



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-86,567-01

EX PARTE MARK ANTHONY GONZALEZ, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 2011-CR-5289 IN THE 175TH DISTRICT COURT
FROM BEXAR COUNTY**

**WALKER, J., delivered the opinion of the Court in which
SCHENCK, P.J., and NEWELL, FINLEY, and PARKER, JJ., joined. PARKER, J.,
filed a concurring opinion. KEEL and MCCLURE, JJ., dissented. RICHARDSON
and YEARY, JJ., did not participate.**

O P I N I O N

Applicant Mark Anthony Gonzalez was convicted of capital murder for intentionally and knowingly causing the death of a peace officer acting in the lawful discharge of an official duty, knowing that the person he killed was a peace officer.¹ Based on the jury's answers to the special issues set forth in Texas Code of Criminal

¹ See TEX. PENAL CODE Ann. § 19.03(a)(1).

Procedure article 37.071, §§ 2(b) and 2(e), the trial judge sentenced Applicant to death. This Court affirmed the conviction and sentence on direct appeal. *See Gonzalez v. State*, 616 S.W.3d 585, 587 (Tex. Crim. App. 2020) (published in part).

In this initial article 11.071 writ application, Applicant raises seven claims for habeas corpus relief from his capital murder conviction and death sentence:

- Claim 1: A six-part jury misconduct claim, including an allegation (Sub-Claim 1.1) that one of the alternate jurors threatened the lone “life” holdout juror in an effort to change the juror’s vote while the two were sequestered overnight in the same hotel room;
- Claim 2: A two-part ineffective assistance of counsel claim, alleging that trial counsel (Paul Goeke and Kurt Gransee, Applicant’s second set of attorneys)² conducted a constitutionally inadequate guilt phase investigation and presentation (Sub-Claim 2.1), and a constitutionally inadequate mitigation investigation and presentation (Sub-Claim 2.2);
- Claim 3: A four-part ineffective assistance of counsel claim, alleging that Goeke and Gransee were ineffective during jury selection;
- Claim 4: A twelve-part ineffective assistance of counsel claim, alleging that Goeke and Gransee were ineffective at the guilt phase for reasons other than those alleged in Claim 2;
- Claim 5: A five-part ineffective assistance of counsel claim, alleging

² Applicant’s mother retained Goeke to replace Applicant’s first set of attorneys. Goeke, in turn, asked the trial judge to appoint Gransee as second-chair, which was granted.

that Goeke and Gransee were ineffective at the punishment phase for reasons other than those alleged in Claim 2;

Claim 6: A four-part ineffective assistance of counsel claim, alleging that Goeke and Gransee were ineffective at Applicant's competency trial; and

Claim 7: A *Brady* claim, alleging that the State withheld evidence that could have impeached one of its guilt phase witnesses, Steve Starling.

On these claims, we determine first that Claim 1 is procedurally barred. Next, based upon the habeas court's findings and our own independent review of the record, we find that Sub-Claim 2.1 and Claims 3, 4, 5, 6, and 7 are without merit.

On Sub-Claim 2.2, Applicant has alleged that trial counsel ignored red flags indicating that they should have investigated Applicant's mental condition and instead relied solely on self-reporting by Applicant and his mother to develop their mitigation case. However, regardless of whether counsels' performance was deficient, we find that it did not prejudice the defense. Relief is denied on all claims.

I — Background

The unpublished portion of this Court's direct appeal opinion provides a detailed account of the offense and the evidence the parties presented at both phases of trial. *See Gonzalez v. State*, No. AP-77,066, 2020 WL 6482409, at *7-14 (State's guilt phase case), at *14-18 (defense guilt phase case), at *18-21 (State's guilt phase

rebuttal), at *21 (State’s punishment phase case), at *21 (defense punishment case) (Tex. Crim. App. Nov. 4, 2020) (not designated for publication). We summarize that evidence below.

I(A) — Guilt Phase Evidence

On May 28, 2011 around 2:00 a.m., Bexar County Sheriff’s Deputy Kenneth Vann stopped at a red light in his marked patrol car. Meanwhile, Applicant had been out drinking with his friend, Steve Starling, and the two were going to go to a nearby Denny’s restaurant. Instead of following Starling, Applicant pulled his pickup truck alongside Vann’s patrol car. Even though Applicant had no previous connection to Vann, he shot at Vann with an AR-15-style semi-automatic rifle (Smith & Wesson M&P-15) that he had with him in the cab of the truck. At least thirty-nine shots, of forty-six or more, struck Vann, causing devastating, gruesome injuries.

Within minutes of fleeing the scene, Applicant called Starling, and, in that phone call, Applicant confessed that, “I killed a cop.” *Id.* at *11. He chuckled and told Starling not to tell anyone. About a week later, Starling revealed this information to his wife, who immediately called the reward tip-line. Afterwards, Starling told authorities what he knew about the offense, and he later testified for the State at trial. Based on Starling’s information and other evidence, law enforcement arrested

Applicant and charged him with capital murder.

Although Applicant pleaded not guilty, his identity as Vann's killer was not an issue at trial. The defense team that took the case to trial—Paul Goeke and Kurt Gransee—acknowledged that Applicant fired the shots that killed Vann. Instead, their defense was that Applicant did not act intentionally, knowingly, or voluntarily because he was in an automatistic state caused by a “perfect storm” of alcohol and prescription drug abuse, head injuries, brain dysfunction, and hypoglycemia. *Id.* at *14. The defense presented this theory through the testimony of their expert, Dr. James Merikangas, a clinical psychiatrist and neurologist. The State countered with a robust rebuttal case—the testimonies of Dr. Brian Skop, a general and forensic psychiatrist, and Dr. Peter Fox, a neurologist and neuro-imaging specialist. The jury rejected Applicant's defensive theory and found him guilty of capital murder as alleged in the indictment.

I(B) — The Parties' Punishment Phase Cases

During the punishment phase, the State emphasized the offense's heinousness; evidence from which the jury could infer that Applicant lacked remorse, refused to accept responsibility for the offense, and engaged in a cover up; an incident in which Applicant disrupted a pretrial hearing and arguably threatened deputies; and other

evidence to support an affirmative answer to the future dangerousness special issue.

On direct appeal, we rejected Applicant's issue that the evidence was legally insufficient to show future dangerousness:

Applicant's reliance on his lack of a violent criminal history is misplaced. Applicant's jury could have reasonably inferred from the evidence that, in 1988 and 1989, Applicant engaged in conduct that led to his arrest for vehicle burglaries, unlawfully carrying a weapon, DWI, and attempting to elude an officer. In 2000, he drove with an invalid license, and the jury could have reasonably inferred that he continued to do so after that date and often drove while intoxicated. When he lost his right to buy guns, he circumvented the restriction by persuading his wife to buy them for him, and he then used one of those guns to murder Vann. The jury could have reasonably concluded that Applicant demonstrated an on-going and escalating pattern of disrespect for and continued violations of the law.

Further, the facts of the offense are especially heinous. Applicant murdered Vann, a total stranger to him, without provocation, by firing forty-six shots at him with a rifle. Applicant paused in the middle of firing to rest or switch his trigger finger before resuming firing. The resulting "mini explosion" inside Vann's vehicle destroyed the deputy's body. The sheer brutality of the instant killing could indicate to a jury that Applicant posed a future danger to society. Even if the jury had been inclined to find that Applicant's conduct stemmed from an isolated incident of rage, it could have rationally concluded that Applicant's "rage is of such an uncontrollable and extreme nature that he is a continuing danger to society."

In addition, the jury could have reasonably found that Applicant displayed a lack of remorse and expressed a willingness to engage in future violent acts. Immediately after murdering Vann, Applicant admitted to committing the crime and chuckled about it. Hours later, he browsed pornography sites. During the following week, he engaged in a

cover-up, re-loaded the murder weapon's high-capacity magazine, made a threatening comment to his supervisor, continued to browse pornography sites, focused on finding his lost sunglasses, shopped for more firearms, continued to get "fucked up" on alcohol, and partied.

When uniformed SWAT officers arrived in a clearly marked armored vehicle and approached his home, Applicant tried to retreat to a bathroom where the murder weapon and another firearm were located. Although those guns were not loaded, the jury could have inferred, as argued by the prosecutor, that Applicant forgot that fact in the stress of the moment. Applicant then struggled against the officers who prevented him from barricading himself inside the bathroom, took him to the ground, and handcuffed him. And at the end of a pretrial proceeding, Applicant disrupted the courtroom and struggled against and threatened the deputies who were charged with escorting him to the holding area, stating, "I'll do what I got to do."

Id. at *23–24 (overruling point of error eleven) (internal citations omitted; references to "appellant" changed to "Applicant").

The defense presented a mitigation case, which this Court described as "weak, consisting mainly of evidence that he was a good father and son, he was kind to homeless people, and he had faced financial and emotional strain during his adult life." *Id.* at *46. Trial counsel's presentation was summarized as follows:

Applicant's family members collectively testified that, although Applicant drank too much and got "worked up" about things that did not bother others, he was a loving and attentive son and father who encouraged his children to pursue their goals in life. They related the emotional and financial strain Applicant experienced when his younger son was born with hydrocephalus. The jury also heard of Applicant's kindness to homeless people. A prison classification expert testified

about TDCJ's inmate classification system, living conditions, and restrictions within each classification.

Id. at *21 (references to “appellant” changed to “Applicant”).

In an effort to refute Applicant's mitigation case, the State emphasized evidence that he was selfish by spending irresponsibly on himself even when his family was facing financial hardship, and that he spoiled his children with gifts just as his parents had spoiled him as a child and as an adult.

I(C) — Punishment Phase Deliberations

The jury answered the punishment special issues in a manner requiring the trial court to sentence Applicant to death, but the process was not entirely straightforward. First, an alternate was substituted for a regular juror after the regular juror became disabled late in the evening of the first day of punishment phase deliberations. The procedure surrounding that substitution—specifically, the fact that the trial court did not instruct the jury to begin its deliberations anew—was the subject of an ultimately unsuccessful Sixth Amendment lack-of-group-deliberation challenge on direct appeal. *See Gonzalez*, 616 S.W.3d at 592–93 (finding Sixth Amendment argument not preserved; alternatively, assuming there was error, finding such error not structural and harmless beyond a reasonable doubt because the alternates attended deliberations before the substitution, the trial court did not prohibit the jury from beginning its

deliberations anew, and the verdict was adopted by each juror individually in the post-verdict poll).

Second, we know from the direct appeal, supplemented by the habeas record, that there was a lone holdout juror for a “life” sentence, even with counsel’s weak mitigation presentation. On the second day of punishment phase deliberations, the jury foreperson sent a note generally indicating that a juror’s emotions were interfering with the juror’s ability to answer the special issues and asking if it was possible for a juror to self-withdraw. *See Gonzalez*, 2020 WL 6482409, at *47 (quoting the exact questions in the note). The juror was subsequently identified as Eve Martinez, and the trial court interviewed her in the parties’ presence.

The theme of the interview was Martinez’s emotional stress, difficulty in deciding the special issues, and her desire not to cause a mistrial. At one point in the exchange, Martinez expressly stated that she believed Applicant should receive a life sentence, although she also acknowledged that there were “no excuses” for what he had done. *Id.* at *47. The trial court emphasized throughout that Martinez should hold to her beliefs, whatever they were, and the trial court sent her back to deliberate. The jury returned its punishment verdict shortly thereafter. In individual polling, each juror affirmed that the answers to the special issues were his or her own.

II — The Holdout Juror

Although we deny Claim 1 as procedurally barred, we take note of the factual allegations underlying Sub-Claim 1.1, which alleges that an alternate juror threatened the single life holdout outside of the jury room. Applicant contends that the second alternate juror, Martha Rubio, verbally pressured the lone “life” holdout juror, Eve Martinez, and threatened her with a knife to change her vote when the two of them were sequestered in the same hotel room after the first day of the jury’s punishment phase deliberations. Whether the “life” holdout juror Eve Martinez would have held on for Applicant’s dear life or whether she would have still let go and changed her vote is relevant to the resolution of Sub-Claim 2.2, discussed in Section IV(I)(2), *infra*.

II(A) — Martinez’s Declaration

Eve Martinez, the regular juror at the heart of Sub-Claim 1.1, provided two declarations, the second of which focused on her experience during the punishment phase deliberations. In that declaration, Martinez stated that she was the last juror to change her vote from life to death. The jury deliberated until 1:00 a.m., after which they were sequestered overnight at a nearby hotel. Martinez stated that she was put in a room with alternate juror Martha Rubio. Once inside the hotel room, Rubio

started arguing with Martinez about the case. Rubio told Martinez that Applicant was guilty and should get the death penalty. Based on what Martinez had said during jury deliberations, Rubio accused Martinez of being on Applicant's side instead of being with the jury.³ Rubio said she wanted and needed to go home to her family and her baby, and she wanted Martinez to vote for death. Martinez responded that she did not want to change her vote; she believed that Applicant should get life instead of death.

They continued arguing:

[Rubio] kept repeating that she needed to go home to her family and that I needed to make a decision. Then she told me that she had a knife in her pocket. When [Rubio] told me that she had a knife, she was sitting on her bed and I was on mine. [Rubio] was sitting facing towards the foot of her own bed, but her head was turned to the right, when she was speaking to me. I was sitting on the side of my bed with my whole body facing her. When [Rubio] said that she had a knife she pointed to her right pocket with her left hand to show me where she had the knife.

Martinez "was shocked and scared" and "did not know how to react." Martinez further "believed that she was threatening to hurt me if I did not change my vote to death." Rubio continued telling Martinez that Rubio wanted to go home and for Martinez to change her vote to death. Rubio eventually went to sleep, but Martinez could not fall asleep because: (1) she did not know what to do; (2) she was afraid of

³ Rubio was in a position to know Martinez's stance because the trial judge instructed the alternate jurors to join the regular jurors during deliberations but not to vote or otherwise participate.

being alone with Rubio; and (3) she could not stop thinking about Applicant's sentence. She thought about asking the judge if she could get off the jury, and she only managed to sleep for thirty minutes that night.

The next morning when jury deliberations resumed, Martinez still believed that Applicant should get life, but she was worried about being sequestered with Rubio another night. However, Martinez did not tell any of the other jurors what happened with Rubio. Hoping that the judge would dismiss Martinez, the jury sent a note to the trial court asking if Martinez could withdraw. Martinez was brought in to speak with the trial judge, and Martinez explained that she did not think Applicant should be sentenced to death. She wanted to tell the judge about what happened with Rubio, but Martinez was stressed by the situation and did not want to embarrass herself by making herself out to be a victim. The trial judge sent Martinez back and instructed her to continue deliberating.

Although Martinez still did not want Applicant to be sentenced to death, she also did not think she could change anyone else's mind. She was also afraid that if she did not change her vote, she would be sequestered again with Rubio, who would hurt her. Martinez changed her vote from life to death because of her fear of Rubio and because she was afraid of causing a mistrial.

Martinez stated in her declaration that she did not understand that if she had stuck to her vote, Applicant would have gotten life, which she still thinks Applicant should have been sentenced to.

II(B) — Rubio's Declaration and Affidavit

In Rubio's handwritten declaration, she said that she did not remember much about the guilt phase deliberations, but "[i]t was the second deliberation when things got stressful" because of Martinez, whom she referred to as "the girl":

There was so much drama. Things started getting heavy when one girl voted [life] and everyone else voted [death]. People were arguing a lot. Some of the jurors were really angry that the girl was voting [life]. I also felt angry that she was voting for life and keeping us in that room. I believed [Applicant] was guilty and should get the death penalty. I wanted the case to be over so I could take care of my daughter and start working again. We all went around the room giving our opinions and verdicts. . . .

We stayed in the court very late. I think around midnight they stopped us and sent us to a hotel for the night. I got mad when I found out we would have to spend the night in a hotel. I was tired and wanted to go home to my daughter. I was mad at the girl for causing us to stay in the hotel and for dragging the case on. They did not give us our phones back. They did not search us when we left court. A court officer called my mom to tell her that I wasn't coming home that night. We all walked over to the hotel. It was near the courthouse. It was kind of hidden. Nobody wanted to room with the girl who was still voting for life. Other people started pairing up with each other. I went to the bathroom in the lobby. When I came back out, the officer told me that I was rooming with the girl voting for life. I got even more mad when I found out I was rooming with her. I was more mad because she was the whole reason we

were at the hotel. We went up to the room.

Right when we got settled in our rooms we started arguing about the case. I told her that it was pretty obvious that [Applicant] was guilty. The girl said that he was probably mentally ill and that she didn't want his death on her conscience. She wanted to give him a chance. I ended up telling her that I didn't have time for this. I told her I had a daughter to get back to and that this was dumb. I was really mad at her when we were arguing. I was lying down a lot at the time when we were arguing. When I told her I did not have time for this, I sat up. I sat up because I got even more mad. I told her that I hoped she made her decision tomorrow because I don't have time for this. I was really angry that she was keeping us there and that her opinions were not making sense. I think we argued for about five minutes. Eventually I told her that I was going to go to sleep. I slept for a little bit. But I also stayed up for a while staring at the wall and thinking about my daughter and my boyfriend.

In the morning we did not say anything to each other. We went downstairs and ate quietly in the hotel. Then we went back to court. In the morning it all went back to that girl. She said that she still felt the same and everyone got mad again. I was just so mad I didn't talk to anybody. The girl eventually got taken to see the Judge. When she came back from her meeting with the Judge, she had changed her vote to [death]. The girl told the group that she was going to vote [death] because she did not want to stay at another hotel again overnight. When she changed her vote I was relieved. The jury could finally give the verdict. We went to the courtroom and gave the verdict. Everybody in the courtroom was happy with the decision. After I left court that day I found out that my boyfriend had broken up with me because he thought I had been cheating. There was so much drama for those few days.

(paragraph breaks inserted). Before the habeas evidentiary hearing, the State obtained a sworn affidavit from Rubio that succinctly stated:

I never threatened eve martenez [Martinez]

I never had a knife
We brarely [barely] talked

II(C) — Boilerplate Affidavits

The State also filed boilerplate affidavits that all the regular jurors and alternate Rubio signed on the day of the punishment verdict or a day or so afterward. As relevant to Sub-Claim 1.1, the affidavit signed by Martinez attested that “the verdict of the Jury was reached by each and every one of the Jurors individually and satisfactorily to each of us.” Alternate Rubio attested that she was present in the jury room, and she also stated “[f]rom [her] observations, the verdict of the Jury was reached by each and every one of the Jurors individually and satisfactorily to each of them.”

II(D) — Martinez and Rubio at the Evidentiary Hearing

Martinez and Rubio both testified at the habeas evidentiary hearing. Martinez’s testimony was generally consistent with the declarations she provided to Applicant. However, at the hearing Martinez was able to further explain that when she was paired up with Rubio, Rubio let out a frustrated sigh. Martinez interpreted it as showing Rubio was mad because Martinez was the hold-out juror. Martinez also described Rubio’s physical appearance as bigger and kind of rough, with tattoos and piercings. When they got into the hotel room, Rubio was angry with Martinez, and then they

argued as described in Martinez's declaration. The next morning when the jury had breakfast at the hotel's restaurant, Martinez did not eat or talk to any of the other jurors because she felt alone due to her status as the hold-out juror.

Importantly, Martinez testified that she did not feel like she could actually hold on to her beliefs if it meant having to spend another night in a hotel room with Rubio. She was terrified of that possibility, and she changed her vote even though that was not the vote she actually wanted. She would not have changed her vote if Rubio had not threatened her the night before, and she would not have changed her vote if she had known that she would not be sequestered again with Rubio.

Martinez acknowledged that she answered "yes" when the court polled the jury after reading the punishment verdict, but she explained that it did not feel right. However, she felt that she would not be allowed to change her vote in the courtroom. Regarding the boilerplate affidavit, Martinez acknowledged that she signed it, but she said that did not really read it or think about what it said because she was tired and eager to leave.

Although she did not tell the trial judge about the threat from Rubio when she was brought out of the jury room, Martinez testified that she tried to speak up toward the end of the conversation when she told the judge that "[t]here's other stuff, but I

don't know if I can say it here." At the evidentiary hearing, Martinez explained that she was referring to the threat from Rubio, and also an issue with her contact lens solution. She testified that she did not tell the judge about the threat because she felt that the trial judge was cutting her off and did not want to hear about it. Additionally, on cross-examination Martinez agreed that the jurors went through security screening and were under the watch of court bailiffs through the deliberations, without access to their belongings. She also did not tell any of the bailiffs about Rubio's threat.

Martinez denied that she was having "buyer's remorse" about the death sentence. Yet, Martinez said she regretted voting for death, because it was not her vote and it was not what she wanted. It was not her "real vote."

For her part, Rubio also provided testimony in line with her prior declaration and affidavit. In her testimony, Rubio again denied threatening Martinez with a knife or ever bringing a knife. She explained that the jurors went through security screening, and when the jury was sequestered there was no chance to find a knife. Rubio acknowledged that she was angry and frustrated with Martinez and argued with her. She also stated that she observed a lot of pressure was being put on Martinez by the other jurors, and she was not the only one telling Martinez to change her vote; "[i]t was me and everybody[.]"

