases, Mediterranean." *Id.* at 13.

Trial counsel also missed two critical opportunities with Doyle Wayne Hill, who testified that Mr. Canales pantomimed a confession to him while in administrative segregation. SR 10:159. Competent counsel would have revealed Hill's extensive history of seeking out opportunities to manipulate and curry favor with TDCJ. In addition, competent counsel would have exposed Hill's racism and likelihood of bias against Mr. Canales. As with the other witnesses, defense counsel simply allowed the witness to deny an allegation without taking the next step of using available evidence to prove that the witness is lying.

As with Driver and Canida, defense counsel permitted the witness to deny demonstrably true facts. Hill denied being a racist and ever belonging to the Aryan Brotherhood or Aryan Circle. SR 10:164. Instead of showing extensive evidence that Hill, like Driver, was a member of racist prison gangs, trial counsel simply allowed him to rest on his denial. SR 10:164.

Hill's gang file[6] is replete with Hill's documented history of seeking out opportunities within TDCJ to furnish information with prison authorities in order to

[6] Upon information and belief, undersigned counsel believe that defense counsel were not granted access to Hill's gang file. If that is subsequently determined to be true, the State's failure to disclose this information to defense counsel constitutes a *Brady* violation, as it is material exculpatory information. *See infra.*

pursue his own ends. In one undated communication,[7] he wrote, "I would like to say in this letter that I can and will provide you with all the information I can possibly gather about all the gangs in lock up and population[.]" Exh. 13 (undated Hill letter to Morgan). In another letter from October 31, 1987, he not-so-subtly offered to provide information to TDCJ, writing, "I would like you to know that through my involvement I've seen the inner workings of other gangs[.]" Exh. 13 (Hill letter to Buentello). In yet another letter, Hill wrote,

> I was present at the David Alto murder in the Darrington shower. I will testify. Wallis Joslin killed a Cuban on Darrington, he told me all about it, how he got out of the cell, ect. ect. [sic] I will tesitify [sic]. Terry Litted stabbed Duncan Rankin in A-line dayroom. Read all the kites and orders. I will testify. Duncan Rankin stabbed Edwards on E-line Darrington. I was present and will testify.

Exh. 13 (9/19/89 Hill letter).

Hill was also clearly manipulative and opportunistic in his dealings with TDCJ. In one 1990 letter to Tim Morgan, a TDCJ Bureau of Classification official, he expressed regret for having mishandled a previous interview at which he was to present his sincere intent to separate from the Texas Mafia: "I personally expressed this desire to you personaly [sic] before but at that time I had alot [sic] of things on my mind and let them interfer [sic] with my judgement. [sic] Of this I have regretted deeply." In a last ditch effort to get TDCJ's attention, Hill asserted for the first time, "I would also like to state that I am a homosexual," and asks "for just one more chance, to get this stuff off me." Exh. 13 (9/3/90 Hill letter to Morgan). Hill attached a "Statement" in which he alleges

[7] This letter was likely written soon after September 3, 1990, because it appears to refer to another letter dated September 3, 1990, sent a few days earlier to the same person.

his refusal to cooperate with Morgan in the prior interview stemmed from his desire to protect his "lover." Exh. 13 (undated Hill letter to Morgan).

For all his expressions of supposedly sincere desire to leave gang life in 1990, according to his testimony, he has been a TM member since 1985. SR 10:155.

Effective trial counsel would have brought forward TDCJ's extensive documentation confirming Hill's membership in white supremacist prison gangs, namely the Aryan Brotherhood of Texas (ABT) and Bad Company, Inc., an ABT affiliate. Exh. 13 (Hill racist prison gang records). In light of the fact that Mr. Canales is Jewish and Mexican-American, Hill's racism and likely bias against Jews would have been important to expose to the jury.

Finally, trial counsel also permitted Hill to deny the significance of Mr. Canales' refusal to carry out a "hit" against Bruce Richards. SR 10:162. Defense counsel sought to show Hill's bias against Mr. Canales by recalling an incident at which Hill had ordered Mr. Canales to beat up Bruce Richards. *Id.* It was widely believed that Mr. Canales refused to follow that order and, as a result, Hill lost status in the Texas Mafia. *Id.* Defense counsel failed to meet Hill's denial with documents contradicting Hill's assertion that he had never ordered a hit on Bruce Richards and that he harbored no animosity toward Mr. Canales from this episode. Exh. 15 (Incident Report concerning assault on B. Richards) This was important testimony to impeach as it went both to Hill's substantial bias against Mr. Canales and it bolstered trial counsel's punishment phase theme that Mr. Canales was a peacemaker. *See, e.g.*, SR 12:9; 12:42, 12:56; 12:58; 12:109.

b. Trial Counsel Failed to Debunk the "Science" of Handwriting Analysis

One of the most important pieces of evidence against Mr. Canales at both the guilt/innocence and punishment phases was the letter Bruce Ennis produced to bargain for a dramatically reduced sentence. The State called a handwriting analyst to testify that the letter -- which contained many damaging statements – had been written by Mr. Canales.

Despite the obvious importance of the confessional letter to both the guilt/innocence and punishment phases of Mr. Canales' trial, defense counsel failed to attack the testimony of the handwriting analyst to cast doubt on the reliability of handwriting "science" and the analyst's conclusions. The letter in which Mr. Canales allegedly confessed to committing the murder was central to the State's case, yet trial counsel made only weak efforts to undermine the critical testimony of the handwriting analyst. *See generally* SR 10:63-67. Unscrutinized, the letter appeared to be the **only** reliable evidence against Canales when contrasted with the compromised, inconsistent, biased inmate testimony.

This testimony was particularly prejudicial as it came in through a supposed scientific expert. "Scientific or expert testimony particularly courts the [danger of undue prejudice] because of its aurora of special reliability and trustworthiness." *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973). As Justice Blackmun noted in *Barefoot v. Estelle*, 463 U.S. 880 (1983):

> There can be no dispute about this obvious proposition:
>
> 'Scientific evidence impresses lay jurors. They tend to assume it is more accurate and objective than lay testimony. A juror who thinks of scientific evidence visualizes instruments capable of amazingly precise

> measurement, of findings arrived at by dispassionate scientific tests. In short, in the mind of the typical lay juror, a scientific witness has a special aura of credibility.'

Id., at 926 n.8 (Blackmun, J., dissenting) (*quoting* Imwinkelried, *Evidence Law and Tactics for the proponencs of Scientific Evidence*, in SCIENTIFIC AND EXPERT EVIDENCE 33, 37 (E. Imwindkelried ed. 1981)).

As one court stated about handwriting analysis in particular, "[Forensic Document Examiner] testimony...does suffer from a substantial problem of prejudice... The problem arises from the likely perception by jurors that FDEs are scientists, which would suggest far greater precision and reliability than was established by the *Daubert* hearing." *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1029 (S.D.N.Y. 1995).

Indeed, instead of drawing on the voluminous evidence of the unreliability of handwriting analysis, trial counsel inadvertently pursued a cross-examination that bolstered the analyst's opinion. For example, when trial counsel asked, "And on this letter here I'm noticing – that seems to be the word 'as' – with a capital 'A,' but they sure look different to me. What could be the explanation for that?," he gave the analyst the opportunity to hold forth on his theory that this was merely "natural variation," and insignificant to his conclusion. SR 10:65. This point about "variation" would be repeated by the State in its closing argument. SR 11:144. Further, trial counsel was unprepared to confront the analyst when he made a wholly unexplained, but fundamental, assertion about the "match" he had made.

> Q: ... I'm just referring to this one on Exhibit 27, the 'and' that we looked at?
>
> A: Yes.

Q: Okay. And again, I'm not trying to say that I'm doing exactly like the letter, but basically, it looks something like this – 'and' – and on the second one I asked you to look at on Exhibit 29, it seems to me to be a capital 'A' like this – for 'as.' And of course, this looks completely different than it does on there, but you understand what I'm saying about the different shapes of the letters?

A: Sure.

Q: Aren't they different like that?

A: Sure.

Q: Okay. And is it common for natural variation to be that variable.

A: **In the case of these documents, yes.**

Q: Okay...

SR 10:66.

Trial counsel never asked for any explanation why these documents should be so susceptible to "natural variation."

Effective counsel would have been prepared to marshal the substantial evidence that handwriting analysis is not a reliable "science." The ABA GUIDELINES require attorneys in death penalty cases to "subject the prosecution's evidence to searching scrutiny." Exh. 27 (GUIDELINE *Commentary 4.1*). Further, at the time of Mr. Canales' trial, substantial caselaw and scholarly writing addressed handwriting analysis' unreliability. *See, e.g., United States v. Velasquez*, 64 F.3d 844 (3rd Cir. 1995) (conviction reversed where defendant's expert regarding unscientific nature of handwriting analysis excluded); *United States v. Fujii*, 153 F. Supp. 2d 939 (N.D. Ill. 2000) (the few studies supporting handwriting analysis' reliability are methodologically flawed; no peer review by unbiased and disinterested experts; potential rate of errors almost entirely unknown); *Starzecpyzel*, 880 F. Supp. at 1038 ("forensic document

examination... cannot after *Daubert*, be regarded as 'scientific...knowledge'); D. M. Risinger, M. P. Denbeaux, M. J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise*, 137 U. PENN. L. REV. 731 (Jan. 1989); D. M. Risinger, M. J. Saks, *Science and Nonscience in the Courts: Daubert Meets Handwriting Identification Expertise*, 82 IOWA L. REV. 21 (Oct. 1996).

Handwriting analysis has been barred because it does not meet the standard set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In *United States v. Saelee*, 162 F. Supp. 2d 1097 (D. Alaska 2001), the court found the Government had failed to meet its burden that the handwriting analysis was sufficiently reliable to be admitted under Rule 702. The court was concerned that the theories and techniques of handwriting analysis have not been generally empirically tested, and the tests conducted are methodologically flawed. *Id.*, at 1102. The court pointed to the lack of empirical evidence on the proficiency of document examiners as well as

> on the basic theories upon which the field is based. For instance, the basic premise on which document examiners work – namely that no two persons write alike and that no one person writes the same all the time – has not even been adequately tested. In fact, [the defendant's expert] testified that one study suggested that this basic premise was not entirely true.

Id., at 1102.

The court also cited the lack of empirical research on the "theory of probability" undergirding the analysis:

> According to Professor Saks, the field of handwriting analysis is based on a theory of probability that 'if we know the individual probabilities of a set of independent attributes, we can calculate the probability of their joint occurrence by multiplying them together.' But, according to Saks, document examiners have never gone beyond stating their general theory. 'They make no measurements, they make no calculations, they report no

> probability of coincidental matches. In other words, they do not apply the theory to the practice at all.

Id., at 1102.

Finally, the court cited the lack of any controlling standards:

> Missing from [the analyst's] description of how he makes comparisons and reaches ultimate conclusion is any testimony about the controlling standards used to make each of these determinations. The closest [the analyst] came to discussing any standards he employed was when he indicated that 25 samples of known writing were necessary for this process.[8] Even then, he did not indicate what the effect would be on his ability to make comparison or to reach an ultimate conclusion if he had a different number of samples or why 25 was the magic number. Above, the court infers that a limited quantity of questioned writing would detract from the reliability of the analysis; but in reality, we do not know whether there should be some minimal amount of questioned writing in order to arrive at a reliable opinion. The technique of comparing known writings with questioned documents appears to be entirely subjective and entirely lacking in controlling standards.

Id., at 1104.

Even courts that have permitted the analysts' testimony have prohibited precisely the kind of testimony the State's witness provided in Mr. Canales' case – an ultimate conclusion regarding the actual authorship of a writing. In *United States v. Hines*, 55 F. Supp. 2d 62 (D. Mass. 1999), the court credited testimony demonstrating that:

> [H]andwriting analysis by experts suffers in two respects. It has never been subject to meaningful reliability or validity testing, comparing the results of the handwriting examiners' conclusion with actual outcomes. There is no peer review by a competitive, unbiased community of practitioners and academics. To the extent that it has been generally accepted, it is not by a financially disinterested independent community, like an academic community, only other handwriting analysts have weighed in. It has never been shown to be more reliable than the results obtained by lay people. Some tests have been done, but all lacked a control or comparison group of lay persons.

Id., at 68 (footnotes and internal punctuation omitted).

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[8] In Canales' case, the examiner looked at only five documents before reaching his conclusion. SF 9:63.

The court continued:

> There is no data that suggests that handwriting analysts can say, like DNA experts, that this person is 'the' author of the document. There are no meaningful, and accepted validity studies in the field. No one has shown me [the examiner's] error rate, the times she has been right, and the times she has been wrong. There is no academic field known as handwriting analysis. This is a 'field' that has little efficacy outside of a courtroom. There are no peer reviews of it. Nor can one compare the opinion reached by an examiner with a standard protocol subject to validity testing, since there are no recognized standards. There is no agreement as to how many similarities it takes to declare a match, or how many differences it takes to rule it out.

Id., at 69.

The *Hines* court specifically prohibited the analyst from opining on the authorship of the document – the **only** thing the State's witness testified to in Mr. Canales' case – because the "conclusion of authorship...has a different resonance: 'Out of all of my experience, and training, I am saying that he is the one, the very author.' That leap may not at all be justified by the underlying data[.]" *Id.*, at 70.

In *United States v. Rutherford*, 104 F. Supp.2d 1190 (D. Neb. 2000), the court remarked on the "well prepared and executed cross-examination" of the handwriting analyst which made the following points:

- No blind external proficiency testing demonstrating any scientific reliability;
- Examiner had not been given an opportunity to examine a greater universe of people who could have possibly written the relevant documents, other than the defendant who wrote the documents;
- Unlike fingerprint identification, there is no specific number of characteristics an analyst is required to find before declaring a match;

- A match is declared based upon the subjective satisfaction of the analyst, based only his education, training, and experience;
- The analyst knew of no generally accepted published standards government handwriting analyses that were both empirically based and regularly peer-reviewed.

Id. at 1193.

Based on this evidence, the court concluded that "handwriting analysis testimony on unique identification lacks both the validity and reliability of other forensic evidence, such as fingerprint identification or DNA evidence." *Id.* (citations omitted). As a result, it too precluded testimony regarding the ultimate authorship of the questioned documents. *Rutherford* at 1193.

The court in *United States v. Starzecpyzel* remarked on the issue defense counsel unsuccessfully tried to elucidate regarding "natural variation:"

> As a matter of elementary logic, the fundamental issue in determining the reliability of forensic document examination must be the ability of FDEs to **distinguish natural variation from inter-writer differences.** ... If forensic document examination does rely on an underlying principle, logic dictates that the principle must embody the notion that inter-writer differences, even when intentionally suppressed, can be distinguished from natural variation. How FDEs might accomplish this was unclear to the Court before the hearing, and largely remains so after the [*Daubert*] hearing.

880 F. Supp. at 1031-32 (emphasis added).

In light of all the evidence that the reliability of handwriting analysis is, at best, highly compromised, reasonably effective counsel would have moved to exclude this testimony entirely or in part based on *Daubert*, and if unsuccessful, would have cross-examined the State's witness to expose the untested and unsound bases for the expert's

testimony, and/or presented their own witness to testify about the unreliability of handwriting analysis.

2. Trial Counsel Was Unfamiliar with Law Governing Capital Charge Against Mr. Canales And Unwittingly Argued and Presented Evidence Inculpating Mr. Canales.

Mr. Canales was charged with committing the offense of capital murder because he allegedly "with the intent to establish, maintain, or participate in a combination, intentionally and knowingly cause[d] the death of an individual... and were then and there incarcerated in a penal institution." CR 2. In order to prove the "combination" element, the State introduced evidence of Mr. Canales's alleged prison gang connections, and advanced the theory that Mr. Canales had participated in the murder as part of his prison gang activities.

Under *Nguyen v. Texas*, the State had no choice. 1 S.W.2d 694 (Tex. Crim. App. 1999). *Nguyen* made clear that a "combination" requires more than "an agreement to jointly commit a single crime." *Id.* at 696. "Language used later in the Penal Code chapter on organized crime implies an element of continuity....something more than a single, *ad hoc* effort." *Id.* at 697.

> Construing the statute to give meaning to all of the words contained therein leads to the conclusion that the State must prove that the appellant intended to 'establish, maintain, or participate in' a group of three or more, in which the members intend to work together in a continuing course of criminal activities."

Id.

In a misguided effort to defend Mr. Canales, trial counsel sought to implicate Larry Whited in the murder. *See, e.g.*, SR 9:158-60; 9:318-20; 11:123. The problem with this defense was that it was inconsistent with the caselaw interpreting the statute.

Indeed, one of the theories counsel appeared to be trying to develop during the case – that Whited was somehow behind the killing – served only to **inculpate** Mr. Canales. Multiple witnesses testified to Whited's ranking position with the Texas Mafia. SR 9:319; 10:130, 162. By pressing a theory implicating Whited while simultaneously doing nothing to undermine the State's evidence regarding Mr. Canales' TM affiliation, counsel conceded the "combination" element the State had to prove to convict Mr. Canales. Counsel focused on the fact that the State alleged only two people committed the murder, SR 11:113-14, but this represents a fundamental misunderstanding of *Nguyen*.

This was deficient performance. It is fundamental that counsel must understand the law that applies to his client's case. *See, e.g.,* Moore v. Bryant, 237 F. Supp. 2d 955 (C.D. Ill. 2002)) (counsel ineffective where counsel did not review the statute or case law to research the issue); *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir.) (en banc), cert. denied, 497 U.S. 1011 (1990) (counsel ineffective where failed to ascertain through minimal research applicable statute governing parole eligibility). It was clearly harmful as counsel essentially conceded an element of a crime that made Mr. Canales eligible for the death penalty.

3. Defense Counsel's Performance Was Deficient Where They Failed To Challenge The Patently Unconstitutional Grand Jury Process That Indicted Mr. Canales.

As detailed below, the Bowie County grand jury system is unconstitutional because of it does not draw from a "fair cross section" of the community, namely, it dramatically underrepresents women. *See, e.g., Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). Further, this underrepresentation also implicates the Fourteenth Amendment,

which prohibits discriminatory selection of the panel from which a grand jury is drawn. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977).

Had trial counsel investigated and raised this issue, the indictment against Mr. Canales would have been dismissed. Competent counsel would have researched, investigated, and litigated this issue. *See* Exh. 27 (*Commentary* to GUIDELINE 10.8 ("The Duty to Assert Legal Claims") at 1022 ("Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case."))

While this claim is based on the ineffective assistance of counsel, Mr. Canales does not have the burden to show prejudice. Discrimination in the grand jury process is not subject to harmless error analysis. *See Rose v. Mitchell*, 443 U.S. 545 (1979)

4. Defense Counsel's Performance Was Deficient For Failing To Object To The Grand Jury Foreperson's Testimony.

As detailed below, the grand jury foreperson testified at Mr. Canales' trial. Because this testimony was served only to diminish the petit jury's sense of responsibility for its verdict against Mr. Canales, this evidence violated Mr. Canales' Sixth, Eighth, and Fourteenth Amendment rights. Competent defense counsel would have objected to this testimony. Exh. 27 (*Commentary* to GUIDELINE 10.8 ("The Duty to Assert Legal Claims") at 1032 ("Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case."))

D. Trial Counsel Wholly Failed To Discharge Their Constitutional Duty To Mr. Canales When They Conducted No Investigation into Mr. Canales' Life, and Therefore Failed to Uncover Powerful Mitigating Evidence.

At sentencing, the jury was asked:

> Taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, the personal moral culpability of the Defendant, and mitigating evidence, if any, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

CR 110.

In mitigation, trial counsel presented evidence that Mr. Canales was a gifted artist and a peacemaker in prison. SR 12:9; 12:42; 12:45-46; 12:56-58; 12:109; 12:111. Trial counsel, by their own admission, conducted no investigation into Mr. Canales' background, never interviewing any members of his family or any of the mandatory areas set forth in the GUIDELINES' outline of the "extensive and generally unparalleled investigation into personal and family history." Exh. 27 (GUIDELINE 10.6 *Commentary*). According to Harrelson:

> Mr. Hoover and I did not consult with or hire a mitigation specialist. I now understand that mitigation specialists are the standard of practice to the American Bar Association's Guidelines in Death Penalty cases, as well as being mandated by the Supreme Court of the United States' opinion in *Wiggins v. Smith*. I now realize and understand how essential mitigation specialists are to investigating, developing, and presenting mitigation evidence that may persuade a jury to vote for life.
>
> Neither Mr. Hoover nor I were qualified by training and experience to evaluate individuals for the presence of mental or psychological disorders or impairments.
>
> Although we discussed his background and life experience with Mr. Canales, we did not develop any aspect of Mr. Canales' life before this crime in order to present testimony of same at his trial. We did not collect any records or any historical data on his life. We did not interview any family members or other people who knew him growing up.

Exh. 1 at ¶¶ 9-11 (Harrelson Decl.). Mr. Hoover similarly confirmed that they "did not work with a mitigation specialist or any other experts. They did not conduct any interviews of Mr. Canales' family." Exh. 2 at ¶ 6 (Ryder Decl.).

In failing to conduct an investigation into all potentially available and relevant mitigating circumstances, counsel performed deficiently. First, as set forth above, it is well-settled that counsel must conduct a reasonable investigation in order to provide effective assistance under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *see also, e.g., Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985) ("[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case").

In a capital case, counsel's duty to investigate includes the responsibility to seek out mitigating evidence for use in the penalty phase, in the event the defendant is convicted of a death-eligible crime. *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2537 (2003) (counsel is bound to undertake "efforts to discover all reasonably available mitigating evidence"); *Williams v. Taylor*, 529 U.S. 362, 396-97 (2000) (trial counsel in a capital case must "conduct a thorough investigation of the defendant's background") (citing 1 ABA STANDARDS FOR CRIMINAL JUSTICE § 4-4.1 & *Commentary*, § 4-55 (2nd ed. 1980)). "[I]n the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigating circumstances." *Lewis v. Dretke*, 355 F.3d 364, 367 (5th Cir. 2003) (citing *Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2002) (*en banc*)).

"Generally, any lawyer who tries capital murder cases knows that he or she has a duty to investigate the client's life history and emotional and psychological make-up

through an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings." *Valdez v. Johnson*, 93 F. Supp. 2d 769, 780-81 (S.D. Tex. 1999), *aff'd in part and vacated in part sub nom. Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001) (internal quotation marks omitted; citation omitted). *See also Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003) (counsel performed deficiently, *inter alia*, in "fail[ing] to investigate, research, or collect pertinent records regarding [the defendant's] background or history for mitigation purposes, and made no attempt to locate significant persons from [his] past who may have provided valuable testimony regarding mitigating factors"); White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 341 (1993) ("Constructing the capital defendant's complete social history is necessary in every capital case").

"Mitigating evidence concerning a particular defendant's character or background plays a constitutionally important role in producing an individualized sentencing determination that the death penalty is appropriate in any given case." *Moore v. Johnson*, 194 F.3d 586, 612 (5th Cir. 1999). As Justice O'Connor has explained, "evidence about the defendant's background is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (citation omitted). *See also Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (evidence of a "turbulent family history [is] particularly relevant" to an individualized sentencing determination.).

Further, mitigation evidence individualizes the defendant, and gives the jury the opportunity to see him as a unique, if flawed, human being whose life is worth sparing.

> The presentation of mitigation evidence affords an opportunity to humanize and explain -to individualize- a defendant outside the constraints of the normal rules of evidence. Indeed, in capital cases, where the need for individualized sentencing is most critical, the right to present mitigating evidence to the jury is constitutionally protected. *(Michael) Williams v. Taylor*, __ U.S. __, 146 L. Ed. 2d 389, 120 S. Ct. 1495, (2000). *See also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). We are therefore compelled to insure the sentencing jury makes an individualized decision while equipped with the "fullest information possible concerning the defendant's life and characteristics," and must scrutinize carefully any decision by counsel which deprives a capital defendant of all mitigation evidence. *Lockett*, 438 U.S. at 603 (*quoting Williams v. New York*, 337 U.S. 241, 247, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949)).

Mayes v. Gibson, 210 F.3d 1284, 1288 (10th Cir. 2000). *See also Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992) ("Mak's defense counsel never placed Mak in the community nor portrayed Mak as a human being who was a devoted son with family members who loved him. Mak was depicted by the prosecution as a killing machine, and the defense presented no humanizing evidence whatsoever to offset that picture. Absent tactical purpose or risk, such performance is deficient within the meaning of Strickland.")

Defense counsel himself wondered to the jury at punishment: "You can imagine from what you've heard the kind of youth that Mr. Canales had. Maybe it was without the advantages of some of us – maybe he failed to overcome them." SR 12:111. The State responded with the predicable riposte: "Mitigating evidence folks – it is unbelievably sad – it's an incredibly sad tribute that when a man's life is on the line about the only good thing we can say about him is he's a good artist." SR 12:118-19. There was in fact a great deal of mitigating evidence. Counsel's duty was not to leave this to

the jury's imagination, but to investigate it. Had trial counsel investigated this information – all of which was available to them – they would have been able to develop powerful evidence for a life sentence.

1. An Effective Investigation Would Have Explained Mr. Canales' Desire To Be Part Of A Gang And Uncovered Ample Evidence Of Mr. Canales' Traumatic And Neglectful Childhood, His Love And Efforts To Protect His Sister, The Love His Family Has For Him, And The Likelihood Of Mental Disorders.

One of the most aggravating aspects of Mr. Canales' case was that he allegedly committed the murder as part of his participation in a prison gang. His apparent involvement in gang activities suggested a future dangerousness independent of the homicide. Indeed, the State repeatedly reminded the jury that prison gangs continuously engage in a range of harmful and disruptive behavior inside prison. SR 10:119; 10:121-24; 10:136; 10:159; 11:130-31. While Mr. Canales' relationship to Texas Mafia was never clearly established at trial, it was plain from Mr. Canales' tattoo that, at the very least, he aspired to be a part of that gang. Therefore, it was incumbent for defense counsel to explain and contextualize why gang membership was desirable to him.

In addition, trial counsel had an obligation to present a persuasive affirmative case to the jury to spare Mr. Canales' life. Exh. 27 (*Commentary* to GUIDELINES 10.11 at 1062-63). Had defense counsel investigated Mr. Canales' life before the murder, they would have uncovered not only ample evidence explaining the life and death importance of gang membership to Mr. Canales, but also very moving evidence about Mr. Canales' past that is independently mitigating.

Mr. Canales was born in Waukegan, Illinois, on December 1, 1964, to Anibal Canales and Juanita "Janie" Garcia. Exh. 16 (birth certificate). His sister Elizabeth was

born about a year later on February 6, 1966. Exh. 17 at ¶ 2. (Villarreal Decl.). Anibal, Sr. and Janie had what could charitably be called a turbulent marriage. In fact, Anibal, Sr. was an explosively violent and angry husband and father. Exh. 18 at ¶ 12 (Garcia Decl.); Exh. 19 at ¶ 15 (J. Canales Decl.); Exh. 20 at ¶¶ 7- 8 (Velasco Decl.); Exh. 21 at ¶¶ 3-4, 6-7 (A. Canales Decl.). Janie (who died in 1998) was an alcoholic, drinking heavily and often, and eagerly foisting her children off on whoever would take them. Exh. 22 at ¶¶ 5-6, 8-9, 11 (Chacon Decl.); Exh. 23 at ¶¶ 3, 12 (Schiefelbein Decl.); Exh. 18 at ¶¶ 16, 18 (Garcia Decl.); Exh. 24 at ¶¶ 4-7, 13 (Young Decl.); Exh. 25 at ¶¶ 5, 7-9 (Vallin Decl.); Exh. 19 at ¶¶ 18, 25, 32 (J. Canales Decl.). Caught in a household full of abuse and neglect from his earliest years, Mr. Canales had to chart his own course to survive physically and psychically. For better or for worse, that led him to seek refuge in gang life that provided him with physical protection and an emotional refuge.

a. Mr. Canales' School Records Outline The Disruption and Chaos of his Childhood.

Mr. Canales' school records alone furnish a powerful clue that his childhood was suffused with instability. They reflect his frequent moves – and that the problems at home were affecting Mr. Canales.

Mr. Canales was enrolled in pre-kindergarten in Chicago, Illinois in 1968. Exh. 26 (school records). These pre-kindergarten records from when he was three years old show that he was already having real conduct problems, earning him an "F" for his behavior. *Id.* Given the relatively lax standards for behavior in pre-kindergarten, this is a powerful clue that, very early on, Mr. Canales was in trouble.

Mr. Canales attended elementary school in Kenosha, Wisconsin in 1971, but was withdrawn in March 1972, ostensibly to transfer into a Chicago school. He was about

seven years old at this time. *Id.* Two years later, in 1974, he was enrolled in fifth grade in Los Angeles, California. *Id.* In fifth grade, he was reading at a third grade level and appears to be having an attention-deficit disorder common to traumatized children. *Id.* ("He requires close supervision to begin and complete a task. Reads at a 3rd grade level.") In March, 1975, Mr. Canales apparently made a mid-year transfer to the Chopin Elementary School in Chicago. *Id.* He was "socially promoted" to sixth grade. *Id.* In June, 1975, he was transferred to Laredo, Texas, but then was enrolled in the Kenosha school system for the 1976-1977 school year. *Id.* In September 1978, he was enrolled in the Racine school district, but withdrawn in April, 1978. *Id.* At this point, he was twelve years old. He was enrolled in seventh grade in Houston in August 1978, and withdrawn from there in April 1979. *Id.* In the fall of 1979, he was enrolled in high school in San Antonio. *Id.* He changed high schools twice in San Antonio, until at the "parents request" at the age of 16, he was withdrawn from school altogether. *Id.* The last grade he completed was the 9th grade. *Id.* He subsequently earns a General Equivalency Degree. *Id.*

b. Mr. Canales' Family

The school records hint at a picture family witnesses complete. Anibal, Sr. is universally described as a brutal, irrational, and violent man who abandoned his children. Anibal, Sr.'s brother Jose relates:

> My brother has always had a very bad temper. My brother became violent with Juanita and he would hit her. I remember going over to their house the weekend after Juanita had been out late, which was my usual routine. I would work during the week and on the week-ends I would go over to see the kids and the family. Juanita's face was black and blue, and she told me that she had been fighting with Anibal, and he hit her.

Exh. 19 at ¶ 15 (J. Canales Decl.).

Janie's sister Irene also remembers seeing Janie injured.

> I remember Andy's father, Anibal Canales. I didn't know him very well, but I do know that there was always something about him that I didn't like. He was a very arrogant man. I know that he abused my sister. Janie would come home to Kenosha on the week-ends, sometimes, and she would be black and blue from having been beaten by Andy's father. I remember one time seeing finger-mark bruises on both sides of her neck, as if he had gone after her throat from the front with both hands.

Exh. 18 at ¶ 12 (Garcia Decl.).

Hinting at what he must have done to Janie, one of Anibal, Sr.'s subsequent five or six wives described his behavior toward her:

> Andy's father also beat me a lot, but he would beat me with his fists. He also left me with marks from the beatings. He was an extremely violent man. He beat me in the presence of people. I recall that sometimes he would invite friends over to eat. Once I had cooked and everything was served, he would get mad because of anything. For example, he got mad if the salt was missing or if the rice was flavorless. When he got mad, he would throw everything from the table and he would beat me in front of his friends. He would also get annoyed if people who knew me came to the house. There was a lady who did me the favor of taking me to work. Sometimes the woman would come into the apartment and if Andy's father arrived, he would start asking her if she didn't have responsibilities because I did. Andy's father grabbed me by the hair in front of the woman. Andy's father also did things that were not normal. For example, he would grab clothes from the closet and put them in the bathtub with hot water. He would tell me that he was going to go out and that the clothes better be washed, dried, and ironed in hour or I knew what was going to happen to me.

Exh. 20 at ¶ 8 (Velasco Decl.).

Elizabeth Velasco's son – and Mr. Canales' half-brother – Aquiles has similar memories:

> My father was a very mean and violent [man]. My father beat my mother a lot. My mother had a terrible life with my father. My parents separated when I was very little, but I remember seeing my father beat my mother after they had separated. I saw that on one occasion, my father beat my mother as if my mother was a man.

Exh. 21 at ¶ 3 (A. Canales Decl.).

He continues:

> My uncles used to say that my father was the devil in person. My uncles tell me that my father used to beat my mother in front of them.
>
> All my life, I experienced embarrassments with my father in restaurants. Without exception, he would always get mad and he would become violent with the waiters. If he was lacking salt or he didn't like it, he would become angry and would even throw plates at the waiters. He would always create a scene in restaurants.

Id. at ¶¶ 6-7 (A. Canales Decl.).

Anibal, Sr.'s abusiveness was not limited to his wives. Aquiles Canales recalls:

> I have a half-brother by my mother whose name is Cesar Arizola. He lived with my mother and father until my mother noticed that my father was not right in his head. My mother tells me that my father was very violent with my brother Cesar, just like he was with Andy. My mother tells me that my father gave Andy and Cesar beatings. My mother ended up sending my brother Cesar with my aunt Carlota because of the treatment that my father gave Cesar.
>
> With me, my father was extremely strict and irritable. My father treated me with screams. He abused me verbally. When I said something that he didn't like, he would call me "idiot" or "pendejo." I was very scared of my father, I would rather not say anything. Even today, I have a lot of problems because of the treatment I received. I stutter a lot, I am very insecure, I am very nervous. Everything I lived affected me a lot.

Id. at ¶¶ 3,4 (A. Canales Decl.).

Dorothy Garcia Schiefelbein, Janie's youngest sister, who was in elementary school when Janie was married to Anibal, Sr. recalls seeing "black and blue marks [on Janie] from having been hit," but also remembers that Anibal, Sr. sexually molested her as a child:

> [W]hen I was in the 4th or 5th grade, he started molesting me. I used to go over to babysit for their kids. The first time it happened, I was in Anibal Canales' truck going to his house. He told me to scoot next to him so I didn't fall out the door, and I did. He put his hands inside my underwear

> and was rubbing on me. I didn't know what was going on, but I knew it wasn't right, and I hated it. After that, he would do that other times, when he got me alone, or when the young kids were sleeping. I must have been around the ages of 8, 9 and 10. I never told anyone because I was afraid to, and I thought no one would believe. He told me not to tell anyone, and he told me that no one would believe me.

Exh. 23 at ¶ 3 (Schiefelbein Decl.).

Anibal, Sr. left the household when Mr. Canales was about five years old, but he continued to be a presence in Mr. Canales' life as Juanita would periodically leave the children with him. Mr. Canales' sister Elizabeth recalls:

> Every summer, Andy and I spent in Laredo with my father, which really meant that we lived with my grandmother. My father would drop in and out, and he had a terrible temper, and was especially hard on Andy. He would hit Andy, or beat him with a belt, for discipline.
>
> My father's temper could be scary sometimes. I remember at one point my father was with a Cuban woman. He had two kids with her: a girl and a boy. I remember being down there and seeing my dad get really mad at my half-brother Ulysses, who was still a baby in diapers. My dad picked him up by the arms and swung him around and flung him across the room. Ulysses slammed into the coffee table, and slid underneath it. I was shocked, but I was also very scared. Their mom was crying in the other room, and that's the last time I ever saw her or my half-siblings. I think they live in Miami now.
>
> I remember one time I must have been about eight, and Andy must have been about ten. He was already so tall–he looked way older than his age by that time. We were in Laredo, and we were supposed to go to church, and Andy said, let's go to the hotel and go swimming. There was a really nice hotel right near the Mexican border. We went to the hotel, and hooked up with a couple who had some black kids and were staying at the hotel. Andy decided to go to Mexico–it was a couple of blocks away. He said I would be okay there, with the other kids, so he left, and I went and changed into my swimsuit in the couple's room. When I came downstairs, there was my father, standing there waiting. I got so scared, I went back upstairs and changed. My dad didn't say a word. Andy was already gone, and we had to wait for about an hour for him to come back. We got into his truck, and my dad just started screaming at us. We got home, and my dad took Andy into a room and closed the door and I heard Andy get beat within an inch of his life. I was terrified that he was going to kill Andy. Dad was screaming, and Andy was on the floor, begging my father to stop.

> I went in and yelled for my dad to stop, and he hit me, and I fell to the floor. My grandmother came in, and I threw a candle at my dad. It was one of those glass candles, and it hit him and broke. Finally, he just left, and my grandmother took care of Andy's wounds.
>
> I remember another time, Andy and I went swimming at a public pool that was about eight blocks from my house. Andy was a great swimmer, but I was not, I could just make it to the edge. I wanted to go off the high dive, and Andy told me not to. I kept insisting, and Andy kept telling me no. Finally, I just went up. I got to the top and realized that I couldn't come back down. There were kids all lined up behind me, and the lifeguards were whistling, telling me to jump. Andy was below, and he yelled up for me to sit down, and jump from there because I would be closer. I sat down, but instead of jumping feet-first, I jumped forward, and slammed into the water on my face and chest. Andy dove in and pulled me off to the side. I was hurt. We rested for a while, then walked back. The next day, on top of my sunburn, I had bruising from hitting the water. When I realized what I looked like, I started crying, because I knew Andy would be in trouble. My grandmother came in, and asked me what happened. Andy said it was his fault, he took me to the pool and I hurt myself, and he didn't tell and he should have. My grandmother called my father, and he came in, took one look at me, and got out the belt to beat Andy. I was trying to tell him that it was my fault, but he wouldn't listen. He beat Andy all over his body with a belt. I remember washing Andy's back and arms, where he had swollen welts from the beating. I was telling Andy not to worry, that we would be going back home soon because it was almost the end of the summer. Andy was saying that he didn't think he would get to go.

Exh. 17 at ¶¶ 20-23 (E. Villarreal Decl.).

As detailed, *infra*, Mr. Canales' fear that he would not be allowed to return home was well-founded. The children were well aware that their mother did not like them around and was having trouble handling Mr. Canales. Mr. Canales was sent to live with his father when he was about 12 or 13 years old. His stepmother remembers the beatings the father would give him:

> When Andy's father would get mad with Andy, he would put him in the room and give him beatings with the belt until the father got tired. I recall that one time he was beating him for about an hour. When the father beat Andy, he would leave bruises and wounds all over the body. I know that Andy would be left wounded because I was the one who cured the

wounds.

Exh. 20 at ¶ 7 (Velasco Decl.).

She reflected, "I, who was an adult, was terrified of Andy's father. I also felt helpless. I can't imagine what Andy, who was a child, felt." *Id.* at ¶ 9 (Velasco Decl.).

While Anibal, Sr. continued to be present in the children's lives, it was also apparent that he had no interest in the children's welfare. One of Mr. Canales' stepmothers reflected, "When I lived with Andy's father, I noticed he had forgotten about the children he had previously had. Andy's father knew nothing about his children and he did not support them in any way." *Id.* at ¶ 4 (Velasco Decl.).

Unfortunately for Mr. Canales and his sister, Janie appears to have attracted violent predatory men. After Anibal, Sr. left, Janie married Carlos Espinoza. Jose Canales, Mr. Canales' uncle, remembers the children's lives worsening:

> I remember when Espinoza was living with the kids, they complained bitterly about him all the time. I remember them telling me over and over that they hated him, that they didn't want him living in the house, that they didn't want him putting his hands on them or spanking them. They would say, "we hate that man, we hate that man, we cannot stand him." I suspect that they were being abused. One time, Andy came to my house and he had black and blue welts on his arm from having been beaten with a belt. Now that I look back on it, I realize that I should have lifted his little shirt to see if he had marks on the rest of his body, but I was so young, I didn't know what to do. Andy did say that Espinoza had hit him in the head with his fists. Andy's mom, Juanita, was working in a department store called Gobalt's, which no longer exists now a days. I walked over to her work and took it up with Juanita. I told her that this was unacceptable. Juanita said that Andy was not behaving, didn't go to school or something. She was defending Espinoza and not Andy. Shortly after that, Juanita moved. I don't remember where she went, maybe Kenosha or someplace in Wisconsin....
>
> One time, Andy ran away from home. He was just a small kid, and he made it all the way from where he was living on the west side near Chicago Avenue to my house in the city of Chicago. He must have

> walked, my guess is that it was a couple of miles. He must have been five or six.
>
> I did notice a change in those kids after Espinoza was living with them. They had been lovely children, just lovely. And Andy became a rebel after Espinoza moved in. They seemed so unhappy to have him there. They were angry that their mother was forcing them to live with Espinoza. I even remember Andy saying that he hated his mother for what she was making them go through. Elizabeth was small, she was playing with dolls, but Andy knew and he said that it would bother him when he went to sleep at night, he would think about that man. Seeing them later over the years, I got the sense that their circumstances deteriorated even more.

Exh. 19 at ¶¶ 20-22 (J. Canales Decl.).

Jose was the only member of the family to treat the children as wanted and loved. Because of his devotion to them, however, he worried that taking a more forceful position with Janie would lead her to cut off his relationship with the children:

> I felt angry because I felt that Juanita had made these changes in her life that were having a very negative impact on the kids, but I didn't want to have any hostile exchanges with Juanita because I didn't want to jeopardize my relationship with the kids, or the opportunity to visit them and take them to my house on the week-ends.

Id. at ¶ 25 (J. Canales Decl.).

Elizabeth's recollections about the life Jose only glimpsed are chilling:

> The rest of the week [*i.e.*, when the children were not staying with Jose on weekends], Andy and I lived with my mother, and from the time I was about five, with my step-father, Carlos Espinoza. Both Andy and I hated living with him. He was a beater. He used to beat up my mom, and beat up Andy, and he was rough on me.
>
> We spent most of our early childhood in Chicago. We spent some time in Racine. I almost named my daughter Racine because I have such good memories of my time there. It was the one place where we lived in a stable neighborhood, in a clean house, with clean houses around–no fleas or lice or noisy Puerto Ricans partying in the next apartment. The places we stayed in Chicago were awful, we lived in gang central.
>
> My step-father, Carlos Espinoza, lived with us for several years when we lived in and around Chicago. I don't remember ever meeting him until he

and my mom were married. I didn't even know my mom was pregnant with Gabby until she brought her home from the hospital. I dreaded being around Carlos. He was a beater. He beat on my mom, and he beat on Andy bad. He would use a switch or a belt. And there was always a lot of pushing and shoving. He would pull Andy's ears, drag him around by his ears, I remember that Andy had ear infections-but I never really thought at the time that it was from that. We both did, chronic ear infections from being dragged around by our ears.

I remember one time my mom stayed out late after work. When she got home, I was already asleep, and so was Andy. I woke up because I heard some rustling, and I woke Andy up. We went out to see what was going on, and Carlos was sitting on my mom, who was on her back, and he was hitting her as hard as he could around her face and head. He was really beating her bad. Andy ran to the back to get something, and I ran over and started pulling on his hair, and trying to get him off my mom. He backhanded me, and I fell down. The next thing I remember, I woke up and my mom was lying next to me in bed, along with Andy. We were all three in one single bed, and she had an ice pack over her head.

Carlos used to beat Andy badly too. Andy didn't stand a chance with Carlos. Beatings were a regular thing at our house. He would drag Andy around by his ears. Carlos would beat Andy with a belt. He would beat Andy until he had welts all over his back and butt and arms and legs. We were always having to kneel in a corner for punishment. Andy had to strip sometimes to be beaten. Andy and I were always afraid that we would do something wrong around him. I remember seeing Andy lying naked, curled up in a ball, and Carlos hitting him as hard as he could with the buckle end of the belt. Carlos would beat Andy until he had welts and bruises all over his body.

My dad was strict and hard on us, but Carlos was way worse. Carlos was a beater, and Carlos was a molester. The first time I can remember being molested by Carlos, we lived in a little apartment in Chicago or Wisconsin, and I was really young. The neighborhood was horrible, there were rats everywhere, and kid were getting sick, and there was a lice epidemic. I think that's where the molestation started. There were Puerto Ricans living downstairs, and the lice were terrible, we had to stay down there sometimes. I must have been about 5 or so, because I don't remember having any contact with Carlos before he and my mom got married, and Gabby was born when I was six.

I was molested for several years, but didn't tell anyone. Carlos threatened me, he told me that he would kill my uncle or my dad if I told them. I was terrified of my dad's temper, so I probably wouldn't have told him anyway. My paternal uncle Jose was the only one I could have told, but I

was afraid to.

My mom was working at Bell Telephone, and she wasn't home a lot. That left Carlos around, because he wasn't working that I can remember.

The most vivid memory I have of being molested was a time when I was sick, I was having fevers. I went in to sleep with my Mom, and Carlos put me in between them, which I didn't want. My mom got up in the morning and left, and I woke up and Carlos was all over me. I was in my underwear, and Carlos started rubbing and putting his hands all over me, and having me rub him and all that, it was horrible. I was crying and crying, and he kept slapping me in the head to get me to stop. I finally did because I just kept getting slapped. And he had me sit on him, and then he flipped me over and he had my hands pinned above my head and he took my leg and was getting my underwear off. Andy was home–it must have been a Saturday morning–and he came in and started yelling, "I'm gonna tell, I'm gonna tell!" Carlos got off me and ran after Andy, and Andy dodged him and came in and got me and we ran downstairs to the neighbors. I was naked, and I was bleeding from a busted lip, and we were just trying to get them to call my Mom. The neighbors knew what was going on, but they were the type, they just didn't want to know, didn't want to be involved. They finally got a hold of my Mom, and she came down and got me. She took me to my uncle Joe and Aunt Bonnie's, and we were there for a while. They didn't know what happened.

I don't remember exactly how long my Mom and Carlos were together. I do remember that after they weren't living together, he'd show up sometimes. I remember one night Carlos showed up and we were living in a small apartment–Andy and I didn't really have a room, there was just a tiny kitchen and a little living room that had a beaded curtain. Carlos and my Mom were drinking late into the night, and this big old scuffle broke out because Carlos was trying to get to me. My mom was trying to keep him away. He wanted to see me and my mom took a knife and stabbed him, and I went out there and just started screaming that this wasn't his house and to get out. He had on a gauzy shirt, and I remember seeing the blood begin to seep through. He did leave. My mom washed me up, and the next morning I remember there was blood everywhere, in the kitchen, on the porch, on the stairs, everywhere.

Carlos is the first person who ever molested me, but he wasn't the only one. My mom had a number of boyfriends who were in and out of the house and who thought they were my boyfriend too. If you asked me to count how many, I couldn't. It was several. I remember one guy who had a really fast mustang. He was so gross, like a dog, and he always smelled of alcohol. I also remember a guy named Ruben. I remember because he was the dirtiest. He would have me take a towel and masturbate him.

> And Ruben would always hit me in the head. I was getting these terrible headaches, and my mom finally brought me in to have my eyes checked because she thought that's what was giving me headaches. There was nothing wrong with my vision, but when the doctor looked into my eyes he could see damage. I told my mom that if Ruben would just stop hitting me, maybe the headaches would go away. She didn't know before that. I eventually told her about the rest, and I remember she gave me this really short haircut and dressed me in hideous clothes to try to get them to stay away from me.
>
> Whenever my Mom got a new boyfriend, Andy would stay around, he wouldn't stray far. I knew that if there were two of us, I was safer, so I would sit outside on the porch, and it didn't matter how late it was, I would sit and wait for Andy to come home. There was this one apartment where I would sit on the back porch, and I could see the playground down the alley where Andy was playing basketball. I would wait there, it didn't matter if it was cold or snowing or a blizzard, I would sit there and wait for Andy before I would go up by myself.

Exh. 17 at ¶¶ 5-16 (E. Villarreal Decl.).

Elizabeth had to rely on Mr. Canales because Janie was not cut out to be a mother. She neglected and failed to protect her children; she would dump them on anyone she could find; and she drank heavily. One long-time friend stated:

> I have fond memories of Janie. She was a good person. We used to go out together, and we would have fun. But I don't believe that Janie was meant to be a mother. Some people are, and some aren't. For Janie, it was like her kids got in the way. Janie just didn't have the patience it takes to have kids. The kids were bothersome to her. I don't know why people like that have children, I really don't.
>
> I don't remember any family activities at all. I don't know that Janie's family ever did the normal things a family does, like have picnics or go to the park.
>
> ...
>
> Janie's kids had a hard life with Janie. Things were very unstable for her. She had to keep moving from place to place, every few months. I don't know exactly why she wasn't making it, but she just couldn't get it together to have a stable environment for the kids to grow up in.

Exh. 22 at ¶¶ 8-9, 11 (Chacon Decl.).

Her sister Dorothy Garcia Schiefelbein states:

> As adults, my mother (Andy's maternal grandmother) and Janie were very close. They looked a lot alike, and they had the same mannerisms. They also both drank too much. They would sit around and drink a 12-pack of beer, then have someone go out for more. They both would get to the point of being sloppy-drunk. I would have to watch the kids while they got drunk. Both of them had drinking problems. My mother was getting drunk as far back as I can remember, and I don't know when Janie's drinking became a problem, as far back as I know.

Exh. 23 at ¶ 5 (Schiefelbein Decl.). Dorothy started babysitting Mr. Canales and his sister when she was only about eight years old, a child herself. *Id.* at ¶ 3 (Schiefelbein Decl.). Dorothy lived with Janie for about a year in Kenosha, and observed:

> I babysat a lot during that time, because Janie would be out drinking a lot in bars. I went out some myself, but usually with friends. I didn't like going out with Janie, because she would get way too drunk. I can remember her getting so drunk that she would fall asleep at the table. It was embarrassing and it got to the point that I didn't want her to go out with me and my friends. I think we lived together for about a year, then we each moved on.

Id. at ¶ 12 (Schiefelbein Decl.).

One of Janie's other sisters, Irene Garcia, also remembers Janie's excessive drinking:

> When I got older, when I was in between husbands, I would go out with Janie sometimes. She was a quiet personality when she was not drinking, but when she would drink she would get loud and talk and laugh and joke and dance. She was a party girl. I've heard stories over the years, and there is no doubt that Janie had a drinking problem. We would leave the house sober, and she would drink way too much, and come home completely drunk. She'd get sloppy. I thought she had a drinking problem because I saw her drinking a lot, at all hours.
> ...
>
> Over the years, Janie drank a lot, and she would leave the kids with babysitters so that she could go out drinking. I think they were neglected. And whenever their dad was taking care of them, he was very short-tempered and impatient with them. Janie was too lenient with those kids, she didn't want to deal with the kids alone.

Exh. 18 at ¶¶ 16, 18 (Garcia Decl.).

Later on, when she was living in San Antonio, her friend Hope Chacon recalls:

> Janie was drinking regularly when she lived here. She had to have her beer every day. She would go out and get a six-pack, and I would see her drinking and smoking in the morning. Janie was generally a very nervous person. Her hands and her jaws used to shake for no reason. Janie was also a very heavy smoker.

Exh. 22 at ¶ 6 (Chacon Decl.).

Vicki Cizneros Young is Janie's niece and recalls her childhood impressions of Janie:

> When I was very young, my mom and my aunt Janie would go out together all the time. They would often leave us at one of their houses, all together, with my sister Michele or Andy's sister Elizabeth in charge. I remember looking forward to going to my aunt's house because everything was so lacks [sic]. My mom was always protective of us as kids, and things were different at Aunt Janie's house. There was always junk food, and we could do what we wanted to do.
>
> My aunt Janie went out a lot. She was a party animal–she always had a good time. Sometimes when they dropped us off they would be gone all week-end long.
>
> ...
>
> I realize now, as a parent, how much kids need to have their parents around. My aunt's kids, especially the two older ones, just didn't have their mother around as much as they needed her.
>
> ...
>
> My aunt Janie drank very regularly all the time I was growing up. She would go to bars a lot, and she would drink at home. She would generally drink beer. She drank heavily. When she would get together with her parents, my maternal grandparents, they would sit around and drink a lot, until they got drunk.

Exh. 24 at ¶¶ 4-5, 7, 13 (Young Decl.).

Michele Vallin, another one of Mr. Canales' cousins, remembers having to babysit Mr. Canales and his sister during her pre-teen years:

> I think the period of time I spent the most time with my cousins were the

> pre-teen years for me: when I was 9, 10 & 11 years old. Andy was closest in age to me, about three years younger, so he must have been 6, 7, & 8. That's after my step-dad died, and so my mom was spending a lot of time with my aunt. Andy was two or three years younger than me, and we were closest in age. My mom and my aunt Janie used to go out a lot when I was that age. They would take off for the week-end, and leave me in charge of the younger kids. I used to get so upset with my mother for making me take care of the kids all week-end. Andy and I would drink alcohol and beer, and smoke cigarettes. There was always alcohol around Janie's house. I can remember when I was about 11, my aunt Janie would offer me a six-pack of beer and cigarettes to get me to babysit.

Exh. 25 at ¶ 7 (Vallin Decl.).

She feels this neglect was symptomatic of Janie's alcoholism:

> From what I saw of Andy when he was growing up, he was not getting the kind of structure that a child needs. His mother was interested in doing her own thing, going to bars, and he was left alone a lot. His mother had very serious money problems, which were chronic. She also was a steady, heavy drinker, and between working and going out, the children were left alone a lot to take care of themselves. She drank every day, she drank a lot. When I was older, I went out with her and she would get way too drunk to drive, but she would drive anyway. Janie and my grandmother used to drink together a lot, they would drink a case easy together, sometimes more. At times, my grandmother, and Janie as well, would get to the point that they could not make it to the bathroom, someone had to help them.

Id. at ¶ 9 (Vallin Decl.).

Making the situation even more difficult was the family's poverty. Because they had no money, Janie and the children moved often, sometimes living with friends, sometimes living in dangerous and depressed neighborhoods.

Elizabeth recalls:

> We spent most of our early childhood in Chicago. [Racine] was the one place where we lived in a stable neighborhood, in a clean house, with clean houses around–no fleas or lice or noisy Puerto Ricans partying in the next apartment. The places we stayed in Chicago were awful, we lived in gang central.

Exh. 17 at ¶ 6 (Villarreal Decl.).

At times, the children did not even have a bedroom, sharing a space partitioned from the living room by a bead curtain. *Id.* at ¶ 14 (Villarreal Decl.). Other family members confirm her recollection.

> The neighborhoods that Janie lived in were very rough. Janie did come to live with us at one point, I think it must have been for about a year, maybe two. I don't remember what the circumstances were, but I know that Janie didn't have any place to stay, and she had no money and no job. I had a 3-bedroom house, so she moved into my house with her kids.

Exh. 22 at ¶ 5 (Chacon Decl.).

Janie's niece observed:

> Our families were close, but they were different. My mom was very protective of us growing up, and my mom had the determination to get her kids out of poverty. My aunt Janie just didn't have that kind of determination. My aunt was always going from job to job or place to place. When we were young, I don't remember her having a steady job, I think she was getting assistance from the state. Every so often, Janie and her family would come and live with us. That meant that I would have to share a room with all the girls, so I thought it was a drag. I mean, it was fun at first, but it would get old.

Exh. 24 at ¶ 6 (Young Decl.). Another niece recalled on the family's instability and poverty:

> Home life with my aunt Janie was very unstable, because there were constant money problems and they were always moving. My aunt had chronic money problems. As far as I know, she was sometimes not working, she was getting aid from the state. If I had troubles, I would go to her, because anything went with her, I was not likely to get into trouble.
> ...
> I remember going to visit my aunt Janie where she lived in Chicago, and I thought it was a scary place. It was really the ghetto. I can remember asking my cousin whether he liked it here, because I would not have wanted to live there. But it was the kind of place where there were kids everywhere outside, so Andy liked that part of it. There were always kids to run around with.

Exh. 25 at ¶¶ 8, 5 (Vallin Decl.).

Jose Canales stated:

> I remember one place Juanita was living in Chicago, it was a terrible neighborhood. I went to get the kids one time, and Juanita was not there. There was a big dump of garbage behind their house, and the kids were dirty and had dirty clothes and they were playing. Elizabeth had a dirty doll, and both were in the garbage behind the house. There was a Puerto Rican woman who offered to clean them up, but I just took the kids and brought them to my apartment on the north side. They cleaned themselves up, and I took them to a community store and got them clothes, and took them to the movies. They loved it. They just needed love and attention, and they loved coming here.
>
> I also remember a place where Juanita was living that was terrible, it was very small and in bad shape, and she shared it with a Puerto Rican woman who also had kids. I don't know if they all slept in one room or if there were two rooms, one for each family. But this Puerto Rican lady would get her sister to come over and watch the kids so that she and Juanita could go out.

Exh. 19 at ¶¶ 23-24 (J. Canales Decl.).

Making things worse, Mr. Canales and his sister were also rejected by their mother's family.

> I remember Andy when he was a young kid he was full of energy, he was just bouncing off the walls. By today's standards, he would definitely be called ADD. My parents were verbally abusive to Andy and Lisa. I remember my dad would tell Lisa [Elizabeth] that she looked just like her wet-back father. And they would call those kids stupid and idiot in Spanish, they were mean to them. My mother would hit them at times, take a strap to them. It may have something to do with the fact that my parents did not like their father, because Linda's kids could do no wrong in their eyes. I remember my mom taking a strap to Andy regularly when Janie was not around. He was 5 or 6 or 7 at the time. It would leave red marks. He also would have to sit in the corner or a chair for hours at a time for punishment.

Exh. 22 at ¶ 13 (Schiefelbein Decl.). The children bore the brunt of the maternal grandparents' animosity toward Janie's men:

> I did not know Carlos Espinoza, Gabby's dad, very well. I do remember seeing him. He was a big sloppy kind of guy, and I got the instinctual feeling that I should stay away from him. He seemed to not be all there. He was from Mexico, and I remember back then there was a feeling in our

> community that people from Mexico were dirty. But I don't think that's all that was at work. There was something about him I didn't like. Maybe it was because I could tell that my cousins were not happy to have him around.

Exh. 25 at ¶ 6 (Vallin Decl.).

Janie's sister Irene remembers:

> I only met Carlos Espinoza, Janie's second husband, a couple of times. My parents didn't like either of Janie's husbands. They thought that they just married Janie to get their papers. My parents were very racist. They were racist against all nationalities, but especially Mexicans from Mexico. I often wondered if that was why my parents, Andy's grandparents, didn't treat Andy and his sister well. They would often hurl verbal abuse at them, they treated those kids like they really didn't like them.

Exh. 18 at ¶ 14 (Garcia Decl.).

Elizabeth recalls:

> My mom was very close to my maternal grandparents. They would all sit around and drink together. It was one big hoopla when they were together. And my mom traveled every summer to see them. She was their favorite. But I hated going there. I hated going there because my grandparents didn't like me and Andy. They didn't like us because of my dad, they just hated him, because he was from Mexico. My dad would call them dirty filthy Indians and say they were no better, but my grandparents didn't get over that. It would really upset my Mom. My grandparents would get Christmas presents for Linda's kids, and not for us. My mom used to cry, and ask them why they didn't love her kids.

Exh. 17 at ¶ 19 (Villarreal Decl.).

Mr. Canales' childhood was not wholly devoid of love, however. His paternal uncle Jose in Chicago loved Mr. Canales and his sister. Exh. 19 at ¶ 18 (J. Canales Decl.). When they lived in Chicago, he would visit them every weekend. *Id.* Mr. Canales' mother usually did not want the children around on the weekends, and she would leave them with anyone who would take them. *Id.*

Jose Canales recalls:

> I was very happy to have the kids. I didn't want to lose touch with them. I would take them to the zoo, or to the park, or downtown on the holidays, and out to eat. I would cook for them. I was just trying to fill some sort of gap that was left after my brother left them. As an uncle, I could only do so much, but I tired. I tried to be a stabilizing force in their lives, because they needed it so much. My brother Anibal had basically abandoned them, and Juanita was still wanting to go out and go bar hopping, and the kids did not get the structure or the attention they needed.

Id. at ¶ 19 (J. Canales Decl.).

Sadly, though, because the children were shipped from pillar to post, Jose lost touch with them, despite his best efforts. All their lives, the children had been moved around, as Janie tried to get Anibal, Sr. to take care of them and because she was struggling financially.

Elizabeth remembers being sent to her father's during the summer, though the father would just leave the children with his mother in the Colonias in Laredo.

> My father was not around much at all. He didn't help with child support, so my mother's way of getting back to him was to ship us off to stay with him every summer. We saw him during the summers some, but really my father would get us and just drop us off at his mother's house, my paternal grandmother, who lived in Laredo, Texas. She lived in the Colonias Projects in Laredo, and money was tight.

Exh. 17 at ¶ 3 (Villarreal Decl.).

The turning point in Mr. Canales' life – the point at which he could not bear any longer to stay with his abusive father and the point at which Jose was no longer able to give him the love and structure he needed – seems to be when Mr. Canales was sent to Houston.

One of Janie's sisters recalls:

> As the kids grew up, Janie got frustrated with her kids, especially Andy. I remember before she moved to Texas, she was saying she didn't know what to do with Andy anymore, he was acting out, and she didn't know

> what was going through his mind. He was being disruptive in school and things like that, as far as I know.

Exh. 18 at ¶ 19 (Garcia Decl.).

Mr. Canales was sent to Houston to live with his father when he was 12 or 13 years old. Anibal, Sr.'s wife at the time remembered vividly Mr. Canales' arrival at her home in Houston.

> Andy arrived to live with us when he was about 13 years of age. At that time, we were living in Houston, Texas. Andy arrived at the apartment where we were living because Andy's mother had sent Andy to live with the maternal grandmother in Laredo, Texas. The maternal grandmother was already an old woman. She lived in government housing and could not have Andy in her house, so, she sent her to live with us in Houston.
>
> When Andy arrived to live with us, Andy had not seen his father in years. Rather than Andy's father receiving Andy with a hug, giving him support, Andy's father was extremely violent with Andy. The life that Andy and I lived with Andy's father was terrible. Just as Andy's father gave Andy beatings, he also gave me beatings.
>
> ...
>
> My impression was that all of the problems that Andy had were due to the fact that Andy had a very sad and difficult life. When Andy came to live in our house, you could see the sadness in his eyes. Andy had a life full of instability and lack of appreciation and interest from his parents. Andy's father would tell me that Andy never had stability with his mother. According to Andy's father, Andy's mother drank a lot, lived in bars, and always left the children alone. With Andy's father, there was also never a good word or a hug.

Exh. 20 at ¶¶ 5-6, 11 (Velasco Decl.).

Elizabeth recalls:

> The year my brother spent in Houston was a really bad year for Andy. He went to Kingsborough that year, and worked in a movie theatre–I remember he had to get a job. It was bad for him all around. My dad was really tough on Andy, and he was getting into trouble there. My dad was gone a lot, so Andy ended up having a lot of freedom. My dad would be out driving trucks until real late, or he'd be gone for days at a time. My step-mom, Elisa, worked for an apartment complex. That's when Andy started getting into trouble. He had no supervision, and he started drinking during the day. He was always hooking up with the wrong people. My

dad was always really hard on Andy. I guess it was because Andy was a boy, he was way harder on Andy than on me. Maybe because I looked just like my dad, too. But he would really beat Andy bad sometimes. He would get beat black and blue.

That year, my dad and Elisa moved away from Houston, and they left my brother Andy in Houston to live by himself. I remember because my dad used to call once a month or so to check in and give us news of Andy, and we hadn't heard from him for a long time, so I asked my mom about it. My mom couldn't get a hold of my dad, but eventually found out that he had moved and left Andy. She was really mad, and told my dad to go get him, but my dad wouldn't. My mom didn't know what to do, so she decided to leave him. Some time later, we got a call notifying us that Andy had gotten arrested with some friends over a stolen car. My mom let Andy deal with it himself. I didn't see him for a long time after that. I think he was about fourteen by the time he came back to San Antonio.

Exh. 17 at ¶¶ 26-27 (Villarreal Decl.).

Jose, too, remembers Houston as a particularly bad time.

Years later, Juanita moved to San Antonio. Juanita sent Elizabeth and Andy to Laredo to live with my mother, their paternal grandmother. My mother was having a hard time, she was getting some money from the government, and I would send her a little bit of money when I could, like $25 at a time. My mother just couldn't afford to keep the kids, so she wanted to send them to San Antonio to live with their mom. Elizabeth went, but Andy went to Houston, to live with his dad.

Anibal was working as a trucker in Houston at the time, for a company called Brown Trucking Co. He was with a third woman by this time, Eliza. Eliza was working as a building manager. They were living in a very small apartment with only one room. Andy went to work as a busboy in a cafeteria in a mall across the street, he had to use my brother's social security number to get a job. I was staying there for a while, all of us slept in one room, but I got a different place because there just was not room. There was tremendous hostility and anger in the house. No one was paying any attention to Andy. I remember that Andy was complaining of headaches around that time, he was having trouble sleeping, and said that he was bothered at night by visions and voices. That's when Andy started hanging out with bad company. I became aware during that time that Andy was smoking marijuana with his friends. My brother wasn't helping the situation. He was having bad problems with Eliza and I know that he was violent with her. And then my brother got laid off from Brown Express, and Eliza was pregnant with Aquilles, so he decided to move back to Laredo with Eliza. Andy wanted to stay and live with two friends

> that he had met, but everyone knew they were bad company. I was still in Houston at the time, and I was very much opposed to the idea of leaving Andy by himself in Houston. He was too young, and I knew that it was a very bad idea. I argued with my brother about leaving Andy there to live with friends who were bad company, and he was too young. But there was nothing I could do to get my brother to listen, and they left Andy there, and I never heard from Andy again.

Exh. 19 at ¶¶ 27-28 (J. Canales Decl.).

Mr. Canales' stepmother Elizabeth Velasco similarly remembers telling Anibal, Sr. that it was wrong to leave such a young child to fend for himself. Like Jose Canales, it was after Anibal's, Sr.'s fateful decision to abandon Mr. Canales in Houston that she lost all contact with Mr. Canales:

> At school, Andy would say that he did not want to live with us, but he never said how violent his father was. Andy ended up leaving the house and later we learned that he went to live with a black couple that lived near the apartments. These people would take in children and make them steal in stores. Afterwards, we did not know anything about Andy. Andy's father never did anything to look for his son. I would tell him that we needed to do something for Andy, but he would tell me that if Andy liked the bad life, things were going to stay that way.

Exh. 20 at ¶ 12 (Velasco Decl.).

Mr. Canales eventually rejoined his sister and mother in San Antonio, but at this point, his sister recalls, her mother could not handle him financially or emotionally, and Mr. Canales was spending time in juvenile detention.

> During the first years we lived in San Antonio, we lived with different families: first an uncle for a few months, then with my mother's sister, my maternal aunt Linda, then with my mother's friend, Hope Chacon, for a couple of years I think. Andy lived with our family for a while when were living with Hope, but he didn't stay long. He must have been about fourteen.
>
> My mother couldn't handle having Andy around. She couldn't handle it financially, because Andy was such a big eater, and things were tight. Andy would also keep his window open, and the heat would go right out. My mom had hard money problems, I remember one time we had no

> money for food, and all my mom had was rice and beans, We ate nothing but rice and beans for breakfast, lunch, and dinner for a couple of weeks until my mom got a paycheck. It was horrible. My mom also couldn't handle it because Andy would get into trouble, like not go to school or get in trouble in class, or be with the wrong crowd. It was like Andy was more trouble than it was worth for my mom. So Andy lived in half-way houses a lot during his teen-age years. It was sad actually. I can remember going to see him at Boysville. We brought him an Oiler's jacket and some T-shirts and socks. He cried, and wanted to come home, but my mom told him he couldn't. I remember looking at Andy and saying I'm sorry, and he said, "don't be sorry, I'm here because I'm dumb, because I'm stupid."
>
> I remember another time going to visit Andy, and when we pulled up to the place, it looked like a jail. I told my mom, and she said it kind of was a jail. Andy was upbeat and funny, during part of the visit, but he wanted to come home that time too, and my mom said no. Andy would act upbeat and be funny, that was his personality, but I also know Andy well enough to know that that was Andy's way of masking. He would use his silliness to mask that things were not going well, and to mask that he didn't get it a lot of times. I know because I did it too, I had problems in school understanding things, and I would hide it. Andy did the same thing. When Andy did come home, he often had headaches, and I would give him aspirins because my mom couldn't afford medicine.

Exh. 17 at ¶¶ 28-30 (Villarreal Decl.).

It did not help that Mr. Canales did not get along with Janie's new boyfriend, who like the others, sought to molest Elizabeth.

> By that time, my mother had a boyfriend, John (Juan) Ramirez. John didn't like Andy at all, and Andy did not like John. So it might have been partly that problem that led to Andy living away from us so much. My mother lived with John for about four years in a subdivision called Indian Creek. John was also a molestor. I remember when Andy was around for a short time in the beginning, he saw John looking at me, and he warned me to be careful of this guy, that he was going to come after me. Andy was reassuring too, he told me I was stronger now, that I would be able to fight him off, and told me to be careful. He told me not to wear tight clothes, and always wear a robe, and lock my door, and keep my hair off my face. I was careful. I would lock my door, and wash my underclothes myself and hang them in my room. Andy was not with us long, and John did end up coming after me. He would come to my door at night and try to get me to open it, he would say he had a question for me.

Id. at ¶ 31 (Villarreal Decl.). Ramirez later tried to assault Elizabeth, taking advantage of Janie's being passed out drunk. When she locked herself in her room, Ramirez tried to break down the door, stopping only when a neighbor threatened to call the police. *Id.* at ¶ 33 (Villarreal Decl.).

c. If Trial Counsel Had Conducted Any Investigation, They Would Have Uncovered Moving Evidence Of Mr. Canales' Love For His Family, And Their Love For Him.

Defense counsel in this case presented no evidence of Mr. Canales' love for his mother and the deep impact her debilitating illness (that eventually led to her death) had on him, of his love for his sisters, and his family's love for him.

His sister Elizabeth remembers life after Mr. Canales returned home to San Antonio from prison, when he worked hard to rebuild his life and contribute to his family.

> I was working, and my mom was working, and Andy was working at Blockbuster. I remember he would often do things to be nice to my mom. He would call home and ask her what kind of pizza she wanted (it was usually pineapple), and he would bring it back for her. He would have her come to Blockbuster's to pick out movies, and then he would bring them home for her. I remember we did have one big fight because Andy wasn't cleaning or helping out enough around the house, and my mom got into it, and Andy shaped up and cleaned more and helped out around the house.

Exh. 17 at ¶ 35 (Villarreal Decl.).

His younger half-sister Gabriella also recalls the happy time when Mr. Canales came home.

> My clearest memories of Andy are from the time he came home to live with us as an adult after getting out of jail. I was a senior in high school at the time. Andy showed up, and our apartment was too small. So we started looking for a house, and my mom was able to qualify for Section 8 housing, and we found a house over on Ingram Road. It was a 4-bedroom house, and my mom, my brother, my sister, and Brittany were living there.
>
> My mom was excited when Andy was coming home from prison. She went to the Thrift Store and bought him some clothes and stock-piled the fridge. Andy seemed to like he wanted to take care of my mom–he would clean, do the dishes, take care of things around the house. Andy wanted to go to school to become a medical assistant, and he started classes, but when they found out about his record, they told him there was no way he would be able to work in a hospital, so he quit. Andy started working for Blockbuster Video. He would always do special nice things for my mom.

He would call my mom from work, and insist on talking to her, then he would ask her what kind of pizza she wanted, and bring it back to her. He would also always let my mother go to Blockbusters and browse around the store for movies she wanted, and then he would bring them home for her. He was allowed to bring two movies home every time he worked.

My brother and I got to be very close during that period of time. We went out together a lot, we had many of the same friends, and we had a lot of fun. My brother was always very protective of me. I remember one night, close to my graduation time, I was having a party and I got drunk and got into a huge fight with a girl who showed up at my party. It was a physical fight, and I came out of it bloody and bruised. Andy came to defend me.

After a while, Andy got a job as a DJ with a friend. It was their own little business, and Andy had his equipment in his room, which was over a garage. Andy would play his music there, and dance around. He was goofy and dorky, silly and funny like me, but so much fun. That's one reason it's hard to imagine him in prison, he's just not your typcial tough guy, he's always kidding around. Once his business picked up, he moved into an apartment with his friend, Rudy, who he was in business with. I was dating Rudy at the time, so we spent a lot of time together.

My brother went from working as a DJ to working for Joey's Records, which is a local record company that helps musicians get a start. He was driving for them, running errands, and helping bands set up to play. He wanted to work his way up to doing more interesting, musical parts of the business.

Andy and I are a lot alike, and we were very close during the time he was out of jail. We had a whole lot of fun together, and he watched out for me and protected me and defended me in all kinds of ways. He's silly and funny, but he's also really sensitive. I love my brother very much, and can't imagine what life is like for him in prison. I remember when he came back from prison the first time, and I would ask him about it, he would tell me not to ask him about it, that he wouldn't talk about it, and he never did.

Exh. 28 at ¶¶ 13-16, 20, 28 (Rodriguez Decl.).

This hopeful time came to an abrupt end when Mr. Canales' mother had an aneurysm and became completely incapacitated.

My mom was having bad headaches sporadically for a few months around the time I got married before I had Colton. Colton was born on May 20, 1992, and my mom made it to the hospital, even though she was having

> bad headaches by then. My mom got there, and collapsed. They took care of her some, and sent her home with some really heavy medication that knocked her out. Nine days later, she was in the hospital again, and had to have surgery on an aneurism. The doctors told us she wouldn't make it. Andy, Gabby, and I were all at the hospital, and we had to sign for her to be cremated. I refused at first, because I felt like it was giving up hope that she would make it. It was devastating for all of us, but Andy took it by far the worst. He was sobbing, leaning over her body and crying and crying and crying, and apologizing. It was heart wrenching. I think he really had wanted to make it, to make up for all the trouble in the past, and he was seeing his chance to do that for my mom slip away.

Exh. 17 at ¶ 37 (Villarreal Decl.).

> Gabriella also recalls Mr. Canales being devastated by mother's illness:
>
> We went to visit her at the hospital, and the doctors expected her to die. We were all crying, but Andy took it by far the hardest. He was crying and crying over her, I think he felt like he had screwed up, and he wouldn't be able to make it up to my mom. Liz was crying because she couldn't keep him together. ... She never talked again, and needed 24-hour care. The first few days after she had surgery, my mother went through terrible withdrawals in the hospital, I think it was from not smoking. She was sweating until she was drenched, and shaking, it was terrible.
>
> Andy had been drinking and smoking pot socially before my mom got sick, but he went off the deep end after. He was getting high and drunk and showing up at the hospital completely loaded. I remember seeing him show up filthy dirty and high, just a mess. He was getting high and drunk every day, and was beginning to get into harder drugs. He went on a binge after that, and I remember Liz telling me that she didn't know what to do because all Andy wanted to do was stay drunk and high all the time.
>
> It was not long after my mom got sick that Andy got arrested. I went to visit him when he was in county jail a few times, but then he got transported. My sister, Lisa, had moved out of town at that point, and Andy was in jail, so I was the only one who could visit my mother and take care of her, and I just couldn't gather what it took to do that. Andy was talking to me, telling me to be strong, to be there for my mother, and trying to help me with it. It's funny, because even though Andy was the one who took it the hardest when it happened, and fell apart the most, he was the strong one when it came to being level headed and thinking through what needed to be done for my mother.

Exh. 28 at ¶¶ 23, 25, 27 (Rodriguez Decl.).

This is powerful mitigating evidence that would have served to remind the jury that Mr. Canales is human, capable of hope, loss, hard work, and deep sorrow. The evidence would have also reminded the jury that Mr. Canales has a family who would be deeply affected by his execution. All of these individuals would have been able and willing to testify at Mr. Canales' trial. Exh. 21 at ¶ 14 (A. Canales Decl.); Exh. 19 at ¶ 34 (J. Canales Decl.); Exh. 22 at ¶ 13 (Chacon Decl.); Exh. 18 at ¶ 21 (Garcial Decl.); Exh. 27 at ¶ 29 (Rodriguez Decl.); Exh. 23 at ¶ 15 (Schiefelbein Decl.); Exh. 25 at ¶ 11 (Vallin Decl.); Exh. 20 at ¶ 17 (Velasco Decl.); Exh. 24 at ¶ 14 (Young Decl.).

d. Mental Health Issues

Based on this chronically disrupted, violent, abusive, and neglectful childhood, upon information and belief, Mr. Canales suffers from a trauma-related disorder and possibly other disorders. Further, upon information and belief, the gang involvement that he had as a child and then as an adult in prison, flows directly from these experiences. Fred Sautter, Ph.D. has opined:

> I also believe that one of the ways Andy may have adapted to the trauma and neglect was by seeking out and joining gangs, whether as a child or as an adult. Individuals who survive trauma can avoid Post-Traumatic Stress Disorder by creating social support networks. It appears that the primary social support networks available to Andy were gangs. While these are obviously very dysfunctional support networks, they may well have been able to meet Andy's urgent need for social support and to avoid abuse and abandonment.
>
> Gang membership may also have given Andy a way to deal with the hyperarousal that often develops in traumatized individuals. As a result of such early and chronic exposure to unpredictable violence, Andy likely does not have the baseline assumption that most people share about what situations are safe. As a result, he perceives the world as being very dangerous – a perception likely intensified by the very real dangers of prison. This too would make gang membership attractive, as it could give him a sense of trying to get a handle on the violence he always anticipates.

Exh. 29 at ¶¶ 7-8 (Sautter Decl.).

Further, to the extent the jury believed Mr. Canales was in fact truly guilty of the crime he was accused of committing, an expert like Dr. Sautter can explain that gang affiliation is so vital to someone with Mr. Canales' background, that "the threat of having his gang association taken away from him would likely have been devastating and terrifying to Andy. In his mind, he would just as soon die than risk losing this connection." *Id.* at ¶ 9 (Sautter Decl.).

In addition, there are other powerful suggestions in Mr. Canales' and his family's history of mental health issues. Irene Garcia, Janie's sister, states that depression runs in her family. Exh. 18 at ¶ 5 (Garcia Decl.). Irene recalls the family moved around a lot and the father would find country houses that were far away from everything. *Id.* at ¶ 5 (Garcia Decl.).

Janie's sisters also report their father was irrationally abusive and extremely violent. Exh. 23 at ¶¶ 7-9 (Schieffelbein Decl.). He would choose bizarre punishments, such as making them kneel or stand in the corner with their faces to the wall. Exh. 18 at ¶ 6 (Garcia Decl.).

Dorothy Garcia Schiefelbien recalls being awoken at 4 or 5 a.m. by him demanding that she scrub the bathroom. While she was at work that day, her mother called her to say her father was angry and that she needed to come home. When Dorothy told her mother that she was at work, her mother told her her father was going to come and get her. Dorothy decided to go home to avoid a scene, and when she arrived home, her father started screaming at her about the bathroom. He started hitting her with a belt and slamming her face into the toilet. Dorothy said he was just "berserk." When the

father finally stopped beating her, he told Dorothy's mother to get Dorothy out of there, because if she was still there when he returned, he would kill her. Exh. 23 at ¶ 10 (Schiefelbein Decl.). Dorothy remembers hearing her sister Irene also talking about the father waking her up at odd hours to make her clean.

Irene remembers her father beating her savagely on the day of her wedding:

> I got married very young, a few years after we got to Kenosha. I remember the day I got married, I got a terrible beating from my father. I was getting ready, I was going to get married at the court house at one or two, and it was morning and I wanted to go shopping. We had so little money and I didn't have any bedding or dishes or anything like that. I wanted a ride into town, and my dad was going to the hospital to pick up Janie, who had something done to her feet. He lost his temper because I was wanting a ride into town, and my mom held me down, and he beat me as hard as he could with his arm, which was in a cast. My face was all bruised and scraped, my head had been hit in several places, and he kept hitting me and hitting me. I was so angry that I broke loose and I scratched my dad's face with my long fingernails, and I drew blood. My dad drew back, and he said that I better be there when he got back, we had an account to settle. My pin-curls were hanging all over the place, and my face was bleeding, and I was crying and crying, I couldn't stop crying.

Exh. 18 at ¶ 11 (Garcia Decl.).

Janie's mother was verbally abusive, and got drunk regularly Exh. 23 at ¶ 8 (Schiefelbein Decl.); Exh. 18 at ¶ 8 (Garcia Decl.). When the schoolbus would drop the girls off on the way home from school, they would look for their mother at a nearby bar near the bus stop. Exh. 18 at ¶ 8 (Garcia Decl.). Irene also recalls stretches of time when her mother would not leave the bed, when the house would be a mess, when her mother would just watch television all day long. *Id.* at ¶ 10 (Garcia Decl.). .

Anibal, Sr.'s family members believe that Anibal, Sr. also has mental problems. His son Aquiles says, "Even though my father has changed, I recognize my father is not well in the head. I see him sick, messed up. He lives in a small room. Sometimes he

doesn't even bathe." Exh. 21 at ¶ 11 (A. Canales Decl.). His former wife Elizabeth Velasco recalls that he drank a lot and used a lot of different kind of drugs. Exh. 20 at ¶ 14 (Velasco Decl.). She believes he became more violent when he did not have drugs. *Id.* (Velasco Decl.).

In addition, two of Mr. Canales' family members expressed concern about his mental health. His mother's friend Hope Chacon remembered Mr. Canales having temper tantrums as a young child that did not seem normal:

> Andy was very young, maybe four or five years old. Janie's youngest child was not born yet, it was just Andy and Elizabeth. I thought at the time that there might be something wrong with Andy, and I told Janie that. He would have these terrible outbursts of anger, tantrums, over nothing. They seemed beyond what a normal child of that age has. I don't know whether there was something wrong with him, or whether he was angry about something, but it didn't seem normal. He seemed very high strung. I told Janie that maybe something was wrong with that boy, that maybe she should have him checked out.

Exh. 22 at ¶ 3 (Chacon Decl.).

Mr. Canales' uncle Jose also recalls Mr. Canales complaining to him about headaches and visions when he was a teenager. Exh. 19 at ¶ 28 (J. Canales Decl.).

Based on all this information, competent counsel would have investigated, developed, and presented mental health evidence to the jury. Certainly Dr. Sautter believes further assessment is warranted. In his declaration, he opines:

> Based on the information I have been provided, I believe there are strong indications of mental health concerns that should be – and apparently have never been – further explored. Having the opportunity to review family interviews and medical and social history documents and to meet Mr. Canales to perform a comprehensive psychological evaluation would enable me to reach an opinion to a reasonable degree of psychological certainty on the effect of the trauma and neglect Mr. Canales appears to have survived.

Exh. 29 at ¶ 10 (Sautter Decl.).

E. Effective Trial Counsel Would Have Presented Evidence That TDCJ Has The Ability To Control Even Prisoners Who Commit Homicides In Prison.

At sentencing, the jury was specifically asked to decide: "Is there a probability that the Defendant, ANIBAL CANALES, would commit criminal acts of violence that would constitute a continuing threat to society?" CR 109. Trial counsel presented no evidence regarding whether Mr. Canales would be a future danger in prison. Given the fact that Mr. Canales had just been convicted of a prison gang killing, effective trial counsel in this case would have presented evidence that TDCJ has the ability to incarcerate prisoners under extremely restrictive conditions. This was particularly crucial evidence as the jury had heard a great deal of testimony during the guilt/innocence phase about prisoners' almost unchecked ability to move around the prison. Leaving uncorrected this misconception of what a life sentence would be for Mr. Canales fell below professional norms and was prejudicial.

Effective counsel would have presented evidence demonstrating that as a gang member, Mr. Canales would live under high security and extremely spartan conditions with little time out of his cell. In addition, having committed a killing in prison, the prison would house him under highly restrictive conditions. While the jury heard some testimony about administrative segregation conditions, they were never told that if Mr. Canales were sentenced to a life sentence, he would be housed in administrative segregation. Mr. Steve Martin, a corrections expert and former employee of the Texas Department of Corrections, is familiar with the current conditions of confinement, including the special security measures, at the Texas Department of Criminal Justice. He or a similarly qualified expert could have testified:

I understand this case involves a prisoner who was convicted of capital murder for killing another prisoner as part of a prison gang "hit" at the Telford unit.

In my opinion, if this prisoner were sentenced to life in connection with this crime, he would be housed in the most secure housing at the Texas Department of Criminal Justice, with security conditions essentially identical to those on Texas' death row.

With a conviction for capital murder in prison and identification with a security threat group, this prisoner would almost certainly be housed in administrative segregation.

In administrative segregation, prisoners live in one-person cells.

