CAPITAL CASE
EXECUTION SCHEDULED FOR APRIL 23, 2025, 6:00PM CST
No. ___

IN THE

Supreme Court of the United States

MOISES SANDOVAL MENDOZA,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

PETITIONER'S APPENDIX

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-70,211-02

EX PARTE MOISES SANDOVAL MENDOZA, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION TO STAY THE EXECUTION IN CAUSE NO. W401-80728-04-HC2 IN THE 401ST JUDICIAL DISTRICT COURT COLLIN COUNTY

***Per curiam*.**

O R D E R

We have before us a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5, and a motion to stay Applicant's execution.[1]

In June 2005, a jury convicted Applicant of the offense of capital murder. *See* TEX. PENAL CODE ANN. § 19.03(a). The jury answered the special issues submitted under

[1] All references to "Articles" in this order refer to the Texas Code of Criminal Procedure unless otherwise specified.

Texas Code of Criminal Procedure Article 37.071 and the trial court, accordingly, set Applicant's punishment at death.

This Court affirmed Applicant's conviction and sentence on direct appeal and denied habeas relief on his initial Article 11.071 writ application. *Mendoza v. State*, No. AP-75,213 (Tex. Crim. App. Nov. 5, 2008) (not designated for publication); *Ex parte Mendoza*, No. WR-70,211-01 (Tex. Crim. App. June 10, 2009) (not designated for publication).

The trial court ultimately scheduled Applicant's execution for April 23, 2025. On April 2, 2025, Applicant filed the instant habeas application in which he raises three claims. Specifically, Applicant asserts that the prosecutor used false testimony at trial (claim 1); his trial counsel was ineffective for failing to adequately investigate the officer's false testimony (claim 2); and his initial habeas counsel was ineffective (claim 3).

We have reviewed the application and find that Applicant has failed to show that he satisfies the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised. Art. 11.071 § 5(c). We deny Applicant's motion to stay his execution.

IT IS SO ORDERED THIS THE 15th DAY OF APRIL, 2025.

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WR-70,211-02
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IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

Ex parte **MOISES SANDOVAL** **MENDOZA,**	§	
APPLICANT	§	**Writ No. _____** **(Trial – Cause No. 401-80728-04)**
	§	**CAPITAL CASE**

MOTION TO STAY EXECUTION

EXECUTION DATE: April 23, 2025

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** Pending admission pro hac vice*

Attorneys for Applicant

MOTION FOR STAY OF EXECUTION

Moises Sandoval Mendoza, by and through undersigned counsel, respectfully moves this Court to stay his execution, which is scheduled for April 23, 2025. A stay of execution is justified to allow for full and fair consideration of issues presented in his First Subsequent Application for Writ of Habeas Corpus Filed in Accordance with Article 11.071, Section 5, Texas Code of Criminal Procedure ("Subsequent Application").

Mr. Mendoza files this motion to allow for full and fair consideration of his three claims for relief: (1) the prosecution's use of false testimony violated his right to a fair trial; (2) trial counsel's failure to adequately investigate the false testimony violated Mr. Mendoza's Sixth Amendment right to effective assistance of trial counsel; and (3) state habeas counsel's failure to investigate and assert trial counsel's ineffectiveness violated Mr. Mendoza's Sixth and Fourteenth Amendment rights. These three distinct constitutional claims for relief are based on new, previously unavailable legal and factual bases, as set out in the Subsequent Application.

In order to ensure fair consideration of his Subsequent Application without the time pressure of a pending execution date, Mr. Mendoza respectfully requests that the Court issue a stay of execution.

PRAYER FOR RELIEF

For the reasons explained in this Motion and the Subsequent Application, Mr. Mendoza respectfully requests that the Court stay the pending execution to allow the Court to carefully review the claims presented by the Subsequent Application.

Dated: April 2, 2025

Respectfully Submitted,

/s/ Kristin Cope

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** Pro hac vice admission pending*

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CERTIFICATE OF CONFERENCE

I hereby certify to the Court that counsel for Moises Sandoval Mendoza conferred with opposing counsel on April 1, 2025 regarding the relief sought in this Motion and opposing counsel indicated that they are opposed to the relief sought.

/s/ Kristin Cope
Kristin Cope

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Tex. R. App. P. 9.4. The word count of this document is 238 words, not including words not included in the word count limit.

/s/ Kristin Cope
Kristin Cope

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2025, I served a copy of this motion through the Court's electronic filing system on the following:

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IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

Ex parte MOISES SANDOVAL MENDOZA, APPLICANT	**§**	**Writ No. _____**
	§	**(Trial – Cause No. 401-80728-04)**
	§	**CAPITAL CASE**

[PROPOSED] ORDER

I have considered Moises Sandoval Mendoza's Motion to Stay. After reviewing the Motion and all relevant materials, the Court is of the opinion that a stay of the pending execution is necessary to allow the Court to review the claims presented by the Subsequent Application.

SIGNED this ____ day of _____, 2025.

_____
Judge Presiding

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IN THE 401ST DISTRICT COURT
OF COLLIN COUNTY TEXAS
and
IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

Ex parte	§	
MOISES SANDOVAL	§	
MENDOZA,	§	
	§	
APPLICANT	§	**Writ No. _____**
	§	**(Trial – Cause No. 401-80728-04)**
	§	
	§	
	§	**CAPITAL CASE**
	§	

FIRST SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS FILED PURSUANT TO ARTICLE 11.071, § 5 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

EXECUTION DATE: April 23, 2025

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FIRST SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS FILED PURSUANT TO ARTICLE 11.071, § 5 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

Applicant MOISES SANDOVAL MENDOZA seeks relief from his conviction and judgment imposing death in violation of the United States Constitution.

INTRODUCTION

The prosecution's first rebuttal witness at the punishment phase of this death-penalty case offered false testimony. The witness testified that Applicant Moises Sandoval Mendoza attacked another inmate while in jail awaiting trial. That was not true. In sworn affidavits, the inmate, Melvin Johnson, has averred that *he* was the aggressor, and that Mendoza's only role in the fight was to defend himself. There is no real dispute that this false testimony was prejudicial. Defense counsel's strategy before the jury on the future dangerousness special issue was to argue that Mendoza would not be a danger in prison. The witness's false testimony shattered that theory, as the prosecution emphasized to the jury in closing. And we know the fight was material to the jury's verdict because it specifically asked about the fight during its deliberations.

Reviewing this evidence, the U.S. Court of Appeals for the Fifth Circuit held that Mendoza had a substantial constitutional claim. But it ultimately concluded that

a federal court could not adjudicate the claim on the merits because of procedural barriers.

There is no barrier to Mendoza's presentation of his claims in this Court. In fact, at least one of the claims in this application straightforwardly satisfies the requirements in Section 5(a)(1) because it was legally "unavailable" when Mendoza filed his initial state habeas petition.

That claim alleges "specific facts," Tex. Code Crim. Proc. art. 11.071, § 5(a)—corroborated with evidence—that the prosecution offered false testimony in violation of *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). As set out immediately above, that false testimony was material to the jury's verdict. Given the outsized role that Mendoza's alleged propensity for violence in prison played in the punishment phase of the trial and the jury's deliberations, there is a reasonable likelihood that at least one juror would have voted differently but for the critical witness's testimony. And this Court has already recognized that Section 5(a)(1) authorizes a colorable claim under *Chabot* to proceed where, as here, the "applicant filed his initial (and only other) habeas application in the trial court prior to this Court's decision in *Chabot*." *Ex parte Castillo*, 2017 WL 5783355, at *1 (Tex. Crim. App. Nov. 28, 2017) (unpublished); *see Ex parte Chavez*, 371 S.W.3d 200, 205 (Tex. Crim. App. 2012). As in *Castillo*, Mendoza's false testimony claim should be allowed to proceed.

The Court should also authorize Mendoza's claim that his trial counsel was ineffective for failing to investigate the witness's false testimony. For substantially similar reasons, Mendoza has specifically alleged a prima facie case of ineffective assistance—his appointed counsel did not investigate a crucial witness whose testimony undermined their chosen defense strategy. That claim should be authorized under Section 5(a)(1) because its factual basis was previously unavailable. Like Mendoza's trial counsel, his appointed state habeas counsel failed to investigate the claim, so the evidence in support was not developed until Mendoza was appointed effective counsel in federal court. In these circumstances, state habeas counsel's ineffectiveness should not be held against Mendoza to bar his assertion of a colorable constitutional claim.

Finally, this Court should authorize Mendoza to assert a claim that his state habeas counsel was ineffective. No procedural impediment stands in the way of this claim—state habeas counsel could not have asserted her *own* ineffectiveness in Mendoza's first application. The question is whether Mendoza has a right, in these circumstances, to effective assistance of state habeas counsel. He must. Where, as here, state habeas proceedings are a criminal defendant's first meaningful opportunity to raise a federal constitutional claim, the defendant must be afforded an effective lawyer in those proceedings. For instance, if a state required all Confrontation Clause claims to be asserted in state habeas, no one would argue that

it would be constitutionally permissible for the state not to provide counsel in that proceeding. So too here. Because Mendoza's first opportunity to raise trial counsel's ineffectiveness was his state habeas proceeding, he was entitled to an effective lawyer in that proceeding.

STATEMENT OF THE CASE

A. Trial and Sentencing

In 2005, Applicant Moises Mendoza was convicted of capital murder and sentenced to death for the killing of Rachelle Tolleson. The complete factual background is laid out in the Court of Criminal Appeals' ("CCA") opinion, *Mendoza v. State*, 2008 WL 4803471 (Tex. Crim. App. Nov. 5, 2008) (unpublished). The most salient facts are repeated here.

1. *Offense and guilt phase*

On Thursday, March 18, 2004, Pam O'Neil went to her daughter Rachelle Tolleson's home to visit Rachelle and her five-month-old daughter, Avery, in Farmsville, Texas.

> Tolleson was not there. . . . The bedroom was a mess . . . [and] Avery was on the bed . . . O'Neil collected Avery and called her husband, who contacted the police. . . . Farmersville police began interviewing potential witnesses that day. They learned that, on the Friday before her disappearance, Tolleson hosted a party for about fifteen people, including [Mendoza].

Mendoza, 2008 WL 4803471, at *1. Several days later, Tolleson's body was found.

> Six days after Tolleson disappeared, James Powell was hunting for arrowheads . . . [and] came across a body that had been burned and was

> lying face down. Through the use of dental records, the body was eventually identified as Tolleson's.

Id. at *2.

After speaking with several potential witnesses, the police arrested Mendoza.

> Once in custody, [Mendoza] told police that, late Wednesday evening, he had driven by Tolleson's . . . and let himself into the house through the back door without knocking. According to [Mendoza], Tolleson left with him to get a pack of cigarettes. [Mendoza] drove "for a little" and then "for no reason" started to choke Tolleson. Tolleson passed out, and [Mendoza] drove to a field behind his home, where he had sexual intercourse with Tolleson and "choked her again." [Mendoza] then dragged Tolleson out of the truck and into the field, where he choked her until he thought she was dead. To "make sure," he "poked her throat" with a knife. [Mendoza] left Tolleson's body in the field until Monday, after he was first interviewed by police. Scared that Tolleson's body would be found and tied to him, [Mendoza] moved the body to a remote area and burned it, ultimately dragging it to where it was found.

Id.

The State charged Mendoza with capital murder, *id.* at *3, and the trial court appointed Angela Tucker and Juan Sanchez to represent him, Ex. A at ROA.638.[1] The jury found Mendoza guilty of capital murder. *Mendoza*, 2008 WL 4803471, at *1.

[1] This brief uses the following citation conventions: "Ex." denotes exhibits attached to this petition; ECF No. denotes the docket number for documents from the federal habeas proceedings in *Mendoza v. Director, TDCJ-CID*, No. 5:09-cv-00086 (E.D. Tex.); RR#:# denotes the state trial record, volume, and page number; #:SCHR:# denotes the volume of the state court habeas record and page number; #:SHTR:# denotes the volume of the State Habeas Trial Record and page number.

2. *Punishment phase*

To impose a death sentence, the jury had to find two special issues unanimously. First, the jury had to find beyond a reasonable doubt there was a probability that Mendoza "would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § 2(b)(1) (future dangerousness). Second, the jury had to find that there were no "mitigating circumstance[s] . . . to warrant" life imprisonment instead of death. *Id*. § 2(e)(1) (mitigation). If even one of Mendoza's jurors had dissented on a single special issue, Mendoza could not have been sentenced to death. *Id.* § 2(g).

The prosecution's case-in-chief on future dangerousness focused exclusively on Mendoza's conduct outside prison, adducing evidence of Mendoza's past criminal conduct and his misbehavior in school, at home, and among his friends. *See Mendoza*, 2008 WL 4803471, at *5-6. To counter the prosecution's theory, Mendoza's trial counsel pursued a narrative that Mendoza would not be a danger within the confines of prison. On "Special Issue Number 1," defense counsel argued, "you have to remind yourself that you're dealing with that question in the context of prison," where Mendoza would no longer "have access to the culture that he did before," Ex. B at RR25:37-38 ("those walls are not gonna get any thinner, the steel's not gonna get any lighter, the doors aren't going to open up for him").

Defense counsel pursued this narrative through a "focal expert," Dr. Mark Vigen. *See* Ex. C at 4:SCHR:1473. Read charitably, Vigen's theory was that Mendoza would not be a danger in a highly controlled environment where he would "experience[] consequences if his behavior is inimical or antagonistic," and receive "rewards if his behavior is productive." Ex. D at RR24:131-32. Counsel's overall presentation of Vigen, the Fifth Circuit recognized, "present[ed] a close question" as to ineffectiveness. *Mendoza v. Lumpkin*, 81 F.4th 461, 476 (5th Cir. 2023), *cert. denied*, 145 S. Ct. 138 (2024) (mem.). Vigen testified, for instance, that the "traditional" mitigation factors were not present, Ex. D at RR24:156, 186-88, that Mendoza had no moral "compass" or sense of "inner self," *id.* at RR24:117-18, and that he "certainly agree[d]" "that in a free society [Mendoza] is a very dangerous individual," *id.* at RR24:178. But this application is not about counsel's presentation of Vigen as such—although his testimony that Mendoza was a danger in free society and that "the best predictor of whether a person is going to be violent in prison is whether or not he's been violent in prison before," *id.* at RR24:174, placed an even greater focus on counsel's chosen defense strategy that Mendoza would not be a danger in prison.

In response to defense counsel's theory, the prosecution called as its very first rebuttal witness Officer Robert Hinton, who testified that, in jail, "Mendoza approached" another inmate "in an aggressive fashion" and then attacked him. *Id.*

at RR24:230-31. Mendoza, Hinton told the jury, was the "aggressor," and began beating the other inmate, Melvin Johnson, with his fist. *Id.* at RR24:231. Hinton testified that he ordered the men to stop fighting, but "couldn't break it up" until additional officers arrived. *Id.* at RR24:231; *see id.* at RR24:235. And contrary to defense counsel's narrative that the structured environment of prison could control Mendoza, Hinton testified that the fight occurred notwithstanding the fact that Mendoza was a "keep-away-from-all-other inmates" prisoner. *Id.* at RR24:233. Hinton's testimony was the only direct evidence that Mendoza remained a danger while incarcerated.[2]

The fight featured prominently in the State's closing. The prosecution argued that Mendoza remained a "danger" in part because he had already "committed assault." Ex. B at RR25:21; *see id.* at RR25:22 ("best predictor of future behavior is past behavior"). And after defense counsel urged the jury to answer the first special issue by focusing on the "context of prison," *id.* at RR25:38, the prosecution returned to the theme in rebuttal. It argued that the "pattern of violence" had not been broken because "[w]e've got him in the Collin County jail . . . in administrative

[2] The prosecution's rebuttal case was dedicated to Mendoza's conduct in jail. And Hinton's testimony was by far the most significant piece. The other evidence consisted of equivocal testimony by other officers that they found "tin or aluminum" in Mendoza's cell that either could have been a "shank" or "[t]he foil from an orange juice drink," Ex. D at RR24:242-44; that they found a "portion of [a] comb" that "possibly" could be a shank, *id.* at RR24:248-49; and that they found rap lyrics that they believed Mendoza had written, *id.* at RR24:255-62.

segregation in a single cell. And surely to goodness it has to stop there, right? No. Wrong." *Id.* at RR25:44. Relying on Hinton's testimony, the prosecution continued: "You know that he comes out of that rec yard, and he runs right up there as the aggressor toward Melvin Johnson and starts a fight with Melvin Johnson . . . . He charges Melvin Johnson and starts to assault him. And sure, Melvin Johnson decides he's going to defend himself out there from this man's attack." *Id.* at RR25:45.

The jury was paying attention. Before returning its verdict, the jury asked the Court to further define terms in the future dangerousness special issue and for additional information about Mendoza's "criminal acts while in jail," including his "assault on other inmate." *Id.* at RR25:51.

B. Officer Hinton's Testimony Was False

In fact, Hinton's testimony about the jail fight was "false." *See* Ex. E; Ex. F. When Mendoza's federal habeas counsel finally interviewed Johnson in 2016, Johnson swore under oath that he started the fight, not Mendoza:

> As Mr. Mendoza was heading toward the rec yard, my cell[] was rolled. What this means is for some reason, my cell door was opened. This can only happen by a guard opening the door. As soon as the door opened, I figured what the guards wanted and I exited my cell and started a fight with Mr. Mendoza. I was definitely the aggressor. Mr. Mendoza was defending himself, but wasn't fighting back. After a short period of time, guards arrived and broke the fight up. That night I received an extra tray of food which I figured was a bonus for my actions in fighting Mr. Mendoza. Although, no one ever spoke to me about this incident, I am sure that the guards had planned this situation. I was told that there was trial testimony that Mr. Mendoza was in the rec yard when I was allowed to exit my cell to finish mopping the floor

> in the day room and Mr. Mendoza attacked me, this testimony is patently false. I have never been contacted until recently by anyone in regards to the facts of this situation, but had I been so contacted, I would have testified at trial as to what really happened on that occasion which is what I have stated in this affidavit.

Ex. E at 1.

In March 2025, Johnson reaffirmed his previous statements and provided additional detail in a new affidavit. *See* Ex. F. Johnson's second affidavit recounting the incident confirmed that Mendoza did not start the fight:

> [Mendoza and I] were both in the Special Housing Unit (SHU). The SHU has 2 floors with 25 cells on each floor. I was on the first floor and Mendoza was on the second floor. One day, I don't remember the date, I was in my cell when I heard a cell door on the second floor open. I did not know whose cell it was, I just heard it open. A few seconds later, I saw Mendoza walking down the stairs on his way to the rec area. Because his was a high profile case, Mendoza was given rec by himself. As I saw him walking down the stairs, my cell door opened. I was shocked because a guard has to open my door and I was not supposed to be out with Mendoza. When my door opened with Mendoza out, I knew the guards wanted me to jump him, and that's what I did. I rushed out of my cell and attacked Mendoza. He immediately fell to the ground and covered up to protect himself. He never threw a punch.

Id. at 1-2.

Johnson reiterated that "Mendoza did not attack [him]. It was the other way around." *Id.* at 3-4. Further, Johnson explained that the guards opened his cell door just after Mendoza had been let out, and before Mendoza had even made it to the rec yard. This conflicts with Hinton's testimony that he had seen Mendoza enter the rec yard, then re-enter the SHU through a "self-locking door" before attacking Johnson.

Compare Ex. D at 24:RR24:228-31 *with* Ex. F at 2-3. Johnson highlighted that the guards "did not get there as quickly as normal" when responding to the fight, and did not use pepper spray to break up the fight (as was their usual practice). Ex. F at 2. Finally, Johnson confirmed that he was "rewarded" for his actions with an extra tray of food. *Id*. at 3.

This application concerns Hinton's false testimony and appointed counsel's failure to investigate this account.

C. Post-Conviction Proceedings

This case has a long and winding procedural history but two pieces stand out. *First*, Mendoza has not yet had the opportunity to fully litigate the merits of a claim based on Hinton's false testimony. This application represents Mendoza's first such opportunity. And *second*, the reason for that is Mendoza's lawyers in his state proceedings never contacted Johnson. In brief, the history is as follows.

After being sentenced to death, Mendoza appealed his conviction, and the CCA affirmed. *Mendoza*, 2008 WL 4803471, at *1. Lydia Brandt was then appointed as state habeas counsel.

In Texas, state habeas proceedings are criminal defendants' first real opportunity to litigate claims of ineffective assistance of trial counsel ("IATC"). *See Trevino v. Thaler*, 569 U.S. 413, 429 (2013). Brandt raised seven claims on Mendoza's behalf in state habeas, 1:SCHR:4-199, but did not contact Johnson, and

therefore failed to raise any claims related to Hinton's testimony. The trial court recommended denial of relief on all grounds, 4:SCHR:1772-1849, and the CCA adopted those recommendations, *Ex parte Mendoza*, 2009 WL 1617814 (Tex. Crim. App. June 10, 2009) (per curiam) (unpublished).

The Eastern District of Texas appointed Brandt to continue her representation in federal court, ECF No. 3, and Brandt's federal petition raised the same claims that she asserted in state court, Corpus, ECF No. 6. The district court denied Mendoza's petition, ECF No. 64, but later found that Mendoza had made a "substantial showing of the denial of a constitutional right" on four of his claims, and issued certificates of appealability ("COA") on those claims. ECF No. 71.[3]

Mendoza proceeded to the Fifth Circuit. While on appeal, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino*, 569 U.S. 413, which permitted federal habeas petitioners to assert defaulted IATC claims where a petitioner's ineffective state habeas counsel was responsible for the default. In light of those cases, the Fifth Circuit remanded Mendoza's case to the district court to appoint conflict-free federal habeas counsel and "to consider in the first instance"

[3] Those claims were that his trial counsel rendered ineffective assistance by (1) failing to obtain a comprehensive psycho-social history; (2) failing to consider, investigate, and present condition-of-the-mind evidence to negate the mens rea element in the guilt-determination phase of his trial; and (3) failing to adequately investigate and develop crucial mitigating evidence, as well as an additional claim that (4) he was denied his right to individualize sentencing by his trial counsel's failure to present mitigating evidence. ECF No. 71 at 2.

whether Mendoza could "establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims . . . that he may raise, and if so, whether those claims merit relief." *Mendoza v. Stephens*, 783 F.3d 203, 203-04 (5th Cir. 2015) (per curiam).

On remand, Mendoza was appointed new conflict-free federal habeas counsel, who interviewed Johnson, and raised for the first time an IATC claim based on trial counsel's failure to investigate Hinton's false testimony. *See* First Am. Pet. for a Writ of Habeas Corpus, ECF No. 86 at 1-2. The district court ultimately acknowledged that "trial counsel's failure to investigate the alleged incident [between Johnson and Mendoza was] concerning," ECF No. 101 at 23-24, but denied Mendoza's request for an evidentiary hearing or additional discovery, *id.* at 26-27, and ultimately denied relief on both claims, *id.* at 28. As discussed in detail, *infra* at 29-34, Mendoza never had the opportunity to appeal the district court's findings on this claim.

Mendoza moved for a COA in the Fifth Circuit. App. for, and Brief in support of, COA, *Mendoza v. Lumpkin*, No. 12-70035 (5th Cir. Sept. 9, 2020), ECF No. 228. While Mendoza's application for a COA was pending, the Supreme Court decided *Shinn v. Ramirez*, 596 U.S. 366 (2022), which held that "a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." *Id.* at

382. This development meant that Mendoza could not litigate on the merits in federal court his IATC claim based on Hinton's testimony because Johnson's affidavit was not in the state-court record. So Mendoza sought a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), to permit him to return to state court to develop the claim.[4]

In December 2022, the Fifth Circuit concluded (as relevant here) that Mendoza's failure-to-investigate claim based on Hinton's testimony was "substantial" and granted him a COA. Unpub. Order, *Mendoza v. Lumpkin*, No. 12-70035 (5th Cir. Dec. 23, 2022), ECF No. 276 ("COA Order"). In August 2023, the Fifth Circuit resolved all of Mendoza's claims against him and denied his motion for a *Rhines* stay. *Mendoza*, 81 F.4th 461. Importantly, the Fifth Circuit did not review the merits of the federal district court's rejection of Mendoza's failure-to-investigate claim because of the Supreme Court's intervening decision in *Shinn*. Rather, it denied Mendoza's request for a *Rhines* stay because it incorrectly thought Texas courts would deem Mendoza's IATC claim barred under Texas's subsequent-writ-bar. *See id*. at 482 (citing Tex. Code Crim. Proc. art. 11.071, § 5(a)).

[4] In *Rhines*, the Supreme Court held that a district court may stay a mixed habeas petition containing exhausted and unexhausted claims to allow the petitioner to present their unexhausted claims in state court in the first instance, and then to return to federal court for review of the perfected petition. 544 U.S. at 276-79.

Mendoza then filed a petition for a writ of certiorari, which was denied. *Mendoza v. Lumpkin*, 145 S. Ct. 138 (2024) (mem.). Immediately after, the 401st Judicial District Court of Collin County, Texas issued a death warrant setting Mendoza's execution date as April 23, 2025.

AUTHORIZATION STANDARD

Mendoza seeks authorization to file a subsequent application under Texas Code of Criminal Procedure article 11.071, § 5(a)(1). To satisfy this provision, Mendoza must demonstrate that the factual or legal basis for the claim was unavailable at the time his initial application was filed. *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). A claim's legal basis is "unavailable" if, before the first application was filed, the legal basis "was not recognized by or could not have been reasonably formulated from" a Texas or federal appellate decision. Tex. Code Crim. Proc. art. 11.071, § 5(d). The factual basis of a claim is "unavailable" if it was not "ascertainable through the exercise of reasonable diligence on or before" the filing of the initial post-conviction application (here, October 24, 2007). *Id.* § 5(e).

Mendoza must also allege "specific facts," *id*. § 5(a), making out a "prima facie case for relief." *Ex Parte Oranday-Garcia*, 410 S.W.3d 865, 868 (Tex. Crim.

App. 2013).[5] In making this determination, the Court must decide, "from the face of the application itself, whether the application merits further inquiry." *Ex parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005). In other words, Mendoza does not need at this stage to *prove* with evidence that his claims are meritorious. Rather, his application need only "state specific, particularized facts which, if proven true, would entitle him to habeas relief." *Id*.; *see also, e.g.*, *Oranday-Garcia*, 410 S.W.3d at 867 n.6 (quoting *Campbell*, 226 S.W.3d at 421 (holding that Section 5(a)(1) inquiry requires the CCA to ask whether "'the specific facts alleged, if established, would constitute a constitutional violation'")).

This Application sets forth the specific factual allegations that support Mendoza's constitutional claims (backed by corroborating evidence) and then addresses the bases for Section 5(a)(1) authorization. The authorization arguments specific to each claim appear just below the corresponding merits arguments.