Rubio conceded that she looked up information about Applicant's case on the internet even though the trial judge instructed the jury not to; nevertheless, she did not share that information. She also admitted that she participated in the deliberations, despite the trial court's instructions that the alternates not participate and her post-trial boilerplate affidavit in which she attested that she did not participate. She made posts on her Facebook account about her service as an alternate juror while the trial was ongoing, although the posts complained of jury service generally and did not include facts about the case specifically. Regarding her short affidavit provided to the State, Rubio agreed that the affidavit, in which she attested that she barely talked to Martinez, made no mention of being sequestered with Martinez or the argument she had with Martinez in the hotel room.

On re-direct, Rubio explained that she was mad at Martinez, not because she was voting for life, but because she was the holdout. If the sides were reversed, and all of the jurors except Martinez were voting for life without parole, Rubio said she would have been just as mad at Martinez for being the holdout and keeping the jury there. Rubio repeated that everybody was harsh towards Martinez—“eleven people in that room were mad” at Martinez because she was the holdout.

II(E) — Habeas Court's Findings of Fact (Claim 1)

In its findings of fact and conclusions of law on Claim 1, the habeas court acknowledged all six of Applicant's sub-claims, but it only made findings as to Sub-Claim 1.1, the allegation that Rubio threatened and pressured Martinez about her vote on the punishment special issues when they were in the hotel room together. We take note of the findings on Sub-Claim 1.1, because Martinez's initial vote for life and her reluctance to change her vote to death is relevant to Sub-Claim 2.2, regarding whether Applicant's trial counsel provided constitutionally ineffective assistance of counsel as a result of a deficient mitigation investigation. Having independently reviewed the record in our role as the ultimate fact finder, we find the habeas court's findings regarding Sub-Claim 1.1 are supported by the record, which state:

1. Specifically, with regard to the claim involving Jurors [Martinez] and [Rubio], . . . [t]he alternate jurors were allowed to be present for jury deliberations. During sequestration, alternate juror [Rubio] was assigned a hotel room with juror [Martinez].
2. Neither side objected to [Rubio] being present for deliberations and being assigned to room with [Martinez]. . . .
3. This court finds . . . that alternate juror [Rubio] did improperly voice her opinions to juror [Martinez] in an attempt to pressure [Martinez] to change her vote from life to death. This was in disobedience to the court's instructions to not discuss the case, particularly with regard to [Rubio] being an alternate juror.
4. The court finds credible [Martinez's] testimony that she felt pressured to change her vote from life to death. The court also

finds credible [Martinez's] misgivings about changing her vote and believes that it would have been her preference to stick with her vote of life, rather than death.

5. The court finds credible [Martinez's] position that after hearing from the defense expert regarding Applicant's mental health, she believed that he had a mental illness and should not be put to death.
6. Nevertheless, this court does not find credible [Martinez's] accusation that [Rubio] threatened [Martinez] with a knife. The following circumstances weigh against finding [Martinez's] version of that story credible:
 - a. [Martinez] did not see a knife.
 - b. [Martinez] did not tell the bailiffs about the perceived knife threat.
 - c. [Martinez] did not tell anyone else on the jury about it.
 - d. [Martinez] had an opportunity to tell the judge about her fear of [Rubio] when she was called into the judge's chambers the next morning, but she did not tell the judge at that time. The court does not find it credible that the Judge prevented [Martinez] from telling her about the knife threat and her fear of [Rubio].
 - e. [Martinez] was being pressured to change her vote by all of the jurors, not just by [Rubio].
 - f. [Rubio] did not continue to pressure [Martinez] after their exchange in the hotel room, but the other jurors continued to pressure [Martinez] during the next day's deliberations.
 - g. [Martinez] did not say anything about the alleged threat by

[Rubio] or her ambivalence regarding her verdict when the jury was polled after the verdict.

- h. [Martinez] did not say anything about her ambivalence when asked to fill out her affidavit after the trial was over.
- I. [Martinez] waited two years to tell someone of [Rubio's] "threat" and to "confess" that she didn't really want to vote for the death penalty.

...

- 12. As noted above, although the court agrees that [Rubio] disobeyed the court's admonitions and improperly attempted to persuade [Martinez] to change her vote when they were in the hotel room, the court does not find it credible that [Rubio] threatened [Martinez] with a knife. Such a claim raised two years too late does not ring true.
- 13. The Court finds it more likely than not that [Martinez] changed her vote from life to death, (1) because she did not want to be sequestered another night with [Rubio], and (2) she felt pressured by *all* of the other jurors to change her vote, not just by [Rubio].

...

(emphasis in original).

We find the facts underlying Sub-Claim 1.1 troubling. However, as the habeas court found, the alternate juror's behavior was not quite as bad as Applicant alleges. Given Martinez's silence about the threat at the time it was supposedly made, it does not seem likely that Rubio actually threatened Martinez. Even if their hotel room

argument descended into the realm of threats, no knife seems to have been involved. Yet, the alternate's behavior was still improper. How that improper behavior affected the "life" holdout juror Eve Martinez and whether she would have still changed her vote after being pressured, or whether she would have held onto her vote for "life" in the face of a more thorough mitigation presentation, is relevant to the resolution of Sub-Claim 2.2, which we now turn to.

III — Ineffective Assistance of Counsel

In Claims 2 through 6, Applicant argues that he received ineffective assistance of counsel throughout the trial from voir dire to punishment and also in the separate competency proceeding. A successful claim for constitutionally ineffective assistance of trial counsel requires an applicant to establish, by a preponderance of the evidence, that (1) counsel's performance fell below an objective standard of reasonableness (deficient performance); and (2) there is a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance (prejudice). *Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). An applicant's failure to satisfy both prongs of the two-pronged test defeats a claim of ineffective assistance. *Ex parte Lane*, 303 S.W.3d 702, 707 (Tex. Crim. App. 2009).

As to the deficient performance prong, there is a strong presumption that counsel's conduct was reasonable and judicial scrutiny of it will be highly deferential. *Strickland*, 466 U.S. at 689. To satisfy the deficient performance prong, an applicant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687; *see also Harrington v. Richter*, 562 U.S. 86, 110 (2011) (" *Strickland* does not guarantee perfect representation, only a 'reasonably competent attorney.'") (quoting *Strickland*, 466 U.S. at 687). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Richter*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 690).

Regarding the prejudice prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693). "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (quoting *Strickland*, 466 U.S. at 687).

The "reasonable probability" standard is somewhere less than a

preponderance,⁴ as explained in *Strickland* itself: “[W]e believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693. Instead, “[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.* at 694.

In the years since *Strickland*, the Supreme Court has reaffirmed that the reasonable probability standard is less than a preponderance. Two years after *Strickland*, the Court noted that “a defendant need not establish that the attorney’s deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*.” *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). It explained in *Williams v. Taylor* that:

If a state court were to reject a prisoner’s claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be “diametrically different,” “opposite in character or nature,” and “mutually opposed” to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a “reasonable probability that . . . the result of the proceeding would have been different.

⁴ While a “reasonable probability” is less than a preponderance, an applicant nevertheless must show that it is more likely than not that such a reasonable probability exists. *See Overton*, 444 S.W.3d at 640.

Williams v. Taylor, 529 U.S. 362, 405–06 (2000); *see also Woodford v. Visciotti*, 537 U.S. 19, 22 (2002) (“[*Strickland*] specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered[.]”); *Thornell v. Jones*, 602 U.S. 154, 163–64 (2024) (“This standard does not require a defendant to show that it is more likely than not that adequate representation would have led to a better result[.]”).⁵

IV — Claim 2: “Trial Counsel Were Ineffective for Failing to Investigate [Applicant’s] Psycho-Social History and Present Critical Evidence at Both Phases of Trial.”

Claim 2, leveled solely against the attorneys who took the case to trial (Goeke and Gransee), complains in two intertwined sub-claims (Sub-Claim 2.1 for guilt phase, Sub-Claim 2.2 for punishment phase) that:

⁵ The federal courts of appeals have taken *Strickland*’s caution to heart, and some have even explicitly characterized the reasonable probability standard as “less than” a preponderance. *See, e.g., Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001) (“This standard ‘is not a stringent one;’ it is less demanding than the preponderance standard.”) (quoting *Baker v. Barbo*, 177 F.3d 149, 154 (3d Cir. 1999)); *Dale v. Quarterman*, 553 F.3d 876, 880 (5th Cir. 2008) (“A reasonable probability . . . is less than a preponderance of the evidence.”); *Cornwell v. Bradshaw*, 559 F.3d 398, 405 (6th Cir. 2009) (“‘[a] reasonable probability’ . . . is less than a preponderance of the evidence.”); *Paul v. United States*, 534 F.3d 832, 837 (8th Cir. 2008) (“A reasonable probability is less than ‘more likely than not[.]’”) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)); *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007) (“A reasonable probability . . . is ‘less than the preponderance more-likely-than-not standard.’”) (quoting *Summerlin v. Schriro*, 427 F.3d 623, 643 (9th Cir. 2005)); *Fisher v. Gibson*, 282 F.3d 1283, 1307 (10th Cir. 2002) (“The prejudice defendant must demonstrate is by less than a preponderance of the evidence[.]”); *Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338, 1355 (11th Cir. 2020) (“‘A reasonable probability’ . . . is a lesser showing than a preponderance of the evidence[.]”).

- Trial counsel failed to do a constitutionally adequate investigation into Applicant's background before settling on the guilt phase defense of automatism. Their shortcomings included failing to follow up on various "red flags" that were evident in: (1) Applicant's behavior while the initial trial team was representing him; (2) discovery material provided by the State; and (3) information in the initial defense team's files. The investigation that trial counsel failed to do would have also functioned as a source of mitigating evidence for the jury to consider at the punishment phase, if Applicant were convicted of capital murder.
- If a constitutionally adequate investigation had been done, the results would have led reasonable counsel to present a defense that, at the time of the offense, Applicant was in the grip of delirious mania or Bell's mania—to which he was particularly susceptible due to untreated bipolar disorder and childhood trauma or abuse—and thus he lacked the requisite mens rea for capital murder. The Bell's mania theory would have: (1) been more convincing and more effective at countering the State's evidence than the automatism defense, and (2) had the advantage of front-loading mitigating evidence of Applicant's traumatic background and untreated mental illness.
- It is reasonably likely that the Bell's mania theory would have persuaded the jury to acquit Applicant of capital murder.
- Alternatively, even if the jury had still convicted Applicant of capital murder, it is reasonably likely that the mitigating evidence that would have already been presented at the guilt phase (by virtue of the Bell's mania defense) would have resulted in Applicant receiving a sentence of life without parole.

In essence, Applicant argues that trial counsel rushed into the automatism theory without enough information, and then they put blinders on for the rest of their

representation regarding anything that they thought might conflict with that theory. Applicant acknowledges that trial counsel enlisted the aid of some mental health experts, but he contends that the experts' work was narrowly focused on a head injury Applicant sustained about a week before the offense. Applicant further emphasizes that these experts did not have the benefit of the information about Applicant's background that a reasonable investigation would have uncovered. As a result, Applicant argues that trial counsel failed to discover significant mitigating evidence that they could have used to obtain an acquittal of capital murder or, barring that, a sentence of life without parole.

Applicant also points to Goeke and Gransee's inexperience in representing a client facing the death penalty, and neither was on Bexar County's list of attorneys approved to be appointed to represent defendants in capital-death cases. Trial counsel consulted with the Texas Defender Service (TDS)—specifically, Kathryn Kase, who was then TDS's executive director. Relying on Kase's declaration, Applicant alleges that trial counsel unreasonably ignored Kase's repeated advice to further investigate Applicant's mental health and trauma history before deciding on a guilt phase defensive theory.⁶

⁶ Besides providing a written declaration, Kase testified at the habeas evidentiary hearing. Her live testimony is summarized in Section IV(G)(1)(g), *infra*. Because there are no material

IV(A) — Red Flags that Applicant Says Trial Counsel Overlooked or Ignored

IV(A)(1) — Red Flags in Applicant's Behavior

IV(A)(1)(a) — Courtroom Incident

Applicant first contends that the circumstances which led to Goeke and Gransee becoming involved in his case indicated that he suffered from serious, untreated mental illness. Applicant says his relationship with the original defense team deteriorated because he came to believe that initial counsel Michael Gross and Mario Del Prado were involved, with the State and the trial judge, in a conspiracy against him. Applicant asserts that his paranoia resulted in him causing a scene at the end of a pre-trial hearing in mid-May 2012 by attempting to pass a note to the media, and bailiffs had to wrestle him from the courtroom.⁷ Goeke and Gransee took over Applicant's representation soon after this incident. Applicant argues that Goeke and Gransee should have recognized from this paranoid behavior that his mental health might be compromised, and they should have realized that they needed to investigate that issue extensively.

discrepancies between her live and written testimony, we discuss her written testimony no further except to give context to Applicant's allegations.

⁷ At the punishment phase, the State elicited testimony about the incident from a deputy who was involved, and the State also published the relevant courtroom video to the jury. This Court's direct appeal opinion summarizes the incident. *See Gonzalez*, 2020 WL 6482409, at *21.

IV(A)(1)(b) — Applicant's Suicidality

Applicant asserts that after Goeke and Gransee took over, they continued to ignore signs of mental illness in his behavior. Relying on Kase's declaration, Applicant says Goeke and Gransee repeatedly represented to her that Applicant threatened to kill himself if the trial team did not focus on a defensive theory that would result in his complete acquittal if the jury believed it. Applicant also points to the post-trial written declaration provided by Goeke, in which Goeke stated that, in regard to whether he investigated the potential for a plea deal, Applicant:

was not interested in cutting his losses. He said I do not want to live like an animal [sic]. His constant refrain was that he was going to kill himself. During voir dire, he disclosed to me that, at some earlier time, he attempted suicide in the jail by swallowing pills – probably Trazadone. The result was that he slept for three days and woke with a headache. During voir dire, Mr. Gransee convinced him that he could commit suicide anytime and that he could at least wait and see what prison was like. After that, [Applicant] stopped talking about suicide.

Applicant says the fact that he had apparently actually attempted suicide and the fact that suicide was “his constant refrain” would have put reasonable trial counsel on notice that they needed to investigate Applicant's psychological health.

IV(A)(1)(c) — Applicant's Jail Phone Calls

Applicant stresses that trial counsel had access to a transcript of his recorded jail calls, in which he “expressed extreme paranoia and agitation.” From our cold

review of the that transcript, we find that Applicant seems normal in most of these conversations. However, there are definitely instances in which Applicant exhibits seemingly irrational paranoia about Gross and Del Prado, as well as somewhat grandiose thinking. As to “agitation,” there are instances in which Applicant appears to become angry at his wife and mother when he believes they are not taking his complaints about Gross and Del Prado seriously enough.

IV(A)(2) — Red Flags in Discovery Materials

Applicant emphasizes a number of materials that were provided to the defense in discovery. The materials generally reflect his assertions or reasonably support his inferences:

- Statements that Applicant, Patricia Alcala (Applicant’s wife), and Mario Sepulveda (Applicant’s friend and Alcala’s cousin) gave to police indicating that Applicant’s suicidality was recurrent over his life. Applicant asserts that this information should have alerted Goeke and Gransee that Applicant’s suicidality was not simply situational, but a symptom of a long-standing mental illness that required further investigation.
- Alcala’s and Sepulveda’s statements to police indicating that Applicant experienced mood swings, anxiety, and paranoia; took medication for anxiety; and had excessive, compulsive, and impulsive spending habits.
- A San Antonio jail medical record showing that Applicant reported suffering panic attacks from age sixteen, and that these panic attacks had prompted Applicant to “run out” of class

occasionally.

- Indications from multiple sources that Applicant had been very badly affected by the 2000 death of his only sibling, Richard Gonzalez. The habeas record shows that Richard, Applicant's younger brother, died of a self-inflicted gunshot wound after murdering his ex-girlfriend and her female roommate.
- Relatives' statements to police indicating that Applicant experienced physical, verbal, and possibly sexual abuse as a child. Alcala asserted that Applicant's father, Alberico ("Al") Gonzalez, was "very abusive" to Applicant and his brother and "would beat them a lot." Applicant's mother, Ninfa Gonzalez, asserted that Al verbally and physically abused her. Ninfa also asserted that Applicant said that a friend's father sexually abused Richard, but Applicant denied that the man also sexually abused him.⁸
- Indications that Applicant's father and brother suffered from mental illness. Applicant emphasizes (1) statements to the police from various sources reporting that Al had been repeatedly admitted to the VA hospital for psychotic episodes, was "manic" and mentally unstable, and took Trazadone for depression; and (2) information trial counsel had about Richard's death (a double murder-suicide). Applicant argues that this information should have alerted Goeke and Gransee to the possibility that both Richard and Applicant inherited Al's mental illness.

IV(A)(3) — Red Flags in Materials Inherited from the Initial Trial Team

⁸ Alcala's post-trial affidavit stated that Applicant's upbringing was "terrible"; his father was an abusive alcoholic; and after his brother's suicide, Applicant told her that his friend's father sexually molested Applicant multiple times when he was between nine and thirteen years-old. Mitigation specialist Gerald Byington's affidavit reflects that, in his June 2011 interview notes to the first trial team, he stated, *inter alia*, "Patricia [Alcala] told me that [Applicant] had said to her that one time when he was about 12[,], he was sexually assaulted by a neighbor."

Applicant notes that when Goeke and Gransee became Applicant's counsel, they received Applicant's basic medical, employment, and educational records and work product from the original team's mitigation investigator, Gerald Byington. According to Applicant, red flags in these materials included:

- Medical records showing that Applicant was diagnosed with social anxiety in 2010 and prescribed medication for it;
- School records revealing that Applicant was frequently absent for long periods of time, had been put in speech pathology for a language disorder, and had a chaotic home life;⁹ and
- An interview in which Sepulveda told Byington that Applicant was depressed and suicidal and that Applicant's father, Al, was "crazy" and once shot at Applicant and Sepulveda with a shotgun.

As with the previous "red flag" evidence Applicant relies on, these exhibits generally reflect his assertions or reasonably support his desired inferences.

IV(B) — What Applicant Says Reasonable Counsel Would Have Done in the Face of These Red Flags

Applicant contends that the information set forth above in Section IV(A), *supra*, would have prompted reasonable counsel to attempt the following:

1. talk to Applicant's extended family members, friends, neighbors, and teachers, all of whom he says were available and willing to testify;

⁹ Applicant asserts that all of these correlate with mental illness.

2. get Applicant's father's VA records, which showed that Al had been diagnosed with several mood disorders and had a lifetime of psychiatric hospitalizations and treatment;
3. get Al's criminal records, which revealed that he repeatedly abused his children and Applicant's mother;
4. get the education and death investigation records for Applicant's brother;¹⁰ and
5. investigate the possibility that two different neighborhood men (Joe Garza and Clayton Meyer) sexually abused Applicant when he was a child.

Applicant avers that instead of doing the above, all Goeke and Gransee did was hire the original team's mitigation investigator, Byington, to re-interview four witnesses (Applicant's wife, mother, and in-laws); interview Applicant's teenage son; obtain Applicant's basic educational, employment, and recent medical records; and arrange for Applicant to undergo neuropsychological testing to demonstrate that Applicant had cognitive impairment consistent with a head injury.

IV(C) — Applicant's Prejudice Argument

Applicant alleges that, if trial counsel had conducted an adequate investigation, they could have presented "a consistent, unified theory of defense and mitigation that

¹⁰ Applicant emphasizes that susceptibility to mental illness can be inherited, and they say these records provided clues that Richard likely had a mood disorder.

relied on evidence of [Applicant's] struggle with mental illness and trauma.”

Specifically, Applicant argues that:

[T]rial counsel would have been able to engage a neuropsychiatrist to explain to the jury that, on the night of the offense, [Applicant] experienced a delirious mania, known as a Bell's mania, during which [Applicant's] consciousness waxed and waned. The expert would have told the jury that [Applicant's] history of mental health and trauma rendered him particularly vulnerable to a Bell's mania following his head injury a week before the offense. That expert's opinion would have been corroborated by the extensive social history evidence demonstrating that [Applicant] and his immediate family members suffered from Bipolar Disorder, as well as evidence that [Applicant] experienced significant traumas correlated with mental illness.

For the theory that Applicant is bipolar and was experiencing Bell's mania, Applicant relies on declarations from his writ mental health experts—Dr. James Campbell, Psy.D., a clinical psychologist and trauma expert, and Dr. George Woods, M.D., a neuropsychiatrist.

Alternatively, Applicant argues that even if the jury found him guilty of capital murder, there is a reasonable probability that he would have been spared the death penalty had the jury heard the evidence about his background.

IV(D) — Trial Counsels' Written Declarations Provided to Applicant

Before or soon after Applicant filed his habeas application, Goeke and Gransee each gave Applicant a written declaration. As relevant to Claim 2, they stated as

summarized below.

IV(D)(1) — Goeke

Regarding Goeke's selection of the automatism defense, he said the idea occurred to him before Goeke formally began representing Applicant, when initial lead trial counsel Gross talked to him about the case. Goeke said he was aware of automatism due to his training in the area of clinical psychology. He emphasized his undergraduate degree in psychology; his year working as a neurosurgical technician before deciding to attend law school; his perceived ability to tell, with a sufficiently long conversation, the difference between someone who had suffered head injuries and people with naturally occurring low intellect; and his success in helping a previous client avoid criminal charges after that client had taken Ambien and started driving in the middle of the night, causing several accidents.

