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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-70035

MOISES SANDOVAL MENDOZA,

Petitioner-Appellant,

v.

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:09-CV-86

AUGUST 31, 2023

Before RICHMAN, *Chief Judge*, and HIGGINBOTHAM and SOUTHWICK, *Circuit Judges*.

PER CURIAM:

Moises Sandoval Mendoza was convicted of capital murder by a Texas jury and sentenced to death. He later filed an application in district court for habeas relief. In an earlier appeal, because his initial counsel had a conflict of interest, we remanded for appointment of additional counsel and further development of potential claims of ineffective trial counsel. An

amended application was filed, but the district court rejected all the new claims.

We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Moises Mendoza was convicted and sentenced to death in 2005. Since his conviction, he has sought relief from the judgment entered against him on direct appeal and in numerous filings for writs of habeas corpus.

Mendoza's victim was Rachelle Tolleson. She lived in Farmersville, a small town in northeast Texas. *See Mendoza v. State*, No. AP-75,213, 2008 WL 4803471, at *1 (Tex. Crim. App. Nov. 5, 2008). On March 17, 2004, after visiting her mother's home, Ms. Tolleson and her five-month-old daughter, Avery, arrived at their house around 10:00 p.m. The next morning, Ms. Tolleson's mother went to the house, as was common practice. The back door was wide open. The bedroom was in chaotic disarray, with the mattress and box springs askew, the headboard broken, other furniture out of place, and papers and other objects scattered around the room. Baby Avery was on the bed alone. *See id.*

Police were summoned, and their investigation identified Mendoza as a prime suspect. Less than a week before the murder, Mendoza had been at the Tolleson home for a party of about fifteen people. Ms. Tolleson and Mendoza spoke a few times, but she told a friend she had no interest in him. Certain other evidence made police suspicious of Mendoza. *See id.* at *1–2.

Mendoza was arrested and confessed to killing Ms. Tolleson. He alleged that she had willingly gone with him in his truck, even though that would mean leaving her six-year-old daughter home alone. He then con-tended that while in his truck, he choked her, causing her to pass out. He later drove to a field behind his own home, had sexual intercourse with her, and choked her again. Mendoza then dragged her into the field, where he choked her more until she appeared dead. He stabbed her in the throat with a knife to assure her death. After his first interview with police, he moved her body to a more remote location and burned it. Someone found the body six days later. *See id.* at *2.

It was undisputed at trial that Mendoza had murdered Tolleson. To support capital murder, the indictment charged Mendoza with having committed the murder in the course of a kidnapping and aggravated sexual assault. The jury found he had committed those offenses as well. *Id.* at *3.

For a defendant to be eligible for the death penalty in Texas, the prosecution must prove beyond a reasonable doubt that the murder was "intentionally or knowingly" committed and was aggravated by at least one enumerated circumstance. TEX. PENAL CODE §§ 19.02(b)(1), 19.03. Once a defendant has been found guilty of capital murder, the jury must make findings on two special issues before a sentence of death can be imposed. First, the jury must find beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE

CRIM. PROC. art. 37.071, § 2(b)(1). This "future dangerousness" issue requires the jury to find the "defendant would constitute a continuing threat whether in or out of prison without regard to how long the defendant would actually spend in prison if sentenced to life." *Estrada v. State*, 313 S.W.3d 274, 281 (Tex. Crim. App. 2010) (quotation marks and citation omitted). Second, the jury must find that there are no "mitigating circumstances . . . to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1). The jury must decide both of these special issues unanimously. TEX. CODE CRIM. PROC. art. 37.071, § 2(d)(2), (f)(2).

The jury returned a verdict of death. On direct appeal, the Texas Court of Criminal Appeals affirmed Mendoza's conviction and sentence. *Mendoza*, 2008 WL 4803471, at *1. In the state habeas proceeding, the state trial court appointed Lydia Brandt as state habeas counsel. She raised seven claims. The state trial court denied relief on all grounds, as did the Court of Criminal Appeals. *Ex parte Mendoza*, No. WR-70,211-01, 2009 WL 1617814, at *1 (Tex. Crim. App. June 10, 2009).

Brandt was appointed to continue her representation as federal habeas counsel. Mendoza's federal habeas application asserted the same seven claims as in state court. In 2012, the district court entered final judgment denying relief but granted a Certificate of Appealability ("COA") on four ineffective assistance of trial counsel ("IATC") claims. Those claims were for ineffectiveness due to trial counsel's "failing to obtain a comprehensive psycho-social history, by failing to

consider, investigate, and present condition-of-the-mind evidence to negate the *mens rea* element in the guilt-determination phase of his trial, and by failing to adequately investigate and develop crucial mitigating evidence."

Mendoza appealed. Brandt continued as counsel. While the appeal was pending, the Supreme Court decided *Trevino v. Thaler*, 569 U.S. 413 (2013). That case extended the Court's previous holding in *Martinez v. Ryan*, 566 U.S. 1 (2012), to Texas courts. *Trevino*, 569 U.S. at 416–17. Under these two decisions, a federal court may review an IATC claim that was "defaulted in a Texas postconviction proceeding . . . if state habeas counsel was constitutionally ineffective in failing to raise [the claim], and the claim has 'some merit.'" *Buck v. Davis*, 580 U.S. 100, 126 (2017) (quoting *Martinez*, 566 U.S. at 14); *see also Trevino*, 569 U.S. at 429.

Because Brandt had represented Mendoza as both state and federal habeas counsel, Mendoza moved for the appointment of conflict-free federal habeas counsel. We remanded to the district court "to appoint supplemental counsel" and "to consider in the first instance whether [Mendoza] can establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* and *Trevino* that he may raise, and if so, whether those claims merit relief." *Mendoza v. Stephens*, 783 F.3d 203, 203 (5th Cir. 2015).

The district court appointed new habeas counsel. That counsel raised two new IATC claims in November 2016 in a "First Amended Petition for a Writ of

Habeas Corpus." Both claims alleged defense counsel's ineffectiveness at the punishment phase. Mendoza's amended application conceded both claims were procedurally defaulted but argued he could overcome the procedural default under *Martinez* and *Trevino* because state habeas counsel's failure to raise the claims in state court amounted to ineffective assistance of counsel.

Mendoza alleged his trial counsel was ineffective for (1) calling Dr. Mark Vigen as a defense expert witness and (2) for failing to investigate and rebut Officer Hinton's testimony by not interviewing Melvin Johnson, an in-mate Mendoza had allegedly attacked in prison. Mendoza's new federal habeas counsel interviewed Johnson. Subsequently, Johnson swore in an affidavit that Officer Hinton's testimony was "patently false," that the affiant Johnson was actually the "aggressor," that Mendoza did not fight back, and that Johnson "received an extra tray of food" after the attack that he "figured was a bonus for [his] actions in fighting Mr. Mendoza."

The district court denied relief on both claims. While Mendoza's application for a COA from this court was pending, the Supreme Court decided *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). There, the Court held that a "federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." *Id.* at 1734. As a result, Mendoza is barred from using the Johnson affidavit to support his failure-to-investigate claim with regards to Officer Hinton's testimony. *See id.* Mendoza asked this court to remand to the district

court to consider whether to enter a stay to allow Mendoza to return to state court to present his IATC claim in investigating Officer Hinton's testimony and develop an evidentiary record in support of that claim. *See Rhines v. Weber*, 544 U.S. 269, 278 (2005) (allowing a stay in federal court so additional state proceedings can be conducted).

We summarize. The IATC issues include several that predate our earlier remand to district court. Those are that trial counsel failed to (1) formulate an integrated defense theory throughout all phases of trial, (2) investigate condition-of-the-mind evidence to negate *mens rea*, (3) investigate and develop mitigation evidence, and (4) present crucial mitigating evidence. After the December 2022 district court judgment, we granted Mendoza a COA on two additional claims: trial counsel was ineffective for (5) presenting Dr. Mark Vigen's testimony during the punishment phase of the trial and (6) failing to investigate a jailyard fight between Mendoza and Johnson.[1] Finally, we also discuss whether (7) Mendoza may return to state court to develop a record regarding the prison fight.

DISCUSSION

This court reviews the district court's conclusions of law *de novo* and its findings of fact for clear error. *See Sanchez v. Davis*, 936 F.3d 300, 304 (5th Cir. 2019).

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[1] We deferred a decision on the propriety of granting a COA on the claim that Mendoza's state habeas counsel was ineffective for not preserving these issues on appeal.

I

We first consider whether we even have jurisdiction over this appeal. The State argues we do not have jurisdiction over the IATC claims raised by Mendoza's supplemental, conflict-free federal habeas counsel after our 2015 limited remand. *See Mendoza*, 783 F.3d at 203–04. Those are claims (5) and (6) in our enumeration above. The State contends that those claims are barred by the Antiterrorism and Effective Death Penalty Act's ("AEDPA's") restrictions on second-or-successive habeas applications under 28 U.S.C. § 2244(b). According to the State, our remand did not vacate the district court's final judgment denying habeas relief. Therefore, the State argues, Mendoza is procedurally barred by Section 2244(b) from "amending" his initial application.

Under Section 2244(b), a district court cannot consider a second-or-successive application unless authorization is obtained from the court of appeals.[2] 28 U.S.C. § 2244(b)(3). Mendoza did not obtain such authorization. If the State is right that this is a second-or-successive application, "the District Court

[2] A court of appeals may only authorize a second-or-successive habeas application in accordance with statutory restrictions. Specifically, a court of appeals must conclude that the application relies on either: (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) newly discovered facts that, if proven, would "establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty." 28 U.S.C. § 2244(b)(2)(A)-(B). If these requirements are not satisfied, we must dismiss the second-or-successive application. § 2244(b)(3)(C).

never had jurisdiction to consider [these new claims] in the first place." *See Burton v. Stewart*, 549 U.S. 147, 152 (2007).

Mendoza counters that the State's argument conflicts with this court's mandate, to which we are bound by the rule of orderliness. *See Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 400 n.28 (5th Cir. 2022). Further, Mendoza argues, our mandate ensured there was no longer any "final" judgment under 28 U.S.C. § 1291 because we ordered the appointment of supplemental federal habeas counsel and reopened litigation on the merits for any defaulted IATC claims. He contends that this lack of final judgment permitted an amended filing under Section 2242 via Federal Rule of Appel-late Procedure 15.

These are unusual circumstances, ones that will not recur. Mendoza's federal habeas litigation began after the Supreme Court's *Martinez* opinion, which seemingly did not apply to federal habeas proceedings by state prisoners in Texas. It was pending on appeal here when *Trevino* was decided. Under those two decisions, a federal court may review an IATC claim that was "defaulted in a Texas postconviction proceeding . . . if state habeas counsel was constitutionally ineffective in failing to raise [the claim], and the claim has 'some merit.'" *Buck*, 137 S. Ct. at 779–80 (quoting *Martinez*, 566 U.S. at 14). Mendoza, however, was represented by the same counsel in both his state habeas proceedings and initial federal habeas proceedings.

An opinion concurring in the limited remand in 2015 acknowledged that Mendoza's counsel's "loyalty

to her client reasonably appears to be adversely limited because of her own interests." *Mendoza*, 783 F.3d at 207 (Owen, J. [now Richman, C.J.], concurring). The concurrence identified several other circuit courts that recognized "when state habeas counsel was also trial counsel, an inherent conflict of interest is present." *Id.* (citing *Bloomer v. United States*, 162 F.3d 187, 192 (2d Cir. 1998); *Stephens v. Kemp*, 846 F.2d 642, 651 (11th Cir. 1988); *Riner v. Owens*, 764 F.2d 1253, 1257 (7th Cir. 1985); *Alston v. Garrison*, 720 F.2d 812, 816 (4th Cir. 1983). In a similar vein, having the same state and federal habeas counsel would place Mendoza "in the untenable position of being forced to rely on appointed counsel to identify that counsel's own failings, if any, and to contend in federal court that her failings constituted ineffective assistance of habeas counsel." *Id.* at 208.

We remanded Mendoza's case to the district court to appoint supplemental counsel and for the court to make the initial decision of whether there was "cause for the procedural default of any ineffective-assistance-of-trial- counsel claims pursuant to *Martinez* and *Trevino* that he may raise, and if so, whether those claims merit relief." *Id.* at 203.

The State argues that Mendoza's case is analogous to several cases outside our circuit, chiefly, *Balbuena v. Sullivan*, 980 F.3d 619 (9th Cir. 2020), which renders his application second-or-successive despite our remand instructions. In *Balbuena*, the Ninth Circuit remanded for an indicative ruling under Federal Rule of Civil Procedure 12.1(b) on the petitioner's Federal Rule of Civil Procedure 60(b) motion regarding a new claim that his confession was improperly obtained. *Id.*

at 627, 638. The district court denied the motion but stayed proceedings and allowed him to return to state court to exhaust the new claim. *Id.* at 627–28. The petitioner lost in state court, then returned to district court to file a renewed Rule 60(b) motion. *Id.* at 628. The district court held that adding the new claim was a successive habeas application. *Id.* at 635. The Ninth Circuit agreed, rejecting Balbuena's argument that his habeas application was "pending" for the purposes of Section 2244 because its denial was still on appeal when he filed his Rule 60(b) motion in the district court. *Id.* at 636–37. The court held that once the district court made a final ruling and the appeal had commenced, the Section 2254 application was no longer pending. *Id.*

The *Balbuena* decision is obviously procedurally distinct from the circumstances here. The type of limited remand under Rule 12.1(b) ordered by the *Balbuena* court, one that seeks an indicative ruling, does not disturb finality in the district court. *See id.* at 638; FED. R. APP. P. 12.1. Nor does it allow the district court to consider the merits or a motion under Rule 15. *See Balbuena*, 980 F.3d at 638. Instead, under Rule 12, the district court indicates how it *would* rule on the Rule 60(b) motion (or an equivalent) if its jurisdiction were later restored. FED. R. APP. P. 12.1. advisory committee notes to 2009 amendment. The appellate court "retains jurisdiction" over the entire matter. FED. R. APP. P. 12.1(B); 2 STEVEN S. GENSLER ET AL., FEDERAL RULE OF CIVIL PROCEDURE, RULE 62.1 (2023).

Here, we did not remand for an indicative ruling. *See Mendoza*, 783 F.3d at 203. Further, we retained

only partial jurisdiction (*i.e.*, "jurisdiction in the remainder of the case"), and so, we restored jurisdiction to the district court to hear any new IATC claims if Mendoza could overcome the procedural default of ineffective state habeas counsel. *See id.* We therefore agree with Mendoza that this case is procedurally distinct from *Balbuena* and the other out-of-circuit cases the Government cites.[3]

We also agree with Mendoza that the effect of our mandate was to reopen litigation in the district court. Our remand in this case was not unlimited, though. It was defined in scope to those IATC claims potentially defaulted by a conflicted state habeas counsel now available under *Martinez* and *Trevino*.[4] Even so, once litigation was effectively reopened on the merits for those limited claims, Section 2242 allowed an amended filing: an application "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. The rel-

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[3] The Government cites five courts of appeals cases as support for the argument that "after the district court's judgment is final (in the sense that it is appealable), a filing containing habeas claims is a second-or-successive application, even if the petitioner's appeal is still pending." *See Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012); *Beaty v. Schriro*, 554 F.3d 780, 783 n.1 (9th Cir. 2009); *Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007); *Williams v. Norris*, 461 F.3d 999, 1003 (8th Cir. 2006); *United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006); *United States v. Terrell*, 141 F. App'x 849, 852 (11th Cir. 2005).

[4] We decline to consider the Government's argument raised for the first time on appeal that Mendoza's new claims are barred by AEDPA's statute of limitations. *Wood v. Milyard*, 566 U.S. 463, 474 (2012).

evant civil rule on amended and supplemental pleadings is Federal Rule of Civil Procedure 15. Learned authority interprets Rule 15 to mean that "[o]nce [a] case has been remanded, [a] lower court [may] permit new issues to be presented by an amended pleading that is consistent with the judgment of the appellate court." 6 WRIGHT & MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 1489 (3d ed. 2022). Indeed, in its response before the district court, the Government answered on the merits and did not challenge jurisdiction. Further, the district court entered a new final judgment when it completed its remand duties.

Both parties urge us to resolve the broader question of whether a habeas filing is second-or-successive when proceedings on the initial application are ongoing. The Government urges us to follow several circuits' lead in holding that, after a district court's judgment is final, a filing containing a habeas claim is a successive application, even if the petitioner's appeal is still pending. *See Phillips*, 668 F.3d at 435; *Beaty*, 554 F.3d at 783 n.1; *Ochoa*, 485 F.3d at 540; *Williams*, 461 F.3d at 1003; *Nelson*, 465 F.3d at 1149; *Terrell*, 141 F. App'x at 852. Mendoza urges us to adopt the opposite approach, and argues that holding otherwise conflicts with Supreme Court precedent in *Slack v. McDaniel*, 529 U.S. 473, 487–88 (2000), *Banister v. Davis*, 140 S. Ct. 1698 (2020), and *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Mendoza would have us follow the approaches in *United States v. Santarelli*, 929 F.3d 95, 105–06 (3d Cir. 2019) and *Whab v. United States*, 408 F.3d 116, 118–19 (2d Cir. 2005), which hold that a subsequent habeas application is not successive if an appeal is ongoing.

We decline to resolve that broader question here because of the unusual timing of Mendoza's case does not require such a decision. Instead, we confine our holding to the narrow facts of this case.

II

We now turn to the merits of Mendoza's appeal. "In a habeas corpus appeal, we review the district court's findings of fact for clear error and its conclusions of law *de novo*, applying the same standards to the state court's decision as did the district court." *Escamilla v. Stephens*, 749 F.3d 380, 387 (5th Cir. 2014).

Mendoza first argues that the district court erred in denying his motion for an evidentiary hearing. If a petitioner failed to develop the factual basis of a claim in state court, he may obtain an evidentiary hearing on the claim in federal court if he shows that: (1) either "the claim relies on . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or "a factual predicate that could not have been previously discovered through the exercise of due diligence;" and (2) "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2). In cases where Section 2254(e)(2) does not bar the district court from holding an evidentiary hearing, this court reviews the denial of the evidentiary hearing for abuse of discretion. *Blue v. Thaler*, 665 F.3d 647, 655 (5th Cir. 2011).

Mendoza argues that the district court abused its discretion because the new evidence in the defense team members' responses to the interrogatories created a genuine issue of material fact as to whether Mendoza's defense team conducted an adequate mitigation investigation. He asserts that, because he made the "required *prima facie* showing of a material issue of fact, the [district] court was required to conduct an evidentiary hearing."

"[A] district court's refusal to hold an evidentiary hearing in a § 2254 proceeding is an abuse of discretion only if the petitioner can show that (1) the state did not provide him with a full and fair hearing, and (2) the allegations of his petition, if proven true, . . . would entitle him to relief." *Id.* (alteration in original) (quotation marks omitted). In addition, a third condition is that federal courts are prohibited "from using evidence that is introduced for the first time at a federal-court evidentiary hearing as the basis for concluding that a state court's adjudication is not entitled to deference under § 2254(d)." *Id*. at 656 (citing *Cullen v. Pinholster*, 563 U.S. 170 (2011)). Because a federal habeas court cannot "consid[er] new evidence when reviewing claims that have been adjudicated on the merits in state court," if Mendoza's claim was adjudicated on the merits in state court, it could not have been error for the court to deny an evidentiary hearing. *See Broadnax v. Lumpkin*, 987 F.3d 400, 407 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 859 (2022).

Mendoza asserts that, because he sought discovery in state court, but it was denied, the Texas Court of Criminal Appeals failed to provide him with due pro-

cess and his claims were not adjudicated on the merits. Mendoza relies substantially on Fourth Circuit decisions holding that "when a state court forecloses further development of the factual record, it passes up the opportunity that exhaustion ensures," and, therefore, "[i]f the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d)." *Winston v. Kelly* (*Winston I*), 592 F.3d 535, 555–56 (4th Cir. 2010); *Winston v. Pearson* (*Winston II*), 683 F.3d 489, 501–02 (4th Cir. 2012).

With respect for that circuit, we have consistently held that "a full and fair hearing is not a precondition to according § 2254(e)(1)'s presumption of correctness to state habeas court findings of fact nor to applying § 2254(d)'s standards of review." *Boyer v. Vannoy*, 863 F.3d 428, 446 (5th Cir. 2017) (quoting *Valdez v. Cockrell*, 274 F.3d 941, 951 (5th Cir. 2001)). Such a requirement is supported neither by the plain text of Section 2254(d), which makes no reference to a full and fair hearing, nor by the legislative landscape against which AEDPA was passed, which involved excising from the pre-AEPDA version of Section 2254 references to a full and fair hearing. *Valdez*, 274 F.3d at 949–51. Further, "[w]here we have conducted an examination of whether an 'adjudication on the merits' occurred, we have looked at whether the state court reached the merits of the petitioner's claim rather than deciding it on procedural grounds." *Id.* at 952.

As in *Valdez*, evidence relevant to Mendoza's claims was not included in the record — due to the Court of Criminal Appeals' denial of Mendoza's motion for discovery — and was not reviewed by the court in making its decision. Likewise, the Court of Criminal Appeals' denial of Mendoza's claims was based not upon procedural grounds but upon the merits of the claims, albeit without the benefit of additional material evidence. *Ex parte Mendoza*, 2009 WL 1617814, at *1. We conclude that, as we held in *Boyer* and *Valdez*, Mendoza's claims were adjudicated on the merits. In one precedent, we held that "where a petitioner's habeas counsel had raised an issue in the state habeas court, albeit ineffectively from a constitutional standpoint, the petitioner was barred by *Pinholster* from offering new evidence in federal court precisely because the original claim had been 'fully adjudicated on the merits' in state court." *Broadnax*, 987 F.3d at 409 (quoting *Escamilla*, 749 F.3d at 394–95).

Because Mendoza's claims were adjudicated on the merits in state court, an evidentiary hearing could not have aided the district court in its review. Therefore, the district court did not abuse its discretion in denying Mendoza's motion for an evidentiary hearing.

Mendoza also (1) challenges the application of AEDPA deference under Section 2254(d) to the Court of Criminal Appeals' decision and (2) requests this court consider the interrogatories the federal district court ordered and considered. He premises both this challenge and request on the ground that, due to the Court of Criminal Appeals' denial of his motion for discovery, its decision was not an adjudication on the

merits. For the reasons already explained, we reject these arguments.

Section 2254(d)'s highly deferential standard applies. We now discuss the relevant claims with that deference.

III

We begin with the four claims for which a COA was granted in 2013. All four of these claims concern the ineffective assistance of trial counsel. In order to prevail on an IATC claim, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness" and that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). There is "a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). "'surmounting *Strickland*'s high bar is never an easy task' . . . [and] [e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Id.* at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). Because *Strickland* and Section 2254(d) are highly deferential, our review is doubly deferential when both apply in tandem. *Id.*

"When § 2254(d) applies, the question is not whether counsel's actions were reasonable. . . . [but] whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

The 2013 COA was granted on four IATC claims: trial counsel failed to (1) formulate an integrated defense theory throughout all phases of trial, (2) investigate condition-of-the-mind evidence to negate *mens rea*, (3) investigate and develop mitigation evidence, and (4) present crucial mitigating evidence. All four of Mendoza's claims stem from the premise that his defense team unreasonably failed to conduct an adequate investigation of Mendoza's psycho-social history. Had counsel conducted an adequate investigation, he asserts, they would have discovered evidence of adverse childhood experiences and attachment disorder, leading to binge drinking that culminated in brain damage. With this information, Mendoza argues his defense team could have — and should have — argued that (1) Mendoza's brain damage prevented him from forming the necessary *mens rea* of intent to kill; and (2) that on the night of the murder, his attachment disorder, amplified by the negative relationship with his former girlfriend, resulted in a catathymic homicide. A catathymic homicide, rather than intentional murder, is an unintentional "culmination" of the attachment disorder.

Under *Strickland*, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690–91. If counsel opts not to explore a particular line of defense, that decision must be assessed for reasonableness in light of all the circumstances, "applying a heavy measure of deference to counsel's judgments." *Id.* at 691. The Court of Criminal Appeals

concluded that the investigation conducted by Mendoza's defense team was constitutionally adequate. It found that the defense team had conducted a "comprehensive and thorough investigation into [Mendoza's] psycho-social history" and determined that counsel had acted reasonably in not further investigating, developing, and presenting the theories of attachment disorder, alcohol-related brain damage, and catathymic homicide advocated by Mendoza on habeas. The court based its conclusion in part on the fact that Mendoza failed to identify on habeas "any specific, credible fact or event . . . that [his defense team] failed to uncover."

The record supports that the Court of Criminal Appeals' decision was not an unreasonable application of *Strickland*. Further, the cases Mendoza cites are distinguishable. In one precedent, the state habeas mitigation investigation revealed a "tidal wave of information," including "a childhood marked by extreme neglect and privation [and] a family environment filled with violence and abuse." *Andrus v. Texas*, 140 S. Ct. 1875, 1879 (2020). Here, the traditional factors for mitigating evidence and ineffective counsel were arguably absent, and there is no evidence of a substantial quantity of missed information that would have swayed the jury's mind. *Id*. at 1880.

The Supreme Court has found investigations to be constitutionally inadequate when counsel did not begin their investigation until a week before trial, did not seek relevant records, and did not return a willing witness's phone call. *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000). Inadequacy also was shown when the

investigation was limited to reviewing the defendant's presentence investigation report and various social services records and counsel "acquired only rudimentary knowledge of [petitioner's] history." *Wiggins v. Smith*, 539 U.S. 510, 523–24 (2003). Another example was when counsel spent only one day or less investigating and spoke only with witnesses selected by the defendant's mother. *Sears v. Upton*, 561 U.S. 945, 952 (2010). Our final comparator is when counsel "did not obtain any of [the defendant's] school, medical, or military service records or interview any members of [his] family." *Porter v. McCollum*, 558 U.S. 30, 39 (2009).