Any time an administrative segregation prisoner is transported to or from his assigned cell, the prisoner is strip-searched and placed in hand restraints prior to the opening of the cell door. After the strip search, the prisoner is directed to put his arms behind him and through the food slot in his cell door so that he can be handcuffed. Administrative segregation prisoners demonstrating the best behavior must be escorted by at least one officer within the housing area, with another officer available to assist in case of an emergency. Other administrative segregation prisoners must be escorted by two officers at all times. Any administrative segregation prisoner leaving the housing area must be accompanied by at least two officers.

In administrative segregation, prisoners have very limited opportunities to leave their cells. Prisoners who demonstrate the best behavior have no more than 12 hours of out-of-cell solitary recreation a week. They receive only non-contact visits and only on a much more restricted basis than general population prisoners.

All prisoners, whether they are administrative segregation or in general population, live in conditions that severely limit, for example, their ability to move around the prison, attend school, choose their job assignment, and purchase personal items. Because these benefits are so highly valued by prisoners, prison administrators control access to good jobs and other benefits to induce compliance with prison rules.

Prisoners who are identified with gangs or "security threat groups" will generally be barred from access to better jobs and schooling. Membership in a security threat group alone can result in a prisoner being housed in administrative segregation, where one of the only benefits he receives is the opportunity for solitary recreation for about an hour a day. To have the prison administration remove from his record a prisoner's membership

> in a security threat group often grants that prisoner access to a range of benefits that gang membership alone would deny him.

Exh. 30 at ¶¶ 5-12 (Martin Decl.). *See also* Exh. 32 (TDCJ Administrative Segregation Plan)

F. COUNSEL'S DEFICIENT PERFORMANCE CLEARLY PREJUDICED MR. CANALES, UNDERMINING CONFIDENCE IN THE JURY'S VERDICTS AT GUILT AND PUNISHMENT

In light of these errors, there is reasonable probability that the outcome of Mr. Canales' trial would have been different. At guilt, crucial aspects of the State's case would have been challenged and discredited. At punishment, had the mitigating and "future dangerousness" evidence had been presented, "there is a reasonable probability that at least one juror would have struck a different balance."

Further, in measuring whether trial counsel's deficiencies prejudiced Mr. Canales, the Court must consider the cumulative effect of all the alleged deficiencies taken together, rather than judging the effect of each in isolation. *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) ("the question [under *Strickland*] is whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable"); *Livingston v. Johnson*, 107 F.3d 297, 308-309 (5th Cir. 1997) (noting that district court correctly considered whether habeas petitioner had suffered cumulative harm from various claimed instances of deficient attorney performance); *see also, e.g., Williams v. Washington*, 59 F.3d 673, 682 (7th Cir.1995) ("a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was [prejudicial]"); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir.1991) (a "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions"); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir.1992) (finding that "significant errors . . . , considered

cumulatively, compel affirmance of the district court's grant of habeas corpus"); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir.1978) (observing that "prejudice may result from the cumulative impact of multiple deficiencies").

In sum, Mr. Canales has shown that his counsel performed deficiently and these deficiencies were harmful. Had counsel conducted an appropriate and timely investigation, they could have raised a host of questions about the reliability of the State's proof, and presented a wealth of powerful mitigating evidence that gave the jurors persuasive reasons to find that a sentence less than death was appropriate. Counsel's performance denied Mr. Canales his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.

II. THE TRIAL COURT'S RULINGS VIOLATED MR. CANALES' RIGHT TO PRESENT A DEFENSE

Due process and the right to a fair trial entitle defendants to an opportunity to be heard, to effectively present evidence central to their defenses, to call witnesses in their behalf, and to rebut evidence presented by the prosecution. The combination of these rights is known as the right to present a defense, which the trial court in Mr. Canales' case fatally interfered with when it refused to grant the defense a continuance after it effectively had only a month to prepare for trial and severely limited access to critical records and prohibited all copies, effectively foreclosing effective cross-examination of critical witnesses.

Had the court not interfered with Mr. Canales' right to present his defense, his trial counsel would have been better prepared and would have been able to introduce evidence challenging the State's witnesses. *See* Exh. 1 (Harrelson Decl. at ¶ 8)

The right to present a defense is ingrained in our system of justice. After a long history of development, the common law in England "recognized that the accused has a right to present a defense at trial." Imwinkelried, EXCULPATORY EVIDENCE 1 (1996). The United States Supreme Court also has found the right to effectively present a defense to be constitutionally required. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 294 (1972); *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle [is] grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness...

Ake, 470 U.S. at 76.

A defendant's fair trial right cannot be fulfilled when his trial counsel have not had sufficient time to investigate, digest, and prepare his case. This is especially true where, as here, the State took over two years to investigate the case against Mr. Canales before indicting him, interviewed dozens of possible witnesses, and where the case at trial depended almost entirely on highly suspect inmate testimony. In contrast to the State, which had three years to build its case against Mr. Canales, his trial counsel were rushed, cut off from their client and overwhelmed with investigative tasks. *See infra* and Exh. 1 at ¶ 8 (Harrelson Decl.).

The section of this petition concerning ineffective assistance of counsel, *supra*, exhaustively details the inability of trial counsel to prepare in the short time allocated prior to trial. The factual pleadings in that section are incorporated by reference here. It is, nonetheless, worth noting signal events that should have warned the trial court that

Mr. Canales' counsel would not be able to construct a coherent defensive legal theory[9] in time for jury selection on October 16, 2000, including the fact that:

- Trial counsel had filed no motions prior to the motion for continuance;
- No defense investigator was appointed in the case until October 5, 2000;
- Counsel had had severely limited access to their client until September 2000;
- Counsel told the court the client, as a result of his prison transfers, had lost information he had intended to give his lawyers;
- Trial counsel had not asked for any other continuances.

By the time the defense's Motion for Continuance was heard on October 5, 2000, SR 4:16, it should have been all too clear to the trial court that Mr. Canales' defense was losing the race with time in terms of trial preparation. Yet, the trial court abdicated any responsibility to substantively evaluate whether trial counsel had had sufficient opportunity to digest, let alone investigate, the results of State's two plus years of investigation.

In order for counsel to effectively present a defense, there must be adequate time to prepare for a case. *See Powell v. Alabama*, 287 U.S. 45 (1932). The duty to appoint counsel, for example, "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the **preparation** and trial of the case." *Id.* The Supreme Court has said that while "the Constitution nowhere

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[9] "[I]t it is critical that, well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages." Exh. 27 (GUIDELINES 10.10.1-Trial Preparation Overall, *Commentary* at 979-80); *see also* Pozner & Dodd, CROSS-EXAMINATION: SCIENCE & TECHNIQUES 36 (1993)("A successful theory of the case must be consistent with both the law and the facts; in fact, a theory of the case describes counsel's position on how the facts and the law come together to justify the outcome being sought").

specifies any period which must intervene between the required appointment of counsel and trial, the denial of opportunity for . . . counsel to confer, to consult with the accused and to *prepare* his defense, could convert the [right to] . . . counsel into a sham and nothing more than a formal compliance with the Constitution's requirement." *Avery v. Alabama*, 308 U.S. 444, 446 (1940). *See generally Dillon v. Duckworth,* 751 F.2d 895 (7th Cir. 1985) (trial judge arbitrarily denied defense counsel's request for continuance, supported by affidavit attesting to his own incompetence, due to inexperience and personal crisis, and a retrial was warranted in capital murder case); *United States v. Fessel,* 531 F.2d 1275 (5th Cir. 1976) (refusal to grant continuance to permit defendant to secure materials necessary to insanity defense warranted reversal where continuance would have permitted defendant to secure his psychiatric records).

Obtaining time to properly prepare for representing a person facing death is essential. The necessary investigation, motion advocacy and preparation cannot be accomplished in a month's time.

Defense counsel face difficult and time-consuming tasks in capital cases, especially in light of the fact that they operate without the resources available to the State. A capital trial is different from all other cases, not just by degree, but in kind. When that case involves reviewing nearly two years of prosecutorial investigation, as well as review of 23 extraneous offenses intended for prosecutorial introduction in punishment, the case for additional preparation time is all the more compelling. In *Ungar v. Sarafite*, 378 U.S. 575 (1964), the Supreme Court explained that "a myopic insistence upon expeditiousness in the face of justifiable request for delay can render the right to defense with counsel an empty formality . . . ." *Id.* at 849-50.

In seeking to have completed factual investigation before jury selection, the defense sought to act in accord with good capital defense practice. The American Bar Association mandates that capital defense lawyers have a duty to investigate cases thoroughly, including interviewing all potential witnesses. Exh. 27 (Guideline 10.7, *Commentary* at 1019). Factual investigation of this sort enables the defense to develop its theory of the case and to present that theory during jury selection. *Id.*, at Guideline 10.10.1-Trial Preparation Overall, Commentary, at 99. Presentation of a coherent defensive theory during jury selection is impossible where the case has not been thoroughly investigated. Frederick, MASTERING VOIR DIRE AND JURY SELECTION, at 48-49 (ABA 1995).

The reliability of a jury verdict on guilt or innocence and on the extent of punishment requires that a defendant be permitted to be fully heard and to fully present his defense. Imwinkelried, EXCULPATORY EVIDENCE 1 (1996). No defendant – let alone one in a factually complicated capital case – can present a defense when his attorneys have been denied the very necessary opportunity to know the facts that underlie the prosecution's theory and develop the facts underlying the defense's theory. By refusing to grant the continuances sought by the defense, the trial court prevented Mr. Canales' counsel from investigating and preparing its case and, in that way, interfered with his right to present a defense. This interference, because it prevented counsel from presenting an effective defense to the jury at guilt/innocence and at punishment, had a substantial and injurious effect on the verdict.

MR. CANALES'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS SATISFY THE STATE STANDARD FOR FILING A SUBSEQUENT APPLICATION.

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

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

Id.

Mr. Canales's claims have not been previously presented to the state court and meet the standards set forth in art. 11.071 §5(a) because the legal basis for his claims was previously unavailable.

Mr. Canales's *Wiggins* claim is based on law not in existence nor reasonably formulated at the time he filed his first habeas petition. Although applicants have obviously long raised ineffective assistance of counsel claims before this Court, the basis of current claims – mandatory obligations regarding investigation of a defendant's background– found no support in this Court's legal jurisprudence at the time of Mr. Canales's first habeas application and was regularly and routinely rejected. Indeed, until *Wiggins* was decided in 2003, the Supreme Court itself provided no support for such claim. This fact was highlighted by Justice Kennedy's dissent in *Rompilla v. Beard*, 545 U.S. 374 (2005), joined by Justices Rehnquist, Scalia, and Thomas, complaining that the Court:

> proceeds to adopt a rigid, per se obligation that binds counsel in every case and finds little support in our precedents. Indeed, Strickland, the case the Court purports to apply, is directly to the contrary: 'Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules.' (internal citations omitted).

Id. at 404. *See also, Wiggins v. Smith,* 539 U.S. 510 (2003) (Scalia, J, dissenting).

Presiding Judge Keller, in dissent in *Ex parte Gonzalez*, 204 S.W.3d 391 (Tex. Crim. App. 2006), similarly noted that relevant caselaw at the time of Gonzalez's trial imposed no obligation for trial counsel to "inquire into a subject without some indication that the subject might be an issue in the case." *Id.* at 402. "The Court cites no cases imposing such a requirement at the time counsel represented applicant, and I have found none." *Id.* The caselaw imposing such a requirement also did not exist at the time Mr. Canales filed his original habeas application but resulted from the later developments in *Wiggins* and *Rompilla*. *Rompilla, Wiggins,* and *Gonzalez* altered the legal landscape of ineffective assistance of counsel claims and thus now provide a basis for Mr. Canales's comprehensive claim.

Moreover, this Court had regularly and routinely rejected claims similar to Mr. Canales's prior to *Wiggins* and *Gonzalez*. Because it would have been "futile" to assert such a claim in the Texas courts prior to the change in law, Mr. Canales should be excused from his failure to do so. *See, e.g., Black v. State*, 816 S.W.2d 350, 371 (Tex. Crim. App. 1991) (Campbell, J., concurring); *see also id.* at 368 (Texas' "'right not recognized' exception excuses a failure to contemporaneously object when either; the claim was so novel that the basis of the claim was not reasonably available at the time of trial, or, the law was so well settled *by this Court* that an objection at that time would have been futile." *Black*, 816 S.W.2d at 368 (Campbell, J., concurring) (emphasis

added). *See also, e.g., Selvage v. Collins*, 816 S.W.2d 390, 392 (Tex. Crim. App. 1991) (this Court's decision in *Penry I* constituted a "right not previously recognized" in Texas).

Further, the factual bases for this claim were not previously available because of the financial constraints placed on state postconviction counsel. Because state postconviction counsel understood that only $25,000 would be available to pay for all fees and costs associated with the state habeas application, he was prevented from undertaking the kind of investigation required to develop this claim. He allocated only $2,500 to investigating the case, and used that small sum primarily to secure affidavits supporting Mr. Canales's claim of innocence. Exh. 75 (Hornsby affidavit).

Finally, Mr. Canales's claims meet the exceptions of both 11.071, §5(a)(2) & (3) and should be remanded to the district court. As discussed above, trial counsel sought to defend Mr. Canales, in part, by implicating Larry Whited, another member of the Texas Mafia. Unaware of the caselaw interpreting the "combination" element underlying Mr. Canales's capital indictment, trial counsel, by choosing this defense, essentially conceded the capital element of the crime and aided the State's proof. Had trial counsel provided effective assistance of counsel and not conceded the capital element of the charged crime, it is more than likely that Mr. Canales would not have been convicted of a capital crime. Because, absent the ineffectiveness of trial counsel, no rational juror would have found Mr. Canales guilty of capital murder, he meets the strictures of 11.071, §5(a)(2) and his case should be remanded to the district court for further proceedings.

Because Mr. Canales's claims of ineffective assistance of counsel, when viewed together with the suppressed exculpatory evidence, also establish that no rational juror

would have would have answered in the state's favor one or more of the special issues that were submitted to the jury at punishment, Mr. Canales should be allowed to present his new claims to the state district court pursuant to Section 5(a)(3).

STATE MISCONDUCT

Investigation documents and internal communications obtained by undersigned counsel while representing Mr. Canales in federal court paint a vivid picture of how intertwined TDCJ's and SPU's investigators are with each other and with the prisoners who served as informants, witnesses – and sometimes agents. This collaboration created a unique situation wherein the witnesses, victims and defendants in nearly every case were all in the custody and complete control of the prosecuting authority. TDCJ exerted total control over the prisoners -- without outside influence and with minimal oversight. This unparalleled control TDCJ wielded over the inmates' lives, especially those deemed to be gang members, set the stage for how TDCJ and SPU approached and cultivated inmate witnesses.

To understand and evaluate the State's misconduct in Mr. Canales's case -- both the way in which this collaboration led the State to recruit Innes to elicit statements from Mr. Canales and the extensive and undisclosed prison benefits and deals the State's witnesses received in exchange for their testimony for SPU – it is essential to recognize that deals and benefits provided in exchange for cooperation and testimony in a prison environment are different from so-called "freeworld" deals and benefits in several important respects. Where *Brady* evidence involving informant witnesses generally includes promises not to prosecute and favorable plea agreements in exchange for testimony, in prison the incentives to cooperate are more varied and subtle precisely

because the prison exerts total control over the inmate's environment, from whether he is permitted to hang pictures of his family on his cell wall to whether he is locked in his cell 23 hours a day. The atmosphere in prison is so controlled that prisoners can be punished for possession of lip balm or other small items. *See* Exh. 31. If an inmate has a long sentence, benefits that seem trivial to a free person to a prisoner represent a way to make prison survivable.

When an inmate is classified as a confirmed gang member, his already contracted freedoms are even further reduced. Confirmed gang members generally serve all or most of their sentences in administrative segregation ("Ad Seg"). *See* Exh. 32 at Para. F ("Offenders assigned Level 1 [of Ad Seg] are generally maintaining good behavior but have a requirement for segregation or separation from general population offenders. Additionally, the offender is considered a security risk due to being: ... (c) a physical threat to the physical safety of offenders or staff for reasons other than behavior, such as membership in a Security Threat Group (STG).") According to TDCJ policies, an inmate is on "Administrative Segregation anytime he is separated from the general population by confinement in a cell for twenty (20) hours or more a day without a disciplinary hearing." Exh. 32.

In reality, the best behaved prisoner in Ad Seg will be allowed out of his cell for either one hour a day, seven days a week; two hours, five days a week; or three hours, four days a week. *Id.* at 16. Ad Seg inmates are housed in single man cells and allowed only one non-contact visit each week and no contact visits. They are obviously not allowed work assignments and their movement is severely restricted. "Any time an offender is transported to or from his assigned cell, the offender is to be strip-searched

and placed in hand restraints prior to the opening of the cell door." *Id.* Ad Seg inmates must be accompanied by two officers whenever they are taken outside of the segregation area and each officer must "be outfitted with a riot baton, thrust vest, and Carry on Person (COP) chemical agent." *Id.* "Before the offender is returned to his cell, he shall again be strip-searched." *Id.*

The hardships of Ad Seg were reflected (albeit obliquely) in trial testimony and letters written by inmates. State witness Richard Driver that an inmate might "cover a patch" falsely to get out of Ad Seg. SR 9:316. In a letter to prison authorities, Innes noted that "This is a terrible place to do prison time and I myself desperately need out..." Exh. 33 (3/6/00 Innes letter).

Faced with the hard time that gang classification entails and the powerful influence SPU had on TDCJ, it is little wonder that inmates such as Innes, Driver, Canida, Whited and others would readily concoct stories, exaggerate their knowledge and act as illicit agents for the State.

III. When The State Used Innes As Their Agent To Solicit Incriminating Evidence From Mr. Canales For Use At Both The Culpability And Punishment Phases Of Trial, It Violated Mr. Canales' Sixth And Fourteenth Amendment Rights.

Bruce Innes was the star of the State's case, presenting two powerfully inculpatory notes alleged written by Mr. Canales. He provided the only testimony alleging any statement or admission from Mr. Canales regarding the Dickerson murder. Unbeknownst to defense counsel, and in violation of *Massiah v. United States*, 377 U.S. 201 (1964) and *United States v. Henry*, 447 U.S. 264 (1980), at the time he gathered these statements, Innes was acting as an undercover agent of the State. This fact was never disclosed to the defense and was discovered only upon review of documents from

the State's file disclosed to undersigned counsel in the course of federal habeas proceedings.

A. Governing Legal Standard

The test for a violation under *Massiah v. United States*, 377 U.S. 201 (1964), is whether the Government "deliberately elicited" information from a defendant in custody and under indictment. The "deliberate" requirement is met even when the Government agent/informant is instructed not to initiate conversations with the defendant, but to act passively and merely "pay attention to information" given in the course of ordinary conversation that will implicate the defendant. *United States v. Johnson*, 954 F.2d 1015 (5th Cir. 1992). Any time the government intentionally creates a situation likely to induce a defendant to make incriminating statements without the assistance of counsel, it has violated the Sixth Amendment. *See United States v. Henry*, 447 U.S. 264 (1980). Any statements of a defendant so obtained, must be excluded from trial. *Massiah*, 377 U.S. at 207.

B. Factual Background

In early 1998, in Ad Seg and the target of a SPU prosecution himself, Innes supplied SPU with two incriminating "kites," one allegedly from Mr. Canales and one from Speer, which became crucial pieces of evidence in the prosecution's case against Mr. Canales.[10] Realizing that Innes provided a ready conduit into TM activity and the circumstances surrounding Dickerson's murder, the State began cultivating Innes as a source of valuable evidence. Over the three years between the murder and Mr. Canales' trial, Innes became an important agent for SPU. Because SPU actively used Innes' position as a trusted member of the Texas Mafia to solicit incriminating correspondence

from Mr. Canales in violation of *Massiah* and its progeny, Mr. Canales is entitled to habeas relief.

Although it is currently unclear when Innes was first approached about collecting information for the State, he was certainly acting as an agent for the State starting sometime around July 11, 1997, the date of the murder and January 28, 1998. Sometime in January 1998, Innes requested a meeting with a TDCJ Security Threat Group officer, which occurred on January 28, 1998. Exh. 34. At that meeting, Innes stated:

> Lt. Dodson, Telford IAD, had requested any information or kites that inmate Innes had pertaining to the homicide of inmate Dickerson, Gary #587361, shortly after the incident occurred, but that inmate Innes denied knowing anything regarding the incident.. However, inmate Innes now admits that all though [sic] he did not have any prior knowledge of the situation, he sent a kite to both inmate Canales, Anibal #696334, now C/TM, AKA: Bigfoot/Jewboy/Dobie; and inmate Spper, William #668485, S/TM, AKA: Say Puff; asking what happened.

Id. Innes then said that he had given the original kites to his attorney to assist in a plea bargain. *Id.*

Innes continued to work actively for SPU and TDCJ investigators, fueled on by Innes' "desperate need," *supra*, to escape Ad Seg – where he had been living since at least July 1997 – and the State's eagerness to obtain the information Innes was acquiring.

Two undated I-60 requests clearly demonstrate Innes was acting as an agent for SPU. In one, after asking to be moved, Innes wrote:

> As you know I'm a witness for special prosecution unit & was gathering information as a member of TM.

Exh. 35 (I-60). He reaffirmed his role in another I-60:

> As you know I'm a cooperating witness in a murder case for the State the special prosecution division & A.P. Merillat. I've been gathering information a member of TM..."

[10] Mr. Canales alleges in this claim that this first letter was also obtained illegally.

Exh. 36 (I-60).

In exchange for his cooperation, SPU agreed to "de-confirm" Innes but expressed internal concern about losing his ability to surreptitiously collect information about the gang. By mid-1998, Innes also recognized the tension between becoming de-confirmed and his ability to retain bargaining power. Worried about losing his informer-agent status, Innes wrote to SPU June 18, 1998:

> Dear Mr Merillat,
>
> I just received your letter of June 18th 98. Thank you for responding.
>
> Okay- first order of business. Good [I] want to be (de-confirmed) the question I have is, **will they do this even if they want me to milk my situation with TM. Until the last? Which I'm still corresponding for info** in other words or must I cut all ties immediately to be de-confirmed. I am willing to help in what ever capacity officials want me to.

Exh. 37 (Innes 6/18/98 letter to Merillat) (emphasis added).

The SPU, however, was not so willing to let Innes become declassified since he was so eagerly and effectively gathered information for the State. Although Innes desperately wanted to be deconfirmed and begin accruing those benefits, Merillat recognized Innes's unique usefulness to the State and worked with TDCJ investigators to identify further opportunities for Innes to inform:

> I received a letter from inmate Innes yesterday, June 23, 1998. In his letter, Innes states that he does want the process to have him 'de-confirmed' from the Texas Mafia started. Innes relates that he is willing to 'work' either or both of our offices in any way we can use him. **He will correspond with gang members as usual, *if you want him to*, in order to help expose/uncover their activities, or do whatever is best.** Innes is presenting a valuable, unique opportunity to possibly do some major damage to the TM's business.

Exh. 38 (Merillat 6/24/98 letter to Cheatham) (emphasis added).

Later that year, Innes wrote to Merillat to let him know that he had "cut all contact with any and all Texas Mafia Members," and had "tried to get the Unit Mail Room (return to sender) all inmate mail because the only inmates writing me are gang members." Exh. 39 (Innes 7/25/98 letter to Merillat). In response to the mail room's failure to follow his request, Innes wrote an I-60 to "get help in this matter!" and also requested a letter from Merillat to show or give to Classification to let them know he was co-operating with SPU. Exh. 36. For whatever reason, Innes was clearly still receiving correspondence from other prisoners by June 1999. That month, Merillat wrote Innes a reminder:

> Please remember to keep any correspondence you get from inmates threatening you. It would be beneficial to try not to handle letters too much, as there might be a possibility of lifting prints from them. Let me know if you have anything like that, and I'll make arrangements to pick them up and have them processed.

Exh. 40.

In August, Innes again reminded TDCJ his work for SPU in his continued attempt to have TDCJ deconfirm him:

> So I contacted the special prosecutors office & Huntsville & offered to give my cooperation in solving & testifying in the case. I have been providing information to Special Agent A.P. Merillat . . . He will verify my cooperation.

Exh. 41 (Handwritten Statement by Bruce David Innes regarding his application to the Gang Renunciation Unit, 8/16/99).

A Wynne Unit sergeant also reminded the Wynne Security Threat Group office of Innes' undercover work for the State:

> Offender Innes has requested reclassification as an ex member, but claims that **special prosecutor's office has instructed him to keep in contact with TM members (for purposes concerning the homicide)**. You may

> want to contact Mr. C. Dodson, Telford IAD, regarding any questions you have concerning this situation.

Exh. 42 (Telford Unit Memo: Sgt. D. Johnson to Wynne STG: 9/3/99) (emphasis added).

In 2000, Innes' fishing for incriminating correspondence apparently bore fruit as he purportedly received a letter from Mr. Canales which he claims puts a hit on a prosecution trial witness. SPU investigation notes reveal that:

> D wrote Innes, advising that he (D) thought Whited had snitched. Canales writes Whited needs to be hit – either by TM or another gang. (APM) **Sent Innes letter asking him to correspond w/ Canales** (see copy).

Exh. 43 (SPU notes).

On March 13, 2000, Merillat notified Gang Intelligence at the Wynne Unit about Innes' assistance:

> Innes provided that letter to me, and he, at my request agreed to correspond with Canales to confirm authorship of the letter, attempt to obtain details of actions against our witnesses, information on the Dickerson killing, etc.

Exh. 44 (Merillat 3/13/00 Letter). Merillat also made clear that this relationship has been ongoing:

> For several months, inmate Innes has been corresponding with me, providing information on TM activities, background information on the gang, and he has assisted our office with intelligence surrounding the killing of Dickerson and the persons responsible for the murder.

Id.

When Innes began having difficulty because his mail was being confiscated because of its gang material, SPU became even more directly involved by essentially becoming a mail carrier for Innes. Innes wrote to Merillat:

> I'm glad to be of service to you in the getting of information! But I've had several letters denied by the unit gang intelligence officer – Mr. Sgt Burson - Man it must be really confusing to these people because, I claim to be an X- but they see these gang related letters coming and going to me!

...
The fact that I am only in contact at the request of S.P.U. and that they should not hold any writing against my de-confirmation process, because it is at this time damaging that process and it makes me look like a liar.

Exh. 33 (Innes 3/6/00 letter to Merillat). Merillat quickly began to make special arrangements for Innes' mail. He faxed a letter to Burson and personally spoke to another sergeant:

Letter from Innes re: SPU asking him to correspond w/ Canales to prove authorship, get info on this case etc. Innes needs SPU to let Sid @ (WY) know, so they won't think he's trying to keep patch, etc. APM faxed letter to SFT. Burson.

3/13/00 (APM) Spoke to Sgt. Kirb - S. L. @ (B.1) re: Canales writing to/from Innes. **He will allow Innes letter through, & advise APM regarding any corresp. from Co.Ds.**

Exh. 43. Merillat also began sending the actual letters to Mr. Canales that were allegedly from Innes. Having established a more reliable mail system, Innes now became worried that his value was drying up. Concerned that he was not getting any response to his letter to Canales, Innes wrote to Merillat:

I wrote to Canales about the issue of taking 'Iron' out and **sent it to you to you to mail out**, I never heard from him or you! I wrote him directly to see if he got the letter and again reiterating that Iron issue - never got word back'? I'd like to ask if there is any witness list as evidence been made available to the defense because if so and I'm on it, it could be the reason he's not responding.

Exh. 45 (Innes 6/4/00 letter to Merillat).

On June 12, 2000, Merillat wrote Innes expressing his disappointment about the most recent attempt at collecting incriminating evidence:

Dear Bruce,

I got your letter and the Stiner information today. Thanks for sending those documents. I have not heard anything about the Canales letters or any ramifications about the letters you sent him. I was hoping he might

> make some admissions etc., but evidently not. As far as a witness list, we haven't sent one out yet, Mr. Mullin and I are holding off as long as we can.

Exh. 46 (Merillat 6/12/00 letter to Innes).

Mr. Innes did receive a letter purporting to be from Mr. Canales in June. The State relied heavily on this letter, ostensibly calling for a "hit" on another gang member, during the punishment phase of the case.

C. Argument

The extensive correspondence among Innes, TDCJ investigators, and SPU investigators make clear both Innes' continuous efforts to produce information to the State so that he could be taken out of Ad Seg, as well as the State's intent to have him seek out this information. Using Innes in this way clearly violated *Massiah* and its progeny.

In *United States v. Henry*, the Supreme Court distinguished between the jailhouse informant as "listening post," *i.e.*, one who was instructed only to "overhear conversations," and the inmate who as a government agent "deliberately and surreptious[ly] interrogates" the defendant. 447 U.S. at 276 (Powell, J., concurring) (internal punctuation omitted). Innes' role far exceeded that of overhearing conversations, and instead constituted an on-going campaign to obtain information the State sought. Indeed, the State's role in facilitating this effort – as demonstrated, for example, by the fact that it was mailing Innes' interrogating letters for him – reveals how enmeshed Innes' inquiries were with the State's.

Further, as the Supreme Court noted in *Illinois v. Perkins*, Innes was perfectly situated to elicit especially incriminating statements from Mr. Canales. "[W]here the

suspect is incarcerated, the constant threat of physical danger peculiar to the prison environment may make him demonstrate his toughness to other inmates by recounting or inventing past violent acts." 496 U.S. 292, 307 (1990). Assuming *arguendo* that Mr. Canales in fact wrote one or both of the letters to Innes, he would have been aware of Innes' status in the TM, and would have had reason to "demonstrate his toughness" to him.

Innes, therefore, clearly acted as a government agent in asking Mr. Canales questions about matters of interest to the State, and his conduct falls in the heartland of conduct prohibited by *Massiah*. These statements were also clearly damaging. They were the only statements the jury heard ostensibly from Mr. Canales. In both the guilt/innocence and the punishment phases of the trial, the State used these letters as the centerpiece of its argument. While these illegally obtained letters incontestably had a substantial and injurious effect on the verdict, Mr. Canales is entitled to have the State prove the error harmless beyond a reasonable doubt, pursuant to *Chapman v. California*, 386 U.S. 18 (1967). Mr. Canales should not be denied a more lenient harm standard because of the State's misconduct in withholding this information from him.

IV. THE STATE DEPRIVED MR. CANALES OF DUE PROCESS OF LAW WHEN IT WITHHELD MATERIAL EVIDENCE IN VIOLATION OF *BRADY V. MARYLAND* AND KNOWINGLY ALLOWED FALSE TESTIMONY TO BE PRESENTED TO THE JURY IN VIOLATION OF *GIGLIO V. UNITED STATES* AND *NAPUE V. ILLINOIS.*

The prosecution in Mr. Canales' case suppressed material evidence that was favorable to Mr. Canales, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. The suppressed evidence included crucial impeachment evidence regarding key guilt/innocence and punishment phase witnesses, Innes, Driver, Hill, Canida and Whited. Moreover, in violation of *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v.*

Illinois, 360 U.S. 264 (1959), the State knowingly presented false testimony to the jury and did not correct the testimony.

A. *Brady v. Maryland* And *Giglio v. United States* Provide That Habeas Relief Is Warranted When The State Suppresses Material Evidence Favorable To The Defendant Or Knowingly Permits False Testimony.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Subsequent decisions have abandoned the prerequisite of a defense request for exculpatory evidence before an accused may benefit from the Court's decision in *Brady*. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Moreover, the Court has rejected any distinction between impeachment and exculpatory evidence for purposes of *Brady* analysis. *Id.* at 677; *Giglio v. United States*, 405 U.S. 150, 154 (1972). Under *Brady* and its progeny, a proceeding is rendered fundamentally unfair if: 1) the prosecution suppressed favorable evidence; and, 2) the evidence was material to either the guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See Kyles v. Whitley*, 115 S.Ct. 1555, 1565 (1995); *United States v. Bagley*, 473 U.S. 667, 683 (1985); *Blackmon v. Scott*, 22 F.3d 560, 564 (5th Cir), *cert. denied*, 513 U.S. 1060 (1994); *Ex parte Adams*, 768 S.W.2d 281, 290 (Tex. Crim. App. 1989).

The evidence discussed below was not disclosed to trial counsel, *see* Exh. 93 (8/18/05 Harrelson declaration); Exh. 92 (8/19/05 Hoover declaration). Therefore the only remaining question is whether the evidence was material in this case. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed, the

result of the proceeding would have been different." *Kyles*, 115 S.Ct. at 1565; *Bagley*, 473 U.S. at 682; *Blackmon*, 22 F.3d at 564; *Adams*, 768 S.W.2d at 290. The *Kyles* decision clarifies four significant aspects of materiality analysis under *Brady*. First, to demonstrate materiality, Petitioner is not required to demonstrate by a preponderance of the evidence that the suppressed evidence, if known to the defense, would have ultimately resulted in an acquittal or a life sentence. *Kyles*, 115 S.Ct. at 1566-1567. The inquiry is more properly whether the suppressed evidence undermines confidence in the jury's decision. *Id.* at 1566. Second, materiality analysis "*is not a sufficiency of the evidence test.*" *Id.* (emphasis added). The Supreme Court clearly stated, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict [or return a sentence of death]." *Id.* One demonstrates a *Brady* violation by "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (footnote omitted); *see also Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (suppressed impeachment evidence may have consequences for the case far beyond discrediting the witness's testimony). Third, harmless error analysis is not applicable to *Brady* violations. *Kyles*, 115 S.Ct. at 1566. The *Kyles* Court stated, "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless error review." *Id.* Finally, materiality must be assessed "in terms of the suppressed evidence considered collectively, not item by item." *Kyles*, 115 S.Ct. at 1567. As is discussed herein, when the suppressed evidence in Mr. Canales' case is considered collectively, as it must be under *Kyles*, there is a reasonable probability that the result of his sentencing proceedings would have been different.

Under *Giglio* and its progeny, a state denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir.1996), (citing *Giglio v. United States*, 405 U.S. 150 (1972)); *Napue v. Illinois*, 360 U.S. 264 (1959); *Cordova v. Collins*, 953 F.2d 167 (5th Cir. 1992). Due process also is violated when the prosecution allows the jury to be presented with a materially false impression. *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957); *United States v. O'Keefe*, 128 F.3d 885, 897 (5th Cir. 1997). "[U]nder the Constitution, the defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence when it decides the question of guilt or innocence with all its ramifications." *United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979).

In order to obtain relief under *Giglio*, Mr. Canales must show that (1) the testimony in question was actually false, (2) the State knew it was false and (3) the testimony was material. *See Pyles v. Johnson*, 136 F.3d 986, 996 (5th Cir. 1998); *O'Keefe*, 128 F.3d at 893; *Faulder*, 81 F.3d at 519. "False evidence is 'material' only "if there is any reasonable likelihood that [it] could have affected the jury's verdict." *Goodwin v. Johnson*, 132 F.3d 162, 185 (5th Cir. 1997) (quoting *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir.1996), *cert. denied*, 117 S.Ct. 773 (1997). It is immaterial whether the false testimony directly concerns an essential element of the Government's proof or whether it bears only upon the credibility of the witness. *O'Keefe*, 128 F.3d at 893; *Barham*, 595 F.2d at 241-42. Even if there is sufficient evidence in the case to support a guilty verdict, it is the jury, and not judges, that is the body given the constitutional responsibility to decide guilt or innocence. *Barham*, 595 F.2d at 242. Habeas relief is

warranted if there is a reasonable likelihood that the false testimony could have affected the jury's determination. *Bagley*, 473 U.S. at 678-79 & n.9; *Moody v. Johnson*, 139 F.3d 477, 484 (5th Cir.), *cert. denied*, 119 S.Ct. 359 (1998).[11]

Moreover, *Giglio* relief is warranted for false evidence that affects the jury at the punishment phase, as well as evidence that affects the guilt/innocence phase. *See, e.g.*, *Moody*, 139 F.3d at 484 (discussing *Napue/Giglio* claim regarding allegedly false expert testimony at punishment phase on subject of future dangerousness); *Goodwin v. Johnson*, 132 F.3d 162 (5th Cir. 1998) (discussing claim regarding allegedly false testimony by punishment phase witness). Because Texas law requires the jury to be unanimous when voting for death, "the proper frame of reference, at least with regard to the punishment assessed, is whether the mind of **one juror** could have been changed with respect to the imposition of the sentence of death." *Kirkpatrick*, 992 F.2d at 497 (discussing Louisiana law) (emphasis added); *see also Wiggins v. Smith*, 539 U.S. 510, 537 (2003) ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.")

[11] This standard is "considerably less onerous" than the standard for relief under *Brady v. Maryland*, 373 U.S. 83 (1963). The *Brady* standard requires a showing of a reasonable probability that the result of the proceeding would have been different if the evidence in question had been disclosed to the defense. A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome of the proceeding. *See Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993) (citing *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985)).

B. Witnesses About Whom The State Failed To Disclose Benefits And Deals

1. Bruce Innes

Bruce Innes was a crucial witness for the State at both the guilt/innocence and the punishment phase. Through Innes the State presented letters allegedly written by Mr. Canales explaining his participation in the murder of Dickerson and trying to put out a hit on a State witness. However, because Mr. Canales' defense was denied important impeachment evidence regarding Mr. Innes, the jury was unable to place Mr. Innes in the proper context. The evidence regarding Mr. Innes that was suppressed by the State included:

- Evidence demonstrating Innes' renunciation of his gang affiliation was not true and that he was simply seeking the benefits conferred by not being labelled as a gang member;
- Evidence that Innes received favorable treatment in prison contraband cases such as possessing a weapon;
- Evidence that the relationship between SPU and Innes was ongoing and multifaceted whereby Innes was receiving Unit transfers and other benefits in exchange for his cooperation, including the solicitation of incriminating evidence;
- Evidence that SPU not only agreed to the deal revealed to the defense but that SPU agreed to continue to advocate for him including sending favorable recommendations to the parole board;
- Evidence that Innes was allowed to speak to other State witnesses and corroborate their stories; and
- Evidence that Innes' testimony about how he received Mr. Canales' incriminating letter was false and that the State knew his testimony was false.

These violations standing alone would undermine confidence in the jury's verdict in Mr. Canales' case; taken together they illustrate the inherent unreliability of all the State's inmate witnesses.

a. Continued Gang Ties

Innes presented himself to the jury as an ex-gang member who, because of pangs of conscience, came forward and assisted in the prosecution of the murder of Dickerson. Although Innes did admit that he was pending sentencing for two offenses, a major theme on cross-examination, his complete and sundry history was never revealed. When asked why he decided to go to the authorities he responded:

> Well, that's kind of a complicated question, but I felt like that it was possible that they got the wrong person, and not only that, my romanticized ideas of being in the Texas Mafia were destroyed. I mean, you know, it woke me up – you know, murder – it's all well and good to want to be Al Capone and all of that, but to actually know that you're involved in something that's taking people's lives, is – it's pretty heavy, so –

SR 10:40.

Contrary to the impression he gave the jury, Innes seemed to have little problem with the violence of prison gang life. On December 23, 1996, for example, Innes and two others attacked another inmate with their fists and "an oblong stone approximately 6" in length, 2 ½" in circumference, with one end blunt, and the other end pointed." Exh. 15 (Incident Report and memo). As a result of their attack, the inmate "received 5 puncture wounds to the lower back, a 4" laceration to the back of his head which required 13 stitches, and multiple bruises and contusions to the face and forehead." *Id.* The jury was never informed of Innes' attack on this inmate.

Even though the State presented Innes as an ex-gang member who had apparently had become disillusioned with prison gang life after Dickerson's murder, the State never revealed the detail surrounding Innes' gang renunciation or the substantial benefits an inmate gains from disassociation with a prison gang. Documents in the DA' s file obtained by undersigned counsel demonstrate that Innes sought not only reduced sentences on his pending charges, but also gang declassification as a condition for his cooperation with the murder investigation. TDCJ officials had apparently agreed to Innes' declassification early in 1998. On June 1, 1998 A.P. Merillat of the SPU Unit contacted Records/Classification and informed them he was leaving it up to Innes "as to whether or not he wants the de-confimation process started, or if he wants to lay low and provide us information on the gang." Exh. 47 (SPU letter 6/15/98). Innes was still seeking benefits of deconfirmation in 1999 and 2000. On September 3, 1999, a Telford Unit printout shows that "offender Innes has requested to be reclassified as an ex member, but claims that special proscecutor's [sic] office has instructed him to keep in contact with TM members (for purposes concerning the homicide)." Exh. 42 (Telford Unit printout).

> An I-60 also demonstrates Innes' belief that he should no longer be treated as a gang member: Capt. Scott, I have requested to be reclassified as an X-member of the TM. Due to my cooperation in a capital murder investigation involving several member, so that my file reads as me being de-confirmed & that my seg. status be changed to protective custody, instead of security detention as threat to staff & inmates.

Exh. 48 (I-60 from Innes).

Moreover, SPU was allowing Innes to seek the benefits of deconfirmation despite evidence and even TDCJ employee's strong concern that he had not renounced membership. Lonnie Eason, another TM member providing information to SPU, wrote

to A.P. Merillat in July of 2000 noting that Innes had not given up his gang activity. According to Eason, Innes "has been constantly representing T.M. matters and has been pure 'Gun Ho.'" Exh. 49 (Letter of Eason). He also asks Merillat to "Just tell Innes to leave T.M. Alone & lay low, He's outta there with em when he Testify's anyway!" *Id.* TDCJ's concerns about Innes' renunciation are reflected in a letter dated June 2000, well after Innes had supposedly "renounced affiliation." The Estelle Unit copied a letter from Innes to a "District Major"of TM named James Nicholas. Attached to the letter, a TDCJ employee queries:

> Please note: According to I/M Innes O [illegible] screen he is supposed to be on the TM "Hit list" if he was why would he be writing the District major a letter like this?

Exh. 50. This information, which directly undermined Innes' assertions that he was no longer involved with the gang, was never supplied to the defense. Moreover, because this information was known to the State, the prosecution violated *Napue* by failing to correct the false impressions Innes presented to the jury regarding Innes' revelations of conscience.

b. Special Treatment Regarding Crimes Committed In Prison

Innes' cooperation with SPU gained him other advantages which were also suppressed by the State. Innes, for example, was not subjected to prosecution for taking a metal shaft from his fan and hiding it in a pipe chase, an action which normally be considered concealing a shank. After "catching a case," Mr. Innes wrote to Merillat:

> I was without a radio & I had a pair of headphones. My neighbor offered to connect me if I could come up with some wire & help him get his radio open. So I broke my fan down for the coil of copper wire inside & I used the metal shaft that [illegible] is on to make a screwdriver out of to try & break the triangle shaped screws. Well it didn't work & I threw away, or tried to, in the back vent...

Exh. 51 (Innes 10/7/99 Letter).

Merillat responded:

> Regarding the recent case you spoke of where a fan was disassembled and part of it was put in the pipe chase – just because a disciplinary case was written, it does not mean that our office will file criminal charges. We have no control over the disciplinary process within TDCJ. However, when IAD comes to us to file charges in criminal matters, we screen each case individually, giving consideration to each element of the case. Simply calling an item a weapon does not guarantee that the SPU will go to the grand jury seeking indictment. Yes, I know that fingernail clipper can be called a weapon, and we have prosecuted inmates for less than that *but* – we have only done that when the facts showed that the defendant intended the item to be a weapon. So, the facts that you provided make a big difference in how we would look at the case.

Exh. 52 (SPU 10/14/99 Letter).

Thus, even though SPU admittedly has prosecuted inmates for having less than a fingernail clipper, in Innes' case SPU simply chose to believe his version of events and no case against Innes was pursued. This information was never revealed to the defense.

c. Ongoing relationship between SPU and Innes

The relationship between Innes and the SPU was much more complicated than the State portrayed at trial. Although the State admitted that they had cut a deal with Innes in exchange for his testimony, the communications between both parties reveal that there were continual intricate and subtle negotiations. Innes, for example, wrote to SPU from Midway, Texas (likely the Ferguson Unit) in July of 1999 stating:

> Mr. Merillat I'm not just dead weight to you, as you can see by the info – I'm asking you to help me get transferred A.S.A.P. I will continue to prove useful & help full, [sic] But if I have problems I expect your help too.

Exh. 53 (Innes 7/7/99 Letter).

He wrote again in October of 1999 when he suddenly believed that the State had retracted its deal. Since the last letter Innes had been moved to the Wynne Unit. He wrote:

> Also I get a letter from State Counsel for Inmates and it's a plea offer on the New Boston cases! But I'm being offered 10 on one case & five on the other to run CC. But I was told by Mr. David P. O"Neil (also runs State Counsel for offenders) that the agreement for my copperation [sic] & testimony & the letters I had, would be 3 yrs. & the weapons charge dropped.

Exh. 51 (Innes 10/7/99 Letter).

Merillat, acknowledging the unit change, reassured Innes:

> I got your letter, and previously heard that you were on the Wynne Unit. I recall our phone call when you were housed at Telford, and you advised me that Wynne would be agreeable for housing. Now, we are not going back on anything...let me know who promised you what as far as agreements on your pending cases. I have not been involved in any negotiations, deals or anything of that nature. If someone made promises, let me know *who* it was so I can pursue that.

Exh. 52 (SPU 10/14/99 Letter).

A letter to Innes, this time signed "A.P.", dated June 12, 2000 makes clear that Innes is still in an active working relationship with SPU. He states:

> I got your letter and the Stiner information today. Thanks for sending those documents. I have not heard anything about the Canales letters or any ramifications about the letters you sent him. I was hoping he might make some admissions, etc., but evidently not.

Exh. 46 (SPU 6/12/00 Letter).

By July 2000, Innes was already having difficulty at the Wynne Unit and requesting another change. Merillat wrote back offering to help:

> I got your letter today. I have made moves toward getting you somewhere else. They aren't real supportive of my asking for particular units, but I'm willing to give it a go.

Exh. 54 (SPU 7/12/00 Letter).

On November 6, 2000, almost immediately after Mr. Canales' trial, a SPU investigator wrote TDCJ's Bureau of Classification, asking it to "honor [the prisoners'] request" to be moved to specific units. Innes, along with the other State's witnesses, was on this list. Exh. 76.

These documents, which were never revealed to the defense, demonstrate that Innes' relationship with the State far exceeded simply getting a deal on his pending felonies. Innes was continually receiving benefits from the prison system in exchange for actively seeking out evidence to use at Mr. Canales' trial. This partnership even included illegally soliciting incriminating information from Mr. Canales himself. *See infra.* Had the jury been aware of this information, Innes' testimony would have been placed in proper perspective: that of a canny, sophisticated, and manipulative prisoner who would do whatever he could to make his time in prison easier.

d. Collaboration between State witnesses

Unbeknownst to the defense and the jury, the State had placed Innes together with another witness thus providing an opportunity to compare information. This classic type of impeachment evidence was not disclosed to the defense.

An April 4, 2000, letter from Larry Whited indicated that he and Innes were in solidarity and working for SPU. In the letter Whited recounted how he and Innes compared and corroborated each other's stories. Whited mentioned that he and Bruce Innes went to the John Sealy Hospital in Galveston together:

> But anyway, we got to talk the whole way down there (and no, we didn't coach one another on our stories. Smile) and I found out a whole lot about some of the things that've been going on with the infamous Texas Mafia

> since I've been gone. Which is good for me because "To Know Is To Be Prepared." If you know what I mean.

Exh. 55 (Whited 4/4/00 Letter). Whited also reveals more of Innes' incentive to cooperate:

> Which reminds me, A.P., the dude ask me to talk to you about helping him go on and get out of Seg so he can get somewhere to do his time, so even though I already know that there isn't a whole lot you can do, I'm still going to go on and try to do this because I gave him my word that I would. Not to mention the fact that if you'de [sic] have seen his face when he ask me, well, you'de [sic] have probalby [sic] done the same thing. (smile) He wants to come to population and be on the same farm as I am , A.P. Which to be honest, isn't really a bad idea since we're in this particular boat we are in.

Id.

e. State's Continued Support Of Inmate Witnesses

At trial, the State acknowledged only that it had agreed to a deal with Innes about his pending felonies, but documents revealed during federal court proceedings strongly suggest that other promises were made. After the trials were completed, for example, SPU provided letters to the Texas Board of Pardons and Parole on behalf of inmates Baker, Canida, Innes, Hill, Henson, Driver and Rice and provided a letter to Sammy Buentello for Innes regarding gang renunciation. Exh. 56. No documents have been disclosed to the defense regarding any promises or deals involving the parole board. It is possible that such documents do not exist despite such promises being made. Several letters from A.P. Merillat regarding inmate Eason illustrate how SPU so effectively suppresses this information. In December 1999, Merillat wrote to Eason:

> Now, what I must make clear is that no moves or benefits will be done in exchange for helping us. That would amount to payment to some people, and we do not do that. If anyone ever asks what you "got" for helping the State, you can honestly answer that we have only promised you protection,

> nothing else. If that ever changed, you would have to answer with whatever benefit you received.

Exh. 57 (Merillat letter to Eason).

> The same day Merillat wrote to Sammy Buentello stating:
>
> Eason has cooperated with the Special Prosecution Unit in case preparations for the Dickerson murder case out of the Telford Unit. He has requested that we send you this copy of his renunciation. This is provided for any consideration you deem appropriate. Please call if you have any questions.

Exh. 58 (Merillat letter to Buentello).

These transactions, conducted with a wink and a nod, seem fairly well understood by inmates. In Whited's chatty letter of April 4, 2000, he let Merillat know that he would really like a radio:

> I've got somebody who'll send me a radio just like the one that got took from me. It has all the T.V. stations and is a clock radio. It'll be brand new, still in the box, coming directly from the store is gets bought at... I know you can't just bring it up here to me without asking somebody first but I'm hoping you might be able to pull some strings and get someone in Huntsville to approve you giving it to me. **Your office reputation will still remain untarnished as far as your never having to pay witnesses for testimony and all that...** All you have to say is that you're replacing a radio that was destroyed by people who don't want to see me take me stand, and it's a clock radio, medium size, and leave it at that.

Exh. 55 (Whited letter).

f. False Testimony About Receiving The Letter From Mr. Canales

Innes also provided perhaps the most damaging evidence against Mr. Canales when he testified to witnessing Mr. Canales pass him a "kite" containing a confession to the murder.[12]

[12] The length of the excerpt reproduced below demonstrates the amount of time and attention the State devoted to Innes allegedly receiving a kite from Mr. Canales.

Q: Alright, so on this particular day you told Canales you wanted a blow by blow description in a kite of what happened?

[Innes]: Yes

Q: Now, did you get it that day?

[Innes]: I got it the next day.

* * *

[Innes]: Yes, I asked him if he had that for me, and he said, yes, I've got it, and I said, well, hang on just a second and I'll shoot the line out there to you and you can tie it on the line.

Q: Alright, explain to the jury what you mean by "shooting the line."

[Innes]: A line is thread taken from a waistband from the elastic of underwear, braided or twisted into a handmade rope, in sections of eight or ten foot, and then there's any type of weighty object attached to the end of it. The doors in Ad Seg only have about an inch or an inch and a half of space underneath, so it has to be something flat, and you just slide it out there to the day room, and that way you can pick stuff up, and send stuff.

Q: Alright, you said the sections of string might eight to ten foot. Can a string – is that the longest it can be?

[Innes]: Oh, no. There's lines long enough to go all the way around six stations.

Q: Alright, they just keep tying strings?

[Innes]: Uh, huh (yes). They just keep adding them on – tying them on.

Q: And – okay. Is that a way for inmates to pass things among themselves?

[Innes]: Sure.

Q: Now, did you shoot a line over to the day room where Mr. Canales was?

[Innes]: Yes, I did.

Q: Did you live on the first row or the second row?

[Innes]: I lived on the second row.

Q: Alright, did the line make it over to near the day room?

[Innes]: Yes, right by the bars.

Q: Was Mr. Canales able to reach the line?

[Innes]: Yes, he was.

Q: Explain how Mr. Canales was able reach the line if you were on the second row?

[Innes]: Well, if you'll notice where the door is – the day room door – where the bars come into a "V" – an inmate would – Mr. Canales would climb up the bars and stand about even with the 2-Row tier floor, and specifically that area right there is blind to the picket, so you know, just climb up there – climb up the bars, and I'd slide the line to him, and he'd reach out and grab it, and tie whatever he had.

Q: Okay. Did Mr. Canales climb up those bars?

[Innes]: Yes, he did.

Q: Did he get hold of your line?

[Innes]: Yes, he did.

Q: Did he put anything on your line?

[Innes]: He tied a written kite to me on the line.

Q: Did he pull the line back in your cell?

[Innes]: Yes, I did.

Q: Did you read the kite?

[Innes]: Yes, I did.

* * *

Q: Mr. Ennis, do you recognize State's Exhibit 27?

[Innes]: Yes, this is the –

Q: –no, no. We're going to take this step by step. Be very careful. Do you recognize it?

[Innes]: Yes, I do.

Q: When is the first time you ever saw State's Exhibit 27?

[Innes]: The day that Mr. Canales tied this onto my line.

Q: Is that the kite you received from Mr. Canales?

[Innes]: Yes, it is.

Q: Did you see Anibal Canales tie that kite onto your string?

[Innes]: Yes, I did.

Q: Did you pull it into your cell?

[Innes]: Yes, I did.

Q: And did you read it?

[Innes]: Yes, I did.

SR 10: 28-33.

The importance of the letter was emphasized by the prosecution, which relied on it almost exclusively in its closing argument:

> The problem for Mr. Canales, is that they didn't back any of theirs up with anything. They got a couple of inmates to come and say, naw, I know where he was – I know what he was doing, but they didn't back it up. I did. I backed up our testimony with the most damning piece of evidence I could have imagined, and there it is, and you will have this with you in the jury room, and if you don't, you may ask for it. This is the letter. This should convince you that Anibal Canales killed Gary Dickerson.

SR 11: 136. The State spent the remainder of closing presenting an exegesis of the letter.

Despite the almost agonizing detail presented to the jury about how Innes came into possession of the letter, the State never revealed that Innes had given a previous account which directly contradicted his trial testimony. Furthermore, the State never corrected Innes' false testimony.

In early 1998, as Innes was facing several criminal charges, his lawyer Dave O'Neil approached SPU about providing evidence in exchange for a deal. SPU, initially, would not guarantee anything. Exh. 59. A few weeks later, O'Neil again contacted SPU and informed them that Innes had "**access** to a letter written by suspects." *Id.* (emphasis added). The details surrounding the letter became clearer the following day when Innes was interviewed directly by SPU. During that interview, Innes informed SPU that he **neither possessed the letter nor received it.** SPU's notes of this interview state:

> Letter
>
> written by Canales
> **Another inmate has the letter - he's not involved @**
> **all – will have to get the letter from him**
> **Another inmate rec the letter from Canales**
> This inmate sent me the letter to see it
> The letter is step for step how the letter [sic]
> went down.
> The letter is in Canales' handwriting

Exh. 60 (SPU notes) (emphasis added).

Thus Innes' claim before the jury that he had Mr. Canales write a letter and that he watched as Mr. Canales tied the kite on a string was completely fabricated. Had this evidence been properly disclosed and/or had the State discharged its duty to inform the jury that one of their main witnesses was testifying falsely, the jury would have had a very different view of the State's case and the investigation of Dickerson's murder. *See e.g. Kyles v. Whitley*, 514 U.S. 419, 445 (1995) ("Damage to the prosecution's case

would not have been confined to evidence of eyewitnesses, for [the suppressed evidence] would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well.").

2. Steven "Beaver" Canida

The State went to great lengths to assure the jury that its key eyewitness, Steven Canida, had obtained no benefits in exchange for his testimony:

Q:	Have you ever talked to me or any other prosecutor about any cases?
[Canida]:	No, sir, never.
Q:	Have I ever offered you any kind of a deal?
[Canida]:	No, sir.
Q:	Have you ever asked me for anything
[Canida]:	No, sir.
Q:	Well, as a prosecutor – you understand I work for TDCJ, right?
[Canida]:	Yes, sir.
Q:	Is there something I can do to help you?
[Canida]:	No, sir, ain't nothing – not that I know of.

SR 10:114.

In fact, Canida did receive substantial benefits from the State for his testimony. On November 6, 2000, just weeks after Canida testified, SPU wrote to the Board of Pardons and Parole on Canida's behalf. Exh. 56 (Inmate witness correspondence note).

Canida was paroled the following July, having served only 11 years on a 50 year sentence. Exh. 61 (Canida criminal history).

Further, upon information and belief, Canida's cooperation with the State enabled him to diminish significantly his sentence and incarceration on a subsequent offense. Although an apparent candidate to be prosecuted under as a habitual offender[13]– indeed it was because it was his third felony offense that when he testified against Mr. Canales, Canida was serving a 50 year sentence for Delivery of Marijuana in the Second Degree[14] – when Canida was convicted of another felony in 2002, he was sentenced to only 10 years, and served only one year before being paroled. Exh. 61 (Canida criminal history).

The extent of Canida's involvement and cooperation with authorities has not yet been fully revealed. Mr. Canales has not been given access to internal TDCJ documents regarding Canida, correspondence from Canida to TDCJ or other documents that would explain Canida's favorable treatment.

3. Larry Whited

Larry Whited did not testify at Mr. Canales' trial nor at Mr. Speer's subsequent trial for the murder of Dickerson. Whited, however, appears to have been instrumental in developing and investigating the case against Mr. Canales. Whited was one of the first inmates to contact authorities and offer help in exchange for various benefits. On July 27, 1997 Whited wrote:

> If you want to talk to me about this, then you take me away from here first. I do not care about your threats about refusing to cooperate. I will. But under my conditions (and parole is not one of them).

Exh. 62 (Whited 7/27/97 Letter).

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[13] TEX. PENAL CODE §12.42.

By April of 1998, SPU was already helping Whited become declassified as a gang member. According to a letter from the SPU chief prosecutor:

> Larry Whited #575256 has cooperated with the State of Texas in the investigation of the murder of inmate Dickerson which occurred at the Telford Unit in July 1997. Inmate Whited, previously confirmed as a Texas Mafia member, has provided valuable information against that gang, including details of how and why the killing was carried out, background information of gang activity at the Telford Unit and other information crucial to the prosecution of this murder case, which was a Texas Mafia hit on Dickerson... Please consider the possibility of classifying inmate Whited as "Ex-Texas Mafia," if this would be appropriate in light of his cooperation.

Exh. 63 (SPU 4/22/98 Letter). After Mr. Canales was convicted, SPU wrote the Texas Board of Pardons and Parole on behalf of Whited, noting that although he "[d]id not testify, but cooperated." Exh. 56 (Inmate witness correspondence).

Whited's role in the investigation and prosecution of Mr. Canales is not entirely clear. However, it appears that much of the original prosecution theory may be attributable to Whited's contact. Such a role would not be inconsistent with the manner in which TDCJ is known to develop prison cases. As State witness Doyle Wayne Hill stated:

> They interviewed those of us who were in administrative segregation first because TDCJ assumed the killers would have had to clear it with us first, since the leaders of the gang were in administrative segregation. You knew that in this situation, a lot of people are going to say whatever, whether they've seen something or not. There are just that many prisoners looking to make a deal... If the prosecutors have no evidence, they just get one or two prisoners to write a statement. They just tell them what to say and give them good time.

Exh. 64 (Declaration of Hill).

Whited's extensive contact was not revealed to the defense prior to trial and has only been partially disclosed to undersigned counsel.

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[14] SR 10:79.

4. Richard Driver, Jr.

Richard Driver was another witness that provided a purported link between Mr. Canales and the death of Dickerson. Driver claimed that he saw Canales speaking to Constadine, Speer and Barnes prior to the murder, an important fact to pursue a combination theory of prosecution. Driver, however, gave multiple versions of the events he supposedly witnessed, each changing significantly from the last. *See* discussion *infra*. The extent of Driver's participation with authorities has never been fully disclosed although it is clear from SPU's noted that prosecutors wrote the Texas Board of Pardons and Parole on his behalf. Exh. 56 (Inmate witness correspondence).

V. THE CUMULATIVE EFFECT OF THE INEFFECTIVE ASSISTANCE OF COUNSEL AND THE STATE'S *BRADY* VIOLATIONS UNDERMINED CONFIDENCE IN THE VERDICT AND DEATH SENTENCE AT MR. CANALES' TRIAL

While each instance of ineffective counsel and suppressed evidence sufficiently prejudiced Mr. Canales to mandate relief, this Court must also consider the cumulative impact of these constitutional violations. Where individual error is insufficient to raise a probability that the outcome of a trial would have been different, the cumulative impact of *Brady* and *Strickland* error can suffice to warrant habeas relief. The errors in this case undermine confidence in the outcome, and the combined prejudice resulting from counsel's errors and omissions and from any other constitutional error(s) in this case require relief. *Phillips v. Woodford*, 267 F.3d 966, 985 (9th Cir. 2001) (considering, in deciding whether to grant relief, the cumulative prejudice resulting from counsel's deficient performance and from testimony admitted in violation of *Giglio v. United States*); *Gonzales v. McKune*, 247 F.3d 1066, 1078 (10th Cir. 2001) ("we can see no basis in law for affirming a trial outcome that would likely have changed in light of a

combination of *Strickland* and *Brady* errors, even though neither test would individually support a petitioner's claim for habeas relief"). Here, the combined prejudicial impact of counsel's deficient performance at the punishment phase and every other constitutional error alleged in this Petition, and all those errors considered cumulatively, requires relief.

VI. PROSECUTORIAL MISCONDUCT SO PERVADED MR. CANALES' TRIAL THAT HE WAS EFFECTIVELY DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

While insufficient on their own to warrant relief, the combined effect of four instances of prosecutorial misconduct were sufficiently prejudicial to deny Mr. Canales due process.

A. Factual Background

First, during general *voir dire* before the entire venire, the prosecutor asked a potential juror "And any defenses, Ms. York, that Mr. Canales wishes to bring to you- he should bring, and have every right to bring." SR 5: 67. Defense counsel immediately objected, and the prosecutor apologized. The prosecutor "corrected" his statement by telling the venire

> Mr. Canales doesn't have to say anything here in this case. What I meant to tell you was, he can do that if he wishes. Okay? And if he does that you can hear about those. I want to be clear that I misstated that. There's nothing that says he should. That's his choice. Okay?

SR 5: 67.

Outside the presence of the jury, defense counsel moved to quash the panel on the basis that "the State alluded to the fact that Mr. Canales had an obligation to present his defense, which not only unfairly and unconstitutionally shift the burden of proof, it amounts to a comment on his failure to testify." SR 5: 107. The prosecutor stated that he

did not mean it that way, and he did not think the jury understood his comment in that way. SR 5:108. The court denied the motion. SR 5: 109.

Second, during rebuttal closing argument, the prosecutor said "[Mr. Hoover] says that Mr. Canales wrote the letter because he had an ironclad alibi. Really, was there any other way for Mr. Canales to explain the letter? I mean really, what do you do if you're sitting over there and you have to explain this letter?" SR 11: 137. Defense counsel objected and, outside the presence of the jury, asked for a mistrial, which the trial court denied. SR 11: 137; 11: 148-49.

Third, before closing, the prosecutor announced his intent to read aloud to the jury a large letter supposedly written by Mr. Canales. SR 10: 147. Defense counsel immediately objected to the prosecutor reading the letter, arguing that "these people can read it, and put emphasis on whatever they want to put emphasis on." SR 10: 148. The prosecutor's only response was that the letter was in evidence. The trial court denied the objection, and the State's rebuttal argument at closing consisted almost entirely of a reading of the letter. SR 10: 149.

Fourth, during the trial, the prosecutor attempted to admit a letter supposedly bearing Mr. Canales' fingerprint without laying a proper foundation. Defense counsel objected twice to the admission of the letter, and yet the prosecutor continued without laying a foundation. SR 9: 259. Defense counsel then requested to make a motion outside the presence of the jury where he stated:

> [T]hat evidence has been offered without any semblance of foundation simply for the purpose of making me object to it at this time in front of the jury, as to—as if I'm hiding something, and I think that is a tactic that's base, and it's certainly prejudicial.

SR 9: 260. The prosecutor responded:

> [T]his document is being offered because it has Mr. Canales' fingerprint on it, and we intend to show later that that is Mr. Canales' handwriting, and that it corresponds to other writings and documents we do care strongly about being admitted in this case for their content.

SR 9: 260-61. The court then denied defense counsel's motion. SR 9: 261.

B. Mr. Canales was denied his right to a fair trial.

The repeated instances of prosecutorial misconduct deprived Mr. Canales of his right to a fair trial. The right to due process is violated if the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *see also Riddle v. Cockrell*, 288 F.3d 713, 720 (5th Cir 2002) (holding due process analysis turns on the fairness of the trial). The Court must consider "1) the magnitude of the statement's prejudice, 2) the effect of any cautionary instructions given, and 3) the strength of the evidence of the defendant's guilt." *United States v. Duffaut*, 314 F.3d 203, 211 (5th Cir. 2002). The Court should also look to the totality of the trial to determine if the prosecutor's conduct considered as a whole denied defendant a fair trial. *United States v. Young*, 470 US 1, 11-12 (1985). If the prosecutor's pattern of misconduct infected the integrity of the trial so as to have an injurious influence on the jury, this Court must grant relief. *Brecht v. Abrahamson*, 507 US 619, 637 (1993).

The prosecutor's improper conduct relating to letters purportedly written by Mr. Canales effectively denied Mr. Canales his right to a fair trial because those letters constituted the majority of the prosecution's case against Mr. Canales. The prosecutor acted improperly by (1) commenting at voir dire on Mr. Canales' failure to testify in order to explain a letter he allegedly wrote, (2) again commenting on Mr. Canales' failure to testify and explain the letters during the state's closing arguments, (3) reading to the

jury with prejudicial inflection a letter allegedly written by Mr. Canales, and (4) forcing defense counsel to object repeatedly by continuing to offer one of the letters for admission without laying a proper foundation. Considered together, these actions by the prosecutor so pervaded Mr. Canales' trial with prejudice as to result in an unfair trial.

First, the prosecutor's comments both at the very beginning and very end of the trial were improper and unfairly prejudiced Mr. Canales at two critical stages of the proceedings. The prosecutor commented on defendant's obligation to present all possible defenses right at the outset of the trial, when the jury was forming its first impressions of Mr. Canales and the case. The prosecutor then wrapped up the trial by commenting on defendant's failure to explain an inculpatory letter, again trying to shift the burden to Mr. Canales and again suggesting to the jury that Mr. Canales had done something wrong by failing to get on the stand and explain the letter. During *voir dire*, the prosecutor corrected himself after defense counsel objected, but even the correction amounted to a suggestion that if defendant **wanted** to bring a defense he would, still leaving the jury with the impression that if defendant didn't present a particular defense, it must be because he did not have one to present.

These comments clearly and strategically implanted in the jury's minds both at the outset of the trial and again in its last moments that Mr. Canales had a duty to get on the stand and explain the letter himself. Given the importance of the letter to the State's case, the prosecutor's comments effectively placed the burden of disproving the contents of the letters on Mr. Canales himself.

Second, the prosecutor acted improperly by reading with unnecessary inflection a letter supposedly written by Mr. Canales, thus prejudicing the jury's interpretation of the

letter and the meaning of its contents. This was particularly improper given that the letter was purportedly written by defendant, as whatever emphasis and inflection the prosecutor gave in reading the letter would be imputed to Mr. Canales by the jury. This too again called attention to the fact that Mr. Canales did not take the stand.

In reviewing read-backs of testimony or evidence for prejudice, courts note the fact that court reporters are trained **not** to read with inappropriate inflection or word emphasis. *See, e.g., Hegler v. Borg*, 50 F.3d 1472, 1474 (9th Cir. 1995). If courts find no prejudice on the basis of no use of inflection, then clearly the converse must be true - inflection can be a basis for a finding of prejudice. Because the prosecutor was allowed to use improper inflection and emphasize sections of the letter as he pleased, Mr. Canales was unfairly prejudiced. Furthermore, under *Darden*, prosecutors should not "manipulate or misstate the evidence." 477 US at 182. By reading the letter with his own emphasis and inflection, the prosecutor essentially manipulated the letter.

Finally, the prosecutor improperly attempted to admit one of the letters into evidence intentionally without laying the proper foundation, forcing defense counsel to object repeatedly, thus prejudicing Mr. Canales by making it appear as if he had something to hide. Given the significance of the letters to the State's case, the jury was likely to infer from defense counsel's repeated objections that defense counsel was trying to prevent the jury from reading those letters, rather than trying to make the prosecution abide by the rules of evidence.

The prosecutor's conduct violated Mr. Canales' due process rights under the Fourteenth Amendment and Mr. Canales is entitled to relief. First, considered together, the prosecutor's conduct relating to the letter was highly prejudicial. Second, the trial

court failed to give any cautionary instructions on any of the prosecutor's inappropriate actions, so there was nothing to mitigate the harm caused by the prosecutor's conduct. Third, there was not substantial evidence of guilt in the absence of the prosecutor's improper comments and conduct. This is particularly important given that the prosecution's case centered around the letters, and all of the prosecutor's improper actions related to the letters. Because the letters were the most important evidence presented by the state, the prosecutor's conduct relating to the letters clearly had a substantial impact on the jury's verdict.

MR. CANALES'S *BRADY, NAPUE, MASSIAH* AND OTHER STATE MISCONDUCT CLAIMS SATISFY 11.071, §5 AND THUS SHOULD BE REMANDED TO THE DISTRICT COURT.

None of the *Brady, Napue, Massiah* or other misconduct evidence presented in this application was available to Mr. Canales when he filed his initial habeas application. The information forming the basis of these claims were disclosed to Mr. Canales's counsel only during preparation for filing his federal habeas petition in 2004, well after the filing date of Mr. Canales's original state habeas petition. Because this evidence was not disclosed to Mr. Canales as required by *Brady* and its progeny, this evidence was unavailable to Mr. Canales at trial, when he was constitutionally entitled to it. Compounding this constitutional violation, it was never disclosed to state postconviction counsel.

There is strong precedent that previously unpresented *Brady* claims and claims based on newly discovered evidence of innocence will meet the requirements of §5 and thus be considered on the merits in state court. *See Ex parte Reed,* No. 50-961-03 (Tex. Crim. App. October 19, 2005) (authorizing successive proceedings on *Brady* claims); *Ex*

parte Blair, No. 40,719-3 (Tex. Crim. App. May 30, 2001) (authorizing successive proceedings on, *inter alia*, a claim based on new evidence of innocence); *Ex parte Rousseau*, No. 43, 534-02 (Tex. Crim. App. 2002) (authorizing successive proceedings on a claim that the State withheld impeachment evidence of eyewitness and evidence of innocence); *Ex parte Washington*, No. 35, 410-02 (Tex Crim. App. 2002) (authorizing successive proceedings on claim that the State withheld information regarding criminal records of punishment phase witnesses and presented false and misleading testimony); *Ex parte Murphy*, No. 30.035-02 (Tex. Crim. App. Sept. 13, 2000) (authorizing successive proceedings on a claim that prosecutors relied on perjured testimony); *Ex parte Faulder*; No. 10,395-03 (Tex. Crim. App. June 9, 1997) (authorizing successive proceedings on a claim that prosecutors allowed witnesses to testify falsely and withheld exculpatory evidence); *Ex parte Nichols*, No. 21,253-02 (Tex. Crim. App. Apr. 16, 1997) (authorizing successive proceedings on a claim that prosecutors withheld the correct name address of a witness with exculpatory information); *see also Ex Parte Soffar*, 2003 WL 22682475 (Tex. Crim. App. November 12, 2003) (ordering further briefing on whether the court should consider successive application raising new evidence of innocence and mental retardation claims).

Because this evidence was previously unavailable and presents potentially meritorious claims, Mr. Canales's case should be remanded to the district court for further proceedings.

VII. Several Of The Jurors Who Sat In Judgment Of Mr. Canales Lied About Their Criminal Past, Violating Mr. Canales' Right To A Fair Trial Under The Sixth, Eighth And Fourteenth Amendments To The Constitution.

A. Factual Background

Several of the jurors who were selected to be on Mr. Canales' jury were dishonest in their questionnaires and misrepresented their involvement with the criminal justice system.

1. John Dozier

Mr. John Dozier served on the jury which convicted Mr. Canales of capital murder and sentenced him to death. Prior to his selection, he completed a juror questionnaire under oath that asked him the following:

> 30. Have you or any member of your family ever been convicted of a crime other than a traffic offense?
>
> 32. Have you, a family member, or someone close to you ever spent time in jail or a penitentiary?

See Exh. 65 (Dozier Juror Questionnaire).

Mr. Dozier answered all these questions "no," except in answer to Question 31, whether he had ever been arrested or charge with any crime other than a traffic offense. He admitted he had, but claimed that the record had been expunged. *Id.*

Upon information and belief, Mr. Dozier was arrested and convicted of battery in the second degree in Miller County, Arkansas. Mary de la Rosa reviewed court records pertaining to Mr. Dozier in Miller County. She states:

> In the Criminal Fee Book "U" at the Miller County Courthouse in Texarkana, Arkansas, there is an entry under the name of John Dozier on page 325. The Criminal Fee Book indicates a case name and number – *State v. Dozier*, No. CR 81-310 – and a charge, Battery in the 2nd Degree.

Exh. 66 at ¶ 5 (de la Rosa Decl.).

Ms. de la Rosa asked to see the court file corresponding to this entry, but the clerk of the court was unable to locate the file corresponding to the Criminal Fee Book entry.

Exh. 66 at ¶ 6. According to Arkansas law, had this conviction been expunged, all mention of it would have been removed from any publically available file. In addition, all records regarding that conviction would be preserved by the court, albeit not in a publically accessible place.

> (e) (1) The clerk of the court shall remove all petitions, orders, docket sheets, and documents relating to the case, place them in a file, and sequester them in a separate and confidential holding area within the clerk's office.
>
> (2) (A) A docket sheet shall be prepared to replace the sealed docket sheet.
>
> (B)The replacement docket sheet shall contain the docket number, a statement that the case has been sealed, and the date that the order to seal the record was issued.
>
> (3) All indices to the file of the individual with a sealed record shall be maintained in a manner to prevent general access to the identification of the individual.
>
> (f) Upon notification of an order to seal records, all clerks, arresting agencies, and other criminal justice agencies maintaining such conviction records in a computer-generated database shall either segregate the entire record into a separate file or by other electronic means ensure that the sealed record shall not be available for general access unless otherwise authorized by law.

A.C.A. § 16-90-904 (e) & (f).

2. Marty Rawson and Jon Miller

Mr. Rawson and Mr. Miller each also answered the same questions on their juror questionnaire. Each was asked:

> Have you or any member of your family ever been arrested or charged with any crime other than a traffic offense?

Exh. 67 (Questionnaires of Rawson and Miller). Each answered, under oath, in the negative. *Id.*

In the course of federal court proceedings, undersigned counsel had the opportunity to view handwritten notations in the prosecution's file next to some of the selected jurors. Next to Mr. Rawson's name, the prosecutor noted, "been arrested for hot checks" and "inv. pending." Exh. 70 (State's juror list). Next to Mr. Miller's name, was written "hot checks" and "inv. Pnd", *id,*[15] suggesting that he too had been under arrest.[16] Thus despite each of these men's disavowals, each had been or may have been arrested for something other than a traffic offense. Moreover, each of these men was currently **under investigation.**[17]

B. Argument

1. Mr. Canales Had A Right To A Fair And Impartial Jury.

If Mr. Dozier, Rawson, and Miller in fact have criminal convictions and/or arrests, their failure to answer relevant questions truthfully raises the inference that they sought to conceal these facts because they had an actual bias in the case.

In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), the Supreme Court set out the federal standard for evaluating claims that a party had been denied his constitutional right to an impartial jury. The defendant must demonstrate (1) that a juror failed to answer honestly a material question on *voir dire*, and (2) that a correct response would have provided a valid basis for a challenge for cause. *Id.* at 556.

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[15] Steve Matlock also has a notation which states: "he's been arrested several times – reckless driving, etc." and "no conv." *Id.* To the extent that any of the other of the "several times" he was arrested was for something other than a traffic offense, Mr. Canales incorporates Mr. Matlock into this claim.

[16] Because these facts were never revealed to trial or state habeas counsel, it is impossible for counsel to determine whether Mr. Rawson was arrested without access to discovery. This Court should remand this claim for further development in the district court.

[17] It is also troubling that despite seeking out and noting these arrests and pending investigations on their juror list, the State did not bring to the Court's attention that these jurors were concealing relevant facts from the Court.

The Supreme Court has made clear that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error. The right to an impartial adjudicator, be it judge or jury, is such a right." *Gray v. Mississippi*, 481 U.S. 658, 668 (1987) (citations and internal quotation marks omitted). Accordingly, the presence of a biased juror can never be harmless, and "the error requires a new trial without a showing of actual prejudice." *Dyer v. Calderon*, 151 F.3d 970, 972 n. 2 (9th Cir.)(en banc), *cert. denied*, 119 S.Ct. 575 (1998) (citing *Arizona v. Fulminante*, 499 U.S. 279, 307-310 (1991)).

The fact that the juror lied is itself indicative of bias. "[I]n most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." *McDonough Power Equipment, Inc.*, 464 U.S. at 556 (Blackmun, J., concurring). *See also United States v. Boney*, 977 F.2d 624, 633-34 (D.C. Cir. 1992) (hearing into possible bias required where juror failed to acknowledge prior felony conviction on juror qualification form; juror's lack of candor "presents serious concerns," because it "raises at least the inference that the juror had an undue desire to participate in a specific case, perhaps because of partiality"); *Dyer*, 151 F.3d at 979 (juror's "lies give rise to an inference of implied bias on her part."); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991) ("Mrs. G. was dishonest is her response to questions on voir dire – this is true whether or not she simply did not, or could not respond properly because of her own emotional distress. This dishonestly, of itself, is evidence of bias."); *United States v. Colombo*, 869 F.2d 149, 152 (2d Cir. 1989) ("Willingness to lie about [potentially disqualifying fact] exhibited an interest strongly suggesting partiality"); *United States v. Scott*, 854 F.2d 697, 699-700 (5th Cir. 1988) ("certainly when possible

non-objectivity is secreted and compounded by the untruthfulness of a potential juror's answer on voir dire, the result is deprivation of the defendant's right to a fair trial."); *United States v. Perkins*, 748 F.2d 1519, 1532 (11th Cir. 1984) (juror's "dishonesty, in and of itself, is a strong indication that he was not impartial."); *Rogers v. McMullen*, 673 F.2d 1185, 1189 (11th Cir. 1982) ("a state criminal defendant who can demonstrate that a member of the jury which heard his case was biased ... is entitled to federal habeas corpus relief"); *McCoy v. Goldston*, 652 F.2d 654, 659 (6th Cir. 1981) ("A district judge shall presume bias where juror deliberately concealed information").

As one court explained:

> If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror – to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions – with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

Dyer at 983.

Moreover, even if a juror is **not** lying, the bias stemming from a juror who faces criminal charges him- or herself at the time of the trial on which he or she sits as a juror can be so great that it is objectively unreasonably to sustain a conviction and death sentence in light of it. *Brooks v. Dretke*, 418 F.3d 430 (5th Cir. 2005).

2. The Eighth Amendment's Mandate Of Heightened Reliability Prohibits Upholding A Death Sentence Rendered By These Jurors.

While a juror's misconduct has always concerned the courts, it takes on added significance in the context of a death penalty case. Because the penalty of death is qualitatively different from any other punishment, the Supreme Court "has gone to

extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (O'Connor, J., concurring). One of the most important and consistent themes of the Supreme Court's death penalty jurisprudence is the "emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner." *Barclay v. Florida*, 463 U.S. 939, 960, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983) (Stevens, J., concurring); *see Beck v. Alabama*, 447 U.S. 625, 638, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) (noting that, because death is different, "we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination"). Accordingly, the severity of the sentence that Mr. Canales faces demands that this Court apply "careful scrutiny in the review of any colorable claim of error." *Stephens v. Zant*, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1982). This admonition is especially true when the claim of error involves the right to a fair trial, one of the primary means of ensuring that a jury render its verdict "based only on the evidence subjected to the crucible of the adversarial process." *Woods v. Dugger*, 923 F.2d 1454, 1460 (11th Cir.), *cert. denied*, 502 U.S. 953 (1991).

3. The Jurors' Misconduct Requires Reversal Of Mr. Canales' Conviction And Sentence.

"[S]ome constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error. The right to an impartial adjudicator, be it judge or jury, is such a right." *Gray v. Mississippi*, 481 U.S. 658, 668, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987) (citations and internal quotation marks omitted). Accordingly, "the

presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. Like a judge who is biased, the presence of a biased juror introduces a structural defect not subject to harmless error analysis." *Dyer v. Calderon,* 151 F.3d at 972 (*en banc*) (citing *Arizona v. Fulminante*, 499 U.S. 279, 307-310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

An evidentiary hearing is required on this claim. If Mr. Dozier, Mr. Rawson and Mr. Miller in fact deliberately concealed their previous experience with the criminal justice system during jury selection, Mr. Canales was denied his constitutional right to a fair and impartial jury and is entitled to relief from his conviction and death sentence.

VIII. THE JURY COMMUNICATED WITH THE COURT AND BAILIFF ABOUT THE CASE DURING DELIBERATIONS OUTSIDE THE PRESENCE OF COUNSEL AND DEFENDANT AND WITHOUT THEIR KNOWLEDGE, VIOLATING MR. CANALES' SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

A. Factual Background

On information and belief, the jury in Mr. Canales' case submitted questions to the Court through the bailiff. These questions were not presented or answered in open court with the knowledge and presence of counsel and Mr. Canales. Nor was any record made of these questions. In addition, the bailiff asked the jurors during their deliberations that he would have to get them dinner and arrange for a hotel if they did not reach a verdict soon.

According to Sathya Gosselin, who interviewed some of the people who sat on Mr. Canales' jury:

> Among other questions, the jurors were asked whether there were any jury note to the judge asking questions. One of the jurors laughed when asked this, and responded, "oh yes, there was a lot [they] didn't understand." He could not remember how many, or the content of the notes, nor could he

> recall if the jury wrote all the notes down or simply asked the bailiff to relay the information.
>
> This juror believed that the punishment phase deliberations went more quickly in part because the jury had a better understanding of the procedure and did not have to have it explained to them again.
>
> This juror also said that during the guilt phase, the bailiff came in and told them during deliberations that they would need to get in a pizza or something, and organize a hotel if they didn't reach a decision. The jury reached a verdict and made that unnecessary.

Exh. 68 at ¶3-5 (Gosselin Decl). *See also* Exh. 71 at ¶5 (Blackstock Decl.).

B. Governing Legal Standard

This *ex parte* communication between the jury and the court violated Mr. Canales' Sixth Amendment right to confrontation and effective assistance of counsel, his Fourteenth Amendment rights to a fair trial and to appeal.

The proper practice for a jury inquiry and response requires: "(1) the jury inquiry should be in writing; (2) the note should be marked as the court's exhibit and read into the record with counsel and defendant present; (3) counsel should have an opportunity to suggest a response, and the judge should inform counsel for the response to be given; and (4) on the recall of the jury, the trial judge should read the note into the record, allowing an opportunity to the jury to correct the inquiry or to elaborate upon it." *See, e.g., United States v. Mejia*, 356 F.3d 470, 475 (2nd Cir. 2004).

The Supreme Court in *United States v. United States Gypsum Co.*, 438 U.S. 42 (1978) made clear that all *ex parte* contact between the judge and the jury is fraught with peril.

> [A]ny *ex parte* meeting or communication between the judge and the foreman of a deliberating jury is pregnant with the possibilities for error. . . . Even an experienced trial judge cannot be certain to avoid all of the pitfalls inherent in such an enterprise.

Id., 438 U.S. at 460.

The Court outlined the nature of its concerns: "the *ex parte* discussion was inadvertently allowed to drift into what amounted to a supplemental instruction to the foreman relating to the jury's obligation to return a verdict...;" communicating with the jury through the foreman created an unacceptable risk of innocent misstatement of the judge's directions; and the exclusion of counsel denied the defendants any chance to correct any mistaken impressions. *Id.*, 438 U.S. at 461-62.

Because of these concerns, the Fifth Circuit has long held that the court must consult with counsel upon receiving questions from the jury. *See United States v. Sylvester*, 143 F.3d 923, 928 (5th Cir. 1998) (*citing Gomila v. United States*, 146 F.2d 372 (5th Cir. 1944)). *See also United States v. Cowan*, 819 F.2d 89, 93 (5th Cir. 1987) (exclusion of counsel denied defendant opportunity to correct or object to supplemental instruction). Where the court receives a communication from the jury, the procedure is "well established" that "counsel should be informed of its substances and afforded an opportunity to be heard before a supplemental charge is given." *Sylvester*, 143 F.3d at 928.