Goeke claimed that, largely because of his background and training, he has good relationships with psychiatrists and psychologists, including psychiatrist Dr. Michael Arambula. Goeke talked to Arambula about using an automatism defense, "but [Arambula] doubted that automatism could produce behavior as complex as both shooting and making well-placed shots." Second-chair Gransee found Dr. James Merikangas, who "believed automatism was a viable explanation for what occurred."

Merikangas became their expert at trial.

Regarding an investigation into Applicant's background, Goeke said he came into the case mindful of what he understood from talking with Gross. Goeke believed that the attorney-client relationship between the Gross-Del Prado team and Applicant deteriorated because: (1) Applicant did not trust Gross and Del Prado because they were court-appointed; (2) Gross and Del Prado talked to Applicant about mitigation from the outset; and (3) Applicant perceived Gross and Del Prado's focus on the penalty phase as giving up.

What Goeke found when he took over the case was consistent with this belief. He found Applicant to be very focused on obtaining a complete acquittal. Goeke recounted Applicant's expressed aversion to spending the rest of his life in prison; "constant refrain was that he was going to kill himself"; and assertion that he had previously attempted suicide in jail.¹¹

Because of what he understood about the initial team's experience, Goeke said he did not immediately talk to Applicant about Applicant's background or mitigating evidence. But when Goeke eventually did try to talk to Applicant about these subjects,

¹¹ There is independent support in the record for Goeke's assertion about Applicant's attitude. Applicant's wife, Alcala, predicted to the police that Applicant would commit suicide in jail or provoke someone to kill him. Alcala told investigators that, after Applicant's brother committed double-murder-suicide in 2000, Applicant told her that he "would've done the same thing, because [he] wouldn't never wanna go to prison."

Applicant did not want to. Goeke's impression was that Applicant saw preparing a mitigation case as surrendering. Goeke acknowledged that, from conversations with Applicant's mother, "it seemed clear that [Applicant's] father was an abusive alcoholic[.]" But Goeke said that, when asked about it, Applicant "insisted he had a happy childhood." According to Goeke, Applicant "did not think of himself as abused. He said and seemed to believe his childhood was fine because he did not know any better." Goeke admitted that Applicant "had a malignant lack of insight" into his past.¹²

Goeke stated that he spent a lot of time with Applicant's mother, Ninfa, trying to discover potentially mitigating information. While Goeke learned from her that Applicant sustained a head injury as a teenager, when Goeke asked about the family's home life, she

would act as though it was none of my business and be evasive. She talked about his father's drinking and abuse, but it was not like [Applicant] was beaten with rods. She appeared to be an abused spouse in denial. She also appeared afraid of her husband. My understanding is that, when she spoke to the mitigation investigator Gerald Byington, she hid the fact that she was talking to him from her husband.

¹² Goeke's admission is notable because it acknowledges that he was contemporaneously aware that Applicant had poor insight into his history. And yet, as will be seen, Goeke kept turning to Applicant, whom he knew to have poor insight, and to Applicant's mother, whom he contemporaneously found to be evasive, for information about Applicant's history.

Goeke further made this statement:

28. Childhood abuse can be a mitigating factor, but it is also not uncommon. I believed that in [Applicant's] case, *it was sad, but typical. I suspected it existed in this case, but it was typical. It was not like he was chained in the basement. It appeared to be a plain vanilla abusive household.* [Applicant] did make a point of telling me that he was different from his father – he did not hit his children.

(emphasis added). Goeke did not explain “typical” in his declaration. However, Goeke’s live hearing testimony suggests he was referring to Applicant’s socioeconomic demographic (“blue collar”) and possibly also to Applicant’s Mexican heritage. In any event, the habeas record supports a finding that Goeke generally made no effort, other than asking Applicant and his mother about it, to ascertain what was going on in Applicant’s childhood home even though he subjectively suspected that some kind of abuse occurred.

Goeke continued:

29. From what I was able to glean from Gerald Byington and [Applicant's] mother, the only mitigation available was the moderately abusive environment, his father’s alcoholism, and his head injuries. The head injuries in combination with alcohol and Xanax® led to “automatism” which I saw as intrinsically mitigating.

30. As I recall, [Applicant] had a mediocre IQ, no real demonstrable deficits, nothing glaring, although the results of his testing was consistent with head injury. I do not remember him having any particular psychological disorders. He was probably chronically depressed and had an ongoing substance abuse problem. We did not learn anything about

his mental health that was not discussed in conjunction with in the neuropsychological and psychiatric evaluations that were conducted in preparation for trial.

The final sentence quoted above seems to say nothing more than that “they learned nothing about Applicant’s mental health except for what they learned.”

Goeke added, “[t]o me, the best-available mitigation was the guilt-innocence defense theory. I hoped to carry that evidence, along with the idea that the brain is fragile, into the penalty phase. . . . We presented what mitigation we could through [Applicant’s] wife and son, both in the guilt-innocence and the penalty phase. In my view, any good qualities that were inconsistent with the crime supported our theory of automatism.”

IV(D)(2) — Gransee

Gransee stated that he had never heard of automatism before, and “[t]he automatism idea first came from Paul [Goeke,]” who “is well versed in medical and mental health issues” due to his undergraduate studies. After Gransee was appointed, he and Goeke attended death penalty seminars in Dallas hosted by the TDS. They started using a few TDS lawyers they encountered there as sounding boards, including Kathryn Kase, whom Gransee knew from law school. “There were no big disagreements with them.”

Gransee said that he did not actually meet Applicant until about six months before trial began. This was due to Goeke's concern that Applicant would "turn against" Gransee because Gransee was appointed by the trial court like Applicant's previous lawyers. Goeke told him that Applicant "was adamant that, if he was found guilty, he would rather die than serve a sentence of life without parole."

On Gransee's first visit with Applicant, the defense team was investigating whether Applicant should testify at trial. Gransee asked soft questions, and the questioning "went alright." But during the next session, Gransee conducted "harder, more robust questioning of [Applicant], and it did not go well."¹³ It is implied that Goeke and Gransee decided it would be a bad idea for Applicant to testify at the guilt phase. Gransee said they could not recommend that Applicant testify at the punishment phase, either, "in part because he showed no empathy or sympathy for Sergeant Vann's family. I attributed that to the fact that he had no memory of the shooting. He always maintained that he does not remember what happened that night." Gransee continued:

15. We also told [Applicant] that we wanted to put on a mitigation case.

¹³ In the affidavit Gransee later gave to the State, summarized in Section IV(E)(2), *infra*, he said Applicant seemed "very sharp" at the first mock-examination session. But in the second session, Gransee said he asked more difficult questions, and Applicant contradicted himself. "At first he said he didn't remember anything about the night of the killing, but when I asked him about his conversation with his mother after he got home, he said it was an ordinary conversation."

[Applicant] said he did not want a life sentence, but he did not forbid us from putting on mitigation evidence. We told [Applicant] that the State was not going to let him walk out of that Court and go back to his former life. He said something to the effect of, "Are you telling me that I don't have a one-in-a-million chance?" He did not want us to focus or put any effort on mitigation and would become agitated when we did.

Gransee said they had multiple experts meet with Applicant, and these experts reported their findings. They also had various medical tests performed. Goeke dealt with the mental health experts due to his background. Gransee:

[C]an't remember an issue we learned that was not reflected in the experts' reports. He suffered that head injury in Corpus Christi. He was a likeable guy, a good father to his kids, and he had a decent job. His IQ was okay, even if he probably would never be an engineer. One of the psychologists told us he was primitive during competency proceedings. He had a lot of photographs of his car in his phone, pictures of it with the hood up and no engine. I asked why he had pictures of his cars, and he said something like, "My friends don't believe the good shit I got." His response was like he was 15-16 years old.

As to their guilt phase strategy, the plan was to present evidence that the shooting was out of character for Applicant and resulted from a head injury.

We wanted to both explain how the shooting happened and show that [Applicant] was not evil. His family testified about him. We showed that he had no serious criminal record and that there was no explanation other than something went wrong upstairs, meaning his head injury. I cannot think of any available mitigation evidence that we were prevented from putting on this way.

Gransee also noted that Applicant's mother was "adamant" that the police

were framing her son. Her attitude “appeared to stoke [Applicant’s] belief that even his original appointed lawyers were against him.”

Gransee described his understanding of Applicant’s background as follows:

19. My sense was that [Applicant] had kind of a spoiled childhood, that his parents even provided things for him, like his pickup and a motorcycle, when he was a kid and an adult. I don’t remember if that idea came from his wife or mother. He seemed to make decent money, but he was always short on money. He was living in an inexpensive trailer, and he was spending money on guns and drinking. I got the sense from his wife that she felt he was kind of worthless. That said, he paid for his son’s piano lessons.

Gransee also mentioned that, during voir dire, Applicant “sometimes inappropriately waved or smiled at jurors.” Applicant would also “get angry about questions we asked that appeared directed toward finding jurors who would vote for a life sentence.”

IV(E) — Trial Counsels’ Written Declarations Provided to the State

After Applicant filed his application and before the live evidentiary hearing, the State obtained responsive affidavits from Goeke and Gransee. The statements they provided in these affidavits, relevant to Claim 2, are summarized below. While these statements overlap with the statements given to Applicant, there is enough additional detail and difference in tone to warrant discussion.

IV(E)(1) — Goeke

In his affidavit provided to the State, Goeke said that Applicant's mother hired him after the first trial team withdrew because of conflict in their relationship with Applicant. As to the idea that he and Gransee should have provided a Bell's mania defense, Goeke stated that he was generally familiar with Bell's mania from reading psychiatric literature over the years, but he "thought it had become an archaic diagnosis supplanted by the spectrum of bipolar disorder that has evolved in modern psychiatry." Further, "Bell's mania seems to be equated here with 'excited delirium[,] a controversial diagnosis[.]'" And "[o]ne of its manifestations (that of amnesia for or unawareness of an event) can be compared to automatism, the recognized defense which we presented, and one which the State would have attacked in a similar manner." Goeke said that:

[N]one of the many psychological professionals who evaluated [Applicant] mentioned Bell's mania or excited delirium as a possible diagnosis. This is not surprising in that the two "conditions" are not recognized by the vast majority of medical, psychiatric and psychological organizations in existence. Excited delirium is recognized by the American College of Emergency Medicine but this acceptance is not shared by any other recognized body that I can find. I am however not a physician or other professional qualified to diagnose.

Regarding his approach to Applicant's case, Goeke again emphasized that he and Gransee were the second set of lawyers to represent Applicant, replacing Gross and Del Prado.

Mr. Gross referred [Applicant's] mother (Ninfa Gonzalez) to me when he and Mr. Del Prado withdrew . . . based upon the ethical ramifications of [Applicant's] (and Ninfa's) total lack of cooperation in helping them prepare for a mitigation defense. Neither [Applicant] nor his mother would provide access to the historical information or any family members who could provide it.

Goeke speculated a lot about Gross's state of mind and reasons for giving Goeke's contact information to Ninfa.

Goeke further explained that he:

[I]nherited the expert witnesses and investigators that [the first trial team] had engaged, including a Mitigation Specialist (Gerald Byington) who had worked on the case from the beginning. When I spoke to him about his investigation, Mr. Byington described his inability to obtain information without the approval and cooperation of the client and his mother, and described the ways [Applicant's] mother prevented his inquiries in this regard. Mr. Byington was highly experienced in this area and seemed to confirm for me the futility of further efforts in this regard. The discussion was further disheartening about the possibility of acquiring and presenting the mitigation evidence deemed necessary to the Colorado Method of defending a death penalty case.^[14] I took this as expert confirmation that Mr. Gransee and I would have no greater success in this regard than [Gross and Del Prado.]

Despite this information, I undertook this case from a “fresh start” point of view and interviewed [Applicant] as any new client without regard to these preexisting determinations. [Applicant] was adamant that he had not committed the offense, a position not uncommon in my experience of criminal case defendants. I began the

¹⁴ There is no explanation in the record for the “the Colorado Method.” Goeke often seemed to use “the Colorado Method” and “a traditional mitigation case” as shorthand references for a mitigation case that focuses on a defendant's upbringing and any adversities he faced.

review of discovery . . . [which] made clear the untenability of [Applicant's] claim of innocence. I eventually informed him of this and explained the need for a mitigation investigation to support plea negotiations that would save his life. His refusal to cooperate in this regard continued and similar discussions with his mother also fell upon deaf ears. Every time I raised the topic, [Applicant's] constant refrain was, "I don't want to live like this, caged up like an animal." After many failed attempts to persuade [Applicant] and his mother of the need for mitigation evidence, we focused our pursuit of a defense strategy consistent with the facts, including the fact of [Applicant's] blanket denial of the charged offense. Such an approach would enable us to honor the fully-informed choices that were his to make throughout the litigation if and when he could not be persuaded to the contrary.

Goeke said automatism was the only defense that met all of these criteria. Gransee found a well-qualified forensic psychiatrist and neurologist who had published on the topic of automatism and criminality (Dr. Merikangas). Dr. Merikangas consulted with them, and after examining Applicant and reviewing the evidence, agreed to testify in Applicant's defense.

Regarding their interactions with Kathryn Kase, Goeke explained that "[w]hen [they] attended her capital murder seminar on the Colorado Method, [they] began what would become extensive discussions with her about [Applicant's] case. Goeke felt encouraged when they told Kase about their planned automatism defense, because Kase seemed to understand that they were trying to present "up-front mitigation." When they described the difficulties they had been having with Applicant and his

mother, “Kase observed the particularly tragic nature of that situation because lawyers have often succeeded in persuading such reluctant defendants to seek life sentences by appealing for help from family members, a remedy obviously unavailable to us.” Although Kase seemed to approve of their strategy in this situation, she urged them “to keep trying for more traditional mitigation” and noted that “you have to have every bit that there is.” Goeke also felt encouraged because Kase spoke approvingly of Merikangas’s experience in capital cases. Further,

[Kase] was unable to suggest a method by which we could surmount the obstacles we faced in obtaining mitigation other than expressing her willingness to come talk to [Applicant] personally about the difference between life in prison generally and life on death row. I asked [Applicant] if he would talk to another lawyer about his case and he declined. Having grown to trust me (and apparently me alone), he did not even want to meet and speak to [Gransee] about his case until proximity to trial required it.

In the application, Applicant emphasized the negative impact of his brother’s suicide on his mental health. Apparently responding to that, Goeke asserted that he and Gransee “never would have used [that] tragic death . . . as mitigating evidence.” After noting that the brother’s death was ruled a murder-suicide, Goeke stated, “We felt that [information] could have made a death sentence more likely for a couple of congenital murderers.” Further, “Ninfa confided in me that she had been questioned by law enforcement in relationship to the suspicious death of a man with whom she

was acquainted and we jokingly feared they were now viewed as a family of killers.” To make matters worse, Goeke said, Ninfa did not believe the official report of the brother’s death and instead “had an elaborate conspiracy theory that was frankly crazy[.]”

Goeke also noted that Applicant’s friend, Mario Sepulveda, who witnessed the incident in which Applicant fell and hit his head shortly before the offense, ultimately became “a very reluctant witness.” The point of this assertion seems to be that trial counsel had to deal with some uncooperative defense witnesses.

IV(E)(2) — Gransee

In relevant part, Gransee reiterated that he did not meet Applicant until about six months before trial began because Goeke feared Applicant might “turn on” Gransee the way Applicant had turned on his previous trial team. But “for at least a year before” Gransee met Applicant, Goeke met “repeatedly” with Applicant and Applicant’s family. Gransee said that he and Goeke were also consulting regularly with Kathryn Kase and another TDS attorney.

Gransee insisted that he and Goeke “wanted to present a mitigation case” but they were stymied by Applicant, who “was adamant that he wanted to get a not guilty or death” verdict and “did not want to spend the rest of his life in prison.” Hoping

to change Applicant's mind, Gransee asked Applicant to meet with Kase, so she could explain how defendants serving life without parole sentences could still live meaningful lives. Applicant refused. Gransee stated:

[Applicant] wouldn't budge from this position. *He was adamant that he did not want us to put on a mitigation case.* As for mitigation, he said he had a perfectly normal childhood, and was not abused or sexually abused. He even seems to have been indulged with presents and so forth. He kept his family from cooperating with us on preparing a mitigation case. They told us they had no living relatives who could talk about their family history, [Goeke] did meet with [Applicant's] mother repeatedly.

(emphasis added). Gransee's italicized statement is arguably inconsistent with what he said in the declaration he gave to Applicant (i.e., that Applicant "did not forbid" them from presenting a mitigation case but "[h]e did not want us to focus or put any effort on mitigation and would become agitated when we did.").

In any case, Gransee averred that he and Goeke "definitely didn't want to present evidence about [Applicant's] brother's murder-suicide, which would make [Applicant] seem more dangerous." According to Gransee, Applicant "also insisted we not put on this evidence."

Gransee described the defense approach to trial as showing that Applicant:

[W]as an ordinary man who did something completely out of character for him because of his recent head injury and his drinking and drug use. There was no other defensive theory we could see that would lead to a not guilty verdict. I found our primary [expert], Dr. Merikangas. As soon

as I talked to him and outlined the minimal facts, he suggested we consider automatism. He wasn't making a diagnosis, just suggesting it as a theory. When I conveyed that to [Goeke] he said he'd thought the same thing. So that became part of our defensive theory.

Gransee noted that two of their witnesses, Applicant's wife and Sepulveda, became uncooperative as trial approached.

Regarding Applicant's assertion that they should have presented a defensive theory based on Bell's mania rather than automatism, Gransee stated that this approach "would have run contrary to the defense we had prepared."¹⁵ Further, Applicant "was interviewed and evaluated by multiple psychological professionals, and none suggested [the Bell's mania] theory."

IV(F) — Additional Declarations Filed by Applicant Before the Live Hearing

In the post-trial affidavit that Goeke provided to the State, he made certain assertions about his interactions with Applicant's initial lead counsel, Gross, and Gross's mitigation investigator, Byington. Apparently in response to those assertions, Applicant obtained declarations from Gross and Byington. Neither party called Gross or Byington to give live testimony at the evidentiary hearing.

IV(F)(1) — Gross's Declaration

¹⁵ This assertion sidesteps the issue, which is whether they should have prepared an automatism defense at all, given what they could have uncovered with further investigation into Applicant's background.

In his declaration, Gross stated that he was appointed as Applicant's lead counsel in early June 2011, and Del Prado was appointed as second chair shortly thereafter. On the same day he was appointed, Gross successfully moved the trial court to appoint "a pathologist, a psychologist, an investigator, and a mitigation specialist" to assist with Applicant's defense. Gross did not name these individuals, but the record shows that the mitigation specialist was Byington.

The direct appeal record shows that, in May 2012, the State formally filed notice of its intent to seek the death penalty. That same month, at the end of a routine pretrial hearing, Applicant created a disturbance in the courtroom "when he stood up and threw some papers toward the gallery, exclaiming, 'This is for the fucking media,' and then resisted deputies as they tried to remove him from the courtroom." *Gonzalez*, 2020 WL 6482409, at *21. As summarized below, Gross's written declaration sheds some light on the incident.

Gross described his and Del Prado's relationship with Applicant as consistently "up and down," but he explained that the beginning of the end came in February 2012, when an intermediate appellate court affirmed a magistrate judge's refusal to lower Applicant's bond.¹⁶ Applicant took the appellate ruling as evidence that Gross

¹⁶ At the June 2011 bond reduction hearing that was the subject of the appeal, Gross called Applicant's maternal cousin, Gloria Medrano, as a witness. At the habeas evidentiary hearing, Goeke

and Del Prado were conspiring with the State to keep Applicant “locked up.” Gross said Applicant’s suspicions grew over the next few months, and Applicant came to believe that the trial judge was also part of a conspiracy against him.¹⁷ “It seemed to me that this belief was a product of mental illness because there was no basis for it.” According to Gross, what Applicant threw to the media in May 2012 was a letter accusing Gross, Del Prado, and the trial judge of conspiring with the district attorney.

Gross said he and Del Prado eventually learned that Applicant and Applicant’s

agreed that he did not interview any of Applicant’s blood relatives, aside from Applicant’s mother and Applicant’s older son. Goeke’s justification was that he “was told there were none.” However, Goeke admitted that a transcript of Medrano’s bond hearing testimony was in the file he received from Gross.

In support of the habeas application, Medrano submitted a declaration giving a detailed biographical and social history of Applicant’s maternal-side family, emphasizing the extreme poverty and male-dominated society in which Applicant’s mother grew up in Mexico, her coming to the United States, and her marriage-of-convenience to Applicant’s father, Al. Medrano also described Al’s emotional, verbal, and physical abuse; alcoholism; inability to hold a job; frequent stays in the VA hospital; receipt of disability payments; and tumultuous marriage to Applicant’s mother. Medrano additionally noted the high level of dysfunction in Applicant’s nuclear family and Applicant’s depression, especially after his brother’s suicide.