CLAIMS FOR RELIEF

I. CLAIM 1: THE PROSECUTION'S USE OF FALSE TESTIMONY VIOLATED MENDOZA'S RIGHT TO A FAIR TRIAL

Mendoza's false testimony claim straightforwardly satisfies Section 5(a)(1). The Fourteenth Amendment forbids the State from relying on false testimony during

[5] *Oranday-Garcia* involved a request to file a subsequent application under Texas Code of Criminal Procedure article 11.07, § 4(a)(1). 410 S.W.3d at 867. Section 4(a)(1) is the "functional equivalent" to Section 5(a)(1) in post-conviction proceedings that do not involve the death penalty. *Id.* Because the statutory text is nearly "identical," *In re Allen*, 366 S.W.3d 696, 706 n.5 (Tex. 2012), cases interpreting Section 4(a)(1) are relevant to interpreting Section 5(a)(1).

criminal proceedings, including the punishment phase of trial. *See Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011); *see also Estrada v. State*, 313 S.W.3d 274, 287-88 (Tex. Crim. App. 2010) (ordering new punishment hearing because of false punishment-phase testimony). As first recognized in *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009), that is true even when the State's reliance on false testimony is "unknowing." *Id.* at 771. To make a prima facie case under *Chabot*, an applicant must allege specific facts showing that the State presented testimony that was (1) false and (2) material. *Robbins*, 360 S.W.3d at 459-60.

Mendoza's application satisfies both elements—he alleges specific facts showing that Hinton offered false, material testimony. And this Court has already held that a *Chabot* unknowing-false-testimony claim was not legally available under Section 5(a)(1) to applicants who, like Mendoza, filed their initial habeas applications before *Chabot* was decided. *See Chavez*, 371 S.W.3d at 208. This claim should therefore be authorized.

A. The Prosecution's Use of False Testimony Violated Mendoza's Due Process Rights

1. *Hinton's testimony was false*

Testimony is false when "the testimony, taken as a whole, gives the jury a false impression." *Chavez*, 371 S.W.3d at 208; *see also, e.g.*, *Robbins*, 360 S.W.3d at 460. Testimony does not need to be perjured to be considered false; offering false

testimony amounts to a due process violation, regardless of whether the State does so "knowingly" or "unknowingly." *Chabot*, 300 S.W.3d at 770-71.

Mendoza has made a prima facie showing that the prosecution presented false testimony here. Hinton testified that Mendoza "approached" Johnson "in an aggressive fashion," acting as the "aggressor" who started a "fist fight." Ex. D at RR24:230-31. But Johnson has twice averred in affidavits that Hinton's testimony was "false." Ex. E at 1; Ex. F at 3. In his 2016 affidavit, Johnson explained that *he* was the one who attacked Mendoza—that he was "definitely the aggressor," that Mendoza "wasn't fighting back," and that he (Johnson) received "an extra tray of food" after the attack, which he "figured was a bonus for [his] actions in fighting Mendoza." Ex. E. And in his most recent affidavit, Johnson reaffirmed this account and provided additional detail. As Johnson explained, "I attacked him"; "Mr. Mendoza did not attack me." Ex. F at 3. In fact, Johnson recounted, Mendoza "never threw a punch." *Id*. at 2. Johnson's second affidavit also contradicts various secondary aspects of Hinton's account, such as where Mendoza was located when the guards opened Johnson's cell door, and whether Mendoza would have had to pass through a self-locking door to encounter Johnson. *Id*. at 3. So beyond contradicting specific allegations in Hinton's testimony, Johnson's affidavit undermines the notion that Mendoza was able to circumvent the jail's security protocols, as Hinton said he did.

These factual disputes will ultimately need to be resolved by a factfinder in an evidentiary hearing. But this evidence is more than sufficient for purposes of Section 5(a), which requires only specific allegations (here, corroborated by evidence) that if ultimately proven true, make out a prima facie case of falsity. A participant in the fight testified unequivocally that Hinton's testimony was "false."

2. *Hinton's testimony was material*

False testimony is material when "there is a reasonable likelihood that [it] affected the judgment of the jury." *Ex parte Chaney*, 563 S.W.3d 239, 263-64 (Tex. Crim. App. 2018) (quotation omitted); *see also Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011). The lower "reasonable likelihood" standard "is more likely to result in a finding of error" than the higher "reasonable probability" standard applied to *Brady* claims. *Chavez*, 371 S.W.3d at 207 (quotation omitted). Indeed, materiality can be established even where "the false testimony goes only to the credibility of the witness," so long as it impacted the jury's ultimate conclusion. *Burkhalter v. State*, 493 S.W.2d 214, 218 (Tex. Crim. App. 1973).

There is a "reasonable likelihood" that Hinton's false testimony affected the judgment of the jury. As explained above, a Texas jury cannot return a death sentence unless it finds unanimously and beyond a reasonable doubt that the future dangerousness special issue is satisfied—that is, that "there is a probability that the

defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § 2(b)(1).

Defense counsel's strategy on this special issue was to focus the jury on Mendoza's propensity for violence in prison. "[W]hen you answer the Special Issues, especially Special Issue Number 1," defense counsel told the jury, "you have to remind yourself that you're dealing with that question in the context of prison." Ex. B at RR25:38. To rebut that strategy, the prosecution focused its entire rebuttal case on Mendoza's conduct in jail. And the very first (i.e., most important) witness the prosecution called in rebuttal was Hinton, who testified that Mendoza attacked Johnson in spite of the jail's best efforts to keep Mendoza away from other inmates through stringent security protocols.

As explained in detail above, the prosecution seized on this evidence in closing. *Supra* at 7-9. Relying in large part on Hinton's testimony, the prosecution argued that the "pattern of violence" had not been "broken." Ex. B at RR25:44. The prosecution continued:

> You know that he comes out of the rec yard, and then runs right up there as the aggressor toward Melvin Johnson and starts a fight with Melvin Johnson. That wasn't something where we had people agreeing to meet out on Main Street at high noon. He charges Melvin Johnson and starts to assault him. And sure, Melvin Johnson decides he's going to defend himself out there from this man's attack.

Id. at RR25:45. The prosecution's emphasis on Hinton's testimony "in [] closing arguments" is strong evidence of its materiality. *See, e.g.*, *Ex parte Thomas*, 2023

WL 7382706, at *1-2 (Tex. Crim. App. Nov. 8, 2023) (unpublished). In summarizing a case, reasonable counsel do not focus the jury on immaterial bits of evidence.

There is no doubt the jury was listening. During its deliberations, the jury specifically asked about Mendoza's "criminal acts while in jail," including the "assault on other inmate." Ex. B at RR25:51. As further "evidenced by the jury's notes," *Estrada*, 313 S.W.3d at 286-87, Hinton's testimony played a material role in their deliberations. But for his testimony, there is a reasonable likelihood that at least one juror could have changed their vote. *See Chaney*, 563 S.W.3d at 263-64 (awarding relief on false testimony claim where "there [was] a reasonable likelihood that the false evidence affected the judgment of the jury" (quotation omitted)); *Ghahremani*, 332 S.W.3d at 481 (awarding relief on false testimony claim where there was "a reasonable likelihood that the false testimony [] affected the applicant's sentence").[6]

B. Mendoza's *Chabot* Claim Should Be Authorized Under Section 5(a)(1) Because the Claim Was Legally "Unavailable" When Mendoza Filed His Previous Application

Under Section 5(a)(1), an applicant may not file a second habeas petition unless "the current claims and issues have not been and could not have been

[6] Indeed, the Fifth Circuit already held that Mendoza made a "substantial showing" that his counsel was ineffective for failing to investigate Hinton's testimony, COA Order at 2-3, which likewise indicates that there is at least a "reasonable likelihood" that Hinton's testimony affected the outcome of Mendoza's case.

presented previously in a timely initial application or in a previously considered application filed under this article . . . because," *inter alia*, "the . . . legal basis for the claim was unavailable on the date the applicant filed the previous application[.]" Tex. Code Crim. Proc. art. 11.071, § 5(a)(1). Section 5(d), in turn, defines a claim having a previously unavailable legal basis as one that "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." *Id.* art. 11.071, § 5(d).

This Court has already recognized that a *Chabot* claim "presents a new, previously unavailable legal basis" for relief when an initial application was filed before *Chabot* was decided. *Chavez*, 371 S.W.3d at 207. That is because *Chabot* "was the first case in which [the Court] explicitly recognized an unknowing-use due-process claim." *Id*. at 205. Here, Mendoza filed his initial state application on October 24, 2007. *Chabot* was decided on December 9, 2009. Under Section 5(a)(1) and (d) and this Court's precedents applying them in this context, the legal basis for the *Chabot* claim was therefore unavailable on the date that Mendoza filed his initial Texas application. *See id.*; *see also Castillo*, 2017 WL 5783355, at *1 (authorizing *Chabot* claim under Section 5(a)(1)); *Ex parte Young*, 2017 WL 4684770, at *2 (Tex. Crim. App. Oct. 18, 2017) (unpublished) (same).

In addition to pleading legal unavailability, an applicant must also plead a prima facie case for relief on the underlying constitutional claim. *Supra* at 15-16. The facts forming that prima facie case for *Chabot* relief are set forth in Subsection A, *infra*. Because the *Chabot* claim was legally unavailable on October 24, 2007, and because this application alleges specific facts making out a prima facie case for relief under *Chabot*, the Court should authorize this claim under Section 5(a)(1).

II. CLAIM 2: TRIAL COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE OFFICER HINTON'S FALSE TESTIMONY VIOLATED MENDOZA'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

"[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quotations omitted); *see also Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) ("The right to counsel requires more than the presence of a lawyer; it necessarily requires the right to effective assistance."). That right is a "bedrock principle in our justice system" because it ensures that "our adversary system" functions. *Martinez*, 566 U.S. at 12.

Mendoza's trial counsel was constitutionally ineffective by failing to investigate Hinton's testimony. IATC claims require a showing of deficiency and prejudice. *See Strickland*, 466 U.S. at 687; *Lopez*, 343 S.W.3d at 142. Mendoza's claim satisfies both elements, for many of the reasons set out above. No reasonable attorney would have failed to investigate a key rebuttal witness. And that witness's testimony was prejudicial. This Court may consider this ineffective-assistance claim

because the factual basis of this claim was "unavailable" when Mendoza filed his initial state habeas application due to his habeas counsel's ineffectiveness. At least in the circumstances here, this Court should hold that the factual basis for an IATC claim is unavailable when state habeas counsel itself is ineffective.

A. Trial Counsel's Ineffective Assistance Violated Mendoza's Sixth Amendment Rights

1. *Trial counsel was deficient in failing to investigate Hinton's testimony*

Defense counsel's performance is deficient when it is "unreasonable" "under prevailing professional norms." *Strickland*, 466 U.S. at 688, 690-91. Under prevailing norms, reasonable counsel must perform a "thorough investigation of . . . facts relevant to plausible options." *Id*. at 690-91; *see also Ex parte Garza*, 620 S.W.3d 801, 806 (Tex. Crim. App. 2021). In a "failure-to-investigate" case such as this one, the key question is whether counsel reasonably chose to forgo particular steps in an investigation, in light of information available to counsel at the time. *Wiggins v. Smith*, 539 U.S. 510, 523, 527 (2003) (reasonableness of counsel's investigation turns on whether decision to limit investigation is "itself reasonable"). This "reasonable investigation" requirement extends to the penalty phase: "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issue[] of . . . penalty." *American Bar Association Guidelines for the*

Appointment and Performance of Defense Counsel in Death Penalty Cases ("*Guidelines*"), 31 Hofstra L. Rev. 913, 1015 (2003).

It is unreasonable not to investigate "material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Rompilla v. Beard*, 545 U.S. 374, 377 (2005); *see also, e.g.*, *Guidelines*, 31 Hofstra L. Rev. at 1064 ("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."). When "'the known evidence would lead a reasonable attorney to investigate further,'" then counsel must pursue that investigation to effectuate the Sixth Amendment's guarantees. *See Garza*, 620 S.W.3d at 824 (quoting *Wiggins*, 539 U.S. at 527). And where "red flags" indicate the need for further investigation, they "c[annot] reasonably [be] ignored." *Rompilla*, 545 U.S. at 391 n.8; *see also Garza*, 620 S.W.3d at 823 (finding deficiency for failure to investigate "red flags").

Here, trial counsel knew that Hinton was a potential penalty-phase witness because the State had to disclose any witnesses that it "reasonably expect[ed] to call in rebuttal." Ex. G at RR2:47. The State also produced to counsel Hinton's written disciplinary report about the fight. Ex. H. And the fight unquestionably was important to defense counsel's theory that Mendoza would not be dangerous in

prison. Yet trial counsel did nothing to investigate Officer Hinton's account, and never spoke to a critical witness involved in the altercation—Johnson. The failure to investigate a potential witness whose testimony was material to counsel's theory of the case is textbook deficiency. *See, e.g.*, *Rompilla*, 545 U.S. at 377 ("[E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase[.]"). Even the federal district court described trial counsel's failure to investigate Hinton's testimony as "concerning" and "particularly suspect," ECF No. 101 at 23-24, while the Fifth Circuit, too, concluded that Mendoza's failure-to-investigate claim was substantial, COA Order at 3.[7]

Counsel's "unreasonableness" was only "heightened by the easy availability" of the truth. *Rompilla*, 545 U.S. at 389-91; *see also, e.g.*, *Beltran v. Cockrell*, 294 F.3d 730, 734 (5th Cir. 2002). All counsel had to do was ask Johnson about the fight, but they never did. *See* ECF No. 101 at 24 (calling counsel's failure "especially"

[7] The district court ultimately held that Mendoza could not prove "prejudice" or "materiality" even if Mendoza's trial counsel had been deficient, ECF No. 101 at 23-24, but this Court is not bound by the trial court's ruling because Mendoza had no opportunity to appeal it. *See, e.g.*, *Dixon v. Richer*, 922 F.2d 1456, 1459 (10th Cir. 1991); Restatement (Second) of Judgments § 28 cmt. A. Further, the Fifth Circuit found that this IATC claim presented a "substantial showing of the denial of a constitutional right," and issued a COA on the claim (including the prejudice element) before ultimately holding that the claim was not cognizable in federal court because it depended on extra-record evidence. *Supra* at 12.

problematic because "Johnson may have been willing to testify and . . . his testimony would have benefited Mendoza's defense"). Once federal habeas counsel finally began that investigation, years later, Johnson testified that Hinton's testimony was not true. *Supra* at 9-10. Had trial counsel investigated at all, they would have learned from Johnson that Hinton's testimony was "false" and that Johnson was willing to testify. Ex. E. But trial counsel instead did nothing.

2. *Trial counsel's errors were prejudicial*

To establish prejudice, Mendoza need only show a "reasonable probability" that a single juror would have voted to spare his life but for trial counsel's deficient representation. *Wiggins*, 539 U.S. at 534, 537 ("reasonable probability" is one "sufficient to undermine confidence in the outcome"); *see also Rompilla*, 545 U.S. at 377 (applying *Strickland* prejudice principles to capital sentencing-phase claim).

Trial counsel's errors were prejudicial here for the same reasons that Officer Hinton's testimony was "material." *See supra* at 19-21. Hinton's testimony was critical to defense counsel's strategy on the future dangerousness special issue. *See Ex parte Menchaca*, 854 S.W.2d 128, 133 (Tex. Crim. App. 1993) (en banc) (finding prejudice under *Strickland* where counsel's errors "undermined" issue "at the very heart of his defense"). And it was key to the prosecution's rebuttal—that is, after all, why the prosecution called Hinton first. As set out in greater detail above, the fight featured prominently in closing and the jury specifically asked about it during

deliberations. *See id.*; *see also Buck v. Davis*, 580 U.S. 100, 120 (2017) (finding prejudice where "summations for both sides" focused on the challenged testimony and "[t]he jury, consistent with the focus of the parties, asked during deliberations to see the expert reports" related to that testimony).

Had trial counsel conducted a diligent investigation, there is a reasonable probability the trial would have played out differently. If the prosecution chose to call Hinton, he would have been subject to devastating cross-examination to "undermine [his] credibility." *Ramey v. Davis*, 942 F.3d 241, 256 (5th Cir. 2019). Trial counsel also could have called Johnson to testify, which he was willing to do. *See* Ex. E; Ex. F. Or trial counsel could have used the prospect of impeachment to discourage the prosecution from calling Hinton at all. No matter what trial counsel did, the jury's view of the case would have been different, and there is a reasonable probability at least one juror would have dissented. At this stage, that is all Mendoza needs to make out a "prima facie" case of prejudice. *Oranday-Garcia*, 410 S.W.3d at 868.

B. Mendoza's Ineffective-Assistance Claim Is Authorized Under Section 5(a)(1) Because the Claim Was Factually "Unavailable" When Mendoza Filed His Previous Application

This Court may review this Sixth Amendment claim under Section 5(a)(1) because Mendoza's habeas counsel's ineffectiveness rendered the claim factually "unavailable." Tex. Code Crim. Proc. art. 11.071, § 5(a)(1); *see also id.* § 5(e)

(factual basis of claim unavailable if "not ascertainable through the exercise of reasonable diligence"). This Court should interpret Section 5(a)(1) to permit the litigation of failure-to-investigate IATC claims to avoid the possibility that no forum will be available to hear a substantial claim.

1. A capital defendant must have *some* forum in which to litigate a constitutional claim. *See Davila v. Davis*, 582 U.S. 521, 532 (2017) (describing Supreme Court precedent that ensured that "meritorious claims of trial error receive review by at least one state or federal court" to avoid the risk "that a claim of trial error—specifically, ineffective assistance of trial counsel—might escape review"); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (where state court provides forum to litigate federal claim in state post-conviction proceeding, "[s]tate must afford the petitioner a full and fair hearing on his federal claim"); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007) ("[S]ome court must always be open to hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation.").

It is true that this Court, in other cases, has refused to authorize subsequent petitions raising ineffective-assistance-of-counsel claims based on the conduct of post-conviction counsel. *See infra* at 34-38 (discussing application of *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002)). But beyond the fact that an

expansive reading of *Graves* is incorrect as a matter of statutory interpretation, *infra* at 34-38, interpreting Section 5 to foreclose litigants in Mendoza's circumstances from any fair opportunity to litigate their ineffective-assistance claims would violate the Sixth Amendment and due process.

Under the strictest reading of *Graves* and its progeny, Mendoza's habeas counsel's deficient representation sacrificed the "one and only opportunity" Mendoza had to raise his viable IATC claim. *See Ex parte Buck*, 418 S.W.3d 98, 109 (Tex. Crim. App. 2013) (Alcala, J., dissenting). Under that reading, Mendoza is left without any forum to vindicate his Sixth Amendment right to effective trial counsel. Texas defendants typically have no reasonable opportunity to litigate ineffective-assistance claims on direct appeal, so they must bring the claims in state post-conviction proceedings. *Trevino*, 569 U.S. at 422, 428. But when a petitioner lacks effective state habeas counsel, that avenue is foreclosed, too.

That reality drove the Supreme Court to permit federal habeas petitioners to raise defaulted IATC claims in federal court when a petitioner's ineffective state habeas counsel was at fault for defaulting a viable IATC claim. *See Martinez*, 566 U.S. at 9, 12. But subsequent Supreme Court cases clarified that some litigants will *not* have access to a federal forum to litigate IATC claims. In *Shinn*, the Supreme Court held that "a federal habeas court may not conduct an evidentiary hearing or

otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." 596 U.S. at 382.

The upshot is that while *Martinez* and *Trevino* still permit some federal habeas petitioners to litigate a defaulted IATC claim in federal court, they cannot do so if their claim relies on extra-record evidence. Many IATC claims of course do rely on extra-record evidence—such as claims that counsel's failure to investigate resulted in critical evidence being absent from the record. *See, e.g.*, *Wiggins*, 539 U.S. at 534-35 (successful *Strickland* claim based on "mitigating evidence counsel failed to discover"); *see also Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002) ("reasonableness of counsel's choices often involves facts that do not appear in the appellate record"). The result of attributing state habeas counsel's ineffectiveness to the defendant is that defendants with ineffective state habeas counsel, through no fault of their own, may not have one full and fair opportunity to litigate their claims if their claims depend on evidence outside the state-court record.

This Court has previously interpreted its own procedural rules to avoid such untenable situations. In *Ex parte Medina*, the court authorized the filing of a subsequent petition after an applicant's habeas counsel filed a "skeletal" initial writ petition that failed to preserve various constitutional claims or present evidence that could serve as the basis of any subsequent federal review. 361 S.W.3d 633, 640-42 (Tex. Crim. App. 2011). The dissenters argued that a more faithful application of

Texas's procedural rules would have required the court to deny relief. *Id.* at 647 (Keasler, J., joined by Hervey, J., dissenting); *id.* at 645 (Keller, P.J., joined by Hervey, J., dissenting). But the majority held otherwise—deeming the applicant's initial writ application to be no application at all—with a group of concurring judges explaining that it would be "intolerable" for a state habeas applicant to "be made to suffer for the miscalculation of habeas counsel by forfeiting entirely his state habeas forum—and perhaps, ultimately, his life." *See id.* at 644 (Price, J., joined by Johnson and Cochran, JJ., concurring).

Concurring in the court's judgment in *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006), Presiding Judge Keller made a similar point. She justified the court's Section 5 dismissal with reference to the same foundational idea that states can funnel constitutional claims to particular venues, but that procedural rules barring *all* consideration of a claim would be intolerable. In *Medellin*, this Court dismissed a foreign national's successive habeas petition because the applicant's legal arguments did not classify as "new" or previously "unavailable," but Presiding Judge Keller's concurrence was driven in part by the fact that the applicant had recourse to other "safety valve[s]" that would adequately ensure the protection of constitutional rights—the applicant could have brought an "ineffective assistance of counsel claim . . . on an initial application for writ of habeas corpus," and also had

"the option to litigate a habeas petition in the federal system." *Id.* at 356 (Keller, P.J., concurring).

But Mendoza did *not* have a meaningful opportunity to present an IATC claim in his initial state habeas application because his initial habeas counsel was ineffective; and he did not have an opportunity to litigate his IATC claim in federal court for the same reason—because of state habeas counsel's ineffectiveness in developing the state-court record, the claim had no avenue for consideration in federal court. This Court should construe its procedural rules in order to permit Mendoza a forum in which he can reasonably litigate his Sixth Amendment claims, especially because his failure-to-investigate claims depend on evidence outside the trial record.

As *Medina* demonstrates, *Graves* leaves room for this interpretation. This Court should clarify the scope of *Graves* and hold that Mendoza's IATC claim presented in a subsequent application may be reviewed on its merits because ineffective assistance in state post-conviction proceedings resulted in the forfeiture of the IATC claim that depends on evidence outside the trial record.

2. In *Graves*, this Court refused to authorize subsequent litigation of a stand-alone claim that the applicant's state habeas counsel was ineffective. *See* 70 S.W.3d at 104-05. Because this Court found "that competency of prior habeas counsel is not a cognizable issue on habeas corpus review," the Court held that Section 5 barred

the claim. *Id.* at 105. But *Graves* itself does not answer the question presented here—whether ineffective assistance of habeas counsel renders the "factual basis" of an ineffective-assistance-of-*trial*-counsel claim "unavailable" under Section 5(a)(1).

Judges of this Court have repeatedly questioned the propriety of reading *Graves* expansively. *See, e.g.*, *Ex parte Ruiz*, 543 S.W.3d 805, 826-32 (Tex. Crim. App. 2016) (across different opinions, all members of the court suggesting that there was "good cause" to revisit *Graves*); *Ex parte Alvarez*, 468 S.W.3d 543, 545 (Tex. Crim. App. 2015) (Yeary, Johnson, & Newell, JJ., concurring) ("[R]ecent developments in federal habeas procedure, as well as, to a certain extent, the rationale underlying those new developments, counsel that the Court should revisit the holdings of *Graves*" in an appropriate case.). *Graves*'s bar on further litigation should apply only where applicants assert state post-conviction counsel's ineffectiveness as the underlying claim for relief, as the prisoner had alleged in *Graves* itself. *See* 70 S.W.3d at 107.[8]

[8] Most of the policy concerns cited in *Graves* were directed at scenarios in which a claimant asserted state post-conviction ineffectiveness as both the underlying substantive claim and the excusing circumstance. *Graves*, 70 S.W.3d at 114-15 (noting concerns about "perpetual motion machine" if the ineffectiveness of state post-conviction counsel were recognized as a substantive basis for Texas post-conviction relief). But those concerns do not apply when the underlying claim challenges trial counsel's ineffectiveness, like this claim.

Where the ineffectiveness of state post-conviction counsel represents only the excusing condition—i.e., the reason that an underlying claim was factually "unavailable"—then state post-conviction counsel's performance cannot be deemed irrelevant to Section 5 authorization. Judges of this Court have recognized as much. In *Ruiz*, for example, *every* participating member of the CCA questioned the wisdom of applying *Graves*'s bar where state post-conviction counsel's deficient performance was asserted as a basis to permit consideration of distinct trial-ineffectiveness claims. *See* 543 S.W.3d at 827 (Richardson, J., joined by Keller, P.J., and Meyers, Johnson, Keasler, and Newell, JJ.) (noting "good cause" to consider application of *Graves* in such cases); *id.* at 827 (Johnson, J., concurring) ("we should revisit *Ex parte Graves*" in the appropriate case); *id.* at 831 (Alcala, J., dissenting) (arguing that a death-sentenced inmate is entitled to merits review when "he received incompetent representation during the initial state habeas proceeding, and when that incompetent representation has resulted in the forfeiture of one or more substantial claims for relief"). Despite that, this Court has seemingly expanded the reach of *Graves* beyond its original bounds.

That expansion should be curtailed, especially because a rule that ineffective state habeas counsel does not excuse the forfeiture of a trial-ineffectiveness claim is predicated on federal doctrine that no longer exists. *Graves*, for example, relied on *Coleman v. Thompson*, 501 U.S. 722 (1991), for the proposition that deficient post-

conviction performance could not excuse the forfeiture of a trial-ineffectiveness claim because such forfeiture could be excused only if there existed a constitutional right to state post-conviction counsel. *See* 70 S.W.3d at 110 & n.25, 111 n.30 (citing *Coleman*); *Ruiz*, 543 S.W.3d at 825 n.78 (citing *Graves*'s citation to *Coleman*).[9] In 2012, though, the Supreme Court partially invalidated that reading of *Coleman*. Recognizing that "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system," the Court held that inadequate state post-conviction performance could excuse forfeiture of an IATC claim and permit merits review in a federal habeas proceeding. *Martinez*, 566 U.S. at 9, 12. And a year later, *Trevino* expressly held that *Martinez* applied to Texas prisoners. *See* 569 U.S. at 428-29. In other words, *Martinez* and *Trevino* undermined part of the doctrinal rationale for an expansive reading of *Graves*.