Further, in *United States v. Gagnon*, the Supreme Court made clear that, based on the Confrontation Clause of the Sixth Amendment and the due process clause, the defendant has a constitutional right to be present when the court presents supplemental instructions to the jury. 470 U.S. 522, 526 (1985). While "the mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right," the *ex parte* contacts in this case appears to have been more than a simple conversation, instead becoming vehicle for providing the jury with

supplemental instructions. Under these circumstances, the right to presence was violated. "The right to be present has been extended to require that messages from a jury should be disclosed to counsel and that counsel should be afforded an opportunity to be heard before the trial judge responds." *United States v. Mejia*, 356 F.3d 470, 474 (2nd Cir. 2004) (*quoting United States v. Ronder*, 639 F.2d 931, 934 (2nd Cir. 1981) (internal punctuation omitted.)

Further, due process entitles the accused to a record of sufficient completeness to demonstrate that prejudicial error occurred during the trial. Mayer v. City of Chicago, 404 U.S. 189, 194 (1971). Because all the communication occurred outside the presence of a court reporter, Mr. Canales' counsel did not know the communication had occurred and has been denied the best mechanism to appeal that this *ex parte* communication occurred.

Because of the perils of *ex parte* communication, the Fifth Circuit requires "compelling circumstances" be demonstrated to justify *ex parte* communication, and clearly placed the burden on the trial court to demonstrate these compelling circumstances:

> The record suggests no reason for the district court to have embarked on this risky procedure of questioning the jurors outside the presence of counsel or the parties. ... Allegations of jury misconduct, improper contact with a juror or similar problems may justify *ex parte* communication between the court and jurors. Absent such compelling circumstances, communication between the court and a deliberating jury should be either in writing or in open court.

United States v. Cowan, 819 F.2d 89, 94 (5th Cir. 1987).

Whereas in *Cowan* the judge engaged in conversation with the jurors, in *United States v. Talkington*, the Seventh Circuit condemned the trial judge who, unbeknownst to

trial counsel, sent a note to the jury that asked only if the jurors wanted to keep deliberating or whether they wanted to go home and return to deliberate in the morning. 875 F.2d 591, 596 (7th Cir. 1989). "There can be no doubt that the communication with the jury without consulting counsel was error." *Id.* The Seventh Circuit quoted *Remmer v. United States*, 347 U.S. 227 (1954):

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reason, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Talkington, 875 F.2d at 596-97.

It was also separate error for the bailiff to tell the jurors that if they did not reach a verdict soon, he would have to make arrangements for dinner and a hotel. *United States v. Talkington*, 875 F.2d 591, 596-97 (7th Cir. 1989).

The Court must determine whether the *ex parte* communications between the judge and jury "had a prejudicial effect on the defendant and rendered the trial fundamentally unfair." *See Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004) (internal punctuation omitted). A proceeding is "fundamentally unfair if ether is a reasonable probability that the outcome might have been different had the proceeding been properly conducted." *See Foy v. Donnelly*, 959 F.3d 1307, 1317 (5th Cir. 1992).

Given that Mr. Canales has learned of only the outlines of the content of the *ex parte* communications, an evidentiary hearing is necessary.

> Where, as here, the record is void of any specific information regarding the occurrence and nature of, as well as the circumstances surrounding the *ex parte* contacts, the impact thereof upon the jurors, and whether or not

> the juries were prejudiced, a hearing in which all interested parties are permitted to participate is not only proper but necessary.

United States v. Bishawi, 272 F.3d 458, 462 (7th Cir. 2001).

MR. CANALES'S JUROR MISCONDUCT CLAIMS SATISFY THE EXCEPTIONS OF 11.071, §5 AND THUS SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

As the discussion of the claims above make clear, the factual bases of Mr. Canales's juror misconduct claims were not previously available through an exercise of due diligence. The most relevant information came to light only when the prosecution's handwritten notes were disclosed. This previously unrevealed information could not have been previously discovered because, although these jurors were apparently "pending investigation" or had recently been arrested at the time of trial, they were ultimately never prosecuted or indicted after jury service. Because no further prosecutorial action was taken, no public records exist which could have been discovered by a diligent search by previous counsel. Furthermore, Mr. Canales's claims are based upon apparent intentional concealment by jurors in his case. The jurors' false previous representations in Mr. Canales's case rendered the basis of his current claims previously unavailable and thus his case should be remanded for further proceedings in the district court.

IX. MR. CANALES' FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY FORCING HIM TO WEAR LEG SHACKLES IN FRONT OF THE JURY DURING THE PENALTY PHASE OF HIS TRIAL.

Even though Mr. Canales was unshackled and well-behaved throughout the guilt/innocence phase of his trial, over defense counsel's objection, the trial court ordered him shackled in leg irons during the punishment phase of his trial.

> MR. HARRELSON: Your Honor, as a side issue, I would just like to advise the Court that Mr. Canales is wearing leg irons, is that going to be necessary?

> JUDGE CARTER: You know, it seems like that would be fine as long as he's under that desk there. I don't think it would be noticeable by the jury.
>
> MR. HARRELSON: I am just afraid the clinking noise down there will be heard by the jury, and prejudice them in this phase of the trial.
>
> JUDGE CARTER: Well, I've authorized that today. He's behind the desk and shouldn't be seen by the jury, and as far as I am concerned he will have to enter a plea to the enhancements, but you don't have to stand, Mr. Canales, unless you want to.

SR 12: 3-4.

In fact, at least one juror heard the shackles. Exh. 68 at ¶ 7 (Gosselin Decl.).

The United States Supreme Court held in *Illinois v. Allen* that "physical restraints on an accused tend to prejudice the jury against the accused and suggest to the jury that the trial judge, by ordering or permitting the use of such restraints, has thereby expressed the opinion that the accused is a dangerous person and is not to be trusted," 397 U.S. 337 (1970). The Court reiterated this concern in *Holbrook v. Flynn*. 475 U.S. 560 (1986). Similar concerns have been expressed by the Eleventh Circuit. In *Elledge v. Dugger*, Elledge was shackled during his death sentencing trial. 823 F.2d 1439, 1450 (11th Cir. 1987). The Eleventh Circuit remarked,

> There is a troublesome question as to whether the appearance in shackles of a defendant whom the jury has just convicted of a gruesome crime is so inherently prejudicial that he is thereby denied his constitutional right to a fair capital sentencing proceeding.

Id., at 1451. The court remarked, a jury

> might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision.

Id., at 1450. The Ninth Circuit has repeatedly found a violation of due process where dangerousness was an issue and defendant was forced to wear restraints. *Duckett v. Godinez*. 67 F.3d 734, 747 (9th Cir. 1995), *cert. denied* (1996) ("shackling a defendant during a sentencing hearing before a jury is an inherently prejudicial practice which comports with due process only when used as a last resort to protect an essential state interest -- such as maintaining public safety or assuring the decorum of the proceedings."); *Tyars v. Finner*, 709 F.2d 1274, 1285 (9th Cir. 1983) ("In the absence of any such demonstrable or articulable necessity, and in the absence of any showing that less restrictive means not embodying the same potential for prejudice could have maintained order in the courtroom, the circumstances deprived the . . . proceeding of the appearance of evenhanded justice which is at the core of due process. Reversal is therefore required."). The Sixth Circuit has also held that shackles are prejudicial because they lead the jury to infer that the defendant is dangerous. As they stated in *Kennedy v. Cardwell*:

> Physical restraints are viewed with disfavor for the following reasons: (1) physical restraints create a prejudice against defendants as being dangerous and untrustworthy even under the surveillance of law enforcement officers; (2) physical restraints impede a defendant's mental faculties and thus materially abridge his right of defense as well as his privilege of testifying in his own behalf; (3) physical restraints materially interfere with his right to consult with counsel during trial; (4) physical restraint detract form the dignity and decorum of the judicial process.

487 F.2d 101 (6th Cir. 1973), *cert. denied*, 416 U.S. 959, 94 S. Ct. 1976, 40 L. Ed. 2d 310 (1974).

Forcing a defendant to wear leg shackles during the penalty phase of his trial is so prejudicial as to violate his constitutional right to due process and a fair trial. Once the jury has reviewed the facts and determined that in their opinion the defendant is guilty,

they must then face that same defendant and determine his ultimate fate. When making this decision, the jury is asked to consider whether they believe that defendant will be a danger in the future. If they conclude that he does pose a future danger, that decision weighs in favor of the imposition of death. When a judge forces a defendant to wear shackles during the penalty phase, suddenly, after he has not worn them throughout the trial, it creates the impression that the judge believes that defendant is so dangerous as to require special constraints. As the Ninth Circuit stated in *Duckett v. Godinez*:

> In the penalty phase of a capital trial, the jury knows that defendant is a convicted felon. **But the extent to which he continues to be dangerous is a central issue the jury must decide in determining his sentence.** Not all convicted felons are so dangerous and violent that they must be brought to court and kept in handcuffs and leg irons. Unlike prison clothes, **physical restraint may create the impression in the minds of the jury that the court believes the defendant is a particularly dangerous and violent person.** Therefore, in the absence of a compelling need to shackle the defendant during his sentencing hearing, such a **practice is inherently prejudicial.**

(Internal quotations and citations omitted. Emphasis added.) 67 F.3d at 748. Where a jury is charged with determining whether a defendant should live or die, and his dangerousness is a critical component of that determination, forcing that defendant to wear shackles so taints the trial with the increased potential that death will be imposed, that a fair trial becomes impossible.

Because future dangerousness is at issue in both proceedings, civil commitments are analogous to penalty phase proceedings in capital trials. In *Tyars v. Finner*, the Ninth Circuit reversed Tyars' involuntary commitment, because "[t]he likelihood of prejudice inherent in exhibiting the subject of a civil commitment hearing to the jury while bound in physical restraints, when the critical question the jury must decide is whether the individual is dangerous to himself or others, is simply too great to be countenanced

without at least some prior showing of necessity." 709 F.2d 1274, 1285 (9th Cir. 1983). The Eleventh Circuit has similarly held that the trial court is required to consider alternate forms of constraint. *Elledge v. Dugger*, 823 F.2d 1439, 1451 (11th Cir. 1987). But the trial judge here failed to consider any alternatives. He forced Mr. Canales to appear before the jury in shackles while they were determining the fate of his life, but did nothing to determine whether the shackles were even necessary.

It is well settled that constitutional requirements for death sentencing proceedings require heightened reliability, and

> extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passions, prejudice, or mistake.

Eddings, 455 U.S. at 118, 102 S. Ct. at 878.

Shackling Mr. Canales before his sentencing jury had a "substantial and injurious effect" on the verdict, prejudicing him in violation of his Eighth and Fourteenth Amendment rights and compelling relief from his death sentence.

THE LEGAL BASIS FOR MR. CANALES'S SHACKLING CLAIM WAS PREVIOUSLY UNAVAILABLE UNDER ART. 11.071, SEC. 5(A).

Mr. Canales presented a shackling allegation in his initial application for post-conviction writ of habeas corpus. On Mr. Canales initial application for post-conviction writ of habeas corpus, the convicting court denied Mr. Canales's claim, in part because "[t]his was after the defendant had been found guilty and during the punishment hearing. Such action was proper." Findings of Fact and Conclusions of Law at ¶14. As noted *supra*, this Court adopted that finding and denied relief on March 12, 2003.

This Court has recently clarified that when a claim has been previously presented to, and rejected by, this Court, the legal basis for that claim is thereafter "unavailable" within

the meaning of art. 11.071, Sec. 5(a), unless and until "later, binding precedent relevant to the issue in question" is announced that would require this Court to reach a different result. *Ex parte Hood*, 211 S.W.3d 767 (Tex. Crim. App. 2007). The Court found this reading of Sec. 5(a) was not only "supported by the language of the statute," but would also "serve[] judicial economy and conform[] to common sense." *Id* at 776. As the Court explained:

> It is axiomatic that issues raised and rejected on direct appeal are generally not cognizable on habeas corpus. ... In the language of the statute, the legal basis for the claim "could not have been reasonably formulated" at the time the habeas application was filed because, on direct appeal, we had specifically rejected it, and no change in the law had occurred with respect to the issue addressed. Not only is this interpretation supported by the language of the statute, but it serves judicial economy and conforms to common sense: issues that can be litigated on direct appeal, should be litigated there, and not re-litigated on habeas corpus. The same kind of reasoning applies when a claim is litigated in a prior habeas application and the law has not changed with respect to that claim at the time a subsequent application is filed. After all, § 5 bars claims and issues that *have been* presented in an earlier application, not just claims and issues that *could have been presented.* **If we decide an issue adversely to a defendant in a way that contradicts a later legal development, that later legal development constitutes a legal basis that was not presented and could not have been presented at the time.**
>
> To summarize: a legal basis is unavailable if it has been exhausted by previous presentation to this Court, but that **legal basis can become newly available as a result of later, binding precedent relevant to the issue in question.** There are some important distinctions between this "unavailability by exhaustion" doctrine and other situations that practitioners must keep in mind. First, a decision in *someone else's* case cannot qualify as exhaustion. Exhaustion is based on cognizability, which depends on what the *applicant* has done to advance his claims. Also, a "change in the law" under the exhaustion doctrine, rendering an issue newly cognizable (and thus "available"), must come from a binding authority, *i.e.* cases from this Court and the United States Supreme Court.

Hood, 211 S.W.2d at 776 (footnotes omitted; boldface emphasis added).

This Court rejected Mr. Canales's shackling claim when it denied relief on his initial application for post-conviction writ of habeas corpus in March 2003. Thus, Mr. Canales exhausted this issue *in his own case*, as required under *Hood*. As this Court contemplated in

Hood, there is now available "later binding precedent" from the United States Supreme Court which makes clear that Mr. Canales's shackling claim is meritorious.

In *Deck v. Missouri*, the Supreme Court concluded:

> The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with alike force to penalty proceedings in capital cases. This is obviously so in respect to the latter two considerations mentioned, securing a meaningful defense and maintaining dignified proceedings.

Id., 125 S. Ct. at 2014. While not implicating the right to innocence directly, "shackles at the penalty phase threaten related concerns... [T]he jury is deciding between life and death. That decision, given the severity and finality of the sanction, is no less important than the decision about guilt." *Id.* (citation and internal punctuation omitted).

Because the Supreme Court's decision in *Deck* was not available when Mr. Canales filed his initial application and the trial court denied Mr. Canales's claim in a manner contravened by the more recent decision of *Deck*, Mr. Canales is entitled to further proceedings regarding his shackling claim.

X. MR. CANALES' SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE PROCESS BY WHICH BOWIE COUNTY SELECTS ITS GRAND JURIES RESULTING IN AN UNDERREPRESENTATION OF WOMEN.

The Sixth Amendment guarantees criminal defendants "a speedy and public trial, by an impartial jury . . .." This language has been interpreted to require that the panels from which petit juries are selected be drawn from a "fair cross section" of the community in which the proceedings are held. *See, e.g., Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (citing *Brown v. Allen*, 344 U.S. 443 (1953)). In states such as Texas where a grand jury system is employed, the fair cross section requirement applies to this

process as well.[18] *Atwell v. Blackburn*, 800 F.2d 502 (5th Cir. 1986), *cert. denied*, 490 U.S. 920 (1987); *Ciudadanos Unidos de San Juan v. Hidalgo County*, 622 F.2d 807, 825 (5th Cir. 1980), *cert. denied*, 450 U.S. 964 (1981); *Stanley v. State*, 664 S.W.2d 746 (Tex.App. – San Antonio 1983), *cert. denied*, 472 U.S. 1018 (1985); *Alexander v. Louisiana*, 405 U.S. 625, 635-37 (1972) (Douglas, J. dissent) (relying on *Carter v. Jury Commission*, 396 U.S. 320, 330 (1970); and *Brown v. Allen*, 344 U.S. 443, 474 (1953)); *Machetti v. Linahan*, 679 F.2d 236, 239 (11th Cir. 1982), *cert. denied*, 457 U.S. 1127 (1983).

In addition to the Sixth Amendment fair cross section requirement, the equal protection clause of the Fourteenth Amendment prohibits the discriminatory selection of the panel from which a grand jury is drawn if that process produces disproportionately unrepresentative results. *Castañeda v. Partida*, 430 U.S. 482, 494 (1977). *See also, e.g., Alexander v. Louisiana*, 405 U.S. 625 (1972); *Turner v. Fouche*, 396 U.S. 346 (1970).

Since a petitioner need not be a member of the underrepresented group in question to have standing to raise a Sixth or Fourteenth Amendment claim, there is no dispute that Mr. Canales has standing to mount these challenges. *Campbell v. Louisiana*, 523 U.S. 392 (1998); *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975)(male raising gender claim). *See also Duren v. Missouri*, 439 U.S. 357, 359 n.1 (1979); *Peters v. Kiff*, 407 U.S. 493 (1972)(white male raising claim of Blacks' absence from jury); *Powers v. Ohio*, 493 U.S. 1068 (1991); *Dobbs v. Kemp*, 790 F.2d 1499, 1510-11 (11th Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987)(male defendants have standing to raise equal protection claim that women were underrepresented on grand jury).

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[18] In felony cases, the Texas Constitution requires a grand jury to act as the charging body. TEX. CONST., art. 1, § 10.

A. Mr. Canales has Established A Prima Facie Showing Of Underrepresentation Under The Federal Constitution.

To establish a *prima facie* claim that the State has violated the fair cross section requirement, Mr. Canales must show:

- that the group alleged to be excluded is a 'distinctive' group in the community;
- that the representation of the group in *venires* from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
- that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979).[19]

Proving a *prima facie* showing of discrimination under the equal protection clause requires similar proof. A claimant must show "the procedure employed resulted in substantial underrepresentation of his race or identifiable group," by demonstrating:

- the group is a "recognizable, distinct class, singled out for different treatment under the laws, as written or as applied";
- underrepresentation of the group in the grand jury process *over a significant period of time*; and
- a selection procedure "that is susceptible of abuse **or** is not racially neutral."

Castañeda, 430 U.S. 482, 494 (1977) (emphasis added).[20]

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[19] Under this standard, "systematic" is defined by showing that the pattern recurred over time and was "inherent to the particular jury selection process utilized." *Id.* at 366.

[20] Under the equal protection clause, the claimant must also prove intentional discrimination, *see Duren, supra*, 439 U.S. at 368 n.26, while the Sixth Amendment fair cross section requirement "forbids any substantial underrepresentation of minorities, regardless of whether the State's motive is discriminatory." *Alston v. Manson*, 791 F.2d 255, 258 (2d Cir. 1986), *cert. denied*, 479 U.S. 1084 (1987).

Mr. Canales can demonstrate a *prima facie* case of discriminatory underrepresentation, under both the Sixth and Fourteenth Amendments, of females as grand jury panelees in Bowie County.

B. Women Are a Distinct Class In The Community Which Merits Constitutional Protection.

Detailed below, the process by which Bowie County selects a grand jury underrepresents women. Women have long been recognized by the courts as a "distinct class" – the exclusion of whom from possible jury service and the rest of the criminal justice system is constitutionally suspect. *See Taylor v. Louisiana*, 419 U.S. 522, 531 (1975). Thus Mr. Canales satisfies the first prong of his Sixth and Fourteenth Amendment claims.

C. Underrepresentation.

Although the Supreme Court has "never announced mathematical standards for determining the significance of underrepresentations," *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972), the Fifth Circuit and the Texas Court of Criminal Appeals have employed a statistical approach involving "standard deviation." *See Ovalle v. State*, 13 S.W.3d 774 (Tex. Crim. App. 2000); *McGinnis v. Johnson*, 181 F.3d 686 n.6 (5th Cir. 1999); *Boykins v. Maggio*, 715 F.2d 995 (5th Cir. 1983).

Under this statistical analysis, the court must first compare the actual number of women on grand juries with the expected number based on total population over a significant portion of time. The measure of the predicted fluctuations from the expected value is the standard deviation, defined as "the square root of the product of the total number in sample ... times the probability of selecting a [woman] times the probability of selecting a [man]." *Partida*, 430 U.S. at 496. In instances where the "difference between

the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." *Id.* at 496 n. 17. Such situations establish a *prima facie* case of discrimination.

In Bowie County, in the ten years prior to Mr. Canales' trial, only 220 of 536 grand jury panelees were female.[21] Exh. 69. The mean female population for the same time period was approximately 51.1.[22] Thus, one would expect to find about 274 females on Bowie County grand jury lists between 1990 and 2000.[23]

Employing the statistical method outlined by the Fifth Circuit and the Texas Court of Criminal Appeals, the standard deviation is 11.57.[24] As *Partida* and *Ovalle* make clear, if the difference between the expected number and actual number of females on Bowie County grand juries is less than three standard deviations, no *prima facie* case is established. Thus, the number of females on the grand jury lists in Bowie County would have to exceed 239 to meet constitutional muster.[25] It does not.

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[21] Information could not be found regarding one grand juror named "Dana."

[22] The percentage of women in Bowie county above the age of 18 according to the 1990 census was 52.6. The percentage in the 2000 census was 49.7.

[23] Number of grand jurors (536) multiplied by the percentage of females in the eligible pool (51.1%) = 273.896.

[24] Determined by the square root of the product of the total sample (536) multiplied by the probability of selecting a female (.511) multiplied by the probability of selecting a male (.489).

[25] 274 - (11.57 x 3) = 239.29

Clearly, the grand jury selection process in Bowie County falls well below the constitutional standard. Between the years of 1990 and 2000 only 220 females were on the grand jury lists, a result that **exceeds 4 standard deviations**.[26]

D. This Underrepresentation Is The Product Of An Unconstitutional Selection Process.

1. The Process

Between 1990 and 2000, Bowie County primarily used a "key man" system to select its grand juries. Under this system, the presiding district court judge selects between three and five grand jury commissioners. These commissioners in turn select a group of fifteen to forty grand jury panelees, from whom the judge qualifies the first twelve to make up the actual grand jury and two alternates. *See generally Castaneda v. Partida*, 430 U.S. 482 (1977).

The minimum legal qualifications for a grand juror in Texas are:

1) citizen of state and county and qualified to vote therein;

2) of sound mind and good moral character;

3) able to read and write;

4) no felony or theft convictions or current indictments.

5) not related within the third degree of consanguinity or second degree of affinity to any other person selected to serve

6) not have served as a grand juror or commissioner within the last year

7) not be a complainant in any matter heard before the grand jury

TEX. CRIM. PROC. ANN. §19.08 (Vernon 2001).

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[26] (274 - 220) / 11.57 = 4.667

This selection process is susceptible to abuse in two respects. First, judges and commissioners are predisposed to select only persons of their acquaintance, depriving the grand jury panel of a true representation of the community. Second, commissioners have unfettered discretion and little supervision in their selection of potential grand jurors, allowing them to apply their own criteria in selection and thus providing them with a "clear and easy" opportunity to discriminate. *Alexander v. Louisiana, supra*, 405 U.S. at 630. Mr. Canales' proof with respect to this process satisfies the final prong of his *prima facie* case under both the Sixth and Fourteenth Amendments.

2. The Grand Jury Selection Process is Susceptible to Abuse Because the Judges Are Allowed to Pick Commissioners and Forepersons They Know, and Commissioners Pick Panelees Whom They Know.

Historically, Texas counties' implementation of the "key man" system has been vilified by the federal courts. *See, e.g., Castañeda, supra,* 430 U.S. at 449 (though facially constitutional, "key man" system is "susceptible to abuse as applied"); *Hernandez v Texas*, 347 U.S. 475, 480; *Cassell v. Texas*, 339 U.S. 282 (1950); *Akins v. Texas*, 325 U.S. 398 (1945); *Smith v. Texas*, 311 U.S. 128 (1940). Within a constitutional system that requires fair representation of all groups in the community, the "key man" system employed by Bowie County shares the flaw of the systems employed in these cases – it allows unfettered discretion on the part of the presiding judge and commissioners. As shown, these actors exercised their discretion to produce a grand jury that underrepresents women at constitutionally significant stages of the process.

The principle flaw in the Bowie County system is that actors are allowed to select people based on the subjective fact that they know the person and believe him/her to be qualified. Judges, who select the commissioners and forepersons, and commissioners,

who selected panelees, are allowed to choose only those people with whom they are personally familiar. As the Supreme Court has repeatedly recognized, such a system is chronically susceptible to abuse because people tend to associate with others of similar backgrounds. *See Alexander v. Louisiana, supra*, 405 U.S. 625; *Guice v. Fortenberry*, 722 F.2d 276, 281 (5th Cir. 1984). In addition, since judges and the commissioners know only a fraction of the eligible population, they necessarily have a limited population of people from which to select potential jurors. In Bowie County, this sampling by association results in blatant underrepresentation of certain groups and inappropriate over representation of others.

One of the deleterious results of the Bowie County system is the frequent selection of the same people. Mr. Bill Thomas, for example, was selected as a grand juror or commissioner 4 times in a five-year period: April 1990; January 1992; July 1993; and July 1995. Mr. Bobby Shavers was selected four times in a four year span: January 1997, July 1998, April 1999; and October 2000. Exh. 69. Even over a five year period, if a random process was employed in lieu of the "key man" system, the chances of the same person being reselected 4 times out of a county with a population over 89,000 persons, are very slim.

Moreover, this repetition and close-mindedness particularly adversely affects members of minority groups. Even when women were selected, the commissioners' proclivity to repeat the same selections further deprived **all** females of their chance to serve. As in the examples above, with the "key man" process, certain women were picked more than once, to the detriment of those who were never selected. *See e.g.* Mary Dickens, October 1992 and July 1995; Molly Beth Malcolm, April 1993, April 1994, July

1995 and October 1997. Exh. 69. Thus, not only were there fewer women than there **should have** been on grand jury panels, but even within this low percentage of women sitting, the discretion-driven repetition means that there were fewer women than there **could have** been on grand jury panels.

3. Discretion-Driven Jury Selection Further Reduces Representation Of The Entire Community Because Judges And Commissioners Are Allowed To Choose Persons Based On Subjective, Unreviewable Criteria.

Not only do judges and commissioners select persons only of their own community of acquaintances, but they are allowed to decide the qualifications of persons according to subjective criteria which further limits the community representation in grand jury panels. Such a process cannot survive constitutional scrutiny. *See Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991)(A selection process "in which the circuit judge appoints the foreman on the basis of his own subjective criteria after having access to data concerning the race and sex of the [potential candidates] ... is subject to abuse." *Id.* at 1072 (*citing Guice v. Fortenberry*, 661 F.2d 496, 503 (1981)(en banc), *reh'g denied*, 726 F.2d 752 (1984)).

Jury commissioners in Bowie County are instructed to pick panelees with only the basic legal qualifications as guidelines. Because of the lack of guidelines and judicial supervision, jury commissioners invariably are allowed to use personal, subjective criteria to select panelees, including racial, political, and social motives. Indeed, the instruction to choose persons of sound mind and good moral character, without any further guidance, encourages commissioners to rely on their own, possibly biased, moral judgments.

In sum, when commissioners are allowed to apply such subjective criteria to their selections, the ideal of a grand jury panel representing a cross section of the community is mocked. This system is subject to abuse because it was "easily capable of being manipulated" when commissioners "'invoke their subjective judgment rather than objective criteria.'" *Gibson v. Zant,* 705 F.2d 1543, 1548 (11th Cir. 1983).

Through the choosing of grand jury commissioners and panelees on a personal basis and with unreviewable criteria and little supervision, Bowie County produces a system that is susceptible to abuse such that women are under-represented throughout the grand jury process. Mr. Canales has thus met the third prong of his Sixth and Fourteenth Amendment claims.

XI. THE GRAND JURY FOREPERSON'S TESTIMONY VIOLATED MR. CANALES' SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

By allowing the Grand Jury Foreman, Ms. Swanger, to testify at trial, the court violated Mr. Canales' rights under the Sixth, Eighth and Fourteenth Amendments. The testimony violated the Sixth Amendment by denying Mr. Canales the right to a fair trial in front of an impartial jury and the Eighth Amendment by injecting an impermissible unreliability into the death sentencing trial. Ms. Swanger's testimony also violated the Fourteenth Amendment by misleading the jury, and constructively denying Mr. Canales of his due process rights in finding him guilty and sentencing him on an invalid basis. *See United States v. Espinoza*, 481 F.2d 553 (5th Cir. 1973) (citing *see Russo v. United States*, 470 F.2d 1357 (5th Cir. 1972); *Clay v. Wainwright*, 470 F.2d 478 (5th Cir. 1972); *Franchi v. United States*, 464 F.2d 1035 (5th Cir. 1972); *Wheeler v. United States*, 468 F.2d 244 (9th Cir. 1972); *Garnet v. Swenson*, 459 F.2d 464 (8th Cir. 1972); *United States v. Bishop*, 457 F.2d 260 (7th Cir. 1972)); *McAffee v. Procunier*, 761 F.2d 1124, 1128 (5th

Cir. 1985) (citing *United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736, 740 (1948)). This denial of Mr. Canales' Sixth, Eighth and Fourteenth Amendment rights was highly prejudicial error, and had a substantial and injurious effect on the jury's verdict and sentencing.

A. Factual Background

The prosecutor purportedly called Ms. Swanger to testify to clear up a technical detail, but his discursive examination instead profiled the grand jury system. SR 9:115:17. Ms. Swanger testified that she had served on a Grand Jury for Bowie County, and had been given the title of "Foreman." SR 9:115. Although she did agree when prompted to respond to the prosecutor's question that "they're [sic] not any evidence that the person indicted is actually guilty, right?" and to the question that "[i]t's just - - it's a legal way for the District Attorney to be able to have a charge and proceed and do his job, right?," SR 9:116, there was no mention of the State's substantially lower burden of proof, the fact that grand juries are prosecutorial tools, and the exclusion of the defense.

The prosecutor also bolstered Ms. Swanger's credibility in assessing the criminal charges facing Mr. Canales by eliciting from her testimony about her experience in serving on the grand jury for several months and hearing "hundreds" of cases. SR 9:116. The prosecutor further prompted Ms. Swanger to agree to his leading questions to the effect that she had heard evidence presented that the indictment at been signed for Mr. Canales after be presented with evidence that "Gary Dickerson was strangled with a hand, and with an arm, and with an object unknown to the Grand Jury." SR 9:117-18.

By testifying that the Grand Jury sat for three months, heard hundreds of cases, heard evidence regarding the death at the Telford Unit, and after hearing this evidence,

concluded Mr. Canales had committed the crime, she suggested to the jury that a more experienced group of individuals, after considering the evidence, had believed Mr. Canales was guilty of the murder of Mr. Gary Dickerson. SR 9:115; 9:116-18.

B. Argument

In testifying to the grand jury's indictment, the foreperson destroyed any possibility of a fair trial. The trial jurors no longer felt the full weight on their shoulders of making an independent determination of guilt or innocence because they incorrectly believed that Mr. Canales' guilt had already been determined by an independent, experienced, if not expert, unbiased panel of grand jurors, and the trial jurors were simply affirming the status quo.

Had the grand juror testified only to the probable cause finding, it would still have violated Mr. Canales' right to a fair trial. For example, in a Washington state case, the prosecutor suggested in his closing argument that there were "incredible safeguards" against an arresting officer's perjury and that probable cause had already been established, and that if there were any question of the defendant's guilt, he would not be in court. *State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415, 420 (Wash. Ct. App. 1993). In reversing the conviction, the court explained, in citing how impermissible this type of comment was, that making this type of comment to the jury was "tantamount to arguing that guilt had already been determined." *Id.* The court went on to call the comment "flagrantly improper." *Id.*

The introduction of testimony by the Grand Jury's Foreman that went to their finding of probable cause was certainly no less improper, and was arguably more improper. Jurors in *Stith* clearly understood that a trial was an adversarial process, and

that the prosecutor was making arguments in support of the State's case against the defendant. In Mr. Canales's case, however, the jury was presented with far more persuasive evidence to the effect that his guilt had already been established. *See* SR 9:115-18. Hearing the grand jury foreperson – who is presumed not to be an advocate – testify that in an independent fact finding, a panel of unbiased individuals and fellow citizens, who had presided for three months, listening to evidence in hundreds of cases, had already made a determination of Mr. Canales' probable cause was tantamount to hearing that Mr. Canales had already been convicted at trial by twelve jurors.

The fact that this is a death penalty trial further aggravates the prejudice stemming from the grand juror's testimony. In *Caldwell v. Mississippi*, the United States Supreme Court emphasized the importance of the Eight Amendment "need for reliability in the determination that death is the appropriate punishment in a specific case." 472 U.S. 320, 320 (1985) (*citing Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)). The testimony of the grand jury foreman not only destroyed the possibility for an unbiased determination of guilt or innocence at trial, it lessened the feeling of responsibility for sentencing Mr. Canales to death.

Not only was this testimony irrelevant to a finding of guilt or innocence, it was highly prejudicial to Mr. Canales, and was an impermissible violation of his Eighth Amendment rights.

In *Caldwell*, in response to the defense argument to the jury that the defendant's life was in their hands, the State argued:

> Now, they would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

> [Defense counsel objected.]
>
> THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.
>
> ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so." *Id.*, at 21-22.

Id., at 325-26.

The Court in *Caldwell* found this was error because "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 329. Similarly, presenting the jury with testimony that another, more experienced jury had concluded Mr. Canales had committed this crime biased the petit jury and reduced its sense of responsibility.

This requirement of unbiased decisionmaking and maintaining the jury's sense of its proper responsibility preceded *Caldwell*, and many courts have applied this rationale in their analyses of death penalty cases after *Caldwell*. *See, e.g., California v. Ramos*, 463 U.S. 992, 993 (1983); *O'Dell v. Netherland*, 521 U.S. 151, 152 (1997); *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *Darden v. Wainwright*, 477 U.S. 168, 184, n.15 (1986).

Because there is a substantial likelihood that the grand jury foreperson's testimony, had an injurious effect on the jury's verdict and sentence, and deprived Mr.

Canales of his Sixth, Eighth, and Fourteenth Amendment rights, Mr. Canales' conviction and sentence should be vacated.

XII. TEXAS' CAPITAL SENTENCING SCHEME DEPRIVED MR. CANALES OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY PERMITTING A JURY TO FIND FACTS BY A STANDARD OF LESS THAN BEYOND A REASONABLE DOUBT.

During the punishment phase of Mr. Canales' trial, there was no burden of proof placed on either the State of Texas or on Mr. Canales. This permitted the jury to be arbitrary and capricious in engaging in the fact finding that was a prerequisite to its imposition of the death penalty upon Mr. Canales. Accordingly, the punishment phase at Mr. Canales' trial occurred in violation of *Ring v. Arizona*, 122 S. Ct. 2428 (2002), and entitles him to relief.

A. *Ring v. Arizona* Makes Clear That Fact-Findings Required To Justify Imposition Of The Death Penalty Must Be Made: (1) By A Jury And 2) Subject To The Beyond A Reasonable Doubt Standard.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court considered a New Jersey statute which permitted a judge add a "hate crime" enhancement to the ordinary sentence for a defendant's crime upon finding, by a preponderance of the evidence, that the crime was motivated by racial animus. *Id.* at 469-470. The Court held New Jersey's "hate crime enhancement" unconstitutional, because it permitted a judge, acting alone and using only a preponderance standard, to enhance the possible punishment for a crime outside the normal statutory range. The "hate crime enhancement," the High Court found, was not merely a sentencing factor but an "element of the crime." *Id.* at 477. The Court drew on its earlier statement in *United States v. Jones*, 526 U.S. 227, 243 n.6 (1999), that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact

(other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The Court dismissed New Jersey's argument that the hate-crime finding was merely a "sentencing factor" as semantics: "Merely using the label 'sentence enhancement' to describe the [finding] surely does not provide a principled basis" for treating it differently than the substantive elements of the crime. *Id.* at 476.

In *Ring v. Arizona*, 122 S. Ct. 2428 (June 24, 2002), the Supreme Court applied *Apprendi* to the capital sentencing context. The court drew a simple rule from *Apprendi*: "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact–no matter how the State labels it–must be found by a jury beyond a reasonable doubt." *Id.* at *9 (citing *Apprendi*, 530 U.S. at 482-83). This Court accordingly struck down the Arizona statute, which permitted a judge alone to make fact findings essential to the imposition of the death penalty. *Apprendi* and *Ring* teach that courts must look not to the "form" but the "effect" of statutory aggravating factors. The *Ring* Court stressed that there was simply no difference between a substantive element of the offense and a "sentencing factor," so long as that sentencing factor served to elevate the maximum permissible punishment. *Id.* at *10 (quoting four sections of *Apprendi* opinion to this effect, including a concurring opinion by Justice Thomas). Therefore, a "sentencing factor" which makes the defendant eligible for a more severe punishment than "the maximum authorized by a guilty verdict standing alone" is simply "the functional equivalent of an element of a greater offense" and therefore must be proven in accordance with the procedures developed for ensuring a fair and impartial decision as to the defendant's guilt. *Id.* at *11, *12 (quoting *Apprendi*, 530 U.S. at 494 n.19).

Under *Ring* and *Apprendi*, both of the factual findings set out in TEX. CODE CRIM. PROC. art. 37.071 are not mere sentencing factors. When a defendant is convicted of capital murder in Texas, the maximum punishment authorized by law is life imprisonment. The State may announce, before trial, whether it intends to pursue the death penalty. If it does not, the defendant, upon conviction, simply receives a life sentence identical to what he would have received had the State sought the death penalty unsuccessfully. TEX. CODE CRIM. PROC. art. 37.071(1). If the State seeks death, it must prove future dangerousness, and must also prove that the defendant's mitigation facts are insufficient to justify a life sentence.

The *Ring* Court noted in passing that Ring raised "no Sixth Amendment claim with respect to mitigating circumstances." *Id.* at 2437 n.4. However, the *Ring* Court cited the following passage in *Apprendi*, which describes a situation in which a mitigation finding could permissibly be made by a judge alone:

> If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone.

Apprendi, 530 U.S. at 490 n.16. In this example, the jury, as demanded by the Constitution, made all fact-findings necessary to determine the upper limit of the potential sentence for the defendant. If the judge afterward decided to reduce the sentence because of mitigation, there is no constitutional barrier to his doing so. It is permissible for a judge to "ratchet down" the defendant's punishment after the jury has properly made the fact-findings necessary to determine its upper limit; it is not

permissible for a judge to "ratchet up" the punishment beyond that authorized by the jury's fact-finding.

Thus, a state may require a jury to make a finding of future dangerousness–*immediately* rendering the defendant eligible for the death penalty–then permit a judge to decide whether mitigating evidence was sufficient to "ratchet down" the punishment.

However, Texas did not pursue this course: Under the Texas scheme, the jury must answer the mitigating special issue **in order to determine the upper range of the punishment** the defendant will receive. Although its subject matter is "mitigation," what is important, as the Supreme Court emphasized, is the "effect" of the fact-finding, not its form. Functionally, the mitigation special issue operates precisely like an element of the crime – that is to say, it determines what sentence the defendant will receive. It must be determined by a process that meets relevant Constitutional standards, and *Ring* holds that this includes a jury that is convinced beyond a reasonable doubt.

B. Mr. Canales' Sixth Amendment Rights Were Violated When The Jury Was Permitted To Make A Finding That The Mitigating Evidence He Presented Was Insufficient To Warrant A Life Sentence By A Standard Of Less Than "Beyond A Reasonable Doubt."

The requirement that juries find every element of a crime beyond a reasonable doubt "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *see also id.* at 151-54 (tracing deep historical roots of "beyond a reasonable doubt" standard). Because a jury finding increasing a defendant's maximum punishment performs a function identical to an element of a crime, a criminal defendant's Sixth Amendment right to an "impartial jury" requires that any fact-finding that makes possible "an increase in a defendant's

authorized punishment" be "found by a jury beyond a reasonable doubt." *Ring*, 122 S. Ct. at 2439.

In Mr. Canales' case, the jury did not finish with its task of determining the upper limit of Mr. Canales' "authorized punishment" until it answered *both* of the punishment-phase special issues. Therefore, each of these special issues should have been subjected to the reasonable doubt standard. The sentencing scheme under which Mr. Canales was sentenced–which assigned to him the burden of production, and assigned no burden of proof to the jury's question–does not satisfy the Constitutional requirements of the right to trial by jury as articulated in *Ring*.

C. Mr. Canales' Fourteenth Amendment Rights Were Violated When The Jury Was Permitted To Find That The Mitigating Evidence Was Insufficient To Warrant A Life Sentence By A Standard Of Less Than "Beyond A Reasonable Doubt."

The Due Process Clause of the United States Constitution and the corresponding clause of the Texas Constitution require that a jury find, beyond a reasonable doubt, the defendant's guilt of all elements of a criminal offense. In re *Winship*, 397 U.S. 358, 364 (1970). Fact findings that increase a defendant's authorized punishment are in all constitutional respects identical to elements of a crime, and therefore themselves must be found by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 476-77 (2000). Because the finding of "insufficient mitigation" required by art. 37.071 determines the upper range of authorized punishment for a Texas capital murder defendant (i.e., whether he will live or die), it must be made by a jury that is instructed under the beyond a reasonable doubt standard.

D. The Constitutional Requirement Of Heightened Reliability In Capital Sentencing Was Diminished When The Jury Was Permitted To Find That The Mitigating Evidence Was Insufficient To Warrant A Life Sentence By A Standard Of Less Than "Beyond A Reasonable Doubt."

The Eighth Amendment of the United States Constitution, which requires "heightened reliability" in capital sentencing, independently requires this exacting standard. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604, (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *see also Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact finding").

Several judges of the Supreme Court have declared that the Eighth Amendment requires jury sentencing in all capital cases. *See, e.g., Ring*, 122 S. Ct. at 2446 (Breyer, J., concurring) ("[T]he Eighth Amendment requires that a jury, not a judge, make the decision to sentence the defendant to death."); *Harris v. Alabama*, 513 U.S. 504, 515-526 (1995) (Stevens, J., dissenting) (holding that Eighth Amendment requires jury sentencing in capital cases). Because the Texas capital sentencing scheme permits a jury to make a fact-finding essential to the imposition of the death sentence by a standard of less than a reasonable doubt, it violates the Eighth and Fourteenth Amendments of the United States Constitution, Mr. Canales' death sentence must therefore be reversed.

XIII. Lethal Injection As It Is Currently Carried Out In Texas Will Produce Unnecessary Pain, Torture, And Lingering Death.

The Eighth Amendment's proscription against cruel and unusual punishment forbids the infliction of unnecessary pain in the execution of a sentence of death. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (opinion of Reed, J.); *Fierro v. Gomez*, 865 F. Supp. 1387, 1413 (N.D. Cal. 1994) (execution by lethal gas in California held unconstitutional where evidence indicated "death by this method is not instantaneous. Death is not extremely rapid or within a matter of seconds. Rather . . . inmates are likely to be conscious for anywhere from fifteen seconds to one minute from the time that the gas strikes their face" and "during this period of consciousness, the condemned inmate is likely to suffer intense physical pain" from "air hunger"; "symptoms of air hunger include intense chest pains . . . acute anxiety, and struggling to breath"), *aff'd*, 77 F.3d 301, 308 (9th Cir. 1996), *vacated on other grounds*, 519 U.S. 918 (1996). Further, "[p]unishments are cruel when they involve . . . a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). A punishment is particularly constitutionally offensive if it involves the *foreseeable* infliction of suffering. *Furman v. Georgia*, 408 U.S. 238, 273 (1973), citing *Resweber*, *supra* (had failed execution been intentional and not unforeseen, punishment would have been, like torture, "so degrading and indecent as to amount to a refusal to accord the criminal human status"). Due to the anticipated procedures by which Respondent intends to carry out Petitioner's sentence, it is not only foreseeable but also predictable that unnecessary pain, torture, and lingering death will result. The deliberate indifference to this risk of unnecessary pain violates Petitioner's Eighth Amendment rights.

A. Texas's lethal injection protocol.

The lethal injection protocol adopted and implemented by the State to administer the sentence of death by lethal injection and that will be followed against Mr. Canales is as follows.[27] The death-sentenced person is first escorted into the execution chamber and secured on a gurney. A "medically trained individual" then inserts intravenous (IV) catheters into a "suitable vein" of the person, connects an IV administration set, and starts a neutral saline solution flow. Only after this is accomplished are witnesses brought into the viewing area. *See* Exh. 77 at 14 (Defendants' Responses to Plaintiff's First Request for Production in *Raby v. Livingston*, No. 4:06-cv-00818 (S.D. Tex. Mar. 24, 2006)).

After the order to proceed is given and the death-sentenced person is given the opportunity to make a last statement, the Huntsville Unit Warden (or designee) instructs "staff" to "induce, by syringe, substances necessary to cause death." *See id.* at 15. When this order is given, the executioners step behind a wall or curtain and remotely administered drugs to the conscious inmate. *See* Leonidas G. Koniaris, et. al., *Inadequate Anesthesia in Lethal Injection for Execution*, The Lancet, Apr. 16, 2005, at 1412 (attached as Exh. 78). The saline solution flow is discontinued, and the first drug, three

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[27] Under Texas law, Defendants are given by statute the authority and duty to establish and administer a lethal injection protocol. The Texas Code of Criminal Procedure provides:

> Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time after the hour of 6 p.m. on the day set for the execution, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the institutional division of the Texas Department of Criminal Justice.

Tex. Code Crim. Proc. art. 43.14 (Vernon Supp. 2004-2005). No other specifics of the procedure are provided; however, the legislature did constrain the Defendants' discretion by providing, "No torture, or ill treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law." *Id.* art. 43.24.

grams of sodium pentothal in solution, is injected by syringe into the line. The line is then "flushed" with an injection of saline solution. Then the next drug, 100 milligrams of pancuronium bromide in solution, is injected by syringe into the line. The line is again flushed with a saline solution. Finally, the last drug, 140 milliequivalents of potassium chloride in solution, is injected by syringe into the line.[28] Upon completion of the injections, the Warden directs a physician to enter the execution chamber to pronounce death. *See* Exh. 77 at 9. No direct observation, physical examination, or electronic monitoring takes place for anesthesia purposes. Exh. 78, at 1412.

B. The chemicals

The first drug administered to Mr. Canales will be sodium pentothal. It is an ultra-short acting barbiturate that is ordinarily used to render a surgical patient unconscious for mere minutes, only in the induction phase of anesthesia, specifically so that the patient may re-awaken and breathe on his own power if any complications arise in inserting a breathing tube. Dr. Mark Heath, Assistant Professor of Clinical Anesthesia at Columbia University, submitted a declaration in connection with other litigation currently pending with respect to the State's administration of lethal injection. Dr. Heath explained the surgical use of sodium thiopental:

> When anesthesiologists use sodium pentothal, we do so for the purposes of temporarily anesthetizing patients for sufficient time to intubate the trachea and institute mechanical support of ventilation and respiration. Once this has been achieved, additional drugs are administered to maintain a "surgical depth" or "surgical plane" of anesthesia (i.e., a level of anesthesia deep enough to ensure that a surgical patient feels no pain and is unconscious). The medical utility of sodium pentothal derives from these ultrashort-acting properties: if unanticipated obstacles hinder or prevent successful intubation, patients will likely quickly regain consciousness and resume ventilation and respiration on their own.

[28] Each drug is individually lethal in the dosage called for by the protocol.

Exh. 79 at 9 (Declaration of Dr. Mark Heath, *Raby v. Livingston,* No. 4:06-cv-00818 (S.D.Tex. filed June 21, 2006)).

The second chemical involved in the lethal injection process, pancuronium bromide, also known as Pavulon, is a derivative of curare that acts as a neuromuscular blocking agent. Pancuronium bromide paralyzes all voluntary muscles, but "is not an anesthetic or sedative drug, and it does not affect consciousness." *Id.* at 6. According to Dr. Heath:

> Pancuronium bromide is a neuromuscular blocking agent. Its effect is to render the muscles unable to contract but it does not affect the brain or the nerves. It is used in surgery to ensure that there is no movement and that the patient is securely paralyzed so that surgery can be performed without contraction of the muscles. In surgery, pancuronium bromide is not administered until the patient is adequately anesthetized. The anesthetic drugs must first be administered so that the patient is unconscious and does not feel, see, or perceive the procedure. The reason that a surgical patient must be adequately anesthetized prior to administration of pancuronium bromide is that a patient would otherwise experience intense pain and suffering from the paralyzing effects of the pancuronium bromide.

Exh. 79 at 7.

The third drug injected is potassium chloride. Potassium chloride is a salt solution that induces cardiac arrest if injected in sufficiently high concentration. Like pancuronium bromide, potassium chloride has no anesthetic or sedative effect.

C. Potential complications

1. Effect of lethal injection on conscious inmate

If, for reasons that will be described below, an inmate is not rendered unconscious for the duration of the lethal injection by the first injection of sodium pentothal, the inmate will experience excruciating pain and torture as the second and third drugs are administered.

As described above, the second drug, pancuronium bromide, will act to paralyze the inmate while having no effect on the inmate's consciousness or awareness. According to Dr. Mark Heath:

> If administered alone, a lethal dose of pancuronium bromide would not immediately cause a person to lose consciousness. It would totally immobilize the person by paralyzing all voluntary muscles including the diaphragm, causing the person to suffocate to death while experiencing an intense, conscious desire to inhale. Ultimately, consciousness would be lost, but it would not be lost as an immediate and direct result of the pancuronium bromide. Rather, the loss of consciousness would be due to suffocation, and would be preceded by the torment and agony caused by suffocation. This period of torturous suffocation would be expected to last at least several minutes and would only be relieved by the onset of suffocation-induced unconsciousness.

Exh. 79, at 22. With respect to a person's perception, Dr. Dennis Geiser, the Chair of the Department of Large Animal Clinical Sciences at the College of Veterinary Medicine at the University of Tennessee, recently explained in a declaration:

> When these drugs [neuromuscular blocking agents] are used alone, the subject will perceive pain and distress, but would be unable to react to it because of muscle paralysis. Pancuronium bromide would also prevent a subject from vocalizing pain because of the paralysis of those muscles of the larynx and pharynx used to vocalize.

Exh. 80 at 7-8 (Declaration of Dr. Dennis Geiser, *Evans v. Saar*, No. 06-cv-00149-BEL (D. Md. filed Jan. 26, 2006)). In short, an injection of pancuronium bromide in a conscious person will result in the person experiencing suffocation while, due to the paralysis, being unable to express his inability to breathe or show his pain and fear in any other manner.

The intravenous injection of concentrated potassium chloride, the third drug, in an unanesthetized person causes extreme agony. This is because "[t]he vessel walls of veins are richly supplied with sensory nerve fibers that are highly sensitive to potassium ions."

Exh. 79 at 8. Thus, the mere coursing of the chemical through the veins causes excruciating pain and discomfort. *Id.* The ultimate effect of the chemical, cardiac arrest, would also be painful in a conscious person. Due to the prior administration of pancuronium bromide, however, an inmate would be unable to express the pain felt as the chemical courses through his veins to his heart and induces arrest.

The sum effect, therefore, of intravenously injecting massive dosages of pancuronium bromide and potassium chloride into an unanesthetized person is that the person will experience suffocation, followed by the excruciating pain of potassium chloride coursing through his veins, and, finally, cardiac arrest. Due to the paralytic nature of pancuronium bromide, however, the inmate will be forced into a chemical straightjacket, unable to express the fact of his suffocation while he consciously experiences the third chemical ravaging his internal organs.

2. The likelihood a person will not be rendered unconscious

Generally, if successfully delivered into the circulation in sufficient quantities, three grams of sodium thiopental causes sufficient depression of the nervous system to permit otherwise excruciatingly painful procedures to be performed without causing discomfort or distress. Exh. 79 at 8. There are many reasons, however, why an inmate may not be rendered unconscious by the first injection of sodium thiopental. These reasons have to do with (1) the characteristics of the drug; (2) human and mechanical error that are likely to occur during the administration of the lethal injection; and (3) the qualifications, training, and expertise of the persons administering the injections and monitoring the inmate for anesthetic depth.

Due to its short shelf-life in liquid form, sodium pentothal is distributed in powder form. *Id.* at 9. As a result, sodium pentothal must be mixed into a liquid solution before it can be intravenously injected. *Id.* According to Dr. Heath, "This preparation requires the correct application of pharmaceutical knowledge and familiarity with terminology and abbreviations. Calculations are also required, particularly if the protocol requires the use of a concentration of drug that differs from that which is normally used." *Id.* According to the protocol the State intend to use, however, it is not specified what qualifications or expertise is required to achieve this end, nor are there protocols governing the actual preparation of the anesthetic. Under Section IV, titled "Pre-execution Procedures," the protocol provides that "designated staff on the Huntsville Unit" are to be responsible for "ensuring the purchase, storage, and control of all chemicals used in lethal injection executions for the State of Texas." Exh. 77 at 7. It further states that "the drug team" must obtain "all of the equipment and supplies necessary to perform the lethal injection from the designated storage area." *Id.* With respect to the actual preparation of the solutions that are finally injected, the protocol states merely:

> B. Syringes for each of the lethal injection drugs shall be prepared as follows:
>
> 1. Sodium Pentothal – 30 milliliters of sodium containing 3 grams of thiopental sodium.
>
> 2. Pancuronium Bromide – 50 milliliters of solution containing 100 milligrams of pancuronium bromide.
>
> 3. Potassium Chloride – 70 milliliters of solution containing 140 milliequivalents (mEq) of potassium chloride.

Exh. 77 at 8. Mr. Canales does not know what the qualifications of the "designated staff" who must ensure the integrity of the chemicals are, and the protocol is completely silent with respect to who actually "prepares" the syringes for each injection and how they are prepared.

Human error with respect to establishing adequate venous access, properly setting up and maintaining functioning equipment throughout the procedure, and physically pushing the plungers of the syringes can also cause a failure to successfully deliver the intended dosage into the inmate's circulation. Dr. Mark Heath explains several of these potential errors in his declaration. One such possibility relevant to the State's protocol concerns the integrity of the equipment, specifically, the IV administration set. This set consists of multiple components that are assembled by hand prior to use. According to Dr. Heath:

> If the personnel who are injecting the drugs are not at the bedside but are instead in a different room or part of the room, as is the case in the Texas lethal injection procedure, multiple IV extension sets need to be inserted between the inmate and the administration site. Any of these connections may loosen and leak. In clinical practice, it is important to maintain visual surveillance of the full extent of IV tubing so that such leaks may be detected. The configuration of the death chamber and the relative positions of the executioners and the inmate may hinder or preclude such surveillance, thereby causing a failure to detect a leak.

Exh. 79 at 9-10.

Another cause of insufficient administration of anesthetic concerns the integrity of the connection between the IV administration set and the inmate's veins at the catheter. A failure to properly insert the catheter into a vein will cause the sodium thiopental that is administered to enter the surrounding tissue rather than the vein. In that event, the drug will not be delivered to the central nervous system. According to Dr. Heath, "This

condition, known as infiltration, occurs with regularity in the clinical setting. Recognition of infiltration requires continued surveillance of the IV site during the injection, and that surveillance should be performed by the individual who is performing the injection so as to permit correlation between visual observation and tactile feedback from the plunger of the syringe." *Id.*, at 10. Even if a catheter has initially been properly inserted into a vein, the catheter tip may migrate in the time between its insertion and the injection of the drugs, which would again result in infiltration. *Id.* The States' protocol requires the catheter to be inserted prior to the witnesses to the execution entering the gallery and prior to the condemned's last statements, leaving ample time for the catheter tip to migrate, particularly if the person struggles on the gurney.

Additionally, insertion of the catheter can cause perforation of the wall of the vein. *Id.* In this event, some or the entire injected drug leaves the vein through the perforation or rupture and enters the surrounding tissue, again leading to infiltration.[29] *Id.* And according to Dr. Heath, "The likelihood of rupture occurring is increased if too much pressure is applied to the plunger of the syringe during injection, because a high pressure injection results in a high velocity jet of drug in the vein that can penetrate or tear the vessel wall." *Id.* However, even without any prior damage or perforation occurring to the vein wall during insertion of the catheter, rupture, and hence infiltration, can be caused by excessive pressure on the syringe plunger during the injection. *Id.* This is a particular concern in this case, because according to the State, the persons who actually push the plungers of the syringes containing the lethal drugs have no medical training and "learned this procedure by personal observation." *See* Exh. 81 at 6-7

[29] The likelihood of this occurring is greatly increased where an inmate's veins are compromised for whatever reason, including a history of intravenous drug abuse.

(Defendants' Responses to Plaintiff's First Set of Interrogatories in *Raby v. Livingston*, No. 4:06-cv-00818 (S.D. Tex.)).

Other reasons why an insufficient delivery of the anesthetic first drug could occur during a lethal injection pursuant to the State's protocol include: (1) failure to maintain the security of the catheter; (2) failure to properly administer the flush solutions between injections of chemicals; (3) failure to properly loosen or remove the tourniquet from the arm or leg after placement of the catheter; and (4) impaired delivery due to the restraining straps on the gurney that may act as a tourniquet. Exh. 79 at 10-11.

According to Dr. Heath, these risks, present to some degree in all clinical administrations of anesthesia, are amplified when considered in the context of the State's lethal injection protocol, including:

(a) the fact that EMTs or nurses insert the IV lines without supervision by an anesthesiologists or Certified Registered Nurse Anesthetists (CRNA);

(b) the fact that the IV lines run into a separate room;

(c) the fact that the persons who insert the IV lines leave the execution chamber and have no further role in the execution process;

(d) the fact that the persons who "push" the lethal drugs have no medical training whatsoever;

(e) the fact that the persons who "push" the lethal drugs do so remotely;

(f) the fact that no attempt is made to assess anesthetic depth during the induction of general anesthesia;

(g) the fact that no personnel are present who possess the requisite training and experience to assess anesthetic depth; and

(i) the fact that the protocol lacks measures for increasing the depth of anesthesia in the event that anesthetic depth is determined to be insufficient for the administration of potassium chloride.

Id. at 11.

3. Evidence That Inmates Have Not Been Rendered Unconscious in the Past

There is ample evidence, from prior lethal injections administered both in Texas and in other states, that the conditions under which the preparation and administration of the anesthetic drug occurs are less than ideal and that inmates who have undergone lethal injection were not rendered unconscious or sufficiently anesthetized. Indeed, in cases challenging protocols similar to the instant one, federal courts around the country that have reached the ultimate merits have been convinced by the evidence that some persons may in fact have been conscious during their lethal injections. Developments in Missouri, California, Florida, and Ohio stand out in particular.

Missouri

On June 26, 2006, a federal district court in Missouri determined after an evidentiary hearing that Missouri's lethal injection procedures violated the Eighth Amendment. In the Missouri proceedings, the state officials had continuously represented that five grams of sodium pentothal were administered to inmates and that five grams had been prepared to administer to the plaintiff in that cause until the plaintiff in the case obtained chemical dispensary logs which reflected that only 2.5 grams of the barbiturate had been dispensed. The State, after initially responding that the reference to the 2.5 grams noted in the drug log was incorrect, eventually "acknowledge[d] that a mistake had in fact been made regarding the representations as to the amount of thiopental administered" and that 2.5 grams of the anesthetic had been used in the past and had been prepared to use in plaintiff's lethal injection. When the federal court inquired further, it

discovered that the only medical professional involved in the Missouri execution process and who was responsible for mixing and measuring the chemicals had dyslexia and testified that it was "not unusual for [him] to make mistakes," such as transposing numbers. Order, *Taylor v. Crawford*, No. 2:05-cv-04173-FJG at 9, 12 (W.D. Mo. June 26, 2006) (attached as Exh. 82). The court concluded that it was "apparent" there were "numerous problems." Among them, the court found:

- there was no written protocol that described which drugs would be administered, in what amounts, or defined how they will be administered, *id.* at 11;
- the protocol as it existed was not carried out consistently and was subject to change at a moment's notice, *id.*;[30]
- there was "little or no monitoring of the inmate to ensure that he has received an adequate dose of anesthesia before the other two chemicals are administered."[31]

Id. at 13.

The Court also determined that there was "little or no monitoring of the inmate to ensure that he has received an adequate dose of anesthesia before the other two chemicals are administered." *Id.*

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[30] Defendants' protocol is discretionary, not subject to public review and comment, and unpublished and is therefore likewise subject to change at moment's notice. *See* note 1, *supra*; *see also* Tex. Atty. Gen. Op. OR2001-2850 (July 2, 2001) (finding execution procedures confidential and not subject to disclosure under Public Information Act); Tex. Atty. Gen. Op. Informal Letter Ruling No. OR2003-1091 (Feb. 19, 2003); Tex. Atty. Gen. Op. Informal Letter Ruling No. OR2004-1697 (Mar. 5, 2004).

[31] Likewise, Defendants' protocol does not require monitoring nor do Defendants in fact monitor persons for anesthesia purposes during the administration of lethal injection. Exhibit 2 at 1412.

California

On December 15, 2006, a federal judge in California determined that that state's execution procedures, which are similar to Texas's, suffered from numerous deficiencies, including: (1) inconsistent and unreliable screening of execution team members; (2) a lack of meaningful training, supervision, and oversight of the execution team; (3) inconsistent and unreliable record-keeping; (4) improper mixing, preparation, and administration of sodium pentothal by the execution team; and (5) inadequate lighting, overcrowded conditions, and poorly designed facilities in which the execution team works. *Morales v. Tilton, et. al.*, 465 F.Supp.2d 972, 979-80 (N.D.Cal. Dec. 15, 2006).

The court observed:

> Given that the State is taking a human life, the pervasive lack of professionalism in the implementation of OP 770 at the very least is deeply disturbing. Coupled with the fact that the use of pancuronium bromide masks any outward signs of consciousness, the systemic flaws in the implementation of the protocol make it impossible to determine with any degree of certainty whether one or more inmates may have been conscious during previous executions or whether there is any reasonable assurance going forward that a given inmate will be adequately anesthetized.

Id. at 980. Although the court found it impossible to determine if any inmates had been conscious in the past, the court referenced "anomalies in six execution logs rais[ing] substantial questions as to whether certain inmates may have been conscious when pancuronium bromide or potassium chloride was injected." *Id.*

One of the executions not discussed by the Court in its order of February 14 was that of Robert Lee Massie, who was executed on March 27, 2001. Massie's execution was explored in detail at the evidentiary hearing. Testifying on behalf of the State, Dr. Singler opined that based upon the heart rates reflected in the execution log, Massie well

may have been awake when he was injected with potassium chloride. Significantly, Dr. Singler testified that he was unable to give a definitive opinion principally because of the poor quality of the log itself, and in particular an unclear entry in the log as to Massie's heart rate. *Id.* The judge determined, after a thorough evidentiary hearing that included a visit to the actual execution chamber, that the evidence he saw and heard was "more than adequate to establish a constitutional violation." *Id.*

Ohio

In December 2006, a federal district court in Ohio granted a preliminary injunction ordering the State of Ohio to refrain from implementing an order for the execution of a plaintiff who challenged the anticipated administration of lethal injection to him by the Ohio Department of Rehabilitation and Correction. *See* Opinion and Order, *Cooey v. Taft*, No. 2:04-cv-01156 (S.D.Ohio Dec. 21, 2006) (attached as Exh. 83). Taking judicial notice of the fact that multiple states had recently placed executions on hold due to "serious concerns over their lethal injection protocols," the district court determined that even on the limited record before it, there was "a growing body of evidence calling Ohio's lethal injection protocol increasingly into question." *Id.* at *7.

The Supreme Court recently declined the State of Ohio's request to vacate the injunctive relief granted by the district court. *See Strickland v. Biros*, ___ U.S. ___, 2007 WL 831496 (U.S. Mar. 20, 2007) (No. 06A900).

Florida

On December 13, 2006, the State of Florida, the execution protocol of which is similar to Texas's protocol,[32] encountered a problem during the administration of a lethal

[32] Like the Defendants' protocol, Florida used the three chemical cocktail: sodium pentothal, pancuronium bromide, and potassium chloride. The Florida protocol, however, calls

injection when Angel Diaz required a second administration of the three-drug chemical cocktail and took, in all, approximately 37 minutes to die. A postmortem examination of Diaz's body by the county medical examiner discovered that improper catheter insertion led to the chemicals being injected into soft tissue surrounding his vein rather than into the blood vessel itself, known in the clinical setting as infiltration. *See* Exh. 84 at 1-2 (Postmortem Examination of the Body of Angel Diaz, ME 06-589, Dec. 14, 2006). The medical examiner also observed large chemical burns on Diaz's arms, encompassing a 60-square-inch area on his right and 77-square-inch area on his left. *Id.* at 1. Consequently, Florida Governor Jeb Bush issued an executive order on December 15, 2006, establishing a commission to review Florida's lethal injection protocol, stating, "WHEREAS, the significantly lengthier death process for Mr. Diaz compared to that of other inmates who previously have been executed by lethal injection in Florida, including, according to witness accounts, a longer period of time during which Mr. Diaz lay conscious, should be considered... ." Exh. 85 (Fla. Exec. Order No. 06-260 (Dec. 15, 2006)).

Witnesses to the Diaz execution, including Diaz's lawyer and reporters, observed that Mr. Diaz appeared to be in pain during the procedure. Neal Dupree, Mr. Diaz's lawyer who was present in the execution chamber "approximately six (6) to seven (7) feet from Mr. Diaz," observed in a declaration:

> 5. Within a few minutes, Mr. Diaz became agitated, and it appeared to me that he was speaking to the members of the Department of Corrections staff. They did not appear to respond to him and I was unable to hear his part of the conversation because the intercom between the execution chamber and the observation room had been turned off. During the time Mr. Diaz appeared to be speaking, it was my observation that he

for the use of 5 grams of the anesthetic sodium pentothal compared to the Defendants' 3 grams of sodium pentothal.

was in pain. His face was contorted, and he grimaced on several occasions. His Adams Apple bobbed up and down continually, and his jaw was clenched.

6. I could observe some type of fluid flowing through the intravenous tube, and Mr. Diaz head rolled to the right. A strap had been placed across his forehead, and a member of the DOC staff held the strap. I observed Mr. Diaz' right eye to close, but his left eye remained open. His mouth opened, and Mr. Diaz appeared to be gasping for air for at least 10-12 minutes. It was apparent that the complete drug cycle had been given to Mr. Diaz, however, on several occasions over the next twenty minutes I observed movement from Mr. Diaz, and he continued to gasp heavily for air.

7. Approximately twenty minutes into the procedure, I observed two members of the DOC staff, one large black male, and a slightly smaller white male have several conversations into two separate phones. The black male had been on one phone since the initiation of the procedure, and I observed him hand that phone to the white male two times. After speaking into the first phone, the white male picked up a second phone, and had another conversation. It was apparent that something was wrong, and it was my observation that the other DOC staff members in the room looked uncomfortable at that time.

8. After a total of 25-30 minutes, Mr. Diaz' breathing appeared to get shallower. His face became slack, and his skin had a grayish pallor. During the last 5-6 minutes, both of his eyes opened and his Adam's apple slowly stopped bobbing.

Exh. 86 (Declaration of Neal A. Dupree). Similarly, reporters who observed Diaz's execution also reported their observations of Mr. Diaz's apparent pain. A St. Petersburg Times reporter observed Diaz "moving for 24 minutes, sometimes appearing in pain. He grimaced, coughed, tried to talk and licked his lips. His head eventually slipped to the right, but he kept breathing heavy, his chin bobbing and his mouth flexing like a fish out of water." Chris Tisch, *Bush Orders In-Depth Look at Diaz Execution*, St. Petersburg Times, Dec. 15, 2006, at 1A (attached as Exh. 87).[33] A Gainesville Sun reporter noted

[33] In a separate article published in the *St. Petersburg Times*, the reporter, Chris Tisch, posted his notes from the execution verbatim:

6 p.m.: Diaz turns head and mumbles his last statement. Eyes slightly bloodshot and bleary. thatch of black and white hair. Turns head back up and is strapped.

6:02: Blinks. Swallows hard. Blinks slower. Looks up at guy. Grimaces. Says something. Looks at guy. Grimacing. Talking. Looks at man. Winces eyes.

6:06: Cheek bones pinch up. Talking still. As if in pain. Wrinkled eyes. Squints. Guards act like nothing wrong.

6:07: Still wincing.

6:08: Even juts up chin and stiffens his body. Talking and tensing his body.

6:09: Still talking. Looks at guy.

6:10: Still moving mouth. Eyes closed now. Pursed lips. Shakes his head. Guard has to re-apply strap.

6:11: Mouth still moves. Eyes closed.

6:12: His head faces to the right toward audience. He coughs several times. Shudders. Face reddening.

6:13: Still breathing. His body tenses and he coughs again.

6:14: Still breathing.

6:15: Still breathing. Mouth agape. Deep breaths.

6:16: Mouth moves when breathing.

6:17: Still breathing.

6:18: Still breathing.

6:19: Unusual. Guy talking on phone. Gives phone to guy.

6:20: Still breathing.

6:24: Mouth stops moving. Had gotten shallower and shallower. Mouth and eyes open. Face drains of color.

6:26: Body jolted slightly. No more motion. Eyes open more and more. Guy again on fone.

6:34: Dr comes out.

6:35: Comes out again.

6:36: Called. 23 minutes longer than Ruth and Rolling.

that "Diaz's execution would appear to contradict" the state's claim that "the process is designed to ensure inmates are unconscious after the first drug is administered." Nathan Crabbe, *Inmate Takes 34 Minutes to Die*, Gainesville Sun, Dec. 14, 2006, available at http://www.gainesville.com/apps/pbcs.dll/article?AID=/20061214/LOCAL/612140361 (last checked Feb. 27, 2007) (attached as Exh. 89). The reporter observed, "After making his last statement at 6 p.m., Diaz appeared to wince and mouth words. Over the course of 10 minutes, he grimaced and shuddered at several junctures. He then moved his mouth in a way that made it appear he was gasping for air." *Id.*

There are several witness accounts of lethal injections that raise questions directly about Texas's protocol and administration of lethal injection as well. Some of the previous errors by the State include:

- **Stephen Peter Morin** - March 13, 1985 – The execution team punctured him repeatedly in both arms and legs for 45 minutes before they found a suitable vein.
- **Randy Woolls** – August 20, 1986 – A drug addict, Woolls had to help the execution team find a good vein for the execution.
- **Elliot Johnson** – June 24, 1987 – The execution team struggled for 35 minutes to insert the catheter into his veins.
- **Raymond Landry** -- December 13, 1988 – Pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the administration, the syringe came out of Landry's vein, spraying the chemicals across the room toward the witnesses.

Chris Tisch, *'As if in pain': Notes from Diaz Execution*, ST. PETERSBURG TIMES, Feb. 23, 2007, at 14A (attached as Exhibit 12).

The execution team had to reinsert the catheter into the vein. The curtain was drawn for 14 minutes so witnesses could not see the intermission.

- **Stephen McCoy** – May 24, 1989 – Had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnessed the execution, thought that the fainting would catalyze a chain reaction. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding, "The drugs might have been administered in a heavier dose or more rapidly."
- **Billy Wayne White** – April 23, 1992 – It took 47 minutes for the execution team to find a suitable vein, and White eventually had to help.
- **Justin Lee May** – May 7, 1992 – May had an unusually violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the Huntsville Item, Mr. May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze . . ." Associated Press reporter Michael Graczyk wrote, "He went into coughing spasms, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back if he had not been belted down. After he stopped breathing his eyes and mouth remained open."
- **Joseph Cannon** – April 22, 1998 – After his final statement, the execution commenced. A vein in Cannon's arm collapsed and the needle popped out. Seeing this, Cannon lay back, closed his eyes, and exclaimed to the witnesses, "It's come undone." Officials then pulled a curtain to block the view of

witnesses, reopening it fifteen minutes later when a weeping Cannon made a second final statement and the execution process resumed.[34]

D. Expert opinion

Dr. Mark Heath has reviewed the State's lethal injection protocol in another case and "conclude[s] to a reasonable degree of medical certainty that the Texas lethal injection procedure creates an unnecessary and medically unacceptable risk that an inmate will experience excruciating pain and suffering during the lethal injection due to the use of two execution chemicals [pancuronium bromide and potassium chloride] that are unnecessary to cause death but that cause excruciating pain and suffering." *See* Exh. 79 at 1-2.

THE BASIS OF MR. CANALES'S EIGHTH AMENDMENT CLAIM WAS PREVIOUSLY UNAVAILABLE WHEN HE FILED HIS ORIGINAL HABEAS APPLICATION.

At the time of his previous application Mr. Canales did not have access to the current expert testimony, cited above, undermining the constitutionality of the Texas lethal injection protocols. Furthermore, the moratoriums on use of the lethal injection protocols that now exist in at least nine states were not in place when Mr. Canales filed his last habeas application – a fact directly relevant to the evolving standards of decency of an Eighth Amendment claim. Indeed, several of the most relevant developments have occurred within the last six months. *See, e.g. Morales v. Hickman, supra,* (N.D. Cal. Dec. 15, 2006) (discussed above); Order of Florida Governor Jeb Bush (issued December 15, 2006).

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[34] Sources for this information include: Michael Radelet, "On Botched Executions;" Peter Hodgkinson and William Schabas (eds.), *Capital Punishment: Strategies for Abolition* (Cambridge University Press, 2001); and Stephen Trombley *The Execution Protocol*, (1992).

Currently at least nine states have halted the execution process for further review of the administration of lethal injection. *See* www.Deathpenaltyinfo.org/article.php?did=1686&scid=64 (last visited May. 10, 2007) (Maryland, Delaware, Arkansas and Missouri are awaiting federal court clarification of protocols, *see e.g. Taylor v. Crawford*, No. 05-4173-CV-C-FJG (C.D. Missouri) (attached as Exh. 82); California's protocols have been found unconstitutional, *see Morales v. Hickman,* No. C 06 219 JF RS (N.D. Cal. Dec. 15, 2006); Florida's administration of lethal injection was halted by order of the Governor, *see Order of Jeb Bush*; South Dakota is awaiting new legislation; New Jersey's lethal injection procedure was halted by court order; and Ohio currently has issued stays to several inmates with a class action challenge to lethal injection protocols pending).

PRAYER FOR RELIEF

WHEREFORE, petitioner ANIBAL CANALES, JR. prays that this Court:

1. Vacate his vacate his death sentence and conviction and remand to the trial court for further proceedings;

2. Alternatively, Mr. Canales requests that this Court authorize the trial court to consider the claims raised in this successive application, and instruct the trial court to conduct an evidentiary hearing for the purpose of examining the merits of his claims;

3. Grant any other relief that law or justice may require.

Respectfully submitted,

Meredith Martin Rountree
Law Offices of Owen & Rountree, L.L.P.
Post Office Box 40428
Austin, Texas 78704
TEL (512) 804-2661
FAX (512) 804-2685

Morris H. Moon
Texas Defender Service
412 Main Street, Suite 1150
Houston, Texas 77002
TEL (713) 222-7788
FAX (713) 222-0260

Pro Bono Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing pleading to be served by mailing, via the U.S. Postal Service, postage prepaid, a copy of the pleading to the Bowie County District Attorney, Bowie County Plaza, 601 Main Street, Texarkana, TX 75501.

STATE OF TEXAS)
)
COUNTY OF HARRIS)

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Morris Moon, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas.

2. I am the duly authorized attorney for Anibal Canales, Jr., having the authority to prepare and to verify Mr. Canales's Successor Application for Post-Conviction Writ of Habeas Corpus.

3. I have helped to prepare and have read the foregoing Successor Application for Post-Conviction Writ of Habeas Corpus, and I believe all the allegations therein to be true and correct.

Morris H. Moon

SUBSCRIBED AND SWORN TO BEFORE ME on May 21st, 2007.

Notary Public, State of Texas

Araceli Sepulveda NOTARY PUBLIC STATE OF TEXAS EXPIRES October 17, 2010

54,789-02

ExParte

Application for Writ of Habeas Corpus
From Bowie County

Anibal Canales
(Name of Applicant)

5th Judicial District Court

SUPPLEMENTAL
TRIAL COURT WRIT NO. 99F0506-005-B
CLERK'S SUMMARY SHEET

APPLICANT'S NAME: Anibal Canales
(As reflected in judgment)

OFFENSE: Capital Murder
(As reflected in judgment)

This document contains some pages that are of poor quality at the time of imaging.

CAUSE NO.: 99-F-506-5
(As reflected in judgment)

PLEA: GUILTY / NOT GUILTY / NOLO CONTENDERE (CIRCLE ONE)

SENTENCE: Death
(Terms of years reflected in final judgment)

TRIAL DATE: 11-1-2000
(Date upon which sentence was imposed)

JUDGE'S NAME: Jack Carter
(Judge presiding at trial)

APPEAL NO.: 73,988
(If applicable)

RECEIVED IN
COURT OF CRIMINAL APPEALS
AUG 17 2007
Louise Pearson, Clerk

CITATION TO OPINION: — S.W.2d —
(If applicable)

HEARING HELD: ____ YES __X__ NO
(Pertaining to the application for writ of habeas corpus)

FINDINGS & CONCLUSIONS FILED: X YES ____ NO
(Pertaining to the application for writ of habeas corpus)

RECOMMENDATION: ____ GRANT __X__ DENY ____ NONE
(Trial court's recommendation regarding application for writ of habeas corpus)

JUDGE'S NAME: Ralph Burgess
(Judge presiding over habeas corpus proceeding)

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1. Exhibit Volume I.....

2. Exhibit Volume II.....

3. Motion for Leave to File Documents under Seal.....

4. Exhibit Volume III (File Under Seal).....

5. Clerk's Certificate.....

CLERK'S CERTIFICATE

THE STATE OF TEXAS)

COUNTY OF BOWIE)

I, BILLY FOX, Clerk of the 5th District Court of Bowie County, Texas, do hereby certify that the above and foregoing are true and correct copies of the originals as on file in my office.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT at Office in New Boston, Texas, this 15th day of August, 2007.

BILLY FOX, DISTRICT CLERK
BOWIE COUNTY, TEXAS

BY: Dean Maddox
Dean Maddox, Deputy

IN THE
THE 5TH JUDICIAL DISTRICT COURT
OF BOWIE COUNTY, TEXAS

EX PARTE	§	
	§	**No. 99F0506-005-B**
	§	
ANIBAL CANALES, JR.	§	

EXHIBIT VOLUME I

THIS IS A CAPITAL CASE

Meredith Martin Rountree
Law Offices of Owen & Rountree, L.L.P.
Post Office Box 40428
Austin, Texas 78704
TEL (512) 804-2661
FAX (512) 804-2685

Morris H. Moon
Texas Defender Service
412 Main Street, Suite 1150
Houston, Texas 77002
TEL (713) 222-7788
FAX (713) 222-0260

Pro Bono Counsel

DECLARATION OF JEFF HARRELSON

I, Jeff Harrelson, pursuant to the provisions of 28 U.S.C. §1746, declare as follows:

1. I am over 18 years of age. All statements made herein are based upon my personal knowledge, and I am competent to testify hereto.

2. In addition to Paul Hoover, I represented Anibal Canales, Jr. in his capital murder trial and on appeal to the Texas Court of Criminal Appeals. I was appointed to such representation by then 5th District Court Judge Jack Carter.

3. During my representation of Mr. Canales, I had been practicing law for 4 years and I had not represented anyone in a death penalty case. My practice consisted of a general law practice, including criminal and various types of civil law. I now concentrate almost exclusively on criminal cases and I am Board Certified in Criminal Law by the Texas Board of Legal Specialization, which I obtained in 2003. Before 2002, I had not attended continuing legal education courses regarding representation in a death penalty case. During my representation of Mr. Canales, my death penalty education consisted of self-study review of death penalty manuals, treatises, and caselaw.

4. During 1997 and 1998, I was under contract to work as a part-time public defender in Circuit/Chancery/Juvenile Judge Jim Hudson's court in Miller County, Arkansas. Under this contract, I only represented juveniles in 1997 and represented juveniles and adults charged with criminal offenses in 1998.

5. During those two years, I never participated in a jury trial as public defender, although several cases settled the day of jury selection and many cases were tried to the bench. Juveniles are not entitled to a jury trial in Arkansas. Prior to Mr. Canales' trial, I had tried two civil cases and three criminal cases to a jury. Of the criminal cases, one was an arson and burglary case in Sevier County, Arkansas Circuit Court. That defendant was convicted and sentenced to the Arkansas Department of Corrections. Another involved a charge of possession of marijuana with intent to distribute (50 lbs.) in Miller County, Arkansas Circuit Court. That defendant was acquitted. The third was an arson case in Bowie County, Texas District Court. That defendant was convicted and sentenced to the Texas Department of Criminal Justice – Institutional Division. In none of those cases was I required to retain experts, nor did I have occasion to develop claims involving mental health issues

6. My role in Mr. Canales' case was to assist Paul Hoover, and our skills were complementary. I was brought into the case to assist with organizing the information, performing legal research, and assist in the trial of the case. Mr. Hoover has vast criminal law experience and his strength is in the courtroom. We shared responsibility for preparing for both phases of trial. In Mr. Canales' case, to my knowledge, Mr. Hoover had no consultation with experts, nor did our

investigation involve the use of experts.

7. Since I represented Mr. Canales, I have been lead counsel in five capital murder cases. In two of those cases, the State waived the death penalty and a third was never indicted. The State sought the death penalty in the other two. *State of Texas v. Chris Hubbard*, which also involved an alleged murder in the same Telford Unit of TDCJ-ID where Mr. Canales' case occurred, resulted in a manslaughter verdict and life sentence. A life verdict was returned after a guilty finding as to capital murder in *State of Texas v. Stephon Walter*.

8. The trial court's denial of our motion for a continuance created significant problems for us in preparing for Mr. Canales' trial. For all the reasons we told the trial court in our motion for continuance, we had not been able to properly prepare for Mr. Canales' trial and we argued that we were not going to be prepared for the scheduled trial date. Once the court denied our motion, Mr. Hoover and I both basically stopped working on our other cases and focused exclusively on Mr. Canales' case.

9. Mr. Hoover and I did not consult with or hire a mitigation specialist. I now understand that mitigation specialists are the standard of practice according to the American Bar Association's Guidelines in Death Penalty cases, as well as being mandated by the Supreme Court of the United States' opinion in *Wiggins v. Smith*. I now realize and understand how essential mitigation specialists are to investigating, developing, and presenting mitigating evidence that may persuade a jury to vote for life.

10. Neither Mr. Hoover nor I were qualified by training and experience to evaluate individuals for the presence of mental or psychological disorders or impairments.

11. Although we discussed his background and life experience with Mr. Canales, we did not develop any aspect of Mr. Canales' life before this crime in order to present testimony of same at his trial. We did not collect any records or any historical data on his life. We did not interview any family members or other people who knew him growing up.

12. We hired an investigator and his role was basically confined to serving subpoenas and photographing and filming the areas of the prison unit that were relevant to the case. To the best of my knowledge, our investigator did not perform any independent investigation or interviews of witnesses, and he never performed any kind of mitigation investigation.

13. Our mitigation evidence for Mr. Canales showed his talent as an artist, as well as his generally peaceful nature in prison, including the fact that he often mediated disagreements among other inmates. Obviously, the fact that Mr. Canales had been convicted of a murder in prison created a difficult situation for the defense regarding the future danger and mitigation special issues at punishment.

14. I now also have a greater understanding of the requirements of scientific reliability in some areas. We did not challenge the reliability of the handwriting analysis that was presented by the State in Mr. Canales' trial.

15. Certain witnesses could possibly have been impeached more comprehensively than we did at trial. Our decision not to impeach these witnesses further was not necessarily the product of a strategic decision. Instead, the impeachment reflected the acute time pressures we were under because the trial court refused to grant our continuance.

16. During Mr. Canales' trial, the prosecutors presented the foreperson of the grand jury which indicted Mr. Canales. I understood the foreperson's testimony to pertain to the alleged use allegation of an arm or object unknown to the grand jury when causing the death of another as alleged in the indictment.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

11-24-04 TEXARKANA, AR
Date and Place

Jeff Harrelson

DECLARATION OF TATMAN RYDER

I, Tatman Ryder, pursuant to the provisions of 28 U.S.C. §1746, declare as follows:

1. I am over 18 years of age. All statements made herein are based upon my personal knowledge, and I am competent to testify hereto.