¹⁷ The direct appeal record corroborates Gross’s statements about Applicant’s belief in a conspiracy. The trial judge held a hearing in late January 2013 to address Applicant’s desire for Goeke and Gransee to take over his representation and the fact that neither attorney was on Bexar County’s list of attorneys approved to represent defendants in capital-death cases. During this hearing, the trial judge referenced Applicant’s mental health and seemingly “irrational thoughts,” and she implied that these factors had caused her to delay setting a firm trial date. At the same hearing, Goeke asserted that “the problem that ha[d] arisen [between Applicant and the Gross-Del Prado team] ha[d] to do with [Applicant] having a distrust of the court appointed lawyer system.” Goeke did not mention anything about the mitigation investigation being a point of friction between Applicant and Gross and Del Prado.

mother were talking to Goeke about the possibility of retaining Goeke to represent Applicant. Throughout his declaration, Gross described the problem in his and Del Prado's relationship with Applicant as being the fact that they were court-appointed. Gross "[did] not remember feeling like [Applicant] or his mother were obstructing our mitigation investigation or that our mitigation investigation was a focal point of [Applicant's] distrust of Mario and me." "At some point, I gave my files to [Goeke]. In my conversations with [Goeke] at the time we transferred the case to him, he indicated that he intended to distinguish his defense team from ours as much as possible in the hopes that doing so would insulate them from the paranoia that ultimately derailed our relationship with [Applicant]."

IV(F)(2) — Byington Declaration

In his declaration, Byington described his work on Applicant's case while assisting Gross and Del Prado and Applicant's level of cooperation. Gross and Byington had worked together before, and as was Gross's typical practice, he invited Byington to conduct his own investigation and follow the evidence where it led. Byington suggested that he did not have a meaningful opportunity to develop mitigating evidence in Applicant's case while working for the initial trial team because, after about a year, Gross advised Byington that Gross and Del Prado would

be withdrawing from Applicant's case. At that point, Byington stopped working on the case and sent Gross a final invoice for Byington's work as of July 31, 2012. Byington explained that when the attorney who retained him leaves a case, Byington is also off the case unless the new attorney asks for his services.¹⁸

The invoice and Byington's discussion of the work he did on the case while working for Gross and Del Prado collectively indicate that between late June 2011 and the end of July 2012, Byington:

1. Interviewed Applicant four times. Byington said he does not recall the purpose of the second and third visits, but he surmised that it was to follow up on something. He said the last visit was to get Applicant to sign a release allowing Byington to share his files and information with Applicant's new lawyers;
2. interviewed the following people once: Applicant's mother, Applicant's wife (Alcala), Applicant's friend (Sepulveda), and Applicant's in-laws (Gloria and Luis Alcala);
3. emailed summaries of these interviews to Gross and Del Prado;
4. collected some of Applicant's technical training, employment, medical, psychological treatment, Social Security Administration, and jail medical records;
5. reviewed the results of Applicant's neuropsychological evaluation by Gross and Del Prado's expert, Dr. Gilbert Martinez; and
6. started plugging the above information into a document detailing

¹⁸ As discussed below, Goeke eventually re-hired Byington in a limited capacity.

Applicant's life history.

In his email summary of the witness interviews sent to Gross and Del Prado, Byington reported:

7. Ninfa “talked and cried about how abusive her husband was/is. Beat both her and the boys. Lots of violence.”
8. “Patricia [Alcala] told me that [Applicant] had said to her that one time when he was about 12[,] he was sexually assaulted by a neighbor.”
9. “Mom has NO education. Came to the US when she was 17. Learned English from hearing kids speak it. Still doesn't write English.”
10. “Dad has always been disabled. Been on military and VA pension. Used to be on Lithium (Bipolar Disorder?) Was and is practicing alcoholic.”
11. Applicant's only sibling, Richard, shot and killed his ex-girlfriend, her female roommate, and himself in June 2000, but Applicant's mother believed that someone else did it.¹⁹

Turning back to the declaration, Byington described Applicant as having had “an unrealistic expectation” about his case's outcome and having been “resistant to preparing for” either phase of trial. Nonetheless, Byington said Applicant “answered [Byington's] questions and signed the releases that would permit [Byington] to gather

¹⁹ At the habeas evidentiary hearing, Goeke admitted that he could not dispute that this email summary was in the file he received from Gross and Del Prado. But Goeke testified that he did not remember reading the email.

records about him.” Byington said that Applicant “also had no interest in meeting with a neuropsychologist,” but Applicant did ultimately meet with and participate in an assessment done by Gross and Del Prado’s expert (this appears to have been neuropsychologist Gilbert Martinez).

Byington did not find Applicant’s reluctance to focus on preparing for the penalty phase unusual because such preparations suggest “a high likelihood” of conviction. Byington suggested that he did what he ordinarily does when he encounters such resistance: he explained that the attorneys would be best prepared to defend Applicant if they know as much as possible about him and what led to his legal predicament. “In other words, I try to help them see that the mitigation investigation will help their attorneys in the guilt-innocence phase as well as, if necessary, the penalty phase.”

Byington said Goeke eventually re-hired him on the case in a limited capacity. Byington said he first heard from Goeke in early October 2013, after which Byington gave his file for Applicant’s case to Goeke. About a month later, in November 2013, Goeke asked if Byington could provide additional mitigation services for Applicant’s case. Byington told Goeke that he was available, but he expressed concern that there was not enough time to adequately prepare for trial, which was then scheduled for

June 2014.

Byington heard from Goeke again in mid-February 2014. Implying in his declaration that Goeke again asked Byington if he could do some mitigation work, Byington says he told Goeke that he could not assist with Applicant's case unless the trial date were continued. In mid-April 2014, Goeke contacted Byington again with news that Applicant's trial date had been rescheduled for mid-January 2015. In mid-May 2014, Goeke informed Byington that "an order authorizing funding for [Byington's] services was in the process of being finalized." Byington said that he received that order in mid-October 2014 and soon after resumed his work on Applicant's case.

Byington's role was "relatively limited" when he resumed working on Applicant's case. Goeke was his main contact.

Instead of requesting a full mitigation investigation, Mr. Goeke asked me to focus on discrete tasks. Primarily, he wanted me to update the witness interviews that I had previously conducted. As a result, I again interviewed [Applicant's] wife, mother, and in-laws. Based on my files, it appears that these are all the witnesses I spoke with when I resumed work on the case, except that this time I also interviewed [Applicant's older] son, Mark Gonzalez, Jr. I do not remember being asked to interview other witnesses, except that I tried to interview [Applicant's] ex-girlfriend and she refused to meet with me. I interviewed [Applicant's] mother, Ninfa. She sent her husband, Alberico[,] outside and refused to have him provide information to me.

Byington further stated that, by the time he resumed work on Applicant's case, Goeke "already had identified the automatism theory that was presented at trial." Byington said he "was skeptical that a jury would be convinced by this theory given the number of shots that appeared to have been fired at the time of the offense, but Mr. Goeke appeared to believe in it." As to Goeke's punishment phase strategy, Byington stated:

If Mr. Goeke had an over-arching penalty phase strategy, I was not privy to it. I do not remember saying and do not believe I would have told Mr. Goeke that further mitigation investigation was impossible or futile. I also do not remember discussing with Mr. Goeke whether or not [Applicant] had been abused sexually while growing up, but I was not asked to find records, such as [Applicant's] father's criminal or medical records, or otherwise develop evidence relating to abuse. I do remember discussing that this was an abusive household. Had I been asked, I would not have told Mr. Goeke that there was no point in investigating those topics. I do remember discussing childhood abuse with [Applicant] in 2011, which he denied, but it is apparent from my June 29, 2011 email to Mr. Gross and Mr. Del Prado that his mother talked about her husband being abusive when I first met with her at the outset of the case.

IV(G) — Live Evidentiary Hearing (Claim 2)

Applicant attached a large number of exhibits to his application, including witness declarations. Many of these declarants also testified at the hearing and their written testimony is generally consistent with their live testimony. Therefore, we largely do not discuss these declarations unless they are particularly relevant, and we

will discuss other exhibits as they become relevant to the evidentiary hearing testimony.

IV(G)(1) — Applicant's Witnesses

IV(G)(1)(a) — Philip Wischkaemper

Over the State's objection, Philip Wischkaemper testified as an attorney-expert on whether Applicant's trial team adhered to ABA and Texas Guidelines regarding attorney representation in capital cases. Wischkaemper opined that Goeke and Gransee did not adhere to these guidelines.

IV(G)(1)(b) — Mental Health Experts (Drs. Woods, Campbell, and Agharkar)

Applicant's mental health experts at the hearing were Dr. Woods; Dr. Campbell; and an additional expert not relied on in the application, Dr. Bushan Agharkar, a clinical and forensic psychiatrist. Dr. Woods opined that Applicant suffered from previously undiagnosed Bipolar Disorder, PTSD, and personality changes secondary to head trauma at the time of the offense. The interaction among these caused Applicant to experience "delirious mania" (or "Bell's mania") on the night of the offense. Applicant had many factors that made him susceptible to Bipolar Disorder and PTSD, including childhood trauma (physical and emotional abuse and possibly sexual trauma). Dr. Woods opined that Applicant's lack of a disciplinary

history in prison was because people with Bipolar Disorder do better in institutional settings. Dr. Woods acknowledged that the DSM-5 (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition) does not recognize Bell's mania as a disorder.

Dr. Campbell, a trauma expert, opined that Applicant suffered prolonged physical and emotional child abuse and neglect in his highly dysfunctional home. Dr. Campbell asserted that Applicant was also sexually abused, although Dr. Campbell acknowledged that Applicant denied sexual abuse when asked by many interviewers. This complex trauma psychologically damaged Applicant; led to developmental delay, emotional immaturity, and a tendency to dissociate; and caused him to suffer from PTSD. However, Dr. Campbell testified that the effects of the childhood trauma Applicant experienced can be successfully treated. Dr. Campbell recognized that Applicant's father was on medication for Bipolar Disorder, among other things, but Dr. Campbell did not diagnose Applicant with Bipolar Disorder.

Dr. Agharkar, who did not personally examine Applicant and therefore did not diagnose him, testified in rebuttal to the State's mental health experts, Dr. Skop and Dr. Fox. Dr. Agharkar faulted the State's experts for approaching the data in isolation in reaching their conclusions about Applicant rather than considering the data as a whole. Dr. Agharkar further testified that there was evidence to support Dr. Woods's

Bipolar Disorder diagnosis for Applicant and that this diagnosis was a reasonable conclusion. Dr. Agharkar said the same of Dr. Woods's and Dr. Campbell's diagnoses of PTSD. Dr. Agharkar also agreed that automatism was a reasonable diagnosis given the evidence. Dr. Agharkar additionally testified that it is very common for victims of trauma, including sexual trauma, to avoid disclosing the traumatic experience, and that men generally show a greater reluctance to disclose than women. Like Dr. Campbell, Dr. Agharkar testified that Bipolar Disorder and PTSD can be treated effectively, even if the PTSD is from prolonged child abuse.

IV(G)(1)(c) — Applicant's Childhood Friends and Neighbors

Four of Applicant's childhood friends and neighbors testified: Dora Breig; Alex Hartley; Jennifer Murray; and Lafreda "Rusty" Munoz. One of these witness was an adult when Applicant was a child, while the others were his contemporaries.

Collectively, these witnesses testified that Applicant's father was a mentally ill, very violent man who terrorized his wife and sons through verbal and physical abuse. Applicant's mother, Ninfa, also had "a nasty side," and her mood changed frequently. Applicant also behaved strangely at times, "completely zon[ing] out," staring into the distance, and chuckling to himself—without seeming to realize that he was doing it. Applicant's moods changed frequently too. He tried beer when he was

around seven or eight years old, and he started drinking alcohol regularly when he was between fourteen and sixteen years old. Applicant and his friends smoked marijuana in high school, and he used cocaine at age seventeen. The people in the neighborhood were generally poor and some residents (in addition to Applicant's father) engaged in bizarre behavior.

Applicant's friends also testified about an older adult man, Clayton P. Meyer, who frequented their neighborhood, befriended them when they were children, and behaved very inappropriately with them. The behavior they describe suggests that Meyer attempted to fondle them and have them touch him near his genitals, and that he frequently exposed his flaccid penis to them. Meyer also put pornography on TV while the children were in his apartment.²⁰ They also once encountered another man in a car, who watched them and masturbated. Applicant chased the man off.

Roy Ramirez, another of Applicant's childhood neighbors and friends, gave a declaration in support of Applicant's application, but Applicant did not call Ramirez to testify at the live hearing. Ramirez's declaration echoed what many of the other

²⁰ One of Applicant's habeas exhibits shows Meyer filed a civil suit against certain defendants, alleging that the defendants made a false complaint against him in 1984, accusing him of unspecified criminal acts involving the defendants' children. Meyer alleged that, as a result of the false complaint, he was arrested and transported to California (Meyer does not reveal the exact nature of the criminal charges against him or what happened with them). The exhibit shows that Meyer's suit was eventually dismissed for want of prosecution.

declarants and live hearing witnesses related about Applicant's negative childhood environment and Applicant's mood changes.

Notably, Ramirez also stated that Applicant stayed overnight at Ramirez's house many times when they were children. Ramirez further related that his stepfather, Joe Garza, was arrested in 1983 (when Applicant was in eighth grade) for sexually abusing young boys. Garza's victims included boys in Ramirez's friend group and the neighborhood in general. Ramirez said it is possible that Garza sexually molested Applicant, noting that Garza had plenty of opportunities to do so and that Garza was "very nice to" and paid "a lot of attention" to Applicant. Applicant also attached an exhibit to the application reflecting Garza's February 1984 conviction for Indecency with a Child—Sexual Contact (offense date—July 1983). According to the Pre-Sentence Investigation report, the offense involved a twelve year-old male victim.

IV(G)(1)(d) — Applicant's Wife

Applicant's wife, Alcala, testified at trial. Although she was not called to testify at the live habeas hearing, she provided a declaration to Applicant. As relevant to the sexual abuse topic, she stated:

[Applicant] once admitted to me that he had been sexually molested. He told me this not long after his brother killed himself. We were at home when he told me. I believe he was sitting quietly by himself, like he was thinking about something, and I went over to go see what was

wrong. He just blurted it out. [Applicant] told me that when he was young, somewhere between nine and thirteen years old, a friend's dad sexually abused him. [Applicant] told me that this man did sexual things to him and made [Applicant] do sexual things back. [Applicant] made it seem like it happened not just once, but multiple times. I tried to ask [Applicant] for details, but he did not want to keep talking about it.

About a week or two later, I asked [Applicant] about it again. When I brought it up, [Applicant] looked very uncomfortable. He looked scared, as if he had forgotten that he had told me this secret and was now worried that I knew about it. He told me that he did not want to talk about it. I did not push the issue because [Applicant] was already very depressed, and I did not want to make things worse.

(paragraph break inserted to increase readability).

Alcala did not state whether trial counsel asked her about Applicant's history of sexual abuse or whether she otherwise provided this information to them. She emphasized her "bad experience" with the second trial team, especially Goeke, whom she found to be "cocky and disrespectful" and who "would push her buttons for no reason." Alcala said that Goeke and Gransee "did not seem interested in learning just how bad [Applicant's] mental health had been, and the struggles he faced in his life starting from when he was a child."

Whether Alcala personally told Goeke and Gransee about Applicant's revelation to her about sexual abuse, she apparently mentioned it to Byington as indicated by his interview notes. Through Byington's notes, Goeke and Gransee had

constructive notice that Alcala had heard Applicant was abused. Goeke did not dispute that these notes were in the files he inherited from Gross and Byington. However, as discussed below, Goeke said he does not remember seeing them.

IV(G)(1)(e) — Gloria Medrano

Gloria Medrano, Applicant's cousin (as the daughter of Applicant's mother's half-sister), stated that early in Applicant's case, she testified at his bail hearing at the request of his first set of attorneys. At the writ hearing, Medrano testified that Applicant's second set of attorneys, Goeke and Gransee, never contacted her. Medrano gave details about Applicant's extended family and testified that Ninfa, Applicant's mother, grew up in extreme poverty in Mexico, entered the United States illegally, reluctantly married Applicant's father Al, and was raped by him on their wedding night. The ensuing marriage was bad. Al did not work, but he received disability checks from the VA. The burden of keeping the family financially afloat fell mostly to Ninfa. Al was a severe alcoholic. He spent several stints in the VA Hospital for mental issues, and Ninfa and the children seemed happier and much more relaxed during his absences. Applicant was quiet as a child, especially compared to his younger brother, Richard. Richard seemed to have some mental health issues as an adult. Applicant took Richard's death extremely hard.

IV(G)(1)(f) — Paul Goeke

Goeke agreed that Applicant's case was the first and only time Goeke had represented a client potentially facing the death penalty. He had also not previously served as second chair in a capital death case. On cross-examination, the habeas prosecutor elicited evidence that Goeke was nonetheless an experienced criminal defense attorney who often dealt with felony charges.

Goeke agreed that his overarching defensive theory was that the offense was a bizarre act caused by Applicant lapsing into an automatistic state due to a combination of a recent head injury, alcohol, Xanax, and low blood sugar. Goeke stated that automatism is a neurological or neuropsychiatric condition somewhat analogous to an alcoholic or pharmacological blackout. Goeke talked to Applicant and his mother several times before entering a formal appearance, and he also talked to Gross. The automatism defense occurred to Goeke when he was talking to Gross, before Goeke took over the case or consulted Applicant's eventual trial expert, Dr. Merikangas. Goeke's overarching penalty phase theory was the same or similar to his guilt phase theory—that a person in an automatistic state is not criminally responsible for his actions because the person is not acting voluntarily. Goeke thought the automatism defense was “inherently mitigating” as to punishment.

Goeke agreed that Applicant's mental condition was an important aspect of both trial phases and that Dr. Merikangas or a similarly-situated forensic psychiatrist was essential to Applicant's case. Goeke stated that Dr. Merikangas was a board-certified psychiatrist and neurologist with forensic training. Goeke agreed that mental health professionals generally want as much information as possible about the person being assessed.²¹

Applicant questioned Goeke about what he knew when he took the case to trial about abuse in Applicant's home when Applicant was growing up. Goeke agreed that: (1) he did not try to get the VA or criminal records for Applicant's father, so he did not know what information they held; (2) there were various reasonable avenues open to him for obtaining these records; and (3) these avenues did not legally require Goeke to obtain Applicant's or Ninfa's permission. Goeke agreed that when he took the case to trial, he did not have any records documenting Al's abuse of Ninfa when Applicant was growing up or Al's abuse of Applicant and Applicant's younger brother when they were children. Goeke further agreed that he did not talk to any of Applicant's childhood neighbors, friends from elementary school, or blood relatives other than

²¹ Notably, Dr. Merikangas did not testify at the live hearing. He also did not provide an affidavit stating that he would have reached a different opinion about Applicant's mental state at the time of the offense, had he been informed of the information uncovered by Applicant's investigation.

Applicant's mother and teenage son.

Goeke explained that he did not seek Al's VA and criminal records because he did not want to jeopardize the relationship with Applicant or his mother. Goeke stressed that he believed Applicant's relationship with the first trial team broke down because neither Applicant nor his mother would cooperate in any way with Gross and Del Prado's efforts, through their mitigation investigator Byington, to develop a traditional mitigation case.²² "[A]cutely aware" that he was the second lawyer on the case, Goeke said that he was bound by the approaches that Applicant and his mother wanted him to take, and they were very opposed to him delving into the family's history. Further, Goeke asserted that they denied that any type of abuse happened. Instead, Applicant said that he had a happy childhood.²³

Regarding Applicant's former neighbors, Goeke stated that Byington had expressed the sentiment that such endeavors were futile.²⁴ Goeke was shown an email letter that Byington wrote to Gross and Del Prado in late July 2012, before Byington

²² Gross's and Byington's declarations do not support Goeke's assertion.

²³ In his written declaration, Goeke admitted that he was contemporaneously aware that Applicant's mother was being "evasive" and that Applicant had poor or "malignant" insight into his past.

²⁴ Byington disputed this, responding that "I do not remember saying and do not believe I would have told Mr. Goeke that further mitigation investigation was impossible or futile."

knew for certain whether Gross and Del Prado were leaving Applicant's case. The letter was in the trial file Goeke received from the first team. Goeke acknowledged that the letter showed that Applicant was not cooperating with his initial trial team at that point. However, as Applicant tried to show, a reasonable reading of that letter also suggests that Byington had not given up on finding mitigating evidence. At most, Byington expressed the belief that the trial team would need to find a way to get Applicant to be more cooperative with them again and that it would probably take persistent effort; Byington proposed some ideas like visiting Applicant every couple of weeks.

On the topic of Applicant's elementary school friends, Goeke pointed out that they had talked to Applicant's friend, Mario Sepulveda. However, Goeke agreed that Applicant and Sepulveda met as teenagers, and Sepulveda could not speak to Applicant's environment when he was younger.

As for not talking to any of Applicant's other blood relatives besides Ninfa, Goeke said he was told that there were none. Goeke admitted, however, that he inherited Gross and Del Prado's file. Gross and Del Prado called Applicant's cousin, Gloria Medrano, to testify at a pre-trial hearing on Applicant's motion to reduce bond, and the trial file contained a transcript of Medrano's testimony. On

cross-examination, Goeke agreed that the transcript showed that Medrano “knew very little about Applicant, she hadn’t seen him in ten years.”²⁵ On re-direct, although he had previously stated that he was told Applicant had no other family, Goeke gave a reason for not contacting Medrano, that he “was not going to run afoul of [his] client’s desires for a certain strategic approach” that Applicant had the right to make choices about. “I wasn’t going to blow up that relationship unnecessarily.” Goeke stated that he never talked to Medrano because he “wanted to stay on [Applicant’s] good side.”