Indeed, after *Martinez* and *Trevino*, principles of federalism favor a rule that permits applicants to bring these sorts of claims in subsequent state petitions. *See Alvarez*, 468 S.W.3d at 551 (Yeary, J., concurring) (explaining benefit of permitting Texas to "mak[e] the first determination of the merits of any [IATC] claim, so that federal review will remain as deferential as possible to our judgments"). Absent a

[9] As discussed in more detail, *infra* at 38-46, *Coleman* explicitly left open the question of whether some petitioners might have a constitutional right to state habeas counsel in "cases where state collateral review is the first place a prisoner can present a challenge to his conviction." 501 U.S. at 755. Subsequent Supreme Court cases have not answered that question either.

revision to *Graves*, *Martinez* and *Trevino* empower a federal court to reach forfeited IATC claims before Texas courts ever weigh in. *See Ex parte Diaz*, 2013 WL 5424971, at *5 (Tex. Crim. App. Sept. 23, 2013) (unpublished) (Price, J., dissenting) ("*Martinez* and *Trevino* have triggered federalism concerns, paving the way for de novo federal review of a number of state claims and concomitantly diluting the control Texas would otherwise exercise over the finality of its own convictions."); *Ex parte McCarthy*, 2013 WL 3283148, at *7 (Tex. Crim. App. June 24, 2013) (unpublished) (Alcala, J., dissenting).[10]

To the extent this Court interprets *Graves* and its progeny to bar consideration of Mendoza's IATC claim, the Court should reconsider its Section 5 jurisprudence. A proper reading of Section 5(a)(1) permits Mendoza to litigate his factually "unavailable" trial-ineffectiveness claim because of his initial post-conviction counsel's ineffectiveness.

[10] The State previously endorsed this federalism principle in other litigation. In *Trevino*, Texas argued that if forfeited IATC claims could be litigated on the merits in federal court, then there should be a corresponding change to facilitate prior merits review in state court—the rule Mendoza seeks here. *See* Brief for the Respondent at 58-59, *Trevino v. Thaler*, No. 11-10189, 2013 WL 179940, at *58-59 (U.S. Jan. 14, 2013) ("If this Court changes the [rule against excusing defaulted IATC claims] now, equity demands at a minimum that the CCA have an opportunity to reevaluate its procedural ruling and adjudicate Trevino's [IAC] claim on the merits.").

III. CLAIM 3: THE DENIAL OF EFFECTIVE ASSISTANCE OF STATE HABEAS COUNSEL VIOLATED MENDOZA'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS

Mendoza's constitutional rights were also violated because he was denied the effective assistance of counsel in his initial state habeas proceedings. There is no procedural obstacle to this Court's review of this claim for relief—the claim was obviously "unavailable" when Mendoza filed his initial state habeas application because his state habeas counsel could not assert her own ineffectiveness. Tex. Code Crim. Proc. art. 11.071, § 5(a)(1). The only questions, then, are (1) whether Mendoza had a right to effective assistance of counsel in his state habeas proceeding and (2) whether he has made out a prima facie case that state habeas counsel was ineffective.

Taking the second question first, this application contains specific facts making out a prima facie case that state habeas counsel was ineffective under *Strickland*. To establish ineffective assistance in any context, the defendant must prove deficiency and prejudice. State habeas counsel was deficient for failing to investigate and assert a claim based on Hinton's account of the fight, just as trial counsel was deficient for the same reason. If anything, state habeas counsel's performance was even more deficient because, with the benefit of hindsight, she knew the outsized role Hinton's testimony played at trial. After obtaining the trial team's notes, *see* 4:SCHR:1475, a reasonable attorney in state habeas counsel's

position would have realized that trial counsel failed to interview a critical witness and interviewed that witness herself. That is, after all, precisely what happened once effective counsel was appointed in federal court. And after discovering that trial counsel failed to uncover false testimony, reasonable state habeas counsel of course would have asserted an IATC claim—just as federal habeas counsel did.

As to prejudice, the analysis merges with the underlying IATC claim—Mendoza was prejudiced because state habeas counsel defaulted a meritorious IATC claim. *Cf. Washington v. Davis*, 715 F. App'x 380, 385 (5th Cir. 2017) (per curiam) (habeas counsel's failure to raise a "potentially meritorious IATC claim[] evidences both his ineffectiveness and the prejudice that resulted"). Put slightly differently, at this stage Mendoza must allege specific facts showing that, if counsel had asserted the (defaulted) IATC claim in her habeas petition, relief would have been granted. That showing, in turn, depends on the deficient performance of trial counsel and the prejudice caused by that performance. And for the reasons set out in connection with Claim 2, Mendoza has made that showing here.

That leaves one question: Did Mendoza have a right to effective assistance of counsel in connection with his initial state habeas application? The answer must be yes, for three basic reasons. First, having chosen to make habeas proceedings the principal forum for hearing Sixth Amendment claims, the state cannot prevent litigants from vindicating that right by denying them effective assistance of counsel.

Second, having opted to provide state habeas proceedings, the state must provide effective counsel in those proceedings. Third, the state cannot erect procedural barriers that make a colorable federal claim unreviewable in any forum.

1. Although there may be no general right to effective assistance of counsel in habeas proceedings, *see Coleman*, 501 U.S. at 755, initial habeas proceedings in Texas are different when it comes to IATC claims. As the Supreme Court recognized in *Trevino*, 569 U.S. at 429, initial habeas proceedings typically represent a criminal defendant's *first* opportunity to assert an IATC claim. And it should go without saying that the right to effective assistance of counsel would be hollow if a criminal defendant were left without an effective attorney—or any attorney—to assert that right at the first available opportunity.

Consider the Supreme Court's decisions in *Douglas v. California*, 372 U.S. 353 (1963), *Evitts v. Lucey*, 469 U.S. 387 (1985), and *Halbert v. Michigan*, 545 U.S. 605 (2005). In *Douglas*, the Court held that the Constitution requires the appointment of counsel in the defendant's first appeal as of right. In *Evitts*, the Court held that the appointed lawyer must be effective. And in *Halbert*, the Court held that the Constitution requires the appointment of counsel even for discretionary "first-tier" appellate review. If a criminal defendant is entitled to effective counsel to *reargue* federal claims pressed in the trial court, then surely a criminal defendant must be entitled to an effective lawyer to raise those claims in the trial court *in the*

first instance. As the Supreme Court explained in *Martinez*, "[w]here, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Martinez*, 566 U.S. at 11. The same constitutional protections should apply.

A few simplified examples confirm this point beyond doubt. Imagine a state required criminal defendants to raise all federal claims, not in the direct criminal proceeding, but in follow-on state habeas proceedings. Everyone should agree that it would be unconstitutional for the state to refuse to provide the defendant a lawyer in those proceedings. The defendant otherwise would have no way to vindicate his federal rights in state court. Now take a less extreme example. Imagine that the state, instead of channeling all federal claims into habeas, channeled only Confrontation Clause claims or Speedy Trial claims or self-incrimination claims. Again, it should be uncontroversial that the state would be obligated to provide the defendant an effective lawyer in those proceedings for the same reason. Absent an effective attorney in the habeas proceeding, the defendant would have no meaningful way to raise such a claim in defense of his conviction.

This case is exactly the same. Texas channels IATC claims into state habeas proceedings. There is nothing per se problematic about that rule. But having channeled IATC claims into an alternative proceeding, the state is obligated to

provide effective assistance in those proceedings to raise an IATC claim; otherwise, a defendant, like Mendoza, has no meaningful opportunity in state court to vindicate his Sixth Amendment right to counsel. Put simply, a state cannot circumvent a criminal defendant's constitutional rights by channeling federal claims into alternative proceedings in which no lawyer—or an ineffective lawyer—is provided.

2. For similar reasons, the state cannot make habeas review available (let alone required for IATC claims) without providing counsel that is effective in *practice*, beyond the moment of their appointment. That follows from the core principle underlying the trio of cases discussed above. Although the Constitution may not require states "to provide appellate review of criminal convictions" or habeas proceedings, "a State may not bolt the door to equal justice to indigent defendants" having made the decision to "provide[] such an avenue." *Halbert*, 545 U.S. at 610 (quotations omitted).[11] Here, of course, it is not merely that the state is providing habeas as an avenue to *re*assert federal claims (like an appeal). It is effectively *requiring* IATC claims to be asserted in the first instance through that avenue. And "when a State opts to act in a field where its action has significant

[11] Although Texas guarantees "competent counsel" in state habeas proceedings as a statutory matter, Tex. Code Crim. Proc. art. 11.071, § 2(a), the CCA has interpreted that provision to concern only "habeas counsel's qualifications, experience, and abilities at the time of his appointment." *Graves*, 70 S.W.3d at 114. Texas thus does not guarantee a right to "effective" state habeas counsel as interpreted by *Strickland*. *Id.* at 113-14 ("final product of representation" irrelevant to statutory guarantee of competent counsel).

discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts*, 469 U.S. at 401. Initial-review habeas proceedings cannot be a meaningful avenue for relief only for defendants who can afford effective counsel.

3. Last, the Constitution guarantees capital defendants one full and fair opportunity to litigate colorable constitutional claims, which means that criminal defendants must have one fair opportunity to litigate IATC claims through effective counsel. *Supra* at 29-30. "[I]n the usual course, a court of record provides defendants with a fair, adversary proceeding," and state-convicted defendants then have recourse to a second "fair, adversary" post-conviction proceeding in some forum in which they can raise claims of constitutional error. *Boumediene v. Bush*, 553 U.S. 723, 782 (2008). But these foundational assumptions are violated where a defendant lacks any forum in which he can litigate a Sixth Amendment claim with the help of competent counsel. "The intent of Section 5 was to limit capital habeas applicants to one full and fair opportunity to present all existing claims in one comprehensive document . . . . But the applicant whose initial post-conviction habeas counsel performed ineffectively did not receive that first full and fair opportunity that Section 5 presupposes." *Alvarez*, 468 S.W.3d at 549 (Yeary, J., concurring).

While courts have generally supposed that there is "no right to counsel in state collateral proceedings," the Supreme Court has recognized the possibility of an "exception" to that general rule, in "cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman*, 501 U.S. at 755. The Supreme Court has never resolved whether that "exception" exists because it has always had a way to avoid the question while still ensuring that defendants had a right to raise their constitutional claims in *some* forum. *See id.* at 756; *see also Martinez*, 566 U.S. at 9.

But here, if Section 5 actually bars Mendoza's IATC claim, *but see* Claim 2, there is no way to avoid this constitutional question. Applicants like Mendoza would have no right to litigate their claims with the assistance of counsel in state court, and after *Shinn*, would have no way to litigate on the merits in federal court, either. *See supra* at 13-14, 31. If there is indeed a true collision between Section 5 and the Constitution's "one full and fair opportunity" guarantee, then the Constitution controls.

4. *Graves* reached a contrary conclusion on a mistaken and outdated premise. Following the Supreme Court's lead, *Graves* reasoned "that because a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, then clearly, he has no such right when attacking a conviction that has long since become final upon the exhaustion of the appellate

process." 70 S.W.3d at 110 (quotations omitted). In other words, because a criminal defendant has no constitutional right to effective counsel for discretionary review of a criminal conviction, he *a fortiori* lacks a right to effective counsel in state habeas proceedings that come even later in the process. Without doubt, that logic holds as a general matter. If a defendant has no right to effective counsel to file a petition for direct review of his conviction with a court of last resort, he has no right to effective counsel to collaterally attack the same conviction.

But again, when it comes to IATC claims, state habeas in Texas is different. State habeas is not a later stage in the review process for IATC claims than discretionary review at the CCA or Supreme Court. Instead, it is a criminal defendant's *first* meaningful opportunity to raise such a claim, no different than the original trial proceedings. It therefore does not follow from the fact that criminal defendants are not entitled to effective habeas counsel for second-level discretionary appeals that they have no right to counsel in habeas proceedings that represent the petitioner's *first* opportunity to assert a federal claim. As just explained, the logic runs in the opposite direction: Because criminal defendants have a right to effective counsel for first-layer appellate review, it follows *a fortiori* that they have a right to effective counsel *to assert* the claims that would later be subject to first-layer review in the trial court. A contrary rule would mean, as explained at length above, that there would be *no forum* in which a criminal defendant has a meaningful opportunity

to litigate an IATC claim based on extra-record evidence. *Graves* did not consider that possibility. To the extent *Graves* is read to endorse a rule that would eliminate any forum for the vindication of a defendant's constitutional rights, the decision should be reconsidered.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons and those presented in any/all submissions accompanying this Application, Mendoza prays:

1. That the Court of Criminal Appeals find that his Application complies with article 11.071, § 5 of the Texas Code of Criminal Procedure, or can otherwise be litigated on the merits;

2. That summary relief be granted on his claims which are clear from the facts set forth in this pleading and the record;

3. That any remaining claims be remanded to the trial court for an evidentiary hearing and any and all disputed issues of fact be granted;

4. That discovery as may be necessary to a full and fair resolution herein be allowed; and

5. That his conviction and judgment imposing death be vacated.

Date: April 2, 2025

/s/ *Kristin Cope*

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** Pro hac vice admission pending*

Attorneys for Applicant

VERIFICATION

I, Kristin Cope, have read the foregoing verified application for writ of habeas corpus and declare under penalty of perjury that I am familiar with the facts stated therein and the facts are true and correct.

Executed on April 2, 2025

/s/ Kristin Cope
Kristin Cope

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Tex. R. App. P. 9.4. The word count of this document is 11,415 words, not including words not included in the word count limit.

/s/ Kristin Cope
Kristin Cope

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2025, I served a copy of this application through the Court's electronic filing system on the following:

Robert L. Koehl
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/s/ Kristin Cope
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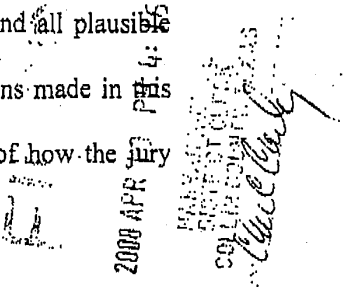
Exhibit A

EX PARTE MOISES MENDOZA

401ST JUDICIAL DISTRICT COURT, CAUSE 401-80728-04

Joint Response of Juan Carlos Sanchez and Angela Ivory Tucker

I, Juan Carlos Sanchez, along with Ms. Angela Ivory Tucker, was appointed by 401st Judicial District Court of Collin County to represent Mr. Mendoza in the defense of a Capital Murder Indictment where the State of Texas was seeking the penalty of Death by lethal injection. All preparations were made by the defense team, and all strategies were discussed with Mr. Mendoza. All avenues of defense were explored and all plausible theories of mitigation were discussed by the defense team. All decisions made in this case took into consideration our experience with juries and our view of how the jury would have responded to strategies and witnesses.



Ground One: The defense team made all proper requests for appointment of experts to help develop issues that were important in Mr. Mendoza's defense. Mr. Mendoza was interviewed about his background and facts of the case. Mr. Vince Gonzalez was appointed as a mitigation expert and the defense team was satisfied with his credentials. Mr. Gonzalez built a good relationship with the defendant and with his family. Mr. Gonzalez, in my presence, constantly reminded the entire family of what information was

Exhibit B

REPORTER'S RECORD
VOLUME 25 OF ___
TRIAL COURT CAUSE NO. 401-80728-04

THE STATE OF TEXAS) IN THE DISTRICT COURT
)
vs.) COLLIN COUNTY, TEXAS
)
MOISES SANDOVAL MENDOZA) 401st JUDICIAL DISTRICT

PUNISHMENT PHASE

On the 29th day of June, 2005, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Mark J. Rusch, Judge Presiding, held in McKinney, Collin County, Texas.

Proceedings reported by computerized machine shorthand.

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VOLUME 25
PUNISHMENT PHASE

EXHIBITS OFFERED BY THE STATE

EXHIBIT	DESCRIPTION	OFFERED	ADMITTED	VOL
137	Documents from Defendant's Cell		25	

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very well depend on how you answer those two questions.

Is he a continuing threat to society? Absolutely without hesitation, yes. Is there mitigation sufficient to ignore that threat and justify a life sentence? Not a shred of it. There's none.

You know what society is. Of course, it's the prison system. It's the people he will encounter inside those walls. It's the guards, the inmates, the doctors and the nurses. Are they in danger? You know that already. In our own Collin County jail he has made shanks. He has committed assault. He has spit on, he has bitten guards. He has already committed criminal acts of violence.

But it's not just the prison system. Because that question asked you whether he is a danger to society, anyone inside or outside that he may encounter. The question is if he is given the opportunity, the opportunity to do violence, will he do it? And you know that he will.

His very own witness, Dr. Vigen. Dr. Vigen told you that this Defendant is dangerous in society. And the Defendant's own words while he sat in our jail, he wrote that he will fight his conscience until he is forever unconscious. So you know the answer to that question.

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You know, the best predictor of future behavior is past behavior. And you know already about the escalation of violence in his life to this point that has already culminated in the ultimate sadistic act.

We know from his family that when he was young, he was already trouble, that by middle school he was getting out of control.

You heard from Robert Thorp that when he was a kid he would go around town destroying the younger kid's club houses just for fun. You know that by 14 his contempt for women was obvious. His disrespect for authority was evident when he would fly into a rage at the simplest instructions from his teacher. At 15 he attacked his own mother, frightening her so much she was afraid to go back home.

At 18 you saw his distorted view of women as objects to be used, disgraded and discarded when he raped a 14-year-old girl, vulnerable because of her inebriation. And he didn't just shove himself inside of her, he shoved a pen and a 40-ounce beer bottle, put it on videotape, displayed it to humiliate her. And you saw his callousness then when he laughed; he laughed when she cried in shame.

At 19 you saw that the very women in his life who tried to protect him weren't safe either.

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That's when he attacked his baby sister, Ruthie, and his mother tried to stop him. He drug her across the street, threw her to the ground, and he used the very same hands on her throat that he later strangled Rachelle with.

You learned that his violence was unpredictable. When he was suppose to be wrestling and playing around with a kid on a trampoline, he suddenly without warning changed, threw him down, stomped his face bloody.

At 20, you started to see a preview of what he was going to do to Rachelle. You know that when the police pulled him over after he harassed his ex-girlfriend, he had a machete in his car. And you know that when he robbed those two young college students, it wasn't just money that he was after. He wanted to terrorize and abduct them. One of them he put into his car; the other one he tried to put into the trunk.

You know that months before he overpowered Rachelle that he had a pension for helpless girls when he tried to put a pill in a girl's drink at a party. And when his plan was interrupted he became enraged and pulled out a knife.

And you know that not long before he put his hands on Rachelle's neck, he put those hands around another girl's throat, Sarah Benedict. And he squeezed

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until she couldn't breathe, and he didn't stop until someone more powerful pulled him off.

And the very night that he took Rachelle's life he told you what he was going to do when he said to those girls, I'm going to cut you with a rusty saw, I'm gonna cut your throat with a rusty saw.

So what else is next? What else is left in this escalation of violence? Fulfillment of that fantasy that he had that he talked about in the jail? That he wanted to abduct, hold captive all the females that brought him here today, is that where we're headed?

Is there anything in his background that reduces his moral blameworthiness for what he's done?

You know, if a bad relationship does this, then I guess every broken-hearted teenager will kill and every divorce would end in bloodshed. It is pathetic for him to blame the very people who tried to help him. I guess if he had had a good childhood, if he had had an education, if he had had parents who loved him and supported him, who provided for him, if he had had moral and spiritual guidance, if he had had a life free of abuse, we wouldn't be here.

But wait a minute. That was his life. He had all of those things handed to him.

So why did he do it? He told the

They want you to kill him because they found a tinfoil from an orange bottle cap in his cell. They want you to kill him for his rap lyrics. We all live in this world. You've heard rap lyrics. Those are pretty tame compared to some of the ones that are being sold.

They want you to kill him for his drawings, that you heard the officer testifying that he wasn't acting well that day. They want you to kill him for drawings he made while he was in a depressive state. And they'll say, well, he wasn't taking his medicine. Well, that's true, but that's why he was acting that way.

So if you send him to the penitentiary for the rest of his life, he's not going to have access to the culture that he did before. He's not gonna have access to alcohol. You're going to take him out of that and put him in this cell for the rest of his life where he'll be able to think about your verdict every day for the rest of his life, where if he doesn't take his medication or he doesn't follow any type of rule, life will get impossible for him. And he's smart enough to figure out over a period of time that if he doesn't do what he gets told to do, if he doesn't change his life, that those walls are not gonna get any thinner, the steel's not gonna get any lighter, the doors aren't going

to open up for him. The prison's not gonna go anywhere. The guards with guns are not going to leave him alone. And that's why Dr. Vigen said that he was smart enough to figure that out and at some point there was hope for redemption in his life and spiritual conversion.

And when you answer the Special Issues, especially Special Issue Number 1, you have to remind yourself that you're dealing with that question in the context of prison, because he's already been convicted of capital murder and that's where he's going.

Now, the decision you're going to have to make, just as the instructions have told you, doesn't have to be unanimous to get life imprisonment punishment. Only ten of you have to feel that way. But when you're making this decision you, yourself, have to be convinced, each one of you as I'm looking at you right now have to be convinced that life punishment is not possible.

Even though you're sitting here as a jury, this is a special type of case where you're allowed individually to decide these things. It's not majority rules. It's not because the foreman says or because somebody else says. It's because you yourself have told yourself and are able to put that along with the group in writing.

If you are convinced that your punishment

for Moises Mendoza is life imprisonment, then that's what it's going to be to you. Now is not the time to start giving in. Now is not the time to say, I know what I think I need to do is right, but I'm not gonna do it because of peer pressure.

These are the hardest decisions you're going to have to make, but now is the time to hold your ground. You all said you could do that. You all said you could respect each others decision.

If you can't come to an agreement, you must tell the Judge, on any of those Special Issues. In order to find those Special Issues in a way that would give Moises the death penalty, all 12 of you must be convinced. All 12 of you must be unanimous.

I'm not going to use all my time. I think you've heard all the evidence. I think the world is tired of death. I think Texas is tired of death. We already have one in this case. You can be the beacon of life. Assess a life punishment for Moises Mendoza and you can leave here with peace and dignity.

THE COURT: Mr. Davis, you have 18 minutes and 10 seconds.

STATE'S CLOSING STATEMENT

MR. DAVIS: May it please the Court. Ladies and gentlemen, this is the last opportunity I'm

going to have to talk with you in this case. And I would be remiss if I didn't thank you for your service, more importantly for the attention you've given to these facts that at times have been horrible, sometimes like a nightmare come to life. You've shown a great deal of courage for having gone through this with us and for that you're to be commended here.

I'm going to keep my comments brief because I think what Mr. Sanchez just said is true, enough words have been spoken. They really have. And a time for action and a time for decision is at hand.

What is this case about? This case has been about the very same thing from the very first day that we interviewed the first juror and that is justice. To see that justice will be done in this case. That has been the ultimate goal from day one. It remains the ultimate goal, and that's why we're here this morning.

The only question that remains is will justice be done in this case? Will it be done in this case? And as before, the truth will lead you to justice. What is the truth in this case? The truth is that the individual seated before you, the Defendant, from a very early age chose a very different and dark path for his life, and that's the truth.

As was recounted to you, as a teenager, out

of control by the time he got to middle school, assaulting his mother in their home to the point that she was afraid to come back into her own home because of her son and the violence that he did with her. Assaulted his own sister, and you had a chance to see her demeanor and her disposition. Assaulted that child out in their front yard.

Assaulting friends, pulling knives, threatening to kill people that he ran around with. I mean, that was just the beginning. Stealing from classmates. Stealing from family members. Stealing from mother, brothers, sisters.

And the escalation continues with him. Taking a 14-year-old girl out in a car, raping her on the way to a party, and then raping her again and thinking it's a wise decision to videotape that poor child in that horrible despicable act with a 40-ounce bottle and a pen.

And then to be able to sit there -- imagine the mind, imagine the depravity of this mind that could sit there and watch that videotape and laugh and enjoy it as that poor child is demeaned beyond belief.

Did it stop there? No, unfortunately. Because we know then that he went out there hunting at Richland College with his juvenile friends. What's he do? He's out there not only robbing people, but the

evidence is clear, attempting to take away two young women from that college campus. And we can only thank God that in both instances something happened to intervene so that those two young women didn't get to meet up close and personal the kind of depraved mind that this individual has and that they're fate was not similar to that of Laura Decker.

Thank God that Nhat Vu was courageous enough to grab that gun and to wave it and to pretend that he had another gun in there so that those people in that car that took Lian Trinh away, they stopped and let her out. Thank God that that happened.

And thank God Melissa Chavez -- and you saw that young lady. And you know the horror that she felt out there on that parking lot that day as this man came up to her, gun in hand, and said, give me your keys, give me your cell phone. She did that, complied completely, and then to her horror and surprise he says, now get in that trunk.

You know what was gonna happen. You know what was in this man's mind. And thank God that she had the courage to say no, and that other people started to appear on that parking lot. And someone said, let's get out of here, you've got to hurry, let's get out of here. That's the only thing that saved her from her fate that

day.

Did that stop? No. We know that after he was arrested, his parents went and bonded him out. And a tremendous mistake was made in Dallas County. The mistake was that a judge down there determined, you see, that he wasn't a future threat to society. He let him out of jail, and he kind of gave himself an insurance policy. He gave himself a leg monitor, and he put it on the Defendant thinking that that would be enough to ensure that society would be safe from this man.

But this man over here thought enough of that that he lasted an entire three months before he jerked that leg monitor off, threw it down and started running from the law. And he ran with Amy Lodhi, and during that time is when he stole from his brother. And eventually, while the leg monitor was still off and while he's still on the run, we come to March the 18th, 2004.

And you say what you want to about his friends, his girlfriends and anyone else that he wants to blame, but here is the truth here. None of them were in that pickup truck that night when he decided, he decided, to stop at Rachelle's home, and he decided that he would go in and take what he wanted. He decided that he would rape, choke and kill that young woman and leave that child on that bed all alone.

What's the very first thing that he does when he's confronted with law enforcement? He lies to save his own hide. Do you remember when Scott Collins and Vicky Pickett go over there and say, hey, do you know anything about this? No, I haven't seen the girl since I went to a party at her house. The first thing out of his mouth was a lie.

And you know from Dr. Vigen yesterday that he was preparing another lie. And that other lie was going to implicate and point the finger at this poor man, Andrew Tolleson, who's lost his wife and now has to raise a child by himself. He's the scapegoat. He's the villain. See, there's always someone else to blame in Moises Mendoza's life. One lie after another, upon another, upon another. That's the pattern that you get from this man.

But then you say to yourself, surely the pattern of violence has to be broken now, right? We've got him in the Collin County jail. We've got him in administrative segregation in a single cell. And surely to goodness it has to stop there, right? No. Wrong. Because you know while he's already in disciplinary segregation, do you remember what Dr. Vigen told you? How June 6th, 2004, shortly after he's been arrested, he's having to be restrained and taken into the infirmary

and put on a restraint bed because he won't follow the rules. He's resisting officers. He's spitting in officers' faces and trying to bite them.

Now, maybe my definition of nuisance is different than Dr. Vigen's; biting officers that are trying to take care of him out here in your county jail.

Does it stop there? No. You know that he comes out of that rec yard, and he runs right up there as the aggressor toward Melvin Johnson and starts a fight with Melvin Johnson. This wasn't something where we had people agreeing to meet out on Main Street at high noon. He charges Melvin Johnson and starts to assault him. And sure, Melvin Johnson decides he's going to defend himself out there from this man's attack.

Going after other inmates, going after guards. As Dr. Vigen told you, if there's one thing we know about him, he's smart, he's resourceful, he's clever, and he's a liar. He does figure the system out; he thought he had anyway.