In contrast, Mendoza's defense team obtained Mendoza's school and medical records, as well as his father's medical records. It spent a considerable number of hours over the course of a month interviewing Mendoza, his parents, his siblings, and individuals from his high school and church. From these records and interviews, Mendoza's defense team learned that his father had a history of depression; his cousin had attempted to sodomize Mendoza when he was a child; his uncle had suffered from bipolar disorder and had been killed by Mendoza's cousins after the uncle tried to kill them; Mendoza had spent time with those same cousins; and that Mendoza had issues with alcohol and drug use that his family members thought might have altered his mind. Given the extent of the investigation conducted by Mendoza's defense team, the Court of Criminal Appeals' conclusion that the investigation was not constitutionally deficient was reasonable.

Even if the investigation conducted by Mendoza's defense team was constitutionally inadequate, Mendoza must still establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id*. at 695. We examine prejudice, though we find the investigation to have been adequate.

Mendoza first argues that he was prejudiced by counsel's failure to conduct a thorough investigation because counsel was unable to formulate an integrated defense theory, and instead presented differing theories of defense during the voir dire, guilt/innocence, and sentencing phases of the trial. He asserts that had counsel presented a unified theory, the defense could have rebutted the prosecution's arguments that Mendoza chose to commit violence against women despite his positive upbringing and that his crime was the result of his evil choices.

The Government argues that the unified theory of defense proffered by Mendoza on habeas has its own problems. First, Mendoza's unified theory posits that Mendoza suffers from attachment disorder, which caused involuntary abuse of alcohol, which later caused brain damage. Then, on the night of the offense, his attachment disorder, amplified by his negative relationship with his former girlfriend, resulted in an unintentional catathymic homicide. This is a

complicated theory to use with a jury. Second, the jury may well have rejected that Mendoza's alcohol abuse was involuntary, especially because jurors had stated during *voir dire* that mitigation arguments premised on voluntary intoxication would not be persuasive. Third, the catathymic homicide theory is inconsistent with the literature observing that perpetrators of catathymic homicides generally have no prior history of violence. Additionally, this theory might have opened the door to otherwise inadmissible evidence regarding Mendoza's numerous violent acts. Finally, due to the complex and technical nature of Mendoza's proffered theory, the defense would have likely needed to provide additional experts even though the jury had given negative responses to defense experts on juror questionnaires. In light of these concerns, it is not reasonably probable that the outcome of the proceedings would have been different had defense counsel presented this unified defense theory.

Mendoza next argues that he was prejudiced by the inadequate investigation because counsel was unable to present condition-of-the-mind evidence to negate *mens rea* during the guilt/innocence phase of the trial. He asserts that had counsel conducted a thorough investigation, the defense would have been able to present evidence of Mendoza's attachment disorder and brain damage that would have negated the *mens rea* for knowing and intentional murder.

This argument suffers from many of the same defects as Mendoza's claim of prejudice from not having a unified defense theory: the complexity of the argument, the jury's negative response to intoxication as a mitigating factor, and the requirement of additional

experts. Especially problematic is Mendoza's inability to assert with any certainty that he actually had extensive brain damage that would have precluded him from formulating the requisite *mens rea*. The expert he relied on in state habeas proceedings affirmed that Mendoza's defense team "*could* have conclusively proved the existence of neuropsychological damage," and that neuropsychological tests "would have provided defense counsel with the means to demonstrate for Mr. Mendoza's jury how the quality of his brain and the specific damage sustained to it adversely affected his higher cognitive functioning and reasoning skills." (emphasis added). Because "impaired cognitive abilities due to alcohol abuse tend to recover with abstinence," however, the extent of Mendoza's brain damage at the time of the murder is largely speculative. Indeed, the Court of Criminal Appeals found that Mendoza had "not presented persuasive evidence that he has or has ever had a cognitive impairment."

Finally, Mendoza argues that the defense team's inadequate investigation prevented counsel from presenting evidence regarding his family's behavior of criminality and domestic violence and the toxic impact of his former girlfriend and her family. He contends that the failure to develop and present this evidence prejudiced him because the defense was unable to rebut the prosecution's story that Mendoza had come from a good environment but simply made evil choices. With respect to sentencing, the evidence that Mendoza was molded to model criminal behavior is double-edged: while it "might permit an inference that he is not as morally culpable for his behavior, it also might suggest [that the defendant], as a product

of his environment, is likely to continue to be dangerous in the future." *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002); *see also Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002). Additionally, the prosecution presented extensive evidence at sentencing that Mendoza had a history of violence, especially towards women. "[T]he evidence of [the defendant's] future dangerousness was overwhelming. When that is the case, it is virtually impossible to establish prejudice." *Ladd*, 311 F.3d at 360. There is not a reasonable probability that the jury would have concluded that the balance of aggravating and mitigating factors did not warrant death.

IV

Having dispensed with the four claims for which a COA was granted in 2013, we turn to the three claims for which a COA was granted in 2020.

The first of those claims is that the actions of Mendoza's trial counsel constituted ineffective assistance for the presentation of Dr. Mark Vigen's testimony during the punishment phase of the trial. The same standards for ineffective assistance of counsel discussed above apply, but this claim is procedurally defaulted because Mendoza did not raise it in his state habeas proceedings. Because of the default, we first address whether Mendoza's trial counsel was ineffective and then whether his procedural default of that claim was excused by the ineffectiveness of his state habeas counsel under *Martinez* and *Trevino*.

Mendoza argues that his trial counsel was ineffective by calling Dr. Vigen, an expert psychologist, to testify that (1) Mendoza had no moral compass or

sense of self, (2) there was an absence of traditional mitigation factors, and (3) Mendoza was dangerous. These claims present a close question but are ultimately unmeritorious, particularly when this testimony is read in its proper context and coupled with Dr. Vigen's experience in other capital cases and his purported ability to "create great rapport with juries."

Mendoza first objects to Dr. Vigen's testimony that Mendoza had no moral compass or sense of self. Dr. Vigen concluded that Mendoza "is an immature, psychologically under-developed adolescent-like man who has no internal sense of himself . . . no inner self, no clear inner identity." Mendoza argues that this testimony would have made more sense coming from the prosecution because "the death penalty calls for a 'moral assessment,' . . . and a person without a 'compass' or 'identity' arguably is a person whose life is not worth sparing." The testimony was not so unreasonable, as Dr. Vigen also testified that Mendoza was still an adolescent and that his brain would not be fully developed until his mid-twenties, helping to explain his psychological condition. Further, Dr. Vigen opined that Mendoza "has the potential to develop a sense of self and the potential for rehabilitation and some type of spiritual conversion." He described Mendoza's dawning recognition of his own "depression" and "emptiness," and his own potential to gain further self-awareness, better appreciate the "tremendous seriousness" of his actions, and cultivate remorse. Viewed as a whole, it was not deficient of trial counsel to believe this testimony would help Mendoza.

Mendoza next objects to Dr. Vigen's testimony that the traditional mitigation factors did not apply to

Mendoza. Dr. Vigen testified that "in most of the cases that I've seen there are incidents — there's the criminal history in the family or there's an alcohol and drug instance in the family or there's a mental health issue in the family," but that "[t]here's something missing in this case for me as a psychologist . . . those general factors . . . are just not present." However, in context, Dr. Vigen was trying to redirect focus to the factors that were present. The quote above continues: "and the family is really on one level trying to work very hard and do their very, very best. On the other level, there is some dysfunction in terms of attachment. [Mendoza] didn't attach to his dad. He worked with him all the time, but he could never talk to him. They could never connect." Dr. Vigen went on to explain that Mendoza's father "has a major affective disorder," which "may, in some way, predispose [Mendoza] to alcohol dependency." Additionally, earlier in this testimony, Dr. Vigen laid out the mitigation factors. On direct examination, he testified that Mendoza "[came] from a psychologically dysfunctional family" with a father "who was a fragile man, who really didn't have the power to be a dad" and a "mom [who] was sort of covering in some ways . . . continually rescu[ing]" Mendoza so that "he really didn't experience the consequences of some of his negative behavior."

Along these same lines, Mendoza argues that "far from attempting to lessen Mendoza's culpability, [Dr.] Vigen testified that Mendoza had made a *choice*: Mendoza 'could have chosen' to live a 'responsible' life, but '[s]ometimes' kids 'don't [listen].'" Dr. Vigen did testify that Mendoza's brother Mario would have been a

"good role model" but that "[t]he problem is [Mario] really feels that he left too early and that he wishes he had been more of a role model." When Dr. Vigen said that sometimes kids do not listen, he was talking about his second opinion, "that [Mendoza] comes from a psychologically dysfunctional family" and explaining that he was "not trying to be critical of the family. It's a good family. But no family is perfect, and families offer their children a smorgasbord of their good behaviors and their not-so-good behaviors. Parents don't control what children come and take from them . . . Sometimes the kids listen. Sometimes they don't. Sometimes they should listen. Sometimes they shouldn't."

Although certain aspects of the testimony were not ideal, which is hardly unusual or constitutionally deficient in general, we are not convinced the choice to present this testimony as a whole falls outside the "'wide range' of reasonable professional assistance." *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689).

The third portion of testimony Mendoza objects to is Dr. Vigen's testimony on future dangerousness. The first piece of future dangerousness testimony Mendoza objects to is when Dr. Vigen admitted on cross examination: State: "The Defendant has already proven to us, hasn't he, that in a free society he is a very dangerous individual, isn't he? [Dr. Vigen]: I think that's — the jury has decided that, and I certainly agree with that." But this was at the sentencing phase of trial; at this point, everyone knew the reality that Mendoza would spend the rest of his life in prison, never in free society. Dr. Vigen emphasized

several times that his assessment was accounting for the fact that the jury had already convicted Mendoza of capital murder. Mendoza argues that the "prosecution understood the import of this testimony and the gravity of the error, arguing in closing that Mendoza's 'very own witness, Dr. Vigen . . . told you that [he] is dangerous in society . . . . So you know the answer to [the future dangerousness] question.'" The context of the use of Dr. Vigen's testimony in closing shows that the prosecution was referring to all the other factors as well:

> But it's not just the prison system. Because that question asked you whether he is a danger to society, anyone inside or outside that he may encounter. The question is if he is given the opportunity, the opportunity to do violence, will he do it? And you know that he will.
>
> His very own witness, Dr. Vigen. Dr. Vigen told you that this Defendant is dangerous in society. And the Defendant's own words while he sat in our jail, he wrote that he will fight his conscience until he is forever unconscious. So you know the answer to that question.
>
> You know, the best predictor of future behavior is past behavior. And you know already about the escalation of violence in his life to this point that has already culminated in the ultimate sadistic act.

The prosecution then segued into the many other incidents in Mendoza's life that signified future violence.

Mendoza also objects to another aspect of this future dangerousness testimony: Dr. Vigen claimed that Mendoza's "bad behavior persists now even in the jail," and despite being imprisoned, Mendoza continues to "cause[] trouble." However, throughout his testimony, Dr. Vigen minimized the severity of Mendoza's actions in jail, describing them as a "nuisance," and his behavior evidencing immaturity, and stating, "You know, it's just adolescent behavior . . . [a]ttention-seeking behavior." Dr. Vigen also opined that the Texas Department of Criminal Justice could house Mendoza such that he would present a "low or minimum risk for future violence," and that a life sentence of imprisonment would encourage rehabilitation.

Mendoza argues that this theory that he could be rehabilitated in prison once he was separated from his "depraved friends" "invited the prosecution to present Mendoza's jail record, including [Officer] Hinton's (uninvestigated) account of Mendoza's alleged attack on Johnson." (citing *Arizona v. Fulminante*, 499 U.S. 279, 300 (1991); *Hooper v. Mullin*, 314 F.3d 1162, 1171 (10th Cir. 2002)). Other evidence, however, independently invited rebuttal testimony regarding Mendoza's behavior in prison. For instance, the priest's testimony regarding Mendoza's improved "demeanor and attitude" during their visits in prison permitted the rebuttal evidence, as did Mendoza's brother's testimony that, apart from "a couple of incidents where the guards antagonized him," Mendoza had been a "model citizen" in prison.

Further, the precedent Mendoza uses to support his objection to the future dangerousness testimony is unpersuasive. Mendoza analogizes to a Supreme

Court decision holding that counsel's presentation of expert testimony regarding future dangerousness was objectively unreasonable. *Buck*, 580 U.S. at 118-121. The testimony in that case, though, is quite distinguishable. In *Buck*, counsel "specifically elicited testimony about the connection between [the defendant's] race and the likelihood of future violence" and offered an expert report "reflect[ing] the view that [the defendant's] race disproportionately predisposed him to violent conduct." *Id*. at 119. The Court stated that, had the testimony been presented by the state, these racialized arguments would be "patently unconstitutional." *Id*. This far exceeds any deficiency shown in presenting the testimony here.

Additionally, as to all three categories of Dr. Vigen's testimony to which Mendoza objects, trial counsel's choice to present was supported by a strategic justification. When evaluating an ineffective assistance of counsel claim, "[t]his court will not question a counsel's reasonable strategic decisions." *Bower v. Quarterman*, 497 F.3d 459, 470 (5th Cir. 2007); *see also Strickland*, 466 U.S. at 691. "Moreover, we have consistently found counsel's decisions regarding examination and presentation of witnesses and testimony to fall within this category of trial strategy which enjoys a strong presumption of effectiveness." *Pape v. Thaler*, 645 F.3d 281, 291 (5th Cir. 2011). Mendoza's trial counsel explained in affidavits that the presentation was strategic: Dr. Vigen could "explain the bad with the good," and Dr. Vigen could support counsel's theory that, although Mendoza had fallen in with a bad crowd and engaged in "depraved behavior, . . . this could be controlled in prison and

eventually lead to some redemption." Trial counsel wanted to offer "an explanation for [Mendoza's] conduct, not an excuse," which reflected counsels' view that "it was better that [the jury] hear [any damaging information] explained by [the defense's] expert than by the state's witnesses."

The closest opinion on point Mendoza offers is *Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987). There, the defense presented an expert witness who "testified on cross-examination that Magill was not under the influence of an extreme emotional or mental disturbance at the time of the crime," instead of offering a second expert who "could have testified that Magill exhibited signs of serious emotional problems at the age of thirteen" and who "'definitely would have projected' the appellant could be involved in a crime of this magnitude" based on that finding. *Id.* at 889. Further, in that case, the Eleventh Circuit stated that it could not "accept the district court's view that [counsel] made an informed, strategic choice not to call" the second expert, because counsel at a hearing stated that he would have called the second expert if he had been available but could not recall any efforts to contact that expert and there was no evidence that expert was unavailable. *Id.* Here, as discussed above, trial counsel explained the strategic justification and there was no uncalled witness as in *Magill*.

This principle that ineffective counsel decisions that amount to deficiency are those made without strategic justification is supported by other circuit court opinions on which Mendoza relies. We held in one of the cited opinions that trial counsel's perfor-

mance was deficient when counsel questioned the defendant about his silence following arrest, allowing the state to probe this evidence on cross-examination. *White v. Thaler*, 610 F.3d 890, 902 (5th Cir. 2010). In *White*, though, an affidavit from defense counsel made clear that the questioning "was not part of a strategy." *Id.* at 900. Here, by contrast, Dr. Vigen's testimony served defense counsel's strategy to explain that a life prison sentence would control and shape Mendoza's behavior for the better. Further, unlike the defendant's post-arrest silence in *White*, Mendoza's prison conduct was not "otherwise inadmissible evidence," *White*, 610 F.3d at 899, because the State could have presented evidence of that conduct in its case in chief, *see Williams v. Lynaugh*, 814 F.2d 205, 207–08 (5th Cir. 1987), and other defense testimony independently invited the State's rebuttal. Likewise, Mendoza cites *Johnson v. Bagley*, 544 F.3d 592 (6th Cir. 2008) and *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009). Both of those cases turned on a failure to investigate or present mitigating or exculpatory evidence that existed, not counsel's decision to present a certain expert. *See Johnson*, 544 F.3d at 605; *Richards*, 566 F.3d at 566–67. Mendoza has not argued that there was a similar traumatic event in his lifetime that Dr. Vigen could have pointed to as a mitigating factor.

Mendoza also specifically objects to one portion of the strategy regarding the future dangerousness special issue, arguing that defense counsel's choice to focus on Mendoza's conduct inside prison rather than outside "was not only legally mistaken but also unreasonable on this record." It is plausible, though, that

counsel's strategy stemmed not from a misunderstanding of the legal standard, but rather from the reality of Mendoza's potential sentence. In closing, counsel told the jury, "when you answer the Special Issues, especially Special Issue Number 1 [the future dangerousness question], you have to remind yourself that you're dealing with that question in the context of prison, because [Mendoza has] already been convicted of capital murder and that's where he's going."

To show error in this context, Mendoza cites an opinion for the proposition that, even when a prisoner would never be eligible for parole, the question is still "whether there is a probability that the defendant would constitute a continuing threat to society whether in or out of prison." *Estrada v. State*, 313 S.W.3d 274, 284 (Tex. Crim. App. 2010) (quotation marks omitted). There was no need, the court stated, for the state to prove "beyond a reasonable doubt that the defendant would get out of prison through means of escape or otherwise." *Id.* Importantly, *Estrada* further held that the evidence of the defendant's brutality and lack of remorse supported the jury's future dangerousness finding:

> In this case, we decide that the evidence of appellant's unremorseful, premeditated, brutal murders of Sanchez and their unborn child by stabbing Sanchez thirteen times, of his pattern of using his position of trust as a youth pastor to take sexual advantage of underage girls in his youth group, of his threat to "ruin" another former member of the youth group when she threatened to expose appellant, and

> of the opportunities for a life-sentenced-without-parole appellant to commit violence in prison are sufficient to support the jury's affirmative answer to the future[]dangerousness special issue.

Id. at 284–85.

That is the same sort of testimony that was presented by the prosecution here, which is why Mendoza cannot show that any potential error in presenting Dr. Vigen's testimony prejudiced him.

In order to succeed on his *Strickland* claim, Mendoza would also need to show that any potential ineffective assistance prejudiced him. *See Strickland*, 466 U.S. at 677. Establishing prejudice requires showing "that there is a reasonable probability" (or, a "probability sufficient to undermine confidence in the outcome") "that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 668, 694. "The likelihood of a different result must be substantial, not just conceivable." *Trevino v. Davis*, 829 F.3d 328, 351 (5th Cir. 20016) (quoting *Brown v. Thaler*, 684 F.3d 482, 491 (5th Cir. 2012)).

"When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer — including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Because Mendoza's "death sentence required a unanimous

jury recommendation, TEX. CODE CRIM. PROC. ANN., art. 37.071, prejudice here requires only 'a reasonable probability that at least one juror would have struck a different balance' regarding [his] 'moral culpability.'" *See Andrus*, 140 S. Ct. at 1886 (quoting *Wiggins*, 539 U.S. at 537–38). "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id*. at 696.

Mendoza also argues that prejudice is shown because the prosecutor referred to Dr. Vigen's testimony in closing argument, and during deliberations, the jury asked about Mendoza's record while in jail. However, the jury heard an overwhelming amount of independent aggravating evidence, including that Mendoza: raped a fourteen-year-old girl twice, and during one of the rapes performed similar acts on her with a beer bottle and pen — which he videotaped and then showed to others while laughing; attempted to strangle a girl at a party and the "only thing that got him off of [her] was two people getting him off of [her]," put a pill into a girl's drink, and, when confronted by the host, "slammed [him] up against [his] friend's truck and stuck [a] knife to [his] stomach," committed multiple robberies, attacked his younger sister, and told two girls on the night of the murder that he would cut their throats with a rusty saw. The prosecution also covered these events in closing.

This substantial aggravating evidence is in addition to the facts of this murder, which Texas law recognizes "alone may be sufficient to sustain the jury's finding of future dangerousness." *Martinez v. State*, 327 S.W.3d 727, 730 (Tex. Crim. App. 2010). The jury also heard evidence from other witnesses about the lack of mitigating circumstances, such as that Mendoza graduated high school and grew up in a supportive religious home with both parents and brothers as his role models. "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." *Strickland*, 466 U.S. at 700.

Because Mendoza's trial counsel was not ineffective, this court need not and does not consider whether the claims can survive procedural default. *See Nelson v. Davis*, 952 F.3d 651, 673 (5th Cir. 2020). "As with any other IATC claim, the underlying IATC-Participation claim (which, *if viable*, may allow a claim that state habeas counsel potential ineffectiveness prejudiced Nelson, thereby excusing procedural default) requires a showing of two elements." *Id.* (emphasis added).

V

The final issue is whether to remand to the district court to stay, or consider staying, federal habeas proceedings under *Rhines*, 544 U.S. at 275.

Mendoza argues that he "has never had a full and fair opportunity to litigate the merits of his claim that

trial counsel were ineffective for not investigating [Officer] Hinton's allegedly false testimony." Because this claim was never presented in state court, Mendoza cannot rely on the Johnson affidavit to support his claim in federal court under the Supreme Court's precedent in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). He asks this court in a motion to remand for entry, or at least consideration, of a *Rhines* stay so that he can litigate this claim in state court.

District courts may stay federal habeas proceedings to allow a petitioner to exhaust a claim in state court to ensure that petitioners with mixed claims do not "forever los[e] [the] opportunity for any federal review of their unexhausted claims." *Rhines*, 544 U.S. at 275. A stay is available where a petitioner can show: (1) good cause for the failure to exhaust, (2) that the request is not plainly meritless, and (3) that the request is not for purposes of delay. *Id*. at 277–78.

The Government primarily argues that, because Mendoza's claim is procedurally barred from being presented in Texas state court, his claim is "plainly meritless" under *Rhines*. *Neville v. Dretke*, 423 F.3d 474, 480 (5th Cir. 2005). Under Texas law, second-or-successive habeas applications must be denied unless a habeas petitioner can show that (1) "the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;" and, (2) "but for" the constitutional violation, either "no rational juror could have found the applicant guilty beyond a reasonable doubt" or "no rational juror would have answered in the state's favor one or more of the special issues" necessary for the sentence of death. TEX. CODE CRIM. PROC. art. 11.071, § 5(a).

Mendoza argues that his application would not be denied because Texas courts have previously allowed successive applications where a petitioner claims the State relied on false testimony or withheld evidence. Further, he contends that federalism dictates that Texas should be afforded the opportunity to "decide whether [*Ramirez*] impacts its application of the abuse-of-the-writ doctrine" because petitioners are now barred from receiving federal review of their claims if the evidence is not already in the state court record. The Government counters that the district court has already found that Mendoza failed to prove Officer Hinton's testimony was false, so he has not lost an opportunity to litigate that claim anyway.

Mendoza's request for a *Rhines* stay is meritless in this context. Texas law forecloses the argument that state habeas counsel's ineffectiveness renders the factual basis unavailable at the time of the initial writ. *See Ex parte Graves*, 70 S.W.3d 103, 117 (Tex. Crim. App. 2002). Mendoza concedes this point, but argues that *Graves* should be "reconsider[ed]" in light of *Ramirez* and its subsequent-writ-bar under principles of comity. The opportunity to reconsider state court precedent, however, is not in itself enough to grant a *Rhines* stay. Moreover, the district court already analyzed the affidavit evidence and held that there was no "reasonable likelihood that Officer Hinton's testimony could have affected the judgment of the jury."

VI

As to the four claims for which the district court granted a COA, Mendoza has not shown that trial counsel's actions in investigating, compiling, and presenting *mens rea* and mitigating evidence fell below

an objective standard of reasonableness. As to the remaining claims for which we granted a COA, Mendoza has not shown that trial counsel was ineffective for presenting Dr. Vigen's testimony and Mendoza's request for a *Rhines* stay is plainly meritless in this context.

We AFFIRM the district court's judgment and DENY Mendoza's motion for a *Rhines* stay.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TEXARKANA DIVISION

MOISES SANDOVAL MENDOZA, **Petitioner,** **v.** **DIRECTOR, TDCJ-CID,** **Respondent.**	**CIVIL ACTION NO. 5:09-cv-00086-RWS**

ORDER

Petitioner Moises Sandoval Mendoza ("Mendoza"), a death row inmate confined in the Texas prison system, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges his capital murder conviction and death sentence imposed by the 401st Judicial District Court of Collin County, Texas, in *The State of Texas vs. Moises Mendoza*, No. 401-80728-04. For reasons set forth below, the petition should be **DENIED**.

I. PROCEDURAL HISTORY

Mendoza was convicted and sentenced to death for the capital murder of Rachel Tolleson, who was killed during the course of an attempted burglary, kidnapping and aggravated sexual assault. RR 21:195.1 Based on the jury's answers to the special issues set forth in Texas Code of Criminal Procedure

Article 37.071, the trial court sentenced Mendoza to death on June 29, 2005. RR 25:58[1]. The Texas Court of Criminal Appeals affirmed the conviction. *Mendoza v. State*, No. AP-75213, 2008 WL 4803471 (Tex. Crim. App. Nov. 5, 2008). The Supreme Court denied his subsequent petition for a writ of certiorari. *Mendoza v. Texas*, 556 U.S. 1272 (2009).

Following direct appeal, the state court appointed Lydia Brandt to represent Mendoza in the state habeas corpus proceedings. CR 5:1876.[2] Brandt filed a habeas petition raising seven claims, including five ineffective assistance of counsel claims. 1 SCHR 4.[3] The Texas Court of Criminal Appeals denied the application based on the trial court's findings and conclusions and its own review. *Ex parte Mendoza*, No. WR-70211-01, 2009 WL 1617814 (Tex Crim. App. June 10, 2009).

This Court subsequently appointed Brandt to represent Mendoza in the present habeas corpus proceedings. Docket No. 3. With Brandt as counsel, Mendoza filed an amended petition for a writ of habeas corpus on January 5, 2011. Docket No. 23.

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[1] "RR" is the abbreviation for the Reporter's Record, pursuant to TEX. R. APP. PROC. 34.1, which is the trial transcript testimony recorded by the court reporter. The abbreviation is followed by the volume number before the colon, and the page numbers after the colon.

[2] "CR" is the abbreviation for the Clerk's Record, as required by the TEX. R. APP. PROC. 34.1. It is followed by the volume number before the colon, and the page numbers after the colon.