2. I am a law student at the University of Texas.

3. I accompanied Meredith Martin Rountree and Morris Moon to an interview with Paul Hoover, one of the attorneys appointed to represent Anibal Canales, Jr. at his capital murder trial.

4. In the course of this interview, Mr. Hoover stated that about 65% of his caseload consists of criminal cases. This was also true when he represented Mr. Canales.

5. Mr. Hoover stated that he had never tried a death penalty case before he represented Mr. Canales. The closest he came to representing someone facing the death penalty was a defendant named Morgan who was charged with capital murder in Bowie County. Morgan pled guilty to burglary of a habitation, and never went to trial.

6. In Mr. Canales' case, Mr. Hoover and Mr. Harrelson conducted all the interviews. They did not work with a mitigation specialist or any other experts. They did not conduct any interviews or investigation of Mr. Canales' family.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

11/23/04
Date and Place
Meredith Rountree's office

Tatman Ryder
Tatman Ryder

PAUL D. HOOVER & ASSOCIATES

ATTORNEYS AT LAW
2501 SUMMERHILL ROAD
TEXARKANA, TX 75501

PAUL D. HOOVER
GREGORY A. HOOVER

TEL. (903) 794-2501
FAX. (903) 792-2434

August 1, 2000

Honorable Jack Carter
5th Judicial District Judge
Bi-State Justice Building
Texarkana, TX 75501

Re: The State of Texas vs. Anibal Canales
Cause No. 99F0506-005

Dear Judge Carter:

Despite my request, Mr. Canales has not been moved back to the Telford Unit. It is critical that Mr. Harrelson and I have him here so that our communication an be constant and our representation effective. Please advise as to whether we should file a writ or whether perhaps your interaction would be all that is required.

I await to hear from you soon.

Yours very truly,

PAUL D. HOOVER & ASSOCIATES

Paul D. Hoover/dp

Paul D. Hoover

PDH:dp

cc: Mr. Jeff Harrelson, Esq.
Mr. Anibal Canales

JACK CARTER
DISTRICT JUDGE, 5TH JUDICIAL DISTRICT OF TEXAS
BOWIE AND CASS COUNTIES

BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE
TEXARKANA, TEXAS 75501
(903) 798-3004

August 2, 2000

Mr. Wayne Scott
Executive Director
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
P. O. Box 99
Huntsville, Texas 77342-0099

Re: State of Texas vs. Anibal Canales; Cause No. 99-F-0506-005
In the District Court of Bowie County, Texas

Dear Sir:

The above defendant is presently indicted in Bowie County, Texas for the offense of capital murder. His trial is scheduled in October of this year. This case originates from the Barry Telford Unit located in New Boston, Bowie County, Texas. This defendant is indicted with killing another inmate in the penitentiary.

This case has been set in my court and at the time of that setting this defendant was incarcerated at the Barry Telford Unit in New Boston. Since that time, it is my understanding that this defendant has been transferred to another unit. It is imperative that this defendant remain or be transferred to New Boston, Barry Telford Unit. The attorneys representing this defendant must have full access to him to prepare properly for trial.

Please see that this inmate is transferred to the New Boston unit so that we can proceed with the trial of this case. Thank you for your assistance.

Very truly yours,

Jack Carter

JC:wb

cc: Mr. Mark Mullin
SPECIAL PROSECUTION UNIT
340 Hwy. 75 N., Suite A
Huntsville, Texas 77320

Mr. Paul Hoover
Attorney at Law
2501 Summerhill Road
Texarkana, Texas 75501

Mr. Jeff Harrelson
DOWD, HARRELSON, MOORE & GILES
P. O. Box 2631
Texarkana, Texas 71854

Mr. Richard N. Dodson
Attorney at Law
P. O. Box 3257
Texarkana, Texas 75504

Mr. W. David Carter
MERCY, CARTER & ELLIOTT
1730 Galleria Oaks Drive
Texarkana, Texas 75503

412 082 498

PAUL D. HOOVER & ASSOC
ATTORNEYS AT LAW
2501 SUMMERHILL ROAD
TEXARKANA, TX 75501

PAUL D. HOOVER
GREGORY A. HOOVER
DEBBIE PIRKEY - LEGAL ASSISTANT

US Postal Service
Receipt for Certified Mail
No Insurance Coverage Provided.
Do not use for International Mail (See reverse)

Sent to	Ms. Dorothy Albright
Street & Number	P.O. Box 4005
Post Office, State, & ZIP Code	Huntsville TX
Postage	$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, & Addressee's Address	
TOTAL Postage & Fees	$
Postmark or Date	1-15-02

PS Form 3800, April 1995

January 15, 2002

Ms. Dorothy Albright
State Counsel for Offenders
Administrative Services
P.O. Box 4005
Huntsville, Texas 77342-4005

Re: State of Texas vs. Anibal Canales
Bowie County District Cause No. : 99-F-506-5

Dear Ms. Albright:

Enclosed please find the original **Order for Attorney's Fees and Expenses**, with conflict of interest statement therein, **Application for Payment of Claim Against the State of Texas** and **Attorney Fees Expense Claim**. This is the final and only claim for this appointment. Please place this claim in line for payment at your earliest convenience.

Thank you for your assistance in this regard. Should you have any questions, please do not hesitate to give me a call.

Yours very truly,

PAUL D. HOOVER & ASSOCIATES

Paul D. Hoover

PDH:dp
Enclosures
CRRR - # P 412 082 498

02

Form 3A06-6.07
(Rev. 6/2001)

APPLICATION FOR PAYMENT OF CLAIM AGAINST THE STATE OF TEXAS

TYPE OF CLAIM (please check one)

INSTRUCTIONS ON REVERSE

☐ Void Warrant ☐ Unpaid Bill ☑ Other Attorney's Fees for Representing Anibal Canales TDCJ # 696334

(Please type or print)

Claimant's Name (Legal Name of Individual or Business)	
Paul D. Hoover, Attorney at Law	
Mailing Address (P.O. Box, Street, City, State & Zip Code + Four)	
2501 Summerhill Road, Texarkana, Texas 75501	
Claimant's Social Security Number or Business Sales or FEI #	
430-98-8048 - EIN 75 2602022	
Claimant's Telephone Number	Amount of Claim
(903) 794-2501	25,162.50

Specific Reason for Claim

For Void Warrant(s): List specific identification of goods, services, refund or other items for which the warrant(s) were originally issued

Supporting Documentation (Please List)

1. Order Appointing Attorney
2. Order w/Statement Attached
3. Attorney Fee Expense Claim
4. _____

CERTIFICATION

I certify that the information I have furnished on this form is true and correct. I certify that the amount of this claim is still outstanding and is due and payable.

Complete Application and Mail to:

See address on Fax Cover Sheet

For questions, contact Dolores Fojtasek at 1-800-531-5441 extension 3-4724 or (512) 463-4724
email: dolores.fojtasek@cpa.state.tx.us

Date: 1/15/2002

Sign Here: _____
(Claimant's Signature)

Paul D. Hoover
(Print name)

Attorney
(Title)

ATTORNEY FEES EXPENSE CLAIM

UNDER ARTICLE 26.05 CODE OF CRIMINAL PROCEDURE AS AMENDED
and ARTICLE 51.10 (a), FAMILY CODE

INSTRUCTIONS

1. SHOW ONLY ONE DEFENDANT AND TYPE OF CASE PER CLAIM
2. ATTORN[illegible] ATTORNEY'S FEES, EACH ITEM MUST BE COMPLETED LEGIBLY IN INK
3. CHECK THE TYPE OF SERVICE PERFORMED IN THE APPROPRIATE BLOCK
4. SET IN THE NUMBER OF HOURS EXPENDED FOR EACH TYPE OF SERVICE PERFORMED. FRACTIONS OF AN HOUR SHOULD BE EXPRESSED IN DECIMALS. FOR EXAMPLE, 30 MINUTES SHOULD BE EXPRESSED AS .5 OF AN HOUR, AND 45 MINUTES AS .75 OF AN HOUR. DO NOT INCLUDE TIME SPENT IN OUT OF COURT HOURS SPENT IN CASE PREPARATION
5. FORWARD COMPLETED CLAIM TO THE PRESIDING JUDGE FOR APPROVAL

COURT APPEARANCE INFORMATION

DEFENDANT
Anibal Canales
TDCJ # 696334

CASE NUMBER
Bowie County District Court
Cause No. 99-F-506-5
State vs. Canales

TYPE OF SERVICE	COURT RULE	HOURLY RATE	HOURS	AMOUNT
I. IN COURT.				
UNCONTESTED PROCEEDINGS				
☐ Guilty Plea	[illegible]	$ /Day		$
☐ Juvenile Disposition	26.05 [illegible]	$ /Day		$
☐ Motion Revocation	26.05 [illegible]	$ /Day		$
☐ Other (Specify, below)				$
CONTESTED PROCEEDINGS				
☐ Hearings Trial	26.05 [illegible]	$ /Day		$
☐ Juvenile Hearing	26.05 [illegible]	$ /Day		$
☐ Juvenile Detention Hearing	26.05 [illegible]	$ /Day		$
☐ Probation Revocation	26.05 [illegible]	$ /Day		$
☐ Motion Hearings	26.05 [illegible]	$ /Day		$
☐ Other (Specify, below)				$
JURY TRIAL				
XX Criminal	26.05 [illegible]	$125.00 $1500/Day*	$137.50	$13,750.00
☐ Juvenile	26.05 [illegible]	$ $1500/Day*		$
APPEAL				
☐ Criminal	26.05 [illegible]	$400		$
☐ Juvenile	26.05 [illegible]	$400		$
II. OUT OF COURT				
XX Case preparation	26.05 [illegible]	$100.00	$93.3	$11,662.50
* to be set by Court			TOTAL	$25,412.50

(Other fees with type of service performed)

Less Paid by Bowie County $ (250.00)

TOTAL $25,162.50

PERSONAL INFORMATION

SOCIAL SECURITY NUMBER	TELEPHONE NUMBER	BAR CARD NUMBER
430-88-8049	(903) 794-2501	#09967300

MAILING ADDRESS (Number, Name, City, State, Zip Code)
2501 Summerhill Road Texarkana, Texas 75501

CERTIFICATION

I, Paul D. Hoover, Attorney at Law, [illegible] the above styled cause, [illegible] representing the Defendant, [illegible] the above Defendant has not [illegible] for representing the Defendant.

[signature]

(The foregoing Attorney Fees Expense Claim is formally approved and payment ordered from the General Fund of Bowie County.)

NO. 99-F-506-5

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	OF _____
	§	
ANIBAL CANALES	§	BOWIE COUNTY, TEXAS

ORDER FOR ATTORNEY'S FEES AND EXPENSES

On February 7, 2000, it was made known to the Court that the Defendant, Anibal Canales, was charged with the offense of Capital Murder, in which the State of Texas would seek the death penalty, and that Defendant was unable to employ an attorney to represent him. It appearing that a conflict of interest exists with the State Counsel for Offenders Office necessitating the appointment of local counsel, it was **ORDERED** by the Court that Paul Hoover, practicing attorney of this Court, be appointed to represent the Defendant in the above cause.

On this day was considered by the Court the Motion to Authorize Attorney Fees, and the Court being of the opinion such fees are reasonable and thus that the motion is well taken,

IT IS, THEREFORE, ACCORDINGLY ORDERED that Paul Hoover, attorney appointed in this cause, be paid by Bowie County $ 250.00 for services rendered.

IT IS FURTHER ORDERED that the State Comptroller of Public Accounts pay the remainder of all sums earned by Paul Hoover, $ 25,162.50, shown on the statement herein below recited and incorporated within this order.

Date	Activity	Time	Rate	Fee	Balance
2-11-00	Phone conf. with Jeff Harrelson re: appointment	.2	100.00	20.00	20.00
2-14-00	R&R letter from A. Canales	.1	100.00	10.00	30.00
2-28-00	R&R letter from Judge Carter re: appointment and fee schedule	.3	100.00	30.00	60.00
3-2-00	R&R copy of Order of Appointment and Indictment from District Clerk	.7	100.00	70.00	130.00
3-13-00	R&R letter from A. Canales	.2	100.00	20.00	150.00
3-28-00	R&R letter from J. Thomas re: hearing setting of 4-20-00	.2	100.00	20.00	170.00
4-20-00	Travel to New Boston, Texas, meeting with Judge Carter, all counsel, meet with client, R&R Amended Indictment, Arraignment	3 IC 2.7 OC	125.00 100.00	37.50 270.00	207.50 477.50

5-2-00	R&R letter, Motion, and Brief from Prosecutor re joint trials of co-defendants in death penalty cases, review cited cases & case law on this issue	2.0	100.00	200.00	677.50
5-8-00	R&R State's letter, Motion and Brief following phone conference	.2	100.00	20.00	697.50
5-10-00	R&R letter and received case file from R. Brothers (OOC)	.5	100.00	50.00	747.50
5-10-00	R&R fax from R. Brothers re: discovery motion following phone conference	1.0	100.00	100.00	847.50
6-14-00	Draft letter to A. Canales	.2	100.00	20.00	867.50
6-21-00	R&R letter & proposed jury charge from prosecutor, research re: jury charge	2.0	100.00	200.00	1,067.50
7-27-00	R&R fax from D. Carter re: Speer's Motion for Severance & Speer's Response to State's Motion for Joint Trial, phone conference with D. Carter	.8	100.00	80.00	1,147.50
7-31-00	R&R letter from D. Carter to Judge Carter re Order setting evidentiary hearing re: severance	.2	100.00	20.00	1,167.50
8-1-00	Draft letter to Judge Carter re: Canales not at Telford	.1	100.00	10.00	1,177.50
8-2-00	R&R letter from Judge Carter to TDCJ re: Canales move to Telford	.1	100.00	10.00	1,187.50
8-17-00	R&R letter from D. Carter to M. Mullin re: meeting of 8-23-00	.2	100.00	20.00	1,207.50
8-18-00	R&R letter to Judge Carter from TDCJ re: Canales move to Telford	.1	100.00	10.00	1,217.50
8-23-00	R&R materials from meeting with J. Harrelson, M. Mullin, A.P. Merrillat, D. Carter & R. Dodson	3.0	100.00	300.00	1,517.50
9-10-00	R&R letter from Canales re: back at Telford	.1	100.00	10.00	1,527.50
9-15-00	R&R witness list from prosecutor, match witnesses with discovery	2.0	100.00	200.00	1,727.50
9-19-00	Travel to Telford with J. Harrelson, meet with Canales	3.0	100.00	300.00	2,027.50
9-20-00	Office conference with J. Harrelson	2.0	100.00	200.00	2,227.50
9-20-00	Review prison gang research	3.0	100.00	300.00	2,527.50
9-22-00	R&R jury list & writ from District Clerk	1.0	100.00	100.00	2,627.50
9-28-00	R&R additional discovery, State's Notice to Introduce Evidence, & jury questionnaire from prosecutor, Conference with J. Harrelson	1.4	100.00	140.00	2,767.50

10-5-00	R&R Motion & Order for Investigator Expenses, Travel to New Boston, Texas for pre-trial hearing, R&R addendum re: State's Notice, conference with J. Harrelson	1.0 IC 3.7 OC	125.00 100.00	125.00 370.00	2,892.50 3,262.50
10-6-00	Draft letter to Telford, Travel to Telford, meet with Canales	4.0	100.00	400.00	3,662.50
10-7 & 8-00	Conference with J. Harrelson re: videos, witnesses	8.0	100.00	800.00	4,462.50
10-9-00	Travel to Telford, conference with Canales	5.0	100.00	500.00	4,962.50
10-10-00	Review Discovery, Phone conf. J. Harrelson re:filming with Dennis Waters	3.0	100.00	300.00	5,262.50
10-11-00	R&R J. Harrelson letter to M. Mullin, phone conference with J. Harrelson, Review documentary evidence and videos, prepare examinations of witnesses	9.0	100.00	900.00	6,162.50
10-12-00	Review documentary evidence and videos, prepare examinations of witnesses	9.0	100.00	900.00	7,062.50
10-13-00	Review documentary evidence and videos, prepare examinations of witnesses, R&R additional discovery	9.0	100.00	900.00	7,962.50
10-14-00	Review documentary evidence and videos, prepare examinations of witnesses	9.0	100.00	900.00	8,862.50
10-15-00	R&R Order of Discovery, R&R additional pre-trial motions, Review documentary evidence and videos, prepare examinations of witnesses	9.0	100.00	900.00	9,762.50
10-16-00	R&R letter to TDCJ, R&R Order Denying Continuance, Travel to New Boston, Texas, general voir dire, R&R jury questionnaires for 10-17-00	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	10,762.50 11,262.50
10-17-00	Travel to New Boston, Texas, general voir dire, R&R jury questionnaires for 10-18-00, R&R additional discovery	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	12,262.50 12,762.50
10-18-00	Travel to New Boston, Texas, individual voir dire, R&R jury questionnaires for 10-19-00, Draft additional subpoena applications, R&R Motion for Discovery	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	13,762.50 14,262.50
10-19-00	Travel to New Boston, Texas, individual voir dire, review jury questionnaires for 10-20-00	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	15,262.50 15,762.50
10-20-00	Travel to New Boston, Texas, individual voir dire, R&R jury questionnaires for 10-23-00	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	16,762.50 17,262.50
10-23-00	Travel to New Boston, Texas, individual voir dire, R&R jury questionnaires for 10-24-00, travel to Telford for inmate/witness interviews, R&R letter to TDCJ	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	18,262.50 18,762.50

10-24-00	Travel to New Boston, Texas, individual voir dire, trial begins	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	19,762.50 20,262.50
10-25-00	Travel to New Boston, Texas, trial	8.0 IC	125.00	1,000.00	21,262.50
10-26-00	Travel to New Boston, Texas, trial, R&R additional subpoena application	8.0 IC 1.0 OC	125.00 100.00	1,000.00 100.00	22,262.50 22,362.50
10-27-00	Travel to New Boston, Texas, trial, verdict	8.0 IC	125.00	1,000.00	23,362.50
10-30-00	R&R additional subpoena applications, Travel to Telford, meet with Canales and witnesses	5.5 OC	100.00	550.00	23,912.50
10-31-00	Travel to New Boston, Texas, trial (punishment)	8.0 IC	125.00	1,000.00	24,912.50
11-1-00	Travel to New Boston, Texas, trial, (punishment), verdict	4.0	125.00	500.00	25,412.50
	TOTAL:				25,412.50

IT IS SO ORDERED.

Signed this 13 day of Dec., 2001.

Jack Carter
5th District Court Judge

HARRELSON, MOORE & GILES
ATTORNEYS AT LAW
1206 STATE LINE AVENUE P.O. BOX 2631
TEXARKANA, ARKANSAS 75504-2631

JOHN O. MOORE (1936-1980)
GENE HARRELSON
MARSHALL H. MOORE
GREGORY L. GILES
JEFFREY S. HARRELSON

ALL ATTORNEYS LICENSED IN ARKANSAS AND TEXAS

TELEPHONE: (870) 774-5191
FAX: (870) 773-1102
E-MAIL: firm@dhmglaw.com
INTERNET: www.lawyers.com/dhm&g

January 14, 2002

Ms. Dorothy Albright
State Counsel for Offenders
Administrative Services
P.O. Box 4005
Huntsville, Texas 77342-4005

Re: ***State of Texas vs. Anibal Canales***
Bowie County District Court No.: 99-F-506-5

Dear Ms. Albright:

Enclosed please find the original **Order for Attorney's Fees and Expenses,** with conflict of interest statement therein, **Application for Payment of Claim Against the State of Texas,** and **Attorney Fees Expense Claim**. This is the final and only claim for this appointment. Please place this claim in line for payment at your earliest convenience.

Thank you for your assistance in this regard. Should you have any questions, please do not hesitate to give me a call.

Sincerely,

Jeff Harrelson

JH:dr
Enclosures

Form 3A06-6-07
(Rev 5/2001)

APPLICATION FOR PAYMENT OF CLAIM AGAINST THE STATE OF TEXAS

TYPE OF CLAIM (please check one)

INSTRUCTIONS ON REVERSE

☐ Void Warrant ☐ Unpaid Bill ☒ Other Attorney fees for representing ANIBAL CANALES TDCJ # 696334

(Please type or print)

Claimant's Name (Legal Name of Individual or Business)

Jeff Harrelson, Attorney at Law

Mailing Address (P.O. Box, Street, City, State & Zip Code + Four)

P.O. Box 2631, Texarkana, AR 71854

Claimant's Social Security Number or Business Sales or FEI #

452-77-0414

Claimant's Telephone Number

(870) 774-5191

Amount of Claim

$27,660.50

Specific Reason for Claim

For Void Warrant(s): List specific identification of goods, services, refund or other items for which the warrant(s) were originally issued

Supporting Documentation (Please List)

1. Order Appointing Attorney
2. Order with Statement Attached
3. ATTORNEY FEE EXPENSE CLAIM
4.

CERTIFICATION

I certify that the information I have furnished on this form is true and correct. I certify that the amount of this claim is still outstanding and is due and payable.

Complete Application and Mail to:

Ms. Dorothy Albright
State Counsel for Offenders
Administrative Services
P.O. Box 4005
Huntsville, Texas 77342-4005

For questions, contact Dolores Fojtasek at 1-800-[illegible] extension 3-4724 or (512) 463-4724
email: dolores.fojtasek@cpa.state.tx.us

Date: 1-14-2003

Sign Here: [signature] (Claimant's Signature)

JEFF HARRELSON (Print name)

ATTORNEY (Title)

COPY

ATTORNEY FEES EXPENSE CLAIM

UNDER ARTICLE 26.05 CODE OF CRIMINAL PROCEDURE AS AMENDED
and ARTICLE 51.10 FAMILY CODE

INSTRUCTIONS

1. Show only one defendant and type of case per claim.
2. Attach payment cards authorized. Each itemized or computed expense must be listed.
3. Check the type of service rendered in the appropriate box.
4. Fill in the number of hours expended for each type of service rendered. Fractions of hours should be stated in tenths. Expenditures for investigation, expert witnesses, travel, and other direct expenses must be listed and itemized.
5. Forward completed claim to the presiding judge for approval.

COURT APPEARANCE INFORMATION

DEFENDANT: ANIBAL CANALES
TDCJ #696534

CASE NUMBER: BOWIE COUNTY DISTRICT COURT # 99-F-506-5

TYPE OF SERVICE	RATE	HOURS	AMOUNT
I. IN COURT			
UNCONTESTED PROCEEDINGS			
CONTESTED PROCEEDINGS			
☑	$125.00	137.50	13,750.00
APPEAL			
II. OUT OF COURT			
☑	$100.00	93.3	11,662.50
		TOTAL	25412.50 + 2,500.00

$2,500.00 INVESTIGATOR EXPENSES PAID BY THIS ATTORNEY

$27,912.50
- 250.00 PAID BY BOWIE CO.
$27,662.50
AMOUNT OF CLAIM

PERSONAL INFORMATION

452-77-0414	(870) 774-5191	00798241

1206 STATE LINE AVE TEXARKANA AR 71854

CERTIFICATION

I, JESSE HARRELSON

NO. 99-F-506-5

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	OF
	§	
ANIBAL CANALES	§	BOWIE COUNTY, TEXAS

ORDER FOR ATTORNEY'S FEES AND EXPENSES

On February 29, 2000, it was made known to the Court that the Defendant, Anibal Canales, was charged with the offense of Capital Murder, in which the State of Texas would seek the death penalty, and that Defendant was unable to employ an attorney to represent him. The Court had previously appointed Paul Hoover on February 7, 2000, but the Court is of the opinion that Defendant should have a second-chair attorney, and it appearing that a conflict of interest exists with the State Counsel for Offenders Office necessitating the appointment of local counsel, it was **ORDERED** by the Court that Jeff Harrelson, practicing attorney of this Court, be appointed to represent the Defendant in the above cause.

On this day was considered by the Court the Motion to Authorize Attorney Fees, and the Court being of the opinion such fees are reasonable and thus that the motion is well taken,

IT IS, THEREFORE, ACCORDINGLY ORDERED that Jeff Harrelson, attorney appointed in this cause, be paid by Bowie County $ 250.00 for services rendered.

IT IS FURTHER ORDERED that the State Comptroller of Public Accounts pay the remainder of all sums earned by Jeff Harrelson, $ 27,662.50, shown on the statement herein below recited and incorporated within this order.

Date	Activity	Time	Rate	Fee	Balance
2-11-00	Phone conference with Paul Hoover re: appointment	.2	100.00	20.00	20.00
2-14-00	R&R letter from A. Canales to P. Hoover	.1	100.00	10.00	30.00
2-28-00	R&R letter from Judge Carter re: appointment and fee schedule	.3	100.00	30.00	60.00
3-2-00	R&R copy of Order of Appointment and Indictment from District Clerk	.7	100.00	70.00	130.00
3-13-00	R&R letter from A. Canales to P. Hoover	.2	100.00	20.00	150.00
3-28-00	R&R letter from J. Thomas re: hearing setting of 4-20-00	.2	100.00	20.00	170.00

4-20-00	Travel to New Boston, Texas, meeting with Judge Carter, all counsel, meet with client, R&R Amended Indictment, Arraignment	.3 IC 2.7 OC	125.00 100.00	37.50 270.00	207.50 477.50
5-2-00	R&R letter, Motion, and Brief from Prosecutor re: joint trials of co-defendants in death penalty cases, review cited cases & case law on this issue	2.0	100.00	200.00	677.50
5-8-00	Faxed State's letter, Motion and Brief to P. Hoover following phone conference	.2	100.00	20.00	697.50
5-10-00	R&R letter and received case file from R. Brothers (OOC)	.5	100.00	50.00	747.50
5-10-00	R&R fax from R. Brothers re: discovery motion following phone conference	1.0	100.00	100.00	847.50
6-14-00	R&R letter from P. Hoover to A. Canales	.2	100.00	20.00	867.50
6-21-00	R&R letter & proposed jury charge from prosecutor, research re: jury charge	2.0	100.00	200.00	1,067.50
7-27-00	R&R fax from D. Carter re: Speer's Motion for Severance & Speer's Response to State's Motion for Joint Trial, phone conference with D. Carter	.8	100.00	80.00	1,147.50
7-31-00	R&R letter from D. Carter to Judge Carter re: Order setting evidentiary hearing re: severance	.2	100.00	20.00	1,167.50
8-1-00	R&R letter from P. Hoover to Judge Carter re: Canales not at Telford	.1	100.00	10.00	1,177.50
8-2-00	R&R letter from Judge Carter to TDCJ re: Canales move to Telford	.1	100.00	10.00	1,187.50
8-17-00	R&R letter from D. Carter to M. Mullin re: meeting of 8-23-00	.2	100.00	20.00	1,207.50
8-18-00	R&R letter to Judge Carter from TDCJ re: Canales move to Telford	.1	100.00	10.00	1,217.50
8-23-00	Meeting with M. Mullin, A.P.. Merrillat, D. Carter & R. Dodson at D. Carter's office. Recieved videos and additional discovery materials	3.0	100.00	300.00	1,517.50
9-10-00	R&R letter from Canales re: back at Telford	.1	100.00	10.00	1,527.50
9-15-00	R&R witness list from prosecutor, match witnesses with discovery	2.0	100.00	200.00	1,727.50
9-19-00	Travel to Telford with P. Hoover, meet with Canales	3.0	100.00	300.00	2,027.50
9-20-00	Office conference with P. Hoover	2.0	100.00	200.00	2,227.50
9-20-00	Conference with S. Rommel re: prison gang research, review prison gang research	3.0	100.00	300.00	2,527.50
9-22-00	R&R jury list & writ from District Clerk	1.0	100.00	100.00	2,627.50

9-28-00	Phone conference with M. Mullin, R&R additional discovery, State's Notice to Introduce Evidence, & jury questionnaire from prosecutor, Conference with P. Hoover	1.4	100.00	140.00	2,767.50
10-5-00	Draft Motion & Order for Investigator Expenses, Travel to New Boston, Texas for pre-trial hearing, R&R addendum re: State's Notice, conference with P. Hoover	1.0 IC 3.7 OC	125.00 100.00	125.00 370.00	2,892.50 3,262.50
10-6-00	Draft letter to Telford, Travel to Telford, meet with Canales	4.0	100.00	400.00	3,662.50
10-7 & 8-00	Conference with P. Hoover re: videos, witnesses	8.0	100.00	800.00	4,462.50
10-9-00	Travel to Telford, conference with Canales	5.0	100.00	500.00	4,962.50
10-10-00	Travel to Telford, filming with Dennis Waters	3.0	100.00	300.00	5,262.50
10-11-00	Draft letter to M. Mullin, phone conference with prosecutor, Review documentary evidence and videos, prepare examinations of witnesses	9.0	100.00	900.00	6,162.50
10-12-00	Review documentary evidence and videos, prepare examinations of witnesses	9.0	100.00	900.00	7,062.50
10-13-00	Review documentary evidence and videos, prepare examinations of witnesses, R&R additional discovery	9.0	100.00	900.00	7,962.50
10-14-00	Review documentary evidence and videos, prepare examinations of witnesses	9.0	100.00	900.00	8,862.50
10-15-00	Draft Order of Discovery, Draft additional pre-trial motions, Review documentary evidence and videos, prepare examinations of witnesses	9.0	100.00	900.00	9,762.50
10-16-00	Draft letter to TDCJ, Draft Order Denying Continuance, Travel to New Boston, Texas, general voir dire, R&R jury questionnaires for 10-17-00	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	10,762.50 11,262.50
10-17-00	Travel to New Boston, Texas, general voir dire, R&R jury questionnaires for 10-18-00, R&R additional discovery	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	12,262.50 12,762.50
10-18-00	Travel to New Boston, Texas, individual voir dire, R&R jury questionnaires for 10-19-00, Draft additional subpoena applications, Draft Motion for Discovery	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	13,762.50 14,262.50
10-19-00	Travel to New Boston, Texas, individual voir dire, review jury questionnaires for 10-20-00	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	15,262.50 15,762.50
10-20-00	Travel to New Boston, Texas, individual voir dire, R&R jury questionnaires for 10-23-00	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	16,762.50 17,262.50

10-23-00	Travel to New Boston, Texas, individual voir dire, R&R jury questionnaires for 10-24-00, travel to Telford for inmate/witness interviews, Draft letter to TDCJ	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	18,262.50 18,762.50
10-24-00	Travel to New Boston, Texas, individual voir dire, trial begins	8.0 IC 5.0 OC	125.00 100.00	1,000.00 500.00	19,762.50 20,262.50
10-25-00	Travel to New Boston, Texas, trial	8.0 IC	125.00	1,000.00	21,262.50
10-26-00	Travel to New Boston, Texas, trial, Draft additional subpoena application	8.0 IC 1.0 OC	125.00 100.00	1,000.00 100.00	22,262.50 22,362.50
10-27-00	Travel to New Boston, Texas, trial, verdict	8.0 IC	125.00	1,000.00	23,362.50
10-30-00	Draft additional subpoena applications, Travel to Telford, meet with Canales and witnesses	5.5 OC	100.00	550.00	23,912.50
10-31-00	Travel to New Boston, Texas, trial (punishment)	8.0 IC	125.00	1,000.00	24,912.50
11-1-00	Travel to New Boston, Texas, trial, (punishment), verdict	4.0 IC	125.00	500.00	25,412.50
	Reimbursement of Investigator expenses			2,500.00	27,912.50

IT IS SO ORDERED.

Signed this 13 day of Dec., 2001.

Jack Carter
5th District Court Judge

COPY

State Counsel for Offenders

A Division of Texas Department of Criminal Justice

P.O. Box 4005
Huntsville, TX 77342-4005

TO: _____ DATE: _____

ADDRESS: _____ TEL. #: _____

CITY, STATE, ZIP: _____ FAX #: _____

RE: _____

Dear Sir/Madam:

Our office has received your request for payment for representation for the offender named above. The Texas Board of Criminal Justice (TDCJ) must approve this request at their next Board meeting. In order to process your claim we need the following information back in our office no later than _____.

Documents needed – must mail original (only those items that are checked):

___ Application for Payment of Claim Against the State of Texas (must have original signature and the offender's name and TDCJ# should be written on the form)

___ Attorney Fees Expense Claim (total on this form should equal total on form above and must have original signature)

___ Order signed by the Judge for payment of attorney's fees (should include a finding that counsel appointed due to conflict of interest). County pays first $250.

___ Itemized statement of services performed (using each date and amount of time worked (must include a breakdown of the hourly charges for in-court and out-of-court). Miscellaneous expenses must be itemized as well.

___ Other: _____

Information needed – may fax this page back (only those items that are checked):

___ Date appointed to the case: _____

___ Is this the final claim for this appointment? Yes or No (Circle One)

___ What is offender's name and TDCJ#: _____

___ Was prior claim filed? Yes or No If yes, what date? _____

___ Other: _____

Please mail the documents to address on this letterhead. Information may be faxed to (936) 437-5293, attention Dorothy Albright. Feel free to call if you have any questions – (936) 437-5264.

Sincerely,

Dorothy Albright

Use this form to file a claim against the State of Texas for the following reasons:

- Warrant that is void due to expiration date.
- Unpaid bill that cannot be paid by receiving state agency due to expiration of appropriation.
- Other claim justified by State contract or State law.

Eligibility:

Claims that are over four years old, as determined from the day after payment was due on the original claim, are generally not eligible for payment by the Comptroller's Office through the provisions of the Miscellaneous Claims Act. For void warrants, the expiration date is four years from the date the warrant was originally issued. For unpaid bills, the expiration date is four years from the day after payment was due on the original invoice of delivery of goods or services. If lacking an invoice, four years from the day after the last day of the contract billing period.

INSTRUCTIONS FOR COMPLETING THE APPLICATION FOR PAYMENT OF CLAIM AGAINST THE STATE OF TEXAS

TYPE OF CLAIM
Check the box indicating the type of claim you are filing.

CLAIMANT NAME
Enter the name of the person or business in whose behalf this claim is being submitted.

MAILING ADDRESS
Enter the mailing address where correspondence concerning this claim should be sent.
Please included your zip + four code.

CLAIMANT'S SOCIAL SECURITY NUMBER, BUSINESS SALES TAX OR FEI #
If claimant is an individual, enter social security number. If claimant is a business, enter sales tax or FEI number.

AMOUNT OF CLAIM
If the claim is for a void warrant, enter the amount of warrant. If the claim is for an unpaid bill, enter the amount due. If the claim is for any other type of liability, enter amount due.

SPECIFIC REASON FOR FILING CLAIM
Fully describe the reason for filing the claim. It must include the following information:

- **Void Warrant:** Description of the goods, services, refund, or other item for which the original warrant was issued. Attach original warrant or warrant information. **File should contain specific identification of goods, services, refund or other items for which the warrant was originally issued.**
- **Unpaid Bill:** Description of goods or services or other item which is unpaid. You must also attach an invoice or other acceptable documentation of the unpaid amount which lists the original date the goods or services were delivered or performed
- **Other:** You must fully describe the reason for the claim. Include all appropriate documentation.

SUPPORTING DOCUMENTATION
Application MUST contain supporting documentation such as void warrants, itemized bills, invoices, contracts, etc. which will fully substantiate the claim. If not included, a statement must be provided which explains why these items are not available.

CERTIFICATION
The claimant or authorized agent (representative of business) signature is required here
Must have original Signature on the form.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INTERNAL AFFAIRS DIVISION

VOLUNTARY WRITTEN STATEMENT

VOLUNTARY STATEMENT OF EDWIN HENSON

GIVEN THIS 16 th DAY OF July, 19 97

at 3:00 o'clock p M. My name is EDWIN HENSON.

My address and telephone number are TDCJ TELFORD UNIT

I am not under arrest or being detained by any law enforcement agency. I understand that I am free to leave at any time I choose. I voluntarily give this statement.

On the day that inmate Dickerson got out of lockup inmate Buff 3872 made the statement at work that they were about to "get" Dickerson because he messed only a couple of guys. On Friday the first after Tonight I observed inmates Cashmere or Big Foot (Carolos) in the section B pod having a close conversation. At that point I asked my buddy Jon Brown please the Big Mexican, called Cashmere I left the dayroom B pod. Jon said "no" he didn't. I asked him if he knew he was over there about the Dickerson thing. To which Brown said "no" he didn't. Cashmere mess with Dusty" At that time I went to my house in B1 One section & still Cashmere about this Big Mexican & Big. Close conversation with Cashmere. All of a sudden the Big Mex gets up & goes over to 3 section as I'll finish up. I'll I have back out of my cell

WITNESSES:

Zeke Williams

Ken Ingle

PERSON MAKING STATEMENT:

Edwin Henson
Signature

IA-33 (Rev. 10/95)

TDCJ-INTERNAL AFFAIRS DIVISION

CONTINUATION

VOLUNTARY STATEMENT OF: EDWIN Henson

I sort of walked past to 3 section where Dickerson lived. At that point I looked up at Dickersons cell & noticed inmates Spears & inmate Bowers come out of Dickersons House & come down the stairs with Dickerson while Canales was still sitting in the day room alone & out of place. At that time I went to the picture recieving & sat with Brown. At that time inmate Bowers came out & was acting very paranoid & inmate Brown asked him what's up & he which he replied, just setting". Another two minute passed & inmate Hammers came out & looked around in the same mood. At that point I got up & go look again in three section & inmate Spears & Canales were leaving the stairs & the section & Canales left the pod.

Edwin Henson 7/16/97
WITNESS SIGNED DATE

Ken Langley
WITNESS

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INTERNAL AFFAIRS DIVISION

VOLUNTARY WRITTEN STATEMENT

VOLUNTARY STATEMENT OF RICHARD DRIVER

GIVEN THIS 16 DAY OF July, 19 97

at 2:30 o'clock P M. My name is RICHARD DREUER.

My address and telephone number are TELFORD UNIT

I am not under arrest or being detained by any law enforcement agency. I understand that I am free to leave at any time I choose. I voluntarily give this statement.

ON FRIDAY JULY 11th AT APPROXIMATELY 9:00 PM INMATE CONSTIDINE ASKED IF I COULD LURE INMATE DICKERSON TO MY CELL. I SAID "WHY ARE YA'LL GOING TO BEAT HIM UP?" HE SAID THAT NO ONE WAS GOING TO GET BEATEN UP I THEN TOLD HIM THAT I WOULDN'T BE A PART OF IT, HE SAID O.K. I THEN OBSERVED INMATE SPEER, INMATE CANALES, INMATE BARNES, AND INMATE CONSTIDINE, TALKING IN TWO SECTION DAY ROOM, ABOUT 4 TO 5 MINUTES LATER INMATE CANALES AND INMATE SPEERS WENT TO THREE SECTION AND UP THE STAIRS TO THREE ROW, I STOOD IN TWO SECTION WATCHING THEM, ABOUT FIVE TO TEN MINUTES LATER I OBSERVED INMATE SPEER AND INMATE CANALES COMING OUT OF B-68 CELL WHICH WAS INMATE DICKERSONS CELL, THEY LOCKED THE DOOR BEHIND HIM, INMATE CANALES CAME DOWN THE STAIRS AND LEFT THE WING, INMATE SPEER WENT TO ONE SECTION

WITNESSES:

PERSON MAKING STATEMENT:

Richard Dreuer
Signature

IA-33 (Rev. 10/95)

TDCJ-Internal Affairs

VOLUNTARY STATEMENT OF Richard Dewer

To his cell and proceeded to get into the shower, at about 9:45 PM officer Dunn was hollering for Sgt. Hicken, she said Inmate Dickerson was dead.

I meant to say that when all four persons were in two section Day Room, I saw Inmate constantine hand Inmate Speer a cigarette. Inmate Speer and Inmate Canales then proceeded to Horse Section Day Room and then to B 6x cell which was Inmate Dickersons. When they came out of the cell Inmate Canales in cell 72 was standing in his door way and also observed Inmate Speer and Inmate Canales leaving Inmate Dickersons cell

WITNESSES:

Joe Shipper

PERSON MAKING STATEMENT:

Richard Dewer

Signature

TEXAS DEPARTMENT OF CRIMINAL JUSTICE
INTERNAL AFFAIRS DIVISION

VOLUNTARY WRITTEN STATEMENT

VOLUNTARY STATEMENT OF Richard Driver # 624204

GIVEN THIS 24 DAY OF July, 19 97

at 4 o'clock PM. My name is Richard Driver.

My address and telephone number are Telford Unit

I am not under arrest or being detained by any law enforcement agency. I understand that I am free to leave at any time I choose. I voluntarily give this statement.

(RD) At 6:00 PM on Friday that Inmate Dickerson was killed, Inmate Constadine approached me while standing in the necessetie line and told me to be ready to go on lock down, I asked him whats up and he said Don't worry about it, and not to tell any one. I then proceeded to go get my clothes from necessetie and afterward went to the SGT. desk and told Sgt Thielen to watch out tonight because I had been informed something was going to happen, he said what is going to happen, I told him I wasn't sure but stay on your toes tonight. I went back to my cell and stayed until after count. At that time I went to Inmate Dickerson's cell to smoke a cigerette, after we smoked I sold him seven cigerettes for some hygenes and a Penthouse magazine, he told me that he had some more Penthouse but they were in inmate canidas cell and he had to wait until he got off of work. I told Inmate Dickerson to holler at me when he gets them, I then left and went to my cell at about 9:00 PM. (RD)

WITNESSES:

PERSON MAKING STATEMENT:

Richard Driver
Signature

Todd W Warren

TDCJ-INTERNAL AFFAIRS DIVISION

CONTINUATION

VOLUNTARY STATEMENT OF: RICHARD DRIVER #624204

(RD) When I got to my cell INMATE CONSTADINE followed me to my cell, He ASKED me IF "this" Doesn't WORK COULD I get INMATE DICKERSON to Come in my cell. I WAS NOT AWARE of WHAT "This" Meant But I ASKED INMATE CONSTADINE IF He WAS going to BEAT INMATE DICKERSON UP. He told me that NO one WAS going to get beat up, I told him I would not RD. RD. BRING him to my Cell. Then INMATE SPEER AND INMATE BARNES showed UP At my Cell AND INMATE CONSTADINE gave INMATE SPEER A cigerette, INMATE SPEER then ASKED to use my pencil lead which is used for lighting cigerettes from the wall socket, INMATE SPEER then Left to go to three Section, INMATE CONSTADINE AND INMATE BARNES then went to Two section AND SAT Down AND WATCHED T.V. At ABOUT 9:20 PM OR 9:25 PM INMATE CONSTADINE Came BACK to my house AND ASKED IF I Could get MS DUNN to leave three section, I then went to three section AND STARTED TALKING With officer Dunn, She WAS Filling out her (RD)

Richard Driver 7/24/97

WITNESS

SIGNED DATE

WITNESS

TDCJ-INTERNAL AFFAIRS DIVISION

CONTINUATION

VOLUNTARY STATEMENT OF: RICHARD DRIVER # 624204

(LD) PAPER WORK, AT ABOUT 9:45 P.M. She GOT UP AND left the Section to GO to the front DOSK to turn IN HER PAPERWORK I then WALKED TO TWO Section, AND STood AND WATCHED INMATE SPEER AND INMATE CANALES come out of inmate DICKERSON'S Cell, INMATE CANALES STOPPED AND SAID Something to INMATE CAMIDA AND then left the Wing, INMATE SPEER went to his Cell AND then went to take a Shower. AFTER that INMATE MURPHY CAME in from the CRAFT Shop AND I went AND visited with him. While I WAS in INMATE MURPHY'S Cell I HEARD officer DOWN Yell for Sgt. thirteen I then went to the DAYROOM AND looked up At INMATE DICKERSON'S Cell AND SAW him lying on his Bunk, I then went to one Section to my house. ABOUT 12:30 AM I went to INMATE DICKERSONS Cell AND helped TIM RICE WHO WAS his CELLMATE AND INMATE SISLEY ALL CLEANED up the Cell we WASHED the the TABLE the BUNK AND the BACK WALL, But Did not WASH Any of the STAINLESS STEEL OR TOILET (RD)

Jose Manjarrez
WITNESS

Richard Driver 7/24/07
SIGNED DATE

Todd W Warren
WITNESS

TDCJ-INTERNAL AFFAIRS DIVISION

CONTINUATION

VOLUNTARY STATEMENT OF: Richard Driver # 624234

(RD) AREA, AT 1:00 AM I went to my cell And went to Sleep. AT About 12:00 pm on SATURDAY Inmate Considine came to my cell to Smoke A Cigorette with me. I told him that they did A CLEAN JOB in Killing inmate Dickerson. he SAID Oh yeA I SAID yeA. But they didn't clean up where the were SMOKing, then Inmate Speer entered And I told him. the Same thing, he JUST laughed, I SAID that when I SAW Inmate Dickerson in his Bunk he had his ARM ACROSS his BACK, Inmate Speer SAID NO WAY we put his hANDS under his BODY After we put him in his Bunk. INMATE BARNES CAME in with Inmate Speer And they All JUST laughed About it. We finished SMOKing AND they LEFT.

They ARE All MEMBERS OF the TEXAS MAFIA, Inmate CONSIDINE (HAMMER) IS The CAPTAIN AND Shot CALLER FOR The TELFORD Unit. Inmate whitted is Lieutenant (BIG BAM) Inmate BARNES Inmate Speer Inmate CANALES (RD)

WITNESS

SIGNED Richard Driver DATE 9/24/97

WITNESS Todd W Warren

TDCJ-INTERNAL AFFAIRS DIVISION

CONTINUATION

VOLUNTARY STATEMENT OF: RICHARD DRIVER #624204

(RD) ARE ALL SOLDIERS, THEY ARE THE ONES THAT FOLLOW ORDERS GIVEN BY BIG BAM AND HAMMER INMATE BARNES NICKNAME IS J.B. INMATE SPEER'S IS STAYPUFF INMATE CANALES' IS BIGFOOT. I KNOW ALL OF THIS BECAUSE AT ONE TIME I WAS A PROSPECTIVE MEMBER OF THIS GROUP.

Jose Alvarez — WITNESS

Richard Driver — SIGNED — 7/24/13 — DATE

Todd W Warren — WITNESS

Appox. 5 PM 1/21/94 422a

(1)

Voluntary Statement of Tim Rice by Tim Rice

AT APPROX. 8:05 pm FRIDAY July 11 A CARD 2ND shift RACKED the bldg up FOR COUNT. I WENT to my living QUARTERS 3-B-68B My Cell MATE GARY DICKERSON WAS SITTING ON the TABLE READING A book. At APPROX. 8:40 PM COUNT CLEARED. I PROCEEDED to go to the REC. YARD with my NEIGHBOR NORDYKE (AKA NUBBS). I observed DICKERSON PREPARING to go to Necessities.

AT APPROX. 9:50 PM I CAME BACK to the pod ACCOMPANIED by NORDYKE. I NOTICED my DOOR WAS locked & lights WERE out. This STRUCK me AS "UNUSUAL", Due to the FACT DICKERSON WAS ON cell RESTRICTION.

I then pushed the INTERCOM BUTTON At the ENTRY OF 3-B-3 SECTION. AND ASK "OFFICER" "Giliam" (Picket officer) TO POP my DOOR (#3-B-68) I THEN WHEN UP STAIRS. AS I got to my DOOR I TOOK OFF my SHIRT. As I WENT IN I NOTICED DICKERSON (PRESUMABLY ASLEEP) LAYING A STRANGLY (ON his stomach & curd with his head WHERE his FEET USUALLY ARE) I ALSO SMELLED A foul odor I thought the ODOR WAS COMING FROM outside SO I got close to my WINDOW AND didn't smell ANY-thing but FRESH AIR. I THEN RAISED up AN the ODOR hit me AGAIN. I then TRIED to WAKE Dickerso up thats WHEN it hit me that HE WAS dead.....

(2)

As I was preparing to leave to get the police Nordyke stuck his head in the door and I told him to get the law. But I went past him and caught OFFICER Dunn coming into 3 section. I ~~took~~ told T.R. her my cellie was dead and I didn't think it was T.R. AND accident. She ~~the~~ thought I was kidding with her but I Finally convinced her to go up stairs to check. I then ~~be~~ went to the Desk and told them to get someone because my cellie was dead and I didn't think it was and Accident. I then went Back to my cell where I Found OFFICER Dunn trying to take Dickersons pulse. She had turned on the light. She said HE was gone. I then noticed other strange things such as Dickersons Ashtray still at the exhaust vent with Ashes on it and a clamp he used to hold the cigerette when it was short under the sink.

Appox. 10 min Later Sgt Thelan 57 came up there he looked at Dickelson and said he had A heartattack, Thats when I told him my Suspisions of Foul play. He told me It couldn't be Foul play Because the only time you lose body Fluids. (Bowels & Urine bladder) was only if it was Natural death. I then told him he was Not A very height Individual. Then told him

3

to come out of the cell and don't touch any thing & ~~lock~~ shut the cell door which he did I was then told to go down stairs. Then Rest is common knowledge.

This is a voluntary Statement in my hand
Dinkins TDCJ # 660765

No. 99F506-5

THE STATE OF TEXAS,	§	**IN THE 5TH DISTRICT COURT**
Plaintiff	§	
	§	
VS.	§	**OF**
	§	
ANIBAL CANALES,	§	
Defendant	§	**BOWIE COUNTY, TEXAS**

AFFIDAVIT OF JASON EARWOOD

STATE OF TEXAS §
§
COUNTY OF BOWIE §

Before me, the undersigned authority on this day personally appeared inmate Jason Earwood, #734220 affiant, who being first duly sworn, deposed as follows:

"My name is Jason Earwood. I am over eighteen (18) years of age, of sound mind, and capable of making this affidavit. I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.

I am currently an inmate in the Coffield Unit in Tennessee Colony, Texas and was an inmate in the Coffield Unit at the time of the following events.

On or about the 23rd of October, 2000, I, Jason Earwood, TDCJ #734220, was on the chain bus en route to the Telford Unit to testify on behalf of Anibal Canales. When I was on the chain bus, inmate Driver stated, "I don't care if they fry that mother fucking Jew boy; better than a white man. I know who was involved and as along as they blame a Jew, I ain't got no problems with lying on somebody. I don't see how anybody would think that coward ass Jew could do anything like that, but as long as he takes the fall, it's okay." This statement was made before the trial.

On the way back to the Coffield unit, my current unit of assignment, inmate Canida was sitting in the front of the bus, talking to somebody that he was handcuffed to and saying, "I got transferred to Powledge unit for saying what the prosecution wanted me to say. I got to go to a trusty unit and all I had to do was lie on that Jew."

There was another inmate who was in the holding pen down in the basement of the courthouse, inmate James Baker. Inmate Baker said, "I don't know why they keep calling

me back to this fucking courthouse. I already said what they wanted me to say. Why don't they just kill the dude and get it over with? He ain't nothing but a piece of shit they are going to fry, who why all this bullshit? They need somebody to blame it on, so why not him?"

The above stated quotes are parts of conversations that I, Jason Earwood, TCDJ #734220, overheard while on the TDCJ-ID chain bus and in the basement of the courthouse. All the statements contained herein are true and correct. I make this statement under the penalty of perjury.

FURTHER AFFIANT SAYETH NOT.

WITNESS the hand of the Affiant at Tennessee Colony, Texas on this 22nd day of October, 2001.

Jason Earwood #734220
Coffield Unit
Route 1, Box 150
Tennessee Colony, Texas 75884

STATE OF TEXAS §
§
COUNTY OF Anderson §

This instrument was acknowledged before me on this 22nd day of October, 2001, by Jason Earwood, and the said Jason Earwood, subscribed his name thereto in my presence and swore before me that the contents thereof wre truce and correct, to certify which **WITNESS MY HAND AND SEAL OF OFFICE.**

Notary Public in and for the State of Texas

(affix seal)

My Commission Expires: 05-26-03

FEDERAL BUREAU OF INVESTIGATION

FREEDOM OF INFORMATION/PRIVACY ACTS SECTION

SUBJECT: ARYAN CIRCLE

FILE NUMBER: 100A-HO-44640 SUB 4

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 03/01/1996

To: HOUSTON

From: HOUSTON
CT-1
Contact: [redacted] (3398)

Approved By: BERNAZZANI JAMES

Drafted By: [redacted] dms

File Number(s): 100A-HO-44640 (Pending)

Title: TEXAS ARYAN BROTHERHOOD,
CHURCH OF THE ARYAN
HERITAGE, INC.(TAB);
ET AL;
D/T
OO: HOUSTON

Synopsis: Sub-Files.

Details: As part of investigation involving captioned matter it is requested that following Sub-Files be opened and assigned to this writer.

100A-HO-44640	MAIN
SUB 302	FD-302'S, INSERTS
SUB 1	TEXAS ARYAN BROTHERHOOD
SUB 2	ARYAN REICH
SUB 3	TEXAS MAFIA
SUB 4	ARYAN CIRCLE
SUB 5	FRATERNAL ORDER OF THE ARYAN BROTHERHOOD
SUB 6	WHITE KNIGHTS

100A-HO-44640 Sub 4-1

SEARCHED:
FOIMS INDEXED
MANUAL FILED
SERIALIZED
MAR 1 1996
FBI - HOUSTON

100A-HO-44640 Sub 4
DMS (1)

On July 2, 1996 [redacted] provided the following b2 b7D
information to SA [redacted] b7C

Source provided a list of members of the Aryan Circle [redacted] b7C b7D

b7C [redacted]

-2
100A-HO-44640(5484)

OPCA-20 (12-3-96)

XXXXXX
XXXXXX
XXXXXX

FEDERAL BUREAU OF INVESTIGATION
FOIPA
DELETED PAGE INFORMATION SHEET

1 Page(s) withheld entirely at this location in the file. One or more of the following statements, where indicated, explain this deletion.

☐ Deletions were made pursuant to the exemptions indicated below with no segregable material available for release to you.

Section 552		Section 552a
☐ (b)(1)	☐ (b)(7)(A)	☐ (d)(5)
☐ (b)(2)	☐ (b)(7)(B)	☐ (j)(2)
☐ (b)(3)	☒ (b)(7)(C)	☐ (k)(1)
_____	☒ (b)(7)(D)	☐ (k)(2)
_____	☐ (b)(7)(E)	☐ (k)(3)
_____	☐ (b)(7)(F)	☐ (k)(4)
☐ (b)(4)	☐ (b)(8)	☐ (k)(5)
☐ (b)(5)	☐ (b)(9)	☐ (k)(6)
☐ (b)(6)		☐ (k)(7)

☐ Information pertained only to a third party with no reference to the subject of your request or the subject of your request is listed in the title only.

☐ Documents originated with another Government agency(ies). These documents were referred to that agency(ies) for review and direct response to you.

_____ Pages contain information furnished by another Government agency(ies). You will be advised by the FBI as to the releasability of this information following our consultation with the other agency(ies).

_____ Page(s) withheld inasmuch as a final release determination has not been made. You will be advised as to the disposition at a later date.

_____ Pages were not considered for release as they are duplicative of _____

_____ Page(s) withheld for the following reason(s): _____

☒ The following number is to be used for reference regarding these pages:
100A-HO-44640(Sub4)-2 Page 2

XXXXXXXXXXXXXXXXX
X Deleted Page(s) X
X No Duplication Fee X
X for this page X
XXXXXXXXXXXXXXXXX

XXXXXX
XXXXXX
XXXXXX

FBI/DOJ

100A-HO-44640 SUB 4
DMS/ds (1)

On November 16, 1996, [redacted] provided the following information to SA [redacted]. b2 b7D b7C

Source advised that within the Texas Department of Corrections prison system is an organized White Supremacist group called the ARYAN CIRCLE (TDC). This group is a splinter group of the TEXAS ARYAN BROTHERHOOD. According to the Source this group is more involved within the TDC system as a white hatred group, that provides protection for the white inmates within TDC. Their rules allow members to come and go without retribution from the group.

b7C [redacted] 100A-HO-44640 Sub 4 -3

4, 5, 6, 7, 11, 15
6c

100A-HO-44640 SUB 4
DMS/ds (1)

67C

On September 26, 1996 [redacted], Midland County Sherriff's Office, Midland, Texas, provided a copy of the "arayn Circle Handbook". This book was obtained during a search of the jail facility at the Midland County Jail.

100A-HO-44640 (4)-4

The Offical Handbook Of The ARYAN CIRCLE

Founded 1985

OPCA-20 (12-3-96)

XXXXXX
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FEDERAL BUREAU OF INVESTIGATION
FOIPA
DELETED PAGE INFORMATION SHEET

6 Page(s) withheld entirely at this location in the file. One or more of the following statements, where indicated, explain this deletion.

☐ Deletions were made pursuant to the exemptions indicated below with no segregable material available for release to you.

Section 552		Section 552a
☐ (b)(1)	☐ (b)(7)(A)	☐ (d)(5)
☐ (b)(2)	☐ (b)(7)(B)	☐ (j)(2)
☐ (b)(3)	☒ (b)(7)(C)	☐ (k)(1)
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☐ (b)(4)	☐ (b)(8)	☐ (k)(5)
☐ (b)(5)	☐ (b)(9)	☐ (k)(6)
☐ (b)(6)		☐ (k)(7)

☐ Information pertained only to a third party with no reference to the subject of your request or the subject of your request is listed in the title only.

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100A-HO-44640 (sub4)-4 Pages 4 through 9

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FBI/DOJ

THE CIRCULAR
P.O. Box 979 Carnegie,OK.73015

GREETINGS:

I am in hopes that this letter will serve to pique your intrest in allowing us to advertise your group,publication or company in THE CIRCULAR.

THE CIRCULAR is the offical publication of the Aryan Circle. It is a bi-monthly publication dedicated to spreading the message of the white race.

Each issue of THE CIRCULAR is filled with articles,poems,news bits,art work,classifieds and pen-pal listings.

Classified ads are $5.00 donation for one year (please keep the length and size reasonable). Full page ads or ads with art work, etc...are slightly higher. However, we will advertise your group, publication or company free in exchange for you advertising ours.

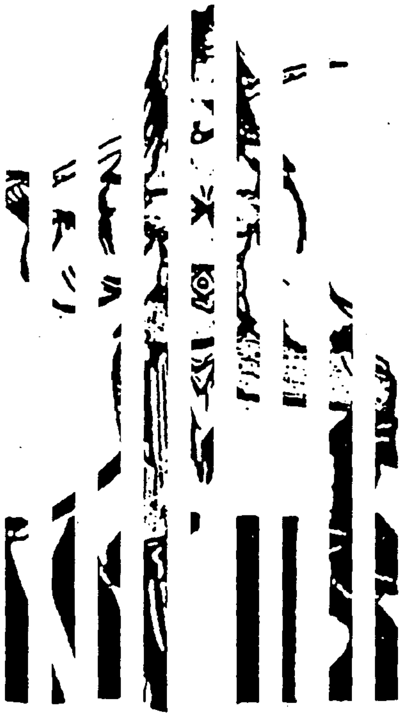
SUBSCRIPTION RATES:

$2.00 donation per single issue
$10.00 donation per one year subscription.
$8.00 donation for prisoners per one year subscription.
[prisoners may send half in stamps]

I look forward to hearing from you in the near future!

IN THE STRUGGLE,

Mark C. Gaspard
Editor in Chief
THE CIRCULAR



WE E IN TE

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c r ow ap c ty
W o o u e n a a te p e stronger
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13

Aryan Circle
P.O. Box 979-Carnegie OK 73015

The Aryan Circle was Founded in 1985 as an independent organization inside the Texas prison system.

The organization was put together by a group of men who were fed up with other organizations within the system who claimed to be for the white race but were in reality nothing more than radical prison gangs.

In the beginning, the organization centered on the preservation of the race within a hostile prison environment. Today, it has expanded to much more than that. As we have grown our attitudes and goals have grown. Our objectives are essentially the same: The preservation of the white race. However, we now seek to accomplish this both in prison and in the world throughout.

Trial and error has taught us much and will no doubt teach us much more in the future.

With our four branches, we now feel we have a place, or an opportunity, for every White man and woman who wishes to participate. However, membership into the organization is a privilege and failure by a member to participate constructively will result in that person's dismissal from the organization.

The Aryan Circle is an elite organization. It is built on a prospective confidential basis. At no time will there be a membership rally held. In this way each member knows that the next member in line was a hand picked prospect. this will work to show each member that he can be assured of solidarity throughout this organization.

We Believe

We Believe:
1. in the betterment and preservation of our race.
2. in separatism.
3. that no foreigner should rule over us.
4. that all who are against or oppress our race are our sworn enemies.
5. in the rights of the White race.
6. in the right to teach our children of our cultures and hertiage.
7. only in the support of our race.
8. that it is important to guide the upbringing of our children, as they are the heirs to the future.
9. that all Aryans have the right, and should bare arms.
10. in honor and pride for our Beautiful race and hertiage.
11. in abstaining from all mind altering chemicals
12. in abstaining from anything that is overtly harmful to our bodies and environment.
13. that all crimes against our race (as a race) is punishable by death.
14. that all men should work to eat - no free rides.
15. in strong family values.
16. in Loyalty, Dedication, Solidarity and Brotherhood among ourselves and our children.
17. in working hand in hand to help each other.

If you would like to contact us for more literature or personal correspondence with one of our members, please feel free to do so.

Donations of money or postage is always greatly appreciated, and used entirely towards publishing and mailing literature.

In The Struggle for a Difference!

Cira Rene
P.O. Box 979
Carnegie, Ok 73015

The Circular

The Circular is the Newszine of the Aryan Circle. We welcome your submissions of news, articles, poems, art, pen-pal ads, classified ads, comments or questions.

Pen-pal ads are free the first time for all subscribers, up to 25 words. (Address and name are not counted in the 25 words!) All other pen-pal ads are $1.00 donations for 25 words.

Classified ads are $5.00 donation for 1 year. Please keep the length and size reasonable. Please inquire for full page ads.

Subscription Rate

$2.00 donation per issue
$10.00 donation 1 year subscription
$8.00 donation prisons 1 year subscription

Any other donations to The Circular will be used for the printing and mailing of the Newszine. Half may be paid in postage stamps by prisoners

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ARYAN CIRCLE
~~4206 - 17th #1, Lubbock, Texas 79416-5824~~

Lets take a look at what and who we are ... and who we are not. We are the descendants of white europeans, be that Germanic, Slavic, or, in some cases, Mediterranean. we come from people that had the will and strength to endure adversity in whatever form it presented itself. This and the courage to fight for what they believed in are the foundation for the western culture. that culture has produced men and women who lead the world into every technological advancement this world has seen. It is clear that we stand out and shine as a race. This race and its true culture must be preserved.

Racial purity, freedom, and a strong work ethic are like a sturdy shell on top of that foundation. As we look back on the history of man we can see that there is a pattern to all those great advancements. The people who are the innovators all were white. They generally had the freedom to be inventive without ZOG breathing down their neck, and they were willing to work hard and stick to their dream. This is the basis of your culture white man! Love it and defend it.

When we turn on a television, radio, or read a newspaper we are told that cultural diversity is what has made America great. THAT IS A LIE! There are people that want to control every aspect of this world. But, they have one problem, the white man. It is clear that for many years these people have been trying to destroy us culturally and genetically. This is the reason the media promotes interracial marriage and racial integration – even to the point of "forced integration."

We must look back to those ancestors of ours and see what they did. They stood up for what they believed in.

Educating all of our people and selecting leaders with the will and the strength to lead this struggle to preserve who and what we are is imperative.

T.K. – M.G.

Help us in our struggle to print and mail this and other literature. Make donations payable to P.L. Payne in care of the above address.

Donations of postage also appreciated.

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ARYAN CIRCLE
4206-17th #1, Lubbock, Texas 79416-5824

The words, "Family Values" have nearly become synonyms with the words "Funny Joke."

Americans today so readily accept the notion of unwed mothers who continually become pregnant and bring "fatherless" infants into the world. It has become a status symbol within some communities to produce these fatherless, and often unwanted children with the intentions of receiving better and more welfare benefits to support what is usually a mother's drug habit.

The responsibility does not lie solely with the mother. Responsibility is a two-way street, so is birth control. Where are the fathers of these "fatherless" children? All too often that question can be answered on the nearest dope street corner, dope house or prison cell.

More and more of our white brothers are being arrested and sent to prison with drug addictions. The outcome is: broken homes, a weaker white population, less protection for our white women, destruction to our bodies, often death in one way or the other ... and our lost sense of "Family Values."

Our creator gave us nothing more important than our ability to reproduce. Sex is fun and our white women are the most beautiful on the planet. Our creator allowed us to enjoy these things with the idea in mind that we would protect them, love them and share responsibilities for our children and households. Anyone who belies he has no responsibilities has not looked.

A drug addict has no sense of values. He walks, talks, thinks and acts solely for one goal ... the next fix. It's insatiable.

Meanwhile, our white sisters are left carrying the load of a "household" we helped create. Often she is then forced into low-income housing and welfare lines where she becomes surrounded, and overwhelmed by the black community who share these facilities ... and our children, the only hope for the future of our race ... never grow with a sense of moral separateness.

When our women in turn seek male companionship with those around her, and our children grow to become interracialy married, who will speak loudest in disgust? The answer is YOU!! A guilty dog always barks loudest.

You might ask yourself if you even have a "drug problem." The answer is simple: If you use drugs you have a problem - period. You should seek help, be it from a supportive spouse, your family chaplin, a 12-step program, drug rehab, or any other form that will work for you. admit your problem and take responsibility for it.

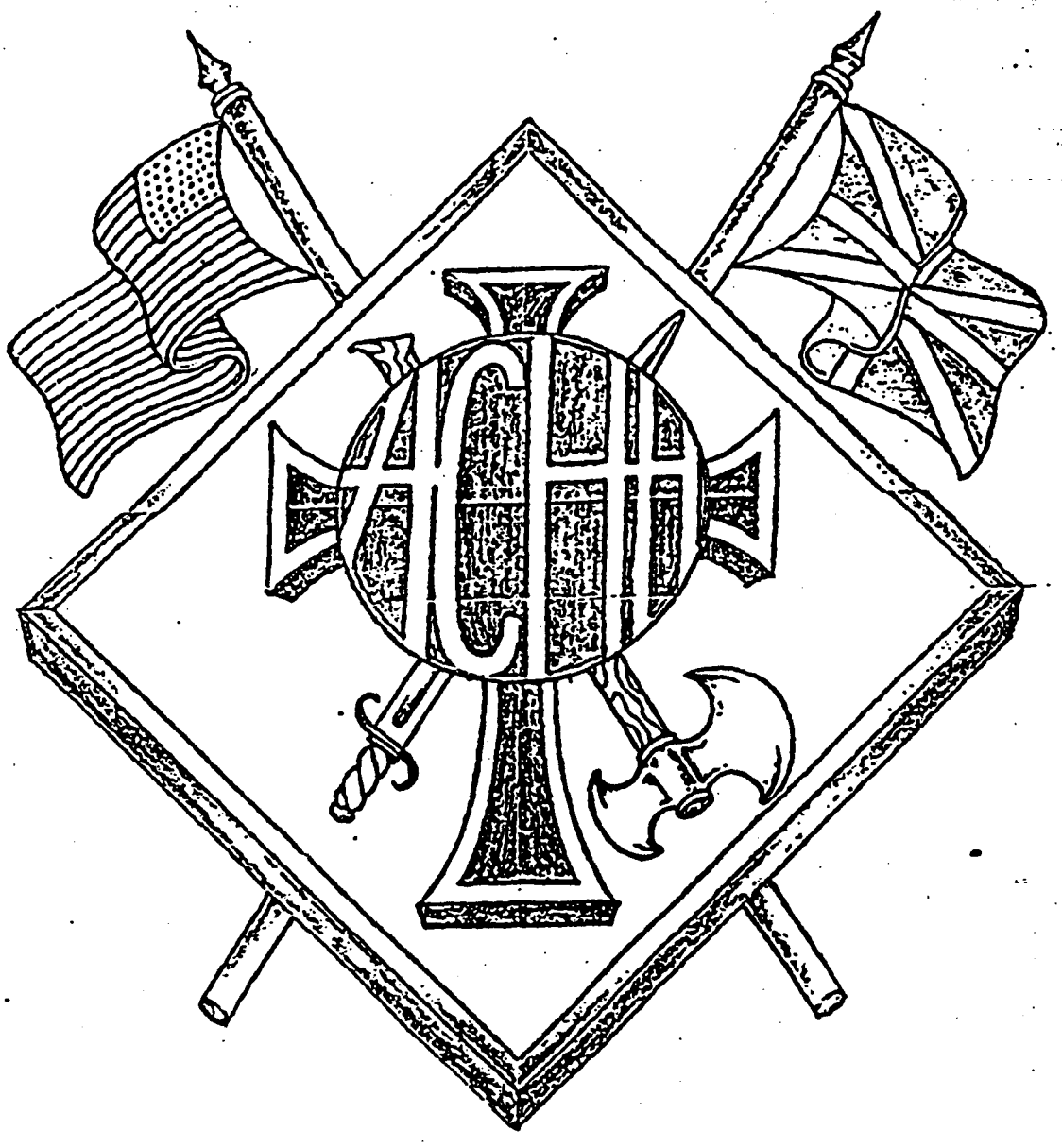
The choice is clear, Your Race, Your Family, Your freedom ... or, your favorite drug.

M.G.

Help us in our struggle to print and mail this and other literature. Make donations payable to, P.L. Payne in care of the above address.

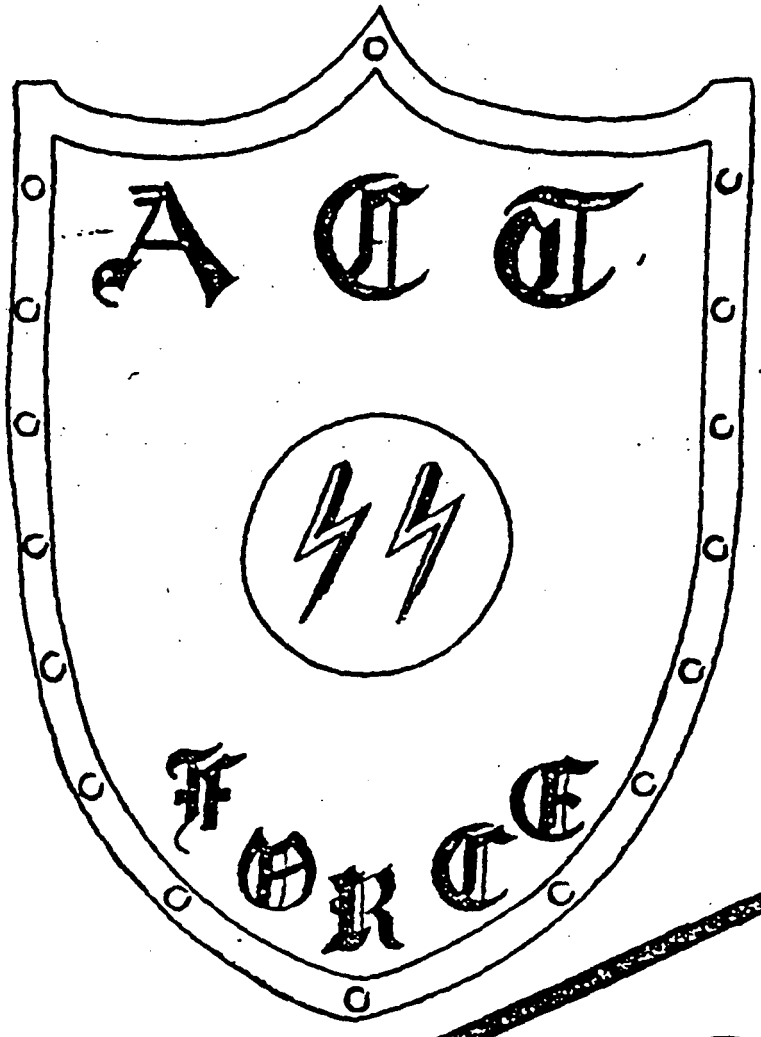
Donations of postage also appreciated.

14



15

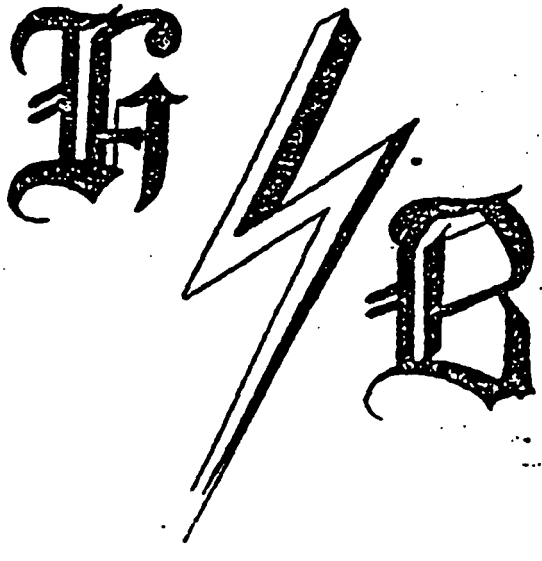
ACT FORCE PATCH



COLORS:

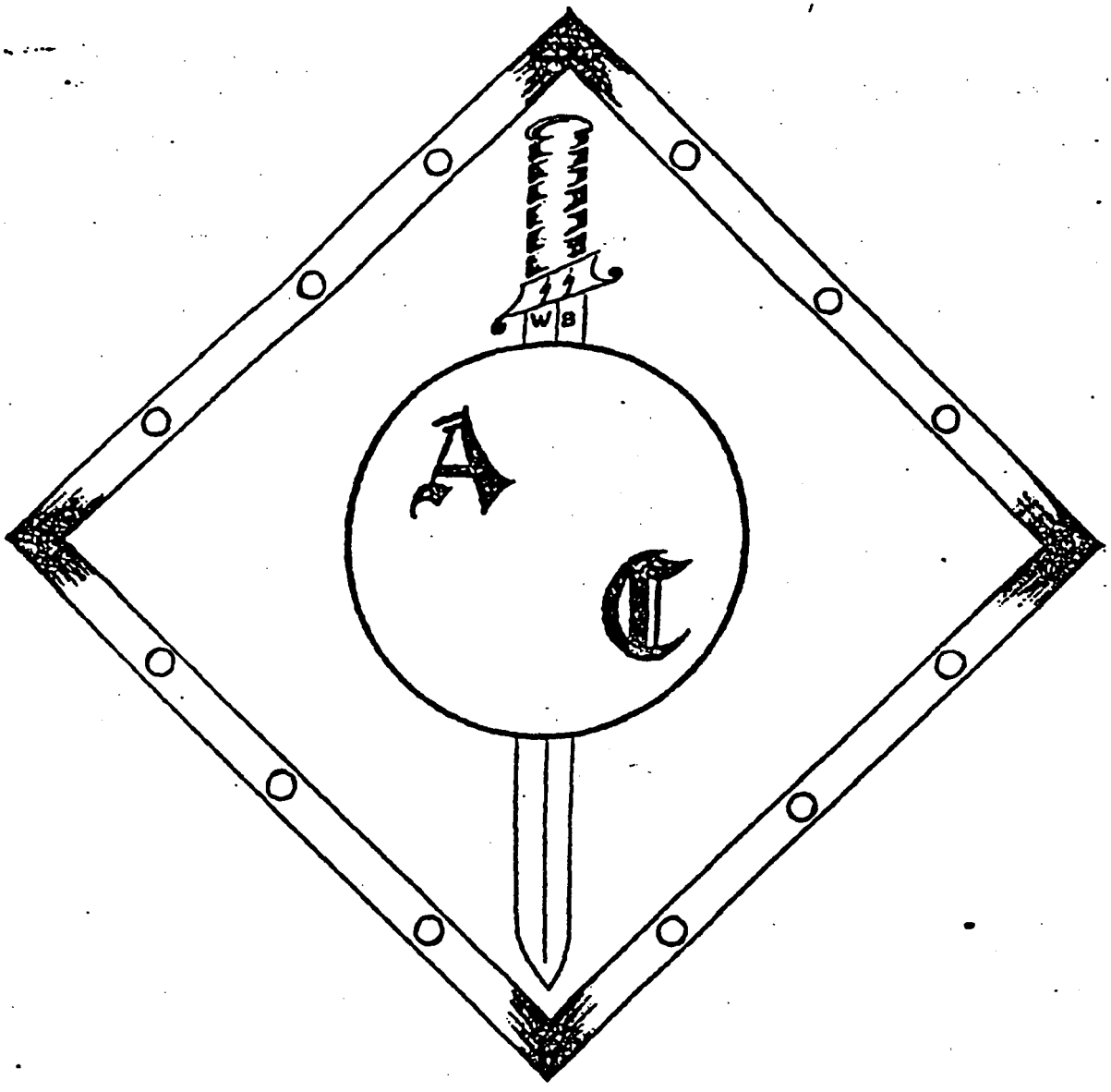
GRAY=SHIELD AND BOLTS
BLUE=LETTERS AND CIRCLE

HONORARY PATCH



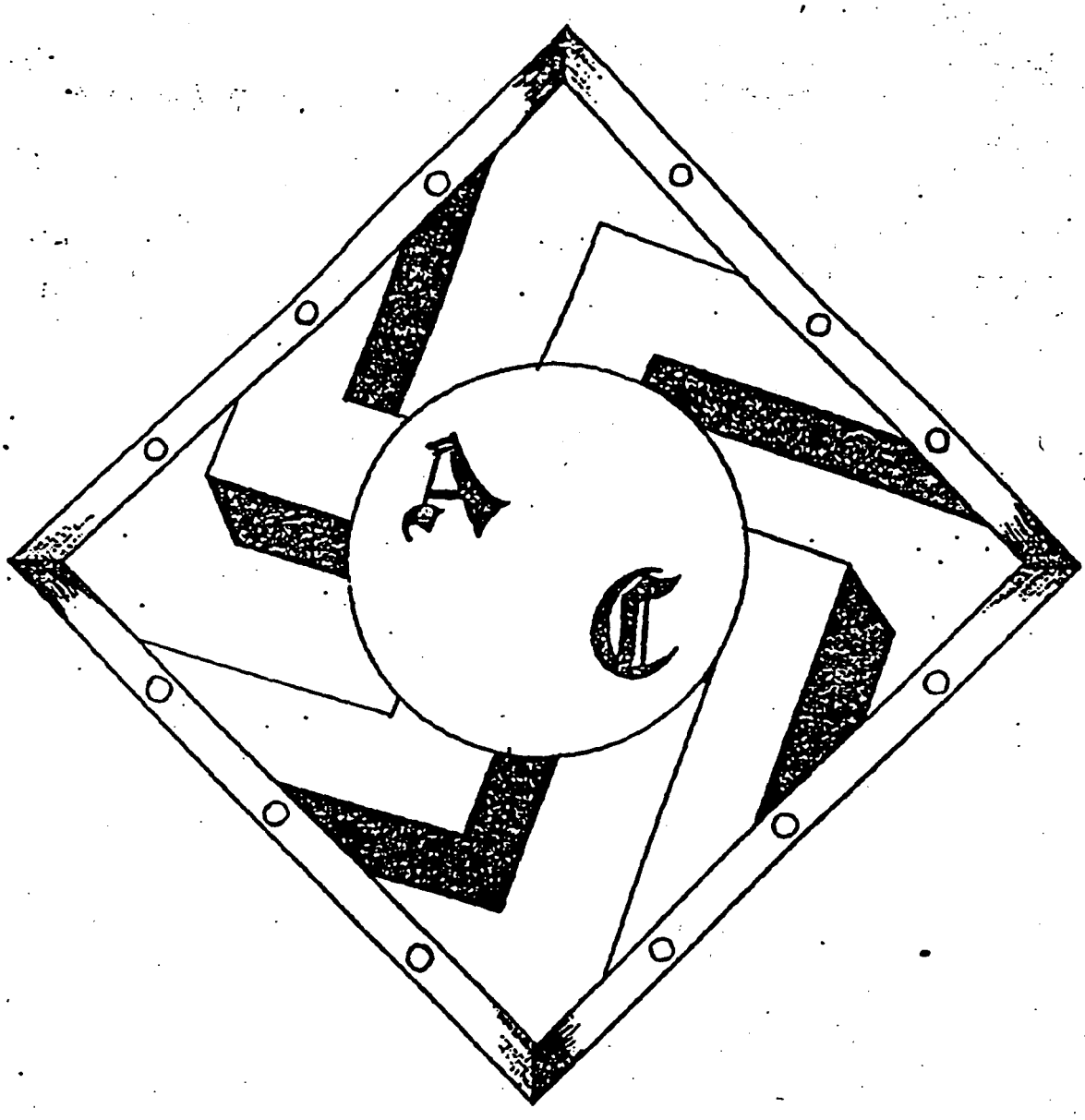
COLORS:
GRAY=BOLT
BLUE=LETTERS

WOMEN'S BRANCH PATCH



COLORS:
GRAY=CIRCLE AND SWORD
BLUE=LETTERS,DIAMOND AND LIGHTENING BOLTS

MEN,S BRANCH PATCH



COLORS:
GRAY=CIRCLE AND SWASTIKA
BLUE=LETTERS AND DIAMOND

Certification of Birth

Lake County Clerk
Waukegan, Illinois

251010

BIRTH NUMBER: 112-64-0129811

NAME: ANIBAL CANALES, JUNIOR

DATE OF BIRTH: DECEMBER 1, 1964 SEX: MALE

PLACE OF BIRTH: WAUKEGAN, LAKE COUNTY, ILLINOIS

MAIDEN NAME OF MOTHER: JUANITA GARCIA

PLACE OF BIRTH OF MOTHER: MICHIGAN AGE: 22

NAME OF FATHER: ANIBAL CANALES, SENIOR

PLACE OF BIRTH OF FATHER: MEXICO AGE: 23

DATE FILED: DECEMBER 8, 1964 DATE ISSUED: SEPTEMBER 11, 2003

SEAL

This is to certify that this is a true and correct abstract from the official record filed with the Illinois Department of Public Health.

Not valid without the embossed seal of Lake County, Illinois.

Willard R. Helander

WILLARD R. HELANDER
LAKE COUNTY CLERK

I, Elizabeth Canales Villarreal, pursuant to the provisions of 28 U.S.C. §1746, declare as follows:

1. I am Anibal (Andy) Canales' older sister.

2. My mother and father got married in Waukegan, Illinois. That's where my older brother Andy was born, on December 1, 1964. I was born less than two years later, February 23rd 1966. My parents got divorced when I was very young. I don't remember my mother and my father together. By the time I was about five, my mother was remarried to a man named Carlos Espinoza. We lived in the Chicago and Wisconsin area, and moved around frequently. My mother and Carlos had one child together, my younger sister Gabby, who was born December 11, 1972.

3. My father was not around much at all. He didn't help with child support, so my mother's way of getting back to him was to ship us off to stay with him every summer. We saw him during the summers some, but really my father would get us and just drop us off at his mother's house, my paternal grandmother, who lived in Laredo, Texas. She lived in the Colonias projects in Laredo, and money was tight.

4. During the school year, my brother Andy and I lived with my mother. My father was supposed to have week-end visitation, but he never showed. His brother, my paternal uncle Jose, was the one who used to come and pick us up and take us for the week-end. I have very fond memories of that time. He would take us to the zoo, take us to the movies, take us downtown or sometimes out to eat. Both Andy and I loved spending week-ends with him.

5. The rest of the week, Andy and I lived with my mother, and from the time I was about five, with my step-father, Carlos Espinoza. Both Andy and I hated living with him. He was a beater. He used to beat up my mom, and beat up Andy, and he was rough on me.

6. We spent most of our early childhood in Chicago. We spent some time in Racine. I almost named my daughter Racine because I have such good memories of my time there. It was the one place where we lived in a stable neighborhood, in a clean house, with clean houses around–no fleas or lice or noisy Puerto Ricans partying in the next apartment. The places we stayed in Chicago were awful, we lived in gang central.

7. My step-father, Carlos Espinoza, lived with us for several years when we lived in and around Chicago. I don't remember ever meeting him until he and my mom were married. I didn't even know my mom was pregnant with Gabby until she brought her home from the hospital. I dreaded being around Carlos. He was a beater. He beat on my mom, and he beat on Andy bad. He would use a switch or a belt. And there was always a lot of pushing and shoving. He would pull Andy's ears, drag him around by his ears, I remember that Andy had ear infections–but I never really thought at the time that it was from that. We both did, chronic ear infections from being dragged around by our ears.