When he makes those shanks, that piece of metal that could harm another inmate, that could harm another guard that's out there to try to take care of him, when he has this comb that he's now fashioning into another shank, weapons to use against other people to perpetuate the violence that he's already done out there

on the outside.

So I ask you, what is it about this man's history of violence that justifies a minimum punishment under the law? Absolutely nothing.

You know, if we had simply the horrible crime committed against Rachelle Tolleson, that crime in and of itself would be enough to show you beyond any reasonable doubt that this man is a future threat to society wherever he may find himself. But you have occasion, after occasion, after occasion, where this man has put you on notice that he has absolutely no regard for the rules that you and I live by.

He has no regard for human life, and he will do whatever pleases him because, as the doctor told you, he's impulsive, he's got a terrible explosive temper, and he will do it anytime he wants to anywhere he wants to.

The evidence is overwhelming on Special Issue Number 1 that this man will be a future threat to society wherever he may be, and he has shown you that as clearly as he can possibly show you.

And as you look at Special Issue Number 2 on mitigation, it's not a question of whether there's sufficient mitigating circumstances. Folks, there are no mitigating circumstances. The truth -- again, we go back

to the truth.

The truth is this man came from a wonderful home. He had wonderful parents. He had wonderful opportunities and advantages that most kids in this society could only dream of unfortunately.

As the doctor told you, this isn't the way it always is. This wasn't a one-parent household where you've got a parent trying their best but just couldn't quite control him. This isn't a home where there's violence, where he's practicing modeling after things he's seen. Folks, this was a darn good home here. And if it was dysfunctional, it was because he made it dysfunctional.

Isn't it unusual? Isn't it curious? Mario, Paul, Elizabeth, Ruthie, they came out of that very same home with the very same parents, and yet they're great productive members of society.

This man right here ended up the way he wanted to because he chose it. And as Dr. Vigen told you yesterday, you see, you can do what you can do for a child, but at a certain point the child takes what he wants to and he leaves behind what he wants to. And this man chose to leave behind the good values, the teachings and the lessons that were shown to him, and he decided to adopt another set of lessons that led to the eventual

death of Rachelle Tolleson.

If you've got any doubts about the total depravity of this individual's mind, he tells you himself what's in his mind, besides the fantasy of capturing and torturing individuals who have lied and testified in this case.

Fuck the world and fuck the reasons, time to release the inner demon, give me a screwdriver so I can dig in your temple, bust your face with a crowbar like I'm popping a pimple. Plain and simple, I lose my temper, it's the end of your time.

Those are his words, and that's an accurate picture of what he's all about and the total absolute depravity that is Moises Mendoza. There's no mitigating circumstances here whatsoever, none. The answer to Number 2 is no, overwhelmingly no, beyond any doubt no.

You know, I'm going to end the way that we began. I think that's the most appropriate way to do this. This case is not only about Moises Mendoza at this point; it's also about Rachelle Tolleson. You know, think about the sad commentary that this case is to this county. We've got to the point where a mother, a young mother can't even be alone and safe in her own bedroom without the fear of someone like Moises Mendoza coming in there, creeping in there, and taking and literally

dragging her away and taking her life after he's raped her. What a sad commentary. We're not even safe in our own homes because of people like him.

You know, this young woman right here, this woman was once ours. Yes, she was. She was our friend. You see, she was our classmate. She was our child. She was our mother. She was all of those things until this man right here came into her life and said, no, I'm gonna take that because that's what I want. And I've got no regard for you, and I will take it, and I will destroy it. And that's why she is no longer with us. This man has practiced maximum destruction for many years and the time has come to end that.

You know, we began a long time ago, back there on March 18th of 2004, when Farmersville Police Department came that day and they began their investigation. And in a way, I guess you could say they took up that torch of truth initially, and they carried it forward with the investigators from the Collin County Sheriff's Office, with A.P. Davidson of the Texas Rangers.

And at a certain point those individuals then turned that torch over to myself, Ms. Voirin and Mr. Waddill. And we have run with it as best we can, as long as we can.

But you see, we're not able -- we're not allowed to cross the line with it ourselves; only you can do that. That's your role as a juror. And at this time I'm going to turn that truth -- that torch to you with all the confidence and hope that as a collective body that you will see that justice is done today. And justice in this case is nothing less than, yes on Number 1 and no on Number 2. Thank you very much and may God be with you.

THE COURT: All right. Members of the jury, you'll take my charge back with you. We will send the exhibits back. When the 12 of you are in that room and my bailiff is on the other side of the door and that door is shut, you will begin your deliberations. When you reach a verdict or if you have a question, knock on the door and we'll take it from there.

Mr. Evans.

THE BAILIFF: Yes, sir. All rise.

(Jury exits courtroom)

THE COURT: We will be in recess in this matter until we have some communication from our jury.

I would appreciate it if you all would clear my courtroom so I can make a brief record.

(Courtroom is cleared; Defendant and counsel are present)

(This portion of proceedings on this day were ordered sealed by the Court. All sealed proceedings are bound in Volume ___)

(Recess taken)

AFTER RECESS

(Open court, Defendant present, no jury)

THE COURT: Let's go back on the record in the State of Texas versus Moises Sandoval Mendoza. At 12 noon I received a note, signed by Richard Froebe, that reads as follows:

We request, one, dates of assault on officer in Collin County jail, assault on other inmate, comb and tin found or any other criminal acts while in jail.

Two, definition of criminal acts of violence.

Three, definition of probability.

Four, definition of possibility.

Now, I have shown this note to counsel and have drafted the following response, that I've already shown to the attorneys, but I'm going to go over it in court here.

The proposed response that I have is -- reads as follows:

Members of the jury, I have received the

following request. Quote, we request dates of assault on officer in Collin County jail, assault on other inmate, comb and tin found or any other criminal acts in jail, end quote.

The Court cannot grant that request as written. If you have an actual disagreement among you about the above issue, then certify to the Court that it is so. Be sure you are clear about specifically what is in dispute.

With respect to your third request, probability as that term is used in the Court's Charge means more likely than not.

With respect to your second and fourth requests, any term in the charge that is not specifically defined in the charge is to be understood in its common everyday usage.

And it's signed today by me.

I've also, prior to doing this, received from the parties a written charge agreement allowing me to send just a written note back to the jury without having to bring them back into the courtroom. That's signed by Mr. Waddill for the State. It's signed by counsel for the Defense and by the Defendant.

Mr. Waddill, do you have any objection to that or this answer going back to the jury?

Is that acceptable?
THE DEFENDANT: Yes, sir, it is.
THE COURT: All right. Mr. Evans. If you'll bring in the jury, please.
THE BAILIFF: Yes, sir.
All rise.
(Jury enters courtroom)
THE COURT: All right. Everybody have a seat.
Mr. Froebe, I understand the jury's reached a verdict in this matter; is that right?
FOREPERSON: We have, Your Honor.
THE COURT: Would you hand that verdict form to my bailiff, please, sir.
The Defendant will please rise.
Special Issue Number 1. Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Moises Sandoval Mendoza, would commit criminal acts of violence that would constitute a continuing threat to society?
The answer is yes. And it's signed by Mr. Froebe as the presiding juror.
Ladies and gentlemen, if this is your individual verdict, your individual answer to this Special Issue, if you would signify by raising your right

hand for me.
(Each member of the jury complies)
THE COURT: All right. You can put your hands down. Let the record reflect that each member of the jury raised his or her respective right hand.
Special Issue Number 2. Do you find from the evidence taking into consideration all the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, Moises Sandoval Mendoza, that there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than a death sentence be imposed?
Answer: No. And again, it is signed by Mr. Froebe as the presiding juror.
Members of the jury, if this is your individual verdict, your individual answer to Special Issue Number 2, if you would signify by raising your right hand.
(Each member of the jury complies)
THE COURT: You can put your hands down. The record will reflect that each member of the jury raised his or her respective right hand.
Mr. Mendoza, this jury having returned this

verdict, by operation of law you are sentenced to death.
It is the order of this Court that you, Moises Sandoval Mendoza, the Defendant herein, who has been judged guilty of the offense of capital murder and whose punishment has been assessed by the verdict of the jury at death, shall be delivered by the Sheriff of Collin County, Texas, immediately to the director of the Institutional Division of the Texas Department of Criminal Justice, or any other person legally authorized to receive such convicts, there to be confined in said Institutional Division in accordance with the provisions of the law governing the Texas Department of Criminal Justice Institutional Division until a date for your execution is imposed by this Court, after receipt in this Court of the mandate of affirmance from the Court of Criminal Appeals in the State of Texas.
You can have a seat, Mr. Mendoza.
Members of the jury, that's going to conclude your service in this case. I told you on May 4th, this wasn't going to be easy. I know it has not been. I want to add my thanks to the attorneys for your patience and your service in this matter. The six dollars a day that we pay you is hardly, hardly recompense for what you have done and the service you have rendered.

All of the instructions that I have previously given to you about not discussing this case, they're gone. You can discuss this case with anybody that you want to. Similarly, if you don't want to talk about it with anybody, you don't have to.
Now, I make it my habit to make myself available to juries after trials to answer their questions, if I can. It is not a command performance by any stretch of the imagination. If you want to leave, feel free to leave. If not, I will be back in the jury room in a few minutes. If you are there, I will be there. If you are not and you have gone on, then thank you for your service. Thank you for your time. And I'll catch you next time around.
I do need those juror badges though because I need to recycle them for the next jury. You're excused with my thanks.
Mr. Evans, if you'll take them out, please, sir.
THE BAILIFF: Yes, sir. All rise.
(Jury exits courtroom)
THE COURT: Ladies and gentlemen, have a seat. We have a victim impact statement, Mr. Davis?
MR. DAVIS: Yes, Your Honor.
THE COURT: Who will be doing this?

Exhibit C

roles. We had Mr. Gonzalez investigate the defendant's background, family, and all possible mitigation issues. Mr. Gonzalez has the experience and credentials to handle such a task. As Mr. Gonzalez would gather and receive information, we would funnel it to our experts, as we felt appropriate. We had decided that Dr. Vigen could assist us in extracting sensitive information because of his forensic background. The roles were not ambiguous, but part of a strategy to use Dr. Vigen as our focal expert. This was because juries liked him as a presenter. Dr. Vigen was able to basically extract the same information, which Toni Knox was able to obtain. Dr. Vigen also encountered the same obstacle of Mercedes Mendoza. As both these professionals have found, Mercedes sought to control how the family was portrayed. That is why, as writ counsel has taken out of context, Dr. Vigen said there was something missing. The "something missing" was the fact that the family always followed the "script" and didn't fully disclose the problems in the family. The defense team knew of the father's lawsuit and employment problems, but the family would minimize it and not testify about it, as we would have liked.

We had decided that S.O. Woods, who had a wealth of information on prison life and classifications, would be used as a consulting expert. This was due to the fact that he was law enforcement at heart and could always be led on cross by the state. We were able to present his expertise through consultations with Dr. Vigen. Dr. Cunningham, assumed he was to testify, yet it was never told to him. We had decided, based on past experience, that juries did not react to him well. His testimony can be stilted and very unpersuasive. We had him appointed to the case because of his past relationship with Dr.

Exhibit D

REPORTER'S RECORD

VOLUME 24 OF ___

TRIAL COURT CAUSE NO. 401-80728-04

THE STATE OF TEXAS) IN THE DISTRICT COURT

)

vs.) COLLIN COUNTY, TEXAS

)

MOISES SANDOVAL MENDOZA) 401st JUDICIAL DISTRICT

PUNISHMENT PHASE

On the 28th day of June, 2005, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Mark J. Rusch, Judge Presiding, held in McKinney, Collin County, Texas.

Proceedings reported by computerized machine shorthand.

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PUNISHMENT PHASE

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conversion as he moves into the latter half of his life.
Q. What do you mean by potential?
A. Potential is the future possibility and probability, a future expectation that he can develop skills that he now -- does not now have but that he has the cognitive, the emotional skills to develop his personality in such a way that he can establish an inner identity and sense of self and come to a fuller appreciation about what life is and the effect of what he has done.
Q. Is there a probability that that will occur?
A. None from the research. I mean, I can't cite any research probability, but it's my opinion that it will occur.
Q. Are you certain about that? I mean, how certain are you? When you say it will occur or that -- it sounds to me like you're certain it will occur.
A. I'm not certain that it will occur. I can't be certain. But in my experience of following inmates for years, I've seen it occur. And I've seen it occur more often than not occurring. But I have no probability statement to offer or no formula, no research to support that.
Q. So you just think there's a chance that he may actually figure out who he is and he may actually develop

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a conscience at some point in the future?
A. I think he will, yes.
Q. That's based on the fact that you've seen other inmates do that in the past?
A. Well, it's based on the fact that I've interviewed him, and I've seen some minor movement in that direction. But I don't -- but I don't think these things develop easily and quickly. I think they take a long time.
Q. Well, describe the minor movement that you've seen.
A. I think while I've -- he's expressed some remorse to me both individually -- some recognition. He's beginning to acknowledge an inner sense of sadness and depression that is within him. I have seen it in his writings, you know, in his letters that he's written to me and so on. But it's very initial and very much just a beginning.
Q. When did this all begin?
A. I don't know when it began, and it's very --
Q. When did you first start noticing it?
A. Just when I met him.
Q. Back in December?
A. Yes, sir.
Q. You haven't seen him since March 17th, correct?

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A. Yes, sir, that's right. It was the anniversary of Ms. Tolleson's death.
Q. Did you choose that date?
A. No, sir. Well, I mean, I chose the date but not for that reason.
Q. Doctor, you've got several notebooks. You've got two large notebooks up there. In just a moment I'm going to need a chance to get copies from you of several things. You have a notebook there in front of you, and it has what appears to be legal -- yellow legal sheets in it; is that right?
A. Yes. Those are my interview notes.
Q. Would those also include the interview notes of your assistant?
A. No, but they're right behind in typed form. I took contemporaneous notes, so as he and I are speaking, I'm writing.
Q. What else is included in the notebook?
A. A timeline of the events in his life and the interviews from -- that I talked to you about before with his family and the teachers, some correspondence between me and the attorneys for his defense and the law enforcement records.
Q. What is included in the second notebook there behind you?

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A. These are the LifePath Systems records, school records, work records and the witness statements.
Q. Do you intend to make a presentation, a Power Point presentation, for the jury?
A. No, sir.
Q. Do you intend to utilize any photographs or charts or any other demonstrative aids?
A. No, sir.
MR. DAVIS: Judge, that's all the questions I have. But I will state to the Court I have not been given an opportunity review any of these notes of interviews. It's going to take me a good period of time in order to do that, so I just wanted to make the Court aware of that.
THE COURT: That's fine.
Doctor, I've got few questions.
THE WITNESS: Yes, sir. Yes, Your Honor.
THE COURT: The phrase "no sense of self" can mean lots of things to lots of people. When you use that phrase, what does -- when you form that opinion, what does that opinion mean when you say the Defendant has no sense of self?
THE WITNESS: If I were to draw a diagram, Your Honor, I'd make circle in the center, and I would put self. And off as ancillary circles would be, like,

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been able to form some opinions that you're going to share with us today, correct?

A. Yes.

Q. We'll go through those one by one. Do you have those with you?

A. Yes, I do.

Q. You developed a total of six opinions that you would like to share with the jury, and then we'll go -- we'll go through those one by one, and then ask your basis for those and explain those. Okay.

Can you please tell us your first opinion?

A. Yes. My first opinion about Moises is that he is an immature, psychologically under-developed adolescent-like man who has no internal sense of himself. He has no inner -- inner self, no clear inner identity that I can detect.

Q. Can you explain what that means when you say no self or no inner self?

A. The easiest way for me to explain it is that each of us has a core self. It's like if you drew a circle and put self in there, that's who the person is in and of himself. It's the unique personality that each of us has. It develops over time.

We all have behaviors, and we all have a body. We all have thoughts, and we all have feelings.

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All of those are things that we possess, but we are not necessarily -- we are more than our feelings. We are more than our thoughts.

We can have accurate thoughts. We can have inaccurate thoughts. We can be angry one moment, and the anger will pass, and we'll be relaxed or sad or happy the next -- or over a period of time, but emotions don't last a long time.

So the best way -- and this is an elusive, abstract, metaphysical kind of idea. But the self is who we really are at our core. It's the internal compass that each of us has. It's the identity that each of us has. It's who we are and what we're about, and it's -- it's knowledge of ourselves, of our feelings, of our attitudes. It's the ability, if we have that, to connect with other people in a way that we know who they are, and we can see their thoughts and see their feelings and know how they feel. So it's the inner part of ourselves that's -- that is the core of personality.

I know those are abstract ideas, but that's kind of what I'm trying to express.

Q. Is that something that's developed over time or how does that work?

A. Yes. There are developmental psychologists -- names that you may have heard of are Peashay (phonetic)

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or Eric Erikson. But psychologists have studied development through human -- through the human life span, and there are certain developmental tasks that children master from zero to one-year-old. Then there are other developmental tasks from 2 to 5 and 5 to 13. Then the period of adolescence begins, 13 -- and it generally ends legally at 18 or 21. Sometimes for men it's generally longer, and then for women it's generally shorter.

But the period of adolescence is a time of coalescing and solidifying and knowing what that identity is. So identity versus role diffusion is the task of the adolescent, to come out of adolescence with an identity of this is who I am and have a clear sense of that himself. So it develops over time.

Q. Now, you've told us that you feel that he's an immature, psychologically undeveloped, adolescent-like man who has no internal sense of himself. What do you base that on in your examinations with Moises?

A. Well, I base it on my observations of him and his responses to issues. He's immature. He was immature in my interviews with him. His reactions to things are immature. And, I mean, I could give you a whole host of examples if you want me to do that at this point. I'd be glad to.

Q. Yeah. Tell us what you based that on, things

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that you've seen.

A. Well, for example, he was very proud of himself. And you'll excuse me, but, you know, there -- we all know what the finger is or flipping somebody off. And, you know, he told me, for example, that he was very proud of himself because when he was six years old he was able to explain that to his father. That is so -- and he was so excited about that at this point in his life. It's just an immaturity that that's an important issue in his life, that he taught his father this very simple thing.

He boosts about getting away with things, about being sneaky, about not getting caught. And bad behavior persists now even in the jail. You know, it's just adolescent behavior, being sneaky and being caught by people and not getting caught. It's sort of a cat-and-mouse game. It's what adolescents might do.

Attention-seeking behavior in jail is -- his jail behavior, in my opinion, is sort of -- he's a nuisance. He causes trouble. He tries to seek attention. He gets himself into trouble. Negative attention, if you will.

He often reacts to criticisms or -- you know, or -- with anger when he perceives that somebody is criticizing him. And -- you know, or if he doesn't get what he wants. It's sort of like an automatic

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at the University of Michigan, I worked -- I was placed -- I didn't have a choice. I was placed in the Myland Federal Penitentiary. It was a medium-security prison. I interviewed and evaluated and worked in some treatment settings under two psychiatrists and a psychologist, under their supervision. A lot of the graduate students in psychology worked there, and we got a lot of our initial training in that setting.

I mean, I didn't work for the prison. I was a student under supervision working with inmates.

Q. Is there any other experience that you draw from to make that conclusion or that --

A. Well, I evaluated -- I did custody -- or not custody, but competency evaluations during my graduate school training and saw inmates at the Utah State Penitentiary down near Provo, Utah. And that, again, was just as a part of training.

And since I've been working in Shreveport, I've had the opportunity to evaluate many men charged with capital or first degree murder in Louisiana.

Q. Now, let's talk about your sixth opinion. Could you please tell the jury what that is.

A. It's my opinion that Moises has the potential to develop a sense of self and the potential for rehabilitation and some type of spiritual conversion,

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whatever that -- however that will be for him, you know, as he moves into the latter half of his life. That's my opinion.

Q. Why do you think that? What do you base that on?

A. Well, Moises is a high school graduate. He did fairly well in high school. He completed some post high school training, about nine months of heating and air-conditioning training. He even received a scholarship to the school.

He was raised in a devoted Catholic family. He went to confession, apparently to one of the Catholic priests in the area, I think a Father Paul at St. Williams. Or is it Father Williams at St. Paul? I'm not sure.

I see in him, in my connections with him -- contact with him, and some letters that he's written, some initial -- very initial beginning recognition that -- you know, that there's a depression inside of him, that there's an emptiness inside of him. He's beginning to see that he reacts -- he's reactive. He's angry, one minute sad, and he's reactive. He's not centered, and I think he's beginning to see that.

He's expressed some initial and somewhat, I guess, superficial -- I don't mean to be the judge of it

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or be critical of it, but some beginning remorse to me in some of his letters.

I think as he develops, you know, throughout, gets through adolescence and into young adulthood and works in a system where he's controlled and where he's -- experiences consequences if his behavior is inimical or antagonistic, and he gets rewards if his behavior is productive, and he has years and years and years of that, I think the potential is there for him to develop a personality and for him to recognize the tremendous seriousness of this, that a person's life is gone because of him. And that's an awesome -- that's an awesome issue, and I don't think he has a very good understanding of that yet.

I'm hoping and my belief is that as he goes through life he may come to really realize that. I think a lot of inmates that I've seen over the years who are life inmates, living in Angola, for example, and been there and will be there and will die there, have that sense of -- have a sense of purpose and have a sense of remorse and have a sense of, how can I contribute now? They've grown to that.

But -- and all the fight and all the antisocial reactivity is gone. And they're more centered individuals, and they have a chance for some kind of

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spiritual conversion and a movement towards looking at what life is really about and what the goal that they're -- you know, that they're going to die there and how are they going to die there and under what circumstance, and that there's some chance for, I guess, redemption or salvation through their good works at that facility.

Q. Now, Doctor, you talked about him being underdeveloped and an adolescent-type man. Is he past adolescence?

A. No. He's still -- there's new research -- or not new research. There's been some research that, you know, the human brain isn't fully developed until, like, 24 and 25. He's 21. And that the frontal cortexes are still developing from the neurobiological point of view.

But I see him as just adolescent in his behavior now. He's adolescent in his behavior at the jail and with the lawyers and with me. So I think he's still in the early adolescent phase of development.

Q. So even though biologically is one thing, and then psychologically is another way to look at as adolescent?

A. Yes. Yeah, that's a good way. I mean, he's 21 chronologically and biologically, but nowhere -- I don't see him as having that level of maturity. That's why I

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Q. That was your understanding?
A. Yes, that he was fighting with another inmate.
Q. Do you know what the real circumstances were?
A. I just have the report. That's all I know.
Q. You haven't talked -- you haven't talked to Detention Officer Hinton, have you --
A. No, I haven't, sir.
Q. -- who witnessed the incident?
A. No, I'm not.
Q. You're not aware that the Defendant came out of the rec yard and ran and attacked Inmate Melvin Johnson?
A. No, sir, I didn't know that.
Could I reference -- just look that up for a minute?
Q. Yes, sir.
A. All I know is -- is what I -- what I thought I knew which was written in the jail incident report dated September 22nd, 2004, at 17:35 hours. I just reviewed this record. I don't know more than what it says.
Q. At the time of that attack or that fight, were you aware that the Defendant was already in administrative segregation in the Collin County Jail?
A. Yes.
Q. He's been in ad seg here since the time he was arrested, hasn't he?

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A. Pretty much. I think -- I think he's been mainly in administrative segregation, yes.
Q. A single cell?
A. Yes, he is now.
Q. He has been for some time, hasn't he?
A. Yes, I believe so.
Q. Doctor, you said just a few moments ago the Mendoza home was a dysfunctional home. Let me ask you, there's no evidence that there was ever any violence in that home, is there?
A. I think there was an altercation between Moises and his sister one time where they were fighting, but there was never any violence where any first aid or any medical attention beyond first aid was needed, to my knowledge.
Q. In some of these homes, for instance, these young people have to witness violence between their parents, correct?
A. Yes, that happens.
Q. Some of them have to witness violence between a sibling and a parent or other siblings, correct?
A. That's correct.
Q. In a lot of these homes violence is actually used against the young person themselves, correct?
A. Yes.

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Q. That never happened to this Defendant, did it?
A. Not to my knowledge.
Q. There was never any alcohol abuse inside that home, was there?
A. Not that I could discover.
Q. There was no drug abuse in that home, either?
A. Not that I could discover.
Q. Would you agree with me that the parents exhibited a good work ethic for all of their children, including the Defendant?
A. Yes. I think the parents worked very hard to do the very best that they could.
Q. That's not always true in these types of homes, is it?
A. No, it's not.
Q. Would you agree with me, too, that the parents exhibited very good values for all of their children?
A. I think, again, parents put forth their very, very best. But they also put forth their own limitations, and the fact of the matter is that children come up and take what they want. We, as parents, don't control what our children take and what they learn. We only control somewhat what we give, and we can't always prevent ourselves from showing our limitations to our children.

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But on the surface the import of your question is correct. I think these parents tried very hard, given who they were and given the depression that they were experiencing.
Q. Provided an opportunity for religious training?
A. Yes.
Q. Appeared to have attempted to teach all the children the difference between right and wrong?
A. Yes.
Q. Supportive?
A. I think they were supportive.
Q. Again, these are things that we find absent in a lot of these homes, isn't it?
A. It's very true. In most of the cases that I have seen in mitigation similar to this, mitigation issues in first degree cases, you will have extensive alcohol abuse or extensive violence or extensive sexual abuse or extensive criminal histories, and this family does not have any of those factors.
Q. Would you agree with me that the Defendant in this particular case had several great role models to pattern his life after?
A. He did. He could have chosen that and patterned his life after his brother, for example, Mario.
Q. I mean, Mario -- Mario is a very responsible

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question that his status can be raised or his status can be lowered. That's sort of an automatic process that's going on independently of any choice he has.

Q. So even if we put him in administrative segregation, there's no guarantee he'll stay there. He can get right back out into his previous classification level, can't he?

A. I don't think he can get right back out into a previous classification.

Q. He can be removed from administrative segregation, can't he?

A. Ultimately after X-amount of time, probably years, he could move up from 3 to 2 to 1 and then go into the 5 classifications; the 5th, for example. But that's a whole process that's controlled completely out of his -- without any of his choice or input.

Q. Did S.O. Woods tell you that it got so violent in administrative segregation that the guards were issued body armor to deal with the inmates that they had to deal with?

A. He did not tell me that. I did not know that.

Q. And the unit that you've been to, sir, have you ever had an opportunity to view inmates interact with guards in administrative segregation in the Texas Department of Corrections?

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A. No, sir, I have not.

Q. Dr. Vigen, would you agree with me that the best predictor of whether a person is going to be violent in prison is whether or not he's been violent in prison before?

A. I would say generally, yes, I would agree with that. That in this case, for example, you're going to see over the next year/two years, probably, similar -- you know, nuisance -- as S.O. Woods termed nuisance behavior or attention-seeking behavior, disruptive behavior, you know, for the next -- for the initial period of incarceration.

Q. Well, do you think Inmate Johnson thought it was a nuisance when this man came up from behind and attacked him?

A. I'm sure he did not think it was a nuisance.

Q. Do you consider shanks to be a nuisance?

A. No, sir.

Q. You've read the reports where the Defendant has been fashioning shanks in his cell?

A. I --

Q. You're aware of that, aren't you?

A. I'm aware that he was making some kind of instrument, if you want to call it that, or a weapon, if you want to call it that on the other end, out of

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aluminum foil probably from some kind of container.