[3] "SCHR" refers to the state habeas clerk's record, preceded by the volume number and followed by the page number.

Mendoza raised the same seven claims he presented in the state habeas corpus proceedings. *Id*. This Court denied the petition but granted a certificate of appealability on four of the claims. Docket No. 71.

Mendoza timely appealed to the United States Court of Appeals for the Fifth Circuit, which stayed the proceedings and remanded the case in part to appoint supplemental counsel and to consider, in the first instance, whether Mendoza can establish cause for the procedural default of any ineffective assistance of trial counsel claims pursuant to the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), and if so, whether those claims merit relief. *Mendoza v. Stephens*, 783 F.3d 203, 203–04 (5th Cir. 2015); *see also Christenson v. Roper*, 574 U.S. 373 (2015).

The Court appointed Jeff Haas as supplemental counsel on May 7, 2015. Docket No. 76. Pursuant to the Court's order, Mendoza filed an amended petition for a writ of habeas corpus on November 4, 2016. Docket No. 86. The State filed an answer on April 3, 2017 (Docket No. 89) and Mendoza filed a response on July 13, 2017 (Docket No. 94).

II. FACTUAL BACKGROUND OF THE CASE

The Texas Court of Criminal Appeals discussed the factual background of the case as follows:

> Sometime after 9:00 p.m. on Wednesday, March 17, 2004, Rachelle Tolleson and her mother Pam O'Neil went to the store to purchase formula and diapers for Tolleson's five-month-old daughter, Avery. Tolleson and

Avery visited at the O'Neil home for a short time after returning from the store, but Tolleson did not feel well, had taken medication for a sinus headache, and wanted to be in her own home. Around 10:00 p.m., Tolleson phoned the O'Neils to let them know that she and Avery had arrived home.

Around the same time that evening, Efren Gamez, [Mendoza], and several friends were having a party. Gamez, [Mendoza], and two young women had purchased two thirty-packs of beer and two forty-ounce cans of beer earlier in the evening. At some point, the women left the party and later called to let Gamez and [Mendoza] know that they were not returning. [Mendoza] became angry, and as he drank more beer, he became more belligerent. Eventually, [Mendoza] said something to two other girls at the party that scared them. [Mendoza] told Gamez that he spoke to the girls in that manner "because he could." [Mendoza] left the party and returned several times, finally leaving for the last time between midnight and 1:00 a.m.

The following morning, O'Neil went to Tolleson's home as she often did. Although her car was parked in the driveway, Tolleson was not there. A note from the landlord was taped to the screen door, but the wooden back door stood wide open. O'Neil entered the house and noticed that a pillow had been left on the floor between the kitchen and the bedroom. The bedroom was a mess. Papers were

strewn across the floor, the night stand was pulled away from the wall, the mattress and box spring were askew, and the headboard was broken and lying against the bed. Avery was on the bed, cold, wet, and alone in the house.

Alarmed, O'Neil collected Avery and called her husband, who contacted the police. Officer Scott Collins of the Farmersville Police Department responded. Collins confirmed O'Neil's description of the bedroom—things were thrown everywhere and furniture was out of place. To Collins, it looked as though there had been a fight, or a tornado, in the bedroom. The rest of the house was orderly, and there were no signs of a forced entry.

Farmersville police began interviewing potential witnesses that day. They learned that, on the Friday before her disappearance, Tolleson hosted a party for about fifteen people, including [Mendoza]. During the party, Tolleson spoke with [Mendoza] a few times but told her best friend Megan Kennedy that she wasn't interested in [Mendoza] in "that way."

Police also learned that, on the Saturday before Tolleson's disappearance, Kennedy's boyfriend Tim Holland returned to Tolleson's home with [Mendoza] and Cody Wiltbanks to retrieve his musical instruments, but Tolleson wasn't home, and the doors were locked. While Holland and Wiltbanks went around the house looking for a way in, [Mendoza] managed to open the locked back door.

After learning this, Collins interviewed [Mendoza], who told Collins that he had last seen Tolleson at the party. Collins noted that [Mendoza] could not sit still and seemed very nervous.

Search parties were organized to look for Tolleson but were unsuccessful. Six days after Tolleson disappeared, James Powell was hunting for arrowheads near Brushy Creek, east of Farmersville. Walking along the creek, he came across a body that had been burned and was lying face down. Through the use of dental records, the body was eventually identified as Tolleson's.

Jerry Farmer, an FBI evidence technician who was one of the first on the scene, noted that tall vegetation had been piled on top of Tolleson's body in an attempt to cover it. Her body was badly burned and had begun to decompose. Fly eggs and maggot activity around her head and neck indicated that she had been there for at least two days. Her skin was charred black in places and seared yellow in others where her flesh had split apart. Most of her hair had been burned away. Scraps of burned clothing clung to her upper torso, but no clothing was found below her waist.

An orange rope was tied around Tolleson's right ankle, and two grommets from a tarp were lying on the back of her left leg and head. Burnt pieces of tarp and skin were found on a path leading to Tolleson's body, indicating that she had been dragged or carried to that

spot. A short distance from where the body was discovered, steps led to a dugout under a tall tree where investigators found evidence that something had been burned. Evidence technicians found ashes, firewood, a clump of hair, pieces of tarp and skin, and orange rope like that found tied around Tolleson's ankle.

Dr. William Rohr, the medical examiner, testified that Tolleson had sustained a five-inch diameter bruise on her left knee, a smaller bruise on the front of her left thigh, bruises on either side of her tongue, a large amount of hemorrhage deep in her left shoulder, and several bruises on her scalp ranging in diameter from three quarters of an inch to three inches. A deep wound, consistent with injury from a knife, penetrated her neck all the way to her spinal column, and her body had been burned post-mortem. Rohr determined that Tolleson's death was consistent with strangulation or another form of asphyxiation.

After further interviews with potential witnesses, police obtained an arrest warrant for [Mendoza]. Once in custody, [Mendoza] told police that, late Wednesday evening, he had driven by Tolleson's house and had seen a light on. He backed his truck into the driveway and let himself into the house through the back door without knocking. According to [Mendoza], Tolleson left with him to get a pack of cigarettes. [Mendoza] drove "for a little" and then "for no reason" started to choke Tolleson. Tolleson passed out, and [Mendoza]

> drove to a field behind his home, where he had sexual intercourse with Tolleson and "choked her again." [Mendoza] then dragged Tolleson out of the truck and into the field, where he choked her until he thought she was dead. To "make sure," he "poked her throat" with a knife. [Mendoza] left Tolleson's body in the field until Monday, after he was first interviewed by police. Scared that Tolleson's body would be found and tied to him, [Mendoza] moved the body to a remote area and burned it, ultimately dragging it to where it was found.

Mendoza, 2008 WL 4803471, at *1–2.

III. SUPPLEMENTAL GROUNDS FOR RELIEF

Mendoza brings the following supplemental grounds for relief:

1. Mendoza alleges, pursuant to *Martinez*, that trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution by presenting the testimony of Dr. Mark Vigen during the punishment phase of the trial.

2. Mendoza alleges that initial post-conviction counsel, pursuant to *Martinez*, rendered ineffective assistance of counsel for failing to raise the issue of trial counsel's ineffectiveness by presenting the testimony of Dr. Mark Vigen.

3. Mendoza claims that the State of Texas used potentially false testimony at the punishment stage of the trial in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and trial counsel was ineffective in violation of the Sixth Amendment of the United States Constitution for failing to discover the State's use of false evidence.

4. Mendoza alleges, pursuant to *Martinez*, that trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution by failing to interview Melvin Johnson and presenting his testimony during the trial.

5. Mendoza alleges, pursuant to *Martinez*, that post-conviction counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution by failing to interview Melvin Johnson and by consequently failing to raise the ineffective assistance of trial counsel on collateral review by trial counsel's failure to interview, investigate and present Melvin Johnson's testimony at trial or discover the use of the State's false evidence.

IV. STANDARD OF REVIEW

Because Mendoza's application for habeas corpus was filed after 1996, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") applies to his claims. *Lindh v. Murphy*, 521 U.S. 321, 326–29 (1997). Under the AEDPA, a state prisoner seeking

to raise claims in a federal petition for habeas corpus ordinarily must fairly present those claims to the state court and thereby exhaust his state remedies. *Ricard v. Connor*, 404 U.S. 270, 275 (1971); *Martinez v. Johnson*, 255 F.3d 229, 238 (5th Cir. 2001).

For properly exhausted claims where the state court denies the claims on the merits, a federal court may only grant relief if a state court's adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, *see* 28 U.S.C. § 2254(d)(1), or the state court's adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, *see id*. § 2254(d)(2).

Generally, federal courts do not review unexhausted claims unless "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." *Id*. § 2254(b)(1). Similarly, federal courts do not review claims that a state court refused to review based on an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 729 (1991). "If a petitioner fails to exhaust state remedies, but the court to which he would be required to return to meet the exhaustion requirement would now find the claim procedurally barred, then there has been a procedural default for purposes of federal habeas corpus relief." *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001).

As a rule, Texas state courts dismiss as abuse of the writ " 'an applicant for a subsequent writ of habeas corpus rais[ing] issues that existed at the time of his first writ.' " *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) (quoting *Ex Parte Barber*, 879 S.W.2d 889, 892 n.1 (Tex. Crim. App. 1994)). Federal courts in Texas therefore consider unexhausted claims in a federal habeas petition to be procedurally barred, because Texas abuse of the writ rules preclude exhausting those claims in a subsequent state habeas petition. *See Finley*, 243 F.3d at 220; *Fearance*, 56 F.3d at 642. Texas's abuse of writ principles have regularly been upheld as a valid state procedural bar foreclosing federal habeas review. *Fearance*, 56 F.3d at 642; *see Moore v. Quarterman*, 534 F.3d 454, 463 (5th Cir. 2008); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008); *Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006).

Mendoza brings claims in this petition that were not raised in the state court proceedings below. Until just recently, the supplemental claims would have undoubtedly been dismissed as procedurally barred by Texas's abuse of the writ principles. However, the Supreme Court has provided a narrow exception to the procedural default rule, allowing federal review of procedurally barred ineffective assistance of trial counsel claims under certain conditions.

In *Coleman*, the Court provided a narrow exception for federal courts to review procedurally defaulted claims:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

501 U.S. at 750. Coleman instructs, then, that federal courts may excuse procedural default and review procedurally barred claims upon a showing of cause and prejudice. *Id*. The Court in *Martinez* then held that petitioners may establish such cause for a procedurally defaulted ineffective assistance of trial counsel claim by establishing ineffective assistance of counsel at an initial-review collateral proceeding. 566 U.S. at 17. Accordingly, the Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id.

The Supreme Court extended *Martinez* to Texas in *Trevino v. Thaler*. 569 U.S. at 427–428. Although

Texas does not preclude petitioners from raising ineffective assistance of trial counsel claims on direct appeal, the Court held that the rule in *Martinez* applies because "the Texas procedural system—as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Id*. at 428.

The Fifth Circuit has summarized *Martinez* and *Trevino* as follows:

> To succeed in establishing cause to excuse the procedural default of his ineffective assistance of trial counsel claims, [petitioner] must show that (1) his underlying claims of ineffective assistance of trial counsel are "substantial," meaning that he must demonstrate that the claims have some merit, . . . and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application.

Chanthakoummane v. Stephens, 816 F.3d 62, 72 (5th Cir. 2016). "The petitioner's failure to establish the deficiency of either attorney precludes a finding of cause and prejudice." *Id*. (quoting *Sells v. Stephens*, 536 F. App'x 483, 492 (5th Cir. 2013)).

The Supreme Court set the standard for assessing claims for ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* applies in assessing the performance of both trial counsel and state habeas counsel. *See Martinez*, 566 U.S. at 14.

Strickland provides a two-pronged standard, and the petitioner bears the burden of establishing both prongs. 466 U.S. at 687. Under the first prong, he must show that counsel's performance was deficient. *Id*. To establish deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Id*. at 688. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . ." *Id*. at 689 (citations omitted). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. (internal quotation and citation omitted).

Under the second prong, the petitioner must show that his attorney's deficient performance resulted in prejudice. *Id*. at 687. To satisfy the prejudice prong, the habeas petitioner "must show that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. at 694. An ineffective assistance of counsel claim fails if a petitioner cannot demonstrate either deficient performance or prejudice; a court need not evaluate both if petitioner makes an insufficient showing as to either. *Id*. at 697.

V. DISCUSSION AND ANALYSIS

1. **Mendoza alleges, pursuant to *Martinez*, that trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution by presenting the testimony of Dr. Mark Vigen during the punishment phase of the trial.**

2. **Mendoza alleges that initial post-conviction counsel, pursuant to *Martinez*, rendered ineffective assistance of counsel for failing to raise the issue of trial counsel's ineffectiveness by presenting the testimony of Dr. Mark Vigen.**

The first two supplemental grounds for relief are related. Mendoza initially argues that trial counsel was ineffective for presenting the testimony of Dr. Mark Vigen. He further argues that state habeas counsel was ineffective for failing to raise this issue on collateral review. Although Petitioner presents these as separate claims for relief, they are best understood as a single claim for ineffective assistance

of trial counsel for presenting the testimony of Dr. Vigen. Nevertheless, Mendoza must still prove the ineffectiveness of both trial counsel and state habeas counsel to overcome his procedural default.

Dr. Vigen testified as a mitigation specialist and risk assessment expert. RR 24:40. The state court held a hearing before he was permitted to testify before the jury. *Id*. Dr. Vigen testified that he conducted an investigation that included interviews with Mendoza, and he prepared a report from his interviews, which was turned over to the state. *Id*. at 40, 50–58. The trial court overruled the State's objections to Dr. Vigen and permitted him to testify before the jury. *Id*. at 87.

According to his testimony, Dr. Vigen spent 13 hours interviewing Mendoza, after which he developed several opinions about Mendoza's personality, life decisions before the crime, future dangerousness and potential for rehabilitation. *Id*. at 117–30. His first opinion was that Mendoza was "an immature, psychologically under-developed adolescent-like man who has no internal sense of himself. He has no inner—inner self, no clear inner identity that I can detect." *Id*. at 117. Dr. Vigen's second opinion was that Mendoza came from a psychologically dysfunctional family. *Id*. at 121. His third opinion was that Mendoza's behavior "changed radically for the worse when he began smoking marijuana and drinking." *Id*. at 123. Dr. Vigen's fourth opinion was that Mendoza's "new friends . . . lived a—sort of depraved and disrespectful, aggressive and drug and alcohol lifestyle in which—what I call empty sexuality was involved." *Id*. at 126. His fifth opinion was

"that the Texas Department of Criminal Justice has the expertise, has the capability to house and incarcerate [Mendoza] in such a manner that he will be a low or minimum risk for future violence in prison." *Id*. at 127. Finally, he thought that Mendoza had the "potential to develop a sense of self and a potential for rehabilitation and some type of spiritual conversion" in prison. *Id*. at 129–30.

Mendoza argues that trial counsel's decision to present Dr. Vigen's testimony opened the door to otherwise impermissible cross examination by the State. Docket No. 86 at 19–20. Mendoza asserts that Dr. Vigen's testimony on cross allowed the State to present harmful evidence, including that Mendoza "has no sense of self, has superficial remorse, is impulsive with a violent temper that can't be controlled, is violent toward his family and others, is a clever thief and liar, . . . takes pride in out-smarting guards," has a "bizarre fantasy" and is an "extremely dangerous person." *Id*. at 19.

In addition, Mendoza contends that proffering Dr. Vigen's testimony allowed the State to obtain a copy of notes taken during his interviews with Mendoza. *Id*. These notes contained evidence of Mendoza's delinquency, violence towards his mother and sister and fantasies of confining people in small rooms. *Id*. Mendoza argues that such information was unknown to the State and would not have been available to the State absent Dr. Vigen's testimony. *Id*.

Mendoza also argues that the possible benefit of Dr. Vigen's testimony, that he could grow spiritually and would not be a future danger, was gutted

during the State's cross examination. *Id*. Mendoza adds that Dr. Vigen's credibility was immediately erased when the State questioned him regarding the fact that he had never testified on behalf of the State in a death penalty case, including in various instances of particularly heinous murders. *Id*. at 20. Mendoza also highlighted Dr. Vigen's testimony on cross that he believed that Mendoza was a very dangerous person, that he had no personal knowledge of the Texas prison system and that his opinion that Mendoza would not be a " 'future danger' was based only on pure speculation with no basis or fact." *Id*.

Mendoza concludes that trial counsel had no "reasonab[ly] strategic basis" for calling Dr. Vigen and failed to conduct "sufficient investigation or consideration" of the decision to proffer his testimony. *Id*. at 25. Mendoza further noted that the prosecutor relied heavily on Dr. Vigen's testimony in closing on the "future dangerousness" special issue, supporting a finding of prejudice. *Id*. at 27. With regard to habeas counsel, Mendoza argues that counsel was ineffective for failing to raise the above argument. *Id*. at 32. Mendoza recognized that habeas counsel "raise[d] the issue of the preparedness of Dr. Vigen to testify" but argued she did not raise the issue of "whether [t]rial [c]ounsel was [i]neffective by proffering the testimony of Dr. Vigen at all." *Id*.

Mendoza's claim lacks merit because he fails to demonstrate that habeas counsel was ineffective. Habeas counsel raised significant concerns regarding trial counsel's selection, preparation and use of

Dr. Vigen during the punishment phase of trial.[4] 1 SCHR 41; *see also* Docket No. 86 at 32 (recognizing that state habeas counsel raised the issue of Dr. Vigen's preparedness of testify). The fact that habeas counsel did not specifically word a ground for relief as "ineffective assistance of trial counsel for presenting the testimony of Dr. Vigen" does not render her counsel ineffective.

State habeas counsel raised four claims asserting ineffective assistance of counsel relating to trial counsel's failure to investigate, develop and present a mitigation defense. Habeas counsel presented Dr. Vigen's problematic testimony as a symptom of this broader failure to prepare and present an adequate mitigation defense. 1 SCHR 31–59, 87–160, 182–196; *see id*. at 47 (asserting that trial counsel "failed in its duty to construct a persuasive narrative in support of the case for life. Instead they called Dr. Vigen to testify to a catalog of seemingly unrelated mitigating factors."). Habeas counsel asserted that the "inadequate mitigation investigation had adverse consequences," including that "expert roles were ambiguous;" Dr. Vigen was "not prepared leaving [Mendoza's] acts unexplained and allowing the

[4] Mendoza does not argue that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceedings under 28 U.S.C. § 2254(d). Accordingly, the Court reviews the state court record only for determining whether habeas counsel was constitutionally ineffective.

prosecution to discredit the defense;" and Dr. Vigen's testimony "aided the prosecution," *id*. at 106–07, 109, 114–15. Habeas counsel also asserted that trial counsel failed to conduct a "very thorough investigation of [Dr. Vigen] to prepare for his possible vulnerabilities on the stand." *Id*. at 109, 114.

As Mendoza argues here, habeas counsel stated several times that "much of Dr. Vigen's testimony was more harmful than helpful." *Id*. at 109, 11415 (citing an affidavit from Toni Knox, a mitigation specialist and arguing that "Dr. Vigen aided the prosecution's case" and his "conclusory opinions . . . shifted the blame to [Mendoza]"). Habeas quoted particularly harmful statements from Dr. Vigen's testimony, many of which are the same statements that Mendoza complains of in this petition. *See id*. at 56, 117 (quoting an affidavit from Dr. Kessner, a psychologist, who cited Dr. Vigen's testimony and stated that "Dr. Vigen did not provide the jury with the context of the 'depraved sexuality' that characterized the relationship of [Mendoza] and his peer group."); *id*. at 98 (noting that Dr. Vigen was "vague in his description of the Mendoza family as being dysfunctional"); *id*. at 114 (quoting Dr. Vigen's testimony that Mendoza expressed some "initial and somewhat . . . superficial . . . some beginning remorse . . . ."); *id*. at 146 (quoting Dr. Kessner, who discussed Dr. Vigen's testimony that Mendoza was "hyperactive" and "impulsive" as a child as and concluded that Dr. Vigen failed to explain Mendoza's attachment disorder).

One of the "various problems with [Dr. Vigen's] testimony" habeas counsel raised was that "all notes

and reports from Dr. Vigen's interviews were available to the [S]tate." *Id*. at 97–98. Habeas counsel asserted that, as a consequence of trial counsel's inadequate investigation, "Dr. Vigen assumed multiple roles . . . . By utilizing [Dr. Vigen] in this manner, the defense opened up all information obtained from the interviewed family and witnesses to the prosecutor." *Id*. at 125.

State habeas counsel also argued, as Mendoza argues in this petition, that the State easily discredited Dr. Vigen, erasing any benefit to his testimony. Because trial counsel failed to adequately prepare Dr. Vigen, the prosecution "discredited the defense, and made them appear 'not equally matched' to the prosecution, 'not very skilled,' and 'not believable.' " *Id*. at 110. "Dr. Vigen was totally unprepared by experience, training or education, to respond in any meaningful way to prosecutor's comments about future dangerousness" or "to testify persuasively in any of the areas about which he opined." *Id*. at 42, 188; *see id*. at 187 (noting that Dr. Vigen's testimony that Mendoza was a low or minimum risk was "riddled with disclaimers"). Again, habeas counsel specifically cited to portions of Dr. Vigen's testimony, including his testimony that he had not worked for the Texas Department of Corrections and that he hadn't done any studies of future dangerousness. *Id*. at 187–89.

State habeas counsel went so far as to suggest that, had trial counsel conducted a proper mitigation investigation, Dr. Vigen would not have been called to testify in the manner he did, or even at all.

Id. at 97 ("Defense counsel's performance was deficient because [of]: . . . problems with the choice and strategy of selecting expert(s)[, including] . . . [p]roblems with Dr. Vigen as a " 'future dangerousness' expert witness."); *see id*. at 108 (quoting mitigation specialist Toni Knox, who opined that it was "unclear" why Dr. Vigen was retained). Counsel particularly emphasized that "[i]f the mitigation specialist had compiled a complete social history and identified mitigation themes, ***Dr. Vigen would not have been hired 'to furnish opinions' with no direction***." *Id*. at 108 (emphasis in original). Habeas counsel argued that Dr. Vigen was unqualified to testify in the manner that trial counsel presented him, and that there were other "more qualified experts" to testify as to future dangerousness. *Id*. at 97, 123; *see id*. at 182 ("Dr. Cunningham was better qualified than Dr. Vigen to testify as to risk assessment, and to Texas prison life."); *id*. at 186 ("Dr. Vigen was not qualified to provide a risk assessment opinion about Mr. Mendoza.").

State habeas counsel also argued that the failure to present an adequate mitigation defense, of which Dr. Vigen's testimony was but a part, was presumptively prejudicial. *Id*. at 62, 130. In support, counsel provided two juror attestations specifically referencing Dr. Vigen's testimony as playing a significant role in their decision. *Id*. at 58 ("Juror John Comer attests: . . . "***[T]he defense called a psychiatrist who*** did not really help their case, and in fact only ***helped the DA because he could not explain why the defendant did what he did, in terms of mental factors***.") (emphasis in original);

see id. at 59 ("Juror Marsha Schmoll attests: . . . ***The defense expert said that the defendant was a 'victim of circumstance' but I was not convinced***.") (emphasis in original); *id*. at 58 (asserting that that Dr. Vigen's testimony caused prejudice because his failure to explain Mendoza's actions left the jury's only choice as "a vote for death.").

The record amply reflects that habeas counsel thoroughly raised issues relating to trial counsel's selection, preparation and presentation of Dr. Vigen, including the concerns Mendoza raises in this petition.

The state trial court's findings further inform this decision. After reviewing the pleadings and evidence accumulated in this case, the state trial court issued findings of fact related to Mendoza's arguments here. These findings of fact include: (1) Dr. Vigen's role in the investigation did not make notes available to the State that the defense team otherwise could have withheld; (2) counsel believed that if Dr. Vigen could acknowledge both the good and bad facts he would seem more credible in the jury's eyes; (3) counsel decision to have Dr. Vigen testify about all facts, including those that were unhelpful to the defense, was a reasonable decision and a strategy the trial court had seen other capable criminal defense attorneys adopt; (4) there is no evidence that a better investigation into Dr. Vigen's vulnerabilities would have resulted in a different outcome for the defense; (5) counsel positioned Dr. Vigen as a voice of the experts to avoid putting on a "parade of experts" and to benefit from Dr. Vigen's "great report with juries;" and (5) at trial, the court

concluded that Dr. Vigen was qualified to give an opinion on future dangerousness. 4 SCHR 1800, 1803, 1811–12.

The state trial court went on to issue the following conclusions of law regarding trial counsel's decision to present Dr. Vigen's testimony:

- [Mendoza] has not met his burden of establishing that counsel was deficient as evidenced by testimony of Dr. Vigen. [Mendoza] complains with the advantage of hindsight that Dr. Vigen's testimony "aided the prosecution." . . . . But Dr. Vigen's willingess to acknowledge that [Mendoza's] remorse was "somewhat . . . superficial" and that mitigating circumstances present in other capital murder cases are not present in [Mendoza's] history could very well have made him seem more objective and thus more credible in the eyes of the jury. Moreover, [Mendoza] has not articulated exactly what counsel should have done differently to prepare Dr. Vigen so that he would not have testified as he did. Nor has [Mendoza] demonstrated that the results of the proceedings would have been any different without Dr. Vigen's concessions.
- An expert relying on the opinions of other experts, Dr. Vigen was qualified based on his consultation with S. O. Woods to testify that TDCJ had the capacity to prevent [Mendoza] from being a future danger.

- [Mendoza] has not established that counsel was deficient for calling Dr. Vigen to give an opinion on [Mendoza's] future dangerousness.
- [Mendoza] has also not rebutted the presumption that counsel's decision to call Dr. Vigen to testify on future dangerousness was within the wide range of professional reasonable assistance.
- An expert may rely on the opinions of other experts if such information is reasonably relied upon by those in the field. *See* TEX. R. EVID. 703. Dr. Vigen was qualified, based on his own experience and training and his consultations with S. O. Woods and Dr. Cunningham, to testify that TDCJ had the capacity to prevent [Mendoza] from being a future danger.