Back to direct examination, Goeke testified that he and Gransee “basically suspected that [they] had not gotten the entire story” about Applicant’s background. However, Goeke asserted that Applicant had “specifically disclaimed . . . that he had suffered any abuse as a child” and had characterized “his childhood as a happy one.” But Goeke agreed that “it would be fair to say” that he “did not have a clear understanding about the nature or the extent of the abuse that [Applicant] experienced while growing up.”

Goeke agreed that, when they went to trial, he believed that the only

²⁵ That line of cross-examination misses the point. While Medrano may have been unaware of Applicant’s life in the years immediately preceding trial, Applicant’s argument is that trial counsel should have contacted Medrano to learn more about Applicant’s *early years* and his extended family’s background and to do so by talking to Medrano and any relatives to whom she could point to.

psychological disorders that Applicant met under the DSM-5's criteria were depression and substance abuse. The extent to which Applicant's depression was more than situational "was never really clarified."

When asked if he or anyone else on his team, including Byington, investigated whether Applicant had been sexually abused as a child by someone outside the home, Goeke became evasive and defensive. Goeke eventually agreed that any such investigation did not extend beyond talking to Applicant, Applicant's mother, and possibly Applicant's wife about the subject. Regarding Applicant's wife, Goeke said the conversation with her occurred during trial. Goeke said he remembered her "mak[ing] intimations of physical abuse but mak[ing] no accusation of sexual abuse."

Goeke justified not talking to potential fact witnesses about the sexual abuse issue "because [he] talked to a lot of mental health professionals about these things." Goeke again laid the responsibility at Byington's feet, repeating his assertion that, when the first trial team withdrew, Byington told Goeke that any further investigation was futile because Applicant and his mother would not cooperate. Nevertheless, Goeke acknowledged that the ABA and Texas guidelines for capital-death penalty cases state that counsel still has a duty to investigate, even when the client says he does not want to present evidence at the penalty phase. Goeke also agreed that lawyers

need to give their clients informed advice about their options, and to give informed advice, lawyers need to know what the available relevant evidence is.

Goeke agreed that he received both Gross's entire file and Byington's file on Applicant's case, and these materials included invoices for Byington's work while employed by the first trial team. According to these invoices, while employed by the first trial team, Byington interviewed five potential witnesses: Applicant's wife, mother, mother-in-law, father-in-law, and best friend. Byington stopped working on the case when the first trial team withdrew.

Goeke agreed that he did not immediately hire a mitigation specialist when he took over Applicant's representation, stating this decision was "because of my conversations with [Byington, Gross, and Del Prado]." Goeke eventually agreed that more than two years and four months passed before Byington did any work on Applicant's case again. After Byington resumed work on the case, his work for Goeke totaled about forty-one hours, about a week of work, over the next roughly fifteen months.

Goeke agreed that Byington's work for him consisted of interviewing the same witnesses that Byington had previously interviewed for the initial trial team (Applicant's wife, mother, in-laws, and best friend), plus Applicant's eldest son, for

a total of one new person. Goeke did not ask Byington to find other family members on his own, without relying on Applicant or Applicant's mother. Instead, Goeke "asked Byington to do what he does," implying that he left Byington to his own devices. Goeke admitted that, although he had the transcript of Medrano's testimony, Goeke did not direct Byington to talk to her. Goeke again laid the blame on Byington, asserting that Byington "had access to all the files." Goeke denied that he set Byington's task as simply updating the interviews that Byington had already done. Goeke thought that he would have generally told Byington something like, "Try again."

Goeke insisted that Applicant's writ counsel were able to discover the information they did because they received a degree of cooperation that neither the first nor second trial team received. Goeke attributed the lack of cooperation he encountered to "denial and shame and cover-up and all of that within this family. I am aware of that now." Goeke held to this view, even though he acknowledged that he did not know how Applicant's writ counsel went about their investigation. When pressed by Applicant, Goeke admitted that resources like online databases exist to help find names and addresses, but he did not direct Byington to use such resources.

Goeke expressed the view that it would have been inappropriate for him to give

those kinds of instructions to Byington. Goeke likened it to a client telling him how to conduct voir dire. Goeke nonetheless acknowledged that he was lead counsel. Goeke said he did not tell Byington to find people, besides Applicant's friend Sepulveda, who knew Applicant growing up: "I gave [Byington] no specific instructions of how to do what mitigation specialists do[.]" To Goeke's knowledge, Byington did not interview anyone who knew Applicant before he was a teenager, other than Applicant's mother. Byington "communicated to [Goeke] that he didn't think he would get anywhere with [Applicant's mother]." Goeke again insisted that neither Applicant nor his mother would cooperate with the mitigation investigation.

Byington did not visit Applicant when Goeke represented Applicant, and Goeke never asked Byington to do so. "I let [Byington] do his work according to what his presentation said he could [sic]."

Goeke acknowledged that, although he thought he was at a dead end with Applicant as far as getting him to cooperate with a mitigation investigation, Goeke did not ask Gransee to try. Goeke did not think that Gransee would be any more successful and be counter-productive instead. Goeke stated that having Gransee talk to Applicant about mitigation risked losing "the trust and relationship that [Goeke] had built up with [Applicant] . . . which was to lose everything." Goeke asserted that,

based on his experience with the trial judge, she would not allow Applicant to fire him, and so Goeke would have a client who did not want him and they would “be stuck with each other.” Goeke explained, “[Applicant] trusted me to have been persuaded by him [sic] that I wasn’t going to force anything on him.” Goeke insisted that Applicant would not have provided information for a mitigation investigation “under any circumstances. He wouldn’t have done it for Jesus of Nazareth.”

Goeke downplayed Applicant’s suicidality and said Applicant made statements that were technically suicidal but were not “statements of certain intent.” Goeke denied that Applicant said he planned to kill himself if he was convicted: “No. He did not say that he planned to kill himself in a way like that.” Goeke acknowledged that Applicant told him during jury selection that he attempted suicide in jail, but Applicant stopped talking about suicide after Gransee pointed out that Applicant could commit suicide at any time and should adopt a wait-and-see attitude.

Goeke asserted that Applicant and Ninfa kept Applicant’s father’s abuse a secret. “[Applicant] believed he had a very . . . happy childhood. He kept his abuse a secret. He may have described his father as harsh but not – not in a – he didn’t describe himself as an abused child.” “As time went on, Ninfa complained about her husband. But her husband towards her, not towards her children.” Applicant

impeached this testimony with Byington's email of interview notes to Gross, which was in the trial file. In these notes, Byington said Ninfa talked and cried about how abusive Al was and how he beat her and the boys, and she mentioned "lots of violence." The notes also stated that Al "has always been disabled," was on a military-VA pension, used to be on lithium for Bipolar Disorder, and was an alcoholic. The notes further mentioned Alcala telling Byington that Applicant revealed to her that he was sexually assaulted around age twelve. Goeke testified that he did not recall reading these notes, especially the part about sexual assault; he said, "That's glaring to me. I don't recall ever reading this." Nevertheless, Goeke said he could not dispute that the email and notes were in the file he received from Gross.

Goeke agreed that the file also included transcripts of the State's interviews with Applicant's parents and wife. He agreed that these transcripts contained information that, when Applicant was growing up, Applicant's father Al: (1) was chronically "real sick" with mental disabilities, was manic depressive and could not work, and was very verbally abusive to Ninfa and their children; (2) started taking medication for his mental issues when the boys were three or four, and according to Ninfa, the medication—not the underlying condition—made him very aggressive and violent; (3) had been jailed twice for hurting Ninfa; (4) had physical fights with his

sons when they were teenagers as they defended Ninfa against their father's physical assaults; and (5) could become "very aggressive and violent" when drinking alcohol. Goeke stated that Ninfa had discussed Al's mental problems with him, and "it was no secret" that Al was being treated by the VA. But Goeke stated that he understood from Ninfa that Al was "abusive towards her and verbally aggressive towards his kids . . . but not in a way that was so far outside the ordinary" in "a traditional" household with "a domineering male . . . in the days of corporal punishment and the like[.]"

Goeke agreed that the file he inherited from Gross also contained documents showing that Gross consulted with psychologist Joann Murphy, including a questionnaire completed by Applicant. In response to a question asking, "Do you think you were abused as a child, physically, emotionally or sexually?," Applicant answered "yes" and explained, "There's too much spanking and yelling." Goeke reluctantly agreed that this response indicated that Applicant felt that he was abused as a child, although Goeke minimized the abusive nature of "spanking and yelling," contending that it could be characteristic of many households.

Goeke further agreed that, while Goeke and Gransee represented Applicant, Applicant signed an authorization form allowing them to obtain a wide range of his records.

Goeke acknowledged that, during the course of representing Applicant and despite knowing that he had a professional duty to investigate mitigating evidence, he never made a record that Applicant did not want them to do so. Goeke expressed the view that it would have been inappropriate or unethical to make such a record because it would have been acting adversely to Applicant in order to protect himself.

Despite Goeke's habeas testimony that Applicant was adamant about wanting to die rather than serve a sentence of life without parole, Goeke acknowledged his contrary punishment phase strategy. He never told the jury that Applicant would rather die than live in a cage; he cross-examined the State's punishment phase witnesses whenever he judged it appropriate; he called Applicant's wife and son to testify on Applicant's behalf; and he argued in closing that Applicant should receive a sentence of life without parole. Goeke acknowledged that Applicant at no time during the penalty phase "[stood] up and [told] the jury he wanted a death sentence," although Applicant had already shown himself capable of making such outbursts.

Applicant engaged in further questioning designed to show that Goeke's habeas testimony—that Applicant's relationship with initial counsel broke down because they emphasized doing a mitigation investigation and because they were court-appointed—was inconsistent with the record. Goeke acknowledged that

Applicant exhibited an aversion to having court-appointed counsel very early in the case. Further, Goeke agreed that Applicant's letter tossed to the media early in the case complained of many things related to initial trial counsel, but not about their emphasis or approach to a mitigation investigation. But although there was nothing in the letter about this, Goeke said he understood the letter as Applicant complaining that, by "[p]reparing for the punishment phase hearing through mitigation from the beginning meant they weren't trying to win the case in any way." Goeke testified that he would not expect Applicant to have said this to the media and that Goeke "now . . . know[s] that's what [Applicant] meant."

Goeke agreed that, in a pretrial hearing about Applicant's poor relationship with Gross and Del Prado, Goeke told the trial court that Applicant mistrusted court-appointed lawyers but Goeke did not say anything about the breakdown being because Gross and Del Prado were trying to investigate mitigating evidence. Although it is not clear how Goeke would have personal knowledge of this, he nevertheless told Applicant that Gross and Del Prado's efforts to do a mitigation investigation was "a dominant theme" in Applicant's interactions with Gross and Del Prado. Gross, as noted, disputes this in his post-trial declaration.

Returning to the issue of whether Applicant's household growing up was an

abusive environment, Goeke testified that “it was very common in blue collar families to yell and to spank[.]” Thus, he explained, he did not find this information noteworthy as far as mitigation evidence— “there was nothing unique about that.” But Goeke presented other evidence that was “common” at the punishment phase —Applicant provided for his family, was supportive when his younger son had health problems, and sometimes gave money to the homeless. Goeke agreed that there was nothing extraordinary about this evidence. Goeke again said he “knew nothing about [Applicant] being sexually assaulted. He, in fact, specifically disclaimed that[.]”

As for physical abuse, Goeke stated that he received some information from Applicant’s wife during voir dire that Applicant’s father was “more abusive than [Applicant] and Ninfa had let on.” As for what Applicant’s wife told investigating officers very early in the case, that Applicant’s father “would beat them a lot[.]” Goeke seemed to shrug that off:

His dad would beat them a lot. Okay? Spanking, yelling, blue collar households are not the kind of horrific abuse that to me really stands out. . . . My point is that we’re not talking about being held captive, tied to the bed, these kind of really horrific PTSD type of abuse scenarios. Okay. He would beat them a lot. . . . [w]ith stick[s], clubs, or spankings, you know.

Goeke agreed that his position was that the abuse Applicant suffered as a child was “not uncommon. . . . All those things exist in a continuum, okay. But I saw it as

corporal punishment perhaps in the extreme.” Goeke noted that, years ago, it was “[v]ery common to take a belt to kids.” Goeke did not endorse such conduct, but he observed that, “for some people that is a legitimate approach to discipline.”

However, Goeke agreed that the following things are not typical in “the average American home,” although he thought they might be more common in some unspecified populations:

- A father being too mentally ill to hold a job;
- A father being hospitalized over and over due to mental illness;
- Children having to call the police to their home dozens of times;
- A child having to leave home late at night to get away from his father;
- A father threatening to kill his wife and sons;
- A father asking his son to kill him; or
- A seventeen year old bringing his father to the hospital because the father is “going crazy and beating us.”

Applicant returned to the transcript of Applicant’s mother’s interview with the State. In this transcript, Ninfa said that when Applicant was eleven or twelve, he told her that one of his friends’ father was in jail for molesting children. Applicant thought the man had molested his younger brother, but Applicant denied having been

molested by the man. Goeke volunteered that Applicant's comments to his mother could have been "a device" because "many people are unable to admit to having been victimized in that way because of shame" and so Applicant "may have been able to say that he thought it happened to his brother and not [have been] able to say that it happened to him." Goeke agreed that, at a minimum, "just based on this statement, [Applicant] appeared to have been at risk of sexual abuse when he was a child" and this information was in Goeke's file. Goeke noted that Applicant denied having been sexually abused, but Goeke acknowledged that Applicant could have been unable to admit it.

Regarding the transcript of Sepulveda's interview with law enforcement, Goeke agreed that Sepulveda told the police that Applicant's father was mentally unstable and went to the VA for treatment of mental issues. Goeke agreed that Sepulveda characterized Applicant as having always been sad, that Applicant was especially badly affected by his brother's suicide, and that Applicant often started crying if he had been drinking. Goeke acknowledged that Sepulveda also referred to Applicant's unwise spending patterns, describing Applicant as spending money like it was "water" on gadgets for himself and his children.

Goeke agreed that Applicant's Bexar County jail records contained signs that

Applicant had a long-standing untreated mental health issue. An excerpt from those records recounted Applicant reported anxiety problems, including panic attacks, starting at around age sixteen. Applicant reported that the attacks increased in frequency over time and grew especially bad about the time of his brother's death.

Goeke agreed that he regularly consulted with TDS lawyer Kase while representing Applicant. Kase suggested that Applicant might have significant mental health issues and that further investigation into Applicant's past was needed. She encouraged Goeke to focus more on mitigating evidence. Goeke responded by explaining the obstacles they were encountering in that regard, including Applicant's insistence that he did not commit the offense. Goeke said that Kase approved of the automatism approach they were taking because it incorporated up-front mitigation.

On cross-examination, the State focused on Goeke's overall legal experience, how bad the facts of the offense were, and Applicant's refusal to admit guilt despite the mountain of evidence against him. Through questioning, the State argued that this left Goeke with limited options as far as a defensive theory. Goeke testified that he tried to persuade Applicant that the chances were very good that he would be convicted, and therefore they needed to prepare a mitigation case. Goeke stated that this made no difference in Applicant's "willingness to talk about anything bad ever

happening to him. It was . . . odd. It was as if he didn't want to criticize his mother or father." Goeke testified that he also explained to Applicant how information about his upbringing and family background could allow them to argue that Applicant was more susceptible to automatism and thus support the idea that Applicant did not know what he was doing when he committed the offense.

To the extent that Applicant's psychologist, Dr. Campbell, spoke of "triggering events," Goeke said that Applicant's use of Xanax and alcohol made the most sense as the trigger, but because Applicant regularly consumed these substances together, he should have developed a tolerance to them. The only other significant event in Applicant's life seemed to be his brother's suicide, but that happened eleven years before the offense.

The possibility of automatism occurred to Goeke, and then Gransee separately found Dr. Merikangas, who independently suggested automatism, too. The intent element of the State's case was really the only element that they could attack, and it seemed like they could present evidence fitting all the criteria of automatism. On re-direct, Goeke agreed that the first forensic psychiatrist he talked to, Arambula, thought Applicant's behavior was too complex to be automatistic.

Goeke tried to get Applicant to talk to Kase so she could explain that life in

prison might not be so bad and would be different from Applicant's experience in county jail, but Applicant refused. Goeke said that Applicant seemed to think there was no point in having that kind of conversation because if things were done properly, he would not be convicted at all. Kase was not the only TDS lawyer Goeke consulted with; he also talked a lot to TDS lawyer Carlos Garcia. According to Goeke, both Kase and Garcia seemed to approve of the defense trial counsel had chosen, given the limitations they were operating under. But Kase did seem to hold the belief that there was no such thing as too much mitigating evidence.

Goeke reiterated that his discussions with Byington gave him the sense that seeking more mitigation would be futile. In his defense, Goeke emphasized that Byington did exactly the same thing when he worked for Goeke as when he worked for Gross and obtained exactly the same "non-result."²⁶ To the extent Applicant faulted Goeke for not talking to any of Applicant's neighbors from Applicant's formative years, Goeke defended himself by blaming Byington. Goeke said Byington did not tell him that such an effort might lead somewhere productive.²⁷

²⁶ It is inaccurate to say that Byington obtained a "non-result." Byington's interview notes indicate that he uncovered a lot of significant information. But even taking Goeke's characterization at face value, it remains problematic. Goeke could have considered trying something different, such as looking to sources of information beyond Applicant and his mother.

²⁷ Goeke spent much of his testimony asserting that he would not presume to tell Byington how to conduct a mitigation investigation. Implicitly, Goeke's position is that counsel should not be

As to the interview that Mario Sepulveda gave to the police, Goeke remembered the import of Sepulveda's comments being more that Applicant's father was verbally rather than physically abusive. Goeke's impression of Sepulveda's comments to the police was consistent with Goeke's understanding that Applicant's father was a "strict disciplinarian in the extreme as opposed to Ted Bundy[.]" But on re-direct, Goeke acknowledged that Sepulveda told the police that Al also took out a firearm and shot it toward Applicant, Sepulveda, and some other kids.

Goeke testified that Applicant was assessed by the following mental health professionals: Gilbert Martinez, the neuropsychologist that Gross hired; Dr. James Sullivan, a neuropsychologist that Goeke and Gransee hired; Dr. Merikangas; and Dr. Matthew Faubian, who evaluated Applicant for the competency trial. As far as Goeke knows, Applicant denied childhood physical or sexual abuse to all of these experts.

held to fault for failing to supervise the mitigation investigation, to the extent there was actually such an investigation.

But holding counsel responsible for overseeing the mitigation investigation is not like, for example, holding an attorney responsible for the specific tests a neuropsychologist decides to administer to a criminal defendant. That kind of decision would reasonably be deemed outside most attorneys' expertise and the very thing for which one relies on a mental health expert. In contrast, the decisions involved in Applicant's case were common-sense and appropriate for an attorney to guide: Who else could they talk to besides Applicant and his mother to learn details about Applicant's formative period? What kinds of records could they obtain that might also lend such insight? Did the information they already had, such as the discovery they received from the State, provide any clues? An attorney overseeing a mitigation investigation could formulate and pose these kinds of questions to a mitigation specialist and then, based on the answers, give the mitigation specialist instructions about how far to pursue the inquiry.

IV(G)(1)(g) — Kathryn Kase

Kase testified that Gransee, whom she knew from law school, and Goeke attended a capital defense training she was teaching, after which they consulted with her about Applicant's case. She was aware of Applicant's case because TDS staff had seen a news article describing Applicant's courtroom outburst when he was still represented by the initial trial team of Gross and Del Prado. By the time Kase met with Goeke and Gransee, Goeke had already identified a defense—automatism—and secured an expert.

Kase said she was concerned from the start, and she told them they need to back up and complete their mitigation investigation. It was clear from Goeke's comments that the mitigation investigation had not been done. Goeke's information signaled to her that Applicant had been abusing alcohol and might be addicted to prescription drugs. Further, Goeke reported that Applicant continually spoke of suicide. Applicant's substance abuse suggested that he was numbing himself to something, such as underlying trauma, and Kase thought it critical to investigate that. She thought Applicant's suicidality also signaled a traumatic history. And then there was Applicant's courtroom outburst, which suggested an impulsivity and lack of self-control that could reflect a mental health issue. However, Goeke seemed

uninterested in evidence that might conflict with the automatism defense. It became a continual theme between them for Kase to urge further investigation and for Goeke to be disinterested in doing so.

Goeke reported to Kase that Applicant and Applicant's mother, who was paying Goeke, did not want a mitigation investigation, and he also expressed concern that such an investigation might uncover information that would lead their expert witness to conclude that Applicant was not in an automatistic state at the time of the offense. Kase specifically told Goeke that the ABA and Texas guidelines required him to do a mitigation investigation, regardless of Applicant's and his mother's wishes and regardless of whether it weakened the automatism theory.

Kase did not recall Goeke mentioning Applicant's father, Applicant's abusive childhood, or the possibility that a neighbor might have sexually abused Applicant. Kase said that information about possible sexual abuse would have been "a big red flag for [her]."