And that there was some type of comb. I saw a picture of a makeshift comb that he was, you know, fiddling with and trying to construct in some way.

So I've seen just those two examples.

Q. You'd agree with me the Defendant is -- he's resourceful, isn't he?

A. He's sneaky and resourceful, yes. He's bright.

Q. He's been able to hide things from the guards, hasn't he?

A. Yes.

Q. He takes pleasure in that, doesn't he?

A. Yes.

Q. Do you remember when he told you that he has kind of caught on to the little things and to the routines in jail?

A. Right.

Q. And he thinks it's normal to lie while he's being incarcerated. Do you remember when you asked him if he had been lying, and he said just the normal amount of lying?

A. Yeah.

Q. Do you remember him telling you that?

A. I do, yes.

Ask your question again so I can really

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listen to it carefully.

Q. I think that you had answered it, actually.

Dr. Vigen, if we could talk to you about your last opinion.

A. Yes, sir.

Q. You said that you thought the Defendant had a potential for rehabilitation and for some sort of spiritual conversion. That's exactly what you testified in the Patrick Murphy case, wasn't it?

A. I don't remember if I did, but it would not surprise me if I had said that if that was my opinion about Patrick Murphy.

Q. Do you remember the ring leader of the Texas Seven? His name was George Rivas. Do you remember him?

A. Yes. Yes, I do.

Q. Do you remember in the Patrick Murphy case that you thought George Rivas, the ring leader of the Texas Seven, had undergone this genuine spiritual conversion himself?

A. Well, I remember being asked about George Rivas. I'd only met him the night before because I wanted to clarify one particular point on how active a role Patrick Murphy played in all of that.

And then, secondly, I think the prosecutor -- I can't remember his name. A Mr. Shook.

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Q. Toby Shook.
A. Yes. He asked whether I believed him, George Rivas. And, you know, I don't really approach clients on whether I believe them or I don't believe them because I know that in most defendants I'm going to get a lot of distortion or a lot of lying or a lot of misrepresentations. That's just the persons we deal with.
But I was -- I guess what I said to Mr. Shook was that I -- I thought he was more truthful when he was talking about other people and less truthful when he was really talking about himself.
Q. Once an inmate -- once an inmate is in TDC, you can't force him to change for the better, can you?
A. You can only control the consequences of his behavior, and from a psychological point of view we call it behavior modification. You can punish negative behavior that's not in compliance, and you can reward behavior that is constructive and good. So -- or the desired behavior. So this kind of behavior modification or token economy or privileges and rank of privileges, restriction and freedom, all of that is so well-regulated that you can control behavior.
Now, whether that ultimately changes the internal moral compass of an individual, you don't -- it

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won't always do that. It will sometimes do that.
Q. Well, you can't force an individual to go through a spiritual conversion if he doesn't want to, can you?
A. No, you cannot force him.
Q. As a matter of fact, you can't even make an inmate go through counseling down there if he doesn't want to, can you?
A. I think you could probably order it, but he probably wouldn't -- if he didn't want to, he would show up but not participate psychologically. He would resist psychologically.
Q. And if we put the Defendant in general population down in the Texas penitentiary, he's going to be around a lot of violent people, isn't he?
A. He will be around a lot of people who have been violent in society but who may not necessarily -- as a matter of fact, the majority of them will not necessarily be violent in the prison system. But they will have had a history of violent behavior in society, yes.
Q. The Defendant has already proven to us, hasn't he, that in a free society he is a very dangerous individual, isn't he?
A. I think that's -- the jury has decided that, and I certainly agree with that.

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Q. Doctor, do you remember on January 31st, 2005, speaking with the Defendant about a certain fantasy that he had?
A. Yes, I remember. But can you refer me to my notes if you're going to question me about it?
Q. Yes, sir. It looks to be -- this is a typewritten piece of paper. It's Page 2.
MR. DAVIS: May I approach the witness, Your Honor?
THE COURT: Yes, sir, you may.
MR. DAVIS: That might speed things up.
Q. (By Mr. Davis) Do you recall that, Doctor?
A. I haven't reviewed it in a long time. May I read it?
Q. Yes, sir. If you wouldn't mind, if you would just read that to the jury, please.
A. He got up about 4:00 a.m. the next --
Q. I'm sorry. I'm referring to what is labeled as a fantasy at the bottom of the page. If you would, read that to the members of the jury.
I take it this is something that the Defendant related to you?
A. I didn't talk with him about it.
Q. This was in your notes, correct?
A. Yes.

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Q. From your -- I guess, was your nurse conducting the interview at that time?
A. Yes.
Q. Would you read that to the members of the jury, please?
A. He gathers ten women and seven guys and keeps three people in each four-by-four-by-four cell. He names some of the people; Farukh, Stacie Garcia, Amy's mom. All of the girl's that lied on him in this case, Stephanie Tucker and his cousin Alex and Amy's two brothers. He hires an Asian woman to feed the people. She had electrolysis because of facial hair. She lives in his house. Two Chinese people abused her, but they are now in prison. The people he is keeping do not know where they are or why. He wears a black mask, and he is very muscular. He never lets them out. He turns the lights on at night so to disorient them. He only harms them if they grab the Chinese woman, and he breaks their arms. His wife and children know about this. He's married to Priscilla.
Q. That's all the questions I have.
REDIRECT EXAMINATION
BY MR. SANCHEZ:
Q. Doctor, was that a fantasy or a dream? Can you tell?

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Q. He asked you if you had talked to community supervision officers or the officers involved in the aggravated robberies or Nhat Vu. You read their reports and you read their statements, didn't you?
A. Yes.
Q. And you've indicated that defendants or people who are accused that you evaluate tend to minimize or not tell you or distort. Is that the reason you just don't rely on them solely and look at other records that would give you a better idea of what's going on?
A. Yes. All defendants that I've seen distort and many lie. That's pretty common.
Q. So it's your job to go around and try to get a better view of what's going on by things that are available to you?
A. Yes.
Q. Now, they've asked you about this assault that they -- in the jail. You took it as mutual combat based on the records you have in front of you. Wasn't Moises Mendoza -- or was he -- didn't he sign an affidavit of nonprosecution?
A. I thought both people -- both men signed affidavits to not prosecute, so there was never any adjudication about it. Neither one of them pressed charges.

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Q. Did that indicate to you that neither of them wanted that thing to go further?
A. Yes.
Q. And that it was mutual combat?
A. That's how I understood it, yes.
Q. Now, you said that the family was dysfunctional, and Mr. Davis gave you certain classic dysfunctional scenarios. Explain to the jury -- and, like, you already have. But do you mean that they were dysfunctional in that the father was never there and that there were beatings in the family all the time? Were you explaining that in a psychological dysfunction, the fact that the family was dysfunctional?
A. If I understand your question, in cases -- people just don't stand up one day and say, I'm going to molest a child or I'm going to murder somebody today. The roots of this type of behavior generally go back a long ways in people's lives, and in most of the cases that I've seen there are incidents -- there's the criminal history in the family or there's an alcohol and drug instance in the family or there's a mental health issue in the family and a lot of mental health problems and a lot of alcohol and drug problems are familiar and move from one generation to another.
There are genetic predispositions for this,

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and these abnormalities cause or contribute to -- there's no one cause for anything, but contribute to aberrant behavior like killing another human being.
There's something missing in this case for me as a psychologist. There is none of that there. There's something I don't know. I can't tell you. From a -- my intuition.
So in this case, those general factors that Mr. Davis was talking about are just not present, and the family is really on one level trying to work very hard and do their very, very best. On the other level, there is some dysfunction in terms of attachment.
Moises didn't attach to his dad. He worked with him all the time, but he never could talk to him. They could never connect. He credits his mother with teaching him to be sneaky, you know, with all of that. He sees all of that.
But there was never any attachments. By that I mean really attaching and connecting emotionally with another human being and taking in values, etcetera, and using those values and developing his own moral compass. That has not happened for him yet. Or if it is happening, it's in a very immature stage. It will happen.
So I think the import of the counselor's

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question is that in this case there aren't those traditional things that we often -- more often than not see which, you know, are traumatic to an individual which contribute to his aberrant behavior of taking another person's life.
Q. Did you get the feeling that the family didn't really want people to know or didn't want you to know about some of these dysfunctions that you described in your opinions?
A. Yes. Mario reported -- or someone reported that -- that I think the mom, Mercedes, wanted the family to not tell us things, to not say anything bad about the family or to not tell the truth but to minimize. And so there's an effort to be a proud family, to be a healthy family. We're not going to talk about the things that really happened or the import of them.
So there's some indication that there's some motivation to distort and present -- or fake good as a family to look better than we are.
Q. And you were asked about his other friends, whether they had committed other crimes. You're just not aware of those. You're not saying they haven't committed any other crimes, right, his other friends?
A. The friends, I don't know them. I don't know their histories. I would predict that if their drug and

A. It depends upon their status, sir. If they're a keep-away-from-all, it's out there by themselves.
Q. Was the Defendant a keep-away-from-all on that date?
A. Yes, sir.
Q. And sometime around 5:35 was the Defendant released from his cell to go out into the recreation yard?
A. The Defendant was released to go back out and complete his recreation time. It had been interrupted earlier.
Q. What had interrupted it?
A. I believe the -- daily lunch for the inmates.
Q. So he's released from his cell. He then is to walk out into the recreation yard; is that correct?
A. To leave his cell, walk across the dayroom of the seg side, exit through a door, and go into the rec side and close the door behind him.
Q. Now, when he walked through the SHU itself, were there any other inmates out there in that open area?
A. Not at that time.
Q. So he was by himself. He then goes through the door out into the recreation yard. And, again, he's by himself, correct?
A. Correct.

Q. And the rules were that the inmate was supposed to close the door behind him when he went into the rec yard, correct?
A. Correct. And that would lock it making it secure.
Q. Did you, in fact, see the Defendant go out into the recreation yard?
A. I did see him go into the recreation yard.
MR. DAVIS: May I approach, Your Honor?
THE COURT: Yes, sir.
Q. (By Mr. Davis) Officer Hinton, let me show you four photographs that have been marked as State's Exhibits 126 through 129. If you will, look through those photographs.
THE COURT: Hang on a second.
MR. DAVIS: 126 through 129, Your Honor.
THE COURT: Okay. I'm showing you already have a 126.
MR. DAVIS: All right. I was told that I didn't.
THE COURT: Dallas County community supervision records.
MR. DAVIS: Yes, sir. I will make a change then. I will change -- for the record, could you please reflect that State's Exhibit 126 will be relabeled as

State's Exhibit 136, Your Honor.
THE COURT: That's fine.
Q. (By Mr. Davis) So, Officer Hinton, having looked at State's Exhibits 136, 127, 128 and 129 do you recognize those to be photographs of SHU 5-A?
A. Yes, sir.
MR. DAVIS: Your Honor, at this time we would offer State's Exhibits 127, 128, 129 and 137 -- 136, I'm sorry.
MR. SANCHEZ: No objection.
THE COURT: They're admitted.
Q. Officer, if we could just briefly, as we look at State's Exhibit Number 136, sir, does this photograph show the control area -- or, if you will, just tell us what's shown in that photograph.
A. It shows the ramp inside the segregation side. It shows the door that leads out into the rec room. It shows the interlock into the recreation side, and the control room would be over here.
Q. Okay. So if you could, my finger, is that generally in the area of the control room then?
A. Yes, sir.
Q. And that's with my right finger. And then my left finger, would that be on the door that would actually give an inmate access out into the recreation

yard?
A. Yes, sir.
Q. And from that control room would you have -- would you have the ability to watch an inmate at all times?
A. Yes. It's a 360-degree view.
Q. Okay. And, sir, as we look now at State's Exhibit Number 127 is this a closer photograph of the door that would lead from the SHU out into the recreation yard?
A. Yes, sir.
Q. Did I understand you to say that when this door is closed behind an inmate it's a self-locking door?
A. Yes, sir.
Q. State's Exhibit Number 128, what do we see in this photograph, sir?
A. We're looking at the rec yard back toward that door and another door that leads to the control room interlock.
Q. The -- my right finger, would that be on the door that would give an inmate access out into the rec yard?
A. Yes, sir.
Q. The other door, actually, would be back into the control area; is that right?

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A. To the interlock beside the control area.
Q. Again, I believe you've already said, this is an entirely enclosed area, correct?
A. Yes, sir.
Q. And this is the area that the Defendant went out into sometime after 5:35 p.m. that day?
A. Yes, sir.
Q. And finally, State's Exhibit Number 129, generally what view do we see here of the SHU?
A. You're seeing the ramp that comes up from the disciplinary side to a platform directly in front of the control room and the stairs that go up to the second tier of the segregation side.
Q. Officer Hinton, I believe that you said you saw the Defendant go out into the recreation yard; is that right?
A. Yes, sir.
Q. And after -- after he actually exited the SHU and went out into the recreation yard, did you believe that the door leading out to that yard had been completely closed and was locked?
A. From my advantage point I believed the door had been closed, and he was actually in the rec yard.
Q. Sir, after the Defendant went out into the rec yard was another inmate released into the interior

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portion of the SHU?
A. Yes. Inmate Johnson was released from his cell, which was 19 on the segregation side, to finish mopping and sweeping the dayroom on the segregation side.
He -- he had begun --
Q. Okay. Well, let me just ask you. After he then came out, did he have the tools necessary to complete his cleaning then?
A. They were at the bottom of the stairs.
Q. Sir, sometime after Inmate Johnson came out into the SHU, did you see the Defendant re-enter the SHU from the recreation yard?
A. Yes, sir.
Q. Had you ordered him back into the SHU?
A. Yes, sir -- no, sir. I mean, I ordered him back into the recreation yard at that point.
Q. All right. Well, did he obey your orders and stay in the recreation yard or did he come into the interior parts of the SHU?
A. He continued up to the base of the stairs where Inmate Johnson was.
Q. And when he came up there to where Inmate Johnson was, what did you witness?
A. A fist fight broke out. Inmate Mendoza approached in an aggressive fashion. Inmate Johnson held

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his ground and took up a defensive action.
Q. So that I understand then, of the two individuals of what you witnessed, who was the aggressor in that?
A. Inmate Mendoza.
Q. Had Inmate Johnson made any moves toward Inmate Mendoza at that time?
A. No, sir.
Q. Did it look like Inmate Mendoza was simply playing with Inmate Johnson?
A. Not from the swings that I saw, sir.
Q. Well, what did you witness him do?
A. Swing with his fist.
Q. Did he strike Inmate Johnson?
A. I don't think he struck him very hard. Inmate Johnson, like I said, took a defensive posture and was blocking the swings and returning them, too.
Q. But when you saw this action, what did you do?
A. I ordered them to stop fighting. I couldn't break it up because the door in front of me was locked, and the policy is that I'm not allowed to go and break up a fight in that it might be a ploy just to get me in there. So I waited until additional officers showed up, and we opened the door and broke up the fight.
Q. Sir, after you broke up the action did you have

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an opportunity to go and examine the door that led from the SHU out into the recreation yard?
A. Not immediately after. As soon as we broke up the fight, we took the inmates to the infirmary.
Q. Well, at some point did you make some determination about whether the Defendant had actually closed the door behind him or not?
A. Like I said, from my vantage point being -- not in the control room but in the vestibule between the control room and the rec yard, it had appeared to have been closed and secured to me. Obviously it wasn't because he was able to come back in.
Q. Sir, had you ever -- before that time had you ever known of an occasion where an inmate had been able to go out into the rec yard and then to come back into the SHU without some sort of authorization from you or another officer? Had you ever seen that happen before?
A. If there were a number of inmates who were just general population that didn't have any restrictions against them, they could come and go from the rec yard if we left the door open. Sometimes the inmates, if there's a crowd or a group, say, of ten, they could come and go without permission.
Q. Well, this inmate was not to come back in, was he?

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A. No, sir, he was not.
Q. He was a keep-away-from-all-other-inmates, wasn't he?
A. Yes, sir.
Q. So did it come as a surprise when he was able to come back into the yard and start to attack Inmate Johnson?
A. I would say it came as a shock.
Q. Was a written disciplinary report made on this case?
A. Yes, sir.
Q. And did the Defendant receive discipline -- disciplinary action as a result of this?
A. I believe he received continuing disciplinary action.
MR. DAVIS: I'll pass the witness, Your Honor.
THE COURT: Mr. Sanchez.
CROSS-EXAMINATION
BY MR. SANCHEZ:
Q. Officer, is there any way to tell in the board room whether the doors are secured?
A. There is. Inside the control room they have red and green lights that will let you know if the door is open or ajar.

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Q. What does a red light mean?
A. That means it's unsafe, ajar.
Q. Was anybody ever able to tell if that red light came on?
A. From where I was, I could not tell. I was not inside the control room.
Q. Is it possible somebody made a mistake and let that other person in?
A. Might be.
Q. Let me --
MR. SANCHEZ: May I approach the witness, Your Honor?
THE COURT: Yes, sir.
Q. (By Mr. Sanchez) Is this the jail incident report that you wrote?
A. Looks like that, yes, sir.
Q. Now, you testified today that you saw Mr. Mendoza leave the pod. But isn't it true that you didn't see that? You just assumed that you saw him leave the pod.
A. What I viewed was Inmate Mendoza leaving the pod and closing the door behind him.
Q. Doesn't it say in your report that it appeared to be -- that it appeared that he would be out of the pod?

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A. It appeared that way, yes.
Q. You can't say for sure?
A. Apparently not.
Q. Okay. Now, did you know what had been said prior between Inmate Johnson and Mr. Mendoza?
A. No, I really didn't. I questioned why they had to fight. This was my first day back at work.
Q. You don't know what went on before. You don't know if there was name-calling or shouting or --
A. No, sir, I surely don't.
Q. Or racial epitaphs or anything like that?
A. No, sir, I don't.
Q. That could have happened, you just don't know about it? That could have happened, but you just don't know about it?
A. I guess it could.
Q. Now, did you see Inmate Johnson hit Mr. Mendoza?
A. Yes, I did.
Q. How many times?
A. I saw at least three. There was a flurry of fists from both sides.
Q. At that point did you consider that to be mutual combat?
A. They were both fighting.
Q. Okay. And did Mr. Mendoza -- was he asked if he

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wanted to press charges against Inmate Johnson?
A. I believe he was.
Q. Was Inmate Johnson punished?
A. I determined Inmate Mendoza to be the aggressor, so I simply wrote the report on him.
Q. But you asked Mr. Mendoza if he wanted to press charges against Inmate Johnson, correct?
A. Right.
Q. And he wrote and signed -- well, actually, he filled in something called an affidavit of non-prosecution that he didn't want to file charges against him, correct?
A. Yes, sir. So did Inmate Johnson.
Q. So did Inmate Johnson, correct?
A. Right.
MR. SANCHEZ: Pass the witness.
MR. DAVIS: No further questions.
THE COURT: Is this witness excused or reserved by the State?
MR. DAVIS: Excused, Your Honor.
THE COURT: By the Defense?
MR. SANCHEZ: Excused.
THE COURT: You can step down, sir. You're free to go.
(Witness exits courtroom)

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A. Instead he stepped back into his cell that he was housed in at the time that we were about to conduct housekeeping in and pulled his greens down to his ankles and sat down on the toilet.
Q. When you say his greens, would that be his overalls over at the jail?
A. Yes, sir.
Q. So he pulled them down. He sat down. Was he on the toilet at that time --
A. Yes.
Q. -- or where was he seated?
A. He was seated on the toilet.
Q. Did he say something when he sat on the toilet.
A. I've got to take a shit.
Q. Okay. What, if anything, did you do then?
A. Me and Officer -- Officer Turkett and I approached him, and I informed him that his recreation would be terminated if he didn't comply.
Q. Did you finally get him to leave the cell?
A. Yes, he did at that time. He stood up.
Q. Now, his cell had a toilet, correct?
A. Yes, it did.
Q. Did he have toilet paper in that cell?
A. Yes.
Q. Where was it located in reference to the toilet

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seat?
A. On the toilet itself there's a small opening where the toilet paper can be held.
Q. Is it within arm's reach of somebody sitting on the toilet?
A. Yes.
Q. And during the course of your search of his cell, Officer, did you search the toilet paper that was in his cell?
A. Yes.
Q. Did you find something there?
A. Yes.
Q. Tell the members of the jury what you found in that toilet paper.
A. There was some form of tin or aluminum that was rolled up very tightly, and it was made into a pointed object which was about two inches long or so.
Q. So about two inches long. And it had been formed into some sort of a sharp edge; is that right?
A. Yes.
Q. Was it just laying out there or had it been concealed some way?
A. It was inside of the toilet paper itself.
Q. Now, are there prohibitions against having objects such as that in an inmate's cell?

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A. Yes.
Q. What's the reason for the prohibitions?
A. It's dangerous. It could be used against an inmate, another inmate, or an officer or a nurse, any kind of staff.
Q. Did you remove the object from the cell then?
A. Yes.
Q. Did you write up a disciplinary report --
A. Yes.
Q. -- as a result of having found that weapon?
A. Yes.
MR. DAVIS: I'll pass the witness, Your Honor.
CROSS-EXAMINATION
BY MR. SANCHEZ:
Q. What was this object you say you found?
A. It was some form of aluminum or tin or some -- some form of metal.
Q. Did it reassemble the top of an orange drink? The foil from an orange juice drink?
A. It may have been.
MR. SANCHEZ: I pass the witness.
REDIRECT EXAMINATION
BY MR. DAVIS:
Q. Are you familiar with the term shank?

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A. Yes.
Q. What is a shank?
A. A shank is anything that's made into a sharpened pointy object that may be used against -- to injure -- to injure somebody.
Q. Did you consider the object that you retrieved from the Defendant's cell a shank?
A. I did.
Q. Is that why you took it out of there?
A. Yes.
MR. DAVIS: No further questions.
RECROSS-EXAMINATION
BY MR. SANCHEZ:
Q. The shank was made out of the tinfoil from an orange juice top?
A. I can't -- can't swear what it was. I'm not -- it was some form of metal or -- I didn't open it up. It was just some form of metal or aluminum. I didn't want to change the form that it was in.
Q. Or foil, is that possible?
A. It may have been.
MR. SANCHEZ: I pass the witness.
MR. DAVIS: No further questions.
THE COURT: Is this witness excused or reserved by the State?

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MR. DAVIS: Excused, Your Honor.
THE COURT: By the Defense?
MR. SANCHEZ: Excused, Your Honor.
THE COURT: Deputy, you can step down. You're free to go.
(Witness exits courtroom)
MR. DAVIS: Your Honor, the State will call Steven Smart.
(Witness enters courtroom)
THE COURT: Sir, would you raise your right hand for me, please.
(The witness was sworn)
THE COURT: Put your hand down.
Watch your step. Have a seat in that chair and speak into that microphone, please. You may need to get a little bit closer.
Mr. Davis.
MR. DAVIS: Thank you.

STEVEN SMART,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q. Sir, first of all, tell us your full name.
A. Steven Smart.
Q. How are you employed?

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A. With the Collin County Sheriff's Office.
Q. How long have you been with the office?
A. Three-and-a-half years.
Q. And what's your present assignment?
A. I'm a detention officer.
Q. Are you assigned to a particular cluster or pod out there at the jail?
A. No, sir. I work movement most of the time.
Q. Sir, directing your attention back to April 27th of this year, what was your assignment at that time?
A. I believe I was a Cluster 5 movement officer.
Q. Sir, on that day did you have occasion to go to a cell that had been occupied by Moises Sandoval Mendoza?
A. Yes, sir.
Q. Do you see him here in the courtroom today?
A. Yes, sir.
Q. Could you please point out where he's seated and what he's wearing?
A. Right over here in the white shirt. (Pointing)
MR. DAVIS: Your Honor, may the record please reflect this the witness is identifying the Defendant in open court.
THE COURT: The record will so reflect.
Q. (By Mr. Davis) Officer, do you remember about what time you went to his cell?

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A. It was after lunch. It should have been around 8 o'clock.
Q. Do you know why you were going to his cell? What was the reason for you to go to his cell?
A. We were going to his cell to restrain him to get him out of his cell for an hour of recreation.
Q. Who else did you go with? Do you remember?
A. I believe --
Q. How many other officers, if you recall.
A. I believe it was Officer Borton and Officer Roberts.
Q. Sir, when you went to his cell did you notice something unusual lying on his floor?
A. Yes, sir.
Q. What did you notice?
A. It appeared to be the teeth of a plastic comb.
Q. Why did that strike you as being unusual?
A. Because we don't allow any -- any property in the cell or outside the cell that's not in its original form.
Q. And it appeared the comb was no longer in its original form, right?
A. Yes, sir.
Q. Did you actually go into the cell then?
A. Yes, sir.

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Q. What was -- what happened to the Defendant?
A. He was fully restrained; leg irons, belly chain and handcuffs. He exited the cell. Myself and Officer Borton entered the cell, and we began searching for the remainder of the comb.
Q. Sir, at one point did one of the officers look underneath his bunk?
A. Yes, sir.
Q. And was something found underneath his bunk?
A. No, sir.
Q. Did you find any other pieces of comb in there?
A. Yes, sir.
Q. Where was that found?
A. Underneath the toilet.
Q. And what portion of the comb did you find?
A. The top portion of the comb that the teeth attached to.
MR. DAVIS: May I approach, Your Honor?
THE COURT: Yes, sir.
Q. (By Mr. Davis) Officer Smart, do you recognize State's Exhibit Number 135, sir?
A. Yes, sir, I do.
Q. Is this the portions of the comb that you found in the Defendant's cell on that date, sir?
A. Yes, sir.

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Q. The teeth have been taken as well as the remainder of the comb?
A. Yes, sir.
MR. DAVIS: Your Honor, at this time we'll offer State's Exhibit Number 135.
MR. SANCHEZ: No objection.
THE COURT: It's admitted.
Q. (By Mr. Davis) Sir, if we look at the larger portion of the comb, have you ever seen inmates sharpen objects in their cells for use as a weapon?
A. Yes, sir.
Q. What was your thought about the larger portion of the comb when you found it that afternoon?
A. It appears to be sharpened.
Q. Okay. Where it could be used to inflict some sort of harm against either you, a nurse or other inmates; is that right?
A. Yes, sir.
Q. Did you consider this to be a possible shank?
A. Possibly, yes, sir.
Q. Did you allow him to keep this object?
A. No, sir.
Q. You took it away from him?
A. Yes.
Q. Again, the larger portion was found where in the

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cell?
A. Underneath the toilet.
Q. Hidden?
A. Yes, sir.
Q. Did you write up a disciplinary report as a result of having found this object, sir?
A. Yes, sir.
Q. Do you remember what the Defendant's reaction was when you found those objects? Do you remember if he made any statements to you?
A. No, sir, I don't.
Q. Did you have some problems with him later that night?
A. Yes, sir.
Q. What sort of problems did you have with him after you'd found these objects?
A. I went back to the control room in Pod 5-A, and I could see from the control room inside the cell through the window. He was standing on the toilet by the sprinkler, the fire sprinkler system. It appeared that he might have had a towel or a sock, a white cloth of some of sort, in his hand. Then very shortly thereafter he pressed his intercom system and advised me that there was water leaking from the sprinkler system. At this time I approached his cell, and he -- there was water

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leaking from that.
Q. Okay. Was he allowed to remain in his cell?
A. No, sir.
Q. What happened to him?
A. I called my supervisor. Advised my supervisor of the situation. He then instructed me to get more movement officers to that area and restrain Inmate Mendoza and have him taken out of the pod.
Q. Now, you say the sprinkler was leaking. Had you seen him previously standing up there near the sprinkler with the towel?
A. Yes, sir.
Q. Had you had any problems with the sprinkler before you saw him up there with the towel?
A. No, sir.
Q. Thank you, Officer.
MR. DAVIS: That's all the questions I have.
THE COURT: Mr. Sanchez.
MR. SANCHEZ: I'm just going to grab the exhibit, Your Honor, and look at it.
CROSS-EXAMINATION
BY MR. SANCHEZ:
Q. This was the comb you found in there?
A. Yes, sir.