4 SCHR 1836, 1848.

The state court specifically found that petitioner "ha[d] not demonstrated that trial counsel was deficient for 'calling Dr Vigen to given opinion on Mendoza's future dangerousness' " or that "counsel was deficient as evidenced by the harmful testimony of Dr. Vigen." 4 SCHR 1836–48. The record makes clear that, although not employing the same wording that Mendoza uses in this federal petition, habeas counsel raised substantial arguments relating to trial counsel's selection, preparation and use of Dr. Vigen. Habeas counsel was therefore not ineffective for failing to specifically argue that trial counsel was ineffective for calling Dr. Vigen.

Mendoza's failure to establish that state habeas counsel was ineffective is sufficient, on its own, to warrant denial of his first two grounds for relief. *See Chanthakoummane*, 816 F.3d at 62. However, petitioner also failed to demonstrate that the underlying ineffective assistance of trial counsel claim has merit.

A review of counsel's affidavit reveals that trial counsel gave a great deal of thought in developing a strategy focusing on the testimony of Dr. Vigen. Trial counsel explained his strategy as follows:

> Dr. Vigen was brought onto the defense team because of his past work in prisons and because we decided he would come across well as a "testifying witness" in the case. The defense team was familiar with his abilities and performance on other Capital cases. Dr. Cunningham and Mr. Woods were brought on the team so that we could funnel all their expertise through Dr. Vigen. This strategy was discussed and explained to Moises Mendoza. The Defense team decided early on that we would employ Dr. Vigen as the voice of these experts since he had/could create a great rapport with juries. The defense team, based on negative responses by potential juror questionnaires about defense experts, had decided that we wanted to present our defense through Dr. Vigen because the law allows an expert to rely on what other experts provide to them. Dr. Vigen had the benefit of all the information gathered by all our experts.

***

> With all the roles defined we developed and presented to the jury our strategized mitigation as an explanation for his conduct, not an excuse. His family, the dysfunction that followed as to Mr. Mendoza when his father became a shell of his former self, and the value system he took on with his new set of friends.
>
> Dr. Vigen's dual role did not provide the prosecution with any information it did not already know about and were prepared to present in rebuttal. We had decided that it was better that they hear it explained by our expert than the state's witnesses. Also, it gave Dr. Vigen a more honest position in front of the jury when it could explain the bad with the good.

4 SCHR 1469–74.

"[I]n the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a 'reasonably substantial, independent investigation' into potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d 230, 236–37 (5th Cir. 2002). The decision concerning which evidence and witnesses to present to a jury in mitigation is a matter of trial strategy and federal courts "will not question a counsel's reasonable strategic decisions." *Bower v. Quarterman*, 497 F.3d 459, 470–73 (5th Cir. 2007).

Mendoza's first ground for relief concerns trial strategy, and habeas relief is unavailable if a peti-

tioner fails to overcome the presumption that counsel made sound strategic decisions. *Del Toro v. Quarterman*, 498 F.3d 486, 491 (5th Cir. 2007). Counsel explained his strategy in selecting Dr. Vigen as the voice of the experts. 4 SCHR 1469. Counsel developed a reasonable strategy to call Dr. Vigen, based on his experience in other capital cases and because he had/could create great rapport with juries. *Id*. at 1469–70. In light of *Strickland*, the Court cannot find that counsel was ineffective for calling Dr. Vigen as an expert witness.

Mendoza has not shown that either habeas counsel or trial counsel was ineffective as it relates to Dr. Vigen's testimony. Because Mendoza has failed to establish cause to excuse the procedural default of this claim, his first ground for relief is **DENIED**.

3. **Mendoza claims that the State of Texas used potentially false testimony at the punishment stage of the trial in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and trial counsel was ineffective in violation of the Sixth Amendment of the United States Constitution for failing to discover the State's use of false evidence.**

4. **Mendoza alleges, pursuant to *Martinez*, that trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution by failing to interview Melvin Johnson and presenting his testimony during the trial.**

5. Mendoza alleges, pursuant to *Martinez*, that post-conviction counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution by failing to interview Melvin Johnson and by consequently failing to raise the ineffective assistance of trial counsel on collateral review by trial counsel's failure to interview, investigate and present Melvin Johnson's testimony at trial or discover the use of the State's false evidence.

Mendoza's final three supplemental grounds for relief are also related. All three claims relate to the State's rebuttal witness, Officer Robert Hinton, a detention officer with the Collin County Sheriff's Department. Mendoza alleges that during the punishment phase of the trial, Officer Hinton may have testified falsely about an incident involving Mendoza and another inmate, Melvin Johnson.

Officer Hinton testified that he was working as a detention officer in the Collin County detention facility on September 22, 2004. RR 24:220–21. He observed Mendoza go into a segregated recreation yard by himself. *Id*. at 229. He then observed that the other inmate, Mr. Johnson, was released from his cell to finish mopping and sweeping the dayroom on the segregation side. *Id*. at 230. Officer Hinton testified that he observed Mendoza re-enter the housing unit, walk up the stairs towards Mr. Johnson, and "a fist fight broke out." *Id*. Officer Hinton testified that Mendoza "approached in an aggressive fashion, and that Mr. Johnson "took a defensive

posture and was blocking the swings and returning them, too." *Id*. at 230–31. Mendoza was disciplined as a result of the incident. *Id*. at 233.

Supplemental habeas counsel interviewed Mr. Johnson, who provided the following affidavit regarding the incident:

> My name in Melvin Jermaine Johnson, I am presently [a]n inmate in the Wynne Unit in the Texas Department of Corrections. In 2004, I was incarcerated in the Collin County Jail where I came into contact with Moises Mendoza. Moises Mendoza was not very well liked by other inmates and the guards. Mr. Mendoza would continually use racial slurs and had a bad attitude. Due to the nature of Mr. Mendoza's offense he was confined to what is called the SHU, the special housing unit. On one occasion, due to a disciplinary problem, I was placed in the SHU also. While confined in the SHU inmates were allowed one hour a day to recreate. Mr. Mendoza would recreate by himself. As Mr. Mendoza was heading toward the rec yard, my cell[] was rolled. What this means is for some reason, my cell door was opened. This can only happen by a guard opening the door. As soon as the door opened, I figured what the guards wanted and I exited my cell and started a fight with Mr. Mendoza. I was definitely the aggressor. Mr. Mendoza was defending himself, but wasn't fighting back. After a short period of time, guards arrived and broke the fight up. That night I received

> an extra tray of food which I figured was a bonus for my actions in fighting Mr. Mendoza. Although, no one ever spoke to me about this incident, I am sure that the guards had planned this situation. I was told that there was trial testimony that Mr. Mendoza was in the rec yard when I was allowed to exit my cell to finish mopping the floor in the day room and Mr. Mendoza attacked me, this testimony is patently false. I have never been contacted until recently by anyone in regards to the facts of this situation, but had I been so contacted, I would have testified at trial as to what really happened on that occasion which is what I have stated in this affidavit.

Docket No. 86, Ex. A. Mr. Johnson signed the affidavit on November 2, 2016.

In the third ground for relief, Mendoza claims that the State may have used false testimony through Officer Hinton in violation of his due process rights, and that trial counsel was ineffective for failing to discover the State's use of false testimony. *Id*. at 33. Mendoza acknowledges that he "cannot allege with certainty that the testimony propounded by Officer Hinton was indeed false," but requests an evidentiary hearing and discovery to determine if there are any witnesses or evidence "to clarify this situation." *Id*. at 39. In the fourth ground for relief, Mendoza argues that trial counsel was ineffective for failing to interview Mr. Johnson and present his testimony at trial. *Id*. In the fifth ground for relief,

Mendoza argues that state habeas counsel was likewise ineffective for failing to interview Mr. Johnson and failing to raise these two ineffective assistance of trial counsel claims. *Id*. at 43.

The precise issue before the Court with respect to the last three supplemental grounds for relief is whether Mendoza can satisfy the requirements of *Martinez* and *Trevino*. Although Mendoza asserts three independent claims for relief, these claims are best understood as a single claim for relief, alleging trial counsel's ineffective assistance of counsel for failing to discover and object to the State's use of false testimony, or failing to interview Mr. Johnson and present his testimony at trial.[5] To the extent Mendoza is seeking relief based on the State's alleged use of false testimony under *Napue v. Illinois,* 360 U.S. 264, 269 (1959), and *Giglio v. United States*, 405 U.S. 150, 153 (1972), neither the Supreme Court nor the Fifth Circuit have extended the holdings in *Martinez* and *Trevino* to such a claim. *Martinez*, 566 U.S. at 15 ("*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial."); *Prystash v. Davis*, 854 F.3d 830, 836 (5th Cir. 2017) (declining to extend *Martinez/Trevino* to claims

[5] Although the claim is not spelled out as such, the Court is entitled to infer that Mendoza raises the *Napue/Giglio* argument to assert that trial counsel was ineffective for failing to object to the introduction of the allegedly false evidence. *Mack v. United States*, No. EP-03-CA-330-H, 2005 WL 8149257, at *10 (W.D. Tex. 2005).

that could have been raised on direct appeal); *Wilkins v. Stephens*, 560 F. App'x 299, 306 n.44 (5th Cir. 2014) (claim alleging denial of right to a public trial under the Sixth Amendment "does not fall within the scope of *Martinez* or *Trevino* and is therefore procedurally barred").

Nevertheless, the elements of *Napue* and *Giglio* are relevant for purposes of evaluating whether trial counsel was ineffective for failing to discover the alleged false evidence and object to its admission at trial. A conviction obtained through the use of false evidence violates the Fourteenth Amendment. *Napue*, 360 U.S. at 269; *Giglio*, 405 U.S. at 153–54; *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002). To prove a due process violation, a petitioner must demonstrate: (1) that the testimony in question was actually false; (2) that the State knew it was false; and (3) that the testimony was material. *Canales v. Stephens*, 765 F.3d 551, 573 (5th Cir. 2014); *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). Perjured testimony is material when there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Canales*, 765 F.3d at 573.

Mendoza argues that trial counsel was ineffective for failing to interview Mr. Johnson and discover the false evidence. To be sure, trial counsel's failure to investigate the alleged incident is concerning. Although Mr. Johnson's affidavit alone does not demonstrate that Officer Hinton's testimony was in fact false, an interview with Mr. John-

son may have led to the discovery of additional evidence either demonstrating such falsity. *See Kutzner*, 303 F.3d at 337 ("[I]t is not enough that the testimony is challenged by another witness . . . ."). Alternatively, trial counsel could have interviewed Mr. Johnson and called him to testify in an effort to discredit Officer Hinton's account. *See Beltran v. Cockrell*, 294 F.3d 730, 734 (5th Cir. 2002) (holding the failure to impeach a witness with evidence that had "significant exculpatory value" amounted to ineffective assistance of counsel).

Generally, federal courts do not question trial counsel's decision not to call a particular witness, as this is considered a matter of trial strategy, and trial counsel may have had a reasonable justification for not presenting Mr. Johnson's testimony. *Bower*, 497 F.3d at 470–73; see *Wilkerson v. Cain*, 233 F.3d 886, 892 (5th Cir. 2000) ("[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy.") However, the decision not to call a witness without even interviewing the witness is particularly suspect. *Miller v. Dretke*, 420 F.3d 356, 362 (5th Cir. 2005) (holding trial counsel ineffective where counsel decided not to call a witness "without even speaking to them" and offered no tactical or strategic explanation for such a decision). This is especially so here, where Mendoza presented Mr. Johnson's affidavit, demonstrating that Mr. Johnson may have been willing to testify and that his testimony would have benefitted Mendoza's defense. *See id.* at 361 ("To establish that an attorney

was ineffective for failure to investigate, a petitioner must allege with specificity what the investigation would have revealed and how it would have changed the outcome of trial.").

However, even if trial counsel's failure to interview Mr. Johnson fell below an objective standard of reasonableness, Mendoza's claim fails because he cannot demonstrate that the officer's testimony was material, for purposes of a *Napue/Giglio* claim, or that the failure to object to the testimony or call Mr. Johnson to testify was prejudicial.

False testimony violates due process only when it is material, meaning that there is a "reasonable likelihood that the false testimony affected the judgment of the jury." *Canales*, 765 F.3d at 573; *United States v. O'Keefe*, 128 F.3d 885, 894 (5th Cir. 1997) (defining materiality in terms of a "reasonable probability of a different outcome.") (internal quotations omitted). Even setting aside Officer Hinton's testimony, the jury heard substantial evidence regarding Mendoza's future dangerousness. In addition to the details of the crime of which Mendoza was convicted—an attempted burglary, kidnapping, sexual assault and murder—the jury heard evidence of Mendoza's childhood delinquency, including violence against teachers; Mendoza's violence against his family; additional acts of violence, and in particular violence against women, including threats to kill, robberies, attempted kidnappings and sexual assault; that Mendoza cut off his electronic monitoring anklet while released from Dallas County jail on bond; that Mendoza violated prison regulations, including making multiple homemade shanks; and

Mendoza's violence against detention officers. RR 22:13–30, 38–41, 23:126–28, 45–48, 57–70, 130–43, 147–61, 191–92, 199–205, 210–17, 225–37, 24:174, 223–49.

In light of all this testimony, Mendoza has not demonstrated that there is any reasonable likelihood that Officer Hinton's testimony could have affected the judgment of the jury. *See Moody v. Johnson*, 139 F.3d 477, 484 (5th Cir. 1998) (holding that expert's misleading testimony on future dangerousness was not material in jury's verdict supporting death sentence, where petitioner had been convicted of brutal rape and strangulation of an elderly woman, and additional evidence at sentencing showed petitioner raped his 10-year-old stepdaughter, had a lengthy criminal history and repeatedly escaped incarceration); *see also Devoe v Davis*, 717 F. App'x 419, 425 (5th Cir. 2018) (holding allegedly false testimony immaterial to verdict supporting death sentence where jury heard evidence that petitioner murdered a pair of teenage girls and four other people, and that petitioner had a violent background, including convictions for assault, child endangerment and harassment); *Perez v. Quarterman*, No. A-09-CA-081, 2011 WL 6959946, at *13 (W.D. Tex. Dec. 29, 2011) (finding that "in light of the extraordinary violent nature of the offense on trial and the punishment phase testimony from the victim's family members," petitioner failed to show that the false testimony "played a crucial, critical, and highly significant role" in the punishment phase at trial).

Petitioner argues that the State relied on Officer Hinton's testimony in his closing argument, demonstrating that the testimony was material and prejudicial. Although petitioner correctly notes that the State referenced the alleged assault in the closing, the prosecutor briefly mentioned the assault only after laying out Mendoza's lengthy violent and criminal history in extensive detail. Moreover, the alleged assault was discussed as one in a series of Mendoza's prison violations, which included the creation of homemade shanks and an assault on detention officers. RR 25:44–45.

Because Mendoza has not shown that Officer Hinton's testimony was material, he cannot demonstrate that trial counsel was constitutionally ineffective for failing to discover and object to the introduction of false evidence. *See McCray v. Caldwell*, No. 15-1912, 2016 WL 8737477, at *9 (E.D. La. Aug. 24, 2016) ("Because [petitioner] has not shown that the arguments he contends counsel should have raised on appeal had any basis in law or fact, he cannot show that his appellate counsel was constitutionally ineffective for failing to raise the claims on direct appeal."). An evidentiary hearing is not warranted where, even assuming the hearing would establish the existence of false evidence, Mendoza has not shown that such false evidence was material. *Puckett v. Epps*, 615 F. Supp. 2d 494, 528–29 (S.D. Miss. 2009)

Because Mendoza has not established that Officer Hinton's testimony was material under *Napue/Giglio*, he cannot demonstrate that the failure to object to the testimony or call Mr. Johnson was

prejudicial, as required to demonstrate ineffective assistance of counsel. The prejudice standard under is more onerous than the materiality standard under *Napue/Giglio*. *Cf. Strickler v. Greene*, 527 U.S. 263, 282 (1999) (holding that petitioner's failure to satisfy the "materiality" prong under Brady necessarily fails to establish prejudice excusing procedural default); *Coulson v. Johnson*, No. 01-20083, 2001 WL 1013186, at *9 (5th Cir. Aug. 7, 2001) (holding that the materiality standard under *Giglio* is "considerably less onerous" than the materiality prong under *Brady*).

Further, it is unclear whether testimony from Mr. Johnson would have effectively rebutted the Officer Hinton's testimony. Mr. Johnson's potential testimony was "double-edged." Any benefit Mendoza might have reaped from discrediting Hinton's testimony that Mendoza was the aggressor in a fight is outweighed by the potentially negative testimony Mr. Johnson may have given. According to his affidavit, Mr. Johnson stated that Mendoza was not well-liked by either guards or inmates, he "continually" used racial slurs, and he had a bad attitude. "[D]ouble-edged evidence cannot support a showing of prejudice under *Strickland*." *Reed v. Vannoy,* 703 F. App'x 264, 270 (5th Cir. 2017) (citing *Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000)); *see also Gray v. Epps*, 616 F.3d 436, 449 (5th Cir. 2010).

Because Mendoza has not adequately alleged ineffective assistance of trial counsel, the Court need not examine whether habeas counsel was likewise ineffective. State habeas counsel is not ineffective nor is a petitioner prejudiced for failing to raise

meritless claims. *Segundo v. Davis*, 831 F.3d 345, 350–51 (5th Cir. 2016).

In sum, Mendoza has not established cause to overcome the procedural default. He has not satisfied his burden of showing that (1) his underlying claim of ineffective assistance of trial counsel is substantial, or (2) his initial state habeas counsel was ineffective in failing to present that claim in his first state habeas application. *Chanthakoummane*, 816 F.3d at 72. Mendoza's third, fourth, and fifth claims for relief are therefore **DENIED**.

VI. CONCLUSION

Having carefully considered Mendoza's amended petition following remand by the Fifth Circuit, the Court is of the opinion that Mendoza has not shown cause to overcome his procedural default of these ineffective assistance of trial counsel claims in state court. Therefore, Mendoza fails to meet the exception under *Martinez* and *Trevino* that would allow this Court to consider whether such ineffective assistance of counsel claims merit relief. It is accordingly

ORDERED that the amended petition for a writ of habeas corpus is **DENIED**. It is further

ORDERED that Mendoza's request for an evidentiary hearing is **DENIED**.

So ORDERED and SIGNED this 14th day of November, 2019.

/s/ Robert W. Schroeder III
ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TEXARKANA DIVISION

MOISES MENDOZA, Petitioner, v. **RICH THALER,** Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	No. 5:09cv86

MEMORANDUM OPINION

Petitioner Moises Mendoza, ("Mendoza"), an inmate in the custody of the Texas Department of Criminal Justice, Institutional Division, filed an application for a writ of *habeas corpus* pursuant to 28 U.S.C. §2254. Mendoza challenged his capital murder conviction and death sentence imposed in the 401st Judicial District Court of Collin County, Texas in trial cause number 401-80728-04, styled *The State of Texas v. Moises Mendoza.* Mendoza raised seven claims in his application:

1. Trial counsel was constitutionally ineffective for failing to obtain a comprehensive psychosocial history; without such history, counsel lacked the necessary facts to formulate an effective defense theory for guilt-determination

and the punishment-determination phases of his trial.

2. Trial counsel was constitutionally ineffective for failing to consider, investigate, and present condition-of-the-mind evidence to negate the *mens rea* element in the guilt-determination phase of his trial.

3. Mendoza's conviction and sentence of death violates his Fourteenth Amendment due process rights because he lacked the necessary *mens rea* for conviction of capital murder and is thus actually innocent of capital murder.

4. Mendoza's trial counsel rendered ineffective assistance because they failed to adequately investigate and develop crucial mitigating evidence.

5. Mendoza was denied his Sixth and Fourteenth Amendment rights to individualized sentencing by trial counsel's failure to adequately present crucial mitigating evidence.

6. The trial court's ruling that Dr. Sorensen was not a qualified expert violated Mendoza's Eighth Amendment right to individualized sentencing under *Lockett v. Ohio,* 438 U.S. 586 (1978).

7. Trial counsel was ineffective for failing to present testimony to support a sentence less than death and to give a favorable opinion concerning Mendoza's risk assessment.

On January 24, 2012, pursuant to 28 U.S.C. § 636(b)(1)(B), this case was referred to the Hon. Caroline Craven, U.S. magistrate judge, for a Report and Recommendation for disposition of the application, Mendoza's motion to expand the record, and his motion for an evidentiary hearing. On June 19, 2012, the magistrate judge issued a Report and Recommendation in which she recommended that the Court (1) grant Mendoza's motion to expand the record, (2) deny his motion for an evidentiary hearing, (3) deny his first, second, third, fourth, fifth and seventh claims, and (4) dismiss his sixth claim with prejudice.

Both parties objected to the magistrate judge's Report and Recommendation. Pursuant to 28 U.S.C. § 636(b)(1), the Court has made a *de novo* determination of those portions of the report and recommendation to which objections have been made.

I. Respondent's Objection

Respondent Rick Thaler ("the Director") objects to the recommendation that the Court grant Mendoza's motion to expand the record. He cites *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) for the proposition that once the state court has adjudicated a claim on the merits, review under 28 U.S.C. §2254(d) is limited to the record developed in the state court proceedings. Noting that the magistrate judge recommended that this Court grant Mendoza's motion to expand the record on the grounds that the state court denied his motion for discovery, the Director contended:

> [T]he fact that Mendoza asked for but was denied discovery from the state court does not remove him from the confines of Pinholster. The Supreme Court made no exception to the rule announced in Pinholster allowing for consideration of evidence by the federal court when the state court adjudicated the claims on the merits but denied additional factual development. The Court simply held that "review under 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."

Doc. No. 56 at 3.

There is some question as to whether expansion of the record is allowed under these circumstances. *See Murphy v. Johnson*, 205 F.3d 809 (5th Cir. 2000). The Court is not persuaded that *Pinholster* prohibits this practice. *See Wilson v. Pearson*, 683 F.3d 489, 501 (4th Cir. 2012). Accordingly, the Court overrules the Director's objection and adopts the magistrate judge's recommendation.

II. Mendoza's Procedural Objections

Mendoza objects to the magistrate judge's recommendation that the Court deny his motion for an evidentiary hearing. After conducting a de novo review of Mendoza's claims and reviewing the new evidence, which showed that members of the defense team had some confusion over each other's roles, the Court finds that the new evidence identified by Mendoza does not raise any material issues of fact requiring an evidentiary hearing. Even considering

the new evidence, the outcome remains unchanged. Accordingly, the Court will overrule Mendoza's motion for an evidentiary hearing and adopt the magistrate judge's recommendation.

Mendoza also objects to the magistrate judge's Report and Recommendation on the grounds that she should not have applied the deferential standard of review in 28 U.S.C. § 2254(d) because the state court did not allow Mendoza to conduct discovery. He contends that the Court should conduct a plenary review of his claims. The Court acknowledges that limited exceptions exist to the deferential review standard. *See, e.g., Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011), *pet. cert. filed* (U.S. Mar. 21, 2012) (No. 11-9526). But the Court finds this issue immaterial. The magistrate judge's recommendation is correct regardless of whether the § 2254(d) deferential standard of review is applied. Accordingly, Mendoza's objection is overruled, and the Court adopts the recommendation of the magistrate judge.

III. Mendoza's Substantive Objections

In his first substantive objection, Mendoza argues that the magistrate judge "sidestepped" his argument that his defense counsel was deficient in failing to offer a "unified theory" that applied at both the guilt-determination and the punishment-determination phases of his trial. In *Strickland v. Washington*, the Supreme Court held that an attorney's conduct would be reviewed for reasonableness under the facts and circumstances known to the attorney. 466 U.S. 668, 690–91 (1984). The magistrate

judge noted that it would be unreasonable for counsel to rely on inconsistent defense theories at the two phases of a capital trial. But the magistrate judge recommended finding that the two defense theories offered at Mendoza's trial *were not inconsistent*.[1] Furthermore, failing to offer a "unified theory" for the guilt-determination and the punishment-determination phases of a capital trial is not deficient performance per se. Accordingly, this objection is overruled, and the Court adopts the recommendation of the magistrate judge.

Next, Mendoza objects to the magistrate judge's recommendation that his second claim be denied. Mendoza argues that his trial counsel failed to exercise reasonable professional judgment by failing to investigate a defense based on lack of *mens rea*. Specifically, Mendoza argues that brain damage resulting from alcohol use rendered him incapable of possessing the necessary criminal intent. He contends that his trial counsel unreasonably relied on an expert opinion—formed after the expert observed Mendoza and interviewed him about his alcohol use—that no evidence of brain damage existed. Mendoza contends that mental health issues must be investigated, regardless of the absence of observable symptoms. The Court disagrees. *See Roberts v.*

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[1] At the guilt determination phase of his trial, Mendoza's defense was that he did not intend to rob the victim, so he could not be guilty of capital murder. At the punishment-determination phase, he contended that the reason he lacked the ability to control his impulse to kill was because of feelings of abandonment, drug and alcohol abuse, and a peer group of self-destructive and amoral friends.

Dretke, 381 F.3d 491, 499 (5th Cir. 2004) (noting that it is not deficient performance for trial counsel to forego further investigation of defendant's mental health based upon personal observation and a report of expert witness). Thus, Mendoza's objection to the magistrate judge's recommendation as to Claim Two is overruled, and the recommendation is adopted.

Mendoza's next objection challenges the magistrate judge's proposed finding that his third claim is barred from review in federal *habeas corpus*. In his third claim, Mendoza contends that he is actually innocent because he did not have the necessary mens rea for murder. Quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993), Mendoza claims that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *See* Second Amended Petition for Writ of Habeas Corpus at 112 n.87, Doc. 34. The magistrate judge proposed finding that regardless of how persuasive Mendoza's claim of actual innocence might be, relief in *habeas corpus* is not warranted because there is a state avenue open to process his claim: the Texas Board of Pardons and Paroles.

Mendoza now contends that *Herrera* only applies to "free standing" claims of actual innocence. Mendoza now insists that his claim of actual innocence is not "free standing" because it is tied to a constitutional infirmity in his capital trial—the failure of the prosecution to prove beyond a reasonable doubt

that he had the *mens rea* required for a capital murder conviction. Mendoza's argument is wrong for two reasons. First, the claim that the prosecution failed to prove an element of the offense beyond a reasonable doubt raises a legal sufficiency issue, and does not support a claim of actual innocence. *See House v. Bell*, 547 U.S. 518, 538 (2006). Second, having claimed in his petition that he was "actually innocent" and requesting relief based upon *Herrera*, Mendoza may not now change the nature of his claim and object on the grounds that *Herrera* is distinguishable. *See U.S. v. Coy*, 19 F.3d 629, 632 n.7 (11th Cir. 1994), *cert. denied*, 513 U.S. 1006 (1994) (noting that arguments raised for the first time in a reply brief are no properly before a reviewing court).

Furthermore, the magistrate judge recommended denying this claim. But the Court finds it more appropriate to dismiss this claim with prejudice rather than deny it on its merits. *Cf. Salazar v. Dretke*, 419 F.3d 384, 398 (5th Cir. 2005) (denial means that the court addressed the claim on its merits, while dismissal means that court declined to consider the claim for reasons unrelated to the claim's merits). Accordingly, the Court overrules Mendoza's objection as to Claim Three. The Court further finds that Mendoza's third claim should be dismissed with prejudice and adopts the magistrate judge's recommendation as to Claim Three in all other respects.

Mendoza next objects to the magistrate judge's recommendation that the Court deny his fourth and fifth claims. Specifically, the magistrate judge recommends finding that defense counsel's failure to

investigate and present mitigating evidence was reasonable under the circumstances. The report and recommendation stated that when counsel's investigation produces a defense theory that appears plausible in light of ordinary experience, failing to investigate theories which appear less plausible in light of ordinary experience is not unreasonable.[2] Mendoza contends that the magistrate judge's use of the concept of "ordinary experience" was arbitrary and contrary to the legal requirement that counsel conduct "a thorough investigation of law and facts relevant to plausible options."[3]

The Court again disagrees with Mendoza's challenge to the magistrate judge's report. The magistrate judge proposed finding that it is not unreasonable for counsel, after formulating a plausible defense, to forgo investigation of less plausible defenses, unless the evidence being developed weakens the proposed defense or suggests that another line of defense would be stronger. The magistrate judge employed the notion of "in light of ordinary experience" to explain why one defense theory would be considered more plausible or less plausible

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[2] Mendoza contends that counsel should have discovered and presented evidence that he suffered from a recognized psychological condition known as "attachment disorder" that caused him to experience flashbacks. He claims he was in the midst of a flashback when he killed the victim.

[3] Mendoza also objects to the magistrate judge's characterizing counsel's arguments as a "theory," contending that they were only a "hypothesis." The Court finds that the point at which a hypothesis becomes a theory is not material to this analysis.

in the reasonable professional judgment of the attorney. Counsel is not deficient for failing to investigate all plausible options if, in his reasonable professional judgment, some are more plausible than others. *See Williams v. Head*, 1185 F.3d 1223, 1236-37 (11th Cir. 1999). Accordingly, this objection is overruled and the Court adopts the findings of the magistrate judge.

In his next objection, Mendoza challenges the magistrate judge's recommendation that his sixth claim be dismissed with prejudice because it was procedurally defaulted in state court. The trial court sustained the prosecution's objection that Dr. Johnathan Sorenson—the defense forensic expert on future dangerousness risk assessment—was not qualified to provide expert testimony. Mendoza objected to the trial court's ruling as a violation of state evidentiary rules. In his state post-conviction proceedings, Mendoza contended that the exclusion of Dr. Sorenson violated Mendoza's constitutional right to present mitigating evidence. The state court found that Mendoza's federal constitutional claim had been waived because he did not raise it when the trial court ruled. Citing *Sharp v. Johnson*, 107 F.3d 282, 285-86 (5th Cir. 1997), the magistrate judge similarly found that this claim had been procedurally defaulted.

Mendoza argues that, unlike the defendant in Sharp, he offered evidence outside of the record in his state post-conviction proceedings. Mendoza relies on *Ex Parte Halliburton*, 755 S.W.2d 131 (Tex. Crim. App. 1988), where the state court addressed the merits of a claim that had not been raised at

trial and that was supported by evidence outside of the record. But the dispositive factor in *Halliburton* was the nature of the claim, rather than the fact that the claim was supported by evidence from outside the record:

> The State argued in its motion that: "Since Applicant cannot show an objection at trial, he cannot meet the first element of proof required by this court." Further, the court of appeals had resolved this issue against applicant in his appeal to that court after his conviction. We impliedly rejected the State's argument when we denied the motion. . . .[W]e believe that the first person "systematically excluded" against, as per *Swain, supra*, is just as entitled to complain of systematic exclusion as is the last person systematically excluded against. In other words, if the systematic exclusion is not apparent at a particular defendant's trial, he should not be excluded from complaining of systematic exclusion by collateral attack when the systematic exclusion becomes apparent. Thus, we could not say prior to applicant's evidentiary hearing that he needed to object at trial in order to preserve Swain error. Having found a dispositive ground other than a procedural default, in the opinion above, we decline for the aforementioned reasons to address the procedural default issue.

Ex parte Halliburton, 755 S.W.2d at 135 n.5.

Mendoza's sixth claim is not based upon *Swain v. Alabama*, 380 U.S. 202 (1965) and thus is distinguishable from the claim asserted in *Ex parte Haliburton*. Accordingly, the Court overrules Mendoza's objection and adopts the magistrate judge's recommendation.

Finally, Mendoza objects to the magistrate judge's recommendation that the Court deny his seventh claim—that his trial counsel rendered ineffective assistance by calling one future dangerousness or mitigation expert versus another. During the punishment–determination phase, the defense called Dr. Mark Vigen, rather than Dr. Mark Cunningham, as its chief expert witness. Mendoza's attorneys stated in their affidavits that they believed Dr. Vigen would be a more persuasive witness based upon their own experience with Dr. Cunningham in a prior case. Mendoza contends that Dr. Vigen was not qualified to opine on the probability that Mendoza would be a future danger to society. This contention is belied by the fact that the Court allowed Dr. Vigen to offer his expert opinion on the issue. Mendoza also contends that Dr. Cunningham was more knowledgeable than Dr. Vigen, and thus would have been a more persuasive witness. Mendoza's argument does not rebut the fact that counsel had formed a contrary opinion based upon previous experience with Dr. Cunningham. *See Pape v. Thaler*, 645 F.3d 281, 291 (5th Cir. 2011) (trial counsel's decisions regarding examination and presentation of witnesses and evidence cannot be found deficient as long as the choices are the result of a conscious and informed decision on trial tactics). Accordingly,

the objection to the magistrate judge's recommendation on Claim Seven is overruled, and the Court adopts the recommendation.

IV. Conclusion

For the above reasons, the Court denies both parties' objections, dismisses Mendoza's third and sixth claims with prejudice, and denies his first, second, fourth, fifth, and seventh claims. An order and judgment to this effect will be entered.

It is SO ORDERED.

SIGNED this 28th day of September, 2012.

/s/ Michael H. Schneider
Michael H. Schneider
UNITED STATES DISTRICT JUDGE

APPENDIX D

COURT OF CRIMINAL APPEALS OF TEXAS

Ex Parte Moises Sandoval MENDOZA

No. WR-70,211-01.

June 10, 2009

On Application for Writ of Habeas Corpus, In Cause No. 401-80728-04(HC1), In the 401st Judicial District Court Collin County

ORDER

PER CURIAM.

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.

On June 23, 2005, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Mendoza v. State*, No. AP-75,213 (Tex. Crim. App. Nov. 5, 2008) (not designated for publication).

Applicant presents seven allegations in this application in which he challenges the validity of his conviction and resulting sentence. Although an evidentiary hearing was not held, the trial judge entered findings of fact and conclusions of law. The trial court recommended that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the

trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review, relief is denied.

IT IS SO ORDERED.

APPENDIX E

W401-80728-04(HC1)

EX PARTE **MOISES SANDOVAL MENDOZA,**	**IN THE 401ST DISTRICT COURT OF COLLIN COUNTY, TEXAS**

Findings of Fact and Conclusions of Law

Having considered the application for writ of habeas corpus, the answer, the affidavits and other official court documents and records in this cause and in Mendoza's capital murder trial in Cause 401-80728-04, and the Court's own personal recollection and experience, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Background and procedural history

1. The applicant, Moises Sandoval Mendoza, was indicted and convicted of the capital murder of Rachelle Tolleson in Cause 401-80728-04 in the 401st District Court of Collin County, Texas.

2. The applicant was represented during trial by three licensed attorneys, Juan Sanchez, John Tatum and Angela Ivory Tucker.

3. On June 29, 2005, after the jury answered special issue one in the affirmative and special issue two in the negative, the trial court assessed punishment at death by lethal injection. 25 RR 57-58.

4. The direct appeal of the case was submitted to the Court of Criminal Appeals on September 12, 2007, and as of the date of these findings, the case was stil1 pending in that court. *See Moises Sandoval Mendoza*, No. AP-75,213 (Tex. Crim. App. submitted Sept. 12, 2007).

This Court's experience with trial counsel and their credibility

5. Juan Sanchez and Angela Ivory Tucker filed a joint affidavit in this cause responding to the claims in the application regarding ineffective assistance of counsel. State's Writ Exhibit 1.

6. Juan Sanchez and Angela Ivory Tucker are personally known to the Court as competent attorneys, experienced in criminal defense.

7. In two decades' worth of experience practicing in and then presiding over courts in Collin County, the Court has observed first-hand a broad spectrum of attorney conduct. The Court is also familiar with the reputation of a great many attorneys practicing in the courts of Collin County.

8. The Court has long known Angela Ivory Tucker and knows that her reputation for honesty among the attorneys and judges in the courthouse is above reproach.

9. At the end of trial, this Court complemented all the attorneys in the case, including Juan Sanchez and Angela Ivory Tucker, for their "professionalism" and "preparedness." 25 RR 61.

10. In the Court's experience with these attorneys in this trial and other appearances before this

Court, Juan Sanchez and Angela Ivory Tucker have proven themselves to be at all times forthright and credible.

Juror affidavits

11. The State objected to the juror affidavits and interviews that applicant included as attachments to his application. *See* State's Answer at 22-23.

12. Based on Texas Rule of Evidence 606(b), which bars admission of juror affidavits or statements by jurors concerning deliberation or the effect anything might have had on the jurors (except where there is an issue concerning juror qualifications or an outside influence), the Court hereby sustains the State's objection and strikes all juror affidavits and interviews. *See* TEX. R. EVID. 606(b).

Counsel's theory of the case

13. Applicant alleges that trial counsel had no theory of the case at the guilt phase other than that the State failed to prove its case. See Application at 30, 32-33, 47, 52. But Applicant has produced no evidence from anyone on the defense team or from applicant himself that trial counsel had no definite theory of the case at guilt.

14. Applicant has also produced no evidence of the investigation counsel conducted, nor the strategic decisions and reasons that counsel pursued the theory of the case they did.

15. In the indictment, the State alleged that applicant caused Rachelle Tolleson's death by strangling or stabbing her in the course of committing

burglary, kidnapping, or aggravated sexual assault. *See* 1 CR 20.

16. Juan Sanchez and Angela Ivory Tucker's defense theory of the case at guilt was that the applicant had committed first-degree murder, not capital murder. *See* State's Writ Exhibit 1 at 2.

17. Counsel state that they decided on a simple murder theory of the case after considering applicant's confessions to the police and the press and because the theory was supported by the physical evidence in the case and the witness statements. State's Writ Exhibit 1 at 2-3.

18. Counsel's reasons for adopting the strategy they did are well documented in the record:

a. Applicant confessed to the police that he strangled and stabbed Rachelle. SX 110 & 111.

b. The physical evidence showed Rachelle's blood was on applicant's jeans and in his truck. 21 RR 64-65.

c. Applicant's DNA on a vaginal swab collected during Rachelle's autopsy established that the two had intercourse, and applicant's shoe print on a piece of paper in Rachelle's bedroom that she had only recently received, established that he had been in her bedroom on the night of the murder. 21 RR 62-63, 132-33.

d. The witness statements that the State produced before trial suggested a possibility that applicant and Rachelle may have had a consensual sexual relationship. 2 CR 615, 624.

19. Counsel interviewed applicant about his background and the facts of the case. State's Writ Exhibit 1 at 1.

20. Counsel formulated their defense theory of the case after meeting with applicant and the whole of the defense team at the jail. State's Writ Exhibit 1 at 2.

21. Counsel's description of their theory of the case at guilt is reliable because, as is shown in the next finding, the trial record is replete with evidence that counsel actively advanced a simple murder theory before the jury.

22. At trial, counsel challenged the State's evidence that there had been a burglary, kidnapping, or aggravated sexual assault, the very factors elevating the murder to a capital murder.

a. Counsel established on cross-examination that there were no signs of forced entry at Rachelle's home. 19 RR 152.

b. Counsel highlighted that in Rachelle's bedroom where officers claimed there were "signs of a struggle," the lamp, alarm clock, and remote control had not been overturned or knocked to the floor, and the ceiling fan and overhead light were still intact. 19 RR 148-50; 21 RR 30-34.

c. Counsel also made the point on cross-examination that Rachelle's comforter being off the bed and clothing lying on the floor may have been due to things other than a struggle. 21 RR 32-33.

d. Counsel established that Rachelle had voluntarily accompanied applicant late one other night to purchase cigarettes and that Rachelle's husband Andrew Tolleson intended to confront applicant when he thought Rachelle had been out one night with applicant. 21 RR 98-100, 124.

e. In closing argument at the guilt phase, Mr. Sanchez contended that the jury could make the inference that applicant and Rachelle had an on-going sexual relationship, which made it consensual for applicant to enter her home, for Rachelle to leave with applicant, and for them to have sexual intercourse. *See* 21 RR 172-74.

23. In their affidavit, counsel set out their theory of the case at punishment. The theory was that Applicant came from a strict family but that his father was frequently absent due to depression and his hospitalization for suicide attempts, and that the applicant sought acceptance from a group of friends who indulged in depraved behavior, and applicant adopted their values, but that in prison he could be controlled and eventually redeemed. Counsel also had an underlying theme that the jury should spare the defendant's life for the sake of his family. *See* State's Writ Exhibit 1 at 3.

24. The trial record confirms that counsel actively advanced the theory of the case at punishment that they had formulated before trial.

a. Counsel called all six members of applicant's immediate family to give an account of their father's depression and how applicant had been

negatively influenced by a new group of friends. 23 RR 53-237; 24 RR 88-99.

b. Counsel called psychologist Dr. Mark Vigen to explain how applicant's father's depression and resulting absence from their home taught applicant that the strict rules that applied to his older siblings did not apply to him, and that he could get away with things because his mother made excuses for him. Dr. Vigen explained that applicant had then changed radically for the worse after his association with the depraved peer group. 24 RR 122-30.

c. Counsel then argued in closing that applicant's father's depression and applicant's own depression, his alcohol abuse, his unhealthy relationship with Amy Lodhi, and his negative peer group "spiraled to [the] tragic event" of Rachelle's murder. 25 RR 34-36.

25. In light of the record support, counsel's description of their theory of the case at punishment, and the court's own recollection of trial, counsel both formulated and pursued a clear mitigation theory at trial.

26. It is logically consistent to argue that the applicant did not break into Rachelle's home, kidnap her, or sexually assault her, and then argue in punishment that the applicant had been drawn to a destructive crowd and had adopted their depraved value system.

27. Elements of counsel's theme to spare applicant for the sake of his family were present in each stage of trial. At voir dire counsel suggested to three

of the sitting jurors that being a good son could be a mitigating factor. 6 RR 251; 9 RR 116-17; 10 RR 152. At guilt, counsel elicited testimony that when the police executed the search warrant on the Mendoza family home, they entered with guns raised and ordered everyone to the ground, which could have generated sympathy for the family. 20 RR 263-67. At punishment, counsel argued that the jury should "look at his family" and also find that there had been enough killing. 23 RR 10; 25 RR 32, 39.

28. As the record demonstrates, counsel elicited evidence at the guilt phase that would converge with their mitigation theory that applicant's depraved peer group had been a contributing factor to his criminality. On cross, counsel had applicant's peers testify about their parties and the drugs and alcohol that were readily available there. 19 RR 189-99; 22 RR 51-52, 218.

29. Applicant complains about trial counsel's failure to pursue certain themes and theories at trial. *See* Application at 30, 35. But applicant has produced no evidence of the investigation counsel conducted and the strategic decisions and reasons based on that investigation that counsel may have rejected these other theories.

30. An effective theory of the case addresses the legal elements of the case, and is logical, simple, and easy to believe.

31. The theory that applicant killed Rachelle after a flashback to an earlier conversation with his ex-girlfriend Amy Lodhi fueled by his lack of firm emotional attachment to his parents is not logical,

simple, easy to believe, nor consistent with everyday experience.

32. Trial counsel's theory that applicant and Rachelle had an on-going sexual relationship, which made it consensual for applicant to enter her home, for Rachelle to leave with applicant, and for them to have sexual intercourse, is logical, simple, and there was potential for the jury to believe it.

Counsel's decision not to challenge *mens rea*

33. Applicant has presented no evidence of the reasoning behind his trial team's strategic decisions not to present evidence contesting applicant's mental state.

34. Counsel state that they did consider but ultimately rejected a possible defense of a lesser *mens rea*. State's Writ Exhibit 1 at 3.

35. It is credible that counsel considered and rejected presenting evidence of a lesser *mens rea* because they can point to a specific reason for rejecting such a strategy: applicant "conveyed to the defense team that he knew what he was doing." State's Writ Exhibit 1 at 4.

36. Given applicant's statements to the trial team that he knew what he was doing and counsel's duty of candor to the court, counsel could not have ethically sponsored applicant's or an expert witness's testimony based on applicant's statements that applicant lacked the *mens rea* to commit the offense.

37. Before trial, two psychologists, Dr. Mark Vigen and Dr. Mark Cunningham, interviewed applicant. 24 RR 51, 56.

38. Applicant has produced no evidence from either Dr. Vigen or Dr. Cunningham that they found evidence that applicant lacked the intent to commit capital murder.

Catathymic homicide

39. Dr. Gilda Kessner has submitted an affidavit in this cause, attached as Exhibit A to the writ application.

40. Dr. Kessner, who was consulted by habeas counsel following trial, states that she interviewed applicant before preparing her affidavit. Applicant's Writ Exhibit A at 4.

41. In her affidavit, Dr. Kessner relates applicant's latest version of the events on the night of the murder:

> Moises related in our interviews that he met up with Rachelle at the parties and they had sex ... The night of the murder, Moises had already been to one of the parties and was in a verbal altercation with a girl. He already disliked the girl because she had previously rejected him. He left the party, was driving around, and wondered why Rachelle was not at he party. He went to her house and wanted her to go to the party. She could not go because of the baby so they stayed at her place and had sex. Sex with Rachelle had not included the shower ritual Moises had with Amy, but he would always

> take time to cleanse her after sex. This time he just got up to leave and she made a remark "like Amy did." She said, "This is all you want?" Moises described that he "snapped." "First thing I did was choke her, I snapped on her. I had never lost control like that. It's not her fault. I thought that would make me look crazy. She was already dead, lifeless, so I stabbed her in the throat. I just freaked out. The bay was in the baby's room. I freaked out. I tried to put all the soft stuff around the baby and I took Rachelle and I hid her in a field behind my house. The next day I woke up and wasn't sure if it was real. I went out there to see if she was there ... I lost control. It wasn't about her."
>
> Applicant's Writ Exhibit A at 19.

42. Based on applicant's latest version of events, Dr. Kessner offers her theory that the murder was a "catathymic homicide":

> Moises was psychologically reacting to [his ex-girlfriend] Amy Lodhi and the threat she posed to his fragile identity and personality organization even though she was not physically present. Rachelle Tolleson spoke words in a near quote to a message that Amy had spoken in a similar context. Moises responded in a flashback triggered by stimuli reminiscent of his experience with Amy. In this situation the context of the sexual encounter, the visual similarity between Amy and Rachelle, and Rachelle's comment combined to trigger Moises' intense emotional arousal and aggression. Rachelle was not the object of his abandonment rage;

> she was an innocent person who was in the wrong place at the wrong time.
>
> Applicant's Writ Exhibit A at ¶64.

43. Counsel have disproved applicant's allegation that an inadequate investigation is the reason they did not pursue a "catathymic homicide" theory at guilt. In their affidavit, counsel state, "Even if we had heard of a 'catathymic homicide' we would not have presented it because the facts as relayed to us by Mr. Mendoza did not support it." State's Writ Exhibit 1 at 4.

44. Counsel explains that contrary to Dr. Kessner's version of events, applicant never mentioned that the killing was in any way connected to Amy Lodhi. *See* State's Writ Exhibit 1 at 4.

45. Counsel had no duty to specifically ask applicant whether he had a flashback to a prior conversation with an ex-girlfriend that may have motivated the murder. This is not the type of event that counsel could foresee.

46. By the time of this writ application, it is not surprising that applicant would concoct a new version of events in an attempt to exonerate himself, lessen his culpability, or simply make sense of his violence against another.

47. Applicant has a history of talking about and modifying the events of the murder. Counsel state that he gave different versions of events to the police and to the press. See State's Writ Exhibit 1 at 2. The record substantiates counsel's claim. In a

pre-trial hearing, this Court made a record of applicant's conduct in initiating contact with law enforcement and making a second statement to police against counsel's advice. 3 RR 11-15.

48. Applicant's statements to trial counsel that he knew what he was doing are consistent with his statements in his initial police interview that he knew what he did was wrong. SX 110 at counter 53:30 to 54:06.

49. The version of events applicant conveyed to Dr. Kessner is convoluted and contrary to everyday experience.

50. The version of events applicant conveyed to Dr. Kessner contradicts the physical evidence in the case:

a. Applicant's latest version of events implies that he stabbed Rachelle in the house, but there is no explanation why there were no signs of blood found in her house but there was blood found in his truck. 19 RR 144, 153, 311-14.

b. Applicant's latest version of events alleges that he and Rachelle had consensual sex together at her house but offers no explanation how Rachelle's tampon ended up in the field behind his house. 20 RR 111; 21 RR 54.

c. Applicant's latest version of events alleges that after he killed Rachelle, the baby was in the baby's room and he put soft things around the baby and took Rachelle's body and left the house. But this does not explain how Rachelle's

mother discovered baby Avery on Rachelle's bed.

d. Another possible interpretation of applicant's statements ("[t]he baby was in the baby's room. I freaked out. I tried to put all the soft stuff around the baby and I took Rachelle and I hid her in a field behind my house") is that he removed baby A very from her crib and put her on Rachelle's bed where Rachelle's mother later found her. But to think that after killing Rachelle applicant would have removed the baby from an already secure place in her bedroom to Rachelle's bed where he then placed soft things around to secure her stretches the bounds of credibility and logic and is unworthy of belief.

51. The version of events applicant conveyed to Dr. Kessner completely lacks credibility, and the Court finds it is not true.

52. Applicant never asserts that he told his trial counsel about the version of events applicant conveyed to Dr. Kessner.

53. Given applicant's motive to reformulate what really happened and the absence of any indication that he presented this latest version of events to trial counsel, counsel's statement that they received a different version of events than Dr. Kessner is entirely credible.

54. The allegation that Rachelle's killing was triggered by an experience with Amy Lodhi is critical to Kessner's "catathymic homicide" theory. *See*

State's Writ Exhibit 5 at 46-47 (Meloy, VIOLENT ATTACHMENTS) (describing elements of catathymic violence, including an ego-threatening relationship and displacement of emotion onto the victim, the unconscious motivation for the act, and symbolic significance of the victim). Without knowing of this allegation, not even a psychologist intimately familiar with catathymic homicide would have been alerted to the theory.

55. Applicant has produced no evidence that most reasonable mental health professionals would have been familiar with a "catathymic homicide."

56. Dr. Kessner relies on Dr. J. Reid Meloy and his book VIOLENT ATTACHMENTS as an authority on catathymic homicide. Applicant's Writ Exhibit A at 5, 20-22.

57. In VIOLENT ATTACHMENTS, Dr. Meloy states that although the catathymic process "has been recognized for nearly a century, research continues to be disappointingly meager and limited to small clusters of case studies." Meloy, VIOLENT ATTACHMENTS at xiii (Rowman & Littlefield 2002) (available from the Collin County law library).

58. Dr. Meloy also explains that his descriptions of violence are intentionally selected from "idiosyncratic and in some cases bizarre forms of homicidal violence that, despite their rarity, heavily implicate…psychopathology of attachment." Meloy, VIOLENT ATTACHMENTS at xxiiii.

59. Applicant has produced no evidence that most reasonable mental health professionals would

have seen the evidence of "catathymic homicide" that Dr. Kessner seems to have found.

60. In addition to the lack of credibility in the version of event applicant told Dr. Kessner, Dr. Kessner's flashback theory itself lacks persuasive force:

a. The experience of a flashback is not a common occurrence that most jurors would have been familiar with.

b. It is difficult to believe that Amy Lodhi's accusation that applicant was disrespecting her was a traumatic enough event to generate the psychological potential for a future flashback.

c. Even if Rachelle said something like "This is all you want?" after they had consensual sex, it is difficult to believe that this comment would be enough to justify the abnormal psychological reaction of a flashback.

d. Jurors would have been skeptical of the idea that applicant acted in such a bizarre manner, a manner which just happened to be immune from objective proof and which would coincidentally absolve him of responsibility or at least lessen his blameworthiness (in applicant's view).

61. The credibility of Dr. Kessner's theory of the murder is undermined by the fact that the only testimony she read and considered from the guilt-innocence phase of applicant's trial was the testimony of the medical examiner. *See* Applicant's Writ Exhibit A at 3.

62. The credibility of Dr. Kessner's theory is significantly compromised by her inability to account for applicant's confession to the police in which he states that he choked Rachelle until he thought she was dead. *See* Applicant's Writ Exhibit A; SX 109.

63. Dr. Kessner's theory that applicant's murder of Rachelle was a catathymic homicide is contradicted by Dr. Kessner's own authority—Dr. J Reid Meloy:

> a. Dr. Meloy describes catathymic homicides as typically committed by a perpetrator with no prior history of violence. In fact, he states that an individual who is impulse-ridden and habitually acting out is "contraindicated in catathymia." Meloy, VIOLENT ATTACHMENTS at 52 (State's Writ Exhibit 5). Yet applicant had a substantial history of violence, especially against women. *See* 22 RR 46-48, 132-34, 152-57, 232-35; 23 RR 214; 24 RR 162-63.
>
> b. Dr. Meloy states that after a catathymic murder, the perpetrator usually feels a profound sense of relief because the murder has resolved a long-standing emotional conflict. See Meloy, VIOLENT ATTACHMENTS at 40, 48, 65 (State's Writ Exhibit 5). But instead of relief, applicant covered up for his crime by taking Rachelle's body to a location where he thought she would never be discovered—an act Meloy describes as characteristic of psychopathic violence. *See* Meloy, VIOLENT ATTACHMENTS at 50.

c. Dr. Kessner proffers none of the results of the psychological tests Meloy suggest to help identify a catathymic homicide. *See* Meloy, VIOLENT ATTACHMENTS at 47-48, 52 (State's Writ Exhibit 5).

64. After learning that Dr. Kessner's authority on catathymic violence would have characterized applicant's conduct as psychopathic violence, the jury likely would have believed applicant was an even greater future danger than without Dr. Kessner's testimony.

65. If trial counsel had offered Dr. Kessner's opinion of the murder as a catathymic homicide at the guilt phase of trial, counsel may have opened the door to otherwise inadmissible extraneous offenses. Since the catathymic homicide theory typically involves an actor with no prior incidence of violence, the State may have been entitled to rebut the applicability of that theory with proof of applicant's assault on his mother and sister, aggravated robberies against college students, a strangling assault on another young woman, or his sexual assault of a fourteen-year-old girl. 22 RR 46-48, 132-34, 152-57, 232-35; 23 RR 214; 24 RR 162-63.

66. The jury would not have credited Dr. Kessner's testimony that applicant's murder of Rachelle was a catathymic homicide in which he killed Rachelle after a flashback to a conversation he had had with Amy Lodhi.

Evidence of applicant's intent to kill admitted before the jury

67. During his interview with police following his arrest, applicant wrote a statement, explaining that he strangled Rachelle to unconsciousness in his truck, then drove her to a field behind his house and choked her again until he thought she was dead, and to make sure she was dead, he took a knife and "poked" her in the throat. 20 RR 240; SX 109.

68. Applicant choked Rachelle so hard that his thumbs hurt. 20 RR 204.

69. Whatever applicant's motivation may have been to kill Rachelle, the diligence with which he acted to ensure she was dead demonstrates that it was his objective to kill her.

70. Applicant's account of strangling Rachelle multiple times (in the truck not far from Rachelle's home and in the field behind his house) and then stabbing her to make sure she was dead is credible. It is internally consistent and consistent with the physical evidence in the case, it is detailed and describes where things occurred and why, and the account was given on March 24, 2004, only a week after the murder.

71. Applicant's actions after the murder are also evidence that he had committed an intentional murder:

> A few days after the murder, applicant was concerned that he might be becoming a suspect, and so he took Rachelle's body out to a rural area that he knew in order to bum her because he felt that

would remove his fingerprints and he would not get in trouble. 20 RR 201-202. He propped logs on the body, doused it with gasoline, lit it, and added gasoline every two minutes (SX 109) for about an hour while he chatted with friends on his cell phone. 20 RR 202. Once he was finished, he tied a piece of orange rope to her ankle, dragged the body off into a creek bed, covered it with vegetation to conceal it from view, and left thinking Rachelle's body would never be found. 20 RR 202-203.

Evidence of applicant's intent to kill that was accessible to the State but not admitted before the jury

72. Two videotapes of applicant's initial interview with the police following his arrest were admitted for record purposes during a hearing to determine the voluntariness of applicant's statements. *See* State's Exhibit 110 & 111; 20 RR 136 (exhibits admitted for record purposes); 21 RR 38-42 (exhibits offered and then withdrawn in front of the jury).

73. On the videotape, applicant and his interrogators had the following conversation:

Q: Did she ask you to take her home or let her go?

A: She was just like, "Just don't." She was like, she told me, "I won't tell anybody." "I won't—"

Q: Was she back behind the house when she told you that?

A: Yeah. "I won't tell anybody."

Q: So you passed her out first?

A: She's like she's like, "No," she's like, "Just stop," "I won't tell anybody, I won't tell anybody." I was like, "Man, you're gonna tell somebody."

Q: She wanted you to stop, she wanted to leave, you wouldn't—

A: I mean, I knew there wasn't no way. I wanted to believe her, I wanted to trust her.

Q: Uh-huh.

A: But I already knew what kind of trouble I was in.

Q: And all this conversation took place behind your house?

A: It took place behind my house, yeah.

Q: Tell me what she said, think back about what she was saying.

A: Like "I got a baby," I mean, this and that. I was like, "I'm sorry." I was like, "I can't. I'll already be in too much."

Q: Uh-huh.

A: "You're going tell somebody." I was telling her, "You're gonna tell somebody. You're gonna, you're gonna." She was like, "I won't tell anybody." I was like, "I can't, I can't trust you, I can't. I want to, but I can't."

Q: Uh-huh.

A: "I'm already involved in it too much. We've already had sex, and this and that. I can't."

SX 110 at counter 48:43 to 50:30. A few minutes later, applicant added:

> "I knew it was wrong. That's why I, I knew it was wrong. That's why I knew I couldn't stop 'cause if I stopped I would still get in trouble for it. You know, 'cause she was gonna tell somebody."

SX 110 at counter 53:30 to 54:06.

74. Applicant told the police during his first interview that as he was choking Rachelle in the truck, his headlights went out, and he thought it was because of a short circuit. He then told the police:

> But that's one of the reasons why I had to bring her to my house. Otherwise I would have done something with her that day. And I was like, I didn't know what to do, I was scared. So I hid her. I mean, I'm sure you know where I hid her now.

SX 110 at counter 30:54 to 31:17.

75. Applicant's admission that he had wanted to dispose of Rachelle's body somewhere else that night if his headlights had been working provides insight into his culpable mental state. At the time he was making the decision to drive Rachelle to the field behind his house, Rachelle was unconscious but still alive. The fact that applicant was making plans to dispose of her body at this moment indicates that he thought he had already killed her. Then, when Rachelle regained consciousness in the field behind applicant's house, applicant made the choice to choke her again. So even when applicant

had a second chance to spare the life of the woman he thought he had killed, he chose murder again. It is clear he intended to kill Rachelle.

76. In his interview, applicant demonstrated for the police how Rachelle's body was jerking, and he told them Rachelle was trying to breathe. Applicant then told police:

> I had a knife on me . . . When she was like, whenever I couldn't, it hurt. My thumbs still hurt. My thumbs still hurt. . . . My fingers, real bad, all of them do. I couldn't, she was, *I thought she was just going to wake back up*. So I got like, and barely poked her right there (indicating) . . . And blood started coming out, and that's when I covered her up. And I went home.

SX 110, counter 37:54 to 39:14.

77. Applicant's account that he stabbed Rachelle because he was afraid she would wake back up and tell someone what he had done to her is forceful evidence of his intent to kill. Applicant demonstrated for the police how Rachelle's body was jerking and how she was trying to breathe and where he stabbed her, all which lent the account tremendous credibility.

78. That applicant would want to kill Rachelle to prevent her from getting him in trouble is logical and easy to believe.

79. The medical examiner Dr. William Rohr testified that he believed that the penetrating wound on Rachelle's neck had been inflicted post-mortem. 20 RR 44. But even if Rachelle was already dead

when applicant stabbed her, his mistaking Rachelle's death rattle as a sign of life and his reaction to stab her in the neck is still unmistakable evidence of his intent to kill.

Dr. Kessner's belief that applicant lacked an intentional and knowing mental state

80. Even if the murder could be considered a "catathymic homicide," this does not mean that applicant lacked the intent to kill. Dr. J. Reid Meloy, the author Dr. Kessner relies on for her information about catathymic homicides, states:

> A catathymic crisis may explain the psychodynamic and motivational *reason* for the violence. The assessment of psychosis at the time of the violence is a *present mental state* issue that will only address diagnostic questions. Both motivation and present mental state are necessary foundations of knowledge to answer legal questions, such as responsibility at the time of the crime. These two areas of investigation need to be carefully delineated and not confused; each may shed light on the other.

Meloy, VIOLENT ATTACHMENTS at 48 (emphasis in original).

81. Dr. Kessner opines that applicant "did not have the necessary mental states of 'knowing' or 'intentional' for capital murder of Rachelle Tolleson." Applicant's Writ Exhibit A at 22.

82. Dr. Kessner's opinion is unpersuasive evidence that applicant did not form the intent to kill

Rachelle because she failed to specify what definition she used to conclude that applicant did not form the mental state of "knowing" and "intentional." *See* Applicant's Writ Exhibit A.

83. Dr. Kessner's opinion that applicant did not form the intent to kill Rachelle is further undermined because it is based on a version of events from applicant that this Court has found to be unworthy of belief.

84. Dr. Kessner's opinion is no evidence that applicant did not form the intent to kill Rachelle for another reason. Even if Kessner's psychological background may help her to articulate in clinical detail what applicant believed, perceived, or thought at the time of the murder, there is no evidence that Dr. Kessner has any particular expertise, knowledge, training, or experience in applying those facts to the legal definitions of "intent" or "knowledge" in Texas.

85. Dr. Kessner's explanation that applicant's rage was triggered by a past experience with an ex-girlfriend and was made worse by his lack of emotional attachment to his parents does not show that applicant lacked the intent to kill.

86. Dr. Kessner offers no alternative of what applicant's objective was (other than to bring about Rachelle's death) when he pressed his thumbs into her neck and strangled her.

87. Dr. Kessner states that applicant had "restricted reality testing" and points to the fact that applicant claims to have stabbed Rachelle after he already knew she was dead. She opines, "[t]he post-

mortem overkill violence suggests a deficit in his capacity to monitor his thoughts and emotions in relation to external reality." Applicant's Writ Exhibit A at 20. Dr. Kessner's statements are not persuasive.

88. Dr. Kessner's theory that applicant had restricted reality testing as evidenced by his post-mortem overkill violence is contradicted by applicant's statements to police—statements which are more credible because they were made closer to the time of the murder.

89. It is Dr. Kessner's theory that applicant knew Rachelle was dead but he still stabbed her anyway and thus his perceptions were out of line with reality. This is convoluted. It is a far simpler (and thus more believable) explanation that applicant was very well in touch with reality and stabbed Rachelle with the knife because he was afraid she was still alive, despite all his effort and physical exertion in strangling her, and he wanted to be sure there was not a witness around to identify him.

Transferred intent

90. Dr. Kessner's description that "Moises was psychologically reacting to Amy Lodhi ... Rachelle was not the object of his abandonment rage; she was an innocent person who was in the wrong place at the wrong time" stops short of asserting that applicant believed Rachelle was Amy Lodhi when he killed her. Applicant's Writ Exhibit A at 21.

91. Dr. Paula Lundberg-Love has submitted an affidavit in this cause, attached as Exhibit B to the writ application.

92. Dr. Paula Lundberg-Love expressly states that "in a state of extreme inebriation Moises thought that [Rachelle] was Amy." Applicant's Writ Exhibit B at 10.

93. Applicant does not refer to Dr. Lundberg-Love's statement in his application for writ of habeas corpus. He makes no argument concerning the statement and does not allege that it supports any alleged constitutional violation. Applicant has procedurally defaulted any claim as a part of any issue in this application that applicant believed he was killing Amy Lodhi when he was killing Rachelle. Judges are not required to construct a habeas litigant's legal arguments for him. *Small v. Endicott*, 998 F.2d 411, 418 (7th Cir. 1993). Neither is it the Court's responsibility to "conjure up unpled allegations." *McDonald v. Hall*, 610 F.2d 16, 19 (1st Cir. 1979). Applicant bears the burden of clearly pleading every element of his claim. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

94. In any event, it is not credible that applicant thought Rachelle was Amy when he killed her.

a. The claim suffers from the same implausibility as Dr. Kessner's "flashback" theory. It relies on applicant having acted beyond the normal range of behavior even though there is no objective proof that this occurred, and it just happens to mitigate his culpability (or so Dr. Lundberg-Love seems to believe).

b. Also, since Dr. Kessner's version of events differs from Dr. Lundberg-Love on this specific

point, applicant either gave the two psychologists different accounts on this point or Dr. Kessner discounted applicant's claim about not knowing who he was killing because she did not believe it herself.

c. Moreover, the claim that applicant killed Rachelle thinking she was Amy was never raised until this late stage of the proceedings. Given applicant's history of creating various versions of events, the Court cannot find this particular version credible.

95. Additionally, Dr. Lundberg-Love's theory has the potential for hurting the defense since his confusion about who he was killing makes it more likely that he would be a future danger to any other person he may later take for Amy Lodhi.

96. Even if applicant believed he was killing Amy Lodhi, this does not negate his intent to commit capital murder since his intent to kill Amy Lodhi would provide transferred intent for the capital murder of Rachelle. TEX. PEN. CODE § 6.04(b)(2).

Dr. Martin's conclusions about brain impairment

97. Dr. Stephen Martin has submitted an affidavit in this cause, attached as Exhibit C to the writ application.

98. Dr. Stephen Martin concludes that applicant has a mild degree of diffuse neuropsychological impairment. Applicant's Writ Exhibit C at 6.

99. Dr. Martin includes the results of thirty-five different neurological tests or tasks in his report.

The large majority of these results suggest that applicant does not have brain impairment:

Above Average, Average & Low Average	**Below Average**
WAIS-3 verbal, performance, full-scale IQ	
Wide Range Achievement Test-3: Reading	
WRAT-3: Spelling	WRAT-3: Arithmetic
Wechsler Test of Adult Reading	
Halstead Impairment Index	
General Neuropsychological Deficit Scale	
Auditory attention: slow- and fast-paced	Simple visual attention and tracking tasks
Sustained visual attention and visual sequencing	Complex visual attention and tracking
Semi-structured task with flexibility of thought, problem solving	
Abstraction ability and logical analysis	
Complex psychomotor problem-solving task	
Aphasia screening exam	Visual attention with rapid visual sequencing

Above Average, Average & Low Average	**Below Average**
Verbal fluency test for generating words beginning with a single letter	
Basic verbal expressive and receptive skills	
Visual spatial and motor integration skills	
Psychomotor problems solving task with a strong spatial component	
Ability to incidentally learn information not specifically set out to learn	
Verbal memory (simple paragraph): immediate recall	
Verbal memory (simple paragraph): 30-min-delayed recall	
Verbal memory (list learning) and recognition	
Visual memory (simple): 30-min delayed recall	Visual memory (simple): immediate recall

Above Average, Average & Low Average	**Below Average**
Visual memory (complex geometrical design): immediate recall	
Visual memory (complex geometrical design): 30-min delayed recall	
Visual memory (complex geometrical design): recognition of specific details & overall gestalt	Visual memory (complex geometrical design): reconstruction
Finger tapping speed & grip strength: left and right hand	
Fine motor dexterity: left and right hand	
Tactile form recognition	Clock drawing task
Gross visual field examination	

Applicant's Writ Exhibit C at 3-6.

100. Dr. Martin fails to explain why the result of these seven particular tasks or tests (out of the thirty-five results he provides in his report) indicates that applicant has neuropsychological impairment or dysfunction.

101. Although Dr. Martin asserts that the neuropsychological tests he administered to applicant are "standard and customary," he does not assert

that the particular combination of tests he used has been empirically validated or that there is a particular decision-making point for determining "impairment" that is comparable between the tests. Neither does Dr. Martin assert that his combined battery of tests produces results that have statistical significance, especially given that as a matter of simple chance, the more tests that are offered, the greater the chance of producing an anomalous result.

102. Dr. Martin does not state that applicant's performance shows with a scientific certainty that he has alcohol-induced brain impairment.

103. Instead, Dr. Martin opines that the areas of impairment on applicant's profile "involve[]" "aspects of frontal lobe mediated skills" and "skills associated with right hemisphere functioning" and that these areas in turn "correspond to cognitive areas that are frequently impaired in individuals that chronically abuse alcohol." Applicant's Writ Exhibit C at 6.

104. Dr. Martin's suggestion that applicant has alcohol-induced brain impairment depends on his finding a concentration of impairment in the frontal lobe and right hemisphere, but this premise is undermined by his finding that along with a mild degree of specific right hemisphere dysfunction, applicant has "a mild degree of *diffuse* neurological impairment." Applicant's Writ Exhibit C at 6. Dr. Martin fails to explain the discrepancy.

105. Dr. Martin asserts that research indicates that "alcohol [has] produced impaired scores on several components of the Halstead-Reitan Battery" of

tests. *See* Applicant's Writ Exhibit C at 4-6. But his suggestion that applicant may have alcohol-induced brain impairment is undermined by his failure to demonstrate that applicant had impaired scores on these particular components. Indeed, the only reference in his affidavit to the Halstead battery—applicant's overall score on the Halstead Impairment Index—shows that applicant had no evidence of brain damage. *See* Applicant's Writ Exhibit C at 4.

106. Dr. Martin states that as a twenty-year old, "it is reasonable to assume that Mr. Mendoza's frontal lobes ... may not have been functioning 'at full capacity' at the time of the offense even prior to any alcohol ingestion." Applicant's Writ Exhibit C at 7. Dr. Martin also opines that "the fact that at age 20, his frontal lobes were still in a developmental stage" would have enhanced the likelihood that frontal lobe dysfunction had a negative effect on his behavior. Applicant's Writ Exhibit at 8. These opinions arc speculative, lack persuasive force, and are no evidence of impairment. Dr. Martin's opinions are premised on an unfounded assumption that the research would hold true in applicant's case.

107. Dr. Martin cites no research in particular for his opinion concerning the developmental limitations of applicant's 20-year-old brain. *See* Applicant's Writ Exhibit C at 7-8. He merely states that it is so. Dr. Martin's opinions about adolescent brain development, in general, and applicant's adolescent brain development, in particular, are not admissible scientific evidence.

108. Despite having conducted neuropsychological tests on applicant, Dr. Martin references no specific finding in applicant's results that indicate his brain was not sufficiently developed.

109. Witnesses who were asked about applicant's intelligence and cognitive abilities believed applicant was fairly intelligent. *See* 22 RR 14 (Nancy Page, applicant's 9th grade algebra teacher); 22 RR 30 (Frank Bruno, applicant's pre-calculus teacher); 23 RR 134 (Mercedes Mendoza, applicant's mother); 24 RR 150 (Dr. Vigen, defense team psychologist).

110. Applicant has not presented persuasive evidence that he has or has ever had cognitive impairment.

Testing for brain impairment

111. Applicant also complains in issue two and five that, according to neuropsychologist Dr. Stephen Martin, counsel was ineffective for not testing applicant for brain damage. Application at 57, 143.

112. Applicant offers no evidence that the defense team did not have applicant tested for brain impairment, and trial counsel do not definitively state that they did not have applicant tested. *See* State's Writ Exhibit I at 4.

113. Applicant has not pointed to any evidence of functional limitations in applicant's mental health records that should have indicated to his trial counsel that neuropsychological testing was warranted. *See* Applicant's Writ Exhibit I, Attachment A-1, Bates stamp 300-599 (Applicant's Life Path records

in Toni Knox's attached files); 1 CR 193-241 (applicant's Life Path records produced in discovery).

114. Dr. Mark Vigen is a psychologist on the trial team who has had training in neuropsychological testing and experience evaluating brain damaged individuals. *See* Dr. Vigen's resume, Applicant's Writ Exhibit I, Attachment A-1, Bates stamp 215, 217, 224; 24 RR 45. He also interviewed applicant and reviewed his mental health records. 24 RR 116, 124-25. Yet applicant has offered no evidence from Dr. Vigen that he believed applicant showed signs of brain impairment or that he suggested to trial counsel that applicant should be referred for neuropsychological testing.

115. Dr. Vigen testified that applicant's adolescent, immature behavior indicated to him that he was still in an early adolescent stage of brain development. 24 RR 132.

116. Nothing in Dr. Kessner's affidavit suggests that after interviewing applicant, she believed that he had brain impairment. *See* Applicant's Writ Exhibit A.

117. Trial counsel saw nothing in applicant's "speech, thinking, etc." to suggest that applicant had brain impairment. State's Writ Exhibit 1 at 4.

118. In this Court's numerous interactions with applicant in hearings outside of the jury's presence and at end-of-the-day *ex parte* proceedings, the Court saw nothing to indicate that applicant had brain impairment. 20 RR 165-70; sealed volume 27.

119. Dr. Martin opines that a neuropsychological examination was warranted during applicant's defense teams' preparation and that in his opinion, trial counsel were ineffective for failing to present the results of his neuropsychological exams. Dr. Martin Affidavit, Applicant's Writ Exhibit Cat 8-9.

120. Applicant offers no evidence that, as a neuropsychologist, Dr. Martin is qualified to assess a defense attorney's decision whether to offer evidence such as Dr. Martin's at trial.

121. Because Dr. Martin fails to attest that the particular combination of neuropsychological tests he administered to applicant has been empirically validated or that the results are reliable and of statistical significance, applicant has failed to show that Dr. Martin's opinion concerning neurological impairment is based on a valid technique that has been properly applied on this occasion.

122. Dr. Martin's view that trial counsel could have conclusively proved the existence of neuropsychological damage at the time of trial is also speculative. He states that "research suggest[s] that brain dysfunction due to the effects of alcohol is often repaired after a period of abstinence." Applicant's Writ Exhibit C at 7. He offers no timeline for how quickly such repairs take place or in what percentage of cases repair takes place at all. On the information Dr. Martin provides, it is speculative to think that there would have been more evidence of impairment around the time of trial.

123. Trial counsel state that without conclusive evidence to a scientific certainty that applicant had

alcohol-induced brain impairment, counsel would not have offered evidence such as Dr. Martin's. *See* State's Writ Exhibit 1 at 4.

124. Trial counsel explain that "[j]urors in voir dire had indicated that they did not put much stock in voluntary intoxication as a defense or mitigating factor." State's Writ Exhibit 1 at 4. The record supports counsel's assertion. Nine of the twelve sitting jurors voiced their beliefs that a defendant's alcohol use would not ameliorate his culpability. *See* 6 RR 68 (Marsha Schmoll); 6 RR 238, 252-53 (John Stockdell); 7 RR 189-90 (John Comer); 10 RR 135 (Geri Johnson); 11 RR 25 (Michael Smith); 13 RR 53 (Dollie Jones); 14 RR 23 (Michael Lee); 18 RR 45-43 (Devesh Singh); 18 RR 88-89 (Richard Froebe).

125. Moreover, it appears applicant himself agreed with the jurors. In his police interview following his arrest, applicant stated that being intoxicated was no excuse for killing Rachelle. He specifically said, "*'Cause drunk people know what they're doing*. You don't see drunk people jumpin' in fires, you don't see drunk people shootin' themselves, I mean, every once in a while, but drunk people know what they are doing, you know." SX 110 at counter 28:33 to 28:59.

Juror's views on free will

126. Several of the jurors on applicant's jury had firmly held beliefs that despite having a difficult childhood, an individual still has free will to choose to do good or evil:

a. Juror Karen Jones said, "We may be born underprivileged. We may be born to abusive parents .... But it's the choices I've made. I think we're given free will and free choice. And it's those choices we make that decides our destiny in life. And some of us make very good choices, and others don't make very good choices." 9 RR 102-103.

b. Juror Geri Johnson said, "I've been exposed to enough [of people using alcohol and the "alcohol as an illness" component] that I think there's always a choice in the end." 10 RR 135.

c. Juror Dollie Jones said, "I do believe that people should be held accountable for their own actions. They have a choice whether to do the right thing or the wrong thing." 13 RR 52-53.

d. Juror Michael Lee said, "No matter what your circumstances are, how you were raised or the environment you grew up in, I think that does influence what you do. But I think when you're doing those things, you typically know whether it's right or wrong." 14 RR 24.

e. Juror Devesh Singh said, "[A]t some point you have to choose what you're going to make out of your own life, and that's the only standard we as society can hold each other accountable to. You can't get into ["Yes, but—"; "Yes, but—"; "Yes, but—"] type of thinking. I am sympathetic up to a point to that line of reasoning, but not enough to just be—just excuse anybody's behavior. 18 RR 61.

127. Applicant claims that counsel was deficient for failing to "educate" the jury that applicant's "choices" to commit violence against women had been made for him long before he was capable of making choices for himself. *See* Application at 37-38. But applicant has offered no expert opinion from an attorney with expertise in the defense of capital murder cases to substantiate such a claim.

Applicant's trial attorneys functioned effectively as counsel during trial

128. Counsel subjected the prosecution's case to meaningful adversarial testing:

a. Counsel actively participated in jury selection. *See* Reporter's Record Volumes 5-18.

b. Counsel cross-examined every single State's witness at guilt (19 RR 70, 139, 184, 219, 239, 264; 20 RR 9, 59, 120, 261; 21 RR 11, 68) and punishment (22 RR 22, 30, 42, 48, 63, 144, 158, 181, 193, 205, 218, 237; 24 RR 233, 243, 251, 261).

c. Counsel raised numerous legal objections to testimony and successfully excluded evidence, including testimony about threats applicant made against two girls, a sexually suggestive photograph of applicant and young woman (SX 76), and a drawing applicant had made in jail (SX 130). 19 RR 211; 20 RR 89; 24 RR 256.

d. Counsel called ten defense witnesses, including every member of applicant's immediate family. 23 RR 11, 39, 53, 139, 163, 193, 217, 240; 24 RR 87, 101.

e. Counsel presented a coherent closing argument at guilt, arguing that applicant was not guilty of the capital murder allegation, and at punishment, arguing that applicant should receive life rather than death. 21 RR 168-81; 25 RR 29-39.

Overall investigation

129. Applicant has presented no direct evidence of the reasoning behind his trial team's decisions with relation to their investigation of the case.

130. Applicant has presented no probative evidence, such as affidavits of other attorneys qualified and experienced in the defense of death penalty cases, that the investigation conducted by his trial team was deficient or unreasonable under the circumstances.

Vince Gonzales's qualifications

131. The Court appointed Vince Gonzales to assist the defense team at trial as a mitigation specialist. State's Writ Exhibit 2 at 1.

132. Trial counsel state in their joint affidavit that they were satisfied with Vince Gonzales's qualifications. State's Writ Exhibit 1 at 1-2, 5.

133. Vince Gonzales has submitted an affidavit in this cause, attached as State's Writ Exhibit 2 to the State's Answer.

134. Vince Gonzales had sufficient qualifications to assist trial counsel in their duty to investigate applicant's background, including:

a. 19 years of experience as a mitigation specialist;

b. Experience working on over 200 murder and capital murder cases;

c. Working as a consulting expert on a case with notorious mental health issues: *State v. Johnny Paul Penry*;

d. Training over the past seven years in mental health and mitigation issues;

e. Regularly appearing as a guest lecturer on mitigation issues for SMU law school's death penalty project.

State's Writ Exhibit 2.

Dr. Vigen's role in the investigation into applicant's background

135. Based on the statements of Vince Gonzales, Juan Sanchez, Angela Ivory Tucker, and the testimony of Dr. Vigen, it is evident that Dr. Vigen and his assistant Fran Dezendorf interviewed all of applicant's family members on behalf of the defense team as part of the investigation into applicant's background and potential mitigation:

a. Vince Gonzales states that Dr. Vigen performed portions of the investigation into applicant's family and background that Gonzales did not perform himself. State's Writ Exhibit 2 at 1.

b. Dr. Vigen testified. at trial that he and his assistant Fran Dezendorf interviewed each of the members of applicant's immediate family. 24 RR 115.

c. Trial counsel confirm that they decided to have Dr. Vigen interview applicant's family members because they believed his forensic background could assist them in "extracting sensitive information." State's Writ Exhibit 1 at 5.

136. Both trial counsel and Vince Gonzales are consistent about the various roles each member of the defense would play, especially in regard to conducting background interviews with applicant's family. Applicant has offered no evidence from Dr. Vigen that he was unclear about his role.

137. Toni Knox complains that the mitigation specialist should have conducted interviews with the family to investigate mitigation issues and then provided Dr. Vigen and a number of other experts with a social history. *See* Application at 110. But just because applicant's defense team delegated responsibilities differently does not establish that Dr. Vigen or any other defense team member was confused or unclear about their role.

138. Applicant has presented no evidence that no reasonable counsel would have a defense expert psychologist conduct the defense team's in-depth interviews with a capital murder defendant's family.

139. Applicant complains that Vince Gonzales lacked the clinical skills to recognize mental health conditions and identify appropriate experts. *See* Application at 84-85. But Applicant does not cite any caselaw, rule, statute, or constitutional provision that requires a mitigation specialist in particular to perform the role of screening for mental health conditions and identifying the relevant experts.

140. ABA Guideline 4.1(A)(2) states that the defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. It does not require this member to be the mitigation specialist. *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, (rev. ed. 2003) Guideline 4.1 & Commentary (reprinted in 31 HOFSTRA L. REV. 913, 1047 (2003)).

141. Applicant fails to cite any caselaw, rule, statute, or constitutional provision that requires a mitigation specialist in particular to perform any other particular function in the investigation.

142. ABA Guideline 4.1 is the guideline that recommends a team approach to the defense of capital cases and specifically names a mitigation specialist. Yet the commentary specifically states that Guideline 4.1 should be construed broadly, in part because defense counsel is in a superior position than the authors of the guidelines "to determine what assistance is needed to provide high quality legal representation under the particular circumstances at hand." ABA Guideline 4.1 & Commentary.

143. The Commentary to the ABA Guidelines 10.7, which applicant cites, does not require a mitigation specialist to perform all aspects of the mitigation investigation. ABA Guideline 10.7, Commentary.

144. ABA Guideline 10.7, which establishes a duty to investigate, puts the burden squarely on *counsel's* shoulders. *See* ABA Guideline 10.7. The

commentary also implicitly acknowledges that the mitigation specialist will play a contributory—not exclusive—role in the investigation. *See* ABA Guideline 10.7, Commentary.

145. Dr. Vigen's role in the investigation did not make notes available to the State that the defense team otherwise could have been withheld. Even if the mitigation specialist had conducted the family interviews and interviews with applicant, the mitigation specialist would have shared these interview notes with Dr. Vigen to use as a basis for his opinion, and consequently the State still would have had access to the interview notes since the expert had relied upon them for his opinion. *See* TEX. R. EVID. 705.

146. Applicant also has not established that Dr. Vigen and his assistant Fran Dezendorf would not have interviewed the family themselves and generated the same notes, even if the mitigation specialist had also conducted his own initial family interviews.

147. Trial counsel state that they preferred that Dr. Vigen be the one to explain negative facts for the defense instead of the State's witnesses. State's Writ Exhibit 1 at 6. Counsel also believed that if Dr. Vigen could acknowledge both the good and bad, he would seem more credible in the jury's eyes. *See* State's Writ Exhibit 1 at 6.

148. Counsel's decision to have Dr. Vigen in a position where he could testify about all of the facts, including those that were unhelpful to the defense, was a reasonable decision and a strategy that the

Court has seen other capable criminal defense attorneys adopt in other cases.

Rapport with applicant's family

149. Applicant has presented no probative evidence to support his accusation that the trial team as a whole failed to establish a rapport with applicant's family. *See* Application at 26, 89.

150. Toni Knox, a mitigation specialist appointed on the writ, has submitted an affidavit in this cause, attached as Exhibit I to the writ application.

151. In her affidavit and in the application, Toni Knox alleges hearsay from applicant's brother Paul Mendoza that he had some negative impressions of Vince Gonzales and that his feelings were hurt when Juan Sanchez, Vince Gonzales, and the defense investigator would laugh among themselves. *See* Knox Affidavit, Applicant's Writ Exhibit I at 11-12; Application at 89. As double hearsay, this is not admissible evidence. TEX. R. EVID. 801. But even if it were, it is only one family member's impressions and does not necessarily reflect the whole of his impressions for the whole of the defense team. It is quite possible that Paul Mendoza may have held these sentiments and still felt that Juan Sanchez and Dr. Vigen established a positive rapport.

152. Moreover, family members in Paul Mendoza's situation, who are trying to support a loved one who is facing the death penalty for his conduct, are apt to be more sensitive when they see the participants in the process carrying on with life as usual. Consequently, the hearsay statements are

not particularly persuasive evidence that the defense team failed to create a good rapport with Paul Mendoza.

153. In information Toni Knox attributes to "the family," Knox states that Juan Sanchez and Dr. Vigen spent more time with the family than Vince Gonzales. Applicant's Writ Exhibit I at 10. This, of course, would be appropriate given Dr. Vigen's role in soliciting sensitive information from the family.

154. There is ample evidence from multiple sources that applicant's mother was resistant to disclose negative information about the family and tried to prevent the other family members from disclosing such information:

a. Trial counsel explain that applicant's mother Mercedes Mendoza "sought to control how the family was portrayed" and that the family did not fully disclose problems in the family. State's Writ Exhibit 1 at 5.

b. Applicant's sister Elizabeth Pathos testified that her mother often minimized events in the family. 24 RR 93.

c. Applicant's brother Mario Mendoza testified that his mother would keep significant events in the family from him (like his father's hospitalizations), even though he lived just a mile down the road. 24 RR 174.

d. Dr. Vigen testified that Mercedes Mendoza wanted the family not to disclose negative things to the defense team in an effort to distort the truth and to "fake [being] good as a family,"

> that is, to present the family as emotionally and psychologically healthier than they really were. 24 RR 188. He testified that the family tried really hard to present themselves are a healthy, productive, and constructive family. 24 RR 74.

155. Communication is a two-way street. Any mitigating information that the family withheld was the result of applicant's mother's substantial resistance to such disclosure, not any deficiency in the defense team's attempts to foster the relationship.

156. Despite the family's resistance to disclose negative information, Vince Gonzales discovered information that the defense team used in its mitigation case at trial: applicant's father's suicide attempts and applicant's possible sexual abuse by an older cousin. *See* State's Writ Exhibit 1 at 2; 23 RR 87, 142-44 (testimony about suicide attempts); 23 RR 147-48 (testimony about incident with applicant's cousin Jorge).

157. Trial counsel both assert that Vince Gonzales built a good relationship with his family and specifically told the family the importance of revealing mitigating information. *See* State's Writ Exhibit 1 at 1.

158. Given that the Court does not find the hearsay statements Toni Knox attributes to Paul Mendoza to be admissible or persuasive and given the family's established resistance to disclosing negative information about the family, the Court finds trial counsel's statements about the rapport Vince

Gonzales established with the family to be more credible.

159. Applicant has not alleged what favorable information the family would have disclosed had the trial team established a better rapport with the family.

160. Indeed, even the various psycho-social history reports and chronologies Toni Knox composed indicate that applicant's violence was aberrational in a family of otherwise successful, law-abiding children.

161. Without stating a basis for her knowledge, Toni Knox asserts that Vince Gonzales brought law students with him to interview applicant on two occasions and opines "[t]his would not create an environment for Moises where he would feel safe in revealing important family information." Applicant's Writ Exhibit I at 11; Application at 90. These unfounded assertions are not evidence of a lack of rapport between Vince Gonzales and applicant.

162. Applicant offers no evidence about the interviews that the law students allegedly attended and what the purpose of those particular interviews was.

163. Applicant himself never asserts that the presence of the law students hampered his disclosure of information to Vince Gonzales or any member of the defense team.

164. Given applicant's frequent desire to share various versions of his story with investigators, members of the media, and others, the Court finds

that the presence of law students in two interviews, even if true, would not have impeded applicant's ability to communicate freely with Vince Gonzales or any other member of the defense team.

Dr. Vigen's testimony concerning the family dysfunction

165. Applicant and Toni Knox complain that trial counsel inadequately prepared Dr. Vigen to testify, and they point to his vague description of the Mendoza family as being dysfunctional and suggest his vagueness is due to oversight or a lack of a compiled report on applicant's social history. *See* Application at 84.

166. Without any further development elsewhere in the application, applicant repeats Toni Knox's bare accusation "It appears that the defense had not done a very thorough investigation of their expert witness to prepare for his possible vulnerabilities on the stand." Applicant's Writ Exhibit I at 31; Application at 95. This ground of ineffective assistance of counsel is procedurally barred due to inadequately pleading. It is not the Court's duty to scour the record in search of facts supporting his and his witness's conclusory allegation. Applicant never asserts what he believes were Dr. Vigen's vulnerabilities or what counsel should have done to investigate these vulnerabilities. Applicant bears the burden of clearly pleading every element of his claim, including how counsel's alleged deficiency contributed to his conviction or sentence, and this he has failed to do. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

167. In any case, applicant offers no evidence that counsel failed to investigate Dr. Vigen's vulnerabilities or that better investigation would have resulted in a different outcome for the defense.

168. Moreover, Dr. Vigen's testimony about the dynamics of the Mendoza family dysfunction is no evidence of inadequate preparation by counsel since his testimony was appropriately specific. Dr. Vigen explained that the once strong, strict father that applicant's older siblings knew withdrew from the family emotionally, and that his mother—in an effort to protect him—minimized problems and made up excuses for him. 24 RR 122. As a result, applicant failed to connect emotionally with his father, and instead of adopting the family's value system, he learned that he was exempt from rules others had to follow. 24 RR 122, 187.

169. Applicant has not established that there was anything further to discover that Dr. Vigen could have been more specific about to convince the jury that applicant's family was truly dysfunctional.

170. On the whole of the record, applicant has not demonstrated that his family was dysfunctional.

171. Applicant has proffered no direct evidence that the defense team did not compile a social history report.

172. Applicant has offered no direct evidence in support of his claim that Dr. Vigen did not have adequate records or documentation concerning applicant's mother and father. *See* Application at 111. This allegation is unreferenced and unsupported by any evidence and devoid of any specific pleading as

to what records or information he lacked about applicant's mother and father that would have made a difference.

173. Applicant has not shown that the lack of a social history report or any other records, reports, or documentation is the reason for any lack of specificity in Dr. Vigen's testimony.

174. Applicant has not met his burden of proving that if counsel had prepared a social history that was identical to the one Toni Knox compiled that Dr. Vigen would have testified in more detail.

175. Applicant has produced no evidence of specific examples of dysfunction that would have made a difference in the outcome of the proceedings even if counsel had discovered such examples and Dr. Vigen testified about them in front of the jury.

Defense team conducted a multi-generational psychosocial investigation

176. Toni Knox attached to her affidavit in this cause the interview notes Dr. Mark Vigen's assistant Fran Dezendorf took during the defense team's investigation before trial. *See* Toni Know Affidavit, Applicant's Writ Exhibit I at 36-37 & n.55; Attachment A-1, Bates stamp 227-244.

177. The interview notes from Dezendorf document that the defense team's investigation into applicant's psychosocial family history was multi-generational:

a. The notes document that the defense team uncovered that applicant's maternal uncle Francisco Sandoval had been diagnosed with bipolar

disorder and was prescribed medication. Applicant's Uncle Sandoval would sometimes act irrationally and was "not all there" when he failed to take his medications. He also had tried to kill his own son, but the son ended up killing him in self-defense. Applicant's Writ Exhibit I, Attachment A-1, Bates stamp 232, 240. Mendoza hung around these cousins off and on, and these cousins were likely taking drugs and drinking a lot. Bates stamp 240.

b. The notes also establish that the defense team uncovered that other cousins on Mendoza's mother's side who live in California were always in trouble and their father is an alcoholic. Bates stamp 235, 242.

178. Applicant alleges his trial counsel failed to adequately investigate and develop the effect of applicant's maternal uncle's mental illness on his development. Application at 92.

179. Applicant has offered no evidence in support of his allegation that trial counsel failed to investigate applicant's maternal uncle's mental illness. Applicant has offered no evidence that his uncle's mental illness in fact had any effect on his development.

180. Fran Dezendorf's interview notes demonstrate that the defense team asked family members about any family history of mental illness and discovered that applicant's uncle had a mental health history. Bates stamp 232, 240.

181. Toni Knox asserts that "[t]he Mendoza family believed that the Sandoval family had pulled off

a scam with the law [when applicant's cousin claimed self-defense for killing his father, applicant's maternal uncle] and this could certainly have influenced Moises." But because Knox would not have any personal knowledge about whether the Sandoval family "pulled off a scam" and she fails to name any particular family member or reference any person's affidavit, the Court cannot give credence to Knox's assertions.

182. Additionally, Toni Knox's assertion that this alleged fraud by the Sandoval family could have influenced applicant is merely speculative. Applicant has offered no evidence from any qualified witness that such an event would have had a psychological effect. Neither has applicant himself said that he thought the Sandoval family had "pulled off a scam" or that it had any effect on him.

Investigation concerning applicant's immediate family

183. Dezendorf's interview notes document that the defense team performed a comprehensive investigation of the members of applicant's immediate family:

a. The defense team discovered that the Mendozas had been married thirty-five years and they have five children, including applicant. They are a close family with a strong Catholic faith, and they still gather together for dinner on Sundays. Bates stamp 229-30, 235, 242-43.

b. The defense team knew Mendoza's father had hurt his back while working for Decker

Foods and afterwards was unable to work. He became depressed because he was no longer able to provide for the family and was institutionalized.

c. The defense team knew most of the family members worked to support the family; Mrs. Mendoza sold tamales in the community. Bates stamp 229, 241-42.

d. Applicant's brother Paul attended two years of college in pursuit of a mechanical engineering degree but had to drop out because of the expense. Bates stamp 235.

e. The defense team asked about but were told that there was not any physical abuse in the immediate family. Bates stamp 229 (Elizabeth Palos), 235 (Paul Mendoza), 239 (Mario Mendoza), 242 (Mercedes Sandoval Mendoza).

f. The defense team asked about but were told that there was no chronic alcohol or drug use in the Mendoza home. Bates stamp 235 (Paul Mendoza), 240 (Mario Mendoza), 242 (Mercedes Mendoza). Applicant's younger sister Ruthie got into drinking and drugs during her first years of high school, but she later straightened herself out. Bates stamp 240.

184. Dezendorf's notes document that the defense team performed a comprehensive investigation into significant events (or the lack thereof) in applicant's life growing up:

a. The defense team asked about but were told Applicant suffered no trauma at birth. Bates stamp 242.

b. The defense team asked about but were told that Applicant has never had a significant injury and never has had surgery. Bates stamp 242.

c. Except for being hospitalized for pneumonia when he was two-and-a-half years old, Applicant has not had any serious physical illnesses. Bates stamp 242.

d. Applicant's sister Elizabeth noticed that Mendoza was "disconnected" from the family when his father was hospitalized for depression, and he began to rebel more. But when his father returned home, he returned back to normal. Bates stamp 230.

e. Applicant did well in school and attended church activities with the family. Bates stamp 230, 242. His elementary school identified him for a gifted and talented program. Bates stamp 230. He also played on the basketball team at school. Bates stamp 234. He was a discipline problem with one female teacher but responded well to another male teacher. Bates stamp 238.

f. Applicant was sad when his older siblings grew up and moved out of the family home. Applicant's older brother Mario was like a second father to him. Bates stamp 230, 235.

g. One cousin on his mother's side who came from Mexico moved in with the Mendoza family for a time. He was a very bad influence on applicant, and on one occasion, family members

walked in on him attempting to sodomize applicant when he was a young teenager. Bates stamp 240.

h. After the incident with the cousin, applicant started wearing feminine clothes such as a pink frilly robe, but the family chastised him, and his behavior eventually stopped. Bates stamp 240.

i. Applicant graduated from high school and was never suspended, and his attendance in high school was good. His principal found him to be fairly intelligent. Bates stamp 234.

j. Applicant received a scholarship and graduated from a technical school. Bates stamp 230.

k. Applicant's behavior worsened when he began dating Amy Lodhi, who was a very negative influence on him. Applicant committed an aggravated assault on some college students with Amy's brother, and he was arrested for supposedly "abducting" Amy. Bates stamp 231, 236-37, 240, 243. Applicant's eldest brother Mario believed applicant's relationship with Amy was psychologically and physically abusive on both sides. Bates stamp 240.

l. Around this time, applicant started going to parties and drinking alcohol. Bates stamp 230, 236, 240, 244.

m. Applicant physically fought with his younger sister Ruthie on one occasion, prompting Mrs. Mendoza to call the police. Bates stamp 244.

185. Trial counsel state that they knew of applicant's father Concepcion Mendoza's lawsuit and employment problems. *See* State's Writ Exhibit 1 at 5.

186. Trial counsel knew the family would minimize the issues concerning Concepcion Mendoza's lawsuit and employment problems and that they would not testify about these issues as the defense would have liked. *See* State's Writ Exhibit 1 at 5. The family's trial testimony gave the impression that they believed their husband's and father's injury was genuine. *See* 23 RR 85 (Mercedes Mendoza); 23 RR 167-68 (Mario Mendoza); 23 RR 221 (Paul Mendoza).

187. The defense team also performed a comprehensive investigation into applicant's mental health history:

a. Applicant's mother sought mental health treatment for applicant in 2003 because of his aggressive behavior and depression. Bates stamp 236, 242.

b. The defense team learned from applicant's brother Paul that applicant was calmer and happier when he took his medication. Bates stamp 236.

c. As mitigation specialist Toni Knox acknowledges, Vince Gonzales obtained applicant's mental health records from Collin County Mental Health & Mental Retardation (MHMR) and Life Path Systems in McKinney. *See* Knox Affidavit, Applicant's Writ Exhibit I at 8; Applicant's Writ Exhibit I, Attachment A-1, Bates

stamp 300-599 (Applicant's Life Path records); 1 CR 193-241 (also produced in discovery).

188. The defense team conducted a thorough multi-generational investigation into the psychosocial history of applicant and his family.

189. Trial counsel state that Dr. Vigen was able to "basically extract the same information[] which Toni Knox was able to obtain." State's Writ Exhibit 1 at 5. Because applicant has not presented evidence of any specific, credible fact or event in applicant's background that counsel failed to uncover, the Court finds counsel's statement is true.

Investigation concerning applicant's father Concepcion Mendoza

190. Applicant has offered no evidence concerning what efforts the defense team engaged in to investigate how applicant's father's depression and hospitalization may have affected applicant.

191. Applicant has offered no evidence concerning what efforts the defense team engaged in to investigate applicant's father's lawsuit against his former employer Decker Foods for a work-related back injury.

192. Applicant has offered no evidence in support of Toni Knox's unfounded allegation that Dr. Vigen was unaware of information concerning Concepcion Mendoza's lawsuit against Decker Foods or that he was unable to consider that information in analyzing the dynamics of the Mendoza family. *See* Applicant's Writ Exhibit I at 13; Application at 91.

193. The mental health records for Concepcion Mendoza that the defense trial team obtained contain several references to his lawsuit regarding his back injury. *See, e.g.*, Applicant's Writ Exhibit I, Attachment A-1, Bates stamp 583, 585, 591-92, 612, 614.

194. Dr. Vigen testified that he reviewed Concepcion Mendoza's medical and mental health records from The Head and Spine Institute of Texas, Green Oaks Hospital, Wichita Falls State Hospital, Collin County Mental Health Mental Retardation Center, LifePath Systems, and North Star. 24 RR 123-25. Dr. Vigen listed the names of each of these sources of medical records and the dates during which Concepcion Mendoza received treatment for each of these providers.

195. Dr. Vigen also characterized these records as "two books filled with just — just on him alone." 24 RR 124. This characterization is accurate. Concepcion Mendoza's medical and mental heath records in the attachments to Toni Knox's materials comprise nearly 900 pages of documents. *See* Sealed Medical Records of Concepcion Mendoza, Applicant's Writ Exhibit I, Attachment A-1, Bates stamp 347-1241.

196. In light of Dr. Vigen's knowledge of the names of the providers, the dates of treatment, and the length and extent of Concepcion Mendoza's medical and mental health records, the Court finds it credible that he did actually review these records.

197. Toni Knox claims that while Concepcion Mendoza's lawsuit was pending, he was "consumed

with building his lawsuit, seeing doctors, gathering records, etc." Applicant's Writ Exhibit I at 13; Application at 91. But because Knox would not have any personal knowledge of these facts and she fails to state any basis for such knowledge, the Court cannot give credence to her assertions.

198. Toni Knox's affidavit demonstrates a willingness to make assertions without foundation and without referencing her source of knowledge. This willingness is damaging to her overall credibility.

199. Even if Dr. Vigen's information about the lawsuit was incomplete, Applicant has offered no evidence that Dr. Vigen would have altered his testimony with more complete information.

200. Applicant has failed to establish that no reasonable attorney would have conducted the level of investigation into Concepcion Mendoza's lawsuit that trial counsel conducted.

201. Toni Knox alleges, without stating a basis for her knowledge, that "[t]he entire [Mendoza] family willingly and/or unwillingly participated in Concepcion's fraudulent activities regarding worker's compensation and social security payments and other agencies the family received aid from because of their 'unreported' income and Concepcion's inability to work. This type of modeling behavior from his father and mother helped to set the example for Moises that under certain circumstances, it is acceptable to do unlawful things." Without knowing what basis Knox has for making such assertions, it appears to be mere speculation, and so the Court cannot give Knox's statements credence.

202. That Concepcion Mendoza lost his lawsuit against Decker Foods is no evidence that his lawsuit was fraudulent or that his injury was not real.

203. In his application, applicant fails to allege any particular facts to support his allegation that his father was involved in a fraud by collecting social security payments and still receiving unreported income. Without alleging facts and evidence to support the allegation, applicant fails in his burden to plead his claim. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

204. Concepcion Mendoza's mental health records indicate that he was "bringing in a little money picking peaches." Sealed medical records of Concepcion Mendoza, Documents attached to Toni Knox Affidavit at Bates stamp 751.

205. It is not credible to conclude that applicant's father's seasonal work picking peaches while also collecting disability pay somehow modeled for applicant that it was acceptable to commit cruel, inexplicable violence against women.

206. If counsel had tried to make the argument Toni Knox suggests concerning modeling behavior, trial counsel would have alienated the jury and undercut what mitigation the trial team had.

Defense strategy concerning experts

207. Trial counsel made the strategic decision to present their case with a minimal "parade of experts." State's Writ Exhibit 1 at 2.

208. Counsel made their decision based on negative responses by potential jurors in their questionnaires about defense experts. The juror questionnaire solicited the jurors' feelings on psychiatrists, psychologists, and other mental health professionals. *See* Juror Questionnaires, Volume 28 RR p.14. Two of the sitting jurors expressed some hesitation about the credibility of such witnesses (*See* Karen Jones and Devesh Singh Juror Questionnaires in Volume 26 at p.14). The Court also recalls other negative responses in the juror questionnaires, though these questionnaires since they included venire members who did not sit on the jury are not part of the appellate record of the case.

209. Counsel's decision not to pursue the theories of catathymic homicide, lack of attachment, the adverse childhood experience study, underdeveloped brain, and alcohol-induced brain impairment was reasonable in light of counsel's strategic choice not to present a "parade of experts."

210. Applicant now offers several experts who he alleges provide more persuasive mitigation testimony than what trial counsel presented. But in reviewing the facts of the offense and applicant's background, each of his new experts have arrived at a different explanation. Dr. Kessner thinks everything had to do with applicant's poor emotional attachment, which drove him to commit a catathymic homicide. Dr. Lundberg-Love thinks alcohol is to blame for the offense and applicant's father's depression for driving him to drink. Dr. Martin thinks chronic alcohol abuse and his relative youth affected his brain. Even ignoring the deficiencies of each of

the experts, in combination, their testimony does not present a persuasive, cohesive narrative. Instead, it seems precisely the kind of parade of experts that applicant's trial counsel was trying to avoid.

211. Trial counsel made the strategic decision not to call S. O. Woods as a testifying witness on prison life because "he was law enforcement at heart and could always be led on cross by the state." State's Exhibit 1 at 5.

212. Trial counsel brought both S. O. Woods and Dr. Mark Cunningham on the defense team so that they could funnel all their expertise through Dr. Vigen. State's Exhibit I at 2.

213. By having Dr. Vigen as the voice of these experts, counsel intentionally avoided putting on a "parade of experts" and positioned themselves to benefit from Dr. Vigen's "great rapport with juries." State's Exhibit I at 2.

214. Dr. Vigen testified, over the State's objection, that TDCJ had the capacity to prevent applicant from being a future danger. 24 RR 84-88.

215. At trial, this Court found that Dr. Vigen was qualified to give an opinion on future dangerousness. 24 RR 84-88.

216. Three of the jurors on applicant's jury expressed their beliefs that life in prison would be a significant punishment. *See* 6 RR 248 (John Stockdell); 7 RR 198-99 (John Comer); 10 RR 151 (Geri Johnson).

Dr. Vigen's statements about "something missing"

217. Dr. Vigen testified that "people just don't stand up one day and say,... [']I'm going to murder somebody today.['] The roots of this type of behavior generally go back a long ways in people's lives, and in most of the cases that I've seen there are incidents—there's the criminal history in the family or there's an alcohol and drug instance in the family or there's a lot of mental health issue [sic] in the family ... and these abnormalities cause or contribute to ... aberrant behavior like killing another human being. There's something missing in this case for me as a psychologist. There is none of that there. There's something I don't know. I can't tell you. From a — my intuition." 24 RR 187.

218. The Court understands the above testimony as an expression of Dr. Vigen's belief that when human beings do something so heinous as to intentionally take the life of another, there is always some past event or experience that must have contributed, that there is some explanation for the unthinkable. And that therefore, since he did not find any such past event or experience in applicant's history, it must be because it has not yet been uncovered.

219. The fact that Dr. Vigen did not find that past event or experience which could give him solace is not evidence of trial counsel's inadequacies or the inadequacies of their investigation. A far more persuasive explanation is that Dr. Vigen's underlying premise is not true—that sometimes there is nothing in a murderer's background to help explain what

he did. In this instance, there was nothing missing because there is simply nothing to find in applicant's background to explain his killing, rape, and kidnapping of Rachelle Tolleson.

Counsel's presentation of attachment disorder

220. Applicant complains that the defense did not have a "robust development and presentation of the theme of attachment disorder." Application at 29; *see also* Application at 102.

221. The trial team presented evidence at trial that applicant did not attach well to his parents. Dr. Vigen testified: "there is some dysfunction in terms of attachment. Moises didn't attach to his dad. He worked with him all the time, but he never could talk to him. They could never connect. He credits his mother with teaching him to be sneaky, you know, with all of that. He sees all of that. But there was [sic] never any attachments. By that I mean really attaching and connecting emotionally with another human being and taking in values, etcetera, and using those values and developing his own moral compass. That has not happened for him yet. Or if it is happening, it's in a very immature stage. It will happen." 24 RR 187.

222. Applicant has not established that he would have benefited from a more robust presentation of his lack of emotional attachment. Gilda Kessner acknowledges that "[a]t its simplest, attachment refers to the relationship between the infant and caregiver, generally the mother." Applicant's Writ Exhibit A at 13. Applicant has presented no probative evidence that he poorly attached emotionally to his

mother. Moreover in order to advocate a more robust theory of attachment disorder, counsel would have had to persuade the jury that Mario Mendoza did not adequately step-in as a surrogate attachment relationship for his absent father—something that applicant offers little probative evidence of. Finally, applicant has not established that the jury would have given weight to applicant's lack of attachment as an explanation for his conduct. Applicant has not demonstrated that the outcome of the proceeding would have been any different had counsel further investigated or developed applicant's poor emotional attachment.

Allegation of family violence

223. Toni Knox and applicant make several unreferenced, unsubstantiated allegations that there was significant on-going violence by Concepcion Mendoza towards his wife and children:

a. "Concepcion's spells often consisted of outward anger and *at times* included physical abuse of Mercedes." Application at 97; Applicant's Writ Exhibit I at 28.

b. "*Even when she was being abused*, Mercedes continued to attempt to protect the family reputation and made excuses for Concepcion." Application at 97; Applicant's Writ Exhibit I at 28.

c. "Mario and Paul describe *considerable use of violence* by their father while they were growing up." Application at 98; Applicant's Writ Exhibit I at 16.

d. "The family also protected the secret of their father's anger and *family violence*." Application at 99; Applicant's Writ Exhibit I at 17.

224. Toni Knox and applicant fail to provide any citations or references to testimony, hearsay, or otherwise to support these bare allegations.

225. None of these bare allegations are supported by an affidavit from a person with knowledge of these alleged events.

226. In the whole of the trial record and the voluminous habeas record, the only possible references to Concepcion Mendoza's use of force in the family are a reference in Concepcion Mendoza's medical records to a single incident of violence against his wife and hearsay statements that Toni Knox attributes to Mario Mendoza. These are the references:

a. One page from Concepcion Mendoza's medical records entitled "Client Data Sheet" and dated August 31, 1992, documents Concepcion Mendoza's violence to himself and others. *See* Sealed Medical Records, Attachment A-1, Bates stamp 569. It records two such episodes of violence: the first, in January when he "hit his wife repeatedly," and the second, a suicide attempt in May 1992. *Id*. The level of violence for the assault against his wife is indicated as "severe." *Id*. This same episode is documented in Case Worker Donna Jones's progress notes also from the same day, August 31, 1992. There Jones writes, "In January the [client] "blew up" and beat his wife up. He denies being able to remember any of it and spontaneously says, "I don't believe it." *See*

Sealed Medical Records, Attachment A-1, Bates stamp 591.

b. The hearsay Toni Knox attributes to Mario Mendoza states: "Mario said that he had seen his father slap his mother when she had continued to badger him. Although Mario stated that it was wrong of his father to hit his mother, she would not stop." Applicant's Writ Exhibit I, Attachment A-1, Bates stamp 256. In the same notes, Toni Knox states "Mario could remember times when his mother would get hit with the belt when she was try[ing] to get in between the boys when they were getting spanked." *Id*. at Bates stamp 257.

227. The statements that Toni Know attributes to Mario Mendoza are inadmissible hearsay, and the Court will not consider them. *See* Mario Mendoza Interview, Applicant's Writ Exhibit I, Attachment A-1, Bates stamp 252-58; TEX. R. EVID. 801.

228. Knox states in her interview notes that she would draft and send an affidavit for Mario Mendoza to review and sign, but no affidavit from Mario Mendoza has been filed swearing to any statements that Knox attributes to him. *See* Applicant's Writ Exhibit I, Attachment A-1, Bates stamp 252. Consequently, the Court finds that even if these hearsay statements were admissible, they are not credible.

229. Even if the words Toni Knox attributes to Mario Mendoza were admissible and true, there is no probative evidence that there was ever more than a single instance of violence by Concepcion

Mendoza against his wife since Mario may have witnessed the same January 1992 event referenced in Concepcion Mendoza's medical records.

230. The Court finds that Toni Knox's unreferenced allegations of ongoing violence by Concepcion Mendoza against his family are hyperbolic and untrue.

231. Applicant himself minimized or denies the impact of these events. *See* Applicant's Writ Exhibit B at 16. Without any evidence that applicant witnessed any instance of violence, he cannot meet his burden of showing that the result of the proceeding would have been any different even if the jury had heard testimony about this allegation.

The claim that counsel did not rebut aggravating factors

232. Applicant alleges that his counsel was deficient for not rebutting "the prosecution's theory that Mendoza kidnapped and raped Amy Lodhi." Application at 99.

233. It was decidedly not the State's theory that applicant kidnapped and raped Amy Lodhi.

a. The State asked Dr. Vigen whether applicant had *hit* Amy when she accused him of cheating on her. 24 RR 165. The State also asked applicant's brother Paul if he had found applicant and Amy at his house and if they had stolen $2,000 from his safe. 23 RR 232.

b. Not even in closing argument did the State portray applicant's interaction with Amy as a kidnap or rape: "he jerked that leg monitor off,

threw it down and started running from the law. And he *ran with* Amy Lodhi, and during that time is when he stole from his brother." 25 RR 43.

c. Applicant fails to reference anything in the record as evidence that it was the State's theory that applicant kidnapped or raped Amy Lodhi. The only presentation of evidence remotely concerning an abduction of Amy Lodhi was the defense team's attempt to question Paul Mendoza whether Amy Lodhi had falsely accused applicant of kidnapping her and Dr. Vigen's disclosure to the jury that the kidnapping was fake. 23 RR 238; 24 RR 165.

234. Regardless of whether it was the State's theory that applicant kidnapped or raped Amy Lodhi, trial counsel presented evidence to ensure that the jury never had that impression. Trial counsel established that when Amy and applicant had run away together and appeared at and later left Paul Mendoza's house, Amy had packed a toothbrush and clothing and left with applicant of her own accord. 23 RR 238-39.

235. Applicant has not established that counsel's investigation into Amy Lodhi and her family was inadequate. Trial counsel established at trial that applicant's family believed Amy Lodhi was a very negative influence on applicant, that she lied, and that her brother had been with applicant when they committed the aggravated robberies against the Richland College students, and that Amy's brother had been incarcerated several times. *See* 22 RR 176-78; 23 RR 116, 137, 185-86.

236. Applicant cannot show that further investigation into Amy Lodhi and her family was possible. Dr. Vigen testified that Amy was not willing to be interviewed by the defense. 24 RR 144-45. Dr. Vigen's statement entirely credible since Amy also refused to be interviewed by the habeas team. *See* Knox Affidavit, Applicant's Writ Exhibit I at 46 (appendix).

237. Applicant also has not established that trial counsel was deficient in interviewing applicant's new group of friends. *See* Application at 111. Dr. Vigen testified that he wanted to interview "more of the people who knew him" but that they were not willing to be interviewed. 24 RR 144-45. Dr. Vigen testified that he wanted to interview applicant's friends specifically but was unable to. 24 RR 146.

238. Applicant has not offered any evidence that these witnesses were willing to cooperate with the defense at the time of their investigation.

Counsel's presentation of adverse childhood experiences

239. Even after learning that Collin County Mental Health and Mental Retardation records indicate that his father beat his wife on one occasion, applicant maintains that there was no domestic violence in his home. Dr. Lundberg-Love Affidavit, Applicant's Writ Exhibit B at 8.

240. Relying on the research of Vincent J. Felitti, Dr. Lundberg-Love alleges that applicant had two adverse childhood experiences: a father who was depressed and hospitalized, and a mother who was

physically victimized by her husband on at least one occasion. Applicant's Writ Exhibit B at 6, 14, 16.

241. For the purpose of the Adverse Childhood Experiences (ACE) Study that Vincent Felitti conducted, a subject was found to have grown up in a household with a mother who was treated violently only if the subject affirmatively answered the survey question:

> *Was your mother (or stepmother)*
> Sometimes, often, or very often pushed, grabbed, slapped, or had something thrown at her?
> Sometimes, often, or very often kicked, bitten, hit with a fist, or hit with something hard?
> Ever repeatedly hit over at least a few minutes?
> Ever threatened with, or hurt by, a knife or gun?

Vincent J Felitti, et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 Am. J. of Preventive Medicine 245-58 (May 1998), accessible online at http://www.ajpmonline.net/article/PIIS07 49379798000178/fulltext#back-BIB39

242. Since applicant denied that there was any abuse in his household, he would not have met the same qualification for a mother who was physically victimized by her husband as those in the study. Consequently, Dr. Lundberg-Love's claim applicant had two adverse childhood experience based on Felitti's research study is not credible.

243. According to the study and Dr. Lundberg-Love, an individual with a history of one adverse

childhood experience (ACE) has a 6% chance of developing alcoholism. Applications Writ Exhibit B at 14.

244. Since application could, at most, only demonstrate one adverse childhood experience (ACE), and thus a 6% chance of developing alcoholism, applicant was better off with trial counsel's decision to present Dr. Vigen's unqualified testimony that applicant's father's depression made him more susceptible to alcoholism. *See* 24 RR 189-90. The evidence applicant has offered would have worsened, not bettered, the jury's evaluation of this particular mitigating circumstance.

Counsel's presentation of other mitigation theories

245. Trial counsel presented evidence from Dr. Vigen in support other mitigation circumstances:

a. Applicant's heavy use of alcohol with his new group of peers. *See* 24 RR 61, 123, 189.

b. Applicant's age and the fact that the frontal cortex of his brain was still developing, and that even for his developmental stage, applicant was psychologically immature and underdeveloped. 24 RR 132.

c. The adverse experience of his father's depression. 23 RR 85, 167-68, 221.

d. The fact that applicant's father had severe depression increased the likelihood that applicant would become an alcoholic. 24 RR 189-90.

e. The Texas Department of Criminal Justice has the expertise and capability to house and incarcerate applicant in such a manner that he will be a low or minimum risk for future violence in the prison system. 24 RR 127.

Concepcion Mendoza's suicide attempts

246. Concepcion Mendoza's mental health records that Toni Knox has attached to her affidavit include several unsworn hearsay statements that perhaps applicant or his brother(s) may have interrupted one or more of his suicide attempts:

a. "[A]pparently in May of this year [1992] he had plans of hanging himself in a shed outside of the home; however, his youngest son knocked on the door and interrupted him." Sealed Medical Records, Applicant's Writ Exhibit I, Attachment A-1, Bates stamp 470.

b. From records dated 9-25-92: "about 5 months ago was sharpening knife to cut arm and son asked him what he was doing." Bates stamp 539; *see also* Bates stamp 572 ("Tried to cut his arm, but son came in").

247. Neither Toni Knox nor applicant referenced this hearsay, and applicant has not articulated any claim based on it. It is not this Court's duty to construct a habeas litigant's legal arguments for him nor to "conjure up unpled allegations." *Small v. Endicott*, 998 F.2d 411, 418 (7th Cir. 1993); *McDonald v. Hall*, 610 F.2d 16, 19 (1st Cir. 1979). Applicant bears the burden of pleading his claim. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). Consequently, a constitutional claim inspired

by this hearsay (such as ineffective assistance of counsel for failing to uncover or present evidence that applicant allegedly witnessed his father's attempt to commit suicide) is procedurally barred because it has never been alleged.

248. Moreover, applicant has proffered no evidence that the defense team failed to uncover these references in Concepcion Mendoza's mental health records. Nor is there any evidence from a person with knowledge showing that these events actually occurred. There is no evidence that applicant's father or other family member would have testified favorably about any interrupted suicide attempt at the time of the trial, and there is no probative evidence that applicant was actually the son who interrupted any suicide attempt. Further, even the hearsay is true, there is no evidence that the son who knocked on the door or asked his father what he was doing was in a position to witness or understand that his father was attempting suicide. Even if it had been applicant who interrupted his father, there is no evidence that he remembered the incident or that it had any effect on him. Consequently, applicant cannot establish that counsel was deficient or that the results of the proceeding would have been any different. *See Strickland*, 466 U.S. at 687-88.

Exclusion of Dr. Sorensen at trial

249. In the sixth issue in his application, applicant argues that this Court's exclusion of Dr. Sorensen's testimony violated his Eighth Amendment right to present mitigating evidence. Application at 147, 167.

250. At trial, applicant objected to the exclusion of Dr. Sorensen's testimony on the ground that he met the *Daubert* test. 24 RR 80.

251. Applicant did not object to the exclusion of Dr. Jonathan Sorensen's testimony on the ground that it denied applicant the ability to present mitigating evidence. 24 RR 80.

252. At trial, Dr. Jonathan Sorensen testified that he was not presenting any opinions concerning the mitigation special issue and that his testimony was limited to the future-danger special issue. 24 RR 14.

253. At trial, applicant did not argue to the Court that exclusion of Dr. Sorensen's testimony would violate his constitutional rights even if the Court found his testimony inadmissible under *Daubert*, *Kelly*, and the Rules of Evidence. See 24 RR 80.

254. Applicant's trial objection on evidence grounds does not encompass the constitutional ground applicant presents in the application.

255. As both parties acknowledge, applicant complained in Issue 29 of his direct appeal that this Court erred in holding that Dr. Sorensen was not qualified to testify as an expert under Rule of Evidence 705. *See* Application at 6; State's Answer at 74; *see also* briefs on file with the Court of Criminal Appeals.

256. The State did not argue on direct appeal of this issue that the evidentiary objection had not been preserved. Consequently, on applicant's direct appeal of this issue, the Court of Criminal Appeals

will in all likelihood address the merits of this Court's decision to exclude Dr. Sorensen under the Rules of Evidence.

257. In his application, applicant does not complain about Dr. Sorensen's exclusion through the vehicle of ineffective assistance of counsel. *See* Application at 147-67.

258. Applicant does not suggest that trial counsel were somehow deficient in preparing Dr. Sorensen to testify at the out-of-court hearing or in failing to present certain evidence concerning the admissibility of Dr. Sorensen's testimony or in failing to raise certain objections. *See* Application at 147-67.

259. Dr. Mark Cunningham has submitted two affidavits in this cause, attached as Exhibits J and L to the writ application.

260. But even with Dr. Cunningham's affidavit and attachments, applicant has not established that Dr. Sorensen's study provides information about a group of individuals with relevance to applicant's situation since the study excluded the vast majority of persons like applicant—those who had been convicted of capital murder in a trial where the State sought death. Applicant has pointed to no evidence in his application that the violence rates for death-row inmates and other murderers are the same or similar.

261. Applicant has not shown that Dr. Sorensen's study offers data that is relevant to the future-danger special issue that the jurors had to answer since the study considered only those acts

that caused or had the imminent potential to cause serious bodily injury.

262. Even with additional evidence beyond that first presented to this Court, applicant still has not offered comprehensible evidence of a reliable rate of error in Sorensen's study.

263. At trial, this Court asked Dr. Sorensen at least three times what his rate of error was. 24 RR 79-80. Dr. Sorensen responded on two different occasions that he would be wrong 20% of the time if his prediction was 20% and 23.8% of the time if his prediction was 23.8%. 24 RR 79-80. This Court conveyed to Dr. Sorensen that the Court understood him to say that his statistical analysis was inaccurate 20% of the time, and Dr. Sorensen did not vary in his answer. The defense also never offered any further evidence or testimony to dispel the Court's understanding that Dr. Sorensen had a greater than one in five percent rate of error. 24 RR 79-80.

264. Dr. Cunningham's explanation in his affidavit does not provide this Court with a clearer understanding of Dr. Sorensen's actual error rate:

> The associated error rate of [Dr. Sorensen's] scale (and the estimates derived from it) involves the inaccuracy of the specified probability (i.e., the plus-minus range surrounding the probability estimate). Data informing this inaccuracy range of the scale is available from the statistical analysis of the scale and by cross-validation (which Dr. Sorensen accomplished with a separate sample of inmates convicted of manslaughter).

Applicant's Writ Exhibit L at ¶32; Application at 164.

Strategic decision not to call Dr. Cunningham as a testifying expert

265. Trial counsel brought Dr. Cunningham on the defense team so that Dr. Cunningham could consult with Dr. Vigen and provide him with expertise that Dr. Vigen could then relate to the jury. State's Writ Exhibit I at 2, 6.

266. While Dr. Cunningham may have assumed differently, trial counsel never told Dr. Cunningham that he would be called to testify. State's Writ Exhibit 1 at 5, 6.

267. It was trial counsel's strategy not to call Dr. Cunningham as a testifying expert. They expressly state that they never intended for Dr. Cunningham to testify. State's Writ Exhibit 1 at 5. Based on past experience with Dr. Cunningham, counsel explain that juries did not react to him well and that his testimony can be stilted and very unpersuasive. State's Writ Exhibit 1 at 5. According to trial counsel, Dr. Cunningham had been used as an expert in another trial in which Counsel Angela Ivory Tucker had been counsel. State's Writ Exhibit 1 at 7. The judgment and record from the Collin County death penalty trial of *State v. Michael Adam Sigala* (marked State's Writ Exhibits 3 & 4) specifically corroborate this fact.

268. The State's cross-examination in the *Sigala* trial also corroborate trial counsel's characterization of Dr. Cunningham's testimony as stilted and unpersuasive:

a. Dr. Cunningham's direct examination in *Sigala* was one-hundred forty-four pages long, consisting predominately of Dr. Cunningham giving extended explanations about slides he showed to the jury. 30 Sigala RR 126-270.

b. During direct examination alone, the trial judge in *Sigala* sustained forty-two objections by the prosecutor to Dr. Cunningham being either non-responsive or lecturing. 30 Sigala RR 126-270.

c. When Dr. Cunningham was asked on re-direct about the difference between, a psychiatrist and psychologist, Dr. Cunningham's response took two pages to transcribe. State's Writ Exhibit 3 at 31 *Sigala* RR 128-29.

d. Even in his affidavit submitted in this cause, Dr. Cunningham refers to his PowerPoint slides as "digital demonstrative exhibits." *See* Applicant's Writ Exhibit J at 2.

269. Several of Dr. Cunningham's statements during his cross-examination in *Sigala* undermined his credibility in that trial and would work to undermine his credibility in future trials:

a. Dr. Cunningham stated that a jury could not reasonably find Adolf Hitler a future danger based on his crimes alone since he had not committed those crimes in a prison setting. State's Writ Exhibit 3 at 31 Sigala RR 17.

b. Dr. Cunningham was not comfortable in saying without caveat that Charles Manson had

a bad character. State's Writ Exhibit 3 at 31 Sigala RR 74-75.

c. Dr. Cunningham is so convinced of the righteousness of using statistical data in deciding the special issues that he dismisses any juror's decision not to rely on his data as an unguided, emotional, knee-jerk response to impose the death penalty. State's Writ Exhibit 3 at 31 Sigala RR 22 & 81.

270. Dr. Cunningham's cross-examination in the *Sigala* trial would have been easy for the prosecutors in applicant's trial to obtain, and moreover, the prosecutors in applicant's trial knew about this particular cross-examination. Prosecutor David Waddill, who was one of the three prosecutors in applicant's trial, also prosecuted Michael Adam Sigala. *See Sigala Judgment*, State's Writ Exhibit 4. If trial counsel had called Dr. Cunningham to testify at applicant's trial, the State would have made effective use of the vulnerabilities Dr. Cunningham revealed in the *Sigala* trial as well as his prior statements.

271. Dr. Vigen was qualified to convey Dr. Cunningham's knowledge and expertise on future dangerousness to the jury. At the time, the two experts were publishing an article together reviewing the scholarship on death-row inmates. *See* Dr. Vigen resume, Applicant's Writ Exhibit I, Attachment A-1, Bates stamp 213; Mark D. Cunningham & Mark P. Vigen, "Death Row Inmate Characteristics, Adjustment, and Confinement: a Critical Review of the Literature," 20 Behave. Sci. & L. 191 (2002).

272. Dr. Vigen testified about applicant's low or minimum risk for future violence in the prison system, in part because of the penitentiary's capability to incarcerate him. 24 RR 127. Dr. Vigen also conveyed Dr. Cunningham and Dr. Sorensen's information about the low rates of violence in prison in a common-sense way. 24 RR 178.

273. After gathering information about the defense team members' experience with Dr. Cunningham, trial counsel made the strategic choice to call an expert who they believed would be more credible and likeable to a jury. This decision is entirely reasonable.

274. Dr. Cunningham states in his affidavit that he was out of the country during the punishment phase of trial, and this is confirmed by trial counsel's affidavit. Applicant's Writ Exhibit 3 at at ¶9; State's Writ Exhibit I at 6.

275. Dr. Cunningham states that defense counsel never asked him whether he could return in an emergency. *See* Applicant's Writ Exhibit J at 3. But the Court finds that Dr. Cunningham never intended to return and indeed would not have cut his trip short so he could testify at applicant's trial. Although it would have been simple enough to say, Dr. Cunningham never asserts that he would have returned if he was needed. Moreover, closer in time to trial, Dr. Cunningham's assistant informed trial counsel that if they needed him to testify, they "would need to ask the court to delay the trial." State's Writ Exhibit 1 at 6. Dr. Cunningham also states in his affidavit that he expected that trial

would have been delayed to await his return. Applicant's Writ Exhibit J at 3. If Dr. Cunningham anticipated that this Court would be waiting around for the end of his vacation for a chance to hear his testimony, then it is unlikely Dr. Cunningham would have made arrangements to return.

Conclusions of Law

Applicable law for reviewing the ineffective assistance of counsel claims

276. A habeas applicant bears the burden of establishing an ineffective assistance of counsel claim under the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). He must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that. there is a reasonable probability that but for counsel's deficient performance the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687-88. To succeed, an applicant must establish both prongs of the *Strickland* test by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

277. The constitutional right to counsel does not mean errorless counsel or counsel judged by hindsight. *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). A fair assessment of attorney performance requires that a reviewing court make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of coun-

sel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689.

278. The fact that another attorney might have pursued a different course of action does not mandate a finding of ineffective assistance. *Miniel v. State*, 831 S.W.2d 310, 325 (Tex. Crim. App. 1992). A court must evaluate any claim of ineffective assistance by looking to the totality of the representation and the particular circumstances of each case. *Thompson*, 9 S.W.3d at 813.

279. Strategic choices made after a thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690-91. After all, there are countless ways to provide effective assistance in any given case, and even the best criminal defense attorneys would not defend a particular client in the same way. *Id*.

280. Even when a defensive course chosen by counsel may have been risky, and perhaps highly undesirable to most criminal defense attorneys, this alone will not establish that counsel's conduct was deficient. *Ex parte Ellis*, 233 S.W.3d 324, 331 (Tex. Crim. App. 2007). Instead, a habeas petitioner must show that no reasonable trial attorney would pursue such a