8. I remember one time my mom stayed out late after work. When she got home, I was

already asleep, and so was Andy. I woke up because I heard some rustling, and I woke Andy up. We went out to see what was going on, and Carlos was sitting on my mom, who was on her back, and he was hitting her as hard as he could around her face and head. He was really beating her bad. Andy ran to the back to get something, and I ran over and started pulling on his hair, and trying to get him off my mom. He backhanded me, and I fell down. The next thing I remember, I woke up and my mom was lying next to me in bed, along with Andy. We were all three in one single bed, and she had an ice pack over her head.

9. Carlos used to beat Andy badly too. Andy didn't stand a chance with Carlos. Beatings were a regular thing at our house. He would drag Andy around by his ears. Carlos would beat Andy with a belt. He would beat Andy until he had welts all over his back and butt and arms and legs. We were always having to kneel in a corner for punishment. Andy had to strip sometimes to be beaten. Andy and I were always afraid that we would do something wrong around him. I remember seeing Andy lying naked, curled up in a ball, and Carlos hitting him as hard as he could with the buckle end of the belt. Carlos would beat Andy until he had welts and bruises all over his body.

10. My dad was strict and hard on us, but Carlos was way worse. Carlos was a beater, and Carlos was a molester. The first time I can remember being molested by Carlos, we lived in a little apartment in Chicago or Wisconsin, and I was really young. The neighborhood was horrible, there were rats everywhere, and kid were getting sick, and there was a lice epidemic. I think that's where the molestation started. There were Puerto Ricans living downstairs, and the lice were terrible, we had to stay down there sometimes. I must have been about 5 or so, because I don't remember having any contact with Carlos before he and my mom got married, and Gabby was born when I was six.

11. I was molested for several years, but didn't tell anyone. Carlos threatened me, he told me that he would kill my uncle or my dad if I told them. I was terrified of my dad's temper, so I probably wouldn't have told him anyway. My paternal uncle Jose was the only one I could have told, but I was afraid to.

12. My mom was working at Bell Telephone, and she wasn't home a lot. That left Carlos around, because he wasn't working that I can remember.

13. The most vivid memory I have of being molested was a time when I was sick, I was having fevers. I went in to sleep with my Mom, and Carlos put me in between them, which I didn't want. My mom got up in the morning and left, and I woke up and Carlos was all over me. I was in my underwear, and Carlos started rubbing and putting his hands all over me, and having me rub him and all that, it was horrible. I was crying and crying, and he kept slapping me in the head to get me to stop. I finally did because I just kept getting slapped. And he had me sit on him, and then he flipped me over and he had my hands pinned above my head and he took my leg and was getting my underwear off. Andy was home–it must have been a Saturday morning–and he came in and started yelling, "I'm gonna tell, I'm gonna tell!" Carlos got off me and ran after Andy, and Andy dodged

him and came in and got me and we ran downstairs to the neighbors. I was naked, and I was bleeding from a busted lip, and we were just trying to get them to call my Mom. The neighbors knew what was going on, but they were the type, they just didn't want to know, didn't want to be involved. They finally got a hold of my Mom, and she came down and got me. She took me to my uncle Joe and Aunt Bonnie's, and we were there for a while. They didn't know what happened.

14. I don't remember exactly how long my Mom and Carlos were together. I do remember that after they weren't living together, he'd show up sometimes. I remember one night Carlos showed up and we were living in a small apartment–Andy and I didn't really have a room, there was just a tiny kitchen and a little living room that had a beaded curtain. Carlos and my Mom were drinking late into the night, and this big old scuffle broke out because Carlos was trying to get to me. My mom was trying to keep him away. He wanted to see me and my mom took a knife and stabbed him, and I went out there and just started screaming that this wasn't his house and to get out. He had on a gauzy shirt, and I remember seeing the blood begin to seep through. He did leave. My mom washed me up, and the next morning I remember there was blood everywhere, in the kitchen, on the porch, on the stairs, everywhere.

15. Carlos is the first person who ever molested me, but he wasn't the only one. My mom had a number of boyfriends who were in and out of the house and who thought they were my boyfriend too. If you asked me to count how many, I couldn't. It was several. I remember one guy who had a really fast mustang. He was so gross, like a dog, and he always smelled of alcohol. I also remember a guy named Ruben. I remember because he was the dirtiest. He would have me take a towel and masturbate him. And Ruben would always hit me in the head. I was getting these terrible headaches, and my mom finally brought me in to have my eyes checked because she thought that's what was giving me headaches. There was nothing wrong with my vision, but when the doctor looked into my eyes he could see damage. I told my mom that if Ruben would just stop hitting me, maybe the headaches would go away. She didn't know before that. I eventually told her about the rest, and I remember she gave me this really short haircut and dressed me in hideous clothes to try to get him to stay away from me.

16. Whenever my Mom got a new boyfriend, Andy would stay around, he wouldn't stray far. I knew that if there were two of us, I was safer, so I would sit outside on the porch, and it didn't matter how late it was, I would sit and wait for Andy to come home. There was this one apartment where I would sit on the back porch, and I could see the playground down the alley where Andy was playing basketball. I would wait there, it didn't matter if it was cold or snowing or a blizzard, I would sit there and wait for Andy before I would go up by myself.

17. Between Carlos and my Mom's other boyfriends, I never felt safe. My whole childhood is peppered with memories of being molested: those men did all kinds of things to me and had me do all kinds of things to them. I remember all this tugging and pulling and rubbing and hands and fingers everywhere.

18. We were also moving around a lot. We moved to Kenosha, to Racine, we lived with my aunt Linda for a while. We lived on Rice Street. At one point my Mom and her sister Dory were living together. At one point, we moved to Los Angeles. We took Carlos' station wagon. There was no room for the Christmas tree, so we dumped it at a McDonald's on the way out of town. We lived in a two-room apartment, all of us slept in one room. It was an apartment building that looks like a motel with a long outside corridor. I barely remember Los Angeles, the other day I just remembered it out of the blue, and my husband had never heard me say we lived there before. We had kind of a crappy Christmas that year, I got roller skates and Andy got a train set–those orange plastic tracks that snap together. The skates turned out to be really loud, and it would piss my mom off that we were so noisy.

19. My mom was very close to my maternal grandparents. They would all sit around and drink together. It was one big hoopla when they were together. And my mom traveled every summer to see them. She was their favorite. But I hated going there. I hated going there because my grandparents didn't like me and Andy. They didn't like us because of my dad, they just hated him, because he was from Mexico. My dad would call them dirty filthy Indians and say they were no better, but my grandparents didn't get over that. It would really upset my Mom. My grandparents would get Christmas presents for Linda's kids, and not for us. My mom used to cry, and ask them why they didn't love her kids.

20. Every summer, Andy and I spent in Laredo with my father, which really meant that we lived with my grandmother. My father would drop in and out, and he had a terrible temper, and was especially hard on Andy. He would hit Andy, or beat him with a belt, for discipline.

21. My father's temper could be scary sometimes. I remember at one point my father was with a Cuban woman. He had two kids with her: a girl and a boy. I remember being down there and seeing my dad get really mad at my half-brother Ulysses, who was still a baby in diapers. My dad picked him up by the arms and swung him around and flung him across the room. Ulysses slammed into the coffee table, and slid underneath it. I was shocked, but I was also very scared. Their mom was crying in the other room, and that's the last time I ever saw her or my half-siblings. I think they live in Miami now.

22. I remember one time I must have been about eight, and Andy must have been about ten. He was already so tall–he looked way older than his age by that time. We were in Laredo, and we were supposed to go to church, and Andy said, let's go to the hotel and go swimming. There was a really nice hotel right near the Mexican border. We went to the hotel, and hooked up with a couple who had some black kids and were staying at the hotel. Andy decided to go to Mexico–it was a couple of blocks away. He said I would be okay there, with the other kids, so he left, and I went and changed into my swimsuit in the couple's room. When I came downstairs, there was my father, standing there waiting. I got so scared, I went back upstairs and changed. My dad didn't say a word. Andy was already gone, and we had to wait for about an hour for him to come back. We got into his

truck, and my dad just started screaming at us. We got home, and my dad took Andy into a room and closed the door and I heard Andy get beat within an inch of his life. I was terrified that he was going to kill Andy. Dad was screaming, and Andy was on the floor, begging my father to stop. I went in and yelled for my dad to stop, and my he hit me, and I fell to the floor. My grandmother came in, and I threw a candle at my dad. It was one of those glass candles, and it hit him and broke. Finally, he just left, and my grandmother took care of Andy's wounds.

23. I remember another time, Andy and I went swimming at a public pool that was about eight blocks from my house. Andy was a great swimmer, but I was not, I could just make it to the edge. I wanted to go off the high dive, and Andy told me not to. I kept insisting, and Andy kept telling me no. Finally, I just went up. I got to the top and realized that I couldn't come back down. There were kids all lined up behind me, and the lifeguards were whistling, telling me to jump. Andy was below, and he yelled up for me to sit down, and jump from there because I would be closer. I sat down, but instead of jumping feet-first, I jumped forward, and slammed into the water on my face and chest. Andy dove in and pulled me off to the side. I was hurt. We rested for a while, then walked back. The next day, on top of my sunburn, I had bruising from hitting the water. When I realized what I looked like, I started crying, because I knew Andy would be in trouble. My grandmother came in, and asked me what happened. Andy said it was his fault, he took me to the pool and I hurt myself, and he didn't tell and he should have. My grandmother called my father, and he came in, took one look at me, and got out the belt to beat Andy. I was trying to tell him that it was my fault, but he wouldn't listen. He beat Andy all over his body with a belt. I remember washing Andy's back and arms, where he had swollen welts from the beating. I was telling Andy not to worry, that we would be going back home soon because it was almost the end of the summer. Andy was saying that he didn't think he would get to go.

24. That was the last summer ~~I spent~~ we spent together in Laredo. When I was about 10, and Andy was about 12, our family moved down to San Antonio. Carlos Espinoza was out of the picture. I remember we all went down together, and we started off living with an uncle and aunt for several months. I don't remember how long Andy stayed with us, but it was not long. Before long, he was shipped off and lived in Houston with my father.

25. My father was very vain. He was the kind of guy who couldn't stand for his wives to be prettier than he was. For him, it was all about the clothes, all about the cars, all about the apartment, all about the job. He had fancy cologne and shoes, "javeres," which are printed Mexican shirts, you name it. He was very flashy. He had a number of different jobs that I can recall: he sold oil drilling machinery, in Houston he was a trucker, he worked for Brown Express, he ~~hung an~~ worked as an "abogado" ~~shingle~~ in Laredo and did bailbonds and stuff like that.

26. The year my brother spent in Houston was a really bad year for Andy. He went to Kingsborough that year, and worked in a movie theatre–I remember he had to get a job. It was bad for him all around. My dad was really tough on Andy, and he was getting into

trouble there. My dad was gone a lot, so Andy ended up having a lot of freedom. My dad would be out driving trucks until real late, or he'd be gone for days at a time. My step-mom, Elisa, worked for an apartment complex. That's when Andy started getting into trouble. He had no supervision, and he started drinking during the day. He was always hooking up with the wrong people. My dad was always really hard on Andy. I guess it was because Andy was a boy, he was way harder on Andy than on me. Maybe because I looked just like my dad, too. But he would really beat Andy bad sometimes. He would get beat black and blue.

27. That year, my dad and Elisa moved away from Houston, and they left my brother Andy in Houston to live by himself. I remember because my dad used to call once a month or so to check in and give us news of Andy, and we hadn't heard from him for a long time, so I asked my mom about it. My mom couldn't get a hold of my dad, but eventually found out that he had moved and left Andy. She was really mad, and told my dad to go get him, but my dad wouldn't. My mom didn't know what to do, so she decided to leave him. Some time later, we got a call notifying us that Andy had gotten arrested with some friends over a stolen car. My mom let Andy deal with it himself. I didn't see him for a long time after that. I think he was about fourteen by the time he came back to San Antonio.

28. During the first years we lived in San Antonio, we lived with different families: first an uncle for a few months, then with my mother's sister, my maternal aunt Linda, then with my mother's friend, Hope Chacon, for a couple of years I think. Andy lived with our family for a while when were living with Hope, but he didn't stay long. He must have been about fourteen.

29. My mother couldn't handle having Andy around. She couldn't handle it financially, because Andy was such a big eater, and things were tight. Andy would also keep his window open, and the heat would go right out. My mom had hard money problems, I remember one time we had no money for food, and all my mom had was rice and beans, We ate nothing but rice and beans for breakfast, lunch, and dinner for a couple of weeks until my mom got a paycheck. It was horrible. My mom also couldn't handle it because Andy would get into trouble, like not go to school or get in trouble in class, or be with the wrong crowd. It was like Andy was more trouble than it was worth for my mom. So Andy lived in half-way houses a lot during his teen-age years. It was sad actually. I can remember going to see him at Boysville. We brought him an Oiler's jacket and some T-shirts and socks. He cried, and wanted to come home, but my mom told him he couldn't. I remember looking at Andy and saying I'm sorry, and he said, "don't be sorry, I'm here because I'm dumb, because I'm stupid."

30. I remember another time going to visit Andy, and when we pulled up to the place, it looked like a jail. I told my mom, and she said it kind of was a jail. Andy was upbeat and funny, during part of the visit, but he wanted to come home that time too, and my mom said no. Andy would act upbeat and be funny, that was his personality, but I also know Andy well enough to know that that was Andy's way of masking. He would use

his silliness to mask that things were not going well, and to mask that he didn't get it a lot of times. I know because I did it too, I had problems in school understanding things, and I would hide it. Andy did the same thing. When Andy did come home, he often had headaches, and I would give him aspirins because my mom couldn't afford medicine.

31. By that time, my mother had a boyfriend, John (Juan) Ramirez. John didn't like Andy at all, and Andy did not like John. So it might have been partly that problem that led to Andy living away from us so much. My mother lived with John for about four years in a subdivision called Indian Creek. John was also a molestor. I remember when Andy was around for a short time in the beginning, he saw John looking at me, and he ~~told~~ warned me to be careful of this guy, that he was going to come after me. Andy was reassuring too, he told me I was stronger now, that I would be able to fight him off, and told me to be careful. He told me not to wear tight clothes, and always wear a robe, and lock my door, and keep my hair off my face. I was careful. I would lock my door, and wash my underclothes myself and hang them in my room. Andy was not with us long, and John did end up coming after me. He would come to my door at night and try to get me to open it, he would say he had a question for me.

32. Once I realized he was coming after me, I took more precautions. In front of my mom, I asked her to have John fix the sliding glass door in my room because I was afraid at night–I wanted a pipe or something to block it. My mom said no at first, so I told her I was really afraid, and I'd break a broomstick. So she had John ~~put pegs~~ in the door to lock it, and while he was fixing it, I was making sure he got it so it really blocked the door, and he was looking at me because he knew I was doing it to keep him out.

BH steel pins

33. One night, my mom and John had been drinking a lot, and my mom was passed out, and John came after me. I was backing off, and I told him to stop or I would scream. He looked at me and half-laughed and said, "you think your mom is going to hear you?" I grabbed a beer bottle, and broke it, and I told him I would slice him up if he came any closer. I told him I didn't care if the police came and got me, for if I had to go to a half-way house like Andy. He kept coming after me, and I ducked behind a chair and he tripped over it and fell and broke the coffee table. I ran into my room and locked the door, and he came to the door and was yelling for me to open it, calling me a bitch and a whore. I was hoping my mom would wake up. Then I heard him go out the front door and come around to my sliding glass door, and he was shaking it. I had put a broken broomstick in the door for added protection, and he was trying to get in. My next door neighbor, Christine, came out and yelled that she was calling the police. He left, and I ran over to her house and stayed there for a couple of days. I didn't tell my mom what was going on.

BH

I remember telling Christine I was glad she did what she did, because my mom was dead drunk and I didn't know what to do.

34. I did leave home when I was ~~18~~, and by the time I came back, John was out my mom's life. I came back to live with my mom as an adult. I had had my first baby by then, and had an abusive boyfriend. My mom got a big four-bedroom house on Ingram, and we all lived there together, including Andy, who was back from prison as an adult too. Gabby was a senior in high school by then.

BH 7 of 9

35. I was working, and my mom was working, and Andy was working at Blockbuster. I remember he would often do things to be nice to my mom. He would call home and ask her what kind of pizza she wanted (it was usually pineapple), and he would bring it back for her. He would have her come to Blockbuster's to pick out movies, and then he would bring them home for her. I remember we did have one big fight because Andy wasn't cleaning or helping out enough around the house, and my mom got into it, and Andy shaped up and cleaned more and helped out around the house.

36. After a while, Andy started working with a friend named Rudy as a DJ. Business started to pick up, and they moved out on their own for a while. My mom decided to retire from the San Antonio Housing Authority and go out to Arizona to take care of her parents. She cashed out some of her retirement, and bought each of us a car and a car for herself, and left. Gabby moved in with me for a while, but we got into a fight and she left. Gabby, Andy, and Rudy drove out to Arizona for about a week, and my mom came not long after.

37. That was the year that my mom got sick. My mom was having bad headaches sporadically for a few months around the time I got married before I had Colton. Colton was born on May 20, 1992, and my mom made it to the hospital, even though she was having bad headaches by then. My mom got there, and collapsed. They took care of her some, and sent her home with some really heavy medication that knocked her out. Nine days later, she was in the hospital again, and had to have surgery on an aneurism. The doctors told us she wouldn't make it. Andy, Gabby, and I were all at the hospital, and we had to sign for her to be cremated. I refused at first, because I felt like it was giving up hope that she would make it. It was devastating for all of us, but Andy took it by far the worst. He was sobbing, leaning over her body and crying and crying and crying, and apologizing. It was heart wrenching. I think he really had wanted to make it, to make up for all the trouble in the past, and he was seeing his chance to do that for my mom slip away.

38. In the end, there was a chance for my mom to live, but the doctors said that she would never be the same. Surgery would cause much of her brain to stop functioning. I was in favor of trying, and Andy was very much opposed to it, because he felt like she would live like a vegetable and it would be miserable for her, better to let her go in peace. In retrospect, he was right, but we opted for keeping her alive. She lived for another 5 ½ years, but she was never the same. She couldn't talk, she could only make slight sounds when she was crying or laughing. She had to live in a nursing home, ~~and had problems with bedsores and bruises~~ with 24-hour care.

39. After my mom got sick, Andy fell apart. He turned heavily to drugs and alcohol. I remember he would show up at the hospital drunk and high. He was getting drunk and high pretty much every day after that. During that period of time, he was working for Joey Records as a driver and errand boy. I used to tell him that job was getting him nowhere, but he was hopeful that it was a foot in the door, that he would eventually get to

8 & 9

I remember him coming to the hospital & they said he looked like he'd been out in the streets for days.

learn to make records, do out takes, create sound bytes, do all that creative, artsy, music stuff that he loved.

40. Andy never really made it beyond my mother's illness. We celebrated Christmas at the nursing home that year, and not long after that, Andy was arrested for a parole violation and new charges.

41. I did not know that Andy had been convicted of a capital offense until I was contacted by Andy's current attorneys. No lawyer or investigator contacted me before or during the trial. As far as I know, no one in my family was contacted or informed. Had I been contacted, I would have provided whatever information I could about the family. I would have been available to testify if needed.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

11/22/04 San Antonio, TX — Elizabeth Canales Villarreal

Date & Place — Elizabeth Canales Villarreal

I, Irene Garcia, pursuant to the provisions of 28 U.S.C. §1746, declare as follows:

1. My name is Irene Garcia. I am Andy Canales' maternal aunt, his mother's oldest sister. I was born December 23, 1939.

2. I am 65 years old, and live in Milwaukee, Wisconsin. I have suffered bouts of depression for many years.

3. I don't know a whole lot about how my parents grew up. Both of my parents grew up in Texas.I know that both of my parents came from big families, my mom from a family of 12, and my dad from a family of 13. Both were toward the tail end of the brothers and sisters. My mom was sickly and didn't go to school much. My dad went to school to the 5th grade. My dad didn't talk about his childhood until very recently. Apparently, his mother died in childbirth, and my dad was raised by his sisters. At the age of 13, he left home because he was sick of the abuse he was getting from his sisters. He hopped a train, and rode from San Antonio to Michigan. He was big for his age, and he hooked up with another kid who was older than he was. There were times when he went hungry, and then the two of them would go into towns and steal food to survive. When they got to Michigan, they started working in the fields. My dad stayed away from home until he was eighteen.

4. When my dad went back to Texas, he started working for a place packing and cleaning pecans. That's where my dad met my mother, who was three or four years older than he was. My mom was 23, so my dad must have been 19 or 20.

5. I was the oldest of seven children. My parents had four kids, then didn't have any kids for nine years, then had three kids. Janie and I grew up together in that first set of kids, and we moved around a lot and were isolated a lot. My dad would isolate us in country houses, away from everything. Growing up in that household was very difficult, and now that I am older, I realize that I suffer from depression partly because it runs in our family, and partly because of the way my parents treated us when we were growing up.

6. Verbal and physical abuse was a regular thing at our house. My parents were very critical and negative, and my dad yelled a lot. My dad yelled at my mom, he yelled at us, he would get up in the morning and start yelling. My dad went into the service, and he fought in World War II. I remember him talking about going to Hawaii and to the Phillipines. When he got back, he was very angry. He was physically abusive, and he was verbally abusive to the kids. He would make us kneel or stand in the corner with our face to the wall so long that it was hard, I don't know which was harder. He would beat us with a belt or a switch or his hands, whatever he could get his hands on. He was always very controlling, overbearing, dictatorial.

7. We lived in San Antonio until I was fifteen, except when I was a baby, we lived in Michigan and followed crops. We moved around a lot, and we lived in places that were really substandard. I remember one house we lived in had no paint on it at all, and it was way out, there were no paved roads. The house had three rooms: one kitchen, and two bedrooms. There was no indoor plumbing. My most vivid memory from that house was being beaten because I had my sister's hair brush. My mom had a tub out by the back door, because I must have been about 2 when we got back to San Antonio.

I.G.

she was doing the wash, and she got a rope, put it in the tub, and beat me with it wet. Another house we lived in was similar, it had some paint but it was all peeling off, and there was no indoor plumbing. No place back then had a living room. My mother's parents (Andy's maternal great grandparents) had land that had several buildings on it, and there was one building where my great grandfather had stored cars back from the time when my maternal granfather was a garbage collector. The barn was converted into sleeping quarters. There was a big room with two double beds in it. There was another building you went to for toilets and showers. Our family stayed there two different times, I guess because of money problems.

8. I think that both my parents had drinking problems. My mom drank more secretly when we were growing up, then it was all out in the open when she got older. My dad always had a shot of brandy in the morning in his coffee, and he drank when he came home. He handled his liquor better than my mom. I remember when we lived in Texas, my dad would leave on Friday night after work, and sometimes he wouldn't be back on Saturday. I remember my mom sending his brother off to look for him.

I must have been about 10, Janee about

9. At the first house that my dad built, we were still living in Texas, and there was no electricity or plumbing. My mom used kerosene lights and a kerosene stove. We lived way out in the country, and we would have to walk a long way to get to a road where the bus would pick us up. There was a bar on that corner, and when we got off the bus coming home from school, my mom would be in the bar. After a few times, we got so that we would go into the bar to get her when we got off the bus.

10. When I was fifteen, we moved to Kenosha, Wisconsin. The first house we lived in in Kenosha was a converted garage. It looked like a barn and there was no indoor plumbing. I remember when I was in high school, I would come home from school and my mom would be in bed. The house would be a mess, none of the dishes done, no supper being cooked. Sometimes I would knock on my mom's door, and she would say she didn't feel good, and wouldn't come out. Looking back on it, I don't know whether my mom was suffering from depression, or whether she was drunk, or both. I would do the dishes and start dinner, because if it was not ready when my dad came home, there would be trouble. That lasted for a year or more. And it seems like it hit periodically. There were times when my mom would just watch TV all day long.

11. I got married very young, a few years after we got to Kenosha. I remember the day I got married, I got a terrible beating from my father. I was getting ready, I was going to get married at the court house at one or two, and it was morning and I wanted to go shopping. We had so little money and I didn't have any bedding or dishes or anything like that. I wanted a ride into town, and my dad was going to the hospital to pick up Janie, who had something done to her feet. He lost his temper because I was wanting a ride into town, and my mom held me down, and he beat me as hard as he could with his arm, which was in a cast. My face was all bruised and scraped, my head had been hit in several places, and he kept hitting me and hitting me. I was so angry that I broke loose and I scratched my dad's face with my long fingernails, and I drew blood. My dad drew back, and he said that I better be there when he got back, we had an account to settle.

My pin-curls were hanging all over the place, and my face was bleeding, and I was crying and crying, I couldn't stop crying.

12. I remember Andy's father, Anibal Canales. I didn't know him very well, but I do know that there was always something about him that I didn't like. He was a very arrogant man. I know that he abused my sister. Janie would come home to Kenosha on the week-ends, sometimes, and she would be black and blue from having been beaten by Andy's father. I remember one time seeing finger-mark bruises on both sides of her neck, as if he had gone after her throat from the front with both hands.

13. When Janie first got married, they lived in Waukegan. I remember visiting her there twice. The place was adequate. It had several rooms, and she had beds, blankets, pillows, and everything seemed clean. As far as I know, Janie was a good housekeeper when she was young. I never saw any of the places where she lived in Chicago.

14. I only met Carlos Espinoza, Janie's second husband, a couple of times. My parents didn't like either of Janie's husbands. They thought that they just married Janie to get their papers. My parents were very racist. They were racist against all nationalities, but especially Mexicans from Mexico. I often wondered if that was why my parents, Andy's grandparents, didn't treat Andy and his sister well. They would often hurl verbal abuse at them, they treated those kids like they really didn't like them. The only time I was around it was when I would go visit my parents, and Janie would happen to be there at the same time with her kids.

← See back page, # 14(a)

15. Janie's kids got left with babysitters a lot. I don't remember much of Janie's second husband, Carlos Expinoza, but I remember sometimes he would go out without her, and that would make Janie really mad.

16. When I got older, when I was in between husbands, I would go out with Janie sometimes. She was a quiet personality when she was not drinking, but when she would drink she would get loud and talk and laugh and joke and dance. She was a party girl. I've heard stories over the years, and there is no doubt that Janie had a drinking problem. We would leave the house sober, and she would drink way too much, and come home completely drunk. She'd get sloppy. I thought she had a drinking problem because I saw her drinking a lot, at all hours.

17. After Janie broke up with Anibal and then later with Carlos, she had boyfriends. She was living in Kenosha and the surrounding areas. I know of two men she lived with, but I cannot remember their names. I remember one guy stole her car and took off for San Antonio. She and my sister Linda went down to San Antonio to get the car. I remember when she was dating a guy named Ruben, she was living in Kenosha. I remember him because Janie was dating him when I met my husband, who was also named Ruben. That was in the early 1970s. I don't think Janie ever lived with him.

18. Over the years, Janie drank a lot, and she would leave the kids with babysitters so that she could go out drinking. I think they were neglected. And whenever their dad was taking care of them, he was very short-tempered and impatient with them. Janie was too lenient with those kids, she didn't want to deal with the kids alone.

19. As the kids grew up, Janie got frustrated with her kids, especially Andy. I remember before she moved to Texas, she was saying she didn't know what to do with Andy anymore, he was acting out, and she didn't know what was going through his mind. He was being disruptive in school and things like that, as far as I kn

20. One of the last times I saw her, she was living in Texas and she was dating John Ramirez. It must have been in the early 1980s. He was a nice guy, but they were both heavy drinkers. I was visiting with my husband, and we would go do things during the day, and as soon as Janie and John got home from work, they would start drinking. They drank every night when I was there. I remember there was a problem because Andy had come home, he'd been locked up, and he stole a check, I think it was a tax refund check or something like that, that belonged to John. John didn't say much about it when he was sober, but he was furious, and when he got drunk, we sure heard about it.

21. I was never contacted by any of Andy's trial attorneys. I didn't know that Andy was on death row until recently, when his current attorneys contacted family members. I would have spoken truthfully to his attorneys had they contacted me, and I would have been available to testify if needed.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

11-16-04 Waterford WI
Date & Place

Irene Garcia
Irene Garcia

I, Jose Canales, pursuant to the provisions of 28 U.S.C. §1746, declare as follows:

1. My name is Jose Canales. Jr. I am Anibal (Andy) Canales' paternal uncle, Andy's father's brother. I live in Chicago, Illinois, and have lived here since The early 1970s or late 1960

2. Both my brother, Anibal, and his son, Anibal Junior, have the same name. I have always called my nephew Junior, but in this statement I will refer to my brother as Anibal, and to his son as Andy.

3. I was born in ~~Mier, Texas,~~ Laredo, Mexico on June 25, 1939. My parents had five children together: my oldest brother was ~~eight~~ nine years older than me, his name is Jose Rolando Canales, and we call him Rolando; my sister, Isaura Canales, is 6-7 older than me, she now lives in Houston; I had a sister Yolanda who died as a very young child; I was the second to last; and then came Andy's father, Anibal Canales. So Anibal and I were the two youngest boys, and we are two 1/2 years apart.

4. My mother and my father, Andy's paternal grandparents, divorced when I was a very young child, about five. I have very few memories of my parents together, but I know from my older siblings and from what I have heard from the family, that my father was physically abusive to my mother. I remember hearing stories of my ~~aunt~~ paternal grandmother, who lived down the block from my parents, running to get my older siblings who were very young children when there were fights between my parents. My father left my mother for another woman. Raising the children alone was hard for my mother.

5. As a child, I grew up in Mier, Texas, ~~very close to Mexic~~o. My mother received a small pension from my father. In 1947, when I was about 8, and Andy's father, Anibal, was about 6, my older brother Rolando joined the military. Rolando was under-age, so my mother signed for him to go. He became a paratrooper, and my mother received a small pension from the government for his service.

6. My mother was very old-fashioned, like from the Victorian era. When things did not go the way she thought they should go, she had us stand in the corner and stay there, or she would put us in the garage and tell us, "that's where you will stay until I call you." We got beatings too, usually with a belt.

7. In 1952, when I was about 13 and my brother, Andy's father, was about 11, my older sister ~~Aurora~~ Isaura got married and left home. That left my mother alone with the two of us boys. My mother's family lived in Laredo, and they encouraged her to move to Laredo, they asked her what she was going to do alone with the two boys. So we moved to Laredo, where my mother had family, including some sisters.

8. Our move to Laredo is when things changed for us. I must have been about 13 years old, and Anibal must have been about 11. I had to go from being a child to being a man. My mother didn't have enough money, and she was always kind of sick. They said she had TB because she coughed, but she didn't. She had gotten sick when she was five or six years old, when she had

gone swimming in the river, and she caught a pneumonia. She had weak lungs and had problems all her life after that.

9. Anibal and I had to go to work. I had to lie about my age, and say I was eighteen, so that they would hire me. We would work in restaurants–I worked as a bus boy, and Anibal worked as a dishwasher.

10. In 1956 or 1957, when I was about seventeen, we moved to Michigan. I went to work in the Heinz pickle factory, and so did my mom. My brother, Anibal, was picking cherries in the fields.

11. After about a year, my brother and my mother went back to Laredo, Texas, and I stayed behind. I joined them again sometime later. We were living in government housing in Laredo, and my mother fell sick. They had to remove a lump in her lungs, so they sent her to Kerrville, Texas, where she stayed for about a year, recovering. My brother and I were left in the government housing by ourselves, and we weren't allowed to stay, so we ~~went to live~~ with my uncle Ventura, in Waukegan, ~~Wisconsin~~.

12. I went to work for the VA Hospital as a nurse's aide, and I kept that job for many years. Anibal met Juanita, his first wife (Andy's mom) at a dance at Waukegan. They got married very fast. They were both very young. Juanita was always nice and friendly to me, but Juanita was the kind of person who didn't show her emotions, she was ~~kind of~~ a dry person.

13. I don't know if Juanita was pregnant already when they got married, or not. I do recall that after they got married, Juanita had a miscarriage, and lost a baby. I remember talking to my brother outside St Theresa Hosptial in Waukegan, he was crying. They were both quite young, but they were both working, and they lived in a house, they both had cars, they were saving money, and I thought they were doing very well.

14. Within a couple of years, my brother Anibal and Juanita moved to Kenosha. I think Andy was about one and Juanita was pregnant with Elizabeth around that time. They stayed there for a short while; then moved to Chicago. ~~Some of our friends~~ talked them into moving, they said they could make more money in Chicago, and they had an apartment upstairs from where ~~they~~ lived. That's where the problems between them began. My brother was working at a factory, and when he got laid off, he went to work as a security guard, and Juanita went to work for a can company. They moved to 47th and Elizabeth Street, and that's where things really got bad. Anibal was working during the day, and Juanita would take care of the kids. At night, Juanita was working the second shift at a can factory, and she was supposed to be home around 11, and instead one or two nights she stayed out until 3 or 4 in the morning. This happened in the middle of the week. My brother, Anibal, suspected that she was seeing someone else. There was some sort of story about him seeing Juanita kiss another man. I think in retrospect it was Carlos Espinoza, who was working at the can company and who later became Andy and Elizabeth's step-dad.

15. That's when the real fighting began. My brother has always had a very bad temper. My brother became violent with Juanita and he would hit her. I remember going over to their house

the week-end after Juanita had been out late, which was my usual routine. I would work during the week and on the week-ends I would go over to see the kids and the family. Juanita's face was black and blue, and she told me that she had been fighting with Anibal, and he hit her. I became upset, and I told my brother that that was unacceptable. After that, it was like both had lost the trust, and the problems just got worse and worse.

16. It got so bad that Anibal moved out to an apartment on 19th Street. ~~took off and moved to Roma, Texas, leaving Juanita and the kids behind~~. I knew what it was like to live in a broken household, and I tried to be the intermediary, to keep them together and help them to work it out. My mother, too, knew what it was like, and she even came up here to try to help smooth things out. I eventually talked Juanita into following Anibal down to Roma. She went for a few months with the kids, but she didn't want to stay in that small town, and she left. She took the kids to my mother, their paternal grandmother, in Laredo, and came back up to Chicago alone. At one point, she was preparing papers to turn full custody over to Anibal, but she changed her mind.

17. When she got back to Chicago, she was seeing Carlos Espinoza within a short time. He was working at the can factory, so that's why I think the relationship started before things were over with Anibal. I don't know much about their life, or about how long he continued to work for the can company or any of that.

18. My mother could not keep the children, and at some point, Andy and his sister Lisa came back to live with their mother. I kept seeing Andy and Lisa during those years. My brother was out of their lives entirely, he pretty much abandoned them, but I would go pick them up on the week-end, and usually I would keep them all week-end. I realized that for Juanita, it was a convenience to have me come and pick them up and take care of them. She would leave the kids with whoever would take them because she wanted to go out and have a good time, and the kids were in her way. My brother was the same way, whenever Juanita did send them off to be with their father, the first thing he would do was dump them with my mother. He was a young man and wanted to go out and didn't think about the kids much at all.

19. I was very happy to have the kids. I didn't want to lose touch with them. I would take them to the zoo, or to the park, or downtown on the holidays, and out to eat. I would cook for them. I was just trying to fill some sort of gap that was left after my brother left them. As an uncle, I could only do so much, but I tried. I tried to be a stabilizing force in their lives, because they needed it so much. My brother Anibal had basically abandoned them, and Juanita was still wanting to go out and go bar hopping, and the kids did not get the structure or the attention they needed.

20. I remember when Espinoza was living with the kids, they complained bitterly about him all the time. I remember them telling me over and over that they hated him, that they didn't want him living in the house, that they didn't want him putting his hands on them or spanking them. They would say, "we hate that man, we hate that man, we cannot stand him." I suspect that they were being abused. One time, Andy came to my house and he had black and blue welts on his arm from having been beaten with a belt. Now that I look back on it, I realize that I should have lifted his little shirt to see if he had marks on the rest of his body, but I was so young, I didn't know what to do. Andy did say that Espinoza had hit him in the head with his fists. Andy's

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mom, Juanita, was working in a department store called Gobalt's, which no longer exists now a days. I walked over to her work and took it up with Juanita. I told her that this was unacceptable. Juanita said that Andy was not behaving, didn't go to school or something. She was defending Espinoza and not Andy. Shortly after that, Juanita moved. I don't remember where she went, maybe Kenosha or someplace in Wisconsin. She moved back to Chicago and was back and forth after that. I have since learned

21. One time, Andy ran away from home. He was just a small kid, and he made it all the way from where he was living on the west side near Chicago Avenue to my house in the city of Chicago. He must have walked, my guess is that it was a couple of miles. He was tired or sick

22. I did notice a change in those kids after Espinoza was living with them. They had been lovely children, just lovely. And Andy became a rebel after Espinoza moved in. They seemed so unhappy to have him there. They were angry that their mother was forcing them to live with Espinoza. I even remember Andy saying that he hated his mother for what she was making them go through. Elizabeth was small, she was playing with dolls, but Andy knew and he said that it would bother him when he went to sleep at night, he would think about that man. Seeing them later over the years, I got the sense that their circumstances deteriorated even more.

23. I remember one place Juanita was living in Chicago, it was a terrible neighborhood. I went to get the kids one time, and Juanita was not there. There was a big dump of garbage behind their house, and the kids were dirty and had dirty clothes. Elizabeth had a dirty doll, and both were playing in the garbage behind the house. There was a Puerto Rican woman who offered to clean them up, but I just took the kids and brought them to my apartment on the north side. They cleaned themselves up, and I took them to a community store and got them clothes, and took them to the movies. They loved it. They just needed love and attention, and they loved coming here.

24. I also remember a place where Juanita was living that was terrible, it was very small and in bad shape, and she shared it with a Puerto Rican woman who also had kids. I don't know if they all slept in one room or if there were two rooms, one for each family. But this Puerto Rican lady would get her sister to come over and watch the kids so that she and Juanita could go out.

25. I felt angry because I felt that Juanita had made these changes in her life that were having a very negative impact on the kids, but I didn't want to have any hostile exchanges with Juanita because I didn't want to jeopardize my relationship with the kids, or the opportunity to visit them and take them to my house on the week-ends.

26. Over the years, my brother went from one bad relationship to another. He married one woman and it lasted only for about a month. He had two kids with a Cuban woman, and that didn't work either and they now live in Miami.

27. Years later, Juanita moved to San Antonio. Juanita sent Elizabeth and Andy to Laredo to live with my mother, their paternal grandmother. My mother was having a hard time, she was getting some money from the government, and I would send her a little bit of money when I could, like $25 at a time. My mother just couldn't afford to keep the kids, so she wanted to send them to San Antonio to live with their mom. Elizabeth went, but Andy went to Houston, to live

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with his dad. He must have been about 13.

28. Anibal was working as a trucker in Houston at the time, for a company called Brown Express. He was with a 3rd woman ~~had married by this time a third woman~~, Eliza. Eliza was working as a building manager. They were living in a very small apartment with only one room. Andy went to work as a busboy in a cafeteria in a mall across the street, he had to use my brother's social security number to get a job. I was staying there for a while, all of us slept in one room, but I got a different place because there just was not room. There was tremendous hostility and anger in the house. No one was paying any attention to Andy. I remember that Andy was complaining of headaches around that time, he was having trouble sleeping, and said that he was bothered at night by visions and voices. That's when Andy started hanging out with bad company. My brother wasn't helping the situation. He was having bad problems with Eliza and I know that he was violent with her. And then my brother got laid off from Brown Express, and Eliza was pregnant with Aquilles, so he decided to move back to Laredo with Eliza. Andy wanted to stay and live with two friends that he had met, but everyone knew they were bad company. I was still in Houston at the time, and I was very much opposed to the idea of leaving Andy by himself in Houston. He was too young, and I knew that it was a very bad idea. I argued with my brother about leaving Andy there to live with friends who were bad company, ~~and he was too young~~. But there was nothing I could do to get my brother to listen, and they left Andy there, and I never heard from Andy again. After I left Houston, I found out that Andy got into trouble. His friends stole a car, Andy

29. I heard years later that he was back in San Anotonio, that he was working and living with a girl, and I thought things turned out okay for him. I tried to get in touch with those kids, but they moved so much I couldn't find them when I tried.

30. My brother, Anibal, is a very hard person. He has gotten into a horrible way of thinking, he is completely irrational, and it is impossible to reason with him. Sometimes he seems all right, and sometimes he is very agitated, extremely nervous, constantly moving around and walking around. I haven't seen my brother in four years, and it seems that he has gotten worse. I don't know what took over my brother. There seems to be something in the family: my older brother Rolando has some kind of Alzeimers or dementia, and Anibal has terrible problems, I'm the only one who is still here, who can see the changes that have happened over the years.

31. My brother has deteriorated over the years. Because I live in Chicago and he lives in Laredo, it is hard to keep track and I have not seen him in more than four years. He has not had a real job in more than 20 years. I don't know what he does, I don't know how he makes it. He moves from place to place, I know that at one point he was homeless. I was sending him boxes of clothes because he wears the same size I do. He barhops, he drinks way too much, he is not stable, he is always womanizing. He has gotten robbed a number of times. He has had two cars stolen and has wrecked 2. I would not be surprised if there were drugs involved. It has become difficult to communicate with my brother because he is so irrational, and he has problems of his own and just can't handle dealing with anything else. My brother has real psychological problems. His irrationality started when he started having problems with Juanita.

32. I can't understand why Andy's parents didn't take better care of them. My brother, Anibal, just abandoned the kids. And then he abandoned him again when Andy was barely a young

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teenager, leaving him to live by himself in Houston. Juanita, on her end, was always interested in going out and going to bars and she didn't provide the kind of support or structure that they needed. When I was spending time with them on the week-ends, Juanita was glad to get rid of the kids so she could go out. And when their step-father was beating up on Andy, Juanita was defending the step-father and not the child.

33. When my mother, the children's paternal grandmother, died a few years ago, I drove to San Antonio and tried to find the kids. The phone number I had was out of order, and I could not find a forwarding address.

34. I did not know that Andy was on death row until November, 2004, when I was contacted by his attorneys. As far as I know, no one on the paternal side of the family knew. I was devastated to find out. I never thought something this bad would happen in our family. I have been at the same address in Chicago for more than 25 years, and was never contacted by any of Andy's attorneys. If I had been contacted, I would have answered all of their questions about Andy's family and his upbringing, and I would have been available to testify if necessary.
or investigators.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

11-16-04
Date & Place

Jose Canales
Jose Canales

State of Texas)
)
County of Harris)

In Re Anibal Canales

Declaration of Naomi E. Terr

I, Naomi E. Terr, declare under the penalty of perjury that I understand the Spanish language and the English language, and that, to the best of my knowledge and belief, the following statements in the English Language have the same meanings as the statements in the Spanish Language in the Declaration of Elizabeth Velasco, signed on October 14, 2004:

I, Elizabeth Velasco, state that the following is true and correct to the best of my knowledge:

1. My name is Elizabeth Velasco. I live in Laredo, Texas. I met Anibal Canales when he was approximately thirteen years old. We always called him "Andy." I met Andy when Andy's father and I lived together. Andy's father was also named Anibal Canales and people knew him as "Andy." To avoid confusion in this declaration, I am going to refer to the son as "Andy" and to the father as "Andy's father."

2. When Andy's father and I met, I was about 19 years old. He was 14 years older than I was. In other words, when we met, he was more or less 36 years old. We lived together for approximately six years and we had one son. Our son is named Aquiles.

3. Before Andy's father and I met, he had already been married several times and he had had four children with two of his wives. His first wife was Juanita, Andy's and Elizabeth's mother. After Juanita, he had two children with Marlene, a Cuban woman from Miami. The children he had with Marlene are named Ulises and Yolanda. After Marlene, Andy's father got married to a woman from Laredo whose name was Mari. Mari and Andy's father were married for about one month. Andy's father and I got together after Mari. He also had another woman, but I don't remember her name.

4. When I lived with Andy's father, I noticed he had forgotten about the children he had previously had. Andy's father knew nothing about his children and he did not support them in any way.

5. Andy arrived to live with us when Andy was about 13 years of age. At that time, we lived in Houston, Texas. Andy arrived at the apartment where we were living because Andy's mother had sent Andy to live with the maternal grandmother in Laredo, Texas. The maternal grandmother was already an old woman. She lived in government housing and could not have Andy in her house, so, she sent her to live with us in Houston.

6. When Andy arrived to live with us, Andy had not seen his father in years. Rather than Andy's father receiving Andy with a hug, giving him support, Andy's father was extremely violent with Andy. The life that Andy and I lived with Andy's father was terrible. Just as Andy's father gave Andy beatings, he also gave me beatings.

7. When Andy's father would get mad with Andy, he would put him in the room and give him beatings with the belt until the father got tired. I recall that one time he was beating him with a belt for about an hour. When the father beat Andy, he would leave bruises and wounds all over the body. I know that Andy would be left wounded because I was the one who cured the wounds.

8. Andy's father also beat me a lot, but he would beat me with his fists. He also left me with marks from the beatings. He was an extremely violent man. He beat me in the presence of people. I recall that sometimes he would invite friends over to eat. Once I had cooked and everything was served at the table, he would get mad because of any little thing. For example, he got mad if the salt was missing or if the rice was flavorless. When he got mad, he would throw everything from the table and he would beat me in front of his friends. He would also get annoyed if people I knew me came to the house. There was a lady who did me the favor of taking me to work. Sometimes the woman would come into the apartment and if Andy's father arrived, he would start asking her if she didn't have responsibilities because I did. Andy's father grabbed me by the hair in front of the woman. Andy's father also did things that are not normal. For example, he would grab clothes from the closet and put them in the bathtub with hot water. He would tell me that he was going to go out and that the clothes better be washed, dried, and ironed in hour or I knew what was coming to me.

9. When Andy's father would get mad, his facial expressions would even change. I, who was an adult, was terrified of Andy's father. I also felt helpless. I can't imagine what Andy, who was a child, felt. After I had my son Aquiles I left Andy's father. I left him after he gave me a beating.

10. When Andy lived with us, Andy did things to get attention. For example, he would come to the house with his pants and shoes all wet from having gotten himself in water. He also associated with people who were not good. At school, he didn't do well. I remember that Andy did not know how to write, nor did he know how to read well. Andy did not know anything in math. I tried to help him with his homework, but he never improved in school.

11. My impression was that all of the problems that Andy had were due to the fact that Andy had a very sad and difficult life. When Andy came to live in our house, you could see the sadness in his eyes. Andy had a life full of instability and lack of appreciation and interest from his parents. Andy's father would tell me that Andy never had stability with his mother. According to Andy's father, Andy's mother drank a lot, lived in bars, and always left the children alone. With Andy's father, there was also never a good word or a hug.

12. At school, Andy would say that he did not want to live with us, but he never said how violent his father was. Andy ended up leaving the house and later we learned that he went to live with a black couple that lived near the apartments. These people would take in children and make them steal in stores. Afterwards, we did not know anything about Andy. Andy's father never did anything to look for his son. I would tell him that we needed to do something for Andy, but he would tell me that if Andy liked the bad life, things were going to stay that way.

13. When Andy's father and I lived together, he would disappear for days. Sometimes he would not arrive all night. He would come back the next day and he would leave again for days. Andy's father also did not have steady work. Sometimes he had a lot of money; sometimes he had no money. I always had to work, sometimes I even had two jobs to support the family. I knew that I could not count on Andy's father.

14. When I lived with Andy's father, he drank a lot and he did all kinds of drugs. He drank alcohol and used marijuana and cocaine. I had the impression that he became more violent when he did not have the drugs.

15. I know that Andy's father had a very hard childhood. His father abandoned his mother for another woman when Andy's father was a child. His father had children with this other woman. The mother of Andy's father instilled a lot of hatred in Andy's father toward his father and half-brothers. Andy's father had to see his half-brothers without his mother's knowledge. When Andy's father was about 14 years old, he went alone to Chicago and had to take care of himself at that age.

16. Even though I suffered a lot with Andy's father, when I see him now, I feel sorry for him. He really does not have a life. He is not the same strong and violent person he was before. He doesn't even have a house. He rents a little room in Nuevo Laredo and sometimes he doesn't even have money to eat. Sometimes he goes from house to house. He is practically alone. My son Aquiles sometimes has to give him money for his expenses.

17. Before Attorney Naomi E. Terr came to speak with me on October 13, 2004, no attorney or investigator working on the case of Andy Canales had come to speak with me. I did not know that Andy was under a sentence of death here in Texas until Attorney Terr told me. If Andy's attorneys would have looked for me previously, I would have been willing to answer any question and if necessary, I would have also been willing to testify on Andy's behalf.

I have read this declaration. I affirm that it is true and correct to the best of my knowledge, and I so state under the pains and penalties of perjury.

This declaration was executed on October 14, 2004.

Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of November, 2004

By: _____
Naomi E. Terr

State of Texas)
)
County of Webb)

In Re Anibal Canales

Declaración de Elizabeth Velasco

Yo, Elizabeth Velasco, declaro bajo protesta de decir verdad que lo siguiente es verdad en mi leal saber y entender (I, Elizabeth Velasco, state that the following is true and correct to the best of my knowledge):

1. Mi nombre es Elizabeth Velasco. Vivo en Laredo, Texas. Yo conocí a Anibal Canales cuando él tenía aproximadamente 13 años. Siempre le llamabamos "Andy." Conocí a Andy cuando el papá de Andy y yo viviamos juntos. El papá de Andy tambien se llama Anibal Canales y la gente tambien lo conoce como "Andy." Para evitar confusión en esta declaración, me voy a referir al hijo como "Andy" y al padre como el "papá de Andy."

2. Cuando el papá de Andy y yo nos conocimos, yo tenía 19 años. El era 14 años mayor que yo. O sea que cuando nos conocimos, el tenía mas o menos 36 años de edad. Vivimos juntos aproximadamente seis años y tuvimos a un hijo. Nuestro hijo se llama Aquiles.

3. Antes de que el papá de Andy y yo nos conocieramos, el ya había estado casado varias veces y había tenido cuatro hijos con dos de sus esposas. La primera esposa fue Juanita, la mamá de Andy y Elizabeth. Despues de Juanita, tuvo a dos hijos con Marlene, una Cubana de Miami. Los hijos que tuvo con Marlene se llaman Ulises y Yolanda. Despues de Marlene, el papá de Andy se caso con una señora de Laredo que se llamaba Mari. Mari y el papá de Andy estuviero casados como un mes. El papá de Andy y yo nos juntamos despues de Mari. Tambien tuvo a otra señora pero no recuerdo su nombre.

4. Cuando yo viví con el papá de Andy, yo me di cuenta que el se olvido de los hijos que había tendio anteriormente. El papá de Andy no sabía nada de sus hijos y no los apoyaba de ninguna manera.

5. Andy llegó a vivir con nosotros cuando Andy tenía como 13 años. En ese entonces viviamos en Houston, Texas. Andy llegó al departamento donde vivíamos porque la mamá de Andy lo había mandado a vivir con la abuela materna en Laredo, Texas. La abuela materna ya era una señora grande. Ella vivía en unos departamentos del gobierno y no podía tener a Andy en su casa, entonces lo mandó a vivir con nosotros en Houston.

6. Cuando Andy llegó a vivir con nosotros, Andy no había visto a su papá por años. En vez de que el papá de Andy recibiera a su hijo con un abrazo, dandole apoyo, el papá de Andy fue extremadamente violento con Andy. La vida que Andy y yo vivimos con el papá de Andy fue terrible. Así como el papá de Andy le daba golpizas a Andy, a mi tambien me daba golpizas.

7. Cuando el papá de Andy se enojaba con Andy, lo metía al cuarto y le daba golpes con el cinto hasta que el papá se cansaba. Recuerdo que una vez le estuvo dando con el cinto por casí una hora. Cuando el papá golpeaba a Andy, le dejaba moretones y heridas por todo el cuerpo. Yo se que Andy quedaba todo herido porque yo era la que le curaba las heridas.

8. A mi tambien me golpeaba muchisimo el papá de Andy, pero a mi me golpeaba con sus puños. Tambien me dejaba marcada de los golpes. Era un señor extremadamente violento. Me llegó a golpear en frente de la gente. Recuerdo que aveces invitaba a sus amigos a comer. Ya que yo había cocinado y todo estaba servido en la mesa, se enojaba por cualquier cosita. Por ejemplo, se enojaba si faltaba sal en la mesa o si el arroz había quedado sin sabor. Cuando se enojaba, tiraba todo de la mesa y me agarraba a golpes en frente de sus amigos. Tambien le molestaba que fuera gente a la casa que yo conocía. Había una señora que me hacía el favor de llevarme al trabajo. Aveces la señora entraba al departamento y si el papá de Andy llegaba al departamento le empezaba a preguntar a la señora que porque estaba ahí en el departamento y que si ella no tenía responsabilidades porque yo si tenía responsabilidades. El papá de Andy me llegó a jalar del cabello en frente de la señora. El papá de Andy tambien hacía cosas que no son normales. Por ejemplo, agarraba ropa del closet y la metía a la tina con agua caliente. Me decía que él iva a salir y que mas valiera que la ropa ya estuviera lavada, seca, y planchada en una hora o que yo ya sabía como me iva a ir.

9. Cuando se enojaba el papá de Andy, hasta le cambiaban las facciones. Yo, que era adulto, le tenía pavor al papá de Andy. Tambien me sentía desamparada. No me puedo imaginar lo que sentía Andy, que era un niño. Despues de que tuve a mi hijo Acquiles deje al papá de Andy. Lo deje despues de que me dio una golpiza.

10. Cuando Andy vivió con nosotros, Andy hacía cosas para llamar la atención. Por ejemplo, llegaba a la casa con los pantalones y zapatos todos mojados de haberse metido al agua. Tambien se relacionaba con gente que no era buena. En la escuela, no le iva bien. Yo recuerdo que Andy no sabía escribir, ni sabía leer bien. Andy tampoco sabía nada en matematicas. Yo trataba de ayudarlo con sus tareas, pero nunca mejoraba en la escuela.

11. Mi impresión es que todos los problemas que Andy tenía se debían a que Andy tuvo una vida muy triste y dificil. Cuando Andy llego a vivir a nuestra casa, se le veía la tristeza en los ojos. Andy tuvo una vida llena de instabilidad y de falta de aprecio y de interes de sus padres. El papá de Andy me contaba que Andy nunca tuvo estabilidad con su mamá. Según el papá de Andy, la mamá de Andy tomaba mucho, vivía en bares, y siempre dejaba a los niños solos. Con el papá de Andy, tampoco hubo una buena palabra o un abrazo.

12. En la escuela Andy decía que ya no quería vivir con nosotros, pero nunca decía lo violente que era su papá. Andy se terminó llendo de la casa y despues supimos que se fue a vivir con una pareja negra que vivían por los departamentos. Estos señores recogian a menores de edad y los hacían robar en las tiendas. Despues ya no supimos mas de Andy. El papá de Andy jamas hizo algo por buscar a su hijo. Yo le decía que teniamos que hacer algo por Andy, pero él me decía que si a Andy le gustaba la vida mala, haci se ivan a quedar las cosas.

13. Cuando el papá de Andy y yo vivimos juntos, él se desaparecía por dias. Aveces no llegaba toda la noche. Llegaba hasta el dia siguiente y se volvía a ir por dias. El papá de Andy tampoco tuvo trabajo estable. Aveces él tenía mucho dinero, aveces no tenía nada de dinero. Yo siempre tuve que trabajar, aveces hasta tuve que trabajar dos trabajos para mantener a la familia. Yo sabía que no podía contar con el papá de Andy.

14. Cuando y vivía con el papá de Andy el tomaba mucho y le entraba a todo tipo de drogas. El tomaba alcohol y usaba marijuana y cocaina. A mi me daba la impresión que él se ponía mas violento cuando le faltaba la droga.

15. Yo se que el papá de Andy tambien tuvo una niñez muy dura. Su papá abandono a su mamá por otra señora cuando el papá de Andy era un niño. Su papá tuvo a niños con esta otra señora. La mamá del papá de Andy le inculco mucho odio al papá hacia su padre y sus medios hermanos. El papá de Andy tenía que ver a sus medios hermanos a escondidas de su mamá. Cuando el papá de Andy tenía como 14 años se fue solito a Chicago y tuvo que versala por si mismo a esa edad.

16. A pesar de que yo sufrí mucho con el papá de Andy, cuando lo veo ahora me da lastima. Realmente no tiene vida. Ya no es la misma persona fuerte y violenta de antes. Ni si quiera tiene casa. Se que renta un cuartito en Nuevo Lared y que aveces no tiene ni para comer. Aveces anda de casa en casa. Esta practicamente solo. Mi hijo Aquiles aveces le tiene que dar dinero para sus gastos.

17. Antes de que la abogada Naomi Terr viniera a hablar conmigo el 13 de Octubre de 2004, ningun abogado ni investigador trabajandon en el caso de Andy Canales había venido a hablar conmigo. Yo no estaba enterada de que Andy esta bajo sentencia de muerte aquí en Texas hasta que me lo comentó la abogada Terr. Si los abogados de Andy me hubieran buscado anteriormente, yo hubiera estado dispuesta a contestar cualquier pregunta y si hubiera sido necesario, tambien hubiera estado dispuesta a testificar a favor de Andy.

Habiendo leído esta declaración, manifiesto que es cierto lo contenido en ella en mi leal saber y entender, conociendo las penas en las que concurren los que declaran falsamente. (I have read this affidavit. I affirm it is true and correct to the best of my knowledge, and I so state under the pains and penalties of perjury.)

Esta declaración fue manifestada el 14 de octubre de 2004.

Elizabeth Velasco

State of Texas)
)
County of Harris)

In Re Anibal Canales

Declaration of Naomi E. Terr

I, Naomi E. Terr, declare under the penalty of perjury that I understand the Spanish language and the English language, and that, to the best of my knowledge and belief, the following statements in the English Language have the same meanings as the statements in the Spanish Language in the Declaration of Aquiles Canales, signed on October 14, 2004:

I, Aquiles Canales, state that the following is true and correct to the best of my knowledge:

1. My name is Aquiles Canales. I live in Laredo, Texas. Anibal "Andy" Canales is my half-brother. Andy and I have the same father, but we have different mothers. My mother is Elizabeth Velasco. Our father is Anibal Canales.

2. I know that my father has children scattered everywhere. He had five or six wives. My father had Andy and Elizabeth with Andy's mother. After having Andy and Elizabeth, he had two children with a Cuban woman from Miami. With the Cuban woman, he had Ulises and Yolanda.

3. My father was very mean/bad and violent. My father beat my mother a lot. My mother had a terrible life with my father. My parents separated when I was very little, but I remember seeing my father beat my mother after they had separated. I saw that on one occasion, my father beat my mother as if my mother was a man. I have a half-brother by my mother whose name is Cesar Arizola. He lived with my mother and father until my mother noticed that my father was not right in his head. My mother tells me that my father was very violent with my brother Cesar, just like he was with Andy. My mother tells me that my father gave Andy and Cesar beatings. My mother ended up sending my brother Cesar with my aunt Carlota because of the treatment that my father gave Cesar.

4. With me, my father was extremely strict and irritable. My father treated me with screams. He abused me verbally. When I said something that he didn't like, he would call me "idiot" or "pendejo." I was very scared of my father, I would rather stay quiet. Even today, I have a lot of problems because of the treatment I received. I stutter a lot, I am very insecure, I am very nervous. Everything I lived affected me a lot.

5. My mother tells me that when she became pregnant with me, my father insisted that my mother have an abortion, but she refused. When I was born, my mother had complications and she had to have a C-section. My mother also tells me that the day she was born, my father went to the hospital drunk and he did not want to sign the papers authorizing that my mother have a C-section for the same reason that my father did not want me to be born.

According to my mother, the situation reached the point that my father began to fight with the doctors.

6. My uncles used to say that my father was the devil in person. My uncles tell me that my father used to beat my mother in front of them.

7. All my life, I experienced embarrassments with my father in restaurants. Without exception, he would always get mad and he would become violent with the waiters. If he was lacking salt or he didn't like it, he would become angry and would even throw plates at the waiters. He would always create a scene in restaurants.

8. I also remember that my father was very abusive with my grandmother, in other words with his own mother. My granny was already an old woman, she was about 80 years old and my father would arrive and would yell at her, he would curse at her.

9. My father, my mother, and my uncle tell me that my father had a very difficult life when he was a child. They have always told me that my grandmother was very mean to my father, that she would beat him bad. He left his house when he was about fourteen years of age. He went to Chicago alone.

10. From the way he was to the way he is, my father has changed a lot in some things. Today he is calmer. He has become super Catholic. I think he has changed because of his age, but also because he regrets everything he did when he was very young. Because of everything he did, he is very alone today. He really doesn't have anyone except for me. I feel sorry for him because he is completely alone.

11. Even thought my father has changed, I recognize my father is not well in the head. I see him sick, messed up. He lives in a small room. Sometimes he doesn't even bathe.

12. My father liked gambling all his life. Even today, he spends his time playing cards, at the pool hall, at the racetrack, at football. My father never really had work, he would spend his time gambling.

13. When I was about eight years old, my half-brother Ulises came to Laredo to look for my father. Ulises thought of staying to live with my father. I only saw my brother for five minutes, because my father kicked him out of the house right away. Right there and then, my father took him to the Greyhound bus station and returned him to Miami.

14. The first time that someone came to talk to my about the case of my brother was on October 13, 2004 when Attorney Naomi Terr came to look for me at my house. No attorney or investigator working on my brother's case had interviewed me before. I would have been willing to help any attorney of my brother if they would have asked. I would have also been willing to go to court and testify at the trial of my brother.

I have read this declaration. I affirm that it is true and correct to the best of my knowledge, and I so state under the pains and penalties of perjury.

This declaration was executed on October 14, 2004.

Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of November, 2004

By: _____
Naomi E. Terr

State of Texas)
)
County of Webb)

In Re Anibal Canales

Declaración de Aquiles Canales

Yo, Aquiles Canales, declaro bajo protesta de decir verdad que lo siguiente es verdad en mi leal saber y entender (I, Elizabeth Velasco, state that the following is true and correct to the best of my knowledge):

1. Mi nombre es Acqiles Canales. Yo vivo en Laredo, Texas. Anibal "Andy" Canales es mi medio hermano. Andy y yo tenemos al mismo papá, pero tenemos a diferentes mamás. Mi mamá es Elizabeth Velasco. Nuestro papá es Anibal Canales.

2. Yo se que mi papá tiene hijos regardos por todas partes. El tuvo como cinco o seis esposas. Mi papá tuvo a Andy y a Elizabeth con la mamá de Andy. Despues de haber tenido a Andy y a Elizabeth, tuvo a dos hijos con una Cubana que vive en Miami. Con la Cubana tuvo a Ulises y a Yolanda.

3. Mi papá fue un hombre muy cabron y violento. Mi papá golpeaba a mi mamá mucho. Mi mamá tuvo una vida terrible con mi papá. Mis papas se separaron cuando yo estaba chico, pero recuerdo haber visto a mi papá golpear a mi mamá ya que se habían separado. Yo vi que en una ocación mi papá agarro a golpes a mi mamá como si mi mamá fuera hombre. Tengo un medio hermano por parte de mi mamá que se llama Cesar Arizola. El vivió con mi mamá y mi papá hasta que mi mamá se dio cuenta que mi papá no estaba bien de la cabeza. Mi mamá me cuenta que mi papá fue muy violento con mi hermano Cesar, asi como lo fue con Andy. Mi mamá me cuenta que mi papá agarraba a golpes a Andy y a Cesar. Mi mamá termino mandando a mi hermano Cesar con mi tia Carlota por el trato que mi papá le daba a Cesar.

4. Conmigo mi papá tambien fue extremedamente estricto y regañon. Mi papá me trataba a grito. Me abusaba verbalmente. Cuando yo le decía algo que no le parecía el me decía "idiota" o "pendejo." Yo le tenía mucho miedo a mi papá, mejor me quedaba callado. Hasta hoy en dia tengo muchos problemas por el trato que recibí. Tartamudeo mucho, soy muy inseguro, soy muy nervioso. Todo lo que viví me afecto mucho.

5. Mi mamá me cuenta que cuando ella se embarazo de mi, mi papá insistía que mi mamá tuviera un aborto pero ella se negó a tener un aborto. Cuando nací, mi mamá tuvo complicaciones y le tuvieron que hacer una cesaria. Mi mamá tambien me cuenta que el dia que nací, mi papá llego tomado al hospital y no quería firmar los documentos autorizando que le hicieran la cesaria a mi mamá por lo mismo que el no quería que yo naciera. Según mi mamá, la situacion llego al grado que mi papá se empezo a pelear con los doctores.

6. Mis tios me decían que mi papá era el diablo en persona. Mis tios me cuentan que mi papá golpeaba a mi mamá en frente de ellos.

7. Toda la vida pase verguenzas con mi papá en restaurantes. Sin falla, siempre se enojaba y se ponía violento con los mesores. Si le faltabal la sal o no le parecía, se enojaba y llegaba hasta a aventar los platos a los mesores. Mi papá siempre hacía shows en los restaurantes.

8. Yo recuerdo que mi papá tambien fue muy abusivo con mi abuelita, o sea con su propia mamá. Mi abuelita ya estaba viejita, tenía como 80 años y mi papá llegaba y le gritaba, le decía de groserias.

9. Mi papá, mi mamá, y mi tio Pepe me cuentan que mi papá tuvo una vida dificil de niño. Siempre me han contado que mi abuelita fue muy gacha con mi papá, que le golpeaba muy feo a el. El se fue de su casa cuando tenía como 14 años. Se fue a vivir a Chicago solo.

10. De cómo era antes a como es ahora, mi papá ha cambiado en ciertas cosas. Ahora es mas tranquilo. Se ha vuelto super catolico. Yo pienso que mi papá ha cambiado por la edad, pero tambien porque se arrepiente de todo lo que hizo cuando estuvo muy joven. Por todo lo que hizo, ahora esta muy solo. Realmente, no tiene a nadie mas que a mi. Me da lastima porque esta completamente solo.

11. Aunque mi papá a cambiado, yo reconosco que mi papá no esta bien de la cabeza. Yo le veo enfermo, jodido. Vive en un cuartito chiquito. Aveces ni se baña.

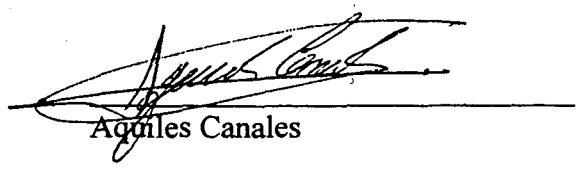
12. A mi papá le gusto el juego toda la vida. Hasta hoy en dia pasa su tiempo en la baraja, el billar, los caballos, el futbol. Mi papá realmente nunca tuvo trabajo, se la pasaba en la jugada.

13. Cuando yo tenía como ocho años, mi medio hermano Ulises vino a Laredo a buscar a mi papá. Ulises pensaba quedarse a vivir con mi papá. Yo solamente vi a mi hermano por cinco minutos, porque mi papá luego, luego lo corrio de la casa. Ahí mismo, mi papá lo llevó a la estacion de Greyhound y lo regresó a Miami.

14. La primera vez que alguien vino a hablar del caso de mi hermano fue el 13 de Octubre de 2004 cuando la abogada Naomi Terr vino a buscarme a mi casa. Ningun abogado ni investigador trabajando en el caso de mi hermano me habían entrevistado anteriormente. Yo hubiera estado dispuesto a ayudar a cualquier abogado de mi hermano si me lo hubieran pedido. Tambien hubiera estado dispuesto a ir a la corte y a testificar en el juicio de mi hermano.

Habiendo leído esta declaración, manifiesto que es cierto lo contenido en ella en mi leal saber y entender, conociendo las penas en las que concurren los que declaran falsamente. (I have read this affidavit. I affirm it is true and correct to the best of my knowledge, and I so state under the pains and penalties of perjury.)

Esta declaración fue manifestada el 14 de octubre de 2004.



Aquiles Canales

I, Hope Chacon, pursuant to the provisions of 28 U.S.C. §1746, declare as follows:

1. My name is Hope Chacon. Andy Canales' mother, Janie (Juanita) Garcia Espinoza, was a long-time friend of mine.

2. Andy's mother Janie and I met when were teenagers in Wisconsin. My parents used to work in the potato fields, and they met Janie's father that way. Her mother was usually at home, caring for their mentally retarded child, Rudy. I moved to San Antonio as an adult, with my children, and Janie moved here after I did. Janie and I were close on and off until the end of her life.

3. As adults, Janie and I were in touch on and off all her life. Before I moved to San Antonio, I lived in Racine and Janie lived in Kenosha for a while. During that period of time, I remember seeing Janie and her kids. Andy was very young, maybe four or five years old. Janie's youngest child was not born yet, it was just Andy and Elizabeth. I thought at the time that there might be something wrong with Andy, and I told Janie that. He would have these terrible outbursts of anger, tantrums, over nothing. They seemed beyond what a normal child of that age has. I don't know whether there was something wrong with him, or whether he was angry about something, but it didn't seem normal. He seemed very high strung. I told Janie that maybe something was wrong with that boy, that maybe she should have him checked out.

4. I remember that Janie wanted my sister-in-law to keep her kids, and my sister-in-law kept them once and said she would never do it again. They were too wild and unruly. I think one big problem with those kids is that they never got any direction at all, no supervision, no adult to tell them what was right and what was wrong.

5. Once we moved to San Antonio, we had fairly separate lives. Janie lived on one side of town, and I lived on the other. The neighborhoods that Janie lived in were very rough. Janie did come to live with us at one point, I think it must have been for about a year. I don't remember what the circumstances were, but I know that Janie didn't have any place to stay, and she had no money and no job. I had a 3-bedroom house, so she moved into my house with her kids.

maybe two. HC

6. Janie was drinking regularly when she lived here. She had to have her beer every day. She would go out and get a six-pack, and I would see her drinking and smoking in the morning. Janie was generally a very nervous person. Her hands and her jaws used to shake for no reason. Janie was also a very heavy smoker.

7. I don't remember Andy having any friends at all. I don't recall ever seeing a single friend of his. Janie didn't seem to see the problems that were there. Andy ~~was for part of the time~~, but not all of the time. I don't know where he was when he was not here.

lived here for a short while HC

8. I have fond memories of Janie. She was a good person. We used to go out together, and

Andy got in trouble and got locked up, he was about eighteen, and it was over a stolen income tax check belonging to Juan John Ramirez. The first time that I knew of that

we would have fun, but I don't believe that Janie was meant to be a mother. Some people are, and some aren't. For Janie, it was like her kids got in the way. Janie just didn't have the patience it takes to have kids. The kids were bothersome to her. I don't know why people like that have children, I really don't.

9. I don't remember any family activities at all. I don't know that Janie's family ever did the normal things a family does, like have picnics or go to the park.

10. I remember at one point, Janie was living here and she and Elizabeth were fighting about something–I don't remember what it was. I think Elizabeth wanted to go out, and Janie was trying to keep her in. Elizabeth pushed Janie, and Janie fell and broke her hip. We had to call an ambulance. She recuperated ~~here~~ there at the house. NC

11. Janie's kids had a hard life with Janie. Things were very unstable for her. She had to keep moving from place to place, every few months. I don't know exactly why she wasn't making it, but she just couldn't get it together to have a stable environment for the kids to grow up in.

12. Janie's last long-term boyfriend that I know about was John (Juan) Ramirez, here in San Antonio. I think that he had a stabilizing influence on her life–it was the only time I know of that Janie managed to stay in one place. I think she lived in the same place with him for a few years. But Juan and Andy did not get along at all. Juan used to always say that his kids were better then Janie's kids, but the problem between Juan and Andy was particularly bad. Juan was with Janie for several years, and even during that time he was still seeing his wife. Juan was also a big drinker. He and Janie had a couple of taverns where they would hang out on the South side of town.

13. I was never contacted by anyone working on Andy's case before or during his trial, and was not aware that he was facing charges on a capital case. If I had been contacted, I would have given truthful information about the family, and I would have been available to testify if needed.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

11/22/04 San Antonio Tex. Hope O. Chacon

Date & Place Hope Chacon

I, Dorothy Garcia Schiefelbein, pursuant to the provisions of 28 U.S.C. §1746, declare as follows:

1. My name is Dorothy Garcia Schiefelbein. I am Andy Canales' maternal aunt, his mother's youngest sister. Andy's mother's real name was Juanita, but the family knew her as Janie.

2. My mother and father, Andy's maternal grandparents, had two sets of kids. She had Irene, Janie, Linda, and Jose, and then nine years later, she had Ralph, Rudy, and me. By the time I was 3 or 4 years old, Linda and Irene were already gone. They both got married early and left the house. Janie stayed for a while, I have some memories of her. When we moved into the house that I grew up in, I remember Janie helping to paint. Then she ran off with Anibal Canales and got married. That's how I remember it–when she came back to the house with him, they were already married. I was sent out, because it was a big scene. My parents were very unhappy, and there was all kinds of screaming and yelling.

3. What I remember of Anibal Canales is that he was a womanizer. He looked like Elvis with a wavy, curly, sleeked-back look. He also abused my sister. I saw marks on her, black and blue marks from having been hit. He was a drinker and a carouser, he was out in bars a lot. I did not like Anibal Canales, it was not only that he treated my sister badly, but when I was in the 4th or 5th grade, he started molesting me. I used to go over to babysit for their kids. The first time it happened, I was in Anibal Canales' truck going to his house. He told me to scoot next to him so I didn't fall out the door, and I did. He put his hands inside my underwear and was rubbing on me. I didn't know what was going on, but I knew that it wasn't right, and I hated it. After that, he would do that other times, when he got me alone, or when the young kids were sleeping. I must have been around the ages of 8, 9 and 10. I never told anyone because I was afraid to, and I thought no one would believe me. He told me not to tell anyone, and he told me that no one would believe me. I kept that secret for many many years. It wasn't until I was a woman with my own three-year old child that I told my sister Janie. She felt awful, and told me I should have told her, but I just didn't know better at the time.

4. I remember Anibal Canales' brother, Jose. He was such a nice, sweet man. And he would always play with the children, he really seemed to care about them. I always thought that he would have made a better father than Anibal Canales did.

5. As adults, my mother (Andy's maternal grandmother) and Janie were very close. They looked a lot alike, and they had the same mannerisms. They also both drank too much. They would sit around and drink a 12-pack of beer, then have someone go out for more. They both would get to the point of being sloppy-drunk. I would have to watch the kids while they got drunk. Both of them had drinking problems. My mother was getting drunk as far back as I can remember, and I don't know when Janie's drinking became a problem, as far back as I know.

6. I don't remember much about Janie's second husband, Carlos Expinoza. He was a big guy who would just lie around on the couch a lot, watching TV. It seemed like Janie was the one working, and Carlos would just lie around. He spoke Spanish, and we didn't talk much at all,

couldn't really communicate. He didn't seem to interact much with the children. My parents didn't like either of Janie's husbands.

7. Growing up, my parents, and especially my dad, were abusive. They split the family–there were the definite favorites. I got constant verbal and physical abuse. I remember quite a bit of violence in my home when I was growing up. My dad would get us up at odd hours of the morning, like at 4 or 5 in the morning. He would pull us out of bed from a deep sleep, and he would have us scrubbing things, like the kitchen cabinets, the dishes in the cabinets, the bathrooms, whatever. And he would hit us if it wasn't done ~~perfectly~~ his way. He would use whatever he could get his hands on to hit us: belts, straps, buckles, fists. (DS)

8. With my mom, it was mainly verbal abuse. She would say horrible things to me, especially when she was drunk. My mom was getting drunk regularly as far back as I can remember. She would tell me that she never wanted me, that my father was the one who wanted an odd number, that I was stupid, that I was worthless, that I was an idiot. I had a problem with my weight, and I was much taller than my sisters, and she would tell me that I was as stupid and ugly as I was big. My sister, Linda, would jump in and make fun of me too. They would embarrass me in front of everyone.

9. One time, when I was fifteen, I ran away. I was staying at friend's house, and he kept calling, and my friends kept saying that I wasn't there. They were getting nervous that my dad was going to come over, so finally, I went home. He took me down to the basement and he beat me so hard I couldn't walk. I had huge black and blue welts all over my back, I had buckle marks, I was black and blue all over the back of my neck, my shoulders, and I was so sore. I remember my dad forced me to go to school, it was so humiliating, I didn't want to go. I ended up spending a good part of the day in the counselor's office. And even though the counselor knew what was going on, no one ever intervened.

10. I got beaten so many times that it's hard to remember specific times. But I do remember the last bad beating I got before I left home. My dad had gotten me up at 4 or 5 to scrub the bathroom, and I did that before I went to work. I was working in a restaurant, and about an hour after I got there, my mom called and told me to come home because my dad was mad. I told my mom I was at work, I couldn't, and she said that if I didn't come home, dad was going to come and get me. So I went to my boss and told her that I had to go home, that my dad was upset, and I didn't want him to come here and for things to get ugly. My boss didn't know what to think, but I left, and when I got home I got home he just started screaming at me. He was asking me what kind of a piss-poor excuse that was for cleaning the bathroom, and he was pointing out all these things, I can't even remember what they were, that weren't cleaned to his satisfaction. He started hitting me, he smacked me in the head, and he was slamming my face into the toilet and he was hitting me with something in the back of the head, I think it was a buckle. He just went bezerk, he went crazy. And my mom was out in the kitchen crying, because that was a small bathroom and it was a lot of banging around. When my dad finally finished, he walked out and he told my mom, "Get her our of here, I don't want to see her anymore. If she is still here when I get back, I am going to get a gun and kill her." He left, and I still remember he peeled out in his truck and stones from the driveway hit the front of the house. My mom helped me to get as many

of my belongings as I could into the car, and I left, and the stuff that I couldn't get I came back for later. That's how I left home when I was eighteen.

11. I was too young to remember what things were like when Andy's mom, Janie was growing up, but my sister, Irene, who was the oldest, said that our dad would get them up at odd hours of the morning and make them clean too. I guess Linda, when she was 12 or 13, had a nose bleed, and she bled through the night, and they had to take her to the hospital, so they were more careful with her. And Janie was the type of person who really needed her sleep, and at one point she passed out on the floor, and they took her to the hospital, and the doctor said she needed more sleep.

12. The first place I lived when I left home was an apartment in Kenosha across the street from the Spaghetti Station with a ~~couple of~~ friends and a 2 yr old boy. There was a vacancy in an apartment across the hall, and I told Janie about it, and she moved in with her kids. Before long, there were problems in my apartment, and I moved in with Janie, and I think we lived together for about a year. I babysat a lot during that time, because Janie would be out drinking a lot in bars. I went out some myself, but usually with friends. I didn't like going out with Janie, because she would get way too drunk. I think we lived together for about a year, then we each moved on. There were periods of time when I didn't see much of Janie's kids at all, and then once she moved to Texas I didn't see much of them at all.

→ I can remember her getting so drunk that she was fall asleep at the table. It was embarrassing and it got to the point that I didn't want to go out with me and my friends

13. I remember Andy when he was a young kid he was full of energy, he was just bouncing off the walls. By today's standards, he would definitely be called ADD. My parents were verbally abusive to Andy and Lisa. I remember my ~~dad~~ mom would tell Lisa that she looked just like her wet-back father. And they would call those kids stupid and idiot in Spanish, they were mean to them. My mother would hit them at times, take a ~~wooden spoon~~ strap to them. It may have something to do with the fact that my parents did not like their father, because Linda's kids could do no wrong in their eyes.

14. I visited Janie once in the mid- to late- 90s, after she got sick. I was living in Wisconsin, where I had always lived, and Linda contacted me and told me that my mother was very sick, had had a stroke. Linda was afraid that this would be my last chance to see her. I hadn't been down to Texas at all. I was a single mother, living check to check, and I didn't have the means to go. So ~~I~~ we drove down, together her can I art and art, and while I was there, I visited Janie. She had lost her voice box, so she would make this gurgling sound. She could laugh, and she could cry, but it was very hard to see her that way.

15. I was never contacted by Andy's trial attorneys or investigators, and did not know that he was on death row until recently, when Andy's current attorneys contacted family members. I would have met with Andy's attorneys, and I would have provided any truthful information I could if asked. I would have been available to testify if needed.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

11-16-04 Waterford WI
Date & Place

Dorothy Garcia Schiefelbein
Dorothy Garcia Schiefelbein

I, Vicki Cisneros Young, pursuant to the provisions of 28 U.S.C. §1[redacted] declare as follows:

1. My name is Vicki Cisneros Young. I am Andy Canales' first cousin. My mother, Linda Garcia, is his mother, Janie (Juanita) Garcia Espinoza's sister.

2. My family is originally from Wisconsin. My date of birth is January 25, 1968, I am about three years younger than Andy. I have one sister and one brother. My sister is quite a bit older than I am, and we have different fathers. Her father died when she was a toddler. My mother got remarried, and had me and my brother. My father was killed when I was 4 or 5. I grew up in Racine, Wisonsin, where our family lived until 1978.

3. When I was 10, my family moved to Texas. We spent a short time in Houston, then moved to San Antonio, where I have lived ever since. I consider San Antonio my home.

4. My mom, Linda, and my aunt (Andy's mom), Janie were very close. Of all of the siblings, Linda and Janie were the closest. Janie was older than my mom, but my mom was the more level-headed one. When I was very young, my mom and my aunt Janie would go out together all the time. They would often leave us at one of their houses, all together, with my sister Michele or Andy's sister Elizabeth in charge. I remember looking forward to going to my aunt's house because everything was so lacks. My mom was always protective of us as kids, and things were different at Aunt Janie's house. There was always junk food, and we could do what we wanted to do.

5. My aunt Janie went out a lot. She was a party animal–she always had a good time. Sometimes when they dropped us off they would be gone all week-end long.

6. Our families were close, but they were different. My mom was very protective of us growing up, and my mom had the determination to get her kids out of poverty. My aunt Janie just didn't have that kind of determination. My aunt was always going from job to job or place to place. When we were young, I don't remember her having a steady job, [redacted]e she was getting assistance from the state. Every so often, Janie and her family would come and live with us. That meant that I would have to share a room with all the girls, so I thought it was a drag. I mean, it was fun at first, but it would get old.

7. I realize now, as a parent, how much kids need to have their parents around. My aunt's kids, especially the two older ones, just didn't have their mother around as much as they needed her.

8. I remember some of the men that my aunt Janie was with. I was too young to remember Andy's father. I have a memory of Carlos Espinoza, but I was too young to have an opinion. I know I used to hear that he was lazy, and I remember when I was growing up, Gabby, Andy's sister, didn't want anything to do with her father. I couldn't understand that, because my father was dead, but she didn't want anything to do with Carlos Espinoza. I do remember a boyfriend that my aunt Janie had in San Antonio, John (Juan)

Ramirez. He seem[redacted] be good for my aunt, in the sense tha[redacted] had a stabilizing influence on her. I think that's the only time they stayed in one place for a couple of years.

9. I remember my grandparents quite well too. I get the sense that they were very strict with their kids–my mom and aunts and uncles. They also drank a lot–they've been drinking a lot ever since I can remember. Whenever my mom and my aunt went over to my grandparents, there would be lots of drinking. That's what they did.

10. My grandparents lived in San Antonio for a while, then they moved to Arizona. That was my grandfather's decision. He just didn't like the hustle and bustle of city life, he wanted to be out in the country. I remember putting my grandmother on the plane to go to Arizona, she was crying, she didn't want to go. I was telling her that it would be fine, that we would keep in touch and all that. Six months after she left, she was dead. She fell and hit her head–something like that. I didn't ever know my grandfather to physically abuse her, but I do know that he was mean, and that he abused her mentally and verbally. He would just blow up, and she would cry. My grandfather was well known to have a temper. He would yell at my grandmother if the tortillas or beans were not the way he liked them. My grandfather was generally a really gruff person who showed no affection to his grand kids whatsoever. As a kid, I never once got a hug from him. He was the kind of guy who always had something bad to say about everyone's kids. I know that as an adult, I would talk to my grandfather like any other adult, and sometimes my mom and my aunts just couldn't believe what I would say to him–they said that they would get slapped if they said anything like that to him.

11. I have 2 kids, and I don't go out much. Maybe I go out once a month, but I feel my responsibility is with my kids. When I had kids, I made the decision that I would break the chain, and do things differently than my mom and my aunt. They were really bar people, they would go out every week-end.

12. My sister tells stories now about how she and Andy would go off and drink when my mom and my aunt left us alone for the week-end–and they were really young.