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Q. Was it in this condition?
A. Yes, sir.
Q. The way it is right now?
A. Yes, sir.
Q. Can a towel be used to absorb water from a sprinkler?
A. Yes.
Q. Would it be abnormal to have a towel with you if there's water leaking from a sprinkler?
A. No, sir.
MR. SANCHEZ: I pass the witness.
MR. DAVIS: Nothing further.
THE COURT: Is this witness excused or reserved?
MR. DAVIS: Excused, Your Honor.
THE COURT: Mr. Sanchez?
MR. SANCHEZ: Excused.
THE COURT: Sir, you can step down. You're free to go.
MR. DAVIS: The State will call Christy Davis.
(Witness exits courtroom)
THE COURT: Estimated time of testimony?
MR. DAVIS: Probably 15 minutes, Your Honor, or less.

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(Witness enters courtroom)
THE COURT: Ma'am, could you step up here.
Would you raise your right hand for me, please, ma'am.
(The witness was sworn)
THE COURT: Put your hand down.
Watch your step on the ramp and have a seat in that chair. Speak into that microphone, please.
THE WITNESS: Okay.
CHRISTY DAVIS,
having been first duly sworn, testified as follows:
DIRECT EXAMINATION
BY MR. DAVIS:
Q. Ma'am, first of all, would you please tell us your full name.
A. It's Christy A. Davis, Christy Ann Davis.
Q. Ms. Davis, how are you employed?
A. With the Collin County Sheriff's Office.
Q. And how long have you been with the Collin County Sheriff's Office?
A. Over five years.
Q. What's your present position with the office?
A. Detention officer.
Q. Officer Davis, I want to direct your attention back to April the 27th of this year. Were you working as

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a detention officer on that date?
A. Yes, I was.
Q. What was your assignment on that date?
A. I was in the SHU in 1-A.
Q. Was the Defendant housed in SHU 1-A that day?
A. Yes, he was.
Q. Do you see him here in the courtroom this afternoon?
A. Yes, I do.
Q. Would you please point him out, where he's seated, as well as what he's wearing?
A. He's right there (pointing). He's wearing a white shirt.
MR. DAVIS: Would the record please reflect that this witness is identifying the Defendant in open court.
THE COURT: The record will so reflect.
Q. (By Mr. Davis) Ma'am, on that day did you have occasion to go into his cell?
A. I did not go into his cell that -- that day.
Q. Did you have occasion on some date to go into his cell and retrieve certain papers from his cell?
A. Actually, the officer that was assigned with me did go in his cell, and I do believe I did later on that morning.

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Q. All right. And were you able to look at the papers that had been retrieved from the cell?
A. Yes, I did.
Q. Several papers?
A. Yes.
MR. DAVIS: May I approach, Your Honor?
THE COURT: Yes, sir.
Q. (By Mr. Davis) Ms. Davis, let me show you -- there will be five pieces of paper here. If you would, take a look at these pieces of paper and tell me whether or not these are some of the papers that you -- that you saw retrieved from the Defendant's cell.
A. Yes, sir, they are.
Q. You previously have had a chance to look at them; is that right?
A. Yes.
MR. DAVIS: Your Honor, at this time we will offer State's Exhibits 130, 131, 132, 133 and 134.
MR. SANCHEZ: Your Honor, we're going to object to these exhibits under improper foundation. We're going to object to State's Exhibit Number 131 under a 403 balancing test. We're going to object under 401, 402 and 403 for State's Exhibit Number 131.
THE COURT: Can I see it?
(Pause in proceedings)

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THE COURT: At this point in time I'll sustain your 403 to State's Exhibit 130.
Objections to the remaining exhibits, 131 through 134, are denied and overruled.
I've done my 403 analysis.
MR. DAVIS: Permission to publish, Your Honor?
THE COURT: Just make sure 130 is not in that group.
MR. DAVIS: I have already handed that to the court reporter, Your Honor.
THE COURT: Thank you. Yes, sir.
Q. (By Mr. Davis) Officer Davis --
MR. SANCHEZ: May I approach, Your Honor? May we approach?
THE COURT: Yes, sir. We're off the record a second, Kim.
(Bench conference, off the record)
THE COURT: I want to make sure everybody is clear. The objection to State's Exhibit 130 -- specifically, your 403 objection to 130 is sustained.
Your objections to 131, 132, 133 and 134 are denied and overruled.
Mr. Davis just displayed, so the record is clear, State's Exhibit 131 to the jury.

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Mr. Davis.
MR. DAVIS: Yes, sir. Thank you.
Q. (By Mr. Davis) Officer Davis, State's Exhibit 132, ma'am, does that appear -- does that have the name Moises Sandoval Mendoza?
A. Yes, it does.
Q. Does it have a date, as well?
A. 3/18/05.
Q. And is there another notation after that?
A. Yes.
Q. Does that appear to be Payaso 'O5?
A. Yes.
Q. Officer, this one, if you want to read along with me: Don't want to try to give a reason for all the things that I did, because if I do I know I'll break and put a hole in -- through my head. I lay in bed tossing and turning, fighting my conscience, confident that one day I'll be forever unconscious. Mama never understood but never questioned my reasons. Slowly, breathing got me fucked up. I done seen too much bleeding. A military-minded gangster is the only way to survive. So best believe I'm still a gangster till the day that I die. What should I do when times get hard if I'm condemned for my action. I lack the hope that things will change 'cause all I see is distractions. So fuck

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them all. I'm on my own until I laid underground. I'm tired of pain, but fuck the change, so let the rain come down.
That's what that --
A. Yes.
Q. -- exhibit says, correct?
State's Exhibit Number 133, Officer, is that entitled "Slip Away"?
A. Yes.
Q. What will I be in time? I feel myself slowly going insane.
There's a couple of lines x-ed out; is that right?
A. Yes.
Q. The next line that's intact says: Yeah, it's about that time to make an entrance so hold up. I'm coming to get -- I'm coming to get ya. Gank ya. Shank ya. Tie ya up in back and rearrange ya. I put my pen on paper and turn my thoughts into fire. I speak my mind about what I think until the day I die. So let me do what I do and hold your thoughts for the toilet. I'm boiling, and I'm bound to blow. I leave 'em gasping for breath. I'll chew you up and spit you out and have you asking for death. Whatever beef you want to bring, I'll leave ya checked and dismantled.

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Correct?
A. Yes.
Q. State's Exhibit Number 134, that's a full-length page, is it not?
A. Yes.
Q. It's also been signed Moises Sandoval Mendoza; is that right?
A. Yes.
Q. With Payaso '05?
A. Yes.
Q. Who'd have thought a movie starts once another movie ends. Picking friends like picking pens. You pick them up and -- and use again. Fucking choosing is confusing, so I choose not to go through it. Fuck 'em. Screw 'em. Leave 'em chewing on their nails while I keep on moving. See, every day I make it clear that when I'm never -- when I'm near to watch your rear because over the years I've held tears, watched my back and watched my peers. But do it now or do it never. That's the saying I live by. Don't want to do these things that my brain talked me -- tells me to do. Don't need to live a life if I'm always alone. I've tried my best to cry the pain out, but my brain won't let my -- let my weep out the stress. When babies grow to see better days if they're taught the better ways. My mom was there through thick

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and thin, and yet I still think this way.
There's another line x-ed out; is that right?
A. Yes.
Q. Control your life. Don't slip and fall or it will slip and be your last. Bone to ash and blood to dust is the way that's meant for us. Fuck the world and fuck the reasons. Time to relieve the inner -- time to release the inner demon. Give me a screwdriver so I can dig in your temple. Bust your face with a crowbar like I'm popping a pimple. Plain and simple, I lose my temper, it's the end of your time. I've been dreaming to be dead because all the heavy pain and strain fucked up my mind.
And then two lines that have been x-ed out, correct?
A. Yes.
Q. Every time I take a breath it's like I'm making a death wish. I'm having memories of nightmares because there were plenty of them. Moises Sandoval Mendoza, Payaso '05. Right?
A. Yes.
MR. DAVIS: Thank you. That's all the questions I have.
THE COURT: Mr. Sanchez.

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CROSS-EXAMINATION
BY MR. SANCHEZ:
Q. Officer, were you the shift and detention officer when Mr. Mendoza would receive his medication?
A. I was on C shift. He would receive medication.
Q. Would you tell him to take his medication?
A. I would ask him if he wanted it. And if he refused, he refused. There's nothing I could do.
Q. So he was on medication that he was receiving in the jail, correct?
A. Yes.
Q. Was there a person named Slim who was in that same pod or in that same area that went by the name of Slim?
A. I wasn't sure who that was.
Q. Was his name Robert Sanchez?
A. Yes, there's a Robert Sanchez in there.
Q. Was he someone who fancied himself a rapper?
A. Yes.
Q. Do you recall if he would ask for people to write rap lyrics for him?
A. Not that I -- not that I was aware of. He would just rap.
Q. And he would -- or he would write lyrics himself that he would rap about?

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A. Yes.
Q. On the day you say you found these writings, do you remember if Moises was emotional that day?
A. Yes.
Q. He was emotional, wasn't he?
A. He was acting odd.
Q. And could you tell if he was depressed or sad about things?
A. Upset maybe.
Q. But he was emotional, wasn't he?
A. Upset. Just odd. I can't explain it.
Q. He wasn't right?
A. I'm not a doctor, so I'm not --
Q. But just you as a detention officer, something was wrong?
A. Something was off.
MR. SANCHEZ: I pass the witness.
REDIRECT EXAMINATION
BY MR. DAVIS:
Q. Officer Davis, I mean, you can give an inmate medication but he can refuse to take it, can't he?
A. I can't give him medication, but the nurse can.
Q. Right. You don't know whether he was taking his medication or not, do you?
A. I would watch him take it.

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Q. But it's very possible that if he didn't, it's because he didn't want to, correct?
A. Exactly.
MR. DAVIS: That's all I have.
MR. SANCHEZ: I have nothing further.
THE COURT: Is this witness excused or reserved by the State?
MR. DAVIS: Excused, Your Honor.
THE COURT: By the Defense?
MR. SANCHEZ: Excused.
THE COURT: Officer, you can step down. You're free to go.
THE WITNESS: Thank you.
THE COURT: I'm going to stop here and recess you-guys until 9 o'clock tomorrow morning.
Don't discuss this case among yourselves. Don't allow anyone to discuss it in your presence. Don't view any newscasts, listen to any broadcasts, read any publication on paper or online or do anything that anyone anywhere could think of as an independent investigation of anything connected with this case, no matter how tangentially remote, just don't do it.
I'll see you-guys tomorrow at 9 o'clock. If something occurs between now and then that you believe is an attempt to influence you, if you'll tell Mr. Evans

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in the morning.
THE BAILIFF: All rise.
(Jury exits courtroom)
THE COURT: Have a seat real quick.
Just for my edification, Mr. Davis, do I have more detention officers coming with more results of searches of the Defendant's cell or otherwise?
MR. DAVIS: Yes, sir, I believe that you may. And I have the documents here that were retrieved. I've placed exhibit markers on them. I have not yet numbered them. But I will be happy to tender those to the Court for inspection.
And, in general, those are the -- those are several pages of very detailed notes on the jurors in this case that were found in the Defendant's trash can in his cell, appear to be his writing.
I will at this time tender those to the Court for its inspection.
THE COURT: Mr. Sanchez, have you seen these?
MR. SANCHEZ: I don't think I've seen those.
THE COURT: Mr. Davis.
MR. DAVIS: Yes, sir.
THE COURT: In the paperwork that

Exhibit E

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF WALKER §

Before Me, the undersigned authority, on this day personally appeared **MELVIN JERMAINE JOHNSON** who after being sworn states the following:

My name is Melvin Jermanie Johnson, I am presently in inmate in the Wynne Unit in the Texas Department of Corrections. In 2004, I was incarcerated in the Collin County Jail where I came into contact with Moises Mendoza. Moises Mendoza was not very well liked by other inmates and the guards. Mr. Mendoza would continually use racial slurs and had a bad attitude. Due to the nature of Mr. Mendoza's offense he was confined to what is called the SHU, the special housing unit. On one occasion, due to a disciplinary problem, I was placed in the SHU also. While confined in the SHU inmates were allowed one hour a day to recreate. Mr. Mendoza would recreate by himself. As Mr. Mendoza was heading toward the rec yard, my celled was rolled. What this means is for some reason, my cell door was opened. This can only happen by a guard opening the door. As soon as the door opened, I figured what the guards wanted and I exited my cell and started a fight with Mr. Mendoza. I was definitely the aggressor, Mr. Mendoza was defending himself, but wasn't fighting back. After a short period of time, guards arrived and broke the fight up. That night I received an extra tray of food which I figured was a bonus for my actions in fighting Mr. Mendoza. Although, no one ever spoke to me about this incident, I am sure that the guards had planned this situation. I was told that there was trial testimony that Mr. Mendoza was in the rec yard when I was allowed to exit my cell to finish mopping the floor in the day room and Mr. Mendoza attacked me, this testimony is patently false. I have never been contacted until recently by anyone in regards to the facts of this situation, but had I been so contacted, I would have testified at trial as to what really happened on that occasion which is what I have stated in this affidavit.

Melvin Jermaine Johnson
MELVIN JERMAINE JOHNSON
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on this the 2nd day of November, 2016, to certify which witness my hand and official seal.

KAREN HEWITT
MY COMMISSION EXPIRES
August 9, 2017

Karen Hewitt
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

EXHIBIT
"A"

Exhibit F

COUNTY OF JEFFERSON
STATE OF TEXAS

AFFIDAVIT OF MELVIN JOHNSON

MY NAME IS MELVIN JOHNSON AND I AM OVER THE AGE OF EIGHTEEN. THE INFORMATION CONTAINED IN THIS AFFIDAVIT IS BASED ON MY PERSONAL KNOWLEDGE AND I AM COMPETENT TO TESTIFY TO THE MATTERS HEREIN

I AM CURRENTLY HOUSED AT THE STILES UNIT OF THE TEXAS DOC. IN 2004, I WAS AN INMATE AT THE COLLINS COUNTY JAIL WHERE I CAME INTO CONTACT WITH MOISES MENDOZA. IN 2016, I SUBMITTED AN AFFIDAVIT IN MR MENDOZA'S CASE AND I SUBMIT THIS AFFIDAVIT TO CLARIFY SOME THINGS

FIRST, I WOULD LIKE TO DESCRIBE HOW THE INCIDENT WITH MR MENDOZA OCCURRED. WE WERE BOTH IN THE SPECIAL HOUSING UNIT (SHU). THE SHU HAS 2 FLOORS WITH 25 CELLS ON EACH FLOOR. I WAS ON THE FIRST FLOOR AND MENDOZA WAS ON THE SECOND FLOOR. ONE DAY, I DON'T REMEMBER THE DATE, I WAS

IN MY CELL WHEN I HEARD A CELL DOOR ON THE SECOND FLOOR OPEN. I DID NOT KNOW WHOSE CELL IT WAS, I JUST HEARD IT OPEN. A FEW SECONDS LATER, I SAW MENDOZA WALKING DOWN THE STAIRS ON HIS WAY TO THE REC AREA. BECAUSE HIS WAS A HIGH PROFILE CASE, MENDOZA WAS GIVEN REC BY HIMSELF. AS I SAW HIM WALKING DOWN THE STAIRS, MY CELL DOOR OPENED. I WAS SHOCKED BECAUSE A GUARD HAD TO OPEN MY DOOR AND I WAS NOT SUPPOSED TO BE OUT WITH MENDOZA. WHEN MY DOOR WAS OPENED WITH MENDOZA OUT, I KNEW THE GUARDS WANTED ME TO JUMP HIM, AND THATS WHAT I DID. I RUSHED OUT OF MY CELL AND ATTACKED MENDOZA. HE IMMEDIATELY FELL TO THE GROUND AND COVERED UP TO PROTECT HIMSELF. HE NEVER THREW A PUNCH

NORMALLY WHEN A FIGHT BREAKS OUT BETWEEN INMATES, THE GUARDS RESPOND WITHIN SECONDS AND WILL SPRAY THE INMATES WITH PEPPER SPRAY. WHEN I ATTACKED MENDOZA THE GUARDS DID NOT GET THERE AS QUICKLY AS NORMAL AND EVEN THOUGH I WAS STILL PUNCHING MENDOZA

THEY DIDN'T SPRAY ME

AFTER I JUMPED MENDOZA, I WAS REWARDED. ON THE SHU THE GUARDS HAND OUT FOOD TRAYS TO THE INMATES BY SLIDING THEM THROUGH A PASS-THROUGH IN THE CELL DOOR. THEN ONLY GIVE ONE TRAY PER INMATE. AFTER I JUMPED MENDOZA, I WAS GIVEN TWO TRAYS. AND I KNEW IT WAS FOR THE FIGHT

IN MY PREVIOUS AFFIDAVIT I TESTIFIED:

> "I WAS TOLD THAT THERE WAS TRIAL TESTIMONY THAT MR MENDOZA WAS IN THE REC YARD WHEN I WAS ALLOWED TO EXIT MY CELL TO FINISH MOPPING THE FLOOR IN THE DAYROOM AND MR. MENDOZA ATTACKED ME, THAT TESTIMONY IS PATENTLY FALSE."

MY STATEMENT IS TRUE BUT I WANT TO CLARIFY WHAT WAS PATENTLY FALSE. FIRST, MR MENDOZA WAS NOT IN THE REC YARD. HE WAS ON HIS WAY TO REC WHEN MY DOOR WAS OPENED AND I ATTACKED HIM. SECOND, MR MENDOZA DID NOT ATTACK ME. IT WAS THE

CITIZEN WAS AROUND. THIRD, I NEVER MOPPED THE DAY ROOM FLOOR. I WAS IN THE SHU FOR DISCIPLINARY REASONS AND WAS NEVER ALLOWED EXTRA TIME OUT. I WAS in MY CELL WITH MY DOOR WAS CLOSED AND NOBODY WAS OUT

I AM WILLING TO TESTIFY TO EVERYTHING I HAVE SAID IN THIS AFFIDAVIT

DATED, THIS THE 28TH DAY OF MARCH, 2025

MELVIN JOHNSON

WITNESSES 3/28/25

Matthew Duff

JEREMY L. ELY

(4)

Exhibit G

REPORTER'S RECORD

VOLUME 2 OF ___ VOLUMES

TRIAL COURT CAUSE NO. 401-80728-04

STATE OF TEXAS * IN THE DISTRICT COURT

*

vs. * COLLIN COUNTY, TEXAS

*

MOISES SANDOVAL MENDOZA * 401ST JUDICIAL DISTRICT

PRE-TRIAL CONFERENCE

On the 15th day of July, 2004, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable MARK RUSCH, Judge presiding, held in McKinney, Collin County, Texas:

Proceedings reported by machine shorthand utilizing computer-aided transcription.

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ATTORNEYS FOR THE DEFENDANT

I N D E X

THE COURT: And I promise you I won't tell them.

Defendant's Motion to Discover Any Concessions or Agreements with Third Parties. I think we've already dealt with this one in discovery motion, but any deal that you've made or offered, you'll reveal. But the State can't read some particular witness' mind as to what that person might hope to gain from doing something. So if there's a deal, they'll reveal it.

Motion for Production of Impeachment Evidence. As I look through this, with respect to any expert that the State has consulted with, that's their work product, unless it's Brady material. Even if it is their work product and it's Brady material, they're ordered to turn it over. But otherwise, with respect to a consulting, non-testifying expert, no, they don't have to do that. With respect to a testifying expert, we already know what that ruling is.

Is there anything else I need to deal with under this motion, guys?

MR. SANCHEZ: No, Your Honor.

THE COURT: No?

The next stack of motions -- you guys

need a break or not?

MS. IVORY: No, Judge.

THE COURT: All right. Next stack of motions I have bundled together are generally Defense motions dealing with witnesses and various requests there. I've got five of those. Motion to Reveal Witnesses and Extraneous Offenses. Most of this stuff's already been ruled on in our discovery motion, but if you want a ruling, I'll give you a ruling.

Number 1 is granted, but work addresses and phone numbers will be sufficient. Home addresses and phone numbers don't need to be given, especially with respect to police officers.

Number 2, as written, it's denied. We've dealt with 37.07 requests, and that is a continuing request. To the extent that this requires anything more than Chapter 37, it's denied. To the extent it's a Chapter 37.037 request, it's granted. Number 3, we've dealt with previously, and it's granted.

Number -- the next motion I've got is Motion to List -- for List of Witnesses to be Called or Used by the State at the Punishment Phase. He's already told you he's going to give you his

case-in-chief and his rebuttal witnesses or at least those people he reasonably expects to call in rebuttal, as I understand his agreement with respect to your previous discovery ruling, and that's the order for this one: case-in-chief, rebuttal witnesses reasonably anticipated to be called in rebuttal. If something comes up, you know, he can't tell you what he doesn't reasonably anticipate and, you know, he's going to have the freedom to -- he being the prosecutor -- he's going to have the freedom to deal with any defensive thing he needs to deal with in rebuttal because that's what the rebuttal phase of the trial is for.

Motion for a List of State's Witnesses Prior to Trial. This is a redundant motion as I read it, okay? Case-in -- what he's ordered to produce -- and he's already agreed to do more than that, but what he's ordered to produce are case-in-chief witnesses, guilt/innocence and punishment witnesses reasonably anticipated to testify in rebuttal case-in-chief and punishment.

Next motion I've got is a Motion for Production of Witness Statements. Number 1 is granted. Number 2 is granted. Number 3, if it exists or if it can be transcribed, and I believe

that's grand jury testimony, they're to transcribe it, have it available after the witness testifies unless it contains Brady material, in which case, it will be provided to you prior to voir dire. Number 4 is granted. Number 5's granted. Number 6 is denied.

Number 7 with respect to your request for a recess, all you got to do is ask, Mr. Sanchez.

MR. SANCHEZ: Okay.

THE COURT: Okay? I'll give you as much time or as little time as you need. It may be that you don't need me to kick a jury out. It may be that you do, and if I do, I will be happy to blame the law rather than hold anybody in this room accountable.

Next motion I've got is styled Request for Notice Under the Texas Rule of Criminal Evidence for Expert Witnesses. It's granted.

Next motion I've got is styled Defendant's Motion for Discovery of Experts. Again, I think this is a redundant motion, but it's granted.

This next packet of motions all deal with issues that we may need a future contested pre-trial hearing on. First one is styled Motion

Exhibit H

JAIL INCIDENT REPORT

IF INMATE INVOLVED: LE#175879

TO: LT CROSSLAND & FIELDS
FROM: OFC ROBERT HINTON
DATE: 09/22/04 TIME: 1735

Name: JOHNSON, MELVIN JERMAINE
DOB: 09/01/84 Cluster: 5
Pod: A Cell: 19 01

IF DISCIPLINARY: IN POD: YES ☐ NO ☒

Category: III Rule#: 34 Type of Infraction: FIGHTING WITH ANOTHER INMATE (DEFENSIVE)

Notification of inmate by: OFC ROBT HINTON Date: 9/22/04 Time: 2020

Inmate Signature: Melvin Johnson Date: 9/22/04 Time: 2020

Officer(s) involved: PHILLIPS, MAY, McNEAR, PETERSON, LT. CROSSLAND

Other Inmate(s) involved: I/M MENDOZA, MOISES LE# 172762

Narrative: WHILE WORKING AS THE SHU. FLOOR WORKER IN 5-A ON WEDNESDAY, 09/22/04 AT APPROXIMATELY 1735 HRS I OBSERVED I/M MENDOZA APPROACH AND FIGHT WITH I/M JOHNSON. OFC HINTON & PHILLIPS ATTEMPTED TO RADIO BLOG CTRL TO ANNOUNCE THE FIGHT. OFC HINTON WAS ALREADY ON THE FLOOR ON THE PICKETT SIDE OF THE SEG SIDE SLIDER DIRECTING THE TWO I/M'S TO STOP FIGHTING AND RETURN TO THEIR CELLS. THEY DID NOT COMPLY. AFTER ADDITIONAL OFFICERS ARRIVED OFC'S MAY & HINTON ENTERED THE SEG SIDE OF THE SHU. AND DIRECTED I/M JOHNSON TO LAY ON THE FLOOR. HE DID NOT COMPLY. OFC'S MAY & HINTON ASSISTED I/M JOHNSON TO THE FLOOR WHERE... CONT'D ON SUPPLEMENTAL PAGE

Attach appropriate reports to this form, i.e., medical treatment, offense report, affidavits, etc.

Supervisor's comments and/or recommendations: Appropriate action taken, I/m escorted out after being restrained. Recommend disciplinary. I/m Johnson was seen by medical & signed off non-pros. Lt Cl

885

CAPTAIN APPROVAL: _____

REV. 07/03

Automated Certificate of eService

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Court Services on behalf of Kristin Cope
Bar No. 24074072
ommsvc2@omm.com
Envelope ID: 99212875
Filing Code Description: Writs
Filing Description: FIRST SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS FILED PURSUANT TO ARTICLE 11.071, ?? 5 OF THE TEXAS CODE OF CRIMINAL PROCEDURE
Status as of 4/3/2025 8:48 AM CST

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WR-70,211-02
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/4/2025 4:08 PM
Accepted 4/7/2025 8:50 AM
DEANA WILLIAMSON
CLERK

WR-70,211-02

RECEIVED
COURT OF CRIMINAL APPEALS
4/7/2025
DEANA WILLIAMSON, CLERK

Ex parte Moises Sandoval Mendoza	§	In the
	§	
	§	Court of Criminal Appeals
	§	
	§	of Texas

State's Motion to Dismiss Subsequent Writ and Deny Motion for Stay of Execution

On April 2, 2025, the State received the instant application for writ of habeas corpus and motion to stay execution in *Ex parte Moises Sandoval Mendoza*, cause number WR-70,211-02. This Court denied Moises Mendoza's (Applicant's) initial application for writ of habeas corpus on June 10, 2009.

Applicant is currently set for execution on April 23, 2025.

The trial court has noted that this current application for writ of habeas corpus is a subsequent writ and ordered it sent to the Court of Criminal Appeals pursuant to article 11.071, § 5 of the Code of Criminal Procedure.