To the extent Goeke testified that Kase seemed to approve of their choice of an automatism defense, Kase disagreed. She asserted that she kept telling trial counsel that they needed to conduct a thorough mitigation investigation before settling on a defensive theory. She testified that she never suggested to trial counsel that they had

sufficiently investigated Applicant's history and mental health, and she never suggested that trial counsel should not pursue independent avenues of investigation that were available to them, like getting criminal and medical records for Applicant's father. Kase testified that she affirmatively urged Goeke to seek a continuance so they could more thoroughly investigate Applicant's past.

Kase was baffled by Goeke's choice to limit Gransee's contact with Applicant for so long. Kase opined that it was important for each member of the trial team to meet individually with the client because the client might develop better rapport with different members of the team.

Goeke did not tell Kase that he did not hire a mitigation investigator for more than two years, and when Byington was re-hired, Goeke did not reveal to Kase the limited nature of Byington's work. Kase did not even recall knowing that Byington was working on Applicant's case. On cross-examination, Kase agreed that Byington is a well-known and experienced mitigation specialist, but she said "[i]t depends" when asked if Byington was "of high regard[.]"

After Applicant was sentenced, Kase recruited habeas counsel for his case because she thought that trial counsel should have raised the issue of Applicant's competency to stand trial earlier, and she questioned the constitutional adequacy of

the mitigation investigation.

On cross-examination, Kase resisted the suggestion that a death sentence was inevitable because the victim was a police officer and the facts of the case were horrible. Kase noted the Harris County case of Jose Quintero, who was spared the death penalty despite similarly involving a police-officer victim and horrible facts.

IV(G)(2) — The State's Hearing Witnesses

IV(G)(2)(a) — Drs. Skop and Fox

The State's mental health experts from trial, Drs. Skop and Fox, testified at the hearing. Dr. Skop and Dr. Fox disagreed with the retrospective Bipolar Disorder and PTSD diagnoses given by Applicant's habeas experts, as well as Applicant's experts' conclusion that Applicant was in the grip of Bell's mania or delirious mania at the time of the offense.

Dr. Skop was aware at the time of trial that Applicant's father had been diagnosed with Bipolar Disorder, so he was alert to Applicant's somewhat elevated risk of also having developed the malady. Nonetheless, after examining Applicant and reviewing the materials made available, Dr. Skop ruled out a Bipolar Disorder diagnosis. The additional information that Applicant provided about his background, including his mental health history, did not change Dr. Skop's opinion on the Bipolar

Disorder issue. He further noted that a complete social and behavioral history is not necessary to make a bipolar diagnosis, explaining that if someone is manic, “it’s pretty apparent to any clinical provider and generally apparent to family and relatives that are around them at the time.” As to PTSD, after reviewing the additional materials, Dr. Skop opined that Applicant may have suffered from PTSD at some point earlier in his life due to childhood trauma. When Dr. Skop examined Applicant before trial, though, he did not endorse symptoms of PTSD. Applicant did not report having been physically or sexually abused, but Dr. Skop agreed that it is common for victims of sexual abuse—especially men—to not disclose the abuse.

Regarding the idea that Applicant was in a delirious mania at the time of the offense, Dr. Skop noted that delirious mania is not a condition that the DSM recognizes. But Dr. Skop acknowledged that extremely manic individuals can exhibit “cognitive issues of not thinking clearly.” He explained that, in extreme cases, an extremely manic person may become disoriented, psychotic, and catatonic. Dr. Skop stated that it is a very extreme condition which is “blatantly noticeable” and “fairly persistent,” meaning that it does not typically wax and wane or resolve on its own. Applicant’s observed behavior and demeanor immediately before and after the offense was generally inconsistent with Applicant being in a manic state, much less being in

a state of manic delirium.

Dr. Fox's testimony generally echoed Dr. Skop's. The additional materials made available in habeas proceedings did not change the opinion Dr. Fox had at trial that Applicant was not in an automatistic state at the time of the offense. As for delirious mania, Dr. Fox did not believe that it was a valid or recognized diagnosis. Further, like Dr. Skop, Dr. Fox did not think the data supported a finding that Applicant was in a manic or even a hypomanic state (hypomania being a slightly less elevated state than mania) at the time of the offense or at any time before the offense. Dr. Fox especially noted that Applicant's mother, who was married to a bipolar individual and would be familiar with its manifestations, never described or suggested that Applicant suffered from the same illness.

IV(G)(2)(b) — Kurt Gransee

The State also called second-chair trial counsel Gransee. Gransee testified that he and Goeke consulted with both Kase and another TDS lawyer, Carlos Garcia. They also had mental health and medical professionals examine Applicant. The medical professionals did things that included blood tests and brain scans. Not all of the mental health experts who examined Applicant wrote reports that appear in the record. Gransee and Goeke inherited a psychological report, but no medical reports of

examinations, from the initial trial team. None of the mental health professionals who examined Applicant reported that he said he was physically or sexually abused as a child. None of them suggested a defense that seemed more likely to succeed than automatism.

Gransee and Goeke came up with the automatism defensive theory because “it seemed to fit the facts as they understood them,” noting Applicant’s asserted inability to recall the incident, his recent head injury, and his lack of a violent criminal history. Gransee used resources in his law partner’s office to identify their eventual expert, Dr. Merikangas. After Dr. Merikangas had been involved for a bit, he suggested automatism as a defense.

As far as what Applicant told Gransee about Applicant’s childhood, Gransee testified that:

[T]here was nothing brought up about any traumatic incidences. And I would say from talking to some of his friends, his wife, it seemed as if he may have had some difficulties. But basically, . . . it seemed as if his childhood was – I don’t want to say spoiled, but his parents helped him out financially, bought him gifts, toys, motorcycle, paid for his vehicle when he got older. So it didn’t seem like there was any real trauma – that anybody disclosed to us.

Further, Applicant “was very against it” when they tried to prepare a “normal” mitigation defense. “I think . . . there was a chance that during the trial, he

would have acted very negatively to trying to . . . go that route[.] [E]ven during voir dire, [Applicant] was very opposed to that idea.” Gransee said Applicant knew when, during voir dire, they “started going down the path of asking questions that could be used to determine a mitigation type juror, [and] he would become agitated that we were doing that.”

Apparently referring to Applicant’s expressed resistance to serving a life without parole sentence, Gransee advised Applicant that Applicant needed to make an informed decision about whether death would be preferable. Gransee wanted Kase to talk to Applicant about what a capital life sentence would be like, but Applicant refused. “[H]e was just opposed to any – any thought of that.” Applicant wanted them to take any shot possible at a not guilty [verdict], even if the chance was very remote. “[H]e made it very clear that . . . if he didn’t get a not guilty and life in prison [sic], he would rather die. And he maintained that” position.

Goeke met with Applicant’s mother a lot; Gransee less so. Gransee’s impression was that the mother gave no information about Applicant’s childhood that would in anyone’s mind “justify or cause or even make somebody commit a situation like this. I wasn’t aware of any type of abuse.” Gransee did acknowledge, however, that:

[T]here was some discussion of maybe mental health issues with the father, some issues along those lines. . . . [T]he impression I got was that there was some issues on that [sic]. But it was also that [Applicant] was always well taken care of.

Gransee also opined that putting on evidence that Applicant had an abused childhood would have increased the likelihood that the jury would find him to be a future danger.

As to whether Applicant's mother suggested any other relatives or old friends that trial counsel could talk to, they:

[W]ere told that there were some unknown relatives, maybe in Mexico, but that they had really nothing of value or if there was – or maybe they had been passed away [sic]. It was from some tiny village, and they had no contact with him for multiple generations.

Gransee and Goeke talked to a few of Applicant's close friends, "mainly Steve," but also Applicant's best friend in high school, Mario Sepulveda, who testified about Applicant's head injury that happened close in time before the offense. They asked Sepulveda about Applicant's childhood, and Sepulveda:

[K]ind of reiterated that [Applicant] always had nice clothes. He always – he had a motorcycle when he was young, he helped finance vehicles for him [sic].

They were always there financially to help [Applicant]. And – you know, I think he said, his dad, could be a – you know, a little bit abusive but, you know, basically nothing worse than a lot of us have to put up with.

Sepulveda was very cooperative with the defense initially, but his cooperation

ceased a few days before the trial started, and they had to subpoena him to appear. Applicant's wife was also pretty cooperative with them early on, but as trial approached, she "turned her back on us and refused to cooperate." It was only through the efforts of Applicant's older son that she agreed to testify at the punishment phase. Applicant's wife in any case did not give them any information that would be useful in preparing a mitigation defense, and they "had to pull things from her."

Regarding why Gransee did not meet Applicant until soon before trial, Gransee reiterated that he and Goeke were afraid that Applicant would turn on Gransee because he was appointed, and then Applicant would turn on Goeke, too. Further, they wanted to see how Applicant did when cross-examined by someone unfamiliar because they were considering the idea of having Applicant testify. After Applicant objected at the habeas hearing to Gransee's testimony about the details of such mock examination, Gransee simply stated that one of the main problems he found was that Applicant "could be led very easily" and that the lead prosecutor on the case would have exploited that tendency.

According to Gransee, when they related the difficulties they were having with preparing a traditional mitigation defense to TDS lawyer Garcia and informed Garcia

that they were proceeding with an automatism theory instead, Garcia approved.

On cross-examination, Gransee disagreed with Applicant's assertion, drawn from Gransee's declaration, that Applicant did not forbid them from presenting a mitigation case. "He threatened to disrupt the trial, threatened to walk out of the trial if we did that. . . . I tend to think he did [forbid it]." As for the statement in his declaration, Gransee explained that Applicant did not forbid them from putting on the kind of testimony that they actually presented. But "[h]e forbid us from making that the focus. Let's put it that way." Gransee then seemed to retreat from the assertion that Applicant threatened to walk out or would have walked out of trial. Gransee seemed to say that Applicant would have objected and done so loudly enough that other people could hear him. Something similar had happened during voir dire, "And so it was a concern." According to Gransee, Applicant did not want to paint himself as having had any difficulties growing up, "the standard" kind of mitigation case. He was very opposed to that. And they did have evidence that Applicant was a great father and good family man with no significant criminal history.

IV(H) — Habeas Court's Findings of Fact (Claim 2)

IV(H)(1) — Findings of Fact and Conclusions of Law for Sub-Claim 2.1 (Guilt-Innocence Phase Investigation and Presentation)

In its findings of fact for Claim 2.1, the habeas court found:

1. Applicant claims that, but for defense counsel's failure to present evidence of Applicant's history of abuse and mental illness, Applicant would not have been convicted of capital murder.
2. Applicant claims that he would not have been convicted had his trial counsel presented his long history of mental illness and that he suffered mental and emotional trauma throughout his childhood. He claims that his counsel should have argued that he lacked the intent to commit murder because at the time of the offense he was suffering from Bell's mania.
- ...
4. The defensive theory presented at trial was that Applicant was in an automatistic state, during which he acted involuntarily and formed no memory of the event. The defense solicited extensive expert testimony at trial by Dr. James Merikangas to support this defense. *See Gonzalez*[, 2020 WL 6482409, at *18] ("Based on his assessment and appellant's self-report, Merikangas concluded that appellant had experienced a sudden, acute, organically based dissociative episode with amnesia. During this automatistic state, appellant was not acting voluntarily and had no conscious desire to cause the results of his actions. Merikangas called it 'a perfect storm of bad circumstances that produced a terrible result.'").
5. At the writ hearing, Applicant's habeas counsel presented mental health experts to support the assertion that Applicant suffered from PTSD and Bell's Mania as a result of his physical, mental, and emotional abuse he suffered as a child. However, [the habeas] court agrees with the State's position that presenting a defense premised on Applicant having a mental illness would have been inconsistent with the automatism defense strategy.^[28]

²⁸ The issue is not whether evidence of mental illness would have been inconsistent with an automatism defense. The issue is whether counsel would have presented an automatism defense at all if they had been armed with the information that further investigation would have yielded.

6. In addition, the State presented expert witnesses that disagreed with the opinions of Applicant's expert witnesses. Dr. Skop's testimony, which [the habeas] court finds credible, discounted the theory of Bell's Mania:

A. And – and subsequent to the incident, like immediately subsequent to the incident, he's observed by his mother, the next day by his wife. And there's not really any substantial mania or confused behavior observed. I think he would be – the call that he made to his friend immediately following the act, you know, speaks to the memory of the incident and understanding the nature of the incident. So all of those things argue against him having a manic delirium.

Like I said, manic delirium is really a profound deterioration of somebody's functional abilities that would be readily apparent to anyone who knew him closely.

Q. So somebody that had been with him that day would notice?

A. I believe they would. I mean, it's – I can't imagine they wouldn't.

Q. And somebody that – and to – intimately knew Mr. Gonzalez, like his wife or his mother, would notice a change in behavior?

A. Yes.

Q. Is there any evidence that – to suggest that Mr. Gonzalez could have been in a state of delirious mania?

A. I don't believe there's any substantial evidence. I know that the expert on the Defense pointed out in – driving his truck,

I believe, on the person's lawn that they went shooting with at one point and making some derogatory comments but I don't think that that – those are just sort of minor things, and not of the severity I would expect of somebody with manic delirium. . . .

Q. Okay. Is Mr. Gonzalez's behavior the night that he shot Sergeant Vann consistent with delirious mania?

A. I don't believe it is.

...

9. [The habeas] court does not agree that advancing a different theory based on a diagnosis of Bell's Mania would have necessarily been any more believable or successful in guilt/innocence.
10. As it was, the defense that was presented, and any other defense blaming Applicant's actions on a manic bipolar episode, would have been refuted by the same evidence the State presented at trial: that Applicant had been behaving normally just before the offense, quietly drinking beer, that he called his friend immediately after the murder and said, "I just killed a cop," and the testimony he then went to his mother's house and had a normal conversation with her.

Based on those findings, the habeas court concluded that:

11. Even assuming that defense counsel *should* have more thoroughly investigated Applicant's troubled upbringing and mental state, based on [the habeas] court's review of the entire record and given the facts of this case, [the habeas] court finds that there is not a reasonable probability that evidence of Applicant's troubled and abusive upbringing and evidence of mental illness, that might have supported a different explanation for Applicant's alleged altered

mental state, would have resulted in a verdict of acquittal.

The habeas court recommended that relief be denied on Sub-Claim 2.1.

IV(H)(2) — Findings of Fact for Sub-Claim 2.2 (Mitigation Investigation and Presentation)

Regarding Sub-Claim 2.2, the habeas court found that:

12. A much closer call is the issue of mitigation evidence and punishment. Applicant claims that his trial counsel was ineffective for failing to present punishment mitigation evidence supported by witnesses and expert testimony to testify about his abusive childhood and mental and emotional illness.
13. In this case, the Court of Criminal Appeals has already observed that Applicant's mitigation evidence was weak, "consisting mainly of evidence that he was a good father and son, he was kind to homeless people, and he had faced financial and emotional strain during his adult life." *Gonzalez*[, 2020 WL 6482409, at *46].
- ...
16. Applicant's habeas counsel presented multiple credible witnesses who testified about how Applicant, his brother, and his mother were physically and emotionally abused for years by his father.^[29]
17. Habeas counsel presented credible expert testimony regarding the long term effects that such abusive treatment would have on someone.
18. None of that evidence was presented to the jury.

²⁹ The habeas court did not acknowledge or address the testimony regarding sexual abuse.

19. Applicant's counsel testified that this was a decision based on Applicant's wishes and instructions, based on the lack of cooperation from Applicant and his family . . .

...

28. In this case, the defensive theory during guilt/innocence and during punishment was that Applicant was a normal man, who was a good husband and father, and who had a good job, and very little criminal history, but who just snapped one night due to the "perfect storm" of a head injury, drinking, and drugs. The defense argued in guilt-innocence that this "perfect storm" created a state of automatism—Applicant was not in control of his actions and had no memory of the incident.
29. It was counsel's intent to present enough evidence of automatism in the guilt innocence phase to carry forward as mitigation evidence in the punishment phase.
30. Thus, the consistent argument during punishment was that, since this "perfect storm" combination would never occur again in prison, Applicant would not present a future danger to anyone.
31. [The habeas] court finds that . . . it was a reasonable strategy to rebut the assertion that Applicant was a future danger.
32. However, because the jury never heard of Applicant's years of physical and mental abuse at the hands of his father, the jury didn't really "know" Applicant. Their answers to the punishment special issue on mitigation was not based on having a complete picture of who Applicant was as a person.

...

34. In this case, defense counsel responded as follows to the allegations that he failed to present mitigation evidence:

- a. Applicant was uncooperative.
- b. He did not provide his attorneys with any mitigation evidence or information.
- c. He refused to admit that he had an abusive childhood. Rather, Applicant told his lawyers and the experts that he had a happy, normal childhood. His mother told his attorneys the same thing.
- d. Applicant denied having been sexually abused as a child.
- e. He instructed his trial counsel to not put on any mitigation evidence, claiming he would rather die than go to prison for life without parole.
- f. Defense counsel spoke with Applicant's mother on several occasions, seeking information on mitigating evidence. Applicant's mother was uncooperative and did not give defense counsel much information regarding Applicant's abusive childhood.
- g. Applicant's mother did not tell trial counsel anything unusual about Applicant's childhood. She also said there were no relatives who would have any relevant information about Applicant.
- h. Defense counsel hired a mental health expert, Dr. James Merikangas, to evaluate Applicant and testify as to his mental state.
- I. Defense counsel used the services of a mitigation specialist, Gerald Byington, whose job was to investigate and uncover mitigating evidence. Defense counsel let Mr. Byington handle the mitigation investigation because he believed Mr.

Byington had a very good reputation as a mitigation specialist.

35. These facts are arguably similar to those in *Martinez* and *Woods*, and contrast with those in *Garza* where defense counsel wholly failed to hire any mitigation specialist or retain any mental health experts and where defense counsel had no reasonable strategy for failing to present mitigation evidence. In other words, in this case there does not seem to have been a “complete failure to investigate potential mitigation evidence.” . . .
36. On the other hand, however,
 - a. Defense counsel in this case missed talking to many of Applicant’s old neighbors and acquaintances.
 - b. He failed to discover Applicant’s social history and evidence of his father’s abuse.
 - c. He failed to independently pursue mitigation evidence related to Applicant’s abusive childhood.
 - d. Moreover, although defense counsel maintains that the mitigation specialist (Gerald Byington) had told counsel that efforts to investigate further mitigation evidence would be futile; Byington disputed that. Byington stated he was willing to do more but did not have instructions or guidance. There were red flags that counsel should have asked Byington to pursue.
 - e. Although defense counsel had access to evidence of Applicant’s abusive childhood and could have explored it further or could have asked Byington to explore further, he did not do so.
 - f. Defense counsel did not gather basic social history

documentation nor inquire about it. Defense counsel stated that he relied on Byington to do that, but Byington stated that defense counsel merely asked him to re-interview the people that he had interviewed for the initial appointed counsel.

37. Thus, even though the defense counsel's investigation and presentation of mitigation evidence in this case does not seem as deficient as it was in *Garza*, this court believes that, as in *Garza*, the mitigation evidence that was omitted would have provided jurors with important context about Applicant's life that trial counsel failed to present "and that would have drawn a considerably different picture for the jury of Applicant's childhood and mental health that what it was presented with at trial."
38. What concerns this habeas judge is the fact that Applicant's trial counsel knew that there was evidence of physical abuse but failed to discover the extent of it and failed to explore the effect that it would have had on Applicant. His strategic decision to not present such mitigation evidence was not made after a thorough investigation.
39. Nevertheless, even if counsel's performance was deficient in failing to discover and present additional mitigation evidence, it is difficult to assess whether the failure to present available mitigation evidence in this case would have changed the punishment outcome. . . .
40. What stands out to this habeas judge is the fact that juror [Eve Martinez] indicated that after hearing defense's expert testimony at trial, she believed Applicant had a mental illness. She stated that is why she was reluctant to vote for death. Had [Martinez] been made aware of the additional mitigation evidence regarding Applicant's abusive childhood and the expert testimony related to Applicant's PTSD caused by his prolonged abusive childhood,

she may not have given in to the pressure to change her vote.

41. Nevertheless, the facts of this capital murder are unbelievably heinous. . . . Sergeant Vann’s face was unrecognizable—there was no face left. It is therefore possible, like in *Woods*, that given the savageness of the offense, “a Texas jury would be singularly unimpressed by the sordid details of Applicant’s background and bad character traits.” *Woods*, 176 S.W.3d at 228.
42. In fact, in assessing Applicant’s direct appeal in this case, the Court of Criminal Appeals recognized the “senseless brutality of the offense” and Applicant’s “lack of remorse,” and concluded that “a death sentence was reasonably certain.”^[30] *See Gonzalez*[, 2020 WL 6482409, at *47]. Even though such observation was in the context of assessing a different point of error, [the habeas] court is quite mindful that, unlike in *Garza*, where the applicant was a gang member who orchestrated the killing of rival gang members but did not participate in the killings, Applicant in this case was the lone shooter of a police officer, having pulled the trigger somewhere in the vicinity of 46 times.