13. My aunt Jamie drank very regularly all the time I was growing up. She would go to bars a lot, and she would drink at home. She would generally drink beer. She drank heavily. When she would get together with her parents, my maternal grandparents, they would sit around and drink a lot, until they got drunk. He had a very early-going personality and I have not known him to have a temper.

14. I have fond memories of Andy. He was funny, often joking. I didn't realized that Andy was on death row until I was contacted by his current attorneys. No lawyer or investigator contacted me before or during his trial. If they had contacted me, I would have provided whatever truthful information I could to help, and I would have been available to testify if needed.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED

STATES THAT THE FO[redacted]GOING IS TRUE AND CORRECT. [redacted]

11/22/04 / San Antonio

Date & Place

Vicki Cisneros Young

Vicki Cisneros Young

VCY

I, Michele [redacted] Vallin, pursuant to the provisions of 28 U.S.C. §1746, declare as follows:

1. My name is Michele [redacted] Vallin. I was born August 21, 1961. I am Andy Canales' first cousin. His mother Janie (Juanita) Garcia Espinoza and my mother Linda Garcia were sisters.

2. I grew up in Wisconsin. That's where I was born, and that's where I lived until 1978, when I was fifteen, I moved to California, had a baby, and got married. My mother, Linda Garcia, and my siblings moved to San Antonio after I left. My family is originally from San Antonio. My great grandfather was buried here, and my grandfather was born here.

3. My dad died in 1963. I was too young to remember him. I was raised by my mother's second husband, Frank Cisneros. We lived in Racine, Wisconsin, in one house, until my step-father, Frank Cisneros was killed. After that, we moved to another house, and eventually, my mom moved to San Antonio.

4. My mother, Linda, and Andy's mother, Janie, were very close. There were seven siblings in that generation, but my mom was closest to Janie. Back when we lived in Racine, Andy's mom lived on and off in Chicago and Kenosha, Wisconsin, which is very close to Racine. I remember spending time with my aunt and my cousins when I was quite young.

5. I remember going to visit my aunt Janie where she lived in Chicago, and I thought it was a scary place. It was really the ghetto. I can remember asking my cousin whether he liked it here, because I would not have wanted to live there. But it was the kind of place where there were kids everywhere outside, so Andy liked that part of it. There were always kids to run around with.

6. I did not know Carlos Espinoza, Gabby's dad, very well. I do remember seeing him. He was a big sloppy kind of guy, and I got the instinctual feeling that I should stay away from him. He seemed to not be all there. He was from Mexico, and I remember back then there was a feeling in our community that people from Mexico were dirty. But I don't think that's all that was at work. There was something about him I didn't like. Maybe it was because I could tell that my cousins were not happy to have him around. At one point, Carlos took my aunt and her family to California, and he left them stranded out there. My grandparents had to go get them.

7. I think the period of time I spent the most time with my cousins were the pre-teen years for me: when I was 9, 10 & 11 years old. Andy was closest in age to me, about three years younger, so he must have been 6, 7, &8. That's after my step-dad died, and so my mom was spending a lot of time with my aunt. Andy was two or three years younger than me, and we were closest in age. My mom and my aunt Janie used to go out a lot when I was that age. They would take off for the week-end, and leave me in charge of the younger kids. I used to get so upset with my mother for making me take care of the kids

all week-end. Andy and I would drink alcohol and beer, and smoke cigarettes. There was always alcohol around Janie's house. I can remember when I was about 11, my aunt Janie would offer me a six-pack of beer and cigarettes to get me to babysit.

8. Home life with my aunt Janie was very unstable, because there were constant money problems and they were always moving. My aunt had chronic money problems. As far as I know, she was not working, she was getting aid from the state. If I had troubles, I would go to her, because anything went with her, I was not likely to get into trouble. sometimes

9. From what I saw of Andy when he was growing up, he was not getting the kind of structure that a child needs. His mother was interested in doing her own thing, going to bars, and he was left alone a lot. His mother had very serious money problems, which were chronic. She also was a steady, heavy drinker, and between working and going out, the children were left alone a lot to take care of themselves. She drank every day, she drank a lot. When I was older, I went

10. Andy and I were close as children, and I still feel close to him and care about him very much. He has a very big heart he is very caring, although he doesn't always show it. He likes to laugh and make others laugh. She

11. I was not aware that Andy had been convicted of a capital crime until I was contacted by his current attorneys. I was not contacted by any lawyer or investigator at the time of his trial. If I had been, I would have provided truthful information about the family, and I would have testified if needed.

Janice and my grandmother used to drink together a lot, they would drink a case daily together, sometimes more, at times, my grandmother and Janie as well, would get to the point that she couldn't make it to the bathroom, someone had to help her.

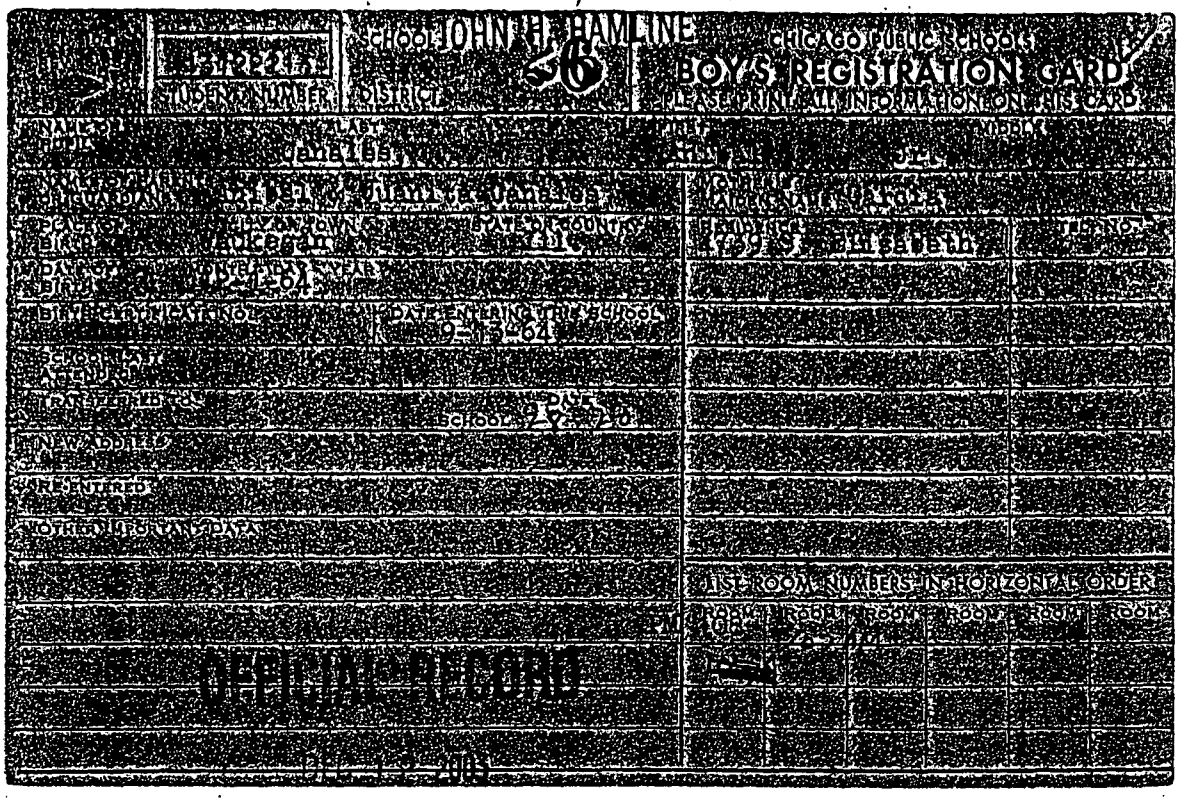
I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

11-22-04 San Antonio

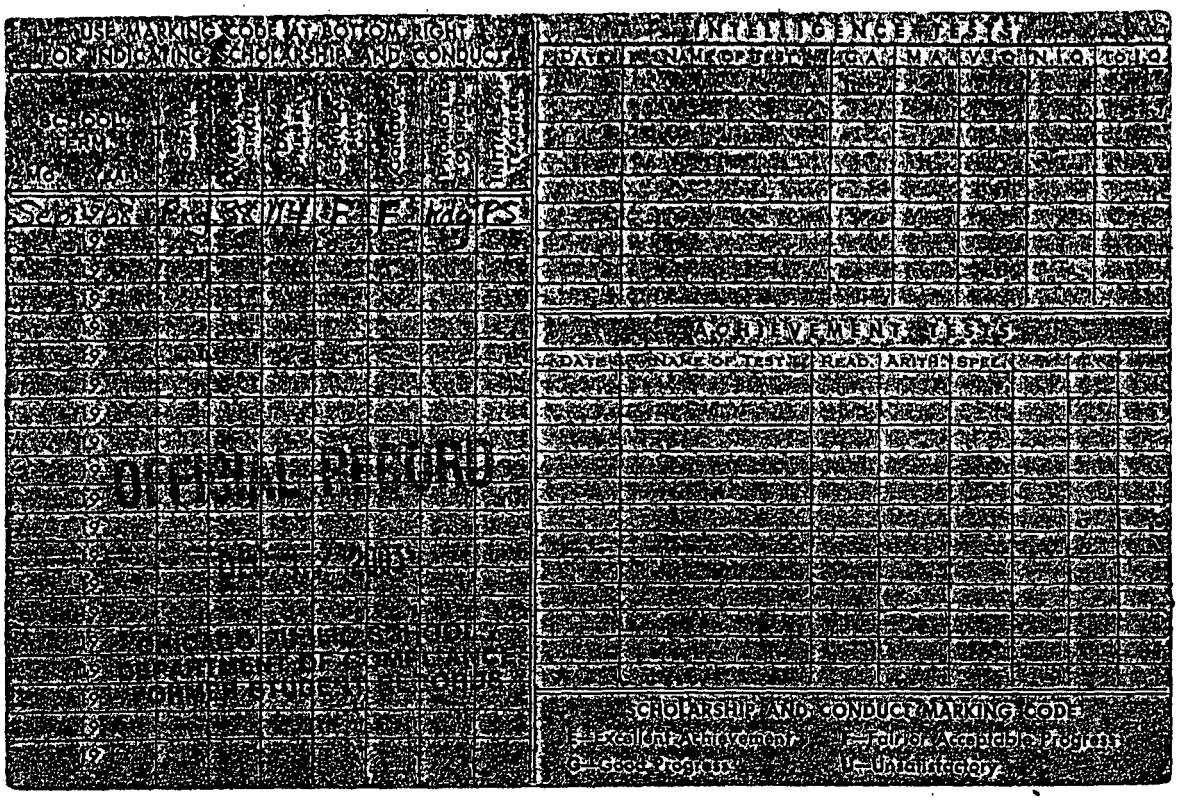
Date & Place

Michele Vallin

Michele ~~Campos~~ Vallin



CHICAGO PUBLIC SCHOOLS
DEPARTMENT OF COMPLIANCE
FORMER STUDENT RECORDS


USE MARKING CODE AT BOTTOM RIGHT FOR INDICATING SCHOLARSHIP AND CONDUCT
SCHOOL
TERM
SCHOLARSHIP AND CONDUCT
RECORD
INTELLIGENCE TESTS
DATE
NAME OF TEST
GRADE
MATERIAL
I.Q.
TO I.Q.
ACHIEVEMENT TESTS
DATE
KIND OF TEST
READ.
ARITH.
SPELL.
SCHOLARSHIP AND CONDUCT MARKING CODE
E—Excellent Achievement
S—Satisfactory Progress
F—Fair or Acceptable Progress
U—Unsatisfactory

PERMANENT RECORD CARD

Name Canales, Anibal (boy) Date of Birth 12-1-64

Address 8243 25thAve. 4608 35th Place of Birth Waukegan, Ill.

Address

Address

Father's Name Step- Espinoz Anibal-sep. Where employed

Mother's Name Juanita Where employed

SCHOOL YEAR	1971-72	1972-73	1973-74	1974-75	1975-76	1976-77
School 1-3-72	Vernon					GrBay Wilson
Grade	2					EH 6

Date and Reason for Leaving School ADM-3

3-24-72-to Chicago, Ill

TOTAL P.02

506a

657-7056

PSYCHOLOGICAL FORM

Name Corales, Cindy Birthdate 12/1/64

Parent Juanita Espinoza Address 4608- 35th Ave.

School Hubon Sex M Grade 6

Date Tested 10/13/76 Reason

Test Adm. WISC By Whom FL

Findings: CA 11-11 MA IQ VIQ 85 PIQ 101 FS 91

Recommendations Enr 1/11/77 R 5.1 A 3.9
S 3.5
Recore 8/77

CUMULATIVE RECORD CARD
ELEMENTARY SCHOOLS
LOS ANGELES, CALIFORNIA
LOS ANGELES CITY SCHOOLS

1. IDENTIFICATION DATA

CANALES, ANIBAL

LAST NAME	FIRST	MIDDLE	SEX	MONTH	DAY	YEAR	BIRTH DATE	VERIFICATION
			M: x F:	12	1	64		Verif. of Age ☐ Dipl. ☐ Birth Cert. ☐ Repl. Cert. ☐ Hlth./Vl. Stat. ☐ Aff.

CITY (BIRTH PLACE)	STATE	CITY SCHOOL DISTRICT LAST ATTENDED	STATE	ADULT RESPONSIBLE FOR CHILD (IF NOT LIVING WITH PARENTS)	LANGUAGE OF HOME
Waukegan, Ill.		Spry Elem. Chicago, Ill.			Eng/Spanish

2. INFORMATION CONCERNING FAMILY

	NAME	SEPARATED DECEASED	BIRTH PLACE	OCCUPATION	CHANGE IN OCCUPATION
FATHER	Anibal Canales	divorced	Mexico		
MOTHER (Last, maiden and present name)	Juanita Garcia Espinoza		Portland, Mich.	Housewife	
GUARDIAN	stepfather-Carlos Espinoza			Carpenter	

NAMES OF BROTHERS		NAMES OF SISTERS	
OLDER	YOUNGER	OLDER	YOUNGER
			Elizabeth
			Gabriela

3. GUIDE FOR INTERPRETING SCHOLASTIC CAPACITY

DESCRIPTIVE RATING	PERCENTAGE IN GROUP	STANINE
MARKEDLY ABOVE AVERAGE:	TOP 4%	9
ABOVE AVERAGE:	NEXT 19%	7, 8
AVERAGE:	MIDDLE 54%	4, 5, 6
BELOW AVERAGE:	NEXT 19%	2, 3
MARKEDLY BELOW AVERAGE:	LOWER 4%	1

4. GROUP SCHOLASTIC CAPACITY TESTS

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

5. GROUP ACHIEVEMENT TESTS

DATE	GRADE	TEST NAME LEVEL AND FORM	CA	MA	LANG.	NON-LANG.	INDEX	STANINE

DATE	GRADE	TEST NAME LEVEL AND FORM	READING VOC.	READING COMP.	ARITH. REAS.	ARITH. FUND.	LANG.	SPELL.	COMMENTS

6. INDIVIDUAL STUDY RESULTS

DATE GIVEN	GRADE	NAME OF TEST	CA	MA	INDEX	VERB	PERF.	STANINE	COUNS. INITIALS

7. SUMMARY OF OBSERVATIONS OF EDUCATIONAL GROWTH AND DEVELOPMENT

GRADE AND TEACHER INITIALS	ACADEMIC PROGRESS AND SOCIAL AND EMOTIONAL FACTORS WHICH AFFECT LEARNING
5th [illegible]	Ability grade to recognize most basic sounds and make letter use of them. Has responsibility to begin and complete a task. Reads at 3rd grade level. Could

close supervision to begin and complete a
508a task. Reads at 3rd grade level. Could
do better with greater effort.

FINDINGS AND RECOMMENDATIONS BY ELEMENTARY COUNSELOR

(INCLUDE DATE AND SIGNATURE OF COUNSELOR)

CONFERENCES WITH PARENTS OR GUARDIANS

DATE	GRADE	PARTICIPANTS	COMMENTS

OOL HISTORY

509a

HOME ADDRESS		TELEPHONE	SCHOOL*	DATE ENTERED	DATE LEFT	TEACHER	E1 E2 E3 E4 ***	AGE	GRADE	ACTUAL DAYS PRESENT**	ACTUAL DAYS ABSENT**
STREET	CITY										
22C Wilcox #18	Cudahy	-	PARK AVENUE	9-28-7	6-12-75	B Jurgens	E5		5th	65	1

* RECORD PRIVATE, PAROCHIAL, OR OTHER SCHOOL DISTRICT ATTENDANCE TO INDICATE CONTINUITY IN SCHOOL ENROLLMENT. RECORD ENROLLMENT OF PUPILS IN PRE-KINDERGARTEN PROGRAMS
** RECORD DAYS PRESENT AND ABSENT AT CLOSE OF EACH SCHOOL YEAR. *** PRE-KINDERGARTEN OR HEAD START ENROLLMENT IS INDICATED WITH AN E RATHER THAN E1, E2, E3, OR E4

9. RECORD OF SPECIAL SERVICES

TE		DATE		DATE
	SPEECH CORRECTION		STATE GIFTED PROGRAM	
			DATE IDENTIFIED	
	LIP READING			
	CORR P E CLASS		CH WELF & ATTENDANCE	
	REMEDIAL READING		NON IMMIGRANT ALIEN	
	MILLER - UNRUH READING			
	P T A GUIDANCE CENTER		COMMUNITY AGENCY	
	OPPORTUNITY CLASS		E S E A	
			READING	
			E S L	
	EDUC HANDICAPPED		ENRICH	
			MATH	

10. SIGNIFICANT HEALTH FACTORS

DATE	SIGNIFICANT ITEMS FROM HEALTH CARD AND TEACHER OBSERVATIONS	TEACHER INITIALS

11. PARENTS' EDUCATIONAL AND/OR VOCATIONAL PLANS FOR PUPIL

DATE	EDUCATIONAL PLAN	VOCATIONAL CHOICE
DATE	EDUCATIONAL PLAN	VOCATIONAL CHOICE

TEACHER INITIALS

FORM 34-E-4 30M 10-73
(STK NO. 33-813791)

2. READERS AND SOCIAL STUDIES UNITS

INDICATE MAJOR CURRICULUM UNIT, DESCRIPTION OF EXPERIENCE, AND DURATION. INITIAL EACH ENTRY.

GRADE AND INITIALS	READERS	SOCIAL STUDIES UNITS	GRADE AND INITIALS	READERS	SOCIAL STUDIES UNITS
GRADE ____ TEACHER INITIALS ____			GRADE ____ TEACHER INITIALS ____		
RADE ____ EACHER INITIALS ____			GRADE ____ TEACHER INITIALS ____		
RADE ____ EACHER INITIALS ____			GRADE ____ TEACHER INITIALS ____		
RADE ____ EACHER INITIALS ____			GRADE ____ TEACHER INITIALS ____		
RADE ____ EACHER INITIALS ____			GRADE ____ TEACHER INITIALS ____		
ADE ____ ACHER INITIALS ____			GRADE ____ TEACHER INITIALS ____		
ADE ____ CHER INITIALS ____			GRADE ____ TEACHER INITIALS ____		
ADE ____ CHER INITIALS ____			GRADE ____ TEACHER INITIALS ____		

CANALES, ANIBAL

Name: Last First Middle Sex: M [X] F [ ]

V___ DT___ P___

SABIN 1. ___ 2. ___ 3. ___

POLIO SALK 1. ___ 2. ___ 3. ___ E___

TRIVALENT 1. ___ 2. ___

LOS ANGELES CITY SCHOOLS HEALTH RECORD

Residence	Phone	School	Date Arr.	Birth Date Mo. 12 Day 1 Yr. 64
8220 Wilcox Ave.	-	PARK AVENUE SCHOOL	10-28-74	Birthplace Waukegan, Ill.
				Arrived in Calif.
				Room Nos. 5th-10

SYMBOLS A NEEDS ATTENTION GRADE URGENCY 1, 2, 3, OR 4 — PHYSICAL EXAMINATION — A RECEIVED ATTENTION F FURTHER EXAM. NEEDED O OVER

Date of Examination	Name of Examiner	Grade	NUTRITION			EYES			EARS			NOSE & THROAT			TEETH				HEART		LUNGS	Orthopedic		Nervous System	Speech	Skin	Endocrine	Misc.
				Hgt.	Wgt.	Vision R	Vision L	Pathology	Hearing R	Hearing L	Pathology	Pathology	Tonsils	Adenoids	Decay	Cleaning	Gums	Orthodontia	Organic	Functional		Posture	Feet					

Rest : how long?

Assignment to Special Classes:

Corrective P. E.

Reg. Gym. Driver Training

FORM 34-EH-6 100M 4-74 (STK. NO. 33-815301) This card must be transferred with other record cards. Every child must have a health card or an "Excuse from Physical Education."

PERSONAL HISTORY

Date

Family Physician — Address

Family Dentist — Address

Asthma		Tbc—Child		Dental Decay		Convulsions		IMMUNIZATIONS	Years									HEALTH STATUS	
Hayfever		Tbc—Family		Toothache		Fainting		Smallpox										Father	
Eczema		Chickenpox		Freq. Colds		When?		Diph.										Mother	
Diabetes		Measles		Freq. Sore Throats		Nose Bleeds		Wh. Cough										Bros. Ages	
Heart Dis.		Ger. Measles		Freq. Coughs		Growing Pains		Tetanus											
Polio		Wh. Cough		Freq. Headaches		Operations		Polio										Sis. Ages	
Pneumonia		Mumps		Wears Glasses															
Rheum. Fever		Hernia		Tires Easily		Accidents													
Scarlet Fever		Eye Difficulty		Recent Bed Wtg.		Other Ser. Ill.													

Appetite — Milk Daily? — Food Allergies?

Breakfast — Bed time — Rising Time

DENTAL RECORD

Date Examined	Name of Examiner	TEETH: Decay	Cleaning	Gums	Orthodontia

VISION SCREENING

Date	R	L

Date

PHYSICIAN'S, DENTIST'S, OR NURSE'S NOTES

Audiometer — Date — Date — Date — Date — Date — Mantoux — Date

R.

L.

EL. 104
REV. 6-65 - 102

12095023
STUDENT NUMBER

SCHOOL Chopin
DISTRICT 6

CHICAGO PUBLIC SCHOOLS

BOY'S REGISTRATION CARD

PLEASE PRINT ALL INFORMATION ON THIS CARD

NAME OF PUPIL — LAST: Canales — FIRST: Anibal (Andy) — MIDDLE:	
NAMES OF PARENTS OR GUARDIANS: Juanita Espinoza	MOTHER'S MAIDEN NAME: Garcia
PLACE OF BIRTH — CITY OR TOWN: Waukegan — STATE OR COUNTRY: Ill.	RESIDENCE: 2652 W. Rice — TEL. NO.: 235-9416
DATE OF BIRTH — MONTH - DAY - YEAR: 12-31-64	
BIRTH CERTIFICATE NO.	DATE ENTERING THIS SCHOOL: 3-4-75
SCHOOL LAST ATTENDED: Park Avenue School - Cudahy	
TRANSFERRED TO: Texas) — SCHOOL — DATE: 6-10-75	
NEW ADDRESS: Laredo Texas)	
RE-ENTERED	
OTHER IMPORTANT DATA	

OFFICIAL RECORD

OCT 10 2003

CHICAGO PUBLIC SCHOOLS
DEPARTMENT OF COMPLIANCE
FORMER STUDENT RECORDS

LIST ROOM NUMBERS IN HORIZONTAL ORDER

ROOM	ROOM	ROOM	ROOM	ROOM	ROOM
210					

USE MARKING CODE AT BOTTOM RIGHT FOR INDICATING SCHOLARSHIP AND CONDUCT

SCHOOL TERM Mo.	Year	Grade	Weeks in Grade	Days Present	Scholarship	Conduct	Promoted to Grade	Initials of Teacher
J	19 75	5	15½	50	U	U Sm Pr	6	AK
	19							
	19							
	19							
	19							
	19							
	19							
	19							
	19							
	19							
	19							
	19							
	19							
	19							
	19							
	19							
	19							
	19							
	19							

INTELLIGENCE TESTS

Date	Name of Test	C.A.	M.A.	V.I.Q.	N.I.Q.	To.I.Q.

ACHIEVEMENT TESTS

Date	Name of Test	Read.	Arith.	Spel.
4 75	ITBS	3.02.7		

SCHOLARSHIP AND CONDUCT MARKING CODE

E—Excellent Achievement
F—Fair or Acceptable Progress
G—Good Progress
U—Unsatisfactory

CANALES ANIBAL 31951 89
1613 ALBERT ST 53404
JUANITA ESPINOZA
637-4731 12/1/64

Sex: M ☐ F ☐ Race: W ☐ N ☐ O ☐

e Name

Birth Date

Guardian: Address:

Entered From: City: State:

Grade	Entry Date	Transfer To	Transfer Date	Reason
SEP	8 1977	Gifford	1/30/78	T-BD

PERMANENT DATA

To be filled out when student leaves school:

Significant comments: Cum to Gifford 2/2/78

Promoted to Senior High: Yes ☐ No ☐

Dated: Signed:

Form S 154 JS SECONDARY SCHOOL PERMANENT DATA

Sex: M ☒ F ☐ Race: W ☐ N ☐ H ☒

CANALES — Last Name | ANIBAL — First Name | JR. — Middle Name

Address: 1613 Albert St. Racine 53403 Phone: 637-4731 Birth Date 12-1-64

Father's Name: Mother's Name: Juanita Espinoza

Guardian: Address:

Entered From: Wash. Jr. City: State:

Grade	Entry Date	Transfer To	Transfer Date	Reason
7 BD	1-31-78	Exempted	4-26-78	

PERMANENT DATA

To be filled out when student leaves school:

Significant comments:

Promoted to Senior High: Yes ☐ No ☐

Dated: Signed:

Form S 154 J5 SECONDARY SCHOOL PERMANENT DATA [illegible] School District No. 1 of Racine County

This is to certify that this is a true and correct copy of an original student record.

OCT 10 2003

Dr. Charles K. Robinson
Manager, Student Records

NAME Canales, Anibal
ADDRESS 5201 W. 34th #1423
PHONE 689-0598
PARENT OR GUARDIAN Anibal Eliza Canales

PERMANENT RECORD
HOUSTON INDEPENDENT SCHOOL DISTRICT
DISTRICT

SCH Lucile Lab
YR 7 GR 77-A
HR

NAME CANALES A
ID 511536
SCH SCARBOROUGH
CR 08 78-79
HR 802

COURSE	AV	CR	Q
GUID-8		000	1
GUID-8		000	2
ENG 8A	F	000	1
AE ENG8B	F	000	2
READ LAB	F	000	2
MATH 8A	F	000	1
AE MTH8B	F	000	2
HIST 8A	F	000	1
AE HIS8B	F	000	2
SCI 8A	F	000	1
M H 8A	F	000	1
OC ORIEN	F	000	2
CD HPE8A	F	000	1
CD HPE8B	F	000	2

ENG Richard Lab
MATH Richard Lab
SOC SCI Richard Lab
ELEC Gene
ELEC
PE
ABS
CDT
W/D

SUMMER SCHOOL

	1	2	3	4	5	6
CDT	P	P	P	P		
ABS	000	20	30	0		

ENTERED 08-28-78
WITHDREW 4-6-79

SCH
YR GR
HR
ENG
MATH
SOC SCI
ELEC
ELEC
PE
ABS
CDT
ENT
W/D
SUMMER SCHOOL

SCH
YR GR
HR
ENG
MATH
SOC SCI
ELEC
ELEC
PE
ABS
CDT
ENT
W/D
SUMMER SCHOOL

EXPLANATION OF GRADES AND CONDUCT

A 93-100	4 POINTS	E EXCELLENT	
B 85-92	3 POINTS	S SATISFACTORY	
C 78-84	2 POINTS	P PROBATIONARY	
D 71-77	1 POINT	U UNSATISFACTORY	
F BELOW 70	0 POINTS	I DISCIPLINARY CONDUCT BY PRINCIPAL	

ACCREDITED BY TEXAS EDUCATION AGENCY AND SOUTHERN ASSOCIATION OF SECONDARY SCHOOLS

ELEMENTARY SCHOOL ATTENDED

HONOR YEAR

TRANSCRIPTS SENT
San Antonio, Texas 11-27-79
San Antonio 11-27-79

NAME Canales, Anibal, Jr.

DOB=12-01-64 SEX=F PH=655-9301

P/G ESPONOZA JUNITA

MAC ARTHUR HIGH SCHOOL 9-04-79

NORTH EAST SCHOOL DISTRICT
SAN ANTONIO, TEXAS

Senior High School Correction Record

Occupation of (F) _____ Place of Birth _____
Parents & Guardian (M) _____ Entered 9-79
(S) _____ On (Date) . . 19

School where taken	No. days in att.	Term or period:	1st, 2nd, 3rd, 4th, quarter	Final Average

MacArthur High School

SUBJECT		9-1	9-2	9-3	AVG.	CR.	PTS.	TEACHER
Art I		C	W/D					
ROTC		D	W/D					
Eng/Read		F	W/D					
A. Hist.		F	W/D					
FOM I		F	W/D					

CREDIT THIS 10 DATE 9CH YEAR 79-80 GRADE 9
DAYS PRESENT 42 DAYS ABSENT 11 9-6 11/1979
CLASS STAND OF

W/D 4 weeks 1 day into the 2nd 6 weeks.

CREDIT THIS TO DATE SCH YEAR GRADE
DAYS PRESENT DAYS ABSENT 9-6
CLASS STAND OF

SUBJECT		9-1	9-2	9-3	AVG.	CR.	PTS.	TEACHER

CREDIT THIS TO DATE SCH YEAR GRADE
DAYS PRESENT DAYS ABSENT 9-6
CLASS STAND OF

SUBJECT		9-1	9-2	9-3	AVG.	CR.	PTS.	TEACHER

UNIT SUMMARY

English	
Mathematics	
Science	
Social Studies	
P.E. (or Equivalent)	
Health & Safety Ed.	
Foreign Language	
Vocational/Technical	
Other	
Total	

SUMMER (Night) SCHOOL

yr.	Course Title				

School Accredited:
Texas Education Agency
Southern Assn. of Schools and colleges.
OFFICIAL SIGNATURE & SEAL

Signature

Withdrawn

Date	Reason
1979	Withdrawn

Form - SR 11.7.73

CANALES ANDY A

D.O.B.

Senior High School Counselor's Record

PHOTO
(Do not staple)

EDUCATIONAL TEST RECORD FOR PRESCOTT LABELS

09-1	01	16	11	08-22	01	1		18	17	23	31	25	01	15

CANALES ANDY A 09
MAC ARTHUR HIGH SCHOOL 10/79
PRIMARY MENTAL ABILITIES, GRADES 9-12

	IQ	GSR		IQ	GSR
VERBL RESO	92	31%	NUMBR FACI	90	27%
REASONING	64	1%	SPATL RELA	75	6%
COMPOSITE	66	2%			

Date	Other Test Results Test	Score %ile

Memberships, Honors, Distinctions, Etc.	9	10	11	12
Future Plans				

Work Experience	9	10	11	12

COMMENTS

7 Quarter Rank	Transcript Requests & Job Recommendations		
No. in Class ____	Date Sent	Place	Initial of Person
Rank of Stu. ____	2-1-80	Mac Houston H S	AL
Quarter of Class			
1st 2nd 3rd 4th			
Grade Ave. ____			

Signature & Seal: ____

San Antonio Independent School District
Student Transcripts
1702 N. Alamo Street
San Antonio, Texas 78215

Transcript Record

School: SAM HOUSTON HIGH SCHOOL Address: 4635 E. HOUSTON

Student: CANALES, ANDY ~~Graduated:~~ 03/12/80 WITHDRAWAL

Changes in credits or units (Carnegie) required for graduation in SAISD have been as follows:

1932 – 32 credits or 16 units.
1933 – 34 credits or 17 units.
1934 – 35 credits or 17 ½ units.
1953 – 37 credits or 18 ½ units.
1962 – 38 credits or 19 units.
1974 – 57 quarter credits (3 quarters = 1 Carnegie unit).
1977 – 58 quarter credits.
1981 – 60 quarter credits or 20 units.
1985 – 21 units.
1987 – 22 units.
1994 – 21 units.
2001 – 22 credits.

Grade scale prior to February, 1966.

A = 93 – 100 D = 70 – 76
B = 85 – 92 F = 0 – 69 Failure
C = 77 – 84

Grade scale beginning February, 1966.

A = 90 – 100 D = 60 – 69
B = 80 – 89 D- = Passing
C = 70 – 79 F = 59 & below – Failure

Grade scale beginning September, 1984.

A = 90 – 100 D = 70 – 74
B = 80 – 89 F = 69 & below – Failure
C = 75 – 79

Grade scale beginning September, 1990.

Alpha to Numeric		Numeric to Alpha	
A+ = 98	C+ = 79	98 – 100 = A+	78 – 79 = C+
A = 95	C = 77	93 – 97 = A	76 – 77 = C
A- = 91	C- = 75	90 – 92 = A-	75 = C-
B+ = 88	D+ = 74	88 – 89 = B+	74 = D+
B = 85	D = 72	83 – 87 = B	72 – 73 = D
B- = 81	D- = 70	80 – 82 = B-	70 – 71 = D-

Number of weeks in the school year = 36.
Classes meet five days per week.

* The San Antonio Independent School District is accredited *
* by the Texas Education Agency. *

Grade points prior to September, 1970.

A or H = Accelerated
A = 5, B = 4, C = 3
R or S = Regular
A = 4, B = 3, C = 2, D = 1, F = 0
M = Modified
A, B, C, D, F = No grade points

Grade points as of September, 1970.

Honors: A = 5, B = 4, C = 3, D = 1, F = 0
Regular: A = 4, B = 3, C = 2, D = 1, F = 0

Grade points as of September, 1983.

Honors: A = 5, B = 4, C = 3, D = 1, F = 0
Regular: A = 4, B = 3, C = 2, D = 1, F = 0
Basic: A = 3, B = 2, C = 1, D = ½, F = 0

Grade weights as of September, 1990.

Advanced Placement (AP)	+12
Honors	+10
Regular	+ 0
Basic	- 10
Special Education	- 12
Below 70 in any course	0

Grade weights as of Spring, 1994.

Advanced Placement (AP)	+12
Honors	+10
Regular	+ 0
Below 70 in any course	0

Grade weights as of December, 1996.

Advanced Placement (AP)	+12
International Baccalaureate (IB)	+12
Pre-AP, Honors, Gifted and Talented	+10
Regular	+ 0
Below 70 in any course	0

Grade weights as of August, 1998.

Advanced Placement (AP)	+10
International Baccalaureate (IB)	+10
Pre-AP, Pre-IB, Honors, Dual Credit	+ 5
Designated high school course credit earned in middle school	+ 5
Regular	+ 0
Below 70 in any course	0

CANALES ANDY 386211

DOB: 12-01-64 SEX: BOY ETH: H

BIRTHPLACE: SAN ANTONIO IL

FATHER: KOEHN BRIAN

MOTHER:

ADDRESS: 2706 KAISER

PHO NBR: 648-0674 ZIP: 78222

Birth Certificate Name:

GRADUATION DATA	
Graduation Date	This Space Reserved For Student Photo
Nbr in Grad Class	
Quartile	
Rank	
GPA	
Diploma Name (Please Print)	

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT
SAM HOUSTON HIGH SCHOOL
4635 E HOUSTON ST
San Antonio Texas 78220

ACCREDITED BY THE SOUTHERN ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS AND THE TEXAS EDUCATION AGENCY

GRADING SYSTEM

A = 90 to 100	56 Qtr Crs req for graduation
B = 80 to 89	1 Qtr = 12 wks work
C = 70 to 79	3 Qtr Crs = 1 Carnegie Unit
D = 60 to 69	All classes meet 5 days/week
F = Below 60 (Failure)	Academic = 56 minutes/day (net)
I = Incomplete	Vocational = 3 hrs/day (net)
	Co-op Program = 4 hrs/day (net)
H - In TYP col = Honors	Labs (Bio, Chem, Phys) 2½ hrs/wk

CANALES ANDY ID 386211

7.0 TO DATE SCH YEAR 79-80 GRADE 09

25.0 DAYS ABSENT 7.0 W/D 03-12-80

SAN HOUSTON HIGH SCHOOL

SUBJECT CGN=860	TYP	S-1	S-2	S-3	AVG	CR	PTE	TEACHER
PE/ATHLETICS			B			10		GOREE
ENGLISH RESRCE	S	F	C			10		GREEN
MATH RESRCE	S	F	C			10		GREEN
SCIENCE RESRCE	S		C			10		GREEN
SOC STU RESRCE	S	F	D			10		GREEN
ART		C						
ROTC		D						

MAC-ARTHUR High 1st Qtr.

School				
School Year	Grade			
Subject	Q1	Q2	Q3	Crt

VALIDATED MIDDLE SCHOOL CREDIT

Date	School	Subject	Grd	Crt

ADV PLACEMENT SUMMER/NIGHT SCHOOL CREDIT

Date	School	Subject	Grd	Crt

School				
School Year	Grade			
Subject	Q1	Q2	Q3	Crt

School				
School Year	Grade			
Subject	Q1	Q2	Q3	Crt

School				
School Year	Grade			
Subject	Q1	Q2	Q3	Crt

Rita A Flores
10/14/03

En
Ma
Sc
Sc
He
Tot.
Aca

Original Entry Date	Former School

CURRENT ADDRESS / WITHDRAWAL / REENTRY DATA

New Address	Telephone	W/D Date	Withdrawal Reason	Reentry Date
		3-12-80	#92	

RECORD OF TRANSCRIPTS

Date	Organization	Address	Requested by	Release

PLACE OF EMPLOYMENT

FATHER:	MOTHER:

Fold Fold

TEST DATA

CANALES ANCY 206 09
HOUSTON HIGH SCHOOL C2/EC
SAN ANTONIO C R T LEVEL IV FORM B

	LANG ARTS	MATH	TOTAL
RS	30	17	47
%	11%	1%	3%

Spaces

Reserved For Testing

Score Labels

Name: Canales Andy

Date									
ADT									
Polio									
Measles									
Rubella									
Smallpox									
Urine									
Glucose									
Albumin									
Hematocrit									
T.B.Skin Test									
Mantoux									
Chest X-ray									
Other:									

Significant Health History

Allergies

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT HEALTH RECORD

Name: Canales Andy Birthdate 12/1/64 Sex M School

Address: Parent/Guardian Phone

Medical Record

School	SHHS				
Year	1980-81				
Grade	9				
Ears					
Nose					
Teeth					
Tonsils					
Heart/Chest					
B/P	114/70				
Spine					
Hernia					
Genitalia					

Wt. - Ht. Progress Report

Date	Weight	Height
1/30/80	181	75"

Code: 0 - Satisfactory, 1X Slight, 2X Unsatisfactory
3X Marked Unsatisfactory, 00 Previous Correction

Remarks:

HR

REV. 8/73

(Last Name) (First) (Middle)

T CANALES, ANDY

GUARDIAN

Birthplace Country or U.S. State	Speaks English	Education	Occupation of Parents or Guardian

524a

Birthdate 12-1 , 1955

Birthdate Based on:

Age at Entrance:

Previous School Record:

Identifi... Picture, Fingerprint

Color Eyes

Color Hair

Other:

RECORD OF ATTENDANCE, SCHOLARSHIP, AND RESIDENCE

GRADE JECTS	Year Studied	Grade Earned per Term 1st	2nd	3rd	4th	Average

9TH GRADE SUBJECTS	Year Studied	No. Weeks Studied	No. Periods per Week	Minutes per Period	Grade Earned per Term 1st	2nd	3rd	4th	Average	Units Earned
PE	~~7879~~					85				½
Eng. Rest	~~7980~~					75				½
Math (Res)						75				½
Soc. (Res)						75				½
Soc. studies (Res)						65				½
Art					75					
ROTC					65					

11TH GRADE SUBJECTS	Year Studied	No. Weeks Studied	No. Periods per Week	Minutes per Period	Grade Earned per Term 1st	2nd	3rd	4th	Average	Units Earned

OFFICIAL RECORD

Marilyn Lately

GRADE JECTS	Year Studied	Grade Earned per Term 1st	2nd	3rd	4th	Average

10TH GRADE SUBJECTS	Year Studied	No. Weeks Studied	No. Periods per Week	Minutes per Period	Grade Earned per Term 1st	2nd	3rd	4th	Average	Units Earned

12TH GRADE SUBJECTS	Year Studied	No. Weeks Studied	No. Periods per Week	Minutes per Period	Grade Earned per Term 1st	2nd	3rd	4th	Average	Units Earned

ITS ON STUDENT'S DEVELOPMENT

Year	School	City or County	Student's Address	Date of Entrance	Cause if Late	Days Present	Days Absent	Times Tardy	Date and Reason for Withdrawal

Total Credits Required for Graduation..... Date of Graduation..... Transcript sent to.....

Total Credits Earned by Student..... Average..... Rank..... in Class of..... Quartile .

Southwest High School.

9/15/80 → 10/28/80

SOUTHWEST HIGH SCHOOL
Rt. 9 Box 205AF
San Antonio, TX 78227

WITHDRAWAL NOTICE

Grade 9th Date 10 [illegible]-80

Please Drop Rosales, Andy from your roll book for this reason Parent Request

Days Absent 11 Days Present 14

Date Entered 9-15-80 DOB

Schedule	[illegible]	[illegible]	[illegible]	[illegible]	Sem Avg	4th 6wk	5th 6wk	6th 6wk	Sem Ex.	Sem Avg	Grade to Withdrawal
1. Typing I	F/1.2										D Sinclair
2. Physical S.	F/31										C J Warren O
3. Phy Ed	F										J P Ballard
4.											K W Monroe
5. W Geo	50										[illegible]
6. FOM I+II	0										[illegible]

Teachers: List any deficiencies this student has according to his/her schedule and initial.

1. D S
2. C J Warren
3.
4.
5. [illegible]
6.

70-6658
523.8 Pag — The Evolution of stars: how they form, age and die $7.95

Library Not cleared McCrickets
Cafeteria Theresa
Office Secretary L M [illegible]
School Nurse
I. D. J R Ballard

ALL BOOKS TURNED IN Alex R Brown — Books cleared M. Magnon

Assistant Principal Brown

Carol McDonald — Counselor

Assistant Principal Boland

H J Taylor (CRB) — Principal

ATTENDANCE OFFICER:

Signs last. Give copy to student and keep other copies.

FEB 16 1994

Official Report of Test Results

TESTS OF GENERAL EDUCATIONAL DEVELOPMENT

375905

ged

issued by

OFFICIAL GED CENTERS of the

GENERAL EDUCATIONAL DEVELOPMENT
TESTING SERVICE
OF THE AMERICAN COUNCIL ON EDUCATION

Name of Examinee:

Last	First	Middle	Maiden
Canales	Anibal	Andy	

Address:
8218 Quiet Creet
San Antonio, Texas 78242

Reported To:
Texas Education Agency

Date of Birth 12-1-64 Last Grade Completed 9 Date Reported 10-28-82

Date of Withdrawal From School
Sept. 1980

Social Security Number
399-66-4274

Last School Attended
(if required by State Policy)
South San Antonio H.S.
San Antonio, Texas

	Test Date	Form	Standard Score	Percentile Rank for U S
Test 1 Writing Skills Test	10-28-82	MO	40	16
Test 2 Social Studies Test	10-27-82	MO	51	53
Test 3 Science Test	10-27-82	MO	47	40
Test 4 Reading Skills Test	10-27-82	MO	55	67
Test 5 Mathematics Test	10-28-82	MO	45	31
Total			238	Passed: X Failed: O
Standard Score Average:			47.6	

(Copies of this report can be obtained from the center listed below.)

Signature of Chief Examiner: Anita Moss Anita Moss

Name of Center: Brownwood State School

Address of Center: P. O. Box 1267

Brownwood, Texas 76801

Center Identification Number (if required)
BRNWGH

Date: 10-28-82

American Bar Association

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

Revised Edition
February 2003

Only the text of the black-letter guidelines has been formally approved by the American Bar Association House of Delegates as official policy. Although it does not express the formal position of the American Bar Association, the commentary serves as useful explanation of the black-letter Guidelines. The text of the commentary published herein is the final version, which was officially released by the ABA on October 24, 2003. It supersedes all prior drafts which had been distributed for informational purposes.

Acknowledgments

The American Bar Association gratefully acknowledges the assistance of the members of the Advisory Committee and others who contributed valuable insight and expertise to this endeavor: Barry Alberts, private practitioner, Schiff Hardin & Waite, Chicago, Illinois (Representative from ABA Section of Litigation); Sylvia Bacon, Judge (Retired), Superior Court of the District of Columbia, Washington, D.C. (Representative from ABA Criminal Justice Section); Stephen B. Bright, Director, Southern Center for Human Rights, Atlanta, Georgia (Representative from National Association of Criminal Defense Lawyers); David I. Bruck, private practitioner, Columbia, South Carolina (Representative from Federal Death Penalty Resource Counsel); Mardi Crawford, Staff Attorney, New York State Defenders Association, Albany, New York; Lawrence J. Fox, private practitioner, Drinker Biddle & Reath LLP, Philadelphia, Pennsylvania (Chair, ABA Special Committee on Death Penalty Representation); Stephen K. Harper, Co-coordinator, Capital Litigation Unit, Miami-Dade County Public Defender's Office, Miami, Florida (Representative from National Legal Aid and Defender Association); Randy Hertz, Professor of Law, New York University School of Law, New York, New York; Henderson Hill, private practitioner, Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumter, P.A., Charlotte, North Carolina (Representative from ABA Special Committee on Death Penalty Representation); Denise LeBoeuf, Director, Capital Post-conviction Project of Louisiana, New Orleans, Louisiana; Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis, Indiana; Margaret Love, of counsel, Asbill Moffitt & Boss, Chartered, Washington, D.C.; Jill Miller, Forensic Social

Worker, Madison, Wisconsin; L. Jonathan Ross, private practitioner, Wiggin & Nourie, P.A., Manchester, New Hampshire (Chair, ABA Standing Committee on Legal Aid and Indigent Defendants); Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York; Randolph Stone, Professor of Law, University of Chicago School of Law, Chicago, Illinois (Representative from ABA Standing Committee on Legal Aid and Indigent Defendants); Ronald J. Tabak, private practitioner, Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York (Representative from ABA Section of Individual Rights and Responsibilities); Scott Wallace, Director, Defender Legal Services, National Legal Aid and Defender Association, Washington, D.C.; and Denise Young, private practitioner, Tucson, Arizona (Representative from Habeas Assistance and Training Project).

The following ABA staff and ABA entities participated in this project: Terry Brooks; Rebecca Coffee; Shubhangi Deoras; Judith Gallant; Robin Maher; Melanie Mays; Elisabeth Semel; the Association of the Bar of the City of New York; Criminal Justice Section; the Special Committee on Death Penalty Representation; the Section of Individual Rights and Responsibilities; the Standing Committee on Legal Aid and Indigent Defendants; the Section of Litigation; and the Senior Lawyers Division.

Finally, the ABA thanks Raoul Schonemann, Chris Spaulding, and Janice Bergmann, who served as consultants to this project, and expresses its special appreciation to the Reporter, Eric M. Freedman, Professor of Law, Hofstra University School of Law, Hempstead, New York.

INTRODUCTION

This revised edition of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* is the product of a two-year long drafting effort. In April 2001, the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation jointly sponsored the ABA Death Penalty Guidelines Revision Project to update the Guidelines, which were originally adopted by the ABA House of Delegates in 1989. An Advisory Committee of experts was recruited to review and identify necessary revisions, including representatives from the following ABA and outside entities: ABA Criminal Justice Section; ABA Section of Litigation; ABA Section on Individual Rights and Responsibilities; ABA Standing Committee on Legal Aid and Indigent Defendants; ABA Special Committee on Death Penalty Representation; National Association of Criminal Defense Lawyers; National Legal Aid and Defender Association; Federal Death Penalty Resource Counsel; Habeas Assistance and Training Counsel; and State Capital Defenders Association.

Expert capital litigators were retained as consultants to the ABA Death Penalty Guidelines Revision Project to incorporate the decisions of the Advisory Committee into preliminary drafts of revisions. Drafts were considered by Advisory Committee members during several day-long meetings in Washington, D.C. as well as follow-up discussions. The final working draft of the revisions was approved by the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation. The ABA House of Delegates approved the revised edition of the Guidelines on February 10, 2003.

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GUIDELINE 1.1—OBJECTIVE AND SCOPE OF GUIDELINES

A. The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.

B. These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings and any connected litigation.

Definitional Notes

Throughout these Guidelines:

1. As in the first edition, "should" is used as a mandatory term.

2. By "jurisdiction" is meant the government under whose legal authority the death sentence is to be imposed. Most commonly, this will be a state (as opposed to, e.g., a county) or the federal government as a whole. The term also includes the military and any other relevant unit of government (e.g., Commonwealth, Territory). Where a federal judicial district or circuit is meant, the commentary will so state.

3. The terms "counsel," "attorney," and "lawyer" apply to all attorneys, whether appointed, retained, acting pro bono, or employed by any defender organization (e.g., federal or state public defenders offices, resource centers), who act on behalf of the defendant in a capital case. When modified by "private," these terms apply to both *pro bono* and retained attorneys.

4. The term "custody" is used in the inclusive sense of *Hensley v. Municipal Court*, 411 U.S. 345, 350-51 (1973).

5. The term "post-conviction" is a general one, including (a) all stages of direct appeal within the jurisdiction and certiorari, (b) all stages of state collateral review proceedings (however denominated under state law) and certiorari, (c) all stages of federal collateral review proceedings, however denominated (ordinarily petitions for writs of habeas corpus or motions pursuant to 28 U.S.C. § 2255, but including all applications of similar purport, e.g., for writ of error coram nobis), and including all applications for action by the Courts of Appeals or the United States Supreme Court (commonly certiorari, but also, e.g., applications for original writs of habeas corpus, applications for certificates of probable cause), all applications for interlocutory relief (e.g., stay of execution, appointment of counsel) in connection with any of the foregoing, and (d) all requests, in any form, for pardons, reprieves, commutations, or similar relief made to executive officials, and all applications to administrative or judicial bodies in connection with such requests. If a particular subcategory of post-conviction proceeding is meant, the language of the relevant Guideline or commentary will so state.

6. The terms "defendant," "petitioner," "inmate," "accused," and "client" are used interchangeably.

7. The terms "capital case" and "death penalty case," are used interchangeably.

8. The terms "defender organization," "Independent Authority" and "Responsible Agency" are defined in Guideline 3.1 and accompanying commentary.

9. The term "Legal Representation Plan" is defined in Guideline 2.1.

History of Guideline

The commentary to the original edition of this Guideline stated that it was designed to express existing "practice norms and constitutional requirements." This thought has been moved to the black letter in order to emphasize that these Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.

The first edition of this Guideline stated that the objective in providing counsel in death penalty cases should be to ensure the provision of "quality legal representation." The language has been amended to call for "high quality legal representation" to emphasize that, because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case.

The Guidelines formerly covered only "defendants eligible for appointment of counsel." Their scope has been revised for this edition to cover "all persons facing the possible imposition or execution of a death sentence." The purpose of the change is to make clear that the obligations of these Guidelines are applicable in all capital cases, including those in which counsel is retained or representation is provided on a pro bono basis. The definition of "counsel" reflects this change.

The use of the term "jurisdiction" as now defined has the effect of broadening the range of proceedings covered. In accordance with current ABA policy, the Guidelines now apply to military proceedings, whether by way of court martial, military commission or tribunal, or otherwise.

In accordance with the same policy, the words "from the moment the client is taken into custody" have been added to make explicit that these Guidelines also apply to circumstances in which an uncharged prisoner who might face the death penalty is denied access to counsel seeking to act on his or her behalf (e.g., by the federal government invoking national security, or by state authorities exceeding constitutional limitations). This language replaces phraseology in the former Guidelines which made them applicable to "cases in which the death penalty is sought." The period between an arrest or detention and the prosecutor's declaration of intent to seek the death penalty is often critically important. In addition to enabling counsel to counsel his or her client and to obtain information regarding guilt that may later become unavailable, effective advocacy by defense counsel during this period may persuade the prosecution not to seek the death penalty. Thus, it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—well before the prosecution has actually determined that the death penalty will be sought.

These Guidelines, therefore, apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be sought. The case remains subject to these Guidelines until the imposition

of the death penalty is no longer a legal possibility. In addition, as more fully described in the commentary, these Guidelines also recognize that capital defense counsel may be required to pursue related litigation on the client's behalf.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.2(c) & cmt. ("The Function of Defense Counsel in Capital Cases"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.1 (3d ed. 1992) ("Objective").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.2 cmt. (3d ed. 1992) ("Systems for Legal Representation").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-6.1 (3d ed. 1992) ("Initial Provision of Counsel").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-6.2 (3d ed. 1992) ("Duration of Representation").

ABA House of Delegates Resolution 8C (adopted Feb. 5, 2002).

Commentary

Introduction

In 1932, Mr. Justice Sutherland, writing for the United States Supreme Court in *Powell v. Alabama*,[1] a death penalty case, acknowledged that a person facing criminal charges "requires the guiding hand of counsel at every step in the proceedings against him."[2]

1. 287 U.S. 45 (1932).
2. *Id.* at 69.

More than seventy years later, death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases.[3]

The quality of counsel's "guiding hand" in modern capital cases is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence. Today, it is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns. Counsel must be able to develop and implement advocacy strategies applying existing rules in the pressure-filled environment of high-stakes, complex litigation, as well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment.

As one writer has explained:

> Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.[4]

Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make "extraordinary efforts on behalf of the accused."[5] As discussed *infra* in the text accompanying notes 230-31, these efforts may need to include litigation or administrative advocacy outside the confines of the capital case itself

---

3. *See* McFarland v. Scott, 512 U.S. 849, 855 (1994) (noting the uniqueness and complexity of death penalty jurisprudence); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303-04 (1983); *see generally* Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1990); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (1993).

4. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995) (footnote omitted).

5. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION, Standard 4-1.2(c), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

(e.g., pursuit of information through a state open records law,[6] administrative proceedings to obtain or correct a military record, a collateral attack to invalidate a predicate conviction,[7] litigation of a systemic challenge to the jury selection procedures of a jurisdiction or district,[8] or to a jurisdiction's clemency process).[9]

Structure of the Guidelines

This commentary provides a general overview of the areas in which counsel must be prepared to perform effectively and be given appropriate governmental support in doing so. These areas are addressed more specifically in subsequent Guidelines and commentaries. While there is some inevitable overlap, Guidelines 1.1–10.1 contain primarily principles and policies that should guide jurisdictions in creating a system for the delivery of defense services in capital cases, and Guidelines 10.2-10.15.2 contain primarily performance standards defining the duties of counsel handling those cases.

Representation at Trial

Trial attorneys in death penalty cases must be able to apply sophisticated jury selection techniques, including rehabilitation of venire members who initially state opposition to the death penalty and demonstration of bias on the part of prospective jurors who will automatically vote to impose the death penalty if the defendant is convicted on the capital charge.[10] Counsel must be experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic evidence, and must be able to challenge zealously the prosecution's evidence and experts through effective cross-examination.[11]

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6. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 526 (1991) (Marshall, J., dissenting) (involving successor federal habeas corpus petition based on documents released as a result of new interpretation of Georgia Open Records Act by Georgia Supreme Court).

7. For example, the defendant prevailed in *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (disallowing use of prior conviction used in aggravation) only after the same pro bono counsel successfully litigated *People v. Johnson*, 506 N.E. 1177, 1178 (N.Y. 1987) (vacating that conviction). *See infra* text accompanying note 22.

8. *Cf.* Amadeo v. Zant, 486 U.S. 214, 219 (1988) (involving federal habeas corpus petitioner who succeeded on jury discrimination claim whose factual predicate was discovered in independent litigation against the county).

9. *See infra* text accompanying notes 65-66.

10. *See infra* Guideline 10.10.2.

11. *See infra* Guideline 5.1.

An attorney representing the accused in a death penalty case must fully investigate the relevant facts. Because counsel faces what are effectively two different trials—one regarding whether the defendant is guilty of a capital crime, and the other concerning whether the defendant should be sentenced to death[12]—providing quality representation in capital cases requires counsel to undertake correspondingly broad investigation and preparation. Investigation and planning for both phases must begin immediately upon counsel's entry into the case, even before the prosecution has affirmatively indicated that it will seek the death penalty.[13] Counsel must promptly obtain the investigative resources necessary to prepare for both phases, including at minimum the assistance of a professional investigator and a mitigation specialist, as well as all professional expertise appropriate to the case.[14] Comprehensive pretrial investigation is a necessary prerequisite to enable counsel to negotiate a plea that will allow the defendant to serve a lesser sentence,[15] to persuade the prosecution to forego seeking a death sentence at trial, or to uncover facts that will make the client legally ineligible for the death penalty.[16] At the same time, counsel must

12. *See* Bullington v. Missouri, 451 U.S. 430, 438-46 (1981); Comm. on Civ. Rts., Ass'n of the Bar of the City of N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS'N OF THE BAR OF CITY OF N.Y. 848, 854 (1989) [hereinafter *Legislative Modification*].

> [For a lawyer], taking on such a case means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum resources to the prosecution, and where one must endure the draining emotional effects of one's personal responsibility for the outcome.

Id.

13. *See infra* text accompanying notes 160-65; *see also* Wiggins v. Smith, 123 S. Ct. 2572 (2003) (holding counsel ineffective on basis of inadequate mitigation investigation; although counsel did arrange psychological testing for client and obtain some government records they thereby "acquired only rudimentary knowledge of his history from a narrow set of sources");Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (notwithstanding fact that trial counsel "competently handled the guilt phase of the trial," counsel's failure to begin to prepare for sentencing phase until a week before trial fell below professional standards, and counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *id.* at 415 (O'Connor, J., concurring) ("counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances" amounted to ineffective assistance of counsel); ABA STANDARDS FOR CRIMINAL JUSTICE: Standard 4-4.1(a), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.")

14. *See infra* Guideline 10.4(C)(2) and accompanying commentary.

15. *See infra* Guidelines 10.9.1, 10.9.2.

16. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (mental retardation).

consciously work to establish the special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress.[17]

With respect to the guilt/innocence phase, defense counsel must independently investigate the circumstances of the crime and all evidence—whether testimonial, forensic, or otherwise—purporting to inculpate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel. As more fully described *infra* in the text accompanying notes 195-204, the defense lawyer's obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence to rigorous independent scrutiny. Further, notwithstanding the prosecution's burden of proof on the capital charge, defense counsel may need to investigate possible affirmative defenses—ranging from absolute defenses to liability (e.g., self-defense or insanity) to partial defenses that might bar a death sentence (e.g., guilt of a lesser-included offense). In addition to investigating the alleged offense, counsel must also thoroughly investigate all events surrounding the arrest, particularly if the prosecution intends to introduce evidence obtained pursuant to alleged waivers by the defendant (e.g., inculpatory statements or items recovered in searches of the accused's home).

Moreover, trial counsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase.[18]

At that phase, defense counsel must both rebut the prosecution's case in favor of the death penalty and affirmatively present the best possible case in favor of a sentence other than death.[19]

If the defendant has any prior criminal history, the prosecution can be expected to attempt to offer it in support of a death sentence. Defense counsel accordingly must comprehensively investigate—together with the defense investigator, a mitigation specialist, and other members of the defense team—the defendant's behavior and the circumstances of the

17. *See infra* Guideline 10.5 and accompanying commentary.

18. *See infra* Guideline 10.10.1 and accompanying commentary; *see also* Stephen B. Bright, *Developing Themes in Closing Argument and Elsewhere: Lessons from Capital Cases*, LITIG., Fall 2000, at 40; Lyon, *supra* note 3, at 708-11; Mary Ann Tally, *Integrating Theories for Capital Trials: Developing the Theory of Life*, THE CHAMPION, Nov. 1998, at 34.

19. *See infra* Guideline 10.11 and accompanying commentary.

conviction.[20] Only then can counsel protect the accused's Fourteenth Amendment right to deny or rebut factual allegations made by the prosecution in support of a death sentence,[21] and the client's Eighth Amendment right not to be sentenced to death based on prior convictions obtained in violation of his constitutional rights.[22]

If uncharged prior misconduct is arguably admissible, defense counsel must assume that the prosecution will attempt to introduce it, and accordingly must thoroughly investigate it as an integral part of preparing for the penalty phase.[23]

Along with preparing to counter the prosecution's case for the death penalty, defense counsel must develop an affirmative case for sparing the defendant's life.[24] A capital defendant has an unqualified right to present any facet of his character, background, or record that might call for a sentence less than death.[25] This Eighth Amendment right to offer mitigating evidence "does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present, and insist on the consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'"[26] Nor will the presentation be persuasive unless it (a) is consistent with that made by the defense at the guilt phase and (b) links the evidence offered in mitigation to the specific circumstances of the client.[27]

Finally, trial counsel, like counsel throughout the process, must raise every legal claim that may ultimately prove meritorious, lest default doctrines later bar its assertion.

> [T]he courts have shown a remarkable lack of solicitude for prisoners—including ones executed as a result—whose attorneys

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20. *See infra* text accompanying notes 222, 301-02.

21. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 160-61 (1994); Gardner v. Florida, 430 U.S. 349, 362 (1977).

22. *See* Johnson v. Mississippi, 486 U.S. 578, 587-88 (1988). Counsel's obligation to prevent the prosecution from using unconstitutionally obtained prior convictions in support of a death sentence, noted *infra* in the text accompanying note 222, may well require counsel to litigate collateral challenges to such prior convictions in the jurisdictions or districts where those convictions were obtained. *See, e.g.*, Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 402-04 (2001).

23. *See infra* text accompanying notes 223, 300.

24. *See infra* text accompanying notes 277-92.

25. *See* Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); *infra* text accompanying note 277.

26. Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1316 (1997) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

27. *See infra* Guideline 10.11 and accompanying commentary.

> through no fault of the prisoners were not sufficiently versed in the law to . . . consider the possibility that a claim long rejected by local, state, and federal courts nonetheless might succeed in the future or in a higher court.[28]

The commentary to the first edition of this Guideline noted that "many indigent capital defendants are not receiving the assistance of a lawyer sufficiently skilled in practice to render quality assistance" and supported the statement with numerous examples. The situation is no better today.[29] Indeed, problems with the quality of defense representation in death penalty cases have been so profound and pervasive that several Supreme Court Justices have openly expressed concern. Justice Ginsburg told a public audience that she had "yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented

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28. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2(a), at 482 (4th ed. 2001). Thus, for example, within a single week in the spring of 2002, the Supreme Court rendered two major rulings favorable to capital defendants. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the Constitution bars execution of mentally retarded individuals); Ring v. Arizona, 536 U.S. 584, 608 (2002) (applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital cases). In both cases, the Court squarely overruled governing precedent. *See* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding that the Constitution does not bar the execution of mentally retarded individuals); Walton v. Arizona, 497 U.S. 639, 649-51 (1990) (upholding same statute later invalidated in *Ring* against same challenge); Apprendi v. New Jersey, 530 U.S. 466, 496 (2000) (stating that *Walton* remained good law). It would have been appropriate (and indeed, some Justices might believe, required on pain of forfeiture) for capital counsel to assert these claims at every stage in the proceedings, even though they were then plainly at odds with the governing law. *See infra* Guideline 10.8 and accompanying commentary. One current example is the potential categorical unconstitutionality of the execution of juveniles. In light of a growing body of scientific evidence regarding the diminished culpability of juveniles, Eighth Amendment considerations, and international laws and treaties forbidding the execution for crimes committed while under the age of eighteen, four current Justices have suggested that the Court should absolutely bar the execution of such offenders. *See In re* Stanford, 123 S. Ct. 472, 475 (2002) (Stevens, Souter, Breyer, Ginsburg, JJ., dissenting). Counsel would be remiss not to assert the claim, notwithstanding that the Court has previously rejected it. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989); Simmons v. Roper, 2003 Mo. LEXIS 123, at *2-4 (Mo., Aug. 26, 2003) (vacating death sentence of defendant who was seventeen at the time of crime on the basis that "the Supreme Court would today hold such executions are prohibited by the Eighth and Fourteenth Amendments"). Similar examples are discussed *infra* at notes 231, 271, 276, 307, 352).

29. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2102-10 (2000); Spec. Comm. on Capital Representation & Comm. on Civ. Rts., Ass'n of the Bar of the City of N.Y., *The Crisis in Capital Representation*, 51 REC. OF ASS'N OF THE BAR OF CITY OF N.Y. 169, 185-87 (1996) [hereinafter *Crisis in Capital Representation*]; Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 428-34 (1996); *see also infra* note 155; *see generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Notes, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923 (1994).

at trial" and that "people who are well represented at trial do not get the death penalty."[30] Similarly, Justice O'Connor expressed concern that the system "may well be allowing some innocent defendants to be executed" and suggested that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used."[31] As Justice Breyer has said, "the inadequacy of representation in capital cases" is "a fact that aggravates the other failings" of the death penalty system as a whole.[32]

In the past, post-conviction review has often been relied upon to identify and correct untrustworthy verdicts.[33] However, legal changes in the habeas corpus regime,[34] combined with Congress' defunding of post-conviction defender organizations ("PCDOs") in 1995,[35] make it less

30. Anne Gearan, *Supreme Court Justice Supports Death Penalty Moratorium*, ASSOCIATED PRESS, Apr. 10, 2001.

31. Crystal Nix Hines, *Lack of Lawyers Hinders Appeals in Capital Cases*, N.Y. TIMES, July 5, 2001, at A1 (quoting Justice Sandra Day O'Connor).

32. *See Ring*, 536 U.S. at 618 (Breyer, J., concurring). The "failings" to which Justice Breyer refers are many of the same ones that led the ABA to call for a moratorium on the imposition of the death penalty. *See* ABA, REPORT ACCOMPANYING RECOMMENDATION 107, 3 (1997), *available at* www.abanet.org/moratorium/resolution.html ("Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.").

33. *See* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 147-48 (2001) (listing numerous modern examples of injustices in capital cases redressed on federal habeas corpus); HERTZ & LIEBMAN, *supra* note 28, § 11.2(c) (same).

34. In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act ("the AEDPA"), which imposed substantial restrictions on the availability of federal habeas corpus for state prisoners. The AEDPA established strict deadlines for the filing of a federal habeas petition, limits on the scope of review of state court decisions, restrictions on the availability of evidentiary hearings to develop facts in support of constitutional claims, and placed stringent constraints on federal courts' consideration of additional applications for review by the petitioner. *See generally* 28 U.S.C. §§ 2244-2255, 2261-2264 (2000). There is significant cause for concern that these provisions may "greatly diminish the reliability of the capital system's review process and of the capital verdicts that the system produces." James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 427 (2001); *see also* ABA Panel Discussion, *Dead Man Walking Without Due Process? A Discussion of the Anti-Terrorism and Effective Death Penalty Act of 1996*, 23 N.Y.U. REV. L. & SOC. CHANGE 163, 168-86 (1997); Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 387 (1997); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 386-93 (1996). One reason for this concern is that portions of the legislation seemed to reduce the level of scrutiny that the federal courts could give to state capital convictions. *See* § 2254 (d)-(e) (providing that writ may not be granted unless state proceedings resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts").

35. *See Crisis in Capital Representation*, *supra* note 29, at 200-05 (presenting state-by-state analysis of impact of defunding of PCDOs); Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 865

likely that such traditional "fail safes" will continue to operate properly in the future. Under the standards set out by the Supreme Court for reviewing claims of ineffective assistance of counsel,[36] even seriously deficient performance all too rarely leads to reversal.[37] Hence, jurisdictions that continue to impose the death penalty must commit the substantial resources necessary to ensure effective representation at the trial stage.[38] In mandating the provision of high quality legal representation at the trial level of a capital case, this Guideline recognizes the simple truth that any other course has weighty costs—to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.

Post-conviction Review

Ensuring high quality legal representation in capital trials, however, does not diminish the need for equally effective representation on appeal, in state and federal post-conviction proceedings, and in applications for executive clemency. Because each of those proceedings has a unique role to play in the capital process, because both legal and social norms commonly evolve over the course of a case, and because of

(1996) (emphasizing the important role that the former PCDOs played in assuring fairness in habeas corpus review of capital convictions); *see also* Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 540-43 (1996).

36. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

37. *See* McFarland v. Scott, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) ("Ten years after the articulation of [the *Strickland*] standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'") (quoting Strickland v. Washington, 466 U.S. 668, 685 (1984)); Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461, 1465 (2003) ("[T]he ruling has proved disabling to the right to effective assistance of counsel in practice."); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 346 (2002) ("[A]ll who have seriously considered the question agree that *Strickland* has not worked either to prevent miscarriages of justice or to improve attorney performance."); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 94 (1995) ("*Strickland* has been roundly and properly criticized for fostering tolerance of abysmal lawyering."); *Legislative Modification*, *supra* note 12 at 862 n.28 (criticizing "the strong presumptions of attorney effectiveness mandated by *Strickland*" as applied to capital cases, and urging that "[w]hatever benefits counter-factual presumptions may have in other areas of the law, they are certainly out of place when a human life hangs in the balance"); *infra* note 155.

38. *See, e.g.*, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 177, 179 (Apr. 15, 2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission-report/index.html (recommending that the Illinois legislature "significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms in capital cases," including the full funding of the defense, which "should significantly improve the quality of defense representation of capital defendants").

"the general tendency of evidence of innocence to emerge only at a relatively late stage in capital proceedings,"[39] jurisdictions that retain capital punishment must provide representation in accordance with the standards of these Guidelines, as outlined in Subsection B, "at all stages of the case." Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. In addition, death penalty cases at the post-conviction stage may be subject to rules that provide less time for preparation than is available in noncapital cases.[40] Substantive pleadings may have to be prepared simultaneously with, or even be delayed for, pleadings to stay the client's execution.[41] For post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers.

A. Representation on Direct Appeal

The Constitution guarantees effective assistance of counsel on an appeal as of right.[42] The "guiding hand of counsel" must lead the condemned client through direct review. Appellate counsel must be intimately familiar with technical rules of issue preservation and presentation, as well as the substantive state, federal, and international law governing death penalty cases, including issues which are "percolating" in the lower courts but have not yet been authoritatively resolved by the Supreme Court.[43] Counsel must also be capable of

39. Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 315, 316 (1991).

40. Under the AEDPA, "special habeas corpus procedures" may apply to federal habeas corpus petitions in capital cases if a state's post-conviction procedures satisfy certain prerequisites. *See* 28 U.S.C. §§ 2261, 2263 (2000). Thus, the deadline for filing of a federal habeas corpus petition by capital prisoners in qualifying "opt-in" states is 180 days, *id.*, in contrast to the one-year limitations period that would otherwise apply. 28 U.S.C. § 2244(d)(1) (2000). In addition, the AEDPA's "opt-in" procedures accelerate the time for review of the case by the district court and the court of appeals, 28 U.S.C. § 2266(b)(1)(A), (c)(1)(A) (2000), and restrict a capital habeas corpus petitioner's ability to amend a petition after the state files its response. 28 U.S.C. § 2266(b)(3)(B) (2000). *See also* Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 487-92 (1991) (discussing why a six-month limit does not provide an attorney with adequate time to prepare a habeas petition properly); *infra* note 335.

41. *See infra* text accompanying notes 333-38.

42. *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985).

43. *See* Smith v. Murray, 477 U.S. 527, 536-37 (1986) (holding that appellate counsel in a

making complex strategic decisions that maximize the client's chances of ultimate success in the event that the direct appeal is resolved unfavorably.[44]

B. Collateral Review Proceedings

Habeas corpus and other procedures for seeking collateral relief are especially important in capital cases.[45] Quality representation in both state and federal court is essential if legally flawed convictions and sentences are to be corrected.[46]

1. State Collateral Review Proceedings

Counsel's obligations in state collateral review proceedings are demanding.[47] Counsel must be prepared to thoroughly reinvestigate the

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Virginia capital case had waived a legal issue by not raising it at an earlier stage of appeal; the novelty of the issue in Virginia was no excuse because it had been raised, though unsuccessfully, in an intermediate appellate court of another state).

44. *See infra* text accompanying notes 342-47.

45. *See* McFarland v. Scott, 512 U.S. 849, 855 (1994) ("[Q]uality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'") (citation omitted); *see generally* HERTZ & LIEBMAN, *supra* note 28, § 2.6.

46. A recent comprehensive study finds that of every one hundred death sentences imposed, forty-seven are reversed at the state level, on direct appeal or collateral review. An additional twenty-one are overturned on federal habeas corpus. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, pt. I, app. A, at 5-6 (2000). These statistics indicate the importance of providing qualified counsel for both state and federal proceedings.

47. Some states provide attorneys at public expense to death-sentenced prisoners seeking state post-conviction relief, but others do not. *See* Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 83-99 (2002) (providing state-by-state list); Jennifer N. Ide, *The Case of Exzavious Lee Gibson: A Georgia Court's (Constitutional?) Denial of a Federal Right*, 47 EMORY L.J. 1079, 1099-1110 (1998); Clive A. Stafford Smith & Rémy Voisin Starns, *Folly By Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55, 56 (1999). Moreover, even in those states that nominally do provide counsel for collateral review, the intertwined realities of chronic underfunding, lack of standards, and a dearth of qualified lawyers willing to accept appointment, *see* THE SPANGENBERG GROUP, ABA POSTCONVICTION DEATH PENALTY REPRESENTATION PROJECT, AN UPDATED ANALYSIS OF THE RIGHT TO COUNSEL AND THE RIGHT TO COMPENSATION AND EXPENSES IN STATE POSTCONVICTION DEATH PENALTY CASES (1996) [hereinafter RIGHT TO COMPENSATION AND EXPENSES], have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance. *See, e.g.*, TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, ch. 7 (2002), *available at* http://www.texasdefender.org/publications.htm (reporting that a review of 103 post-conviction petitions filed by court-appointed counsel in Texas death penalty cases between 1995 and 2000 indicated that 17.5 percent of the petitions were fifteen pages long or less, and that counsel offered no evidence outside the trial record in 42.7 percent of the cases reviewed). Counsel should

entire case to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law. This means that counsel must obtain and read the entire record of the trial, including all transcripts and motions, as well as proceedings (such as bench conferences) that may have been recorded but not transcribed. In many cases, the record is voluminous, often amounting to many thousands of pages. Counsel must also inspect the evidence and obtain the files of trial and appellate counsel, again scrutinizing them for what is missing as well as what is present.

Like trial counsel, counsel handling state collateral proceedings must undertake a thorough investigation into the facts surrounding all phases of the case. It is counsel's obligation to make an independent examination of all of the available evidence—both that which the jury heard and that which it did not—to determine whether the decisionmaker at trial made a fully informed resolution of the issues of both guilt and punishment.

Since the reinstatement of the death penalty in 1976,[48] there have been more than 110 known wrongful convictions in capital cases in the United States.[49] As further described *infra* in the text accompanying

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accordingly be alert to the development of both state and federal law respecting the right to the effective assistance of counsel on state post-conviction review. *See infra* notes 74, 204 (citing cases recognizing right); *see also* Celestine Richards McConville, *The Right to the Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WISC. L. REV. 31, 84-98 (arguing that once a jurisdiction creates a statutory right to post-conviction counsel, the Constitution requires it to provide effective counsel); Leonard Post, *A Fight Over Limits on Pay, Hours: Florida Faces a Suit From a Death Penalty Lawyer*, NAT'L L.J., Mar. 31, 2003, at A1 (describing litigation challenging Florida statutory cap on number of hours for which post-conviction lawyers may be compensated).

In particular, counsel should continue to test the boundaries of *Murray v. Giarratano*, 492 U.S. 1 (1989). Although a plurality of Justices there rejected the constitutional claim of a capital defendant to the appointment of counsel in state post-conviction proceedings, the controlling opinion of Justice Kennedy emphasized that it was based "[o]n the facts and records of this case," in which "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief." *Id.* at 14-15 (Kennedy, J., concurring); *cf. infra* note 334 (citing cases in which states have failed to provide capital prisoners this level of resources).

48. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

49. *See* DEATH PENALTY INFORMATION CENTER: *Innocence and the Death Penalty*, *at* http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (stating that, "[s]ince 1973, 111 people in 25 states have been released from death row with evidence of their innocence") (latest release July 28, 2003); *see also* C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT 62-82 (1996); *see generally* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (updated ed. 2001); EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); Ken Armstrong & Steve Mills, *"Until I Can be Sure": How the*

notes 198-204, these resulted from a variety of causes, including the testimony of unreliable jailhouse informants,[50] the use of dubious or fraudulent forensic scientific methods,[51] prosecutorial misconduct, and

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Threat of Executing the Innocent has Transformed the Death Penalty Debate, *in* BEYOND REPAIR? AMERICA'S DEATH PENALTY (Stephen P. Garvey ed. 2003); Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 223 (James Acker et al. eds. 1998).

50. *See generally* Dodd v. State, 993 P.2d 778, 783-84 (Okla. Crim. App. 2000) (citing "insidious reliability problems" as basis for imposing major procedural restrictions on use of jailhouse informants); Province of Manitoba, Manitoba Justice, The Inquiry Regarding Thomas Sophonow, Manitoba Guidelines Respecting the Use of Jailhouse Informants (Nov. 5, 2001), *available at* http://www.gov.mb.ca/justice/sophonow/appendix/appendixf.pdf (following inquiry into wrongful conviction of Thomas Sophonow, which found jailhouse informants to be "the most deceitful and deceptive group of witnesses known to frequent the courts" (Province of Manitoba Manitoba Justice, The Inquiry Regarding Thomas Sophonow, Jailhouse Informant, Their Unreliability and the Importance of Complete Crown Disclosure Pertaining to Them, *available at* http://www.gov/mb.ca/justice/sophonow/jailhouse), Province bars their use except in limited circumstances and subject to tight safeguards); CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY 52 (2001) (noting that a "category of evidence that has a particularly high chance of being an outright lie, exaggerated, or otherwise erroneous is the testimony of jailhouse informants. Their confinement provides evidence of their questionable character, motivates them to lie in order to improve the conditions of their confinement or even secure their release, and often affords access to information that can be used to manufacture credible testimony."); Robert M. Bloom, *Jailhouse Informants*, CRIM. JUST., Spring 2003, at 20 (discussing studies regarding the unreliability of jailhouse informants and the use of their testimony in capital cases); Ted Rohrlich, *Jail House Informant Owns Up to Perjury in a Dozen Cases*, L.A. TIMES, Jan. 4, 1990, at A1 (detailing perjuries committed by Leslie White, an inmate at the Los Angeles County jail who demonstrated to authorities and reporters how he concocted false confessions, and noting confession of another informant, Stephen Jesse Cisneros, to perjury in five murder cases).

51. *See generally* Brief of Amici Curiae Five Innocent Former Death Row Inmates & Centurion Ministries, Schlup v. Delo, 513 U.S. 298 (1995) (No. 93-7901) (reviewing generally unscrupulous practices by investigators and prosecutors that can lead to false convictions); Paul Duggan, *Oklahoma Reviews 3,000 Convictions*, WASH. POST, May 9, 2001, at A2 (discussing Oklahoma review of three thousand convictions based on work of Joyce Gilchrist, an Oklahoma City police chemist, who went far beyond what was scientifically knowable in conducting forensic investigations of local crime); Davidson Goldin, *5th Trooper Pleads Guilty in Scandal*, N.Y. TIMES, Apr. 8, 1995, at A29 (describing scandal in which New York state troopers transferred fingerprints of potential suspects to crime scenes to enhance their cases); Mark Hansen, *Out of the Blue*, 82 A.B.A. J., Feb. 1996 (describing dentist, widely discredited by his peers, who claimed to be able to match bite marks to the teeth that made them); Adam Liptak, *2 States to Review Lab Work of Expert Who Erred on ID*, N.Y. TIMES, Dec. 19, 2002, at A24 (Montana and Washington reviewing approximately one hundred cases based on questionable forensic testimony of Arnold Melnikoff); Armando Villafranca, *Bradford Cites HPD Lab Flap, Urges Hold for 7 on Death Row*, HOUS. CHRON., Mar. 7, 2003 (reporting legislative testimony of Houston Police Chief urging that no execution dates be set for seven death row inmates whose cases may have been affected by shoddy work of Houston police crime laboratory, which was found in a state audit to have had numerous shortcomings in preservation and testing of DNA evidence); Edna Buchanan, *Did FBI Wrongly Aid Death Row Conviction?*, MIAMI HERALD, May 31, 2003, at 1A (although internal review of FBI crime laboratory has identified about three thousand cases of shoddy forensic work, agency has only notified about 150 defendants of problems; suspect cases include those involving hair and fiber

incompetence of defense counsel at trial. Because state collateral proceedings may present the last opportunity to present new evidence to challenge the conviction, it is imperative that counsel conduct a searching inquiry to assess whether any mistake may have been made.

Reinvestigation of the case will require counsel to interview most, if not all, of the critical witnesses for the prosecution and investigate their backgrounds. Counsel must determine if the witness's testimony bears scrutiny or whether motives for fabrication or bias were left uncovered at the time of trial. Counsel must also assess all of the non-testimonial evidence and consider such issues as whether forensic testing must now be performed, either because some technology, such as DNA, was unavailable at the time of trial or because trial counsel failed to ensure that necessary testing took place.[52]

Counsel must conduct a similarly comprehensive reevaluation of the punishment phase to verify or undermine the accuracy of all evidence presented by the prosecution, and to determine whether the decisionmaker was properly informed of all relevant evidence,[53] able to give appropriate weight to that evidence,[54] and provided with a clear and legally accurate set of instructions for communicating its conclusion.[55]

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analyst Michael Malone, on the basis of whose testimony James Duckett faces execution in Florida); Timothy W. Maier, *Inside the DNA Labs*, INSIGHT MAGAZINE, June 10-23, 2003, at 18 (summarizing numerous cases); *Police Review Chemist's Work*, N.Y. TIMES, Mar. 13, 2003, at A22 (reporting that Baltimore County police are reviewing all 480 blood-typing cases handled by former department chemist Concepcion Bacasnot after she falsely testified to a match that resulted in an innocent defendant serving twenty years for rape); *infra* note 200.

52. *See, e.g.*, Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1098-99 (2001) (describing how pro bono counsel in state post-conviction proceeding discovered exculpatory semen stain evidence, which "having been appropriately turned over by the government, lay unappreciated in the files of former defense counsel"); Gwen Filosa, *N.O. Man Cleared in '84 Murder*, NEW ORLEANS TIMES-PICAYUNE, May 9, 2003, at 1 (describing case of John Thompson, who was deterred from taking the stand at his original murder trial by a prior conviction for armed robbery, which, as a defense investigator discovered weeks before the execution date, had been tainted by government suppression of an exculpatory blood test; when retried on the murder charge, Thompson, who had always maintained his innocence, was acquitted).

53. *See, e.g.*, Wiggins v. Smith, 123 S. Ct. 2527 (2003) (granting habeas corpus relief to petitioner whose trial counsel failed to find and present mitigating evidence); Williams v. Taylor, 529 U.S. 362, 370-71, 374 (2000) (same).

54. *See infra* Guideline 10.10.2(B) and accompanying commentary.

55. For examples of death sentences overturned for failure to comply with this requirement, see Penry v. Johnson, 532 U.S. 782, 796-804 (2001), McKoy v. North Carolina, 494 U.S. 433, 444 (1990), Mills v. Maryland, 486 U.S. 367, 375-80 (1988), and Davis v. Mitchell, 318 F.3d 682, 691 (6th Cir. 2003); *see also* Lenz v. Warden, 579 S.E.2d 194 (Va. 2003) (holding trial counsel ineffective for failure to object to defective penalty phase verdict form); *infra* note 315.

2. Federal Habeas Corpus

In addition to requiring counsel to undertake all the tasks just described in Subsection B(1), federal collateral proceedings present another set of obstacles—ones that highlight the importance of quality representation. From 1973 to 1995, capital habeas corpus petitioners obtained relief at many times the rate of noncapital ones[56] and they should continue to do so in the future. But federal habeas corpus actions are governed by a complex set of procedural rules.[57] Counsel must master these thoroughly.[58] Moreover, restrictions on the availability of federal habeas relief for state prisoners imposed by the AEDPA will continue to raise numerous novel legal issues.