All three of applicant's claims challenge the trial testimony of Collin County Detention Officer Robert Hinton. During Applicant's punishment phase, Officer Hinton testified that he observed Applicant leave the recreation yard and start a physical fight with inmate Melvin Johnson. 24 RR 229-33. Eleven years later, Applicant's counsel procured an affidavit from inmate

Johnson, claiming that Officer Hinton released him from his cell for the purpose of starting a fight with Mendoza, and that Officer Hinton later rewarded Johnson for starting this fight. Applicant's Exhibit E. Applicant claims that this affidavit proves that Officer Hinton testified falsely.

Applicant's first two claims allege false testimony and ineffective assistance of trial counsel. These two claims do not meet the requirements of article 11.071, § 5 because they present no previously unavailable factual or legal basis, nor do they impugn the verdict's integrity. Further, Applicant litigated both of these claims in federal court, so the doctrine of *res judicata* precludes this Court from re-evaluating them. *Ex parte Ruiz*, 543 S.W.3d 805, 825-27 (Tex. Crim. App. 2016). Applicant's third claim alleges ineffective assistance of writ counsel and is not cognizable.

For these reasons, this Court should summarily dismiss the application and deny the motion to stay.

State's Response to Claim 1: False Testimony

In his first claim for relief, Applicant alleges that the State relied on false testimony to prove future dangerousness. Application 16-21. He argues that this claim was legally unavailable under article 11.071, § 5(d) because this Court had not yet determined that unknowing use of false testimony violates due process when his original writ was litigated in 2008. *Id*. at 21-

23. He bases this claim on the notion that this Court first "explicitly recognized" that the unknowing use of false testimony violates due process in *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). *Id*. at 22. But this Court's decision in *Chabot* did not create the claim of false testimony. Instead, this Court recognized that false testimony violated due process in 2006, prior to Applicant's previous writ. *Ex parte Carmona*, 185 S.W.3d 492 (Tex. Crim. App. 2006). More importantly, the operative date that a legal basis becomes available is not when *this Court* first recognizes it, but when the United States Supreme Court, a federal appeals court, or any appellate court of this state recognizes it. Tex. Code Crim. Pro. art 11.071, § 5(d). And a federal court recognized that the unknowing use of false testimony violates due process as early as 2003. *See Ortega v. Duncan*, 333 F.3d 102, 108 (2d Cir. 2003) ("[W]hen false testimony is provided by a government witness without the prosecution's knowledge, due process is violated only "if the testimony was material and 'the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted."). Consequently, the legal basis was available when Applicant's original application for a writ of habeas corpus was filed.

Further, Applicant has already litigated this issue before the federal district court. *Mendoza v. Director*, No. 5:09-cv-00086-RWS, 2019 WL

13027265, *11-14 (E.D. Tex. 2019) (not designated for publication). There, Applicant relied on the exact same 2016 affidavit from inmate Johnson that is the basis for all three of his claims in this subsequent application for a writ of habeas corpus. *Id*. at *11-12. To constitute a due process violation, testimony must be both (1) false and (2) material, meaning there is a reasonable likelihood that it affected the jury's judgment. *Ex parte Robbins*, 360 S.W.3d 446, 495 (Tex. Crim. App. 2011). Applicant failed to demonstrate either to the federal court.

Regarding falsity, Applicant acknowledged that he could not "allege with certainty that the testimony propounded by Officer Hinton was indeed false." *Mendoza*, 2019 WL 13027265 at *12. As with his current claim, Applicant relied entirely on an affidavit from an inmate who claimed that Officer Hinton's testimony was false—far from conclusively proving a detention officer lied. The federal district court even noted that "Mr. Johnson's affidavit alone does not demonstrate that Officer Hinton's testimony was in fact false . . ." *Id*. at *13.

Regarding materiality, the federal district court determined that Mendoza failed to show that Officer Hinton's testimony was material. *Id*. at *13-14. Specifically the federal district court stated,

> Even setting aside Officer Hinton's testimony, the jury heard substantial evidence regarding Mendoza's future dangerousness.

> In addition to the details of the crime of which Mendoza was convicted—an attempted burglary, kidnapping, sexual assault and murder—the jury heard evidence of Mendoza's childhood delinquency, including violence against teachers; Mendoza's violence against his family; additional acts of violence, and in particular violence against women, including threats to kill, robberies, attempted kidnappings and sexual assault; that Mendoza cut off his electronic monitoring anklet while released from Dallas County jail on bond; that Mendoza violated prison regulations, including making multiple homemade shanks; and Mendoza's violence against detention officers.
>
> In light of all this testimony, Mendoza has not demonstrated that there is any reasonable likelihood that Officer Hinton's testimony could have affected the judgment of the jury.
>
> Petitioner argues that the State relied on Officer Hinton's testimony in his closing argument, demonstrating that the testimony was material and prejudicial. Although petitioner correctly notes that the State referenced the alleged assault in the closing, the prosecutor briefly mentioned the assault only after laying out Mendoza's lengthy violent and criminal history in extensive detail. Moreover, the alleged assault was discussed as one in a series of Mendoza's prison violations, which included the creation of homemade shanks and an assault on detention officers.

Id. at *13-14. The Fifth Circuit Court of Appeals affirmed, stating, "the district court already analyzed the affidavit evidence and held that there was no 'reasonable likelihood that Officer Hinton's testimony could have affected the judgment of the jury.'" *Mendoza v. Lumpkin*, 81 F.4th 461, 482 (5th Cir. 2023). Because the federal courts have already resolved Applicant's claim, the doctrine of *res judicata* precludes this Court from reconsidering it. *See Ruiz*, 543 S.W.3d at 825-26.

Applicant has failed to prove that the legal or factual basis for his false testimony claim was previously unavailable. Further, Applicant's claim has already been resolved against him by the federal courts. Applicant's claim should be summarily dismissed. *See* Tex. Code Crim. Pro. art. 11.071, § 5 (a)(1), (e); *Ruiz*, 543 S.W.3d at 825-26.

State's Response to Claim 2: Ineffective Assistance of Trial Counsel

In his second claim for relief, Applicant argues that his trial counsel was ineffective for failing to investigate Officer Hinton's testimony or interview Mr. Johnson. Application 23-28. This is not a previously unavailable factual or legal basis under article 11.071, § 5. Applicant argues that this claim was previously unavailable simply because his prior writ counsel did not discover it. *Id*. at 28. This does not render the claim factually unavailable.

Further, as with his first claim, Applicant already litigated this claim before the federal courts. The federal district court stated

> [E]ven if trial counsel's failure to interview Mr. Johnson fell below an objective standard of reasonableness, Mendoza's claim fails because he cannot demonstrate that the officer's testimony was material . . . or that the failure to object to the testimony or call Mr. Johnson to testify was prejudicial.

Mendoza, 2019 WL 13027265 at *14. In determining that Officer Hinton's testimony was not material, the federal court first found that Applicant

"cannot demonstrate that trial counsel was constitutionally ineffective for failing to discover and object to the introduction of false evidence." *Id*. The federal court then found that Applicant "cannot demonstrate that the failure to object to the testimony or call Mr. Johnson was prejudicial, as required to demonstrate ineffective assistance of counsel." *Mendoza*, 2019 WL 13027265 at *14. Additionally, the federal court stated

> Further, it is unclear whether testimony from Mr. Johnson would have effectively rebutted the Officer Hinton's testimony. Mr. Johnson's potential testimony was "double edged." Any benefit Mendoza might have reaped from discrediting Hinton's testimony that Mendoza was the aggressor in a fight is outweighed by the potentially negative testimony Mr. Johnson may have given. According to his affidavit, Mr. Johnson stated that Mendoza was not well-liked by either guards or inmates, he "continually" used racial slurs, and he had a bad attitude. "Double-edged evidence cannot support a showing of prejudice under *Strickland*."

Id. (quoting *Reed v. Vannoy*, 703 F. App'x 264, 270 (5th Cir. 2017)). Because the federal court has already resolved Applicant's issue, the doctrine of *res judicata* precludes this Court from reconsidering it. *See Ruiz*, 543 S.W.3d at 825-26.

Applicant has failed to prove that the legal or factual basis for his ineffective assistance of trial counsel claim was previously unavailable. Further, Applicant's claim has already been resolved against him by the

federal court. Applicant's claim should be summarily dismissed. *See* Tex. Code Crim. Pro. art. 11.071, § 5 (a)(1), (e); *Ruiz*, 543 S.W.3d at 825-26.

State's Response to Claim 3: Ineffective Assistance of Writ Counsel

In his third claim for relief, Applicant claims that his state writ counsel was ineffective for failing to raise the issue of Officer Hinton's testimony in his original application for habeas corpus. Application 38-46. This Court has already held that ineffective assistance of state writ counsel is not a cognizable issue. *Graves*, 70 S.W.3d at 117 (effective assistance of writ counsel cannot form the basis of a subsequent writ under article 11.071 § 5).

Applicant invites this Court to revisit *Graves*. *See* Application 44-46. He argues that the right to effective assistance of trial counsel is illusory without effective writ counsel to enforce it. Application 40-42. From there, he argues that he must have a right to claim ineffective assistance of writ counsel to ensure that writ counsel fully vindicates his right to effective trial counsel. *Id*. at 42-45. As such, he argues that *Graves* was incorrectly decided. *Id*. This Court heard a similar argument in *Ruiz*, where the applicant argued that a "sea change in the federal law upon which *Graves* relied" meant that the Court should reconsider the *Graves* bar on ineffective assistance of writ counsel claims. Suggestion to Reconsider on Court's Own Motion at p.3 (filed in *Ex parte Ruiz*, WR-27,328-03 on Aug. 11, 2016).

But, as with *Ruiz*, the federal court's resolution of Applicant's claims renders any reconsideration of *Graves* moot. *See Ruiz*, 543 S.W. at 825-26. The federal court determined that Officer Hinton's testimony was not material. *Mendoza*, 2019 WL 13027265 at *13-14. It determined that trial counsel was not constitutionally ineffective. *Id*. at *14. Regarding prior writ counsel, the federal court stated, "State habeas counsel is not ineffective nor is a petitioner prejudiced for failing to raise meritless claims." *Id*. at *14. As this Court stated in *Ruiz*, overturning *Graves* will not change the fact that Applicant's claims have already been resolved. *Ruiz*, 543 S.W. at 826.

The instant claim is not cognizable. Accordingly, this Court should dismiss this claim as an abuse of writ under article 11.071 § 5(c).

B. Prayer

The first two claims in Applicant's subsequent application fail to meet the requirements of article 11.071, § 5. Further, the federal courts have already resolved these issues, so the doctrine of *res judicata* precludes this Court reconsidering them. Applicant's third claim is not cognizable.

The State asks this Court to dismiss the instant application as an abuse of the writ, and deny Applicant's accompanying motion for a stay of execution.

Respectfully submitted,

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Criminal District Attorney

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Certificate of Service

A copy of the foregoing document has been served on counsel for Applicant, Kristin Cope, via eFile and a courtesy copy sent via email to kcope@omm.com on April 4, 2025. Courtesy copies have also been sent to counsels Jason Zarrow, Melissa Cassel, and Evan Hindman via eFile.

/s/ Robert L. Koehl
Robert L. Koehl

Automated Certificate of eService

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Robert Koehl
Bar No. 24097948
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Envelope ID: 99313602
Filing Code Description: Motion
Filing Description: State's Motion to Dismiss Subsequent Writ and Deny Motion for Stay of Execution
Status as of 4/7/2025 8:51 AM CST

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WR-70,211-02
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/8/2025 6:12 PM
Accepted 4/9/2025 8:08 AM
DEANA WILLIAMSON
CLERK

IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

Ex parte	§	
MOISES SANDOVAL	§	
MENDOZA,	§	
	§	
APPLICANT	§	**Writ No. WR 70,211-02**
	§	**(Trial – Cause No. 401-80728-04)**
	§	
	§	
	§	**CAPITAL CASE**
	§	

OPPOSITION TO STATE'S MOTION TO DISMISS SUBSEQUENT WRIT AND DENY MOTION FOR STAY OF EXECUTION

EXECUTION DATE: April 23, 2025

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** Pro hac vice admission pending*

Attorneys for Applicant

INTRODUCTION

Given his impending execution date, applicant Moises Mendoza appreciates the State's speed in responding to his application to file a successor petition for a writ of habeas corpus ("App."). The arguments presented in the State's motion to dismiss ("MTD"), however, are foreclosed by settled precedent, including decisions from this Court.

Mendoza's application specifically alleges that the prosecution's first and most important rebuttal witness, Officer Robert Hinton, offered false testimony at the punishment phase of Mendoza's capital trial, tainting the jury's verdict on the future dangerousness special issue. Instead of engaging with the substance of Mendoza's claims, the State raises two procedural arguments. First, the State argues that Mendoza's false testimony claim under *Ex parte Chabot*, 300 S.W.3d 768 (2009), was available to Mendoza when he filed his initial habeas application in 2007, such that Mendoza cannot satisfy Section 5(a)(1). But this Court repeatedly has held that *Chabot* claims were legally unavailable at that time. *See, e.g.*, *Ex parte Chavez*, 371 S.W.3d 200, 205 (Tex. Crim. App. 2012).

Second, the State argues that a federal district court's rejection of Mendoza's ineffective assistance of trial counsel ("IATC") claim based on Hinton's testimony precludes Mendoza's entire application. The State's *res judicata* argument is wrong for a simple reason: Mendoza had no opportunity to appeal the district court's

decision because of an intervening Supreme Court case, and preclusion does not apply where appellate review is unavailable. *See* Restatement (Second) of Judgments § 28(1) & cmt. a.

In fact, the Fifth Circuit held that Mendoza's IATC claim was substantial and "deserve[d] encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (standard for granting "Certificate of Appealability" ("COA")), before accepting Mendoza's concession that neither it, nor the district court, had statutory authority to consider the evidence Mendoza presented in federal court. That holding is much more pertinent at this stage, where the question is simply whether Mendoza has *alleged* facts demonstrating that his "application merits further inquiry." *Ex parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005). Mendoza has more than met this standard. Because Mendoza's application plainly satisfies the requirements in article 11.071, § 5(a), he should be authorized to proceed.

ARGUMENT

I. CLAIM 1: FALSE TESTIMONY

Mendoza's first claim alleges that the prosecution's most important rebuttal witness offered false testimony in violation of *Chabot*. To undermine Mendoza's argument that he would not be a danger once incarcerated, the prosecution called Hinton first, who testified that Mendoza circumvented jail security and attacked another inmate, Melvin Johnson. Ex. D at RR24:230-31; *see* App. 7-8. Hinton's

testimony had its intended effect. It shattered Mendoza's defense on the future dangerousness special issue, and allowed the prosecution to argue in closing that the "pattern of violation" had not been "broken." Ex. B. at RR:25:44; *see* App. 8-9. The jury then homed in on Hinton's testimony during its deliberations, asking specifically about Mendoza's "criminal acts while in jail," including the "assault on other inmate." Ex. B at RR25:51.

Mendoza's application alleges specific facts showing that Hinton's testimony was false. App. 17-19. More than that, Mendoza's application corroborates his allegation of falsity with two sworn affidavits from Johnson, who is willing to testify at an evidentiary hearing that *he* started the fight (not Mendoza) and that Mendoza did not circumvent jail security. Ex. E; Ex. F. Mendoza would testify to the same. These specific allegations, backed by evidence, make out a prima facie *Chabot* claim. If proven true, the facts alleged show that Hinton's testimony was (1) false and (2) material to the jury's verdict on the future dangerousness special issue. App. 17-21.

In its motion, the State does not meaningfully engage with the substance of this claim. Rather, it argues that the claim was legally available to Mendoza when he filed his initial habeas application in 2007 and that the claim has already been conclusively resolved in federal litigation. Neither argument is correct.

A. The Legal Basis for Mendoza's *Chabot* Claim Was Unavailable When He Filed His Initial State Application in 2007

The State's argument (MTD at 3) that a *Chabot* claim was legally available to Mendoza as early as 2003 is foreclosed by multiple decisions from this Court. "In *Ex parte Chavez*, another subsequent-writ case," this Court "said that unknowing-use-of-false-evidence claims, at least as [it has] come to apply them in Texas, were legally unavailable before *Chabot* and its progeny." *Ex parte Fierro*, 2019 WL 6896993, at *3 (Tex. Crim. App. Dec. 18, 2019) (unpublished) (citing *Chavez*, 371 S.W.3d at 206-07). Accordingly, this Court repeatedly has held that *Chabot* claims like Mendoza's were not legally available within the meaning of Section 5(d) before 2009. *See, e.g.*, *Chavez*, 371 S.W.3d at 205; *see also Fierro*, 2019 WL 6896993, at *3; *Ex parte Castillo*, 2017 WL 5783355, at *1 (Tex. Crim. App. Nov. 28, 2017) (unpublished). In *Ex parte Young*, 2017 WL 4684770, at *1-2 (Tex. Crim. App. Oct. 18, 2017) (unpublished), for example, this Court held that a *Chabot* claim was legally unavailable under Section 5 in March 2009, more than a year *after* Mendoza filed his initial application. Under this Court's settled precedent, Mendoza's *Chabot* claim was legally unavailable when he filed his initial application in 2007.[1] Section 5(a)(1)'s unavailability requirement is plainly satisfied.

[1] The State cites *Ex parte Carmona*, 185 S.W.3d 492 (Tex. Crim. App. 2006), and *Ortega v. Duncan*, 333 F.3d 102, 108 (2d Cir. 2003), as cases recognizing unknowing false testimony claims before *Chabot*. MTD at 3. But *Carmona* did not directly address whether unknowing false testimony violates due process. "*Chabot* was the first case" in which this Court "explicitly recognized an unknowing-use due-process claim," and "therefore" such a claim "was unavailable"

B. Mendoza Alleges a Prima Facie *Chabot* Claim

To make out a prima facie case, Mendoza needed to allege facts which, if proven true, would entitle him to relief. *Staley*, 160 S.W.3d at 63. As explained above and in his application, Mendoza has exceeded this pleading requirement by supporting his application with evidence showing that Hinton's testimony was (1) false and (2) material to the jury's verdict. The State's contrary procedural arguments are incorrect.

1. *Falsity*

The State's argument on falsity conflicts with this Court's precedent on the pleading requirements applicable under Section 5(a). Citing federal district court litigation on a related (but not identical) IATC claim, the State argues that Mendoza has not "conclusively prov[ed]" that Hinton's testimony was false. MTD at 4; *see also id*. at 2 (incorrectly arguing that "Applicant claims that [Johnson's] affidavit[s] prove[] that Officer Hinton testified falsely"). But Mendoza need "not prove his

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until *Chabot* was decided. *Chavez*, 371 S.W.3d at 205. And in *Ortega*, the court set out a different—and higher—standard for unknowing false testimony claims than the standard laid out in *Chabot*. *Ortega* held that false testimony is material if "the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." 333 F.3d at 108 (quotation omitted and alterations in original). But under *Chabot*, the materiality standard is lower, 300 S.W.3d at 771; *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011), which suffices for purposes of unavailability, *see Chavez*, 371 S.W.3d at 207 ("Because an applicant can more easily establish materiality after *Chabot*, applicant's subsequent application presents a new, previously unavailable legal basis."). Thus, it is no surprise that this Court has found *Chabot* claims legally unavailable *after* the decisions cited by the State. *See, e.g.*, *Young*, 2017 WL 4684770, at *1-2.

entire case" at this stage. *In re Tex. Dep't of Crim. Just.*, __ S.W.3d __, 2025 WL 907711, at *5 (Tex. Crim. App. Mar. 26, 2025); *cf. Ex parte Brooks*, 219 S.W.3d 396, 400 (Tex. Crim. App. 2007) ("not necessary for an applicant to prove his innocence" to make out the "prima facie showing of actual innocence" required by article 11.07, § 4). As relevant here, Mendoza need only "state specific, particularized facts which, *if proven true*," would demonstrate falsity. *Staley*, 160 S.W.3d at 63 (emphasis added); *see also* App. 15-16. Mendoza has done so, and the State does not argue otherwise.

Contrary to the State's argument (MTD at 4), there is no significance to the fact that Mendoza's counsel acknowledged in federal court that he could not say "with certainty," *Mendoza v. Director*, 2019 WL 13027265, at *12 (E.D. Tex. Nov. 14, 2019), that Hinton's testimony was false. That acknowledgment is neither relevant nor surprising. It is irrelevant because the question before this Court is not whether there is "certainty" about what happened. As the State itself argues, to require "certainty" is to require "conclusive[] pro[of]," MTD at 4, and conclusive proof is not required. *See Staley*, 160 S.W.3d at 63. And counsel's statement is not surprising because we are dealing with a square conflict in sworn testimony. Someone must be telling the truth and someone must be lying.[2] The only way to

[2] This is what the federal district court meant when it said that "Johnson's affidavit alone does not demonstrate that Officer's Hinton's testimony was in fact false." MTD at 4 (quoting *Mendoza*, 2019 WL 13027265, at *13). One witness's testimony does not "demonstrate" conclusively that

know for certain is for a court to hold a hearing, assess the witnesses' credibility, and make a finding of fact. Mendoza's allegations of falsity, backed by evidence, are sufficient at this stage.

2. *Materiality*

In his application, Mendoza likewise alleged specific facts showing that Hinton's false testimony was material. App. 19-21. The State does not argue otherwise, but instead contends that the federal courts already resolved this issue against Mendoza. MTD at 5-6. The State's invocation of *res judicata* is wrong.[3] Before proceeding further, however, we briefly reiterate what happened in federal court.

In the federal proceedings, Mendoza did *not* assert a false testimony claim. Rather, he alleged a procedurally defaulted IATC claim based on trial counsel "failing to discover and object to the State's use of false testimony, or failing to interview Mr. Johnson and present his testimony at trial." *Mendoza*, 2019 WL 13027265, at *12.[4] His evidentiary support was Johnson's first affidavit. *See* Ex. E.

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another witness's testimony was false. The conflict must be resolved by a factfinder. In any event, Mendoza is not required to demonstrate the merit of his claim at this juncture; he need only allege specific facts which, if proven true, would entitle him to relief. That is the case here: if Mendoza's allegations and Johnson's affidavits are proven true, Mendoza will be entitled to relief.

[3] The correct term here is issue preclusion or collateral estoppel, not claim preclusion or *res judicata*. The State seeks to accord binding effect to the district court's decision on a single issue: materiality/prejudice.

[4] This claim was procedurally defaulted because Mendoza's habeas counsel did not present it or Johnson's first affidavit in state court.

The district court appeared to assume, without deciding, that Mendoza had established that trial counsel's failure to investigate was deficient. *Mendoza*, 2019 WL 13027265, at *13. But it then concluded that Hinton's testimony was not material/prejudicial. *Id*. at *13-14.

Mendoza sought to appeal that decision to the Fifth Circuit. The Fifth Circuit granted a COA, finding that "the district court's decision is debatable among reasonable jurists." Unpub. Order, *Mendoza v. Lumpkin*, No. 12-70035 (5th Cir. Dec. 23, 2022), ECF No. 276 at 2. While on appeal, the Supreme Court decided *Shinn v. Ramirez*, 596 U.S. 366 (2022), which held that the Anti-Terrorism and Effective Death Penalty Act barred consideration in federal habeas of evidence that was not part of the state court record. As applied to Mendoza's case, that holding meant the Fifth Circuit could not consider Johnson's affidavit, and that the district court had erred in considering it. Mendoza thus acknowledged that *Shinn* prohibited the Fifth Circuit from resolving the merits of his appeal (because the evidence in support of Mendoza's claim could not be considered). *See, e.g.*, *Mendoza v. Lumpkin*, 5th Cir. No. 12-70035, Dkts. 260, 265. Thus, as the State notes, the Fifth Circuit observed that the district court had found no materiality/prejudice, MTD 5 (quoting *Mendoza v. Lumpkin*, 81 F.4th 461, 482 (5th Cir. 2023)), but the Fifth Circuit did not pass on the correctness of that ruling one way or another. After *Shinn*, the Fifth Circuit could not consider the merits of Mendoza's appeal.

As the history of these proceedings makes clear, issue preclusion cannot apply. An intervening Supreme Court decision prevented the Fifth Circuit from reaching the merits of Mendoza's appeal, and issue preclusion does not apply where the party opposing preclusion had no opportunity for appellate resolution on the merits. *See* Restatement (Second) of Judgments § 28(1) & cmt. a.[5] Mendoza explained this in his application, *see* App. 26 n.7, and the State offers no real response.

Instead, the State suggests that the Fifth Circuit "affirmed" the district court's no materiality holding. MTD at 5. That is not true. Yes, the Fifth Circuit affirmed the district court's denial of habeas relief.[6] But it never reached the merits of Mendoza's appeal on this Hinton IATC issue. And because, "as a matter of [intervening] law," Mendoza could not "have obtained review" of the district court's

[5] The preclusive effect of a federal judgment is determined by federal law. *Cottonwood Dev. Corp. v. Preston Hollow Cap., LLC*, 706 S.W.3d 514, 532 (Tex. App. 2024). Federal courts follow the restatement, including the rule that preclusion does not apply where the opposing party had no opportunity to appeal the prior decision. *Standefer v. United States*, 447 U.S. 10, 23 (1980); *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 647 (2006). Texas courts do, too. *E.g.*, *York v. State*, 342 S.W.3d 528, 550 (Tex. Crim. App. 2011).

[6] Instead of continuing to litigate the merits, Mendoza asked the Fifth Circuit to stay litigation under *Rhines v. Weber*, 544 U.S. 269 (2005), so he could litigate his IATC claim in state court. The Fifth Circuit denied Mendoza's request for a *Rhines* stay because it believed Mendoza's IATC claim would be barred in state court by *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002). *See Mendoza*, 81 F.4th at 482. That holding has no bearing on Mendoza's false-testimony claim; Mendoza does not need to overcome *Graves* to assert a legally unavailable claim under Section 5(a). That holding is also incorrect, as explained in connection with claim 2, and the federal court's interpretation of state law obviously is not binding on this Court.

decision that his evidence was insufficient to warrant relief, that decision cannot have preclusive effect. Restatement (Second) of Judgments § 28(1).

If anything, proceedings in the Fifth Circuit cut strongly *against* the State. To grant a COA, the Fifth Circuit needed to find that reasonable judges "could disagree with the district court's resolution of [Mendoza's] claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. In other words, Mendoza needed to prove that his IATC claim, including the prejudice/materiality element, was "substantial." 28 U.S.C. § 2253(c)(2). The Fifth Circuit's holding that Mendoza met this standard is a powerful indication that Mendoza's clams "merit[] further inquiry." *Staley*, 160 S.W.3d at 63. And Mendoza has now supported his application with additional, more-detailed evidence (Johnson's second affidavit, Ex. F) that the Fifth Circuit did not consider when finding Mendoza's claim substantial.