Having made those findings of fact, the habeas court concluded:

43. Nevertheless, in light of the clear and undisputed hesitancy and misgivings of juror [Martinez] in changing her vote from life to death, and knowing that the entire jury was deprived of a significant amount of mitigation evidence regarding Applicant’s abusive childhood, this habeas judge cannot say *with certainty* that the facts of the capital murder and the aggravating evidence originally presented by the State would *clearly* outweigh the totality of Applicant’s mitigating evidence if a jury had the opportunity to evaluate it again (most particularly, juror

³⁰ This is an accurate statement, but one of Applicant’s arguments is that the evidence trial counsel could have presented, if believed, would have shown that Applicant’s seeming lack of remorse was in fact a manifestation of his mental illness and history of trauma.

[Martinez]). In this case, as in *Garza*, Applicant’s available mitigating evidence, taken as a whole, might have influenced *at least one juror’s* appraisal of the applicant’s moral culpability.^[31]

With regard to Sub-Claim 2.2, the habeas court made “NO RECOMMENDATION,” deferring to this Court on the question of whether we should grant or deny habeas corpus relief. The habeas court also made no express finding or conclusion regarding whether Applicant: (1) forbade trial counsel from investigating or presenting mitigating evidence regarding his background (i.e., evidence of childhood abuse); or (2) would have protested or disrupted the punishment phase if counsel had nonetheless tried to present such evidence. The habeas court also did not acknowledge or address the evidence of sexual abuse that was in the materials that Goeke and Gransee inherited from the initial trial team and that Applicant developed further.

IV(I) — Discussion (Claim 2)

IV(I)(1) — Sub-Claim 2.1 (Ineffective Guilt Phase Investigation)

The record in its entirety, in our view, supports Applicant’s claim that Goeke and Gransee failed to conduct a reasonable professional investigation before choosing a defensive theory. Nevertheless, Applicant is not entitled to relief on Sub-claim 2.1

³¹ (Emphasis in original).

because he fails to demonstrate prejudice. *See Strickland*, 466 U.S. at 697 (“[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.”); *see also Lane*, 303 S.W.3d at 707 (“An applicant’s failure to satisfy both prongs of the two-pronged test defeats a claim of ineffective assistance of counsel.”).

Applicant has not come forward with written or live testimony from his trial expert, Dr. Merikangas, stating that Dr. Merikangas would have reached the same or a materially similar opinion as writ expert Dr. Woods,³² if Dr. Merikangas had been privy to the information Applicant uncovered. Furthermore, writ expert Dr. Agharkar testified that a mental health expert with access to the body of information that Applicant discovered *could* reasonably conclude that Applicant was in an automatistic state at the time of the offense. Additionally, if trial counsel had presented a delirious mania theory instead of automatism, the State’s writ experts Dr. Skop and Dr. Fox showed that the delirious mania theory would have been subject to vigorous attack. Lastly, the evidence of Applicant’s guilt was overwhelming.

³² As previously discussed, Dr. Woods opined that the interplay of undiagnosed Bipolar Disorder, PTSD, and personality changes secondary to head trauma at the time of the offense sent Applicant into a delirious mania in which he was unaware of his actions.

We conclude that there is not a reasonable probability that the outcome of the guilt phase of trial would have been different had Goeke and Gransee taken heed of the red flags and conducted a thorough investigation into Applicant's mental health. Applicant has not shown that he received constitutionally ineffective assistance regarding the guilt-innocence phase investigation. Accordingly, we deny relief on Sub-Claim 2.1.

IV(I)(2) — Sub-Claim 2.2 (Ineffective Mitigation Investigation)

IV(I)(2)(a) — We Need Not Address Whether Counsel's Performance Was Deficient

A claim of ineffective assistance of counsel requires two showings: (1) deficient performance, and (2) prejudice. *Overton*, 444 S.W.3d at 640. However, "[t]he performance component need not be addressed first." *Smith v. Robbins*, 528 U.S. 259, 286 n.14 (2000). Indeed, as explained in *Strickland*:

there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. *If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.*

Strickland, 466 U.S. at 697 (emphasis added).

This is one of those cases. Even if Goeke and Gransee could have and should have done more in their investigation of Applicant's mitigation case, it is not necessary to determine whether or not they performed deficiently. Their alleged shortcomings did not cause sufficient prejudice to Applicant's defense.

IV(I)(2)(b) — Applicant Has Not Established Prejudice

Childhood abuse, particularly physical and sexual abuse, is the kind of evidence that the United States Supreme Court has recognized as capable of convincing reasonable jurors to exercise mercy. *See Wiggins v. Smith*, 539 U.S. 510, 534–35 (2003). Presentation of this evidence and expert testimony about the long-term effects of such trauma, if believed, would have cast Applicant's life in a radically different light than it was portrayed at trial and explained much of his dysfunctional adult behavior. Further, expert testimony about the availability and efficacy of treatment for such trauma could have limited any adverse impact of such trauma evidence on the future dangerousness special issue. This alone strongly implicates this Court's "concern[] with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696.

On the other side of the issue, the facts of the offense are especially brutal.

Further, there is at least some question regarding whether Applicant would have forbidden or obstructed trial counsel from presenting the evidence in question. *See Schriro v. Landrigan*, 550 U.S. 465, 477 (2007) (explaining that a federal habeas court was “entitled to conclude that regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence” and that therefore, “because of his established recalcitrance, Landrigan could not demonstrate prejudice under *Strickland*”). However, as we have stated, the record does not support an affirmative finding on this question, aside from counsel’s testimony.

Added to this are the facts that: (1) the juror substitution that occurred in the midst of punishment phase deliberations was not handled in an ideal manner; (2) there was a holdout juror for a life sentence (Eve Martinez), even with the “weak” mitigation case that trial counsel actually presented; and (3) an alternate juror, Martha Rubio, disregarded the trial court’s instructions by improperly pressuring and threatening Martinez to change her answers to the special issues when the two women were sequestered overnight together. Is there a reasonable likelihood that Martinez would have stood her ground in the face of a more powerful mitigation case, despite alternate juror Rubio’s improper interference?

Considering Martinez alone, we find that there is *not* a reasonable probability that she would have held more firmly to her vote, had Goeke and Gransee conducted a thorough mitigation investigation and presentation *because* of the facts developed relating to Sub-Claim 1.1. Juror Martinez was clear that she believed, and still believes, that Applicant had a mental disorder and did not deserve the death penalty. She was equally clear that she changed her vote because of pressure she felt from Rubio and the other jurors. Martinez was already solidly committed to a “life” vote based on the mitigation case that trial counsel had actually presented, and Martinez changed her vote for reasons *wholly apart* from the quality of their case. There is no showing that she would have held onto her “life” vote had they done a better job.

But what of the other jurors? Would the other jurors, including Rubio, have exerted less pressure (or even no pressure) on Martinez had Goeke and Gransee conducted a thorough investigation and presented a better mitigation case? Would another juror have been swayed toward a “yes” answer on the mitigation special issue, and would that juror have held up, unlike Martinez, against the pressure from the other jurors? Or would that juror have become an ally with Martinez voting for “life,” such that Martinez would not have felt alone and would have held on to her convictions to spare Applicant the death penalty?

Such questions are certainly speculative, but that is the nature of the task before us to answer whether the “‘available mitigating evidence taken as a whole’ might have ‘sufficiently influenced the jury’s appraisal of [Applicant’s] moral culpability’ as to establish *Strickland* prejudice.” *Andrus v. Texas*, 590 U.S. 806, 823 (2020) (quoting *Wiggins*, 539 U.S. at 538). “That prejudice inquiry ‘necessarily require[s] a court to ‘speculate’ as to the effect of the new evidence’ on the trial evidence[.]” *Id.* at 823–24 (quoting *Sears v. Upton*, 561 U.S. 945, 956 (2010)). We take guidance from this Court’s opinions in which we found, and did not find, *Strickland* prejudice from trial counsels’ deficient mitigation case, as well as such cases from the United States Supreme Court.

IV(I)(2)(b)(I) — Cases in Which We Found Prejudice

In *Ex parte Gabriel Gonzalez*, we found that Gonzalez’s trial counsel failed to inquire into his childhood and his physical and mental health, including whether he had been abused as a child. 204 S.W.3d 391, 397 (Tex. Crim. App. 2006); *see also id.* at 396 (“Or, more directly, was . . . trial counsel ineffective for failing to ask the applicant—or his mother or sister—if he was abused as a child[.]”). Because trial counsel had not done so, the mitigation case presented at trial consisted of only Gonzalez’s sister’s testimony, which related that he had a difficult childhood but did

not indicate that he was abused. *Id.* at 398.

In contrast, the evidence developed post-conviction revealed that he had been systematically abused by his father, starting with being forced to perform oral sex weekly beginning when Gonzalez was less than six years old, escalating to anal intercourse weekly from the time he was seven years old. *Id.* at 399. His father was also physically abusive if Gonzalez resisted, and his father would threaten to kill Gonzalez as well as his mother if he ever told anyone about the abuse. *Id.* The father also sexually molested Gonzalez's sister numerous times during her own childhood, *id.*, which she did not reveal to trial counsel in the one time trial counsel talked to her during trial "because she [was] ashamed of having been abused and it [was] not very easy to talk about." *Id.* at 394–95.

A psychiatrist who examined Gonzalez post-conviction diagnosed him as suffering from post-traumatic stress disorder due to the repeated physical and sexual abuse, and he also had a "borderline normal" IQ, which would have led to poor processing of information and lower level of control, including antisocial and impulsive behavior. *Id.* at 399. The psychiatrist concluded that, if Gonzalez was given treatment, he could perhaps become a productive, law abiding member of society. *Id.*

We found *Strickland* prejudice, "a reasonable probability that . . . a different

result would have occurred, such that it undermine[d] our confidence in the outcome,” *id.* at 399–400, because “the mitigating evidence presented at the habeas hearing [was] substantially greater and more compelling than that actually presented by [Gonzalez] at his trial.” *Id.* at 399. The “available mitigating evidence, taken as a whole, ‘might well have influenced the jury’s appraisal’ of [Gonzalez’s] moral culpability.” *Id.*

In *Ex parte Garza*, trial counsel performed deficiently because lead counsel relied almost exclusively on Garza’s mother to locate witnesses, records, and information, and she defended her own parenting abilities and represented that Garza’s childhood had been normal except for his father’s absence. 620 S.W.3d 801, 823 (Tex. Crim. App. 2021). Having failed to conduct a more thorough investigation, trial counsel put on an “underwhelming” punishment case with “meager mitigating evidence.” *Id.* at 825. The mitigation evidence showed that Garza was not a problem in jail, participated in bible study and prison ministry programs, and when he had been previously released on parole, he attended an alcohol treatment program and attended church on Sundays. *Id.* at 811. A family friend testified that Garza saw his father being shot and killed, but further testimony about this topic by the friend was excluded by the trial court. *Id.* Garza’s aunt and mother also testified, and their testimony revolved

around their own efforts to help Garza out, visiting him in prison and giving him aid after being paroled. *Id.* While Garza’s mother said Garza’s father was hardly around, he treated Garza “good” but eventually died in prison (contradicting the family friend’s testimony). *Id.* Notably, Garza’s aunt said she did not know Garza was in a gang, and Garza’s mother denied that he was in a gang. *Id.* But Garza’s gang involvement was well-established by the State’s guilt phase evidence, severely undermining the credibility of their testimony. Garza admitted to police that he was a local captain of his gang and planned his gang’s robbery of a rival gang in which six people were murdered. *Id.* at 809–10.

We concluded that Garza was prejudiced by defense counsel’s failure to conduct an adequate investigation into his mitigation case. *Id.* Had counsel done more than rely on Garza’s mother, he would have uncovered “voluminous” mitigating evidence which would have “paint[ed] a starkly different, more detailed, and more nuanced, picture of [Garza’s] childhood and formative years.” *Id.* The mitigating evidence “include[d] a wealth of information about how parental neglect and incarceration, sexual and physical abuse, extreme violence, and exposure to drug-dealing and substance abuse influenced [Garza’s] upbringing.” *Id.* at 825. For example, the evidence indicated that Garza’s “mother was a heavy drinker, [and] he

was exposed to alcohol in the womb.” *Id.* at 823. He “was raised in a dysfunctional extended-family environment characterized by drug trafficking, violence, sexual abuse of female family members, and pervasive alcohol and drug abuse.” *Id.* at 824. He “abused alcohol and cocaine during adolescence.” *Id.* His “parents neglected him, failed to supervise him, and spoiled him with ‘lavish material gifts[] bought with drug trafficking proceeds.’” *Id.* He “idolized his violent, often-incarcerated, gang-member father who pioneered the type of ‘pseudo-cop robbery’ that [Garza] committed in the case.” *Id.* And “[a]t age five or six, [Garza] was molested by his 13-year-old aunt who had admitted this conduct but stated that it consisted of ‘mostly fondling.’” *Id.*

The mitigating evidence “also show[ed] that [Garza] suffered from PTSD from an early age and that, because it was left untreated, he developed other mental health problems like chronic depression and suicidal ideations. It also show[ed] that [Garza] also likely suffer[ed] from FASD [Fetal Alcohol Spectrum Disorder].” *Id.* at 825. Acknowledging that it was “a close case,” we nevertheless concluded that “the habeas mitigation evidence would have provided jurors with important context about [Garza’s] life that trial counsel failed to present and that would have drawn a considerably different picture for the jury of [Garza’s] childhood and mental health than what it was presented with at trial.” *Id.* at 826.

IV(I)(2)(b)(ii) — Cases in Which We Did Not Find Prejudice

In contrast, we found that the applicant in *Ex parte Martinez* failed to show ineffective assistance of counsel from his trial counsel's alleged failure to present a better mitigation case. 195 S.W.3d 713, 724–31 (Tex. Crim. App. 2006). There, Martinez alleged that counsel failed to investigate physical, emotional, and sexual abuse and neglect he suffered as a child. *Id.* at 724. While we found that counsel's performance was not deficient,³³ *id.* at 728–29, we nevertheless proceeded to consider whether the supposed failure by counsel was prejudicial. *Id.* at 730–31. Noting that although counsel did not discover the full extent of the abuse, counsel found and presented some evidence of childhood abuse, so the jury was privy to some of the abuse Martinez suffered during his childhood. *Id.* at 731. Furthermore, even if trial counsel discovered the “strong” mitigating evidence Martinez raised, the aggravating evidence was “extensive” and “severe.” *Id.* at 730–31. We judged that “even if trial counsel's punishment evidence ‘merely scratched the surface’” and trial counsel could have presented more mitigating evidence, presenting that additional mitigating

³³ There were no red flags or threads to pull, especially regarding sexual abuse. Trial counsel put forth an effort to discover mitigating evidence, but Martinez's family members were too busy to meet with counsel, Martinez himself did not divulge any evidence that he had been sexually abused, Martinez's mother distanced herself until the last minute, and the school records obtained by trial counsel's investigator did not indicate sexual abuse. *Martinez*, 195 S.W.3d at 728–29. Furthermore, when the family members were asked open-ended questions about any abuse Martinez suffered, they did not allege any sexual abuse. *Id.* at 729.

evidence “probably would have had no effect on the jury’s answer to the mitigation special issue.” *Id.* at 731 (citing and quoting *Ex parte Woods*, 176 S.W.3d 224, 228 (Tex. Crim. App. 2005) (“It is entirely reasonable to conclude that a Texas jury would be singularly unimpressed by the sordid details of applicant’s background and bad character traits.”)).

In *Ex parte Andrus*, a majority of this Court found that trial counsel’s failure to investigate mitigating and aggravating evidence was not prejudicial, because the new mitigating evidence was relatively weak. 622 S.W.3d 892, 899–900 (Tex. Crim. App. 2021). The new mitigating evidence was not specific to Andrus, it was contradicted by other evidence, and it overlapped evidence that was heard by the jury. *Id.* Additionally, much of the proposed new mitigating evidence could have been considered aggravating in some respects. *Id.* at 907. And the actual aggravating evidence, including evidence of prior convictions and multiple instances of violence while Andrus was in jail awaiting trial, was strong and substantial. *Id.*³⁴

³⁴ We note that four judges of this Court dissented to the majority’s conclusion that Andrus had failed to show *Strickland* prejudice. *Andrus*, 622 S.W.3d at 908 (Newell, J., dissenting). The dissent observed that the United States Supreme Court had, in the course of reversing our decision on original submission which had summarily declared that Andrus failed to show prejudice and remanding the matter back to this Court for a detailed assessment of *Strickland* prejudice, characterized Andrus’s new mitigation evidence in such a way that indicated a conclusion that Andrus’s new mitigating evidence was, in fact, significant enough that he was prejudiced by trial counsel’s failure to investigate and present it. *Id.* at 909 (discussing *Andrus v. Texas*, 590 U.S. 806, 806–13 (2020)). The dissenting judges of this Court argued that the prejudice question must be

IV(I)(2)(b)(iii) — Cases in Which the Supreme Court Found Prejudice

Looking to the United States Supreme Court, in *Williams v. Taylor*:

The evidence offered by Williams’ trial counsel at the sentencing hearing consisted of the testimony of Williams’ mother, two neighbors, and a taped excerpt from a statement by a psychiatrist. One of the neighbors had not been previously interviewed by defense counsel, but was noticed by counsel in the audience during the proceedings and asked to testify on the spot. The three witnesses briefly described Williams as a “nice boy” and not a violent person. . . . The recorded psychiatrist’s testimony did little more than relate Williams’ statement during an examination that in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.

In his cross-examination of the prosecution witnesses, Williams’ counsel repeatedly emphasized the fact that Williams had initiated the contact with the police that enabled them to solve the murder and to identify him as the perpetrator of . . . recent assaults, as well as [recent] car thefts. In closing argument, Williams’ counsel characterized Williams’ confessional statements as “dumb,” but asked the jury to give weight to the fact that he had “turned himself in, not on one crime but on four . . . that the [police otherwise] would not have solved.” . . . The

answered in Andrus’s favor because the Supreme Court, which we are duty bound to follow, already made the determination. *Id.* at 910.

Andrus sought review by the Supreme Court, but his petition for writ of certiorari was denied. *Andrus v. Texas*, 142 S.Ct.1866 (2022) (mem.). Although “all that a denial of a petition for writ of certiorari means is that fewer than four members of the Court thought it should be granted,” and “such a denial carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review,” *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., on denial of certiorari), Justice Sotomayor dissented, joined by Justices Breyer and Kagan, to express her views on the merits of Andrus’s case. *Andrus*, 142 S.Ct. at 1866 (Sotomayor, J., dissenting). Not only did Justice Sotomayor agree with the dissent in this Court that, as a matter of vertical *stare decisis*, the United States Supreme Court had effectually decided the prejudice question in Andrus’s favor, *id.* at 1867 (“I agree with the dissenting judges below.”), she also argued that Andrus had shown *Strickland* prejudice. *Id.* at 1869–79.

weight of defense counsel's closing, however, was devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life.

529 U.S. 362, 369 (2000) (internal citations omitted). In contrast to the mitigation that was presented, the Supreme Court found that Williams's counsel:

[F]ailed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Counsel failed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade in school. . . . They failed to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." . . . Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison.

Id. at 395–96 (internal citations omitted). Explaining that "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was

‘borderline mentally retarded,’ might well have influenced the jury’s appraisal of his moral culpability[,]” *id.* at 398, the Supreme Court concluded that “the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised ‘a reasonable probability that the result of the sentencing proceeding would have been different’ if competent counsel had presented and explained the significance of all the available evidence.” *Id.* at 398–99.

In *Wiggins v. Smith*, trial counsel arranged for Wiggins to be evaluated by a psychologist, and they also obtained the written presentence investigation (PSI), “which included a one-page account of Wiggins’s ‘personal history’ noting his ‘misery as a youth,’ quoting his description of his own background as ‘disgusting,’ and observing that he spent most of his life in foster care. Counsel also ‘tracked down’ records kept by the Baltimore City Department of Social Services (DSS) documenting Wiggins’s various placements in the State’s foster care system.” 539 U.S. at 523. Although those records made reference to his life history, “counsel’s investigation into [Wiggins’s] background was limited to the PSI and the DSS records.” *Id.* at 533. Counsel did not obtain a social history report, even though that was standard practice in Maryland and funds were available to retain a forensic social worker to prepare such a report. *Id.* at 524. Instead, their mitigation strategy was “to focus their efforts on

‘retry[ing] the factual case’ and disputing Wiggins’ direct responsibility for the murder.” *Id.* at 517. Essentially, they made a “‘tactical’ decision to ‘retry guilt[.]’” *Id.* at 518–19. “Wiggins’ sentencing jury heard only one significant mitigating factor—that Wiggins had no prior convictions.” *Id.* at 537. In contrast to that mitigation case, Wiggins produced in post-conviction proceedings a social history report from a licensed social worker, who:

testified concerning an elaborate social history report he had prepared containing evidence of the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents. Relying on state social services, medical, and school records, as well as interviews with petitioner and numerous family members, [the social worker] chronicled petitioner’s bleak life history.
...

According to [the social worker’s] report, petitioner’s mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. . . . Mrs. Wiggins’ abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner’s hand against a hot stove burner—an incident that led to petitioner’s hospitalization. . . . At the age of six, the State placed Wiggins in foster care. Petitioner’s first and second foster mothers abused him physically, . . . , and, as petitioner explained to [the social worker], the father in his second foster home repeatedly molested and raped him. . . . At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother’s sons allegedly gang-raped him on more than one occasion. . . . After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly

sexually abused by his supervisor.