C. Executive Clemency

Executive clemency plays a particularly important role in death penalty cases, as it "provides the [government] with a final, deliberative opportunity to reassess this irrevocable punishment."[59] Because post-judgment proceedings have traditionally provided very limited opportunity for review of questions of guilt or innocence, clemency is

56. *See* James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1844, 1849 (2000) (federal habeas relief was granted in forty percent of 599 cases between 1973 and 1995 in which the judgment remained intact after direct appeal and state post-conviction review); *cf.* Eric M. Freedman, *Federal Habeas Corpus in Capital Cases, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 427 (James Acker et al. eds. 1998) ("By the most generous estimates, the rate in non-capital cases does not exceed seven percent, and, if the appropriate statistical methodology is applied, the actual number is less than one percent.").

57. *See, e.g.*, Edwards v. Carpenter, 529 U.S. 446 (2000) (limits on asserting ineffective assistance of counsel as "cause" for procedural default); Schlup v. Delo, 513 U.S. 298 (1995) ("fundamental miscarriage of justice" exception to procedural default rule); Teague v. Lane, 489 U.S. 288 (1989) (non-retroactivity of "new rules" of constitutional procedure); Wainwright v. Sykes, 433 U.S. 72 (1977) (limiting review of constitutional claims due to procedural default). Indeed, on the website of the *New York Times*, its Supreme Court reporter, Linda Greenhouse, has described the Court's habeas jurisprudence as "so complex as to be almost theological" (posted July 6, 2001).

58. *See Legislative Modification*, *supra* note 12, at 854 ("The post-conviction handling of capital cases is a legal specialty requiring mastery of an intricate body of fast-changing substantive and procedural law."). The failure of counsel to fulfill these obligations may entitle the client to relief under federal constitutional or statutory law. *See* Cooey v. Bradshaw, 216 F.R.D. 408 (N.D. Ohio 2003) (granting stay of execution on claim of ineffective assistance by prior counsel appointed under 21 U.S.C. § 848), *motion to vacate stay denied*, No. 03-4001 (6th Cir. July 24, 2003), *motion to vacate stay denied*, No. 03-5472 (U.S. July 24, 2003).

59. Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 214 (1992); *see infra* Guideline 10.15.2 and accompanying commentary.

"the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."[60] As the Supreme Court has recognized, "history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence."[61] Recent advances in the use of DNA technologies, combined with restrictions on the availability of post-conviction review, have elevated the important role that clemency has played as the "fail-safe" of the criminal justice system,[62] and increased the demands on counsel.[63] Moreover, wholly apart from questions of guilt or innocence, executive clemency has been granted in death penalty cases for a broad range of humanitarian reasons.[64] Recognizing these considerations, the Supreme Court has begun to apply due process protection to clemency proceedings.[65] Thus, in addition to assembling the most persuasive possible record for the decisionmaker, counsel must carefully examine the possibility of pressing legal claims asserting the right to a fuller and fairer process.[66]

The Imperative of a Systemic Approach

General statements of expectations about what lawyers should do will not themselves ensure high quality legal representation. Indeed, Guidelines confined to such statements would be ones "that palter with us in a double sense; that keep the word of promise to our ear, and break it to our hope."[67] Attorney error is often the result of systemic problems,

60. Herrera v. Collins, 506 U.S. 390, 411-12 (1993).

61. *Id.* at 415.

62. *See* Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 68-77 (1998); *infra* text accompanying note 356.

63. *See, e.g.*, Freedman, *supra* note 52, at 1100-03 (describing detailed oral and written presentations made to two Governors of Virginia by a six-lawyer team to secure DNA testing for death row inmate Earl Washington that resulted in his exoneration); *see also infra* Guideline 10.15.2 and accompanying commentary.

64. *See* Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-*Furman *Cases*, 27 U. RICH. L. REV. 289, 297-99 (1993) (identifying twenty-nine cases between 1972 and 1993 in which death-sentenced inmates had their death sentences commuted to terms of life imprisonment through executive clemency procedures for humanitarian reasons); *infra* text accompanying notes 357-58.

65. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 275-76 (1998); *see also* Ford v. Wainwright, 477 U.S. 399, 405-10, 418 (1986) (invalidating Florida procedure for determining whether inmate was mentally competent to be executed).

66. *See, e.g.*, Wilson v. United States Dist. Ct., 161 F.3d 1185, 1186-87 (9th Cir. 1998) (affirming district court order staying a prisoner's execution on the grounds that his clemency hearing violated due process).

67. WILLIAM SHAKESPEARE, MACBETH act 5, sc. 8.

not individual deficiency.[68] The provision of counsel for indigent capital defendants is too frequently made through ad hoc appointment, a system inimical to effective representation.[69] Although defender offices generally have the experience and dedication to provide high quality legal representation in capital cases, they are commonly overworked and inadequately funded. And private counsel often discover too late that they have taken on a task for which they are unqualified[70] or lack sufficient resources. The Guidelines that follow, therefore, not only detail the elements of quality representation, but mandate the systematic provision of resources to ensure that such representation is achieved in fact, whether counsel is individually assigned, employed by a defender office, or privately retained with or without compensation.[71]

Conclusion

Unless legal representation at each stage of a capital case reflects current standards of practice, there is an unacceptable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[72] Accordingly, any jurisdiction wishing to impose a death sentence must at minimum provide representation that comports with these Guidelines.[73]

68. *See* Liebman, *supra* note 29, at 2108; Goodpaster, *supra* note 3, at 356-59.

69. *See infra* Guideline 2.1(C) and accompanying commentary.

70. *See, e.g.*, Washington v. Murray, 952 F.2d 1472, 1475, 1476 (4th Cir. 1991) (vacating district court's summary dismissal of ineffective assistance of counsel claim based on failure of retained counsel to appreciate exculpatory significance of scientific evidence produced by prosecution).

71. *See infra* Guidelines 4.1, 8.1, & 9.1 and accompanying commentary; *see generally* Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980) (noting that guarantee of Sixth Amendment applies equally whether counsel is retained or appointed).

72. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

73. *Cf. Legislative Modification*, *supra* note 12, at 848 ("[F]or so long as the death penalty continues to exist in this country, capital inmates are entitled to procedures—including ones for the provision of competent counsel—that result in the full and fair review of their convictions and sentences. Correlatively, any state which chooses to impose death sentences must accept the obligation of providing mechanisms for assuring that those sentences are legally and factually correct at the time of their execution.") (citation omitted).

GUIDELINE 4.1—THE DEFENSE TEAM AND SUPPORTING SERVICES

A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.

1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.

2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

B. The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

1. Counsel should have the right to have such services provided by persons independent of the government.

2. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

History of Guideline

This Guideline is based on Guideline 8.1 of the original edition. In keeping with the team approach described in the commentary, Subsection A has been added to provide for the assembly of a "defense team." The first sentence of Subsection B is based on the original version of the Guideline and has been revised to emphasize that the purpose of providing adequate support services is to further the overall goal of providing "high quality legal representation," not merely "an effective defense." The second sentence is taken from Standard 5-1.4 of the ABA Standards for Criminal Justice: Providing Defense Services. Subsections B(1) and B(2) are new and reflect the decision to include private attorneys in these Guidelines.

Related Standards

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 (1986) ("Roles of Mental Health and Mental Retardation Professionals in the Criminal Process").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 (3d ed. 1992) ("Supporting Services").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-2.4 ("Special Assistants, Investigative Resources, Experts"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1 ("Duty to Investigate"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.14 (1973) ("Supporting Personnel and Facilities").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act, Section 2 (1970) ("Right to Representation, Services, and Facilities").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act, Section 12 (1970) ("Personnel and Facilities").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES, Guideline III-8 (1984) ("Support Staff and Forensic Experts").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES, Guideline III-9 (1984) ("Investigators").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES, Guideline III-10 (1984) ("Compensation").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 3.1 (1976) ("Assigned Counsel Fees and Supporting Services").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 3.4 (1976) ("Nonpersonnel Needs in Defender Offices").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.6 (1989) ("Support Services").

Commentary

Introduction

In a capital case reaffirming that fundamental fairness entitles indigent defendants to the "basic tools of an adequate defense," the United States Supreme Court stated:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and

> that a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.[88]

It is critically important, therefore, that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal, post-conviction and clemency, and to procure and effectively present the necessary expert witnesses and documentary evidence.[89]

The Team Approach to Capital Defense

National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to adequate "supporting services [including] secretaries[,] investigators[, and] . . . expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencings."[90]

This need is particularly acute in death penalty cases. The prosecution commits vast resources to its effort to prove the defendant guilty of capital murder. The defense must both subject the prosecution's evidence to searching scrutiny and build an affirmative case of its own.[91] Yet investigating a homicide is uniquely complex and often involves evidence of many different types. Analyzing and interpreting such evidence is impossible without consulting experts—whether pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, or others.[92]

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88. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

89. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 cmt. (3d ed. 1992).

90. *Id.*

91. *See* Subcomm. on Federal Death Penalty Cases, Comm. on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998) [hereinafter *Federal Death Penalty Cases*] (discussing federal death penalty cases), *available at* http://www.uscourts.gov/dpenalty/1COVER.htm (reporting that "both the prosecution and the defense rely more extensively on experts in death penalty cases than in other [] criminal cases").

92. *See, e.g.*, Alec Wilkinson, *A Night at the Beast House*, THE NEW YORKER, Feb. 13, 1995, at 68 (discussing how counsel used an expert to show that victim was not killed in the prosecuting jurisdiction but dragged to the crime scene after her death; client eventually exonerated and released).

In particular, mental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses on death row.[93] Evidence concerning the defendant's mental status is relevant to numerous issues that arise at various junctures during the proceedings, including competency to stand trial, sanity at the time of the offense, capacity to intend or premeditate death, ability to comprehend *Miranda* warnings, and competency to waive constitutional rights. The Constitution forbids the execution of persons with mental retardation,[94] making this a necessary area of inquiry in every case. Further, the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase.[95] Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.[96] Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.[97]

Counsel's own observations of the client's mental status, while necessary,[98] can hardly be expected to be sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation)

93. *See, e.g.*, Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 559-83 (1995) (examining "the structure of the lives of those who commit [capital violence]"); Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 839-44 (1986) (reviewing inmates' "psychiatric evaluations [and] detailed medical, family, social, and educational histories").

94. *See* Atkins v. Virginia, 53 U.S. 304, 350 (2002).

95. *See* Goodpaster, *supra* note 3, at 323-24.

96. *See* John H. Blume, *Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination*, THE ADVOCATE, Aug. 1995, *available at* http://www.dpa.state.ky.us/rwheeler/blume/blume.html.

97. *See* Douglas S. Liebert, Ph.D. & David V. Foster, M.D., *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15:4 AM. J. FORENSIC PSYCHIATRY 43-64 (1994).

98. *See infra* Guidelines 10.5 and 10.15.1(E)(2) and accompanying commentary. Effective representation requires ongoing interactive contact with the client—in person, by mail, on the telephone, and in other ways—both by counsel and, as discussed in the remainder of this commentary, by the other members of the defense team. To the extent that jurisdictions impede such contact—whether by charging excessive fees for telephone calls, limiting mailings, failing to provide convenient and confidential arrangements for visits, restricting the access of non-attorney defense team members to clients, or otherwise—they jeopardize the provision of high quality legal representation in accordance with these Guidelines.

that could be of critical importance. Accordingly, Subsection A(2) mandates that at least one member of the defense team (whether one of the four individuals constituting the smallest allowable team or an additional team member) be a person qualified by experience and training to screen for mental or psychological disorders or defects and recommend such further investigation of the subject as may seem appropriate.

Although mental health issues are so ubiquitous in capital defense representation that the provision of resources in that area should be routine, it bears emphasis that every situation will also have its own unique needs. The demands of each case—and each stage of the same case—will differ. Jurisdictions must therefore construe this Guideline broadly, keeping in mind the superior opportunity of defense counsel to determine what assistance is needed to provide high quality legal representation under the particular circumstances at hand and counsel's need to explore the potential of a variety of possible theories. For example, it might well be appropriate for counsel to retain an expert from an out-of-state university familiar with the cultural context by which the defendant was shaped or a professional who is skilled at retrieving elusive paper or electronic records. While resources are not unlimited, of course, jurisdictions should also be mindful that sufficient funding early in a case may well result in significant savings to the system as a whole.[99]

Effective Assistance of Experts

Subsections B(1) and B(2) are aimed at insuring that the fact of public funding does not diminish the quality of the assistance that counsel is able to obtain from experts. Thus, unless counsel agrees otherwise, the defendant is entitled to experts independent of the government; the jurisdiction may not meet its obligations by relegating

99. For example, in light of the constitutional prohibition on the execution of the mentally retarded, significant resources spent at the pretrial phase in investigating and presenting the defendant's retardation status will be amply repaid in future cost savings since the most likely outcomes are (a) the case is taken off the capital track entirely, very possibly by agreement with the prosecution or (b) the issue is decided against the defendant, thus minimizing the likelihood of it being raised later. *See, e.g.*, Dan Barry, *Ashcroft Says Retarded Man No Longer Faces Death Penalty*, N.Y. TIMES, Mar. 20, 2003, at B1. Similarly, it is not only expensive, but also extremely unjust for exculpatory evidence about which trial counsel should have learned from an expert to lie undiscovered until post-conviction proceedings many years later—years during which an innocent person is incarcerated. *See* Freedman, *supra* note 52, at 1094-95, 1098-99.

him to the state mental hospital or the state crime laboratory.[100] Similarly, doctrines of privilege, work product, and the like should protect the communications between counsel and the experts just as they would if the experts were being paid with private funds. Any procedures for the auditing of public funds should be structured so as to preserve this confidentiality.

The Core Defense Team

In addition to employing the particular nonlegal resources that high quality legal representation requires in each individual case, the standard of practice demands that counsel have certain specific forms of assistance in every case. This Guideline accordingly requires that those resources be provided.[101]

A. The Investigator

The assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that must be unearthed at trial or in post-conviction proceedings. Although some investigative tasks, such as assessing the credibility of key trial witnesses, appropriately lie within the domain of counsel, the prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation. Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case. Moreover, the defense may need to call the person who conducted the interview as a trial witness.[102] As a result, an investigator should be part of the defense team at every stage of a capital proceeding.

100. Of course, non-lawyer professionals on the staff of defender organizations are, even if on the public payroll, "independent of the government" for this purpose.

101. This Guideline contemplates that defense counsel will be primarily responsible for selection of the remaining members of the defense team. Guideline 10.4 discusses in greater detail the division of this responsibility among the attorneys on the team. The Responsible Agency should, however, be prepared to provide assistance in finding qualified individuals to fill these roles.

102. *See infra* Guideline 10.7 and accompanying commentary.

B. The Mitigation Specialist

A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have.[103] They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict.[104] The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.[105]

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103. *See* Dwight H. Sullivan et al., *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 GEO. MASON U. CIV. RTS. L.J. 199, 206-11 (2002).

104. *See* Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 250 (1991) (noting that many attorneys make no preparations whatsoever for the sentencing phase; because they believe that a lawyer should try to win rather than plan to lose, they "are devastated when the client is convicted and afterward just throw in the towel"); *infra* Guideline 10.10.1 and accompanying commentary; text accompanying notes 273-76; *see also* Head v. Thomason, 578 S.E.2d 426, 430 (Ga. 2003) (finding in state post-conviction proceeding that trial counsel were ineffective at penalty phase; due to their unwarrantedly optimistic belief that the sentencer would not impose death, they were less diligent than they should have been in obtaining mitigation evidence, and failed "to make use of the mitigating evidence and the experts they had").

105. *See generally* Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, *at* http://www.nlada.org/DMS/Documents/998934720.005/Why%20Capital%20Cases%20Require%2

The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death.[106]

For all of these reasons the use of mitigation specialists has become "part of the existing 'standard of care'" in capital cases, ensuring "high quality investigation and preparation of the penalty phase."[107]

Counsel Not Compensated by Public Funds

Finally, in the relatively rare case in which a capital defendant retains counsel, jurisdictions must ensure that the defendant has access to necessary investigative and expert services if the defendant cannot afford them.

> Inability to afford counsel necessarily means that a defendant is unable to afford essential supporting services, such as investigative assistance and expert witnesses. The converse does not follow, however. Just because a defendant is able to afford retained counsel does not mean that sufficient finances are available for essential services. . . . [S]upporting services [should] be made available to the clients of retained counsel who are unable to afford the required assistance.[108]

Of course, the same observations apply where counsel is serving pro bono or, although originally retained, has simply run out of money.

0Mitigation%20Specialists.doc (last visited July 26, 2003) (discussing the role and required skills of the mitigation specialist); TEXAS DEFENDER SERVICE CAPITAL TRIAL PROJECT, DEATH PENALTY MITIGATION MANUAL FOR TRIAL ATTORNEYS ch. 2 (2001) ("The Mitigation Specialist and the Team Approach") [hereinafter TEXAS DEATH PENALTY MITIGATION MANUAL].

106. *See infra* text accompanying note 178.

107. *See Federal Death Penalty Cases*, *supra* note 91. Numerous death penalty jurisdictions, by state statute, court rule, or case law, routinely authorize the payment of funds for mitigation experts pursuant to defense motion. *See, e.g.*, GA. CODE ANN. § 17-12-90 to 97 (1997); 725 ILL. COMP. STAT. 124/10(c) (West 2002); KY. REV. STAT. ANN. § 31.110(1)(b) (Michie 2002); S.C. CODE ANN. § 16-3-26(C)(1) (Law Co-op. 2001); TENN. CODE. ANN. § 40-14-207(b) (1997); TENN. S. CT. R. 13 § 5; State v. Bailey, 424 S.E.2d 503, 507 (S.C. 1992) (interpreting § 16-3-26(C)(1) as applied to capital cases, stating that "in today's capital trial, the defendant is entitled to produce evidence concerning his childhood and family background in mitigation of his criminal conduct, so that the jury may impose life imprisonment as an alternative to the death sentence. In preparing this evidence, the attorney must employ investigators in the course of thoroughly researching the defendant's entire life"). In federal capital trials, mitigation experts are routinely appointed and compensated under 21 U.S.C. § 848(q) (2000).

108. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 cmt. (3d ed. 1992); *see also* Edward C. Monahan & James J. Clark, *Funds for Resources for Indigent Defendants Represented by Retained Counsel*, THE CHAMPION, Dec. 1996, at 16.

GUIDELINE 5.1—QUALIFICATIONS OF DEFENSE COUNSEL

A. The Responsible Agency should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

B. In formulating qualification standards, the Responsible Agency should insure:

1. That every attorney representing a capital defendant has:

   a. obtained a license or permission to practice in the jurisdiction;

   b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and

   c. satisfied the training requirements set forth in Guideline 8.1.

2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:

   a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

b. skill in the management and conduct of complex negotiations and litigation;

c. skill in legal research, analysis, and the drafting of litigation documents;

d. skill in oral advocacy;

e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

g. skill in the investigation, preparation, and presentation of mitigating evidence; and

h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

History of Guideline

This Guideline has been substantially reorganized for this edition. In the original edition, it emphasized quantitative measures of attorney experience—such as years of litigation experience and number of jury trials—as the basis for qualifying counsel to undertake representation in death penalty cases. In this revised edition, the inquiry focuses on counsel's ability to provide high quality legal representation.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.2 (3d ed. 1992) ("Eligibility to Serve").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.2 (1995) ("Education, Training, and Experience of Defense Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline II-3 (1984) ("Duties").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.9 (1989) ("Standards for Performance of Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1(b) (1989) ("Establishment and General Operation of Assigned Counsel Roster").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1.1 (1989) ("Qualifications of Attorneys").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 2.15 (1976) ("Establishing the Assigned Counsel Panel").

Commentary

Under Guideline 3.1, it is the duty of the Responsible Agency to provide capital defendants with attorneys who will give them high quality legal representation. This Guideline amplifies that duty. It is designed to be outcome-focused and to leave the Responsible Agency maximum flexibility. The Guideline sets forth the necessary qualifications for all attorneys (Subsection B(1)), and also requires that "the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation." (Subsection B(2)). The qualification standards set by the Responsible Agency must be such as to bring about this result. This functional approach is new to this edition.

As described in the commentary to Guideline 1.1, the abilities that death penalty defense counsel must possess in order to provide high

quality legal representation differ from those required in any other area of law. Accordingly, quantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster.[109]

There are also attorneys who do not possess substantial prior experience yet who will provide high quality legal representation in death penalty cases.[110] Such attorneys may have specialized training and experience in the field (e.g., as law professors), may previously have been prosecutors, or may have had substantial experience in civil practice.[111] These attorneys should receive appointments if the Responsible Agency is satisfied that the client will be provided with high quality legal representation by the defense team as a whole.

In order to make maximum use of the available resources in the legal community overall, the Responsible Agency needs to devise qualification standards that build upon the contribution that each lawyer can make to the defense team, while ensuring that the team is of such a size and aggregate level of experience as to be able to function effectively.

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109. *See* Bright, *supra* note 29, at 1871 n.209 ("Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications.").

110. Because, as the second sentence of Subsection A emphasizes, the overriding goal is to provide high quality legal representation to the client in the individual case, it may also be appropriate for the appointing authority to certify an attorney for a limited purpose, such as to represent a particular client with whom he or she has a special relationship.

111. Superior post-conviction death penalty defense representation has often been provided by members of the private bar who did not have prior experience in the field but who did have a commitment to excellence. *See, e.g.*, Kelly Choi, *Against All Odds*, AM. LAW., Dec. 2000, at 98; *Death-Row Rescue*, STAR TRIB., Jan. 5, 2001, at 18A.

GUIDELINE 6.1—WORKLOAD

The Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.

History of Guideline

The original edition of this Guideline stated that "attorneys accepting appointments pursuant to these Guidelines . . . should not accept appointment" if their workload would interfere with the provision of "quality representation or lead to the breach of professional obligations."

Although that admonition has been retained in Guideline 10.3, this Guideline, which in accordance with Guideline 1.1 applies to all defense counsel (not just appointed members of the private bar), has been added to make clear that it is the responsibility of the jurisdiction creating the system to establish mechanisms for controlling attorney workloads.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-5.3 (3d ed. 1992) ("Workload").

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTIONS Standard 4-1.3 ("Delays; Punctuality; Workload") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.1 (1976) ("Establishing Maximum Pending Workload Levels for Individual Attorneys").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.2 (1976) ("Statistics and Record-keeping").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.3 (1976) ("Elimination of Excessive Caseloads").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-12 (1984) ("Case and Work-Overload").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1(c) (1989) ("Establishment and General Operation of Assigned Counsel Roster").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1.2 (1989) ("Workload of Attorneys").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.12 (1973) ("Workload of Public Defenders").

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (2002) ("Defense Counsel's Workload Is Controlled to Permit the Rendering of Quality Representation").

Commentary

In order to achieve the goal of providing capital defendants with high quality legal representation, the caseloads of their attorneys must be such as to permit the investment of the extraordinary time and effort necessary to ensure effective and zealous representation in a capital case. As the commentary to the ABA Defense Services Standards notes:

> One of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads. . . .
>
> All too often in defender organizations[,] . . . attorneys are asked to provide representation in too many cases. . . . Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive

workloads, moreover, lead to attorney frustration, disillusionment by clients, and weakening of the adversary system.[112]

A numerical set of caseload standards, standing alone, would not ensure high quality legal representation. While national caseload standards should in no event be exceeded, the concept of "workload" (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's non-representational duties) is a more accurate measurement of counsel's ability to provide quality representation. In assessing counsel's workload, the Responsible Agency must also consider whether counsel has adequate access to essential support staff such as investigators, mitigation specialists, paralegals, and legal secretaries. Counsel's workload, including legal cases and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline to undertake additional cases above such levels.[113]

In accordance with these principles, the Responsible Agency should assess the workload of eligible attorneys prior to appointment to ensure that counsel will be able to provide high quality legal representation. To assist in assessing workloads, some defender offices have established workload guidelines that are useful in determining whether the workload of a particular attorney is excessive. These guidelines may be consulted as one measure of appropriate workloads.[114]

Studies have consistently found that defending capital cases requires vastly more time and effort by counsel than noncapital matters. For example, one study found that over the entire course of a case,

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112. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-5.3 cmt. (3d ed. 1992); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 2-30 (1997); MODEL RULES OF PROF'L CONDUCT Rule 1.3 cmt. 2 (2002) ("A lawyer's work load must be controlled so that each matter can be handled competently."); Taylor-Thompson, *supra* note 37, at 1509 ("If a defense delivery system does not at once identify and impose limits on the number of cases for which an individual lawyer will be responsible, case pressures will inevitably overwhelm the lawyer and compromise the representation.").

113. *See infra* Guideline 10.3 and accompanying commentary.

114. *See* NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guidelines 4.1, 5.1–5.3 (1976); NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.12 (1973). These standards all acknowledge the need to determine acceptable workloads, and all acknowledge within the standards themselves or in commentary the myriad factors that must be considered in weighing workload. Only the National Advisory Commission sets forth suggested numerical maximums for caseloads; those numbers are provided with the caveat "that particular local conditions—such as travel time—may mean that lower limits are essential." *Id.* The National Advisory Commission standard does not address death penalty workloads.

defense attorneys in federal capital cases bill for over twelve times as many hours as in noncapital homicide cases.[115] In terms of actual numbers of hours invested in the defense of capital cases, recent studies indicate that several thousand hours are typically required to provide appropriate representation. For example, an in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that the total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889.[116]

Workloads for lawyers handling direct appeals should also be maintained at levels that are consistent with providing high quality legal representation. Like the responsibilities of counsel at trial, appellate work in a capital case is time-consuming and difficult. A capital trial record, which appellate counsel must review in full and with care, typically runs to thousands or even tens of thousands of pages—even before, pursuant to Guideline 10.7(B)(2), counsel investigates the possibility that the record may be incomplete. Once appellate counsel has reviewed the record, he or she must conduct especially wide-ranging legal research, canvassing both state and federal judicial opinions, before drafting the opening brief. Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of the defendant's conviction or punishment.[117] Further, counsel must aggressively examine the government's brief and research its legal assertions in order to prepare an adequate reply. Preparing for and presenting oral argument requires counsel to invest still more hours. In California, where the Office of the State Public Defender handled capital appeals in the California Supreme Court, a 1989 study concluded that attorneys' responsibilities should be limited to two to three such proceedings per year.[118]

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115. *See Federal Death Penalty Cases*, *supra* note 91.

116. *See id.* This figure was only for the number of hours expended through the end of trial court proceedings, and did not include any post-conviction representation.

117. *See supra* text accompanying notes 42-44. Moreover, counsel must continue to investigate the facts. *See infra* Guideline 10.7 (A); *see also* Orazio v. Dugger, 876 F.2d 1508, 1513 (11th Cir. 1989) (holding appellate counsel ineffective because "[h]e did not review fully the trial court file or talk with petitioner or trial counsel," and hence was unaware of a trial court ruling that should have been appealed).

118. *See* NAT'L CTR. FOR STATE COURTS & THE SPANGENBERG GROUP, WORKLOAD AND PRODUCTIVITY STANDARDS: A REPORT TO THE OFFICE OF THE STATE PUBLIC DEFENDER 86-89 (1989).

Similarly, the workloads of counsel handling collateral proceedings must be carefully limited to allow for high quality legal representation. A 1998 survey of the time and expenses required in Florida capital post-conviction cases concluded that:

> [T]he most experienced and qualified lawyers at Florida's post-conviction defender office, the Office of Capital Collateral Representation[,] have estimated that, on average, over 3,300 lawyer hours are required to take a post-conviction death penalty case from the denial of certiorari by the United States Supreme Court following direct appeal to the denial of certiorari [from state post-conviction proceedings.][119]

It is the duty of the Responsible Agency to distribute assignments in light of each attorney's duty under the Rules of Professional Conduct to "provide competent representation to a client,"[120] which requires the legal knowledge, skill, thoroughness and preparation necessary for a complex and specialized area of the law.[121] Thus, the Responsible Agency must monitor private counsel in accordance with Guideline 7.1, and provide them with additional assistance as necessary. And the Independent Authority must monitor the defender organizations of the jurisdiction and stand ready to supplement their resources with those of the private bar.

Regardless of the context, no system that involves burdening attorneys with more cases than they can reasonably handle can provide high quality legal representation. In the capital context, no such system is acceptable.

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119. THE SPANGENBERG GROUP, AMENDED TIME & EXPENSE ANALYSIS OF POST-CONVICTION CAPITAL CASES IN FLORIDA 16 (1998).

120. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

121. *See id.* cmt. 1; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.2(d), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 1.3(a) (1995).

GUIDELINE 8.1—TRAINING

A. The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

B. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

1. relevant state, federal, and international law;

2. pleading and motion practice;

3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;

4. jury selection;

5. trial preparation and presentation, including the use of experts;

6. ethical considerations particular to capital defense representation;

7. preservation of the record and of issues for post-conviction review;

8. counsel's relationship with the client and his family;

9. post-conviction litigation in state and federal courts;

10. the presentation and rebuttal of scientific

evidence, and developments in mental health fields and other relevant areas of forensic and biological science;

11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.

C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.

D. The Legal Representation Plan should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

History of Guideline

The importance of training was addressed in Guideline 9.1 of the original version of the Guidelines for lawyers seeking to receive appointments in capital cases. Subsections A and D have been added to this revised edition to emphasize that the Legal Representation Plan must provide for specialized training of all members of the defense team involved in the representation of capital defendants. Subsections B and C are based on the original edition of the Guideline. This revised edition of the Guideline has been amended to emphasize that qualified training programs must be "comprehensive" in scope. Thus the eleven areas of training set forth in Subsection B are new and are intended to indicate the broad range of topics that must be covered in order for an initial training program to meet minimum requirements. The requirement of participation in a continuing legal education program every two years is also a minimum; many capital defense counsel have discovered that they must attend training programs more frequently in order to provide effective legal representation.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.5 (3d ed. 1992) ("Training and Professional Development").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-2.6 (3d ed. 1993) ("Training Programs"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.16 (1973) ("Training and Education of Defenders").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, MODEL PUBLIC DEFENDER ACT, Section 10 (1970) ("Office of Defender General").

NAT'L LEGAL AID AND DEFENDER ASS'N, DEFENDER TRAINING AND DEVELOPMENT Standards (1997).

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES Guideline III-17 (1984) ("Professional Development").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.7 (1976) ("Training Staff Attorneys in a Defender System").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.8 (1976) ("Training Assigned Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.2 (1989) ("Orientation").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.3.1 (1989) ("Entry-Level Training").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.3.2 (1989) ("In-Service Training").

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 (2002) ("Defense Counsel Is Provided with and Required to Attend Continuing Legal Education").

Commentary

As indicated in the commentary to Guideline 1.1, providing high quality legal representation in capital cases requires unique skills. Accordingly, the standard of practice requires that counsel have received comprehensive specialized training before being considered qualified to undertake representation in a death penalty case.[129] Such training is not to be confined to instruction in the substantive law and procedure applicable to legal representation of capital defendants, but must extend to related substantive areas of mitigation and forensic science. In addition, comprehensive training programs must include practical instruction in advocacy skills, as well as presentations by experienced practitioners.

Once an attorney has been deemed qualified to accept appointments in capital cases, the standard of practice requires counsel to regularly receive formal training in order to keep abreast of the field.[130] Continuing legal education, which is required by many state bars as a matter of course for all attorneys, is critically important to capital

129. *See, e.g.*, New York Capital Defender Office, *Minimum Standards for Lead Counsel and Associate Counsel in Capital Cases*, *available at* http://www.nycdo.org/35b/35b-std.html (requiring that applicants submit "a description of specialized criminal defense training programs regularly attended, such as the NITA, the National Criminal Defense College, or bar association criminal practice programs" and specifying that "[a]n attorney shall not be eligible to be appointed as lead counsel or associate counsel in a capital case unless the Capital Defender Office shall certify that the attorney satisfactorily has completed a basic capital training program prescribed by the Capital Defender Office" or qualifies for an Interim Certification because she is otherwise qualified and is "in active pursuit of such training").

130. As one authority has noted, capital defense counsel must exhibit "constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law." Vick, *supra* note 4, at 358; *see also* Taylor-Thompson, *supra* note 37, at 1510.

defense attorneys. As the commentary to Guideline 1.1 indicates, they must not only have mastery of current developments in law, forensics, and related areas, but also be able to anticipate future ones.[131]

In recognition of the central role that ongoing training plays in the provision of effective capital defense representation, a number of professional organizations, including the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the Habeas Assistance Project, the NAACP Legal Defense and Education Fund, Inc., the office of the Kentucky Public Advocate, and the Association of the Bar of the City of New York, have regularly devoted significant efforts to providing educational programs of the quality contemplated by this Guideline.

Many such organizations also provide resources, such as newsletters, that counsel should utilize to learn of new developments and to benefit from the collective wisdom and experience of the capital defense bar.

131. *See supra* text accompanying note 28.

GUIDELINE 10.2—APPLICABILITY OF PERFORMANCE STANDARDS

Counsel should provide high quality legal representation in accordance with these Guidelines for so long as the jurisdiction is legally entitled to seek the death penalty.

History of Guideline

This Guideline is based on Guideline 11.3 of the original edition and has been revised for consistency with Guideline 1.1.

Related Standards

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.1 (1973) ("Availability of Publicly Financed Representation in Criminal Cases").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.5 (1989) ("Early Representation").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.6 (1989) ("Duration and Continuity of Representation").

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 3 (2002) ("Clients Are Screened for Eligibility, and Defense Counsel Is Assigned and Notified of Appointment, as Soon as Feasible After Clients' Arrest, Detention, or Request for Counsel") (footnote omitted).

Commentary

The Supreme Court has stated that the "existence [of a death penalty statute] on the statute books provide[s] fair warning as to the

degree of culpability which the State ascribe[s] to the act of murder."[160] In accordance with Guideline 1.1 (B), once a client is detained under circumstances in which the death penalty is legally possible, counsel should proceed as if it will be sought.[161]

As described *supra* in the text accompanying footnotes 13-17, early investigation to determine weaknesses in the State's case and uncover mitigating evidence is a necessity, and should not be put off in the hope that the death penalty will not be requested, or that the request will be dropped at a later point.

Moreover, early investigation may uncover mitigating circumstances or other information that will convince the prosecutor to forego pursuit of a death sentence.[162]

Jurisdictions vary in whether the defense must be formally notified as to whether the prosecution will seek the death penalty.[163] If required

160. Dobbert v. Florida, 432 U.S. 282, 297 (1977).

161. In a number of cases, courts have found no bar to the prosecution pursuing a death sentence, despite belated notice to the defense. *See, e.g.*, State v. Lee, 917 P.2d 692, 698-99 (Ariz. 1996) (affirming death sentence where state filed its written notice eighty-seven days late under state law, because defendant had actual notice that State intended to pursue death penalty); People v. Dist. Court, Gilpin County, 825 P.2d 1000, 1002-03 (Colo. 1992) (concluding defendant received adequate notice of intent to seek death penalty where prosecution never stated death penalty would not be sought and notice was filed forty-one days before trial, even though discovery had been completed and date for filing pretrial motions had passed).

162. *See, e.g.*, State v. Pirtle, 904 P.2d 245, 254 (Wash. 1995) (noting that under state law, "[b]efore the death penalty can be sought, there must be 'reason to believe that there are not sufficient mitigating circumstances to merit leniency'") (quoting State v. Campbell, 691 P.2d 929, 942 (Wash. 1984)); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-10.030 (2001) [hereinafter UNITED STATES ATTORNEYS' MANUAL] ("In any case in which a United States Attorney's Office is considering whether to request approval to seek the death penalty, the United States Attorney shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, to the United States Attorney for consideration."). "Input from the defendant as to mitigating factors is normally desirable, because the subjective factors are better known to the defendant." State v. Pirtle, 904 P.2d at 254 (citation omitted); *see also infra* text accompanying notes 244-45.

163 Some jurisdictions require the defense be provided formal notice of the government's intent to seek the death penalty well before the guilt/innocence phase. *See, e.g.*, ARIZ. R. CRIM. P. 15.1(g)(1) (requiring a prosecutor to provide the defendant notice of intent to seek the death penalty "no later than 60 days after the arraignment in superior court"); MD. CODE ANN., CRIM. LAW § 2-202(a) (2002) (providing that:

> A defendant found guilty of murder in the first degree may be sentenced to death only if:
> (1) At least 30 days before trial, the State gave written notice to the defendant of: (i) The State's intention to seek a sentence of death; and (ii) Each aggravating circumstance on which the State intends to rely);

NEV. SUP. CT. R. 250(4)(c) ("No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance."); N.Y. CRIM. PROC. LAW § 250.40(1)-(2) (McKinney 2002) (stating that:

notice has not been given, counsel is under no duty to invite a death penalty prosecution. While preparing for a capital case when notice has not been given, counsel should also prepare to challenge any prosecution efforts that should be barred for failure to give notice.[164]

Counsel must continue to treat the case as capital "until the imposition of the death penalty is no longer a legal possibility."[165]

A sentence of death may not be imposed upon a defendant convicted of murder in the first degree unless . . . the people file with the court and serve upon the defendant a notice of intent to seek the death penalty . . . within one hundred twenty days of the defendant's arraignment upon an indictment charging the defendant with murder.);

WASH. REV. CODE ANN. § 10.95.040(2)-(3) (West 2002) (stating the state is precluded from seeking the death penalty unless written notice is served on the defendant or counsel "within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice"); UNITED STATES ATTORNEYS' MANUAL, *supra* note 162, § 9-10.030 ("If the United States Attorney decides to request approval to seek the death penalty, the United States Attorney's Office should inform counsel for the defendant.").

Other jurisdictions do not require notice. *See, e.g., Dist. Court, Gilpin County*, 825 P.2d at 1002 ("There is no Colorado statute requiring the prosecutor to give notice of intent to seek the death penalty."); Sireci v. State, 399 So. 2d. 964, 970 (Fla. 1981) ("When one is charged with murder in the first degree, he is well aware of the fact that it is a capital felony punishable by a maximum sentence of death."); Williams v. State, 445 So. 2d 798, 804 (Miss. 1984) ("Anytime an individual is charged with murder, he is put on notice that the death penalty may result."). In jurisdictions where the prosecutor is not statutorily required to give notice of the intent to seek the death penalty, due process nonetheless requires that the defendant have adequate notice. *See* Lankford v. Idaho, 500 U.S. 110, 119-22 (1991) (holding due process was violated where the trial court imposed a death sentence after the prosecution stated it would not recommend a death sentence and the trial judge was silent following the state's decision).

164. *See, e.g.*, Holmberg v. De Leon, 938 P.2d 1110, 1111 (Ariz. 1997) (granting defense motion to strike State's notice of intent to seek death penalty on ground that it violated state court rule requiring notice within 30 days of arraignment); State v. Second Judicial Dist. Court, 11 P.3d 1209, 1211, 1215 (Nev. 2000) (concluding trial court acted within its discretion in denying prosecution motion for leave to file untimely notice of intent to seek death penalty; defense opposed motion). Counsel should be mindful of the possibility that it may be appropriate to pursue the challenge through some collateral proceeding (e.g, application for a writ of prohibition). *See infra* text accompanying note 230.

165. History of Guideline 1.1, *supra*.

GUIDELINE 10.4—THE DEFENSE TEAM

A. When it is responsible for designating counsel to defend a capital case, the Responsible Agency should designate a lead counsel and one or more associate counsel. The Responsible Agency should ordinarily solicit the views of lead counsel before designating associate counsel.

B. Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.

1. Subject to the foregoing, lead counsel may delegate to other members of the defense team duties imposed by these Guidelines, unless:

   a. The Guideline specifically imposes the duty on "lead counsel," or

   b. The Guideline specifically imposes the duty on "all counsel" or "all members of the defense team."

C. As soon as possible after designation, lead counsel should assemble a defense team by:

1. Consulting with the Responsible Agency regarding the number and identity of the associate counsel;

2. Subject to standards of the Responsible Agency that are in accord with these Guidelines and in consultation with associate counsel to the extent practicable, selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:

a. at least one mitigation specialist and one fact investigator;

b. at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and

c. any other members needed to provide high quality legal representation.

D. Counsel at all stages should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.

History of Guideline

This Guideline is new. It supplements Guideline 4.1.

Related Standards

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 (1986) ("Roles of Mental Health and Mental Retardation Professionals in the Criminal Process").

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-5.7 (1986) ("Evaluation and Adjudication of Competence to Be Executed; Stay of Execution; Restoration of Competence").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-2.4 ("Special Assistants, Investigative Resources, Experts") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1 ("Duty to Investigate") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1995) ("Investigation").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS, Standard 13.14 (1973) ("Supporting Personnel and Facilities").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-8 (1984) ("Support Staff and Forensic Experts").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING & AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-9 (1984) ("Investigators").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING & AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-10 (1984) ("Compensation").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.1 (1976) ("Assigned Counsel Fees and Supporting Services").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.4 (1976) ("Nonpersonnel Needs in Defender Offices").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.6 (1989) ("Support Services").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act, Section 2 (1970) ("Right to Representation, Services, and Facilities").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act, Section 12 (1970) ("Personnel and Facilities").

Commentary

As reflected in Guideline 4.1 and the accompanying commentary, the provision of high quality legal representation in capital cases requires a team approach that combines the different skills, experience, and perspectives of several disciplines.[168] The team approach enhances the quality of representation by expanding the knowledge base available to prepare and present the case, increases efficiency by allowing attorneys to delegate many time-consuming tasks to skilled assistants and focus on the legal issues in the case,[169] improves the relationship with the client and his family by providing more avenues of communication, and provides more support to individual team members.[170]

This Guideline contemplates that the Responsible Agency will ordinarily[171] begin by designating lead counsel for a particular case and then, in consultation with that counsel, designate one or more associate counsel.[172] As described in Subsection B, the role of lead counsel is to direct the work of the defense team in such a way that, overall, it provides high quality legal representation in accordance with these Guidelines and professional standards. Accordingly, lead counsel is free

168. *See* TEXAS DEATH PENALTY MITIGATION MANUAL, *supra* note 105.

169. *See* Mahoney v. Pataki, 772 N.E.2d 1118, 1123 (N.Y. 2002).

170. *See* TEXAS DEATH PENALTY MITIGATION MANUAL, *supra* note 105.

171. This term is meant to accommodate the variety of exigent circumstances under which the provision of high quality legal representation might require a different procedure. For example, the client may be so situated that the professionally responsible course is to have a relatively junior attorney deal with the immediate situation, designating lead counsel subsequently. Alternatively, the client might insist on having a particular retained or pro bono attorney involved in the representation.

172. *Cf.* N.Y. JUD. LAW § 35-b(2) (McKinney 2002) ("With respect to counsel at trial and at a separate sentencing proceeding, the court shall appoint two attorneys, one to be designated 'lead' counsel and the other to be designated 'associate' counsel."); CAL. R. CT. R. 4.117(c)(1) (effective Jan. 1, 2003) ("If the court appoints more than one attorney, one must be designated lead counsel . . . and at least one other must be designated associate counsel . . . ."). Because the Responsible Agency has a continuing duty to monitor the performance of the defense team to insure that it is providing high quality legal representation at every stage of the case, *see supra* Guideline 7.1, the Responsible Agency may appropriately change these designations to reflect developments in the case (e.g, it moves to a new post-conviction stage, or lead counsel becomes ill).

to allocate the duties imposed by these Guidelines to appropriate members of the defense team, with two exceptions: (1) duties (such as the one contained in Subsection (C)) that are specifically imposed on "lead counsel," and (2) duties (such as the one contained in Guideline 10.13) that are specifically imposed on "all counsel" or "all members of the defense team."

After designation, lead counsel should assemble the rest of the defense team. The Responsible Agency should give lead counsel maximum flexibility in this regard. For example, counsel should structure the team in such a way as to distinguish between experts who will play a "consulting" role, serving as part of the defense team covered by the attorney-client privilege and work product doctrine, and experts who will be called to testify, thereby waiving such protections.[173] This may well require, in the words of the Guideline, "appropriate contractual arrangements" (Subsection C(2)).

However, Subsection C(2) provides that the Responsible Agency may impose standards on the composition of the defense team that are in accord with these Guidelines. Examples would include a requirement that a staff attorney of a defender organization utilize in-house resources in the first instance, that compensation levels be limited to levels consistent with Guideline 9.1(C), or that non-attorneys meet appropriate professional qualifications.

The defense team should include at least two attorneys, a fact investigator, and a mitigation specialist. The roles of these individuals are more fully described in the commentaries to Guideline 1.1 and Guideline 4.1. In addition, as also described in the commentary to Guideline 4.1, the team must have a member (who may be one of the foregoing or an additional person) with the necessary qualifications to screen individuals (the client in the first instance, but possibly family members as the mitigation investigation progresses) for mental or psychological disorders or defects and to recommend such further investigation of the subject as may seem appropriate.

The team described in the foregoing paragraph is the minimum. In most cases, at least as trial approaches, the provision of high quality

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173. *See* James J. Clark et al., *The Fiend Unmasked: Developing the Mental Health Dimensions of the Defense*, *in* KY. DEP'T OF PUB. ADVOC., MENTAL HEALTH & EXPERTS MANUAL ch. 8 (6th ed. 2002), *available at* http://dpa.state.ky.us/library/manuals/mental/ch08.html; ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 & cmt. (1989) (mental health and mental retardation experts serving as consultants are agents of the attorney, subject to the attorney-client privilege and the work-product doctrine); *accord id.* Standard 7-3.3 & cmt; *see also supra* Guideline 4.1(B)(2).

representation will require at least some contributions by additional lawyers—for example, a specialist to assist with motions practice and record preservation, or an attorney who is particularly knowledgeable about an area of scientific evidence.[174] As discussed in the commentary to Guideline 4.1, because mental health issues pervade capital cases, a psychologist or other mental health expert may well be a needed member of the defense team. As the commentary to Guideline 4.1 also discusses, additional expert assistance specific to the case will almost always be necessary for an effective defense.

At every stage of the case, lead counsel is responsible, in the exercise of sound professional judgment, for determining what resources are needed and for demanding that the jurisdiction provide them. Because the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure these resources,[175] it is counsel's obligation to insist upon making such requests ex parte and in camera.[176]

If requests for the resources needed to provide high quality legal representation at any stage of the proceedings are denied, counsel should make a full record to preserve the issue for further review.[177]

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174. *Cf.* Freedman, *supra* note 52, at 1089 n.* (noting that each of six primary attorneys and eleven other named professionals were "critical to saving Mr. Washington's life.").

175. *See* Guideline 4.1(B)(2); *see generally* Bittaker v.Woodford, 311 F.3d 715 (9th Cir. 2003).

176. Many jurisdictions provide, by statute or case law, that requests for expert assistance may be made ex parte so that indigent defendants are not required to divulge confidential work product or strategy to the prosecution. *See, e.g.*, 18 U.S.C. § 3006A(e)(1) (2000) (providing for *ex parte* hearings for requests for investigative, expert, or other services for indigent defendants); CAL. PENAL CODE § 987.9(a) (West Supp. 2002); KAN. STAT. ANN. § 22-4508 (1995); MINN. STAT. ANN. § 611.21 (West Supp. 2002); NEV. REV. STAT. ANN. § 7.135 (Michie 1998); N.Y. COUNTY LAW § 722-c (McKinney Supp. 2002); S.C. CODE ANN. § 16-3-26(C)(1) (Law. Co-op. 2001); TENN. CODE ANN. § 40-14-207(b) (1997); *Ex parte* Moody, 684 So. 2d 114, 120 (Ala. 1996); Brooks v. State, 385 S.E.2d 81, 84 (Ga. 1989) (holding that while state could be heard on the issue of indigency, showing of need for expert should be made *ex parte*); McGregor v. State, 733 P.2d 416, 416 (Okla. Crim. App. 1987) (stating that "to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendants, as nearly as possible, on a level of equality with nonindigent defendants"); *Ex parte* Lexington County, 442 S.E.2d 589, 594 (S.C. 1994) (equal protection concerns require hearing to be both ex parte and in camera); State v. Barnett, 909 S.W.2d 423, 429 (Tenn. 1995); Williams v. State, 958 S.W.2d 186, 192-94 (Tex. Crim. App. 1997).

177. Under the AEDPA, such a record may be critical to the ability of the client to succeed on federal habeas corpus. *See* Williams v. Taylor, 529 U.S. 420, 437 (2000); *see generally* Stephen B. Bright, *Obtaining Funds for Experts and Investigative Assistance*, THE CHAMPION, June 1997, at 31, 33; Edward C. Monahan & James J. Clark, *Funds for Defense Experts: What a National Benchmark Requires*, THE CHAMPION, June 1997, at 12.

GUIDELINE 10.5—RELATIONSHIP WITH THE CLIENT

A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.

B. 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.

2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.

3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.

C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;

2. current or potential legal issues;

3. the development of a defense theory;

4. presentation of the defense case;

5. **potential agreed-upon dispositions of the case;**

6. **litigation deadlines and the projected schedule of case-related events; and**

7. **relevant aspects of the client's relationship with correctional, parole or other governmental agents (e.g., prison medical providers or state psychiatrists).**

History of Guideline

This Guideline collects, and slightly expands upon, material that was found in Guidelines 11.4.2, 11.6.1, and 11.8.3 of the original edition. The major revisions make this standard apply to all stages of a capital case and note expressly counsel's obligation to discuss potential dispositions of the case with the client.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.1 ("Establishment of Relationship"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.2 ("Interviewing the Client"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.8 ("Duty to Keep Client Informed"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-5.2 ("Control and Direction of the Case"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.3(c) (1995) ("General Duties of Defense Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 2.2 (1995) ("Initial Interview").

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 3 (2000) ("Clients Are Screened for Eligibility, and Defense Counsel Is Assigned and Notified of Appointment, as Soon as Feasible After Clients' Arrest, Detention, or Request For Counsel") (footnote omitted).

Commentary

The Problem

Immediate contact with the client is necessary not only to gain information needed to secure evidence and crucial witnesses, but also to try to prevent uncounseled confessions or admissions and to begin to establish a relationship of trust with the client.

Anyone who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety. Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired."[178] There will also often be significant cultural

178. Rick Kammen & Lee Norton, *Plea Agreements: Working with Capital Defendants*, THE ADVOCATE, Mar. 2000, at 31, *available at* http://www.dpa.state.ky.us/library/advocate/mar00/plea.html; *see also* Lewis, *supra* note 93, at 840 (finding forty percent of death row inmates to be chronically psychotic); Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 586-87 (1988) (finding fifty percent of death sentenced juveniles in survey suffered from psychosis and almost all were severely abused as children).

and/or language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client.

Counsel's Duty

Although, as described *supra* in the text accompanying notes 103-07, ongoing communication by non-attorney members of the defense team is important, it does not discharge the obligation of counsel at every stage of the case to keep the client informed of developments and progress in the case, and to consult with the client on strategic and tactical matters. Some decisions require the client's knowledge and agreement;[179] others, which may be made by counsel, should nonetheless be fully discussed with the client beforehand.

Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea.[180] Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post-conviction review, or clemency. Even if counsel manages to ask the right questions, a client will not—with good reason—trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls. It is also essential to develop a relationship of trust with the client's family or others on whom the client relies for support and advice.

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179. *See, e.g.*, Nixon v. Singletary, 758 So. 2d 618, 624-25 (Fla. 2000) (ineffective assistance for counsel to fail to obtain client's explicit prior consent to strategy of conceding guilt to jury in opening statement in effort to preserve credibility for sentencing); People v. Hattery, 488 N.E.2d 513, 519 (Ill. 1985) (same).

180. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-5.2 & cmt., *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); *see also* Kevin M. Doyle, *Heart of the Deal: Ten Suggestions for Plea Bargaining*, THE CHAMPION, Nov. 1999, at 68 (counsel should not expect client to accept plea bargain unless opinion is founded on experience and leg work investigating the case); White, *supra* note 3, at 371, 374 (thorough investigation and relationship of trust key to persuading client to accept appropriate plea offer).

Often, so-called "difficult" clients are the consequence of bad lawyering—either in the past or present.[181] Simply treating the client with respect, listening and responding to his concerns, and keeping him informed about the case will often go a long way towards eliciting confidence and cooperation.[182]

Overcoming barriers to communication and establishing a rapport with the client are critical to effective representation. Even apart from the need to obtain vital information,[183] the lawyer must understand the client and his life history.[184] To communicate effectively on the client's behalf in negotiating a plea, addressing a jury, arguing to a post-conviction court, or urging clemency, counsel must be able to humanize the defendant. That cannot be done unless the lawyer knows the inmate well enough to be able to convey a sense of truly caring what happens to him.[185]

Counsel's Duties Respecting Uncooperative Clients

Some clients will initially insist that they want to be executed—as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to

181. *See* White, *supra* note 3, at 338 ("Often, capital defendants have had bad prior experiences with appointed attorneys, leading them to view such attorneys as 'part of the system' rather than advocates who will represent their interests. Appointed capital defense attorneys sometimes exacerbate this perception by harshly criticizing their clients's [sic] conduct or making it clear that they are reluctant to represent them. A capital defendant who experiences, or previously has experienced, these kinds of judgments understandably will be reluctant to trust his attorney.") (footnotes omitted); *infra* note 313.

182. A lawyer can also frequently earn a client's trust by assisting him with problems he encounters in prison, or otherwise demonstrating concern for his well being and a willingness to advocate for him. *See id.*; Lee Norton, *Mitigation Investigation*, *in* FLORIDA PUBLIC DEFENDER ASS'N, DEFENDING A CAPITAL CASE IN FLORIDA 25 (2001). Accordingly, such advocacy is an appropriate part of the role of defense counsel in a capital case. Indeed, a lawyer who displays a greater concern with habeas corpus doctrine than with recovering the radio that prison authorities have confiscated from the client is unlikely to develop the sort of relationship that will lead to a satisfactory legal outcome.

183. One important example is the fact that the client is mentally retarded—a fact that the client may conceal with great skill, *see, e.g.*, James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430-31 (1985), but one which counsel absolutely must know. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that mentally retarded defendants may not constitutionally be executed). The issue of mental illness presents a very similar set of challenges.

184. *See* Goodpaster, *supra* note 3, at 321.

185. *See* Norton, *supra* note 182, at 5; White, *supra* note 3, at 375 (jury will be less likely to empathize with defendant if it does "not perceive a bond between the defendant and his attorney").

simply acquiesce to such wishes, which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of a state-assisted suicide.[186] Counsel should initially try to identify the source of the client's hopelessness. Counsel should consult lawyers, clergy or others who have worked with similarly situated death row inmates. Counsel should try to obtain treatment for the client's mental and/or emotional problems, which may become worse over time. One or more members of the defense team should always be available to talk to the client; members of the client's family, friends, or clergy might also be enlisted to talk to the client about the reasons for living; inmates who have accepted pleas or been on death row and later received a life sentence (or now wish they had), may also be a valuable source of information about the possibility of making a constructive life in prison. A client who insists on his innocence should be reminded that a waiver of mitigation will not persuade an appellate court of his innocence, and securing a life sentence may bar the state from seeking death in the event of a new trial.[187]

Counsel in any event should be familiar enough with the client's mental condition to make a reasoned decision—fully documented, for the benefit of actors at later stages of the case—whether to assert the position that the client is not competent to waive further proceedings.[188]

The Temporal Scope of Counsel's Duties

The obligations imposed on counsel by this Guideline apply to all stages of the case. Thus, post-conviction counsel, from direct appeal through clemency, must not only consult with the client but also monitor the client's personal condition for potential legal consequences.[189] For example, actions by prison authorities (e.g., solitary confinement, administration of psychotropic medications) may impede the ability to present the client as a witness at a hearing or have legal implications,[190]

186. *See infra* Guideline 10.7(A) and accompanying commentary; Kammen & Norton, *supra* note 178.

187. *See* Bullington v. Missouri, 451 U.S. 430, 445-46 (1981); *see also* Sattazahn v. Pennsylvania, 537 U.S. 101 (2003). Moreover, if a mitigation investigator is productive, it may persuade the prosecutor to forgo the death penalty. In that event, the jury will not be "death-qualified" and the client's chances of an acquittal will be enhanced.

188. *See generally* Godinez v. Moran, 509 U.S. 389, 396-402 (1993) (setting forth minimum competency standard that the Constitution requires).

189. *See infra* text accompanying notes 341.

190. *Cf.* Sell v. United States, 123 S. Ct. 2174, 2184 (2003) (holding that "the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if

and changes in the client's mental state (e.g., as a result of the breakup of a close relationship or a worsening physical condition) may bear upon his capacity to assist counsel and, ultimately, to be executed.[191] In any event, as already discussed, maintaining an ongoing relationship with the client minimizes the possibility that he will engage in counter-productive behavior (e.g., attempt to drop appeals, act out before a judge, confess to the media). Thus, the failure to maintain such a relationship is professionally irresponsible.[192]

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the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests"); Riggins v. Nevada, 504 U.S. 127, 137-38 (1992) (defendant was constitutionally entitled to have administration of anti-psychotic drugs cease before trial). The Supreme Court has not addressed the application of these principles to phases of the criminal process other than the trial itself, but those cases should alert capital defense counsel to do so. *See, e.g.*, Rohan v. Woodford, 334 F.3d 803, 818-19 (9th Cir. 2003) (Kozinski, J.) (holding as a matter of statutory construction that mentally incompetent federal habeas petitioner is entitled to a stay of execution and of proceedings until he recovers).

191. *See infra* text accompanying note 341.

192. *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2002) ("A lawyer shall . . . keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.").

GUIDELINE 10.7—INVESTIGATION

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

History of Guideline

This Guideline is based on portions of Guideline 11.4.1 of the original edition. Changes in this Guideline clarify that counsel should conduct thorough and independent investigations relating to both guilt and penalty issues regardless of overwhelming evidence of guilt, client statements concerning the facts of the alleged crime, or client statements

that counsel should refrain from collecting or presenting evidence bearing upon guilt or penalty.

Subsection B(1) is new and describes the obligation of counsel at every stage to examine the defense provided to the client at all prior phases of the case. Subsection B(2) is also new and describes counsel's ongoing obligation to ensure that the official record of proceedings is complete.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1 ("Duty to Investigate"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1995) ("Investigation").

Commentary

At every stage of the proceedings, counsel has a duty to investigate the case thoroughly.[195] This duty is intensified (as are many duties) by the unique nature of the death penalty, has been emphasized by recent statutory changes,[196] and is broadened by the bifurcation of capital trials.[197] This Guideline outlines the scope of the investigation required by a capital case, but is not intended to be exhaustive.

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195. *See* Powell v. Alabama, 287 U.S. 45, 57 (1932) (describing "thorough-going investigation" as "vitally important"); ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1, 4-6.1, *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1997) ("Investigation"); *see also* HERTZ & LEIBMAN, *supra* note 28 at 489 n.41 (discussing duty described in Subsection (B) to conduct full investigation of prior proceedings); *infra* text and accompanying note 240 (same); *infra* note 351 (discussing duty of post-conviction counsel to investigate all potential claims, whether or not previously asserted).

196. *See* 28 U.S.C. § 2254(e)(2) (2000), which, as amended by the AEDPA, precludes certain claims from federal habeas corpus review if the petitioner "has failed to develop the factual basis" of them "in State court proceedings." *See* Williams v. Taylor, 529 U.S. 420, 424 (2000) (construing this section).

197. *See generally* Lyon, *supra* note 3; Vick, *supra* note 4. Numerous courts have found counsel to be ineffective when they have failed to conduct an adequate investigation for sentencing. *See, e.g.*, Wiggins v. Smith, 123 S. Ct. 2543-44 (2003) (counsel ineffective because, although they obtained some mitigation evidence, they failed to investigate client's social history or explore the

Guilt/Innocence

As noted *supra* in the text accompanying notes 48-51, between 1976 and 2003 some 110 people were freed from death row in the United States on the grounds of innocence.[198] Unfortunately, inadequate investigation by defense attorneys—as well as faulty eyewitness identification, coerced confessions, prosecutorial misconduct, false jailhouse informant testimony,[199] flawed or false forensic evidence,[200] and the special vulnerability of juvenile suspects—have contributed to wrongful convictions in both capital and non-capital cases.[201] In capital cases, the mental vulnerabilities of a large portion of the client

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numerous areas of mitigation listed in first edition of these guidelines); Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison); Douglas v. Woodford, 316 F.3d 1079, 1087-89 (9th Cir. 2003) (although counsel did uncover and present some mitigating evidence, his investigation "was constitutionally inadequate" for failing to dig deeply enough into client's social, medical, and psychological background; nor did counsel adequately prepare the penalty phase witnesses in order to present the material that he did have "to the jury in a sufficiently detailed and sympathetic manner"); Brownlee v. Haley, 306 F.3d 1043, 1070 (11th Cir. 2002) (counsel ineffective for failing to "investigate, obtain, or present *any* mitigating evidence to the jury, let alone the powerful mitigating evidence of Brownlee's borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse"); *infra* note 205.

As discussed *infra* note 261, another consequence of bifurcation is that counsel must investigate the possibility that the defendant was judged at either the guilt or penalty phases by one or more jurors who were not impartial.

198. *See* DEATH PENALTY INFORMATION CENTER, *Innocence and the Death Penalty* (2003), *at* http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (stating that, "[s]ince 1973, 111 people in 25 states have been released from death row with evidence of their innocence") (latest release July 28, 2003); *see generally infra* note 231 (suggesting legal implications of these developments).

199. *See, e.g.*, Dodd v. State, 993 P.2d 778, 783-84 (Okla. Crim. App. 2000) (canvassing special unreliability of such testimony and restricting its use); *supra* note 50.

200. Recent years have seen a series of scandals involving the prosecution's use, knowingly or unknowingly, of scientifically unsupportable or simply fabricated forensic evidence by governmental agents. *See generally* U.S. DEP'T JUSTICE, OFF. INSP. GEN., THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (1996) (detailing results of eighteen-month investigation into charges by whistleblower Frederic Whitehurst that FBI Laboratory mishandled "some of the most significant prosecutions in the recent history of the Department of Justice" and finding "significant instances of testimonial errors, substandard analytical work, and deficient practices"); Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 442-69 (1997) (summarizing numerous cases); *supra* note 51.

201. *See generally* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001).

population compound the possibilities for error.[202] This underscores the importance of defense counsel's duty to take seriously the possibility of the client's innocence,[203] to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses.[204]

In this regard, the elements of an appropriate investigation include the following:

1. Charging Documents:

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable law to identify:

   a. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

   b. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

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202. *See* Atkins v. Virginia, 536 U.S. 304, 320-21 (2002) ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."); *see also* Jurek v. Estelle, 623 F.2d 929, 938, 941 (5th Cir. 1980) (reviewing "with that suspicion mandated by the Supreme Court" the voluntariness of a confession made by a defendant of "limited intelligence"); Freedman, *supra* note 52, at 1104-06 (noting characteristics of mentally retarded persons making them more likely to confess falsely).

203. As this Guideline emphasizes, that is so even where circumstances appear overwhelmingly indicative of guilt. A recent study that includes both capital and non-capital DNA exonerations has found that in twenty-two percent of the cases the client had confessed notwithstanding his innocence. *See* SCHECK ET AL., *supra* note 201, at 120. *See* Dan Morain, *Blind Justice John Cherry's Killing Left Many Victims; Was the Accused One of Them?*, L.A. TIMES, July 16, 1989, View, at 6 (noting that Jerry Bigelow confessed many times, including to the media, and was eventually found to be innocent).

204. *See* Henderson v. Sargent, 926 F.2d 706, 711-12 (8th Cir. 1991) (granting writ where trial counsel's performance at guilt phase was ineffective in lacking "an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories," and state post-conviction counsel was ineffective for failing to perform full analysis of "trial testimony and the police record [and failing to conduct] interviews with the persons who testified at trial or had firsthand knowledge of the events surrounding the murder"); People v. Johnson, 609 N.E.2d 304, 310-12 (Ill. 1993) (holding state post-conviction counsel ineffective for failing to interview witnesses that client claimed trial attorneys should have called); Steven M. Pincus, *"It's Good to be Free" An Essay About the Exoneration of Albert Burrell*, 28 WM. MITCHELL L. REV. 27, 33-34 (2001).

c. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) that can be raised to attack the charging documents; and

d. defense counsel's right to obtain information in the possession of the government, and the applicability, extent, and validity of any obligation that might arise to provide reciprocal discovery.

2. Potential Witnesses:

a. Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to:

(1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself;

(2) potential alibi witnesses;

(3) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense, including:

(a) members of the client's immediate and extended family
(b) neighbors, friends and acquaintances who knew the client or his family
(c) former teachers, clergy, employers, co-workers, social service providers, and doctors
(d) correctional, probation, or parole officers;

(4) members of the victim's family.

b. Counsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews. Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.

3. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, autopsy reports, photos, video or audio tape recordings, and crime scene and crime lab reports together with the underlying data therefor. Where necessary, counsel should pursue such efforts through formal and informal discovery.

4. Physical Evidence:

Counsel should make a prompt request to the relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the underlying materials. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.

5. The Scene:

Counsel should view the scene of the alleged offense as soon as possible. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

Penalty

Counsel's duty to investigate and present mitigating evidence is now well established.[205] The duty to investigate exists regardless of the expressed desires of a client.[206] Nor may counsel "sit idly by, thinking that investigation would be futile."[207] Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.[208]

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205. *See, e.g.*, Wiggins v. Smith, 123 S. Ct. 2526 (2003) (counsel failed to uncover evidence that client never had a stable home and was repeatedly subjected to gross physical, sexual, and psychological abuse); Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison); Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002) (counsel ineffective for failing to investigate and present evidence of client's brain damage due to prolonged pesticide exposure and repeated head injuries, and failing to present expert testimony explaining "the effects of the severe physical, emotional, and psychological abuse to which Caro was subjected as a child"), *cert. denied*, 536 U.S. 951 (2002); Coleman v. Mitchell, 268 F.3d 417, 449-51 (6th Cir. 2001) (though counsel's duty to investigate mitigating evidence is well established, counsel failed to investigate and present evidence that defendant had been abandoned as an infant in a garbage can by his mentally ill mother, was raised in a brothel run by his grandmother where he was exposed to group sex, bestiality and pedophilia, and suffered from probable brain damage and borderline personality disorder), *cert. denied*, 535 U.S. 1031 (2002); Jermyn v. Horn, 266 F.3d 257, 307-08 (3d Cir. 2001) (counsel ineffective for failing to investigate and present evidence of defendant's abusive childhood and "psychiatric testimony explaining how Jermyn's development was thwarted by the torture and psychological abuse he suffered as a child"); *supra* note 197.

206. *See* Hardwick v. Crosby, 320 F.3d 1127, 1190 n.215 (11th Cir. 2003) ("Even if Hardwick did ask [counsel] not to present witnesses at the sentencing proceeding, . . . [counsel] had a duty to Hardwick at the sentencing phase to present available mitigating witnesses as Hardwick's defense against the death penalty."); Blanco v. Singletary, 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow their client to make an informed decision to waive mitigation); *see also* Karis v. Calderon, 283 F.3d 1117, 1136-41 (9th Cir. 2002), *cert. denied*, 126 S. Ct. 2637 (2003).

207. Voyles v. Watkins, 489 F. Supp. 901, 910 (N.D. Miss. 1980); *accord* Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997) (counsel's failure to investigate and present mitigating evidence at the penalty phase of the trial "because he did not think that it would do any good" constituted ineffective assistance).

208. *See, e.g.*, Wiggins, 123 S. Ct. at 2526 (2003) (counsel's ineffectiveness lay not in failure to present evidence of client's family background, but rather in failure to conduct an investigation sufficient to support a professionally reasonable decision whether to do so); Douglas v. Woodford, 316 F.3d 1079, 1089 (9th Cir. 2003) ("It is, of course, difficult for an attorney to advise a client of the prospects of success or the potential consequences of failing to present mitigating evidence when the attorney does not know that such evidence exists."); Silva v. Woodford, 279 F.3d 825, 838-39 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 342 (2002); *Coleman*, 268 F.3d at 447; Battenfield v. Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001) ("In addition to hampering [defense counsel's] ability to make strategic decisions, [defense counsel's] failure to investigate [defendant's background] clearly affected his ability to competently advise [defendant] regarding the meaning of

Because the sentencer in a capital case must consider in mitigation, "anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,"[209] "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history."[210] At least in the case of the client, this begins with the moment of conception.[211] Counsel needs to explore:

> (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
>
> (2) Family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

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mitigation evidence and the availability of possible mitigation strategies."); United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989) ("[C]ounsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made."); Knighton v. Maggio, 740 F.2d 1344, 1350 (5th Cir. 1984) (petitioner entitled to relief if record shows that counsel "could not make a valid strategic choice because he had made no investigation").

209. Brown v. State, 526 So. 2d 903, 908 (Fla. 1988) (citing Hitchcock v. Dugger, 481 U.S. 393, 394 (1987)); *see also* Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978); *infra* text accompanying note 277.

210. Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Jan./Feb. 1999, at 35; *see also* ABA CRIMINAL JUSTICE SECTION, *supra* note 86, at 63.

211. *See* Norton, *supra* note 182, at 2 (mitigation investigation must encompass client's "whole life"); EQUAL JUSTICE INITIATIVE OF ALA., ALABAMA CAPITAL DEFENSE TRIAL MANUAL ch. 12 (3d ed. 1997) [hereinafter ALABAMA CAPITAL DEFENSE TRIAL MANUAL]; Lyon, *supra* note 3, at 703 (observing that "mitigation begins with the onset of the [defendant's] life" because "[m]any [defendants'] problems start with things like fetal alcohol syndrome, head trauma at birth, or their mother's drug addiction during pregnancy"); Vick, *supra* note 4, at 363.

(3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

(4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);

(5) Employment and training history (including skills and performance, and barriers to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.[212]

Accordingly, immediately upon counsel's entry into the case appropriate member(s) of the defense team should meet with the client to:

1. discuss the alleged offense or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

2. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors; and

212. *See supra* text accompanying notes 13-27.

3. obtain necessary releases for securing confidential records relating to any of the relevant histories.

Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. Topics like childhood sexual abuse should therefore not be broached in an initial interview. Obtaining such information typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments from which the client may suffer. As noted *supra* in the text accompanying note 103, a mitigation specialist who is trained to recognize and overcome these barriers, and who has the skills to help the client cope with the emotional impact of such painful disclosures, is invaluable in conducting this aspect of the investigation.

It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others.[213] Records—from courts, government agencies, the military, employers, etc.—can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness,[214] and corroborating witnesses' recollections. Records should be requested

213. *See* Goodpaster, *supra* note 3, at 321; Lyon, *supra* note 3, at 704-06; Vick, *supra* note 4, at 366-67.

214. *See* Wiggins v. Smith, 123 S. Ct. 2527 (2003) (inadequacy of trial counsel's mitigation investigation demonstrated by post-conviction presentation of expert's report that demonstrated "the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents" through "state social services, medical, and school records, as well as interviews with petitioner and numerous family members"); Williams v. Taylor, 529 U.S. 362, 395 (2000) (counsel ineffective where they:

> failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.)

(footnote omitted); Jermyn v. Horn, 266 F.3d 257, 307 (3d Cir. 2001) (counsel ineffective for failing to obtain school records that disclosed childhood abuse); *see also* ALABAMA CAPITAL DEFENSE TRIAL MANUAL, *supra* note 211; TEXAS DEATH PENALTY MITIGATION MANUAL, *supra* note 105, ch. 3; Norton, *supra* note 182, at 32-38.

concerning not only the client, but also his parents, grandparents, siblings, cousins, and children.[215] A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment.[216] The collection of corroborating information from multiple sources—a time-consuming task—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.[217]

Counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes, to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited to:

a. school records
b. social service and welfare records
c. juvenile dependency or family court records
d. medical records
e. military records
f. employment records
g. criminal and correctional records
h. family birth, marriage, and death records
i. alcohol and drug abuse assessment or treatment records
j. INS records

If the client was incarcerated, institutionalized or placed outside of the home, as either a juvenile or an adult, the defense team should investigate the possible effect of the facility's conditions on the client's

215. In order to verify or corroborate witness testimony about circumstances and events in the defendant's life, defense counsel must "assemble the documentary record of the defendant's life, collecting school, work, and prison records" which might serve as sources of relevant facts. Vick, *supra* note 4, at 367; *see also* Lyon, *supra* note 3, at 705-06. Contemporaneous records are more credible than witnesses sharing previously undisclosed memories or experts offering opinions that were formed only after the client faced capital charges. Records may also document events that neither the client nor family members remember. *See, e.g.*, *Williams*, 362 U.S. at 395 n.19 (relying on a social worker's graphic description of the Williams home that could not have been provided by client, who was too young, or the adult family members, who were too intoxicated, to recall the scene).

216. *See* Norton, *supra* note 182, at 3 (counsel should "investigate at least three generations" of the client's family).

217. *See id.* (advocating "triangulation" of data).

contemporaneous and later conduct.[218] The investigation should also explore the adequacy of institutional responses to childhood trauma, mental illness, or disability to determine whether the client's problems were ever accurately identified or properly addressed.[219] Even if the institution that responded to the client was not grossly abusive or neglectful, it may have been incompetent in a number of ways. For example, IQ testing or other psychological evaluations may have been performed by untrained personnel or using inappropriate instruments—flaws that might not appear on the face of the institutional records.

The circumstances of a particular case will often require specialized research and expert consultation. For example, if a client grew up in a migrant farm worker community, counsel should investigate what pesticides the client may have been exposed to and their possible effect on a child's developing brain.[220] If a client is a relatively recent immigrant, counsel must learn about the client's culture, about the circumstances of his upbringing in his country of origin, and about the difficulties the client's immigrant community faces in this country.[221] Counsel should also be particularly sensitive in these circumstances to language or translation difficulties that may unwittingly have led to misunderstandings between the client and others, including government officials and members of the community at large, with whom he may have come into contact.

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218. *See* TERRY A. KUPERS, M.D., PRISON MADNESS THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT, 33-34 (1999); David M. Halbfinger, *Care of Juvenile Offenders in Mississippi is Faulted*, N.Y. TIMES, Sept. 1, 2003 at A13 (describing allegations of severely abusive conditions in Mississippi juvenile detention facilities and noting that "what is happening in Mississippi is by no means rare. Arizona, Arkansas, California, Georgia, Louisiana, Maryland, and South Dakota, among other states, have all had scandals in recent years," although the conditions in Mississippi were supposed to have been corrected pursuant to a court order issued in 1977).

219. *See* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1467 (1997) (noting damaging effects of "social conditions and experiences" often inflicted on institutionalized juvenile offenders).

220. *See* Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002), *cert. denied*, 536 U.S. 951 (2002).

221. *See* Mak v. Blodgett, 970 F.2d 614, 616-18 & n.5 (9th Cir. 1992) (positive testimony from defendant's family, combined with expert testimony about difficulty of adolescent immigrants from Hong Kong assimilating to North America, would have humanized client and could have resulted in a life sentence for defendant convicted of thirteen murders). *See also* Guideline 10.6 and accompanying commentary (noting that foreign government might recognize an American citizen as one of its nationals and provide counsel with extremely valuable assistance).

Miscellaneous Concerns

Counsel should maintain copies of media reports about the case for various purposes, including to support a motion for change of venue, if appropriate, to assist in the voir dire of the jury regarding the effects of pretrial publicity, to monitor the public statements of potential witnesses, and to facilitate the work of counsel who might be involved in later stages of the case.

Counsel must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside.[222] Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction, adjudication, or unadjudicated offense.[223]

Additional investigation may be required to provide evidentiary support for other legal issues in the case, such as challenging racial discrimination in the imposition of the death penalty or in the composition of juries.[224] Whether within the criminal case or outside it, counsel has a duty to pursue appropriate remedies if the investigation reveals that such conditions exist.[225]

As discussed *infra* in the text accompanying notes 249-52, counsel should consider making overtures to members of the victim's family—possibly through an intermediary, such as a clergy member, defense-victim liaison, or representative of an organization such as Murder Victim's Families for Reconciliation—to ascertain their feelings about the death penalty and/or the possibility of a plea.[226]

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222. *See* Johnson v. Mississippi, 486 U.S. 578, 586-87 (1988); *supra* notes 7, 22.

223. *See supra* text accompanying notes 20-28.

224. *See, e.g.*, Miller-el v. Cockrell, 537 U.S. 322, 329-33 (2003) (ruling for habeas petitioner in reliance on evidence regarding prosecutors' racial discrimination during voir dire presented at a pre-trial hearing and in state post-conviction proceedings); Sara Rimer, *In Dallas, Dismissal of Black Jurors Leads to Appeal by Death Row Inmate*, N.Y. TIMES, Feb. 13, 2002, at A24 (discussing memoranda and training manuals from prosecutor's office documenting policy of racial discrimination in jury selection); Stephen B. Bright, *Challenging Racial Discrimination in Capital Cases*, THE CHAMPION, Jan./Feb. 1997, at 22.

225. *See infra* Guideline 10.10.2; *supra* text accompanying note 7; *infra* text accompanying notes 264-70.

226. *See* Russell Stetler, *Working with the Victim's Survivors in Death Penalty Cases*, THE CHAMPION, June 1999, at 42; *see also* Michael Janofsky, *Parents of Gay Obtain Mercy for His Killer*, N.Y. TIMES, Nov. 5, 1999, at A1 (describing widely publicized case in which the prosecutor decided to drop his request for the death penalty because the parents of the victim so requested).

GUIDELINE 10.8—THE DUTY TO ASSERT LEGAL CLAIMS

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:

1. consider all legal claims potentially available; and

2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and

3. evaluate each potential claim in light of:

   a. the unique characteristics of death penalty law and practice; and

   b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and

   c. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and

   d. any other professionally appropriate costs and benefits to the assertion of the claim.

B. Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and

2. ensure that a full record is made of all legal proceedings in connection with the claim.

C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:

1. asserting legal claims whose basis has only recently become known or available to counsel; and

2. supplementing claims previously made with additional factual or legal information.

History of Guideline

This Guideline is based on Guideline 11.5.1 ("The Decision to File Pretrial Motions") and Guideline 11.7.3 ("Objection to Error and Preservation of Issues for Post Judgment Review") of the original edition. New language makes clear that the obligations imposed by this Guideline exist at every stage of the proceeding and extend to procedural vehicles other than the submission of motions to the trial court.

In Subsection A(3)(b), the phrase "near certainty" is new and replaces the word "likelihood" from the original edition. The change reflects recent scholarship indicating that appellate and post-conviction remedies are pursued by almost 100% of capital defendants who are convicted and sentenced to death.

Subsections B and C are new to this edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.6 ("Prompt Action to Protect the Accused"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.5 ("Compliance with Discovery Procedure"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 5.1 (1995) ("The Decision to File Pretrial Motions").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 5.3 (1995) ("Subsequent Filing of Pretrial Motions").

Commentary

"One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial."[227] For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial,[228] but also of the heightened need to fully preserve all potential issues for later review.

As the text of the first sentence of Subsection A makes clear, this obligation is not limited to trial counsel or to motions made to the trial court. For example, if a state post-conviction court rules on the merits of a claim for relief, the claim will be available for federal review even if the state's rules required the issue to be raised at trial.[229] So, too, it may be appropriate for counsel to proceed on some claims (e.g., double jeopardy) by seeking an interlocutory supervisory writ from an appellate

227. Stephen B. Bright, *Preserving Error at Capital Trials*, THE CHAMPION, Apr. 1997, at 42-43. For example, John Eldon Smith was executed by the State of Georgia even though he was sentenced to death by a jury selected from a jury pool from which women were unconstitutionally excluded. The federal courts refused to consider the issue because Mr. Smith's lawyers failed to preserve it. Mr. Smith's co-defendant was also sentenced to death from a jury selected from the same pool. The issue was preserved in the co-defendant's case, and the co-defendant's conviction and death sentence were vacated. At retrial, the co-defendant was sentenced to life imprisonment. *See* Smith v. Kemp, 715 F.2d 1459, 1476 (11th Cir. 1983) (Hatchett, J., concurring in part and dissenting in part).

228. *See* NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 5.1 (1995) (listing potential motions).

229. *See* Ake v. Oklahoma, 470 U.S. 68, 75 (1985); *see also* Stewart v. Smith, 536 U.S. 856, 859-60 (2002) (*per curiam*).

court[230] or by otherwise seeking relief outside the confines of the capital litigation itself.[231]

As discussed *supra* in the text accompanying note 28, most jurisdictions have strict waiver rules that will forestall post-judgment relief if an issue was not litigated at the first opportunity. An issue may be waived not only by the failure to timely file a pretrial motion, but also because of the lack of a contemporaneous objection at trial, or the failure to request a jury instruction, or counsel's failure to comply with some other procedural requirement established by statute, court rule, or case law. Counsel must therefore know and follow the procedural requirements for issue preservation and act with the understanding that the failure to raise an issue by motion, objection, or other appropriate procedure may well forfeit the ability of the client to obtain relief on that issue in subsequent proceedings.

Whether raising an issue specific to a capital case (such as requesting individual, sequestered voir dire on death-qualification of the jury) or a more common motion shaped by the capital aspect of the case (such as requesting a change of venue because of publicity), counsel should be sure to litigate all of the possible legal[232] and factual[233] bases

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230. *See, e.g.*, Schumer v. Holtzman, 454 N.E.2d 522, 526 (N.Y. 1983) (granting writ of prohibition sought by non-capital suspect to preclude investigation by improperly designated prosecutor); *cf.* Hynes v. Tomei, 706 N.E.2d 1201, 1207 (N.Y. 1998) (invalidating portion of New York death penalty statute in proceeding for writ of prohibition brought by prosecutor).

231. *See* Bradley v. Pryor, 305 F.3d 1287, 1289-90 (11th Cir. 2002) (holding that action seeking DNA samples for testing to establish the innocence of a capital prisoner is properly brought under Section 1983 rather than as habeas corpus petition), *cert. denied*, 123 S. Ct. 1909 (2003); *supra* text accompanying notes 5-9. As this example suggests, developments in DNA technology and increasing knowledge of the extent and causes of wrongful convictions in capital cases, *see supra* text and accompanying notes 48-51, 198-204, should lead defense attorneys to be aggressive in pursuing the implication of the Court's assumption in *Herrerra v. Collins*, 506 U.S. 390, 417 (1993), "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there was no state avenue open to process such a claim." *See* House v. Bell, 311 F.3d 767 (6th Cir. 2002) (en banc), *cert. denied*, 123 S. Ct. 2575 (2003) (relying upon this passage and opinion of Justice O'Connor in *Schlup v. Delo*, 513 U.S. 298 (1995), in certifying to state courts issue of whether procedural vehicle existed to present to them evidence of innocence first uncovered during federal habeas proceedings).

232. Counsel should always cite to any arguably applicable provision of the United States Constitution, the state constitution, and state law as bases for granting a claim. A reviewing court may refuse to consider a legal theory different from that put forward originally. *See* Anderson v. Harless, 459 U.S. 4, 6 (1982) (refusing to consider violation of Due Process Clause of federal Constitution because defense counsel in state courts relied solely upon due process clause of state constitution). For example, courts have refused to consider an assertion that a statement was taken in violation of the Sixth Amendment right to counsel because it was argued in earlier proceedings only that the statement was obtained in violation of the Fifth Amendment protection against self-

for the request. This will increase the likelihood that the request will be granted and will also fully preserve the issue for post-conviction review in the event the claim is denied.

Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case.[234] As described in the commentary to Guideline 1.1, counsel also has a duty, pursuant to Subsection (A)(3)(a)-(c) of this Guideline, to preserve issues calling for a change in existing precedent; the client's life may well depend on how zealously counsel discharges this duty.[235] Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.[236]

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incrimination. *See* McCleskey v. Zant, 499 U.S. 467, 502 (1991). Counsel should also present all of the relevant facts as early as feasible. *See generally* Bright, *supra* note 227, at 43, 44.

233. In this regard, as Subsection C indicates, counsel should bear in mind that in capital litigation the courts tend to be much more responsive to supplemental presentations than they might be in other contexts. *See, e.g.*, Brooks v. Estelle, 702 F.2d 84, 84-85 (5th Cir. 1983) (noting petitioner's multiple applications to the court and addressing them on the merits); Spaziano v. State, 660 So. 2d 1363, 1364, 65-66 (Fla. 1995) (granting motions filed by defendant facing fifth death warrant that "[sought] to open by rehearing an appeal that was finalized more than thirteen years ago and a post-conviction proceeding that was terminated with a denial of rehearing more than nine years ago" and ordering a remand that eventually resulted in an in-court recantation by a key witness and a life sentence); *see also DNA Tests to be Done in '74 Case*, ORLANDO SENTINEL, Dec. 13, 2002, at B3.