For these reasons, this case is nothing like *Ex parte Ruiz*, 543 S.W.3d 805 (Tex. Crim. App. 2016), on which the State exclusively relies. In *Ruiz*, the applicant's IATC claim had already been fully and finally litigated in state and federal court. "[T]his Court" had "already reached the merits of Ruiz's claim of ineffective assistance of counsel" in earlier habeas proceedings. *Id*. at 826. And "the merits of Ruiz's IAC claims ha[d] already been thoroughly addressed by two federal courts." *Id*. Under those facts, the court held that "the doctrine of *res*

judicata would seem to preclude this Court from evaluating Ruiz's IAC claims." *Id*. But those are not the facts here. Mendoza's false-testimony claim was not litigated in state *or* federal court. And the federal district court's resolution of a related IATC claim cannot have issue preclusive effect under settled preclusion doctrine. *Ruiz* is therefore irrelevant to Mendoza's first claim.[7]

In short, because Mendoza has alleged specific facts making out a prima facie case that the State's most important rebuttal witness offered false, material testimony, he should be authorized to proceed on Claim 1.

II. CLAIM 2: IATC

Mendoza's second claim alleges that his trial counsel was ineffective for failing to investigate Hinton's testimony and interview Johnson. Once again, the State does not dispute the underlying merits of that claim but instead argues that Mendoza cannot satisfy Section 5's requirement for prior unavailability or overcome preclusion.

On unavailability, the State asserts that a claim is not "previously unavailable simply because . . . prior writ counsel did not discover it." MTD at 6. Presumably, the State means to invoke this Court's decision in *Graves*. But the State does not

[7] As this Court well knows, it generally is not bound by federal courts' determinations of federal issues. *See Pruett v. State*, 463 S.W.2d 191, 194 (Tex. Crim. App. 1971) ("[S]tate courts are not bound by ruling of lower federal courts on Federal Constitutional questions, both state and federal courts being of parallel importance in deciding such questions, and both answer[ing] to the Supreme Court on direct review" (citation omitted)).

engage with Mendoza's arguments that *Graves* either (1) should not be read to bar IATC claims that rely on evidence outside the original state habeas record or (2) should be reconsidered. Indeed, the State's reliance on *Ruiz* undermines its argument as to Claim 2, for every member of the court in *Ruiz* acknowledged there would be "good cause" to reexamine *Graves* in appropriate cases. 543 S.W.3d at 826; *see* App. 35. This is an appropriate case. The consequence of applying *Graves* as the State wishes is to foreclose litigation in any forum of any claim that was not asserted in state court because it relies on evidence that state habeas counsel failed to discover. That would be intolerable. State defendants, like Mendoza, who were appointed deficient habeas counsel by the State would have no opportunity to litigate substantial claims precisely because the state appointed them deficient counsel.

On preclusion, the State asserts only that the "claim has already been resolved against [Mendoza] by the federal court." MTD at 7-8. Again, the claim was resolved by the district court but not the Fifth Circuit. Mendoza had no opportunity to obtain an appellate resolution of his claim, so preclusion cannot apply. *Supra* at 9-11; *see also Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 n.22 (1982) (claim preclusion requires "full and fair opportunity to litigate"). And the Fifth Circuit's conclusion that the district court's decision was debatable and that Mendoza's claim is substantial is a strong indication that Mendoza made out a prima facie case. That case is even stronger now that it is supported by a second, more-detailed affidavit

from Johnson. And if given the opportunity, Mendoza would prove his claim on the merits in Collin County District Court.

III. CLAIM 3: INEFFECTIVE HABEAS COUNSEL

Mendoza's third claim alleges that he was denied effective assistance of habeas counsel as guaranteed by the Sixth and Fourteenth Amendments. In his application, Mendoza acknowledged that this claim is currently foreclosed by *Graves*. *See* App. 44-46. *Graves* held that criminal defendants have no right to effective habeas counsel. But it did so on a mistaken premise. It analogized state habeas proceedings to discretionary review with an appellate court, where criminal defendants have no right to counsel. In Texas, however, state habeas is not like a discretionary appeal, at least when it comes to IATC claims. Habeas represents a criminal defendant's *first* opportunity to assert an IATC claim, so the better analogy is to a defendant's first appeal as of right. The Supreme Court has held that a criminal defendant has a right to effective counsel in his first appeal as of right. *See* App. 40-41. It follows *a fortiori* that he has a right to effective counsel in the underlying proceeding where he can first assert a claim.

The State does not dispute any of this. Rather, its sole argument is that this is not the right case to revisit *Graves* because Mendoza's claim would fail even if he had a right to effective habeas counsel. MTD at 9. And the sole reason the State gives for that conclusion is the federal district court's holding that Mendoza's state

habeas counsel was not ineffective. *Id*. But that holding is irrelevant here for two independent reasons.

First, the federal court's decision does not bind this Court because Mendoza had no opportunity for the Fifth Circuit to correct the district court's error. *See supra* at 9-12. *Second*, the district court held that state habeas counsel was not ineffective because (in the district court's view) the underlying IATC claim was meritless. *Mendoza*, 2019 WL 13027265, at *14 ("State habeas counsel is not ineffective nor is a petitioner prejudiced for failing to raise meritless claims."). But as explained above and in Mendoza's application, the IATC claim is not meritless. That is what the Fifth Circuit concluded when it found the claim substantial in granting a COA. And the State does not argue that effective state habeas counsel can default a substantial IATC claim. On the contrary, habeas counsel "ha[ve] a duty . . . to raise and preserve all arguably meritorious issues," like Mendoza's IATC claim. *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1086 (2003); *see also Washington v. Davis*, 715 F. App'x 380, 385 (5th Cir. 2017) (per curiam) (habeas counsel's failure to raise a "potentially meritorious IATC claim[] evidences both his ineffectiveness and the prejudice that resulted").

CONCLUSION

For the foregoing reasons, this Court should authorize Mendoza's claims under article 11.071, § 5 of the Texas Code of Criminal Procedure, summary relief should be granted on his claims which are clear from the facts set forth in this pleading and the record, and any remaining claims should be remanded to the trial court for an evidentiary hearing on any and all disputed issues of fact.

Date: April 8, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Tex. R. App. P. 9.4. The word count of this document is 3,714 words, not including words not included in the word count limit.

/s/ Kristin Cope
Kristin Cope

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2025, I served a copy of this opposition through the Court's electronic filing system on the following:

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Filing Description: OPPOSITION TO STATE???S MOTION TO DISMISS SUBSEQUENT WRIT AND DENY MOTION FOR STAY OF EXECUTION
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Ex parte Moises Sandoval Mendoza	§	In the
	§	
	§	Court of Criminal Appeals
	§	
	§	of Texas

State's Reply to Applicants Opposition to State's Motion to Dismiss

The State filed a motion to dismiss Applicant's subsequent writ on April 4, 2025. Applicant filed an opposition response to the State's motion on April 8, 2025. The State offers this reply to two of the arguments raised in Applicant's response. The State otherwise relies on the arguments urged in its original motion.

Applicant's Reliance on *Ex parte Chavez* is Misplaced

In his response, Applicant relies on *Ex parte Chavez*, 371 S.W.3d 200 (Tex. Crim. App. 2012) and its unpublished progeny[1] for the proposition that the unknowing use of false testimony was not a legally available claim prior to this Court's decision in *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). In *Chavez*, this Court stated, "*Chabot* was the first case in which we explicitly recognized an unknowing-use due-process claim," and thus the

[1] The Texas Rules of Appellate Procedure prohibit the citation of unpublished cases from this Court. Tex. R. App. P. 77.3 ("Unpublished opinions have no precedential value and must not be cited as authority by counsel or by a court."). Accordingly, this Court should disregard the portions of Applicant's argument that rely on unpublished authority.

claim was previously unavailable. *Chavez*, 371, S.W.3d at 205. But this determination conflicts with the plain language of article 11.071, § 5(d).

The plain language of article 11.071, § 5(d) states that a basis was unavailable if it "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 Crim. Pro. art 11.071, § 5(d). Accordingly, the operative date that a legal basis becomes available is not the date that *this Court* first recognizes it, but the date that either the United States Supreme Court, a federal appeals court, or any appellate court in Texas recognizes it. *See id*.

As discussed in the State's original response, a federal appeals court recognized that the unknowing use of false testimony violates due process in *Ortega v. Duncan*, 333 F.3d 102, 108 (2d Cir. 2003). In *Ortega*, the Second Circuit Court of Appeal stated,

> [W]hen false testimony is provided by a government witness without the prosecution's knowledge, due process is violated only "if the testimony was material and 'the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.'"

Id. at 108 (quoting *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991)). This is virtually identical to the standard this Court adopted in *Chabot*.

There is no mention of *Ortega* in this Court's decision in *Chavez*. Indeed, the parties may have failed to bring *Ortega* to this Court's attention when *Chavez* was argued.[2] But under the plain language of article 11.071, § 5(d), the unknowing use of false testimony was a legally available claim when the Second Circuit recognized it in 2003. *See* Tex. Code Crim. Pro. art 11.071, § 5(d). To the extent that *Chavez* focused solely on the date that *this Court* first recognized the claim, overlooking an earlier decision from a federal appeals court recognizing the claim, the determination in *Chavez* conflicts with the plain statutory language of article 11.071, § 5(d).

Mere Unavailability Does Not Overcome the Subsequent Writ Bar

Even if Applicant's claim were previously unavailable, a claim's mere "unavailability" at the time of an earlier filing is not sufficient to overcome the bar on subsequent writs if the facts an applicant alleges would not merit relief under the new claim. *Ex parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005). The applicant must also show that the facts, if proven true, would merit relief under the new legal theory. *See Ex parte Oranday-Garcia*, 410

[2] This Court has not cited or addressed *Ortega* in *Chabot*, *Chavez*, or any of their progeny.

S.W.3d 865, 867–68 (Tex. Crim. App. 2013) (citing *Staley*, 160 S.W.3d at 63–64). If the applicant fails to do so, the claim should be dismissed as subsequent. *Id*. at 867, 869. As applied to the instant case, Applicant would need to sufficiently plead (1) falsity and (2) materiality to justify this Court reaching the merits of a *Chabot* claim. Applicant has not pled sufficient facts to establish either.

Falsity

Evidence of falsity must be "definitive or highly persuasive." *Ex parte Reed*, 670 S.W.3d 689, 767 (Tex. Crim. App. 2023). Applicant presents this Court with a 2016 affidavit from inmate Melvin Johnson (who was still an inmate at the time of the affidavit) that purports to contradict Officer Hinton's testimony. Applicant's Ex. E. Now Applicant augments that affidavit with an unsworn written statement[3] by Mr. Johnson (who is still an inmate), witnessed by one of Applicant's attorneys and an individual named Matthew Duff—neither of whom purport to be notaries or otherwise capable of taking a sworn statement. Applicant's Ex. F. These statements convey an incredible tale of a detention officer releasing Mr. Johnson from his cell solely for the

[3] The statement does not meet the requirements for an inmate's unsworn declaration because it was not made "under penalty of perjury." *See Bahm v. State*, 219 S.W.3d 391, 393 (Tex. Crim. App. 2007) (inmates may use unsworn declarations in lieu of affidavit as long as written declaration is made "under penalty of perjury.").

purpose of attacking Applicant and then rewarding him for the attack with extra food trays.

Applicant now claims that Applicant and Mr. Johnson will both testify and contradict Officer Hinton's testimony. Applicant's Response 3. The testimony of a condemned prisoner and a long-time inmate decades after trial would still fall woefully short of the "definitive and highly persuasive" evidence necessary to show the officer's testimony to be false. Indeed, Applicant has known about Johnson's statement since November 2, 2016, and yet waited nearly nine years to bring it to this Court's attention. If his claim were meritorious, he would have brought it to this Court sooner than three weeks before his execution, especially in light of the fact that his entire subsequent writ relies on these allegations. Indeed, given the incredulous nature of the claim, the dubious nature of the witnesses, and the delay in bringing Applicant's claim to this Court, Applicant seems to be delaying in order to benefit from the possibility of fading memories and lost evidence.

Materiality

To plead materiality, Applicant would need to show a reasonable likelihood that, but for a false claim the jury would not have sentenced him to death. *See Ex parte Robbins*, 360 S.W.3d 446, 495 (Tex. Crim. App. 2011) He has failed to do so for numerous reasons. First, the federal district court

has already performed a comprehensive analysis of Applicant's allegation in the light of the remaining evidence admitted at trial, and determined that Officer Hinton's testimony was not material. *Mendoza v. Director*, No. 5:09-cv-00086-RWS, 2019 WL 13027265, *11-14 (E.D. Tex. 2019) (not designated for publication). Indeed, Officer Hinton's testimony was the least damning testimony presented during the punishment phase of trial. The cornerstone of the State's punishment evidence was Applicant's pattern of escalating brutality and predation:

- When Applicant was 18 years old, he sexually assaulted 14-year old L.D. three times in one evening: once by penile penetration, once by inserting beer bottle into her vagina, and once by inserting a pen. 22 RR 210-114, 229-35. He filmed these acts and showed the film to a group of people at a party. *Id*. at 212-14, 235. According to two witnesses, he was laughing while watching it. *Id*. at 213, 236.

- Witness Robert Ramirez caught Applicant slipping a pill into a young woman's drink at a party. *Id*. at 60. Ramirez took the drink, poured it out, and asked Applicant to leave. *Id*. Applicant responded by pulling out a 7-inch knife, shoving it up against Ramirez's stomach, and threatening to murder him. *Id*. at 61-62.

- Applicant and two accomplices robbed Nhat Vu and Lian Trinh at gunpoint in a college parking lot. *Id*. at 131-42, 171.

- Applicant and his accomplices robbed Melissa Chavez at gunpoint in the same parking lot where they robbed Vu and Trinh one day earlier. *Id*. at 148-56, 172, 180.

- Applicant attacked and strangled Sarah Benedict for not giving him a cigarette. *Id*. at 46-47. It took two people to pull him off of her. *Id*.

- Applicant attacked, beat, and strangled his little sister in his mother's front yard. *Id*. at 38-41. He only stopped when a neighbor intervened. *Id*.

Applicant mischaracterizes Officer Hinton as "the prosecution's first and *most important* rebuttal witness." Applicant's Response 1 (emphasis added). Officer Hinton was one of four rebuttal witnesses that the State called (in addition to the twelve witnesses the State called during its punishment case-in-chief). Two of the other rebuttal witnesses testified to finding shanks in Applicant's cell—considerably more dangerous behavior than a mere fistfight. 24 RR 242 (Elias DeLeon) 247-49 (Steven Smart). No one has ever alleged that these two witness' testimony was false.

In light of all of Applicant's extraordinarily violent acts, including the brutal facts of the murder for which he was convicted[4], it is not reasonably

[4] As this Court is aware, Applicant kidnapped Rachelle Tolleson from her home, leaving her 5-months old baby completely alone in her empty house. *See Mendoza v. State*, No. AP-75213, 2008 WL 4803471, at *4-5 (Tex. Crim. App. Nov. 5, 2008). He choked her unconscious, raped her, and then choked her again until he believed he had killed her. *Id*. While he was trying to hide Rachelle's body in a grassy area behind his house, she began to gasp for air, so he stabbed her through her throat all the way to her spinal cord. *Id*. at *2, *4-5. A few days later, he dragged her body to a remote location in a rural area. *Id*. at *2. There, he doused her body with gasoline and burned it while chatting with his friends on a cell phone. *Id*. at *5.

Police described his later confession as it "almost seemed as if he were bragging . . . [i]t was his time to be in the spotlight." 20 RR 204. He demonstrated for them how he choked Rachelle, and complained that his thumbs were still sore from pushing them into her throat. *Id*. at 203-05. He led police back to the location where they had disposed of the body, and even directed police to evidence they had missed. *Id*. at 220. He was eager to show them the scene, and "seemed to be excited" while he described burning Rachelle's body. *Id*.

likely that starting a mere fistfight with a fellow inmate had any actual effect on the jury's decision. The federal district court's analysis was correct. Applicant cannot show Officer Hinton's testimony to be material.

For these reasons, Applicant has not pled sufficient facts that if true would entitle him to relief under his new claim. Accordingly, he has not pled sufficient facts to overcome the subsequent writ bar, even if his claim were previously unavailable.

B. Prayer

The State asks this Court to dismiss the instant application as an abuse of the writ, and deny Applicant's accompanying motion for a stay of execution.

Respectfully submitted,

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Criminal District Attorney

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Certificate of Service

A copy of the foregoing document has been served on counsel for Applicant, Kristin Cope, via eFile and a courtesy copy sent via email to kcope@omm.com on April 10, 2025. Courtesy copies have also been sent to counsels Jason Zarrow, Melissa Cassel, and Evan Hindman via eFile.

/s/ Robert L. Koehl
Robert L. Koehl

Certificate of Compliance

This reply comply with the requirements of Tex. R. App. P. 73, and reply contains 1,882 words.

/s/ Robert L. Koehl
Robert L. Koehl

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Case Contacts

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WR-70,211-02
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

Ex parte	§	
MOISES SANDOVAL	§	
MENDOZA,	§	
	§	
APPLICANT	§	**Writ No. WR 70,211-02**
	§	**(Trial – Cause No. 401-80728-04)**
	§	
	§	
	§	**CAPITAL CASE**
	§	

SURREPLY TO STATE'S MOTION TO DISMISS SUBSEQUENT WRIT AND DENY MOTION FOR STAY OF EXECUTION

EXECUTION DATE: April 23, 2025

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** Pro hac vice admission pending*

Attorneys for Applicant

The State's Reply confirms that the arguments presented in its Motion to Dismiss lack merit. Instead of defending those arguments, the State walks them back. For instance, the State now acknowledges that this Court's precedent forecloses its argument that applicant Moises Mendoza's false-testimony claim was available when he filed his initial habeas petition. Reply at 1-3. Contrary to the State's motion, the Reply now recognizes (in part) that Mendoza need not "prove[]" (MTD at 6) his false testimony claim with evidence—Mendoza need only "plead" a prima facie case, Reply at 4. And the State does not defend its prior argument that Mendoza's claims are barred by *res judicata*. Nor does the State say anything at all about its arguments in support of dismissing claims two and three.

Instead, the State's Reply advances new arguments on the falsity and materiality elements of Mendoza's false testimony claim under *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). Mendoza addresses these new arguments in a surreply because they did not appear in the State's Motion to Dismiss, and thus could not have been addressed in Mendoza's prior Opposition.

Falsity. Although the State purports to acknowledge that the standard for authorization is whether Mendoza's application "pled sufficient facts," Reply at 4, the State contends that Mendoza's application did not make out a prima facie case of falsity because the evidence he attached to corroborate his allegations was not "definitive or highly persuasive." Reply at 4. In support of that evidentiary standard,

the State cites *Ex parte Reed*, 670 S.W.3d 689 (Tex. Crim. App. 2023). But the State misunderstands the procedural posture of that decision. In *Reed*, this Court did not review whether the defendant's allegations made out a prima facie case; it reviewed his claim *on the merits* after habeas proceedings in the District Court. As the decision recounts, the Court had concluded four years earlier that the defendant's "false testimony [claim] satisfied the requirements of Article 11.071, Section 5," and "remanded those claims to the habeas court 'for further factual development.'" *Id*. at 700 (quoting *Ex parte Reed*, 2019 WL 61114891 (Tex. Crim. App. Nov. 15, 2019)); *see also id*. at 731 (recounting same procedural history). *Reed* was back before the Court after those remand proceedings, at which point the defendant bore the burden of *proving* his false-testimony claim with "definitive or highly persuasive" evidence. *Id*. at 767.[1] *Reed*'s standard for evaluating the evidence *after* Section 5 authorization is simply irrelevant to the question before this Court—whether Mendoza meets the requirements for Section 5 authorization in the first place.

As the State elsewhere acknowledges (Reply at 3), the applicable standard under Section 5(a) is the pleading standard set out in *Ex parte Staley*, 160 S.W.3d

[1] *Reed* borrowed that test from *Ukwuachu v. State*, 613 S.W.3d 149, 156 (Tex. Crim. App. 2020), a case that came to the CCA on direct review. *See Reed*, 670 S.W.3d at 767. *Reed* (and *Ukwuachu*) thus set out the standard that Mendoza must *ultimately* satisfy in the habeas court on remand, but those cases have nothing to do with the "prima facie" test that governs Mendoza's request for Section 5 authorization.

56 (Tex. Crim. App. 2005); *see also In re Tex. Dep't of Crim. Just.*, __ S.W.3d __, 2025 WL 907711, at *5 (Tex. Crim. App. Mar. 26, 2025). And the State nowhere contests that Mendoza adequately alleged falsity under *that* standard.

The State's remaining arguments, instead, take aim at Mendoza's initial effort to collect evidence, which he was not even required to attach to his petition. Those arguments fail too.

The State first asserts that Johnson's most recent affidavit attesting to Hinton's falsity is not an "affidavit" within the meaning of the Civil Practice and Remedies Code. Reply at 4. Of course, Johnson submitted another affidavit and that one *was* sworn, *see* Ex. E, rendering the State's point moot. And whatever one wants to call Johnson's second affidavit, Ex. F, it clearly provides additional support to Mendoza's allegations—which are all that matter at this juncture.[2]

Beyond this technical quibble, the State contends that Hinton's testimony was credible and Mendoza's allegations and Johnson's affidavit(s) are not. Reply at 4. But credibility disputes cannot be resolved at the pleading stage. They are quintessentially matters for the factfinder to resolve after all the witnesses are put

[2] Furthermore, the State's legal authority about the effect of "unsworn" declarations is inapposite. Reply at 4 n.3 (citing *Bahm v. State*, 219 S.W.3d 391, 393 (Tex. Crim. App. 2007)). *Bahm* concerned a motion for new trial, which in Texas must be "supported by affidavits." *Id.* at 396. No such requirement governs these proceedings. Both of Johnson's statements may be considered as this Court assesses whether Mendoza's allegations, "if proven true," make out a prima facie case for relief. *Staley*, 160 S.W.3d at 63.

through the crucible of cross-examination, exactly as the procedural history of *Reed* illustrates. As the Court observed in another decision in that litigation, the "unparalleled position of the habeas judge to directly assess a witness's demeanor" puts them "in the best position to assess the credibility of witnesses." *Ex Parte Reed*, 271 S.W.3d 698, 727-28 (Tex. Crim. App. 2008)). Put differently, the State's credibility argument is flatly incompatible with *Staley*'s holding that the question under Section 5(a) is whether Mendoza's allegations (and initial evidence) "*if proven true*, would entitle him to habeas relief." 160 S.W.3d at 63 (emphasis added). If Johnson's and Mendoza's account of the fight are proven true, then Hinton testified falsely. Not even the State disputes that.

Finally, the State attacks Mendoza's diligence. Reply at 5. Here, too, the State's arguments are both irrelevant and wrong. They are irrelevant because diligence is not an element of Section 5 authorization (beyond the threshold question whether the claims were unavailable at the time of Mendoza's earlier application). Whether or not Mendoza "waited nearly nine years to bring [Johnson's testimony] to this Court's attention," Reply at 5, does not matter. More fundamentally, the State obscures the history of this case. Mendoza *could not have* litigated the falsity of Hinton's testimony in State court while his federal habeas case was pending under Texas's "two-forum[] rule." *See Ex parte Soffar*, 143 S.W.3d 804, 805 (Tex. Crim.

App. 2004).[3] After the Supreme Court denied certiorari in 2024, Mendoza returned promptly to this Court.

Materiality. The State's argument on materiality misunderstands the significance of Hinton's testimony in the trial, the parties' arguments, and most importantly, the jury's deliberations. The State begins by reciting evidence of Mendoza's misconduct before he was incarcerated. Reply at 6-7. As Mendoza repeatedly has explained, everyone—defense counsel, the defense's expert, the prosecution, and even the jury—was focused on whether Mendoza would be a danger *in prison*. *See* App. 7-9. Thus, the prosecution recounted Hinton's testimony in closing and the jury specifically asked about the alleged "assault on other inmate" during its deliberations. *See* App. 20-21. The State says nothing about those crucial contemporaneous facts—both the prosecution and the jury understood at the time that Hinton's testimony was material to the verdict.

The State's other argument is that Hinton was not the most important witness on rebuttal. But that argument is also a post hoc reimagining of the trial that is belied by the prosecution's conduct at the time, as well as the rest of the record. Put simply, the prosecution called Hinton first for a reason. As every lawyer knows, you make your most important point first.

[3] In fact, Mendoza tried to stay the federal litigation to return to this Court in 2022, after the Supreme Court made clear that Johnson's affidavit was not cognizable on federal habeas, but the Fifth Circuit denied Mendoza's request. *See* App. 14.

The State nonetheless cites the testimony of Elias DeLeon and Steven Smart. Mendoza did not dwell on their testimony in his application or opposition (*see* App. 8 n.2) because their testimony could not reasonably have supported a death sentence, so Mendoza assumed that the State would not meaningfully rely on it (a prediction that proved correct until this Reply). The State asserts that they testified to finding "shanks" in Mendoza's jail cell, Reply at 7, but the jury heard what those objects actually were—(1) a piece of "tin or aluminum" that appears to have been the "foil from an orange juice drink," Ex. D at RR24:242-44, and (2) a piece of a comb that the guard thought was "[p]ossibly" a weapon, *id.* at RR24:249. No one is sentenced to death for possessing tin foil and comb. In any event, even if their testimony was significant to the jury, that does not mean that Hinton's testimony was insignificant.

The State concludes by citing "[t]he federal district court's analysis," Reply at 8, correctly dropping its argument that this analysis is *res judicata*. As far as the federal litigation goes, by far the more important analysis is that of the Fifth Circuit, which recognized that Mendoza's claims were substantial and deserved encouragement to proceed further. *See* Opp. at 10. That conclusion strongly supports Mendoza's argument that he has alleged a claim that "merits further inquiry." *Staley*, 160 S.W.3d at 63.

The State's Motion to Dismiss should be denied. Mendoza's Application should be granted. And the fact questions raised by the State's Reply should be addressed by the District Court in the first instance.

Date: April 11, 2025

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Attorneys for Applicant

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Tex. R. App. P. 9.4. The word count of this document is 1,852 words, not including words not included in the word count limit.

/s/ Kristin Cope
Kristin Cope

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2025, I served a copy of this opposition through the Court's electronic filing system on the following:

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NO. 401-80728-04

THE STATE OF TEXAS	§	IN THE 401ST JUDICIAL
	§	
V.	§	DISTRICT COURT OF
	§	
MOISES SANDOVAL MENDOZA	§	COLLIN COUNTY, TEXAS

ORDER

In accordance with article 11.071, § 2(b), of the Code of Criminal Procedure the Court conducted a hearing at which the Defendant and his counsel were present. The Court finds that the Defendant is indigent and desires appointment of counsel for the purpose of a writ of habeas corpus. Accordingly, the Court appoints Lydia M. V. Brandt, The Brandt Law Firm, P.C., P.O. Box 850843, Richardson, Texas 75085-0843, (tel. no. (972) 699-7020), as Defendant's counsel for the purposes of a writ of habeas corpus.

IT IS ORDERED that the Clerk of this Court send copies of this *Order* and the *Judgment* to (1) the Court of Criminal Appeals, (2) the Honorable Lydia Brandt, and (3) the Appellate Division of the Collin County District Attorney's Office.

Signed this 28 day of July, 2005.

JUDGE PRESIDING

1876