Id. at 516–17 (internal citations omitted).

The Supreme Court found that “[t]he mitigating evidence counsel failed to discover and present in this case [was] powerful[,]” and “the kind of troubled history we have declared relevant to assessing a defendant’s moral culpability.” *Id.* at 534–35. “Given both the nature and the extent of the abuse petitioner suffered, . . . there [was] a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing[,]” *id.* at 535, and “had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.” *Id.* at 536. Like *Williams*, the Supreme Court concluded that Wiggins was prejudiced by trial counsel’s error, and “the available mitigating evidence, taken as a whole, ‘might well have influenced the jury’s appraisal’ of Wiggins’ moral culpability.” *Id.* at 538 (quoting *Williams*, 529 U.S. at 398).

And in *Rompilla v. Beard*, the mitigation case:

[C]onsisted of relatively brief testimony: five of his family members argued in effect for residual doubt, and beseeched the jury for mercy, saying that they believed Rompilla was innocent and a good man. Rompilla’s 14-year-old son testified that he loved his father and would visit him in prison.

545 U.S. 374, 378 (2005). The Supreme Court found that defense counsel were deficient in failing to examine the court file, *id.* at 381–90, which would have “destroyed the benign conception of Rompilla’s upbringing and mental capacity” given by Rompilla and his family and would have propelled counsel to investigate further. *Id.* at 391 Had they done so, they would have found that:

Rompilla’s parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla’s mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

Id. at 391–92. And because the file would have shown “plenty of ‘red flags,’” counsel would have sought further mental health testing. *Id.* at 392. Testing performed by postconviction counsel “found that Rompilla ‘suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions.’ . . . [and] ‘Rompilla’s problems relate back to his childhood, and were likely caused

by fetal alcohol syndrome [and that] Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense." *Id.*

Thinking that "Rompilla has shown beyond any doubt that counsel's lapse was prejudicial," *id.* at 390, the Supreme Court concluded:

This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing.

Id. at 393 (internal citations omitted) (quoting *Wiggins*, 539 U.S. at 538, and *Strickland*, 466 U.S. at 694).

In *Porter v. McCollum*, standby counsel became the defense counsel a little over a month before the sentencing proceeding. 558 U.S. 30, 39 (2009). In that time, counsel only had one short meeting with Porter regarding the penalty phase. *Id.* He did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family. *Id.* Instead of taking the first step of interviewing witnesses or requesting records, counsel ignored pertinent avenues for investigation

of which he should have been aware. *Id.* at 40. As a result, defense counsel presented only one witness during the penalty phase, Porter's ex-wife, and read an excerpt from a deposition. *Id.* at 32. The mitigating evidence, which was inconsistent, related to Porter's behavior when intoxicated and portrayed his relationship with his soon as good. *Id.* And although counsel told the jury that Porter had "other handicaps" that were not apparent and that "Porter was not 'mentally healthy,'" counsel did not present any mental health evidence. *Id.* The Supreme Court found that counsel "clearly did not satisfy" the "'obligation to conduct a thorough investigation of the defendant's background.'" *Id.* at 39 (quoting *Williams*, 529 U.S. at 396). Even if Porter had been fatalistic or uncooperative, that did not obviate the need for defense counsel to conduct *some* sort of mitigation investigation. *Id.* at 40.

If counsel had conducted the proper investigation, he would have been able to present to the trial judge and the jury the kind of troubled history the Supreme Court has declared relevant to assessing a defendant's moral culpability. *Id.* at 41. The jury and judge would have heard about (1) Porter's heroic military service in two of the most critical—and horrific—battles of the Korean War; (2) his struggles to regain normality upon his return from war; (3) his childhood history of physical abuse; and (4) his brain abnormality, difficulty reading and writing, and limited schooling. *Id.* The

jury and judge heard absolutely none of that evidence, evidence which might well have influenced the jury's appraisal of Porter's moral culpability. *Id.* What the jury and judge heard instead was about Porter's turbulent relationship with his former girlfriend, who was the victim of the murder Porter was convicted of, his other crimes, and almost nothing else. *Id.* Nothing that would have humanized Porter or allowed the jury and judge to accurately gauge Porter's moral culpability. *Id.*

"On the other side of the ledger," the aggravating evidence was not so substantial. *Id.* The murder was not "especially heinous, atrocious, or cruel"; rather, it was consistent with a crime of passion, although premeditated to a degree. *Id.* at 42. On the whole, the Supreme Court found that, "Had the judge and jury been able to place Porter's life history" on the scale, there was "*clearly* a reasonable probability" that the jury and the judge "'would have struck a different balance.'" *Id.* (emphasis added) (quoting *Wiggins*, 539 U.S. at 537). In other words, counsel's failure to investigate and present that life history caused *Strickland* prejudice.

IV(I)(2)(b)(iv) — Cases in Which the Supreme Court Did Not Find Prejudice

While the aggravating evidence was not strong in *Porter*, the Supreme Court recently emphasized that:

When a capital defendant claims that he was prejudiced at sentencing because counsel failed to present available mitigating evidence, a court

must decide whether it is reasonably likely that the additional evidence would have avoided a death sentence. This analysis requires an evaluation of the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors.

Jones, 602 U.S. at 171–72. Accordingly, even “if the defense is able to show that trial counsel failed to produce any mitigating evidence that can be characterized as ‘substantial,’” a new capital sentencing proceeding is not required. *Id.* at 165. Rather, “[i]n such a case, where the aggravating factors greatly outweigh the mitigating evidence, there may be no ‘reasonable probability’ of a different result.” *Id.* As an example, the Supreme Court “[i]magine[d] a defendant with the worst possible aggravating circumstances, say, multiple, vulnerable victims; torture; a lengthy record of violent crime; no remorse; and a vow to kill again if given the chance.” *Id.*

Applying these principles, the Supreme Court found that Jones failed to show *Strickland* prejudice in his case, because “[m]ost of the mitigating evidence Jones presented . . . was not new, and what was new would not carry much weight in Arizona courts. Conversely, the aggravating factors present [were] extremely weighty.” *Id.* Although trial counsel failed to present at Jones’s capital sentencing additional mitigating evidence of mental health conditions, cognitive impairment caused by his history of head trauma, childhood abuse, and drug misuse, the sentencing court had already heard some mitigating evidence covering those same

topics, and none of the additional mitigating evidence was causally connected to the murders. *Id.* at 166–70. Furthermore, the additional mitigating evidence was weak, which contrasted sharply with the strong aggravating circumstances of the offense that Jones murdered multiple people, in a cruel manner, for pecuniary gain, and one of the victims was a child. *Id.* at 170.³⁵ Jones decided he wanted to take another man’s \$2,000 gun collection, and he proceeded to beat the man, the man’s grandmother, and the man’s seven-year-old daughter with a baseball bat. *Id.* at 158–59. The man died after being beaten with the bat two separate times during the assault, and the daughter was asphyxiated with a pillow after she was beaten. *Id.* at 159. Meanwhile, Jones skipped town and used the guns to fund a trip to Las Vegas. *Id.* As for the grandmother, she initially survived but succumbed to her injuries seventeen months later. *Id.*

In *Schriro v. Landrigan*, the issue before the Supreme Court was whether Landrigan was entitled to an evidentiary hearing for his federal habeas claim. 550 U.S. 465, 468 (2007). The district court had determined that Landrigan could not make out a colorable claim of ineffective assistance and was therefore not entitled to a hearing.

³⁵ The aggravating circumstances of Jones’s capital murder offense also established several statutorily enumerated aggravating circumstances requiring a death penalty under Arizona law. *Jones*, 602 U.S. at 159–60 (citing ARIZ. REV. STAT. Ann. § 13-703(E) (1993) (death sentence must be imposed if one or more aggravating circumstances are found and no sufficient mitigating circumstances), (F)(8) (multiple homicides), (F)(5) (pecuniary gain), (F)(6) (cruelty), and (F)(9) (child); current version at ARIZ. REV. STAT. Ann. § 13-751(E), (F)(3), (F)(4), (F)(6), and (F)(7)).

Id. at 472. Ultimately, the Supreme Court upheld the district court’s conclusion as a reasonable one and the denial of a hearing not an abuse of discretion. *Id.* at 477, 480. First, Landrigan could not show prejudice from trial counsel’s failure to present the mitigating evidence, because Landrigan himself had prevented the presentation of mitigating evidence at his trial. *See id.* at 477 (“regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence . . . because of his established recalcitrance, Landrigan could not demonstrate prejudice”). He instructed trial counsel not to present mitigating evidence; he told the trial judge that, as far as he was concerned, there was no relevant mitigating evidence; and he repeatedly interrupted when counsel tried to proffer anything that could have been considered mitigating. *Id.* at 476. And Landrigan clearly understood the consequences of forgoing any mitigation case—he told the sentencing court at the end of the proceeding that, “I think if you want to give me the death penalty, just bring it right on. I’m ready for it.” *Id.* at 479–80.

And on the substance of the new mitigating evidence, the Supreme Court also agreed with the district court’s finding that the poor quality of Landrigan’s mitigating evidence prevented him from making a colorable claim of prejudice. *Id.* at 480.

Landrigan's new evidence showed:

“[That] he was exposed to alcohol and drugs *in utero*, which may have resulted in cognitive and behavioral deficiencies consistent with fetal alcohol syndrome. He was abandoned by his birth mother and suffered abandonment and attachment issues, as well as other behavioral problems throughout his childhood.

“His adoptive mother was also an alcoholic, and Landrigan's own alcohol and substance abuse began at an early age. Based on his biological family's history of violence, Landrigan claims he may also have been genetically predisposed to violence.”

Id. (quoting *Landrigan v. Schriro*, 441 F.3d 638, 649 (9th Cir. 2006), *rev'd by Landrigan*, 550 U.S. at 481). The Supreme Court characterized the mitigation evidence as “weak,” and against that evidence was Landrigan's exceedingly violent past and belligerent behavior. *Id.* at 481.

“The prospect was chilling; before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. As the Arizona Supreme Court so aptly put it when dealing with one of Landrigan's other claims, ‘[i]n his comments [to the sentencing judge], defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior.’ On this record, assuring the court that genetics made him the way he is could not have been very helpful. There was no prejudice.”

Id. (quoting *Landrigan v. Stewart*, 272 F.3d 1221, 1229 (9th Cir. 2001), *reh'g granted by* 397 F.3d 1235 (9th Cir. 2005)).

And in *Wong v. Belmontes*, the Supreme Court bypassed the deficient

performance question because Belmontes could not show prejudice. 558 U.S. 15, 19 (2009). Trial counsel presented substantial mitigating evidence, including testimony from nine witnesses regarding Belmontes's terrible childhood and the abuse he suffered, and his religious conversion. *Id.* at 20–21. Some of the proposed additional mitigating evidence would have been cumulative. *Id.* at 22. And proposed expert testimony or other mitigation evidence as to Belmontes's non-violent character or propensity would have triggered admission of rebuttal evidence that he committed a prior, brutal murder, which counsel had been successful in excluding. *Id.* at 22, 24–26. Furthermore, the aggravating evidence was overwhelming. *Id.* at 26–28. Belmontes was not prejudiced by the decision to keep out the additional mitigating evidence, if it could have been considered “mitigating” at all. *See id.* at 22 (“This evidence would have made a difference, but in the wrong direction for Belmontes.”).

In other, similar failure-to-investigate-and-present-mitigating evidence cases, the Supreme Court considered *Strickland* prejudice, but those cases by-and-large turned upon the failure to show deficient performance. Nevertheless, they are instructive for examples of what does not constitute *Strickland* prejudice in such cases. For example, in *Strickland* itself, the alleged failure by trial counsel was in not seeking out character witnesses, psychological evidence, or a presentence investigation report.

Strickland, 466 U.S. at 675. But counsel made a choice to play to the trial judge's well-known views on the importance of owning up to one's crimes, and counsel's strategy was to argue that Strickland committed the offense under extreme emotional distress and to rely as fully as possible on his acceptance of responsibility for his crimes. *Id.* at 699. Furthermore, counsel could have reasonably concluded that character and psychological evidence would have been of little help given the utterly overwhelming aggravating evidence, and by not presenting such evidence, contrary evidence would not come in. *Id.*

On the prejudice prong, the Supreme Court found Strickland was not prejudiced by the alleged failure. *Id.* at 700. The new mitigating evidence "would barely have altered the sentencing profile[.]" *Id.* at 699–700. "[A]t most this evidence show[ed] that numerous people who knew [Strickland] thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance." *Id.* at 700. Against that mitigating evidence were "overwhelming aggravating factors," and some of the mitigating evidence "might even have been harmful to his case: his 'rap sheet' [which had been successfully excluded by counsel] would probably have been admitted into evidence, and the psychological reports would have directly

contradicted [his] claim that the mitigating circumstance of extreme emotional disturbance applied to his case.” *Id.*

In *Bobby v. Van Hook*, in addition to finding that Van Hook’s trial counsel did not perform deficiently, the Supreme Court concluded that Van Hook was not prejudiced by counsel’s alleged failure to identify and interview additional family members and therapists who had treated Van Hook’s parents. 558 U.S. 4, 12 (2009). The affidavits submitted by the witnesses that were not interviewed by counsel showed that their testimony “would have added nothing of value.” *Id.* Only two of the witnesses had new, relevant information—an uncle noted that Van Hook’s mother had been committed to a psychiatric hospital, and a stepsister mentioned that Van Hook’s father hit Van Hook frequently and had tried to kill his mother—but that was largely similar to what the trial court had already heard. *Id.* The trial court heard that Van Hook’s father was violent and had attacked Van Hook’s mother and beaten Van Hook at least once, and Van Hook’s mother told the trial court that she had been under psychiatric care. *Id.* “On the other side of the scales” from the essentially weightless new mitigating evidence was the *weight* of the aggravating evidence. *Id.* at 12–13, 13 (Sixth Circuit erred when it “focused on the *number* of aggravating factors instead of their *weight*[.]” (emphasis in original)). Van Hook committed the murder

alone in the course of an aggravated robbery. *Id.* And the robbery was one of many in a string of robberies committed by Van Hook in which he employed a strategy of luring homosexual men into secluded settings to rob them, which he had done many times since his teenage years and even employed again after the murder in the weeks before his arrest. *Id.* at 13.

IV(I)(2)(b)(v) — Applicant’s Case

With those examples in mind, we return to Applicant’s case, in which Goeke and Gransee ignored the red flags and presented a “weak” mitigation case that “consist[ed] mainly of evidence that he was a good father and son, he was kind to homeless people, and he had faced financial and emotional strain during his adult life.” *Gonzalez*, 2020 WL 6482409, at *46. In contrast and as described above, Applicant’s writ counsel were able to follow the red flags that Goeke and Gransee did not, and they found that Applicant’s family was physically and emotionally abused by his father, and Applicant may have even been sexually abused as a child.

Despite counsels’ shortcomings, based on the record before us, we conclude that Applicant’s case falls closer to those cases in which prejudice was not found where counsel conducted an inadequate investigation and thereafter presented weak mitigation cases.

With regard to the prejudice prong of *Strickland* analysis, Applicant's case is closer to *Martinez*, *Jones*, and *Landrigan*. Evidence of childhood abuse is "powerful," certainly, but it must nevertheless be added to the entirety of the evidence presented to the jury, rather than substitute for such. In *Martinez*, we found no *Strickland* prejudice because the evidence in aggravation was "extensive" and "severe." *Martinez*, 195 S.W.3d at 730, 731. Against that evidence was Martinez's mitigation evidence. Although we characterized it as "strong," the jury was already "privy to some of the severe abuse [Martinez] suffered during his childhood[.]" *Id.* at 731. It did not "differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing" that was rejected by the jury. *Id.* (quoting *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005)). The same occurred in *Jones*, where the Supreme Court concluded that there was no *Strickland* prejudice—no reasonable probability—where the aggravating factors were extremely weighty and the mitigating evidence was either not new or would not carry much weight—in the Supreme Court's estimation—in an Arizona court. *Landrigan* also saw no shift in the balance against the aggravating evidence. Whereas he alleged counsel should have presented mitigating evidence showing that he was exposed to alcohol and drugs *in utero*, the aggravating evidence showed he had previously murdered one man, repeatedly

stabbed another one, escaped from prison, and within two months murdered still another man. And rather than show remorse, he flaunted his menacing behavior. Showing that genetics made him the way he was would not have been very helpful.

In Applicant's case, the aggravating evidence was also extensive and severe. The jury was well-aware that Applicant had intentionally and brutally murdered a police officer for no reason. While Vann's patrol car was stopped at a red light, Applicant pulled his pickup truck beside Vann. There, Applicant fired at least forty-six rifle rounds at Vann, at least thirty-nine of which hit the deputy. In addition to that heinous murder, the jury was also well-aware that Applicant continued about his business, hardly impressed by the crime that he had just committed. Rather, he seemed to have been amused by it, chuckling when he called Starling after the fact.

Against that aggravating evidence, the mitigating evidence Applicant alleges trial counsel should have presented shows he suffered and continues to suffer from PTSD and may have been experiencing an episode of delirious mania. But this mental health evidence is similar to the evidence actually presented at trial relating to his defense that he had been in an automatistic fugue state when he killed Vann. The jury rejected that defense. Applicant's mitigation evidence also revolves around abuse he suffered as a child. Certainly, evidence that Applicant had an abusive childhood stands

in stark contrast to the happy childhood evidence Goeke and Gransee presented at trial. But there is a spectrum to abusive childhoods. Even if the jury believed the evidence of abuse, what Applicant suffered pales in comparison to the abuse of *Gabriel Gonzalez* and *Garza*, and of *Williams*, *Wiggins*, and *Rompilla*. Furthermore, the allegation of sexual abuse was vague and unsubstantiated, and the jury would not have heard lurid details like there were for Gabriel Gonzalez. Had trial counsel conducted the mitigation investigation and presented the mitigation evidence that Applicant argues they should have, the jury may have come away feeling sorry for Applicant for having lived through a painful childhood. But we do not find a reasonable probability that sympathy for his early years would have led at least one of the other jurors beyond Eve Martinez to decide that sufficient mitigating evidence existed to warrant a sentence of life without parole.

That assumes Applicant would have allowed Goeke and Gransee to present said mitigation case. Although the habeas court made no findings or conclusions that Applicant had actually forbade trial counsel from presenting a mitigation case, or that he would have protested or disrupted the trial had trial counsel nonetheless tried to present a mitigation case, the record does show that Applicant was a difficult client. According to Goeke and Gransee, Applicant viewed a mitigation case as a surrender

on the guilt case. Goeke and Gransee also claimed that Applicant told them that he would rather die than serve a sentence of life without parole in prison. And a constant refrain from Goeke and Gransee was their concern that, if they tried to pursue a mitigation investigation, let alone an make a mitigation case at trial, Applicant would view them as his opponents and he would become disruptive.

To the extent their concerns were founded, Applicant's case shares similarity with *Landrigan*, in which Landrigan had prevented his counsel from presenting mitigating evidence. *See Landrigan*, 550 U.S. at 447. To be fair, Landrigan actually forbade the mitigation case, whereas here there is only the claim by Goeke and Gransee that Applicant forbade one. Yet at trial, Goeke and Gransee actually did put on their "weak" mitigation case without protest from Applicant. *See Gonzalez*, 2020 WL 6482409, at *21 (summarizing mitigation case), *46 (describing mitigation case as "weak"). While Goeke and Gransee's concerns may have been overblown, there is no indication that they were wrong, either. Given that there is a suggestion in the habeas record that Applicant may have been opposed to the presentation of a mitigation case at trial, and such opposition may be elevated against a mitigation case that was more thorough and less flattering of his past and his family, the differences between this case and *Landrigan* may be one of degree, than of kind. Whereas

Landrigan’s “established recalcitrance” was a conclusive factor against a showing of *Strickland* prejudice, *Landrigan*, 550 U.S. at 477, Applicant’s recalcitrance, not conclusively established but asserted by Goeke and Gransee, is an additional factor weighing against a finding of prejudice.

Our confidence in the verdict is not undermined. We conclude Applicant fails to establish prejudice as required by *Strickland*, and he is not entitled to relief as to Sub-Claim 2.2.

V — Conclusion

In conclusion, we deny relief on Claim 1 as procedurally barred, and we deny relief on Sub-Claim 2.1, and Claims 3, 4, 5, 6, and 7 because they are without merit.

On Sub-Claim 2.2, Applicant shows that trial counsel ignored the slew of red flags warning them about Applicant’s mental condition and instead pursued a mitigation case relying solely on Applicant and his mother’s self-reporting. But regardless of whether counsel’s performance was deficient, on balance we are convinced that there is not a reasonable probability that the outcome of the proceeding would have been any different. The lone holdout juror was already sold on the mitigation case that counsel actually presented, and she changed her vote for reasons outside the quality of their representation. As for the other jurors, Applicant has failed

to show a reasonable probability that any one of them would have been swayed by a better mitigation case. Even if counsel conducted the proper mitigation investigation and presentation, the holdout juror's vote would have been the same. He does not meet his burden under *Strickland*, and he is not entitled to habeas corpus relief as to Claim 2.2.

All relief is denied.

Delivered: August 20, 2026
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