234. *See* Bright, *supra* note 227, at 43 ("Failure to make an objection for fear of alienating the judge or jury may be a valid consideration in a case in which there is a good chance of acquittal or the length of sentence will be so short that appellate review will be irrelevant to the client. But in a capital case, it may deprive the client of a life-saving reversal on direct appeal or in habeas corpus proceedings.").

235. *See supra* text accompanying note 28. If a claim, whether meritorious or not, is being litigated anywhere in the country, counsel is likely to be charged with knowledge that the "tools to construct their constitutional claim" exist and be expected to raise it. Engle v. Isaac, 456 U.S. 107, 133 (1982). In *Smith v. Murray*, 477 U.S. 527 (1986), counsel failed to raise a particular issue on behalf of Mr. Smith in one state court because the state supreme court had recently rejected it. *See id.* at 531. Mr. Smith raised the issue in subsequent state and federal collateral proceedings, *see id.*, and, well after these were concluded, the United States Supreme Court ruled favorably on the question. *See id.* at 536. However, because of counsel's previous decision to forego the presentation of a claim that was then meritless, the Court "conclude[d] that . . . [Mr. Smith] must therefore be executed," *Id.* at 540 (Stevens, J., dissenting), and he was. *See Legislative Modification*, *supra* note 12, at 852; *see also infra* note 343.

236. For example, execution by electrocution has become *de facto* unconstitutional because state governments have concluded that challenges to the practice have merit, even though the contrary precedent remains in place. *See In re* Kemmler, 136 U.S. 436, 449 (1890); *cf. Alabama: Optional Execution by Injection*, N.Y. TIMES, Apr. 26, 2002, at A20 (discussing how Alabama enacted a law making lethal injection the state's primary method of execution when it looked as if the Supreme Court might rule that the electric chair was cruel and unusual punishment); Sara Rimer, *Florida Lawmakers Reject Electric Chair*, N.Y. TIMES, Jan. 7, 2000, at A13 (same in Florida).

Because "[p]reserving all [possible] grounds can be very difficult in the heat of battle during trial,"[237] counsel should file written motions in limine prior to trial raising any issues that counsel anticipate will arise at trial. All of the grounds should be set out in the motion.[238] Similarly, requests for rulings during the course of post-conviction proceedings (e.g., for investigative resources pursuant to Guideline 10.4(D)) should be made fully and formally.

In accordance with Subsection B(2), counsel at every stage must ensure that there is a complete record respecting all claims that are made, including objections, motions, statements of grounds, questioning of witnesses or venire members, oral and written arguments of both sides, discussions among counsel and the court, evidence proffered and received, rulings of the court, reasons given by the court for its rulings, and any agreements reached between the parties. If a court refuses to allow a proceeding to be recorded, counsel should state the objection to the court's refusal, to the substance of the court's ruling, and then at the first available opportunity make a record of what transpired in the unrecorded proceeding.[239] Counsel should also ensure that the record is clear with regard to the critical facts to support the claim. For example, if counsel objects to the peremptory strike of a juror as race-based, counsel should ensure that it is clear from the record not only that the prosecutor struck a particular juror, but the race of the juror, of every other member of the venire, and the extent to which the unchallenged venire members shared the characteristics claimed to be justifying the challenge.[240]

Further, as reflected in Guideline 10.7(B)(2), counsel at all stages of the case must determine independently whether the existing official record may incompletely reflect the proceedings, e.g., because the court reporter took notes but did not transcribe them or an interpreter's translation was inaccurate, or because the court clerk did not include legal memoranda in the record transmitted to subsequent courts, or there was official negligence or misconduct.

As the nonexclusive list of considerations in Subsection A(3) suggests, there are many instances in which counsel should assert legal claims even though their prospects of immediate success on the merits

237. Bright, *supra* note 227, at 45.

238. *See* ALABAMA CAPITAL DEFENSE TRIAL MANUAL, *supra* note 211, at 53.

239. *See* Dobbs v. Zant, 506 U.S. 357, 358 (1993); Robinson v. Robinson, 487 S.W.2d 713, 714-15 (Tex. 1972); 4M Linen & Unif. Supply Co. v. W.P. Ballard & Co., 793 S.W.2d 320, 323 (Tex. Ct. App. 1990).

240. *See* Bright, *supra* note 227, at 46.

are at best modest. Examples of such circumstances (in addition to those in which counsel need to forestall later procedural defenses (Subsection A(3)(c)), include instances where:

- the claim should be preserved in light of foreseeable future events (e.g., the completion of an investigation, a ruling in a relevant case); or
- asserting the claim may increase the government's incentive to reach an agreed-upon disposition; or
- the presentation made in support of the claim may favorably influence other relevant actors (e.g., the Governor).[241]

241. *See* 3 CAL. ATT'YS FOR CRIM. JUSTICE, 3 CALIFORNIA DEATH PENALTY DEFENSE MANUAL 4 (1993).

GUIDELINE 10.10.1—TRIAL PREPARATION OVERALL

As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

History of Guideline

The revisions to this Guideline, which was formerly Guideline 11.7.1, are stylistic.

Related Standards

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.3 (1995) ("Theory of the Case").

Commentary

Formulation of and adherence to a persuasive and understandable defense theory are vital in any criminal case. In a capital trial, the task of constructing a viable strategy is complicated by the fact that the proceedings are bifurcated. The client is entitled to have counsel insist that the state prove guilt beyond a reasonable doubt.[255] At the same time, if counsel takes contradictory positions at guilt/innocence and sentencing, credibility with the sentencer may be damaged and the defendant's chances for a non-death sentence reduced. Accordingly, it is critical that, well before trial, counsel formulate an integrated defense theory[256] that will be reinforced by its presentation at both the guilt and

255. *See* Nixon v. Singletary, 758 So. 2d 618, 624-25 (Fla. 2000) (ineffective assistance where counsel failed to obtain client's explicit prior consent to strategy of conceding guilt to jury in opening statement in effort to preserve credibility for sentencing); People v. Hattery, 488 N.E.2d 513, 518-19 (Ill. 1985) (same).

256. *See infra* text accompanying notes 273-75; McNally, *supra* note 242, at 8-11; White, *supra* note 3, at 356-58.

mitigation stages.[257] Counsel should then advance that theory during all phases of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence, and closing argument.[258]

257. As the text accompanying notes 104-07, *supra*, suggests, for counsel to gamble that there never will be a mitigation phase because the client will not be convicted of the capital charge is to render ineffective assistance.

258. *See* Bright, *supra* note 227, at 40.

GUIDELINE 10.11—THE DEFENSE CASE CONCERNING PENALTY

A. As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.

B. Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.

C. Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.

D. Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.

E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.

F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:

1. Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be

explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;

2. Expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;

3. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

4. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.

5. Demonstrative evidence, such as photos, videos, and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.

G. In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise

inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions in limine) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.

H. Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.

I. Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.

J. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:

1. carefully consider

   a. what legal challenges may appropriately be made to the interview or the conditions surrounding it, and

   b. the legal and strategic issues implicated by the client's co-operation or non-cooperation;

2. insure that the client understands the significance of any statements made during such an interview; and

3. attend the interview.

K. **Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.**

L. **Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.**

History of Guideline

The substance of this Guideline is drawn from Guideline 11.8.3 of the original edition. The principal changes are the expansion of coverage to counsel at all stages of the proceedings, and language changes to underscore the range and importance of expert testimony in capital cases, the breadth of mitigating evidence, and counsel's duty to present arguments in mitigation.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.1 ("Sentencing"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.1 (1995) ("Obligations of Counsel in Sentencing").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.2 (1995) ("Sentencing Options, Consequences and Procedures").

Commentary

Capital sentencing is unique in a variety of ways, but only one ultimately matters: the stakes are life and death.

This commentary is written primarily from the perspective of trial counsel. But corresponding obligations rest on successor counsel. This Guideline has been broadened to include them because of the realities that in capital cases (a) more evidence tends to become available to the defense as time passes,[271] and (b) updated presentations of the defense case on penalty in accordance with Guideline 10.15.1(E)(3) may influence decisionmakers both on the bench (e.g., an appellate court considering a claim of ineffective assistance of counsel) and off it (e.g., the prosecutor, the Governor).

The Importance of an Integrated Defense

During the investigation of the case, counsel should begin to develop a theme that can be presented consistently through both the first and second phases of the trial. Ideally, "the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation."[272] Consistency is crucial because, as discussed in the commentary to Guideline 10.10.1, counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime.[273] First phase defenses that seek to reduce the client's culpability for the crime (e.g., by negating intent) rather than to deny involvement altogether are more likely to be consistent with mitigating evidence of mental illness, retardation, domination by a co-defendant, substance abuse, or trauma.[274] But whether or not the guilt phase defense will be that the defendant did not

271. *See supra* text accompanying note 39.

272. Lyon, *supra* note 3, at 711.

273. *See id.* at 708; Scott E. Sundby, *The Capital Jury and Absolution*, 38 CORNELL L. REV. 1557, 1596-97 (1998).

274. In fact, most statutory mitigating circumstances, which were typically adapted from the Model Penal Code, are "imperfect" versions of first phase defenses such as insanity, diminished capacity, duress, and self-defense. *See* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 856-57 (1992) (reviewing BEVERLY LOWRY, CROSSED OVER: A MURDER, A MEMOIR (1992)). Of course, the defendant's penalty phase presentation may not constitutionally be limited to statutory mitigating circumstances and the jury must be allowed to give full consideration to any non-statutory ones he advances. *See* Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

commit the crime, counsel must be prepared from the outset to make the transition to the penalty phase.[275]

The Defense Presentation at the Penalty Phase

As discussed in the commentary to Guideline 10.7, areas of mitigation are extremely broad and encompass any evidence that tends to lessen the defendant's moral culpability for the offense or otherwise supports a sentence less than death.[276] Often, a mitigation presentation is offered not to justify or excuse the crime "but to help explain it."[277] If counsel cannot establish a direct cause and effect relationship between any one mitigating factor and the commission of a capital offense,

275. For an example of an argument making an effective transition, see Edith Georgi Houlihan, *Defending the Accused Child Killer,* THE CHAMPION, Apr. 1998, at 23. Jurisdictions vary as to whether the defendant has a right to present lingering doubt as a mitigating circumstance. *Compare* People v. Sanchez, 906 P.2d 1129, 1178 (Cal. 1995) (stating that under California law, "the jury's consideration of residual doubt is proper"), *with* Way v. State, 760 So. 2d 903, 916-17 (Fla. 2000) (rejecting claim under Florida constitution that a defendant must be permitted to present mitigating "evidence relevant only to establish a lingering doubt"). Existing case law in the United States Supreme Court suggests that a capital defendant has no federal constitutional right to have lingering doubt considered as a mitigating circumstance at the penalty phase. *See* Franklin v. Lynaugh, 487 U.S. 164, 174 (1988). Given the significant number of death row exonerations, *see supra* text accompanying notes 48-51 & 198-204, and the degree to which these have plainly troubled many Justices, *see* Atkins v. Virginia, 536 U.S. 304, 320 n.25 (2002) ("Despite the heavy burden that the prosecution must shoulder in capital cases . . . in recent years a disturbing number of inmates on death row have been exonerated."), *supra* text accompanying note 31, there is ample reason to doubt the force of this precedent. *See* CONSTITUTION PROJECT, *supra* note 50, at 40-41 (advocating allowing lingering doubt to be considered as a mitigating circumstance); *see generally* Christina S. Pignatelli, *Residual Doubt: It's a Life Saver,* 13 CAP. DEF. J. 307 (2001).

276. *See* Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (stating that "it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense"); McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (reaffirming that "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant"); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (holding evidence of defendant's positive adaptation to prison is relevant and admissible mitigating evidence even though it does "not relate specifically to petitioner's culpability for the crime he committed"). Similarly, counsel could appropriately argue to the jury that the death sentence should not be imposed on a client because doing so would tend to incite the client's political followers to avenge him by committing further crimes. *See, e.g.*, Benjamin Weiser, *Jury Rejects Death Penalty for Terrorist,* N.Y. TIMES, July 11, 2001, at B1 (reporting successful use of this argument at trial of defendant convicted of bombing American embassy).

277. Haney, *supra* note 93, at 560. *See* Simmons v. Luebbers, 299 F.3d 929, 938-39 (8th Cir. 2002) ("Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. Despite the availability of such evidence, however, none was presented. Simmons's attorneys' representation was ineffective."), *cert. denied* 123 S. Ct. 1582 (2003).

counsel may wish to show the combination of factors that led the client to commit the crime.[278] But mitigation evidence need not be so limited. Depending on the case, counsel may choose instead to emphasize the impact of an execution on the client's family, the client's prior positive contributions to the community, or other factors unconnected to the crime which militate against his execution (Subsection F). In any event, it is critically important to construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly unrelated mitigating factors.[279]

Since an understanding of the client's extended, multi-generational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present. Expert witnesses may be useful for this purpose and may assist the jury in understanding the significance of the observations.[280] For example, expert testimony may explain the permanent neurological damage caused by fetal alcohol syndrome or childhood abuse, or the hereditary nature of mental illness, and the effects of these impairments on the client's judgment and impulse control.[281] Counsel should choose experts who are tailored specifically to the needs of the case, rather than relying on an "all-purpose" expert who may have insufficient knowledge or experience to testify persuasively.[282] In order to prepare effectively for trial, and to choose the best experts, counsel should take advantage of training materials and seminars and remain current on developments in fields such as neurology and psychology, which often have important implications for understanding clients' behavior.[283] Counsel should also

278. *See* Haney, *supra* note 93, at 600.

279. For an example of the process working as it should, see Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES MAG., July 6, 2003, at 32. *See generally* Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1140-41 (1997) (noting that jurors find expert testimony unpersuasive if it is not tied into other evidence presented in the case).

280. *See* White, *supra* note 3, at 342-43.

281. *See, e.g.*, Ainsworth v. Woodford, 268 F.3d 868, 876 (9th Cir. 2001) (stating that "the introduction of expert testimony would also have been important" to explain the effects that "'serious physical and psychological abuse and neglect as a child'" had on the defendant).

282. *See* Caro v. Calderon, 165 F.3d 1223, 1226-27 (9th Cir. 1999) (although counsel consulted four experts, including a medical doctor, a psychologist, and a psychiatrist, counsel failed to consult neurologist or toxicologist who could have explained neurological effects of defendant's extensive exposure to pesticides).

283. High quality continuing legal education programs on the death penalty, such as those noted *supra* in the commentary to Guideline 8.1, regularly present such information.

seek advice and assistance from colleagues and experts in the field of capital litigation.

Counsel should ordinarily use lay witnesses as much as possible to provide the factual foundation for the expert's conclusions.[284] Community members such as co-workers, prison guards, teachers, military personnel, or clergy who interacted with the defendant or his family, or have other relevant personal knowledge or experience often speak to the jury with particular credibility.[285]

Family members and friends can provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants. These witnesses can also humanize the client by allowing the jury to see him in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive way, such as attempting to protect other family members from domestic violence or trying to be a good parent and provider.[286] Similarly, acquaintances who can testify to the client's performance of good works in the community may help the decisionmaker to have a more complete view of him. None of this evidence should be offered as counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer, someone for whom one could reasonably see a constricted but worthwhile future.

In addition to humanizing the client, counsel should endeavor to show that the alternatives to the death penalty would be adequate punishment. Studies show that "future dangerousness is on the minds of most capital jurors, and is thus 'at issue' in virtually all capital trials," whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration.[287] Accordingly, counsel should give serious consideration to making an explicit presentation of information on this subject. Evidence that the client has adapted well to prison and has had few disciplinary problems can allay jurors' fears and reinforce other positive mitigating evidence.[288] Counsel should therefore always

284. *See* Sundby, *supra* note 279, at 1163-84.

285. *See id.* at 1118, 1151.

286. *See id.* at 1152-62; *see also* Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J.L. REFORM 1, 12-14 (1999).

287. John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 398-99 (2001).

288. *See* Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (stating that jury would "quite naturally" give great weight to "[t]he testimony of ... disinterested witnesses" such as "jailers who would have had no particular reason to be favorably predisposed toward one of their charges");

encourage the client not only to avoid any disciplinary infractions but also to participate in treatment programs and/or educational, religious or other constructive activities.

Counsel is entitled to impress upon the sentencer through evidence, argument, and/or instruction that the client will either never be eligible for parole, will be required to serve a lengthy minimum mandatory sentence before being considered for parole, or will be serving so many lengthy, consecutive sentences that he has no realistic hope of release.[289] In at least some jurisdictions, counsel may be allowed to present evidence concerning the conditions under which such a sentence would be served.[290]

Counsel should also consider, in consultation with the client, the possibility of the client expressing remorse for the crime in testimony, in allocution, or in a post-trial statement. If counsel decides that a trial presentation by the client is desirable, and the proposed testimony or allocution is forestalled by evidentiary rulings of the court either

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Sundby, *supra* note 279, at 1147 (noting tendency of juries to respond favorably to testimony of prison employees).

289. The Supreme Court has held that:

> where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.'

Shafer v. South Carolina, 532 U.S. 36, 39 (2001) (quoting Ramdass v. Angelone, 530 U.S. 156, 165 (2000) (plurality opinion)). The precise contours of this rule remain in dispute, *see* Brown v. Texas, 522 U.S. 940, 940-41 (1997), and counsel may appropriately seek to extend them (e.g., by applying the rule to other alternative sentences than life imprisonment without parole or by requiring that the jury receive the information through instructions).

Some state courts have held that the trial court must resolve, before the capital sentencing hearing, issues such as the length of other sentences the defendant would serve and whether he would be eligible for parole. *See* Clark v. Tansy, 882 P.2d 527, 534 (N.M. 1994) (holding that trial court must, upon defendant's request, impose sentence for non-capital convictions prior to jury deliberations on death penalty); Turner v. State, 573 So. 2d 657, 674-75 (Miss. 1990) (stating that trial court should determine defendant's habitual offender status before capital sentencing hearing so jury could be accurately informed of defendant's parole ineligibility). In other jurisdictions, the defense can at least argue that the defendant is *likely* to receive lengthy, consecutive sentences. *See* Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990) (finding length of time a defendant would be "removed from society" if sentenced to life imprisonment is relevant mitigating evidence that the jury must be permitted to consider); Turner v. State, 645 So. 2d 444, 448 (Fla. 1994) (holding that jury could properly consider in mitigation that alternative to death sentences would have been two life sentences with combined minimum mandatory of fifty years).

290. In the federal capital sentencing of a defendant convicted of bombing American embassies overseas, the defense presented evidence about conditions at the federal "Super Max" prison in Florence, Colorado, where the defendant would be incarcerated if sentenced to life without parole. *See* Benjamin Weiser, *Lawyers for Embassy Bomber Push for Prison Over Execution*, N.Y. TIMES, June 27, 2001, at B4; *see also infra* note 311. The defendant was subsequently sentenced to life without parole. *See* Weiser, *supra* note 276.

disallowing it or conditioning it on unacceptable cross-examination, counsel should take care to make a full record of the circumstances, including the content of the proposed statement. In light of the strong common law underpinnings of allocution and the broad constitutional right to present mitigation that has already been described, any such issue is likely to merit the careful examination of successor counsel.

Finally, in preparing a defense presentation on mitigation, counsel must try to anticipate the evidence that may be admitted in response and to tailor the presentation to avoid opening the door to damaging rebuttal evidence that would otherwise be inadmissible.[291]

The Defense Response to the Prosecution's Penalty Phase Presentation

Counsel should prepare for the prosecutor's case at the sentencing phase in much the same way as for the prosecutor's case at the guilt/innocence phase.[292] Counsel should use available discovery mechanisms to ascertain the aggravating and rebuttal evidence the prosecution intends to introduce, and then thoroughly investigate to determine whether this evidence can be excluded, rebutted, or undercut. As discussed in the commentary to Guideline 10.2, jurisdictions vary in whether the defense must be formally notified as to whether the prosecution will seek the death penalty. If required notice has not been given, counsel should also prepare to challenge at the sentencing phase any prosecution efforts that should be barred for failure to give notice.[293]

Counsel should carefully research applicable state and federal law governing the admissibility of evidence in aggravation. Where possible, counsel should move to exclude aggravating evidence as inadmissible, and, if that fails, rebut the evidence or offer mitigating evidence that will blunt its impact.[294]

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291. However, as Subsection G suggests, if there is uncertainty as to the scope of how wide this opening would be or if counsel believes that excessive rebuttal is to be admitted, they should object and make a full record on the issue.

292. *See* White, *supra* note 3, at 358.

293. *See supra* text accompanying notes 163-64.

294. *See* Smith v. Stewart, 189 F.3d 1004, 1010-11 (9th Cir. 1999) (concluding counsel was ineffective in part for failing to challenge the state's use of prior rape convictions in aggravation as prior violent offenses where both of the convictions occurred when Arizona law did not include violence as an element of rape); Parker v. Bowersox, 188 F.3d 923, 929-31 (8th Cir. 1999) (concluding trial counsel was ineffective for failing to present evidence to rebut the only aggravating circumstances); Summit v. Blackburn, 795 F.2d 1237, 1244-45 (5th Cir. 1986) (concluding trial counsel was ineffective for failing to argue the lack of corroborating evidence of the sole aggravating factor when under state law a defendant cannot be convicted based solely on an

If (but only if)[295] the defense presents an expert who has examined the client, a prosecution expert may be entitled to examine the client to prepare for rebuttal.[296] Counsel should become familiar with the governing law regarding limitations on the scope of expert evaluations conducted by prosecution experts, and file appropriate motions to ensure that the scope of the examination is no broader than legally permissible.[297] If the examination is not limited as counsel deem appropriate, Subsection J(1) requires them to give careful consideration to their response (e.g., refuse to participate on possible pain of preclusion, participate at the cost of an irretrievable surrender of information, seek relief from a higher court). Counsel must discuss with the client in advance any evaluation that is to take place and attend the examination in order to protect the client's rights (Subsections J(2)-(3)). Counsel may also seek to have the evaluation observed by a defense expert.

Counsel should integrate the defense response to the prosecution's evidence in aggravation with the overall theory of the case. In some cases, counsel's response to aggravating evidence at the penalty stage converges with the defense presentation at the guilt/innocence phase. The prosecutor will offer no additional evidence at the penalty phase but will simply rely on aggravating factors established by the evidence at the

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uncorroborated confession and the only evidence supporting the aggravating factor was defendant's confession).

295. *See, e.g.*, Estelle v. Smith, 451 U.S. 454, 468 (1981) (per curiam) (stating "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding").

296. As described *infra* in note 297, several states explicitly limit this right in various ways.

297. *See, e.g.*, FED. R. CRIM. P. 12.2(c)(4) (2003) ("No statement made by a defendant in the course of any [court-ordered psychiatric] examination . . . may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant . . . has introduced evidence"); Abernathy v. State, 462 S.E.2d 615, 616 (Ga. 1995) (holding that where defendant intends "to introduce evidence of mental illness in any phase of trial," he may be required "to submit to an independent psychiatric evaluation or be barred from presenting such evidence, even in mitigation"); State v. Reid, 981 S.W.2d 166, 168 (Tenn. 1998) (stating that once defendant files notice of intent to present expert testimony regarding mitigating evidence, state expert may examine defendant; however, state expert report will be provided only to the defense until after conviction and after defendant confirms intent to rely on expert testimony as part of case in mitigation); *see also* FLA. R. CRIM. P. 3.202(d) (2002) ("After the filing of [notice] . . . to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. . . . The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony."); Dillbeck v. State, 643 So. 2d 1027, 1030-31 (Fla. 1994) ("[W]here the defendant plans to use only in the penalty phase the testimony of an expert who has interviewed him or her, the State is entitled to examine the defendant only after conviction and after the State has certified that it will seek the death penalty."); State v. Johnson, 576 S.E.2d 831, 835-37 (Ga. 2003).

guilt/innocence phase, such as that the murder was committed during the course of a felony.[298] In such cases, counsel's rebuttal presentation should focus on the circumstances of the crime, and defendant's conduct as it relates to the elements of the applicable aggravating circumstances.

In other cases, the prosecution will introduce additional aggravating evidence at the penalty stage. If the prosecutor seeks to introduce evidence of unadjudicated prior criminal conduct as aggravating evidence, counsel should fully investigate the circumstances of the prior conduct and determine whether it is properly admissible at the penalty stage.[299]

If the prosecution relies upon a prior conviction (as opposed to conduct), counsel should also determine whether it could be attacked as the product of an invalid guilty plea,[300] as obtained when the client was unrepresented by counsel,[301] as a violation of double jeopardy,[302] or on some other basis. Counsel should determine whether a constitutional challenge to a prior conviction must be litigated in the jurisdiction where the conviction occurred.[303]

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298. *See, e.g.*, Lowenfield v. Phelps, 484 U.S. 231, 246 (1988); *see also* FLA. STAT. ANN. § 921.141(5) (West 2001) (listing as an aggravating circumstance the fact that the crime was committed while the defendant was engaged in, or an accomplice to, the commission or attempted commission or flight after committing or attempting to commit any one of twelve enumerated felonies). In some states, the prosecution is essentially limited at the penalty phase to the evidence admitted at the guilt phase. *See, e.g.*, N.Y. CRIM. PROC. LAW § 400.27(3), (6) (McKinney 2002).

299. *See supra* text accompanying notes 23, 222-23. In some jurisdictions, only criminal conduct for which the client has been convicted is admissible at the penalty stage. *See, e.g.*, FLA. STAT. ANN. § 921.141(5) (listing as aggravating circumstance the fact that the defendant was previously convicted of capital felony or a felony involving violence). In others, no conviction is necessary, but the admissibility of a prior bad act may depend on other factors. *See, e.g.*, CAL. PENAL CODE § 190.3 (West 1999) (allowing admission of evidence of other criminal activity at penalty phase even though the defendant was not convicted for it, unless the defendant was prosecuted and acquitted or it did not involve the use or threat of violence); Pace v. State, 524 S.E.2d 490, 505 (Ga. 1999) (prior crime without conviction may be used in aggravation unless there is a previous acquittal). As a matter of constitutional law, the attack on the admission of unadjudicated prior misconduct in capital sentencing, which has long been a powerful one in light of the Court's established recognition of the need for special reliability in that context, *see* Monge v. California, 524 U.S. 721, 731-33 (1998) (collecting authority), has received additional support both from *Ring v. Arizona*, 536 U.S. 584 (2002) and from the Court's elaboration of due process limitations in related contexts. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1523 (2003) (in assessing punitive damages a recidivist may be punished more severely than a first offender, but only where the repeated misconduct is of the same sort as that involved in current case).

300. *See* Boykin v. Alabama, 395 U.S. 238, 242-44 (1969).

301. *See* Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

302. *See* Menna v. New York, 423 U.S. 61, 62 (1975).

303. *See* Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 402-04 (2001); *see also supra* note 22.

In jurisdictions where victim impact evidence is permitted, counsel, mindful that such evidence is often very persuasive to the sentencer, should ascertain what, if any, victim impact evidence the prosecution intends to introduce at penalty phase, and evaluate all available strategies for contesting the admissibility of such evidence[304] and minimizing its effect on the sentencer.[305]

In particular, in light of the instability of the case law,[306] counsel should consider the federal constitutionality of admitting such evidence to be an open field for legal advocacy.[307]

Counsel should also evaluate how to blunt certain intangible factors that can be damaging to a capital defendant at sentencing, including the heinous nature of the crime or the sentencer's possible racial antagonism for the client.[308] In jurisdictions where the alternative to a death sentence is life without the possibility of parole, counsel should consider informing the jury of the defendant's parole ineligibility in order to blunt the concern that the defendant may one day be released from custody.[309] If they have not done so previously in building their affirmative case for

304. Limitations on the admission of such evidence exist in a number of jurisdictions as a matter of state law. *See, e.g.*, People v. Edwards, 819 P.2d 436, 464-67 (Cal. 1991); Bivins v. State, 642 N.E.2d 928, 956-57 (Ind. 1994).

305. *See generally* Jeremy A. Blumenthal, *The Admissibility of Victim Impact Statements at Capital Sentencing: Traditional and Nontraditional Perspectives*, 50 DRAKE L. REV. 67 (2001); Randall Coyne, *Inflicting* Payne *on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589, 612-15 (1992); Ellen Kreitzberg, *How Much* Payne *Will the Courts Allow?*, THE CHAMPION, Jan./Feb. 1998, at 31; Michael Ogul, *Capital Cases: Dealing with Victim Impact Evidence* (pts. 1 & 2), THE CHAMPION, June 2000, at 43, Aug./Sept. 2000, at 42.

306. *Compare* Booth v. Maryland, 482 U.S. 496, 501-03 (1987) (victim impact evidence unconstitutional), *and* South Carolina v. Gathers, 490 U.S. 805, 810-12 (1989) (prosecutorial argument for death based upon laudable characteristics of victim unconstitutional), *with* Payne v. Tennessee, 501 U.S. 808, 825, 828-30 (1991) (overruling *Booth* and *Gathers* while noting that Due Process Clause is violated if such evidence is unduly prejudicial).

307. Of course, counsel should also pursue all available state law theories that might exclude such evidence, as indicated *supra* in note 232; *see, e.g.*, Olsen v. State, 2003 Wyo. LEXIS 57, 176-93 (April 14, 2003) (reviewing Wyoming statutory scheme and concluding it does not authorize admission of victim impact evidence in capital case); People v. Logan, 224 Ill. App.3d 735 (1st Dist. 1991) (notwithstanding that no death penalty had been imposed, it was ineffective assistance of appellate counsel to fail to challenge victim impact testimony as inadmissible under state law or limit its impact). For example, on the assumption that victim impact evidence in support of the death penalty would be admissible, there is conflicting case law in various states on whether the defense can call members of the victim's family to testify in opposition to the client's execution. *Cf. supra* text accompanying note 277 (noting that Constitution requires defendants to be able to offer any evidence that might cause sentencer to decline to impose a death sentence in the case at hand).

308. *See* White, *supra* note 3, at 359-60.

309. *See supra* text accompanying notes 289-90.

a penalty less than death,[310] counsel should also consider putting on evidence describing the conditions under which the client would serve a life sentence to rebut aggravating evidence of future dangerousness.[311]

Jury Considerations

Personal argument by counsel in support of a sentence less than death is important. Counsel who seeks to persuade a decisionmaker to empathize with the client must convey his or her own empathy.[312] While counsel may choose to discuss the gravity of the sentencer's life and death decision, the fact that the jury will have been death-qualified[313] means that trumpeting absolutist arguments against the death penalty is less likely to move the audience than sounding pro-life, pro-mercy notes that derive their resonance from the specific facts at hand.

It is essential that counsel object to evidentiary rulings, instructions, or verdict forms that improperly circumscribe the scope of the mitigating evidence that can be presented or the ability of the jury to consider and give effect to such evidence.[314] Counsel should also object to and be

310. *See supra* text accompanying note 290.

311. *See* United States v. Johnson, 223 F.3d 665, 671 (7th Cir. 2000) (describing how, to rebut government's assertion of future dangerousness, federal capital defendant put on evidence at penalty phase regarding conditions at "Supermax" prison where defendant would be housed if sentenced to life imprisonment), *cert. denied*, 534 U.S. 829 (2001); *supra* note 290.

312. *See supra* text accompanying note 185; White, *supra* note 3, at 374-75. An attorney whose contempt for his client is palpable cannot provide effective representation. *See, e.g.*, Rickman v. Bell, 131 F.3d 1150, 1157 (6th Cir. 1997) (describing counsel's "repeated expressions of contempt for his client" as providing the defendant "not with a defense counsel, but with a second prosecutor[;] creating a loathsome image . . . that would make a juror feel compelled to rid the world of him"); Clark v. State, 690 So. 2d 1280, 1283 (Fla. 1997) ("Counsel completely abdicated his responsibility to Clark when he told the jury that Clark's case presented his most difficult challenge ever in arguing against imposition of the death penalty.").

313. *See supra* commentary to Guideline 10.10.2.

314. *See, e.g.*, Penry v. Johnson, 532 U.S. 782, 799-800 (2001) (instructions and verdict form prevented jury from giving effect to mitigating evidence of defendant's mental retardation); McKoy v. North Carolina, 494 U.S. 433, 439-41 (1990) (verdict form and instructions suggesting mitigating circumstances must be found unanimously improperly restricted jurors' ability to give effect to mitigating evidence); Mills v. Maryland, 486 U.S. 367, 384 (1988) (same); Belmontes v. Woodford, 355 F.3d 1024, 1032 (9th Cir. 2003) (granting habeas relief on penalty because "the jury was not instructed that it must consider Belmontes' principal mitigation evidence, which tended to show that he would adapt well to prison and likely become a constructive member of society if incarcerated for life without possibility of parole"); Davis v. Mitchell, 318 F.3d 682, 691 (6th Cir. 2003); Banks v. Horn, 316 F.3d 228, 233 (3d Cir. 2003) ("'Under the United States Supreme Court's cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one the Court dares not risk.'") (quoting Mills, 486 U.S. at 384); Lenz v. Warden, 579 S.E.2d 194,

prepared to rebut arguments that improperly minimize the significance of mitigating evidence[315] or equate the standards for mitigation with those for a first-phase defense.[316] At the same time, counsel should request instructions that will ensure that the jury understands, considers, and gives effect to all relevant mitigating evidence.[317] It is vital that the instructions clearly convey the differing unanimity requirements applicable to aggravating and mitigating factors.[318]

If the jury instructions are insufficient to achieve the purposes described in the previous paragraph or are otherwise confusing or misleading, counsel must object, even if the instructions are the standard ones given in the jurisdiction. If the court does not instruct the jury on individual mitigating circumstances, counsel should spell them out in closing argument.

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196 (Va. 2003) (holding trial counsel ineffective for failure to object to defective penalty phase verdict form).

315. Prosecutors will frequently try to argue, for example, that "not everybody" who is abused as a child grows up to commit capital murder or that mental illness did not "cause" the defendant to commit the crime. *See* Haney, *supra* note 93, at 589-602. Both of these arguments are objectionable on Eighth Amendment grounds because they nullify the effect of virtually all mitigation. *See id.*; *supra* text accompanying notes 277-80. In any event, counsel can seek to counter such arguments by emphasizing the unique combination of factors at play in the client's life and demonstrating that there are causal connections between, for example, childhood abuse, neurological damage, and violent behavior. *See, e.g.*, Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1157-66 (1999) (reviewing psychological and medical "research on the correlation between childhood abuse and adult violence").

316. Arguments confusing the standards for a first phase defense and mitigation also violate the Eighth Amendment. *See generally* Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982) (finding unconstitutional trial judge's failure to consider defendant's violent upbringing as a mitigating factor at sentencing); *see generally* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21 (1997).

317. *See* Blume et al., *supra* note 287, at 398-99. *See also* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 11-12 (1993) (describing results of study showing jury confusion as to meaning of instructions, particularly about the mitigating circumstance burden of proof); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1167 (1995) (describing results of study showing that a substantial percentage of jurors do not understand instructions concerning aggravating and mitigating evidence, burdens of proof and unanimity).

318. *See* McKoy v. North Carolina, 494 U.S. 433, 444 (1990) (instructions allowing jury to consider only mitigating circumstances found unanimously violated Eighth Amendment); Mills v. Maryland, 486 U.S. 367, 375-80 (1988) (same result where jury could misinterpret instructions to require unanimity); *supra* note 315.

Record Preservation

In some jurisdictions, counsel is required or allowed to either proffer to the court or present to the sentencer mitigating evidence, regardless of the client's wishes.[319] Even if such a presentation is not mandatory, counsel should endeavor to put all available mitigating evidence into the record because of its possible impact on subsequent decisionmakers in the case.

319. *See, e.g.*, Hardwick v.Crosby, 320 F.3d 1127, 1190 n.215 (11th Cir. 2003) ("Even if Hardwick did ask [counsel] not to present witnesses at the sentencing proceeding, . . . [counsel] had a duty to Hardwick at the sentencing phase to present available mitigating witnesses as Hardwick's defense against the death penalty."); Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993) (finding that:

> when a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be.);

State v. Koedatich, 548 A.2d 939, 993-95 (N.J. 1988) (mitigating factors must be introduced regardless of the defendant's position).

I, Gabriella Espinoza Rodriguez, pursuant to the provisions of 28 U.S.C. §1746, declare as follows:

1. My name is Gabriella Espinoza Rodriguez. I am Andy Canales' younger sister. My date of birth is December 11, 1972.

2. I am six years younger than Andy. Andy and I have different fathers. Andy's father is Anibal Canales, I have seen him a few times but I don't know him. My father is Carlos Espinoza. He and my mother split up when I was too young to remember. I have seen him a few times, but I barely know him, he has been absent from my life ever since I can remember. I have three memories of him. When I was 4 and graduating from the Head Start program, he brought be a trike in the back of his car. ~~Which I was about~~ the same day, he was supposed to pick me up to take me to dinner, and he didn't show up. As it turned out, he was down the street in a bar, he was already drunk. I didn't get to go to dinner. When I was in 2nd or 3rd grade, he came over to our house. My mom was living with her boyfriend at the time, John (Juan) Ramirez. He followed by mom into the kitchen and tried to feel her up. She shook him off, and when he took off, I noticed that there was a woman in his car. I remember thinking even at that young age that it was sleezy. He also shoved $100 into her [redacted] pocket for me.

3. I was five or six when my family left the Chicago/Wisconsin area and moved to Texas. Andy did not live with us much at all while I was growing up. He lived in Houston with his dad for a while, then returned to San Antonio. I have a fleeting memory of him when I was in about second grade living with us at the house in Indian Creek, San Antonio, where he lived at the time. One of the older boys who lived next door was picking on me and throwing rocks at me, and I called my brother. He was really big in size by then, and he came out and scared the kid away. The kid climbed into a tree, and Andy was standing at the bottom telling him, "don't think I can't you up there!" The kid never picked on me again. Most of the time, Andy was living in half-way houses when he was a teenager and I was a child, and I don't know what led to Andy being away, it was just the way it was.

4. My life growing up was different than it was for my brother and sister. I am so young that I can't remember what our life was like at all before we came to San Antonio, and no one in my family has been willing to tell me much about it. There are times when I think that my family has conspired to keep me in the dark about our family's history.

5. I have very fond memories of my mother. I remember always wanting to be near her, always wanting to do things with her. I remember I would get very upset if my mom took off on a week-end morning to do something, like go to the flea market, without me. I always wanted to be right with her. I was the baby of the family, so I got special treatment from the whole family.

6. We moved a lot when I was growing up in San Antonio. On a couple of occasions we

lived with my Aunt Linda. For a while we lived with my mom's good friend, Hope Chacon. I remember on one occasion, while we were there, my sister and my mom got into a big fight, and my sister pushed my mom, who was near their sunken living room. My mom was drinking and Lisa pushed her down the stairs and she broke her hip. I know that Andy lived with us for a short time when we were living with Hope.

7. John is the only long-term boyfriend of my mother's that I knew. He and my mom started living together when I was about seven. That's when we moved to Indian Creek, an area on the South side of town. We lived there for about four years in a row, until I was eleven or twelve. That's the only time I remember staying in one place for several years in a row. My mom moved a lot. I don't know why, but as an adult, I realized that I was doing the same thing. My lease would get close to being expired, and I would start looking for another place, just automatically, without thinking about it. My husband pointed it out to me, and we have been in the house we live in now for more than a year.

8. Andy was mostly out of our life during that time. My mother's boyfriend, John, could not stand Andy, and there was always tension where my mother would try to stick up for Andy and defend him because he was her son, and John was turning my mom against him. At one point, towards the end of our stay in Indian Creek, Andy stole some kind of a check, like a tax refund check, from John and forged his signature and cashed it. John was furious, he was seeing red and wanted Andy prosecuted to the fullest extent of the law.

9. My mother was a social drinker, but for my mother, everything was social. We had a lot of freedom growing up. Drinking was an everyday thing in our house, and on the week-ends, my mom would usually go out. I started drinking when I was very young, which was okay with my mother, as long as I drank at home, or in her presence. about 13 PR

10. My mother and her boyfriend John (Juan) Ramirez lived together for about four years, then separated. They both left Indian Creek at that point because of some sort of tiff with the landlord. My mom and I moved to the other side of town, and stayed for part of a year. In the 8th grade, we moved back to the South side, and moved into John's house. I hated living in his house, because John was always punishing me. I would get grounded for two weeks for the smallest of things, and it was causing all sorts of problems. My older sister was gone on her own by then, and she was struggling, and I don't know where Andy was, but I gave my mother an ultimatum. I told her that if we didn't move away from John, I would take off and go live with my sister. It was a bluff, because my sister couldn't take me in, but I felt like I had to do something. My mother gave in, and we moved away from John at that point. They continued to see each other on and off, but they didn't live together again. We lived in several different apartments, but we usually didn't stay in a place for more than a year, and sometimes we would move after a few months.

11. John was a drinker. I haven't seen him for a long time, but if I were going to look for him, I would go to the neighborhood bars on the South side of town, and I bet I would

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find him there. That's what he did. Since I've been an adult, I have heard that John Ramirez molested my sister. I was not aware of it at the time, I was too young. I do remember that he insisted on having sex with my mother with the door open, and, even when I was quite young, he would come out of the bedroom stark naked.

13. My clearest memories of Andy are from the time he came home to live with us as an adult after getting out of jail. I was a senior in high school at the time. Andy showed up, and our apartment was too small. So we started looking for a house, and my mom was able to qualify for Section 8 housing, and we found a house over on Ingram Road. It was a 4-bedroom house, and my mom, my brother, my sister, and Brittany were living there.

14. My mom was excited when Andy was coming home from prison. She went to the Thrift Store and bought him some clothes and stock-piled the fridge. Andy seemed to like he wanted to take care of my mom–he would clean, do the dishes, take care of things around the house. Andy wanted to go to school to become a ~~paramedic~~ medical assistant, and he started classes, but when they found out about his record, they told him there was no way he would be able to work in a hospital, so he quit. Andy started working for Blockbuster Video. He would always do special nice things for my mom. He would call my mom from work, and insist on talking to her, then he would ask her what kind of pizza she wanted, and bring it back to her. He would also always let my mother go to Blockbusters and browse around the store for movies she wanted, and then he would bring them home for her. He was allowed to bring two movies home every time he worked.

15. My brother and I got to be very close during that period of time. We went out together a lot, we had many of the same friends, and we had a lot of fun. My brother was always very protective of me. I remember one night, close to my graduation time, I was having a party and I got drunk and got into a huge fight with a girl who showed up at my party. It was a physical fight, and I came out of it bloody and bruised. Andy came to defend me.

16. After a while, Andy got a job as a DJ with a friend. It was their own little business, and Andy had his equipment in his room, which was over a garage. Andy would play his music there, and dance around. He was goofy and dorky, silly and funny like me, but so much fun. That's one reason it's hard to imagine him in prison, he's just not your typcial tough guy, he's always kidding around. Once his business picked up, he moved into an apartment with his friend, Rudy, who he was in business with. I was dating Rudy at the time, so we spent a lot of time together.

17. The summer after I graduated from high school, my mother decided to quit the job that she had had for years with the San Antonio Housing Authority, and go take care of her parents, my maternal grandparents, in Arizona. I went to live with my sister, and Andy was living with Rudy. Once business began to slow down for them, Andy and Rudy moved in with Rudy's grandparents, where they shared a big room and kept their DJ equipment. He was dating a good friend of mine at the time whose name was Liz Hewitt.

18. A few weeks after my mother left, Andy, Rudy, and I were sitting around talking about how much we missed my mom, and we decided to pool our money and drive out there. We had about $300, and we took off. There was a big issue when I got there because I was dating Rudy, and they wanted me to sleep in a room with my mother and grandmother and kept cautioning me about sneaking out. We had a really good time there, it was like a vacation for my mom, because she got to go out. Before we got there, my grandparents insisted that she stay home and not go out, because it was a long drive to go anywhere, and they didn't want my mother going out, getting drunk, and driving home. We went to the Grand Canyon, we went to Indian villages, we went shopping, we went out to the bars. One night, we were driving back and my mom was drunk and was all over the road, and we got pulled over. My mom stopped the car across the center median, and insisted that she had already pulled over when the police told her to get her car out of the road. She was really drunk, and they were warning her about getting belligerent, and Andy got out of the car and intervened, he talked to the officers and worked things out. He explained that we were visiting from out of town, and told them that Rudy would drive, because he had a license and wasn't drunk, and the cops made Rudy do some road-side tests, then they let us go.

19. My grandparents were mad about the whole thing, mad that my mother had been out drinking and driving, and blaming us for getting her into that situation. They were also upset because of all of the chaos of having 3 teenagers in the house. We left because of the problems with them, and my mother was very angry with them for kicking us out, and left a few days later.

20. My brother went from working as a DJ to working for Joey's Records, which is a local record company that helps musicians get a start. He was driving for them, running errands, and helping bands set up to play. He wanted to work his way up to doing more interesting, musical parts of the business.

21. Andy was also dating a good friend of mine, whose name was Liz Hewitt. She was from a really nice family, and they were living in an apartment behind their house. When my mom came back to San Antonio, I immediately moved back in with her, and Andy was there off and on. I was seeing Andy and Liz a lot, because I was young and going out a lot, and Andy was into the night life with his night jobs.

22. A few months after my mom came home from Arizona, she started having bad headaches intermittently. She would go to the hospital, but the doctors were telling her it was related to menopause, which was crazy because my mom had had a hysterectomy. They didn't figure out the problem, and the headaches got worse and worse. My sister was pregnant with her second child, Colton, and my mom managed to get to the hospital, but she was very sick, and collapsed. The doctors sent her home with medication that was so strong that she could barely move, even getting to the bathroom was a problem. I was beside myself, and called Andy, and we basically kept watch over her for several days. Nine days later, she was rushed to the hospital with an aneurism that exploded in her brain.

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23. We went to visit her at the hospital, and the doctors expected her to die. We were all crying, but Andy took it by far the hardest. He was crying and crying over her, I think he felt like he had screwed up, and he wouldn't be able to make it up to my mom. Liz was crying because she couldn't keep him together. In the end, the doctors gave us a choice: to let her go, or to try surgery, which was likely to leave her living like a vegetable. Andy was very much opposed to the surgery. My sister and I wanted to give it a chance. We eventually talked Andy into it–I think Liz was the one who got him to agree. Surgery was performed, and my mother lost 60% of her brain functioning. She never talked again, and needed 24-hour care. The first few days after she had surgery, my mother went through terrible withdrawals in the hospital, I think it was from not smoking. She was sweating until she was drenched, and shaking, it was terrible.

24. My mother's life was miserable after that, and I think that my brother Andy was right. We should have let her go then, because even though she lived for another 5 ½ years, her life was miserable. I rarely went to see her, because it was so hard for me to see my mother that way.

25. Andy had been drinking and smoking pot socially before my mom got sick, but he went off the deep end after. He was getting high and drunk and showing up at the hospital completely loaded. [redacted]. He was getting high and drunk every day, and was beginning to get into harder drugs. He went on a binge after that, and I remember Liz telling me that she didn't know what to do because all Andy wanted to do was stay drunk and high all the time.

26. That period of time was very difficult for me too. I was not working, and had to stay with my sister and her husband until I could get on my feet. I used to get up in the morning and go over to Andy and Liz's, and then stay there until evening time when Andy went to work. I had started dating my husband Paul at that point, so I would often go over to the Pizza Hut where he worked and wait for him to get off and talk to the people there. I was still going out, but less, because I was in a relationship.

27. It was not long after my mom got sick that Andy got arrested. I went to visit him when he was in county jail a few times, but then he got transported. My sister, Lisa, had moved out of town at that point, and Andy was in jail, so I was the only one who could visit my mother and take care of her, and I just couldn't gather what it took to do that. Andy was talking to me, telling me to be strong, to be there for my mother, and trying to help me with it. It's funny, because even though Andy was the one who took it the hardest when it happened, and fell apart the most, [redacted] he was the strong one when it came to being level headed and thinking through what needed to be done for my mother.

28. Andy and I are a lot alike, and we were very close during the time he was out of jail. We had a whole lot of fun together, and he watched out for me and protected me and defended me in all kinds of ways. He's silly and funny, but he's also really sensitive. I love my brother very much, and can't imagine what life is like for him in prison. I

remember when he came back from prison the first time, and I would ask him about it, he would tell me not to ask him about it, that he wouldn't talk about it, and he never did.

29. I did not know that Andy had been convicted of a capital offense until I was contacted by Andy's current attorneys. No lawyer or investigator contacted me before or during the trial. As far as I know, no one in my family was contacted or informed. Had I been contacted, I would have provided whatever information I could about the family. I would have been available to testify if needed.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

11-22-04 San Antonio

Date & Place

Gabriella Espinoza Rodriguez

DR

DECLARATION OF FRED SAUTTER, PH.D.

I, Frederic Sautter, Ph.D., pursuant to the provisions of 28 U.S.C. §1746, declare as follows:

1. I am over 18 years of age. All statements made herein are based upon my personal knowledge, and I am competent to testify hereto:

2. I am a licensed clinical psychologist in Louisiana (#610).

3. I have been provided with summary information about Anibal "Andy" Canales, Jr.

4. I have been told that Andy was exposed from a very early age, *i.e.*, as early as four or five years old, to on-going trauma and neglect, including:

a. Andy spent his first years in Chicago, Illinois, and its environs. He and his family, however, moved around a great deal. While he spent a lot of time in Chicago, the family also moved to Los Angeles, CA, Racine, WI, Laredo, TX, Kenosha, WI. The moves seem to be associated with the mother's multiple, unstable relationships.

b. His mother and father lived together until Andy was about 5 years old. The father never paid child support, and, according to Andy's sister Elizabeth (younger by less than 2 years), the mother would "get back at him" by sending the children to the father during the summer. The children would usually end up at the grandmother's apartment in the Colonias projects in Laredo. (The Colonias constitute some of the most impoverished housing in the United States, often lacking potable water and sewage.)

c. People who knew the mother indicate that she was a very heavy drinker, and spent most of her time in bars. She would start the day with a cold can of beer. Elizabeth recalls that her mother was out a lot, including at night, when the children were growing up. Elizabeth remembers having a lot of freedom because of that, even when the children were quite young.

d. The father is widely reported to be very violent. In addition to beating up his multiple wives, he also beat Andy. Andy's stepmother recalls that the father would beat Andy until he got too tired to continue. Multiple witnesses report that the father was and continues to be explosive and very unpredictable in his violence. In other words, it was impossible for Andy or his mother or stepmothers to know what would precipitate the father's anger.

e. The father also reportedly acts explosively belligerent with and around strangers and people outside the family. For example, it is not uncommon according to

family members, for the father to become very angry at waiters, throwing plates at them, etc. His stepmother reports:

> He beat me in the presence of people. I recall that sometimes he would invite friends over to eat. Once I had cooked and everything was served, he would get mad because of anything. For example, he got mad if the salt was missing or if the rice was flavorless. When he got mad, he would throw everything from the table and he would beat me in front of his friends. He would also get annoyed if people who knew me came to the house. There was a lady who did me the favor of taking me to work. Sometimes the woman would come into the apartment and if Andy's father arrived, he would start asking her if she didn't have responsibilities because I did. Andy's father grabbed me by the hair in front of the woman. Andy's father also did things that were not normal. For example, he would grab clothes from the closet and put them in the bathtub with hot water. He would tell me that he was going to go out and that the clothes better be washed, dried, and ironed in hour or I knew what was going to happen to me.

f. The sister recalls one beating Andy received from his father when he was about 10 years old.

> We got home, and my dad took Andy into a room and closed the door and I heard Andy get beat within an inch of his life. I was terrified. Dad was screaming, and Andy was on the floor, begging my father to stop. I went in and yelled for my dad to stop, and he hit me, and I fell to the floor. My grandmother came in, and I threw a candle at my dad. It was one of those glass candles, and it hit him and broke. Finally, he just left, and my grandmother took care of Andy's wounds.

g. The stepmother reports that Andy's father drank a lot and did all kinds of drugs. She believed the drugs made him less violent. Andy recalls that his father was sober when he was abusive, but that he was "crazy" when he was mad.

h. The mother seems to have attracted men who were violent and who sought to sexually assault her daughter Elizabeth. At least two of the step-father figures molested and otherwise assaulted Elizabeth. According to Elizabeth, Andy became her protector against these assaults. She recalls one time when her first stepfather had her pinned down on the bed and was molesting her. Andy saw him and started yelling, then grabbed Elizabeth and ran down the stairs to a neighbor's house. She would stand outside in the Chicago winter, waiting for him to come back home, so that she would not have to be alone with the stepfathers in the house. We have not at this point been able to determine whether Andy was sexually abused by the stepfathers as well, although Elizabeth reports that he was beaten and otherwise physically abused.

i. When Andy was about 13 years old, his mother sent him to live with his grandmother in Laredo, Texas, but she lived in government housing and could not have Andy in her house, so she sent him to live with Andy's father in Houston. Andy's father resumed the physical abuse, beating him with a belt until the father got tired. His stepmother recalls that one time he was beating Andy for about an hour. She remembers Andy having bruises and wounds all over his body.

j. At 14, Andy decided he had to leave his father's house. He left because he was so upset by the abuse of his stepmother. His father threw a pot of boiling beans on his stepmother, severely burning her back and requiring medical assistance.

k. He went to live with a couple that lived near the father's apartment. According to the stepmother, these people would take in children and make them steal in stores. After a while, the father and stepmother lost all contact with him. According to the stepmother, Andy's father never did anything to look for his son.

l. Andy reportedly has an early and heavy use of alcohol (started at about 8 or 9 years old) and drugs (started in his early teens), including cocaine and heroin. He considers himself an alcoholic. He reports that he started drinking at 8-9 years old in Chicago because the older kids would give them alcohol. Andy reports that in High School he would get high with a group of guys before school started and that he would bring a flask with vodka in it to school with him. He said that he would drink before school and throughout the school day.

m. Andy is apparently a very tall man – about 6'5" – and he was always tall for his age. At a relatively young age, approximately 8 or 9 years old, Andy became involved with the Latin Kings, the predominant gang in his neighborhood of Humboldt Park. He was a lookout for the other gang members. Elizabeth describes where they lived as "gang central."

n. It seems that Andy unsuccessfully tried to maintain his Latin King affiliation after he left Chicago. The gangs in the places he moved to were not interested in him and it seems the Latin Kings were not much of a presence. When he was incarcerated as an adult, it appears he sought out membership in the Texas Syndicate. Ultimately, he was rebuffed because the TS will not accept members who have been members of other gangs. He says he subsequently became a member of the Texas Mafia.

5. Based on the summary information set forth above, I believe Andy has been exposed to significant trauma and neglect, particularly early in his life.

6. I also believe that one of the ways Andy may have adapted to the trauma and neglect was through drug and alcohol use. Drugs and alcohol are very common ways for traumatized people to try to cope with the aftereffects of trauma. Over 70% of people diagnosed with Post-Traumatic Stress Disorder have problems with alcohol and drug addiction. The drugs and alcohol provide a way to avoid the painful and frightening memories.

7. I also believe that one of the ways Andy may have adapted to the trauma and neglect was by seeking out and joining gangs, whether as a child or as an adult. Individuals who survive trauma can decrease the impact of psychological trauma by creating active social support networks. It appears that the primary social support networks available to Andy were gangs. While these are obviously very dysfunctional support networks, they may well have been able to meet Andy's urgent need for social support and to avoid abuse and abandonment.

8. Gang membership may also have given Andy a way to deal with the hyperarousal that often develops in traumatized individuals. As a result of such early and chronic exposure to unpredictable violence, Andy likely does not have the baseline assumption that most people share about what situations are safe. As a result, he perceives the world as being very dangerous – a perception likely intensified by the very real dangers of prison. This too would make gang membership attractive, as it could give him a sense of trying to get a handle on the violence he always anticipates.

9. For both of these reasons, the threat of having his gang association taken away from him would likely have been devastating and terrifying to Andy. In his mind, it is possible that he would just as soon die than risk losing this connection.

10. Based on the information I have been provided, I believe there are strong indications of mental health concerns that should be – and apparently have never been – further explored. It is imperative that I administer him a trauma and PTSD assessment, and that I assess other symptoms of psychiatric disorder. Having the opportunity to review family interviews and medical and social history documents and to meet Mr. Canales to perform a comprehensive psychological evaluation would enable me to reach an opinion to a reasonable degree of psychological certainty on the effect of the trauma and neglect Mr. Canales appears to have survived.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

11-14-04 New Orleans, LA
Date and Place

Frederic Sautter, Ph.D.

IN THE
THE 5TH JUDICIAL DISTRICT COURT
OF BOWIE COUNTY, TEXAS

EX PARTE §
§ No. 99F0506-005-B
ANIBAL CANALES, JR. §
§

EXHIBIT VOLUME III
(Filed Under Seal)

THIS IS A CAPITAL CASE

Meredith Martin Rountree
Law Offices of Owen & Rountree, L.L.P.
Post Office Box 40428
Austin, Texas 78704
TEL (512) 804-2661
FAX (512) 804-2685

Morris H. Moon
Texas Defender Service
412 Main Street, Suite 1150
Houston, Texas 77002
TEL (713) 222-7788
FAX (713) 222-0260

Pro Bono Counsel

Scanned Mar 17, 2009 *CCA Scanning Cover Sheet*

CaseNumber: WR-54,789-02
EventDate: 10/17/2007
Style 1: Canales, Anibal Jr.
Style 2:
Event code: ORDER FILED

EventID: 2307150
Applicant first name: Anibal
Applicant last name: Canales
Offense: 19.03
Offense code: Capital Murder
Trial court case number: 99F0506-005-B
Trial court name: 5th District Court
Trial court number: 320190005
County: Bowie
Trial court ID: 1168
Event map code: GENERIC
Event description: Art. 11.071 - Application for Counsel
Event description code: 11.071
Remarks: BRIEFS DUE IN 60 DAYS FROM APPLICANT AND STATE--DUE 12/16/07

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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-54,789-02

EX PARTE ANIBAL CANALES

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE
NO. 99-F-506-5 IN THE 5TH DISTRICT COURT
BOWIE COUNTY

Per Curiam.

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071 § 5.

In November 2000, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted pursuant to Code of Criminal Procedure article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Canales v. State*, 98 S.W.3d 690 (Tex. Crim. App. 2003). The Court denied applicant's initial post-conviction application for writ

of habeas corpus. *Ex parte Canales*, No. WR-54,789-01 (Tex. Crim. App. March 12, 2003)(not designated for publication).

On June 29, 2007, this Court received the instant post-conviction application for writ of habeas corpus in which applicant has raised thirteen allegations. In one allegation, applicant claims that his trial counsel wholly failed to discharge their constitutional duty to him when they conducted no investigation into applicant's life and, therefore, failed to uncover powerful mitigating evidence. Applicant then sets out what evidence counsel should have uncovered had they properly investigated. Applicant asserts that *Wiggins v. Smith*, 539 U.S.510, 527 (2003), provides a new legal basis for the claim and, thus, the claim should not be barred by Article 11.071 § 5. However, before determining whether any of the allegations meet the requirements of Article 11.071 § 5, this Court has determined that both parties should brief the following issues:

> (1) Is *Wiggins v. Smith*, 539 U.S.510, 527 (2003), new law or such an extension of old law that this Court should hold that it meets the dictates of Article 11.071 § 5?
>
> (2) If *Wiggins* is new law or such an extension of old law that it should meet the dictates of Article 11.071 § 5, under what standard should a court judge the effectiveness of counsel's actions undertaken before the decision in *Wiggins* was announced?

Briefs from both applicant and the State are due in this Court within 60 days of the date of this order. No motions for extension of time to file will be entertained.

IT IS SO ORDERED THIS THE 17TH DAY OF OCTOBER, 2007.

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CCA Scanning Cover Sheet

CaseNumber: WR-54,789-02
EventDate: 12/17/2007
Style 1: Canales, Anibal Jr.
Style 2:
Event code: MISC DOCUMENT RECD

EventID: 2314508
Applicant first name: Anibal
Applicant last name: Canales
Offense: 19.03
Offense code: Capital Murder
Trial court case number: 99F0506-005-B
Trial court name: 5th District Court
Trial court number: 320190005
County: Bowie
Trial court ID: 1168
Event map code: GENERIC
Event description:
Event description code:
Remarks: SUPPLEMENTAL BRIEFING REGARDING THE APPLICATION OF 11.071, SEC. 5 TO MR. CANALES' CLAIM PURSUANT TO WIGGINS V.

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APPLICANT ANIBAL CANALES APPLICATION NO. 54,789-02

SUBSEQUENT 11.071 APPLICATION
FOR WRIT OF HABEAS CORPUS XXX

DISMISS APPLICATION FOR WRIT OF HABEAS CORPUS WITH WRITTEN ORDER AS AN ABUSE OF THE WRIT.

Cathleen Cochran 2/13/08

JUDGE DATE

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

EX PARTE	§	
	§	No. WR-54,789-02
	§	
ANIBAL CANALES, JR.	§	

SUPPLEMENTAL BRIEFING REGARDING THE APPLICATION OF 11.071 §5 TO MR. CANALES' CLAIM PURSUANT TO *WIGGINS V. SMITH*, 539 U.S. 510 (2003)

THIS IS A CAPITAL CASE

Mr. Canales was convicted of capital murder in the 5th Judicial District Court of Bowie County, Texas. This Court affirmed his conviction and sentence on January 15, 2003, *Canales v. State*, 98 S.W.3d 690 (Tex. Crim. App. 2003), and denied his initial application for writ of habeas corpus on March 12, 2003. *Ex parte Canales*, No. 54,789-01 (Tex. Crim. App. 2003). On December 1, 2003, the United States Supreme Court denied *certiorari* review of Mr. Canales' direct appeal. *Canales v. Texas*, 540 U.S. 1051 (2003). Mr. Canales petitioned for habeas corpus relief in the federal district court for the Eastern District of Texas, raising numerous claims, some of which had not been available to present to the state courts during his initial habeas proceedings. Because Mr. Canales filed a mixed petition—one raising both exhausted and unexhausted claims—the federal court stayed and held federal proceedings in abeyance to allow this Court the first opportunity to rule on Mr. Canales' previously unavailable claims.

Mr. Canales filed a subsequent application pursuant to Tex. Code. Crim. App. 11.071 §5 in May of 2007. On October 17, 2007, this Court ordered further briefing regarding the application of 11.071 §5 to Mr. Canales' *Wiggins* claim. Specifically, this Court ordered both parties to brief two questions:

> Question 1: Is *Wiggins v. Smith*, 539 U.S.510, 527 (2003), new law or such an extension of old law that this Court should hold that it meets the dictates of Article 11.071 § 5?
>
> Question 2: If *Wiggins* is new law or such an extension of old law that it should meet the dictates of Article 11.071 § 5, under what standard should a court judge the effectiveness of counsel's actions undertaken before the decision in *Wiggins* was announced?

Mr. Canales submits the following briefing and respectfully requests that this Court authorize his subsequent application and remand it to the district court for further factual development.

Question 1: Is *Wiggins v. Smith*, 539 U.S.510, 527 (2003), new law or such an extension of old law that this Court should hold that it meets the dictates of Article 11.071 § 5?

A. Texas's Prohibition on Abuse of the Writ

By statute, Texas death-sentenced prisoners are permitted to file successive petitions for writ of habeas corpus only in certain narrow circumstances. These circumstances are set out in 11.071 §5 of the Texas Code of Criminal Procedure as follows:

> Tex. Code Crim. Proc. art 11.071§5(a) prohibits the consideration of a successive application unless the applicant can establish one of the following showings:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror would have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury [at punishment.]

Tex. Code of Crim. Proc. 11.071 §5(a)(1).

Subsection (d) further defines when a legal claim is considered unavailable for purposes of authorizing a subsequent application:

> For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

Tex. Code of Crim. Proc. 11.071 §5(d).

B. This Court's Abuse of the Writ Jurisprudence

Article 11.071 § 5 of the Habeas Corpus Reform Act of 1995 essentially codified this Court's then-existing "abuse of the writ" doctrine. *See Ex parte Davis*, 947 S.W.2d 216, 226 (Tex. Crim App. 1996) (McCormick, Presiding Judge, concurring) ("The successive writ provisions of Article 11.071, Section 5(a), for the most part are merely a legislative codification of the judicially created "abuse of the writ doctrine."). This jurisprudence limited death row prisoners' ability to present subsequent applications for writs of habeas corpus.

Apart from cases involving mental retardation or chronological age that mandated categorical exclusion from the death penalty, this Court has had few opportunities to determine the scope of the legal unavailability prong of 11.071 §5. Because the

parameters of what constitutes a previously unavailable legal claim are a threshold issue to deciding whether Mr. Canales may proceed on his *Wiggins* claim, this Court should take this opportunity to resolve this novel question. This Court's *Penry* jurisprudence provides some guidance, but also makes clear that important gaps still remain in formulating a comprehensive, coherent Section 5 jurisprudence.

1. Penry's Contribution to this Court's Section 5 Jurisprudence

After the Supreme Court decided *Penry v. Lynaugh*, 492 U.S. 302 (1989), this Court permitted death-sentenced prisoners to file successive applications. The Court drew on its "right not recognized" rule that excused a death-sentenced prisoner for not raising a federal constitutional claim at trial, on appeal, or in a previous application for post-conviction relief if it would have been "futile" to assert that claim under the CCA's then-existing interpretations of federal law. *Black v. State*, 816 S.W.2d 350, 368 (Tex. Crim. App. 1991) (Campbell, J., concurring); *see also, e.g., Selvage v. Collins*, 816 S.W.2d 390, 392 (Tex. Crim. App. 1991) (this Court's decision in *Penry I* constituted a "right not previously recognized" in Texas). This "right not recognized" rule represented Texas's longstanding effort to accommodate the interests of finality and efficient litigation while meaningfully enforcing the protections of the federal constitution.

Indeed, in the January 2007 oral argument before the Supreme Court in *Smith v. Texas*, No. 05-11304, 2007 WL 187722, the State of Texas acknowledged that *Penry I* was a previously unavailable legal basis:

> MR. CRUZ: Let me suggest it's not an ambivalent use [of Texas' procedural rules], but rather what the Court of Criminal Appeals has held, in the *Black* case it held that *Penry I* was so novel that the State courts would excuse a failure to preserve for purposes of procedural bar. So in this regard the State court is more forgiving to defendant than the Federal courts are.

Transcript of Oral Argument, *Smith v. Texas,* No. 05-11304, 2007 WL 187722, at *32 (Jan. 17, 2007).

Whether subsequent decisions in the *Penry* line of cases constituted a previously unavailable legal basis is a thornier question. In *Ex parte Hood*, 211 S.W.3d (Tex. Crim. App. 2007), for example, this Court considered a subsequent application raising a claim based on the then-newly decided cases of *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Smith v. Texas*, 543 U.S. 37 (2004). Hood argued that *Tennard* and *Smith* repudiated the reasoning of the Fifth Circuit and this Court regarding the threshold requirement of constitutional relevance in *Penry* cases and thus constituted a new legal basis for allowing his third successor application. *Id.* at 772. In parsing Hood's argument, this Court noted that, although his claim was grounded ultimately in *Penry I*, it also was grounded in *Penry II* and *Smith II* because it involved not only the adequacy of the special issues but also the acceptability of a submitted nullification instruction. *Id.* at 775-76. Further, Hood had previously filed a successive petition after *Penry II* but had failed to raise a claim based on *Penry II.*

The majority of the Court found that *Smith II* **was** a legal basis previously available to Hood because the earlier *Penry II* had disapproved of any scheme that would require the jury to nullify one of its special issue decisions in order to return a true verdict. *Id.* at 778. Thus, the Supreme Court's decision in *Smith* served merely to extend and clarify the existing standards of *Penry II* and thus did not provide a previously unavailable legal basis for purposes of 11.071 §5.

The Court nonetheless left unresolved whether *Penry II* constituted a previously unavailable legal basis. The majority of this Court concluded that "*Penry I* did not

specifically address the acceptability of a nullification instruction, so the legal basis for challenging that type of instruction was not 'recognized' in *Penry I*." *Id.* at 776. This Court noted that "[t]he more difficult question, however, is whether that legal basis could have been reasonably formulated from *Penry I* or from other caselaw from the relevant jurisdictions." *Id.* The Court ultimately declined to answer that question since Hood had previously raised a *Penry* claim which had been rejected and thus his case could be examined through the Court's doctrine of "unavailability by exhaustion."

Although this Court has never clearly defined the parameters of 11.071 §5(a)(1)'s provision regarding a previously unavailable legal basis, several important principles can be derived from the Court's *Penry* analysis. First, a previously unavailable legal basis for purposes of 11.071 §5 is distinct from the federal habeas analysis of available legal bases for relief. Therefore, state court litigants could return to this Court to present claims arising under *Penry I* where as federal habeas petitioners they may have been procedurally barred.

Second, a clarification of a legal standard, even within an established body of law, can give rise to a previously unrecognized legal basis. Therefore, this Court held that *Penry II*, which clarified how *Penry I* error could (or could not) be rectified, was not "recognized" by *Penry I* because *Penry I* did not specifically address nullification instructions. Even though the underlying constitutional violation – the failure to allow a reasoned moral response to mitigating evidence – was the same for both *Penry I* and *Penry II*, because *Penry II* clarified the kind of instruction required to prevent *Penry I* error, it constituted a new legal basis for a claim. Thus, whether a legal basis is

previously unavailable so as to allow the filing of a subsequent application is independent of whether a subsidiary or related claim could have been previously raised.

This jurisprudence is directly relevant to the situation presented here, where the underlying claim for relief – that the Sixth Amendment right to counsel was violated by counsel's ineffective performance – has been substantially modified and clarified by a recent Supreme Court case. In other words, *Wiggins v. Smith* is analogous to *Penry II* insofar as *Wiggins* clarified and corrected how Sixth Amendment claims of ineffective counsel are to be evaluated, just as *Penry II* clarified and corrected how *Penry I* error is to be addressed. *Wiggins'* modification was sufficiently profound that, as set forth below, the legal basis for Mr. Canales's claim of ineffectiveness of counsel could not have been reasonably formulated from prior caselaw, and therefore satisfies Section 5.

B. Mr. Canales's Wiggins claim is based on law not in existence nor reasonably formulated at the time he filed his first habeas petition.

Certainly, applicants have long raised claims of ineffective assistance of counsel, citing the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), which set for the dual requirements of deficient performance and prejudice before an applicant could be granted relief. While this two-pronged standard has remained the same, the deficient performance component of the test was so transformed by *Wiggins* as to make this claim previously legally unavailable.

At the heart of this transformation is the role of American Bar Association guidelines for the performance of counsel. Prior to the Supreme Court's decision in *Strickland v. Washington*, the usefulness of ABA guidelines as a checklist had been disputed and particularly strenuously advocated by the then-Chief Judge of the District of Columbia Circuit. *See United States v. Decoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973),

rev. en banc, 624 F.2d 196 (D.C. Cir. 1976) *and United States v. Decoster*, 624 F.2d 196, 276 (Bazelon, J. dissenting). The Supreme Court put an end to this debate with *Strickland* by specifically rejecting any kind of checklist: "Prevailing norms of practices as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable, **but they are only guides**." 466 U.S. at 688 (emphasis added). Further, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. *Accord Chandler v. United States*, 218 F.3d 1305, 1317 (11th Cir. 2000) ("No absolute rules dictate what is reasonable performance for lawyers.").

Two decades later in *Wiggins v. Smith*, the Supreme Court changed course and explicitly incorporated the ABA Guidelines into its Sixth Amendment analysis and adopted objective benchmarks to evaluate counsel's performance.[1] Not only did it drop *Strickland*'s caveat that the guidelines are "only guides," 539 U.S. at 524, but also it relied upon specific guidelines to identify particular deficiencies.

> The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover **all reasonably available** mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel

[1] The Supreme Court cited the important of the ABA Guidelines in its earlier case *Williams v. Taylor*, 529 U.S. 362 (2000). Importantly, however, with respect to his substantive claim of ineffective assistance of counsel, *Williams* was granted *certiorari* on whether the lower court's adjudication of **prejudice** was correct. The court below had "assumed, without deciding, that the performance of trial counsel fell below an objective standard of reasonableness." *Id.* at 375. Reflecting the Court's focus on prejudice rather than performance, the State of Virginia "barely disputed ...in its brief to [the Supreme] Court" that counsel's performance was deficient. *Id.* at 395. It is only in *Wiggins* that the Supreme Court turned its attention to the question of how to assess performance and specifically relied upon the ABA Guidelines. Where *Williams* cited the ABA guidelines only once for the generic proposition that counsel must conduct an adequate investigation, *Wiggins* cited ABA guidelines six times and to far more targeted effect.

> abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. *Cf. id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, **family and social history**, prior adult and juvenile correctional experience, and religious and cultural influences (emphasis added)); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1982) ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .... Investigation is essential to fulfillment of these functions").

Id. at 524-25 (emphasis in original).

Therefore in *Wiggins* we see two significant legal transitions. First, the Supreme Court cited the ABA guidelines as representing the "well-defined norms" of attorney performance rather than simply "guides" to identifying norms. Second, it also plainly adopted the topical checklist approach ("noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, **family and social history**, prior adult and juvenile correctional experience, and religious and cultural influences") it had rejected in *Strickland.*

The magnitude of this change was captured in Justice Kennedy's dissent in *Rompilla v. Beard*, 545 U.S. 374 (2005), joined by Justices Rehnquist, Scalia, and Thomas, complaining that the Court:

> proceeds to adopt a rigid, per se obligation that binds counsel in every case and finds little support in our precedents. Indeed, *Strickland*, the case the Court purports to apply, is directly to the contrary: 'Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules.' (internal citations omitted).

Id. at 404. *See also Wiggins v. Smith,* 539 U.S. 510 (2003) (Scalia, J, dissenting).

Moreover, courts had regularly and routinely rejected claims similar to Mr. Canales' prior to *Wiggins*. This Court, for example, had long held that specific guidelines are not appropriate in analyzing an ineffectiveness claim:

> With respect to determining ineffectiveness, the general standard established in *Strickland* differs little or not at all from this Court's standard, which in turn is based on Fifth Circuit precedents.
> ...
> The Supreme Court in *Strickland* noted:
>
> > As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance ... When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.
> >
> > More specific **guidelines** are not appropriate ... The proper measure of attorney performance remains simply reasonableness under prevailing professional norms ...

Hernandez v. State 726 S.W.2d 53, 55 (Tex. Crim. App. 1986) (emphasis added).

A recent Court of Criminal Appeals case illustrates that these differences are differences in kind, rather than in degree. In *Ex parte Gonzalez*, 204 S.W.3d 391 (Tex. Crim. App. 2006), Judge Cochran's concurrence adopts a checklist approach. "Like a doctor," she wrote, "defense counsel must be armed with a comprehensive check-list of possibilities, and forcefully inquire about each topic." *Id.* at 400-01. She then provided a specific list of possible topics. *Id.* By contrast, Presiding Judge Keller in dissent hewed to a pre-*Wiggins* approach to ineffective assistance of counsel claims. Instead of seeing counsel as an active investigator with an agenda, Presiding Judge Keller defined counsel's role, at least in the 1990s, as reactive, relying on cases finding "counsel is *not* required to inquire into a subject without some sort of indication that the subject might be

an issue in the case." *Id.* at 402 (emphasis in original). In so doing, Presiding Judge Keller implicitly rejected any kind of minimal benchmarks for assessing capital counsel's duties.

The contrast between these two opinions captures the ways in which *Wiggins* fundamentally transformed claims of ineffective assistance of counsel. First, by adopting the ABA Guidelines as authoritative, *Wiggins* sets out an objective, standardized way to assess counsel's performance, and consistent with that analysis, requires counsel to take a **proactive** rather than **reactive** role.

Question 2: If *Wiggins* is new law or such an extension of old law that it should meet the dictates of Article 11.071 § 5, under what standard should a court judge the effectiveness of counsel's actions undertaken before the decision in *Wiggins* was announced

A. Application of 11.071 §5 is a distinct inquiry from Wiggins' merits analysis

Whether a claim meets an exception to the successor bar is an independent and distinct question from whether the claim is meritorious. Thus, whether Mr. Canales' claim meets 11.071 §5(a)'s previous unavailability standard is largely irrelevant to the application of the law of *Wiggins* to the merits of the claim itself. This Court has recognized several instances where a change in the application of federal constitutional principles, although not "new" for federal purposes, nonetheless was considered sufficient to exclude it from being treated as an abuse of the writ. In the context of *Penry* claims, this Court noted that:

> The Supreme Court's finding that *Penry* does not impose a new obligation on the State of Texas, however, does not directly control whether *Penry* claims are novel in light of the right not recognized doctrine approved in *Ex parte Chambers*.

Black v. State, supra, at 371. Therefore, even though the *Penry* jurisprudential underpinnings flowed from well-established cases such as *Lockett*, *Eddings*, and *Jurek* this Court could—and did—refuse to apply state procedural bars to such claims.

In *Black*, this Court also highlighted its treatment of claims involving the necessity of warnings to capital defendants during psychiatric evaluations:

> [T]he United States Court of Appeals for the Fifth Circuit held that the decision in *Estelle v. Smith* "did not establish a new principle of federal constitutional law because that decision merely applied already fixed principles to a new factual situation." The circuit court viewed *Smith* as a logical extension of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), and its related line of cases. *Battie v. Estelle*, 655 F.2d 692, 699 (5th Cir.1981). In contrast, in his concurrence in *Fields v. State*, 627 S.W.2d 714 (Tex.Cr.App.1982), Presiding Judge McCormick recognized the significant impact of the decision in Smith on Texas law:
>
> > Both holdings in *Estelle v. Smith* changed the law in Texas. This Court had for years rejected claims on these bases. Never before had it been held a court-appointed mental health expert must warn a defendant of his right to remain silent and that the evidence adduced in the psychiatric interview could be used against him. Never before had it been held that the defendant's attorney could receive notice before a psychiatric interview on the dangerousness issue could be held. In fact, in numerous cases this Court rejected the contentions that the proceedings used in *Estelle [v. Smith]* violated a defendant's rights. 627 S.W.2d at 723 (McCormick, J., concurring).

Id. at 371 (Campbell, J. concurring).

Despite the clear acknowledgment by the federal courts that *Estelle v. Smith* did not establish a "new principle of federal constitutional law" this Court did not apply a state procedural bar to those claims.

Wiggins, like *Estelle v. Smith* and *Penry*, provided a previously unavailable legal basis and thus presents no bar to a subsequent application. Resolution of that state law inquiry, however, simply has no bearing on the federal constitutional inquiry of whether

the conduct of Mr. Canales' trial attorneys complied with the mandates of the Sixth Amendment.

B. Trial counsels' representation should be evaluated with reference to the ABA Guidelines as explained in Wiggins

As discussed above and as *Wiggins* and *Rompilla* make clear, the Court should use the ABA's guidelines to judge the performance of trial counsel. *Wiggins* did not alter the fundamental content of the federal constitutional right to effective assistance of counsel, but rather transformed how such claims were to be evaluated. Therefore, because the new legal development is the reviewing court's new conceptual model for evaluating performance, *i.e.*, a checklist model rather than a more subjective and global inquiry, even the 2003 ABA Guidelines are relevant as all they do is codify longstanding principles of death penalty defense representation. *See Rompilla*, 545 U.S. 387 n.7 (citing 1989 ABA guidelines for 1988 trial); *Dickerson v. Bagley*, 453 F.3d 690, 693-94 (6th Cir. 2006) (applying 2003 ABA guidelines to pre-2003 case as new guidelines "simply explain [1989 Guidelines] in greater detail."); *see also Anderson v. Sirmons*, 476 F.3d 1131, 1142 (10th Cir. 2007) (citing 2003 Guidelines in pre-2003 case); *Shelton v. Carroll*, 464 F.3d 423, 439 n.8 (3rd Cir. 2006) (same); *Canaan v. McBride*, 395 F.3d 376, 384-85 (7th Cir. 2005) (same).

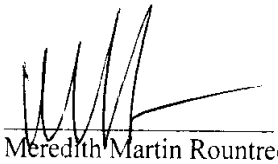
Once this Court determines that *Wiggins* and *Rompilla*, like *Estelle* and *Penry I*, comprise a previously unavailable legal basis for a subsequent application, this Court should remand the case to the trial court for a merits determination of the federal constitutional claim in accordance with the standards announced by the Supreme Court in *Wiggins* and *Rompilla*.

WHEREFORE, petitioner ANIBAL CANALES, JR. prays that this Court:

1. Authorize the trial court to consider the claims raised in his successive application, and instruct the trial court to conduct an evidentiary hearing for the purpose of examining the merits of his claims;

2. Grant any other relief that law or justice may require.

Respectfully submitted,



Meredith Martin Rountree
Bar No. 24033544
Law Offices of Rountree & Owen, L.L.P.
Post Office Box 40428
Austin, Texas 78704
TEL (512) 804-2661
FAX (512) 804-2685

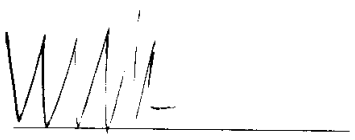
Morris H. Moon
Bar No. 24032750
Texas Defender Service
412 Main, Suite 1150
Houston, Texas 77002
TEL (713) 222-7788
FAX (713) 222-0260

Counsel for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by first class mail on counsel for the State on December 17, 2007 at the following address:

Ms. Melinda Fletcher
P.O. Box 1744
Amarillo, Texas 79105



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COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

February 13, 2008

Presiding Judge
5th Judicial District
Bi-State Justice Bldg.
Texarkana TX 75501

No.: WR-54,789-02
Trial Court No.: 99F0506-005-B
Styled: Canales, Anibal Jr. v. The State of Texas

Dear Judge:

Enclosed herein is an order entered by this Court regarding the above-referenced applicant.

If you should have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Edward Marty

Edward Marty
General Counsel

EJM/bh
cc: Anibal Canales Jr.
C/O MORRIS H. MOON
TEXAS DEFENDER SERVICE
412 MAIN STREET, STE. 1150
Houston, TX 77002

Becky Price
Assistant Director
Records & Classifications
P. O. Box 99
Huntsville, TX 77340

Bowie County
District Clerk
P O Box 248
New Boston, TX 75570-0248

District Attorney
Bowie County
BOBBY LOCKHART
P.O. BOX 3030
Texarkana, TX 75504

Gena Bunn
ASSISTANT ATTORNEY GENERAL
PO BOX 12548
Austin, TX 78711

Melinda Fletcher
Special Prison Prosecution Unit
P.O. BOX 1744
Amarillo, TX 79105

Meredith Rountree
Owen & Rountree
P. O. Box 40428
Austin, TX 78704

Morris Moon
Texas Defender Service
412 Main Street, Ste. 1150
Houston, TX 77002

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

WR-54,789-02

EX PARTE ANIBAL CANALES

ON APPLICATION FOR WRIT OF HABEAS CORPUS
IN CAUSE NO. 99-F-506-5 IN THE 5TH DISTRICT COURT
BOWIE COUNTY

Per Curiam.

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

In November, 2000, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Canales v. State*, 98 S.W.3d 690 (Tex. Crim. App. 2003). This Court denied Applicant's initial post-conviction

application for writ of habeas corpus. *Ex parte Canales*, No. WR-54,789-01 (Tex. Crim. App. March 12, 2003). On June 29, 2007, this Court received the instant post-conviction application for writ of habeas corpus in which applicant raises thirteen allegations challenging the validity of his conviction and the resulting sentence. In an effort to determine if the instant application is barred by Article 11.071, § 5, we ordered both parties to brief the following issues:

(1) Is *Wiggins v. Smith,* 539 U.S. 510, 527 (2003), new law or such an extension of old law that this Court should hold that it meets the dictates of Article 11.071 § 5?

(2) If *Wiggins* is new law or such an extension of old law that it should meet the dictates of Article 11.071 § 5, under what standard should a court judge the effectiveness of counsel's actions undertaken before the decision in *Wiggins* was announced?

We have reviewed the application and the briefs of both parties and find that all of the allegations fail to satisfy the requirements of Article 11.071, § 5(a). Accordingly, the application is dismissed as an abuse of the writ. TEX. CODE CRIM. PROC. Art. 11.071, § 5(c).

IT IS SO ORDERED THIS THE 13TH DAY OF FEBRUARY, 2008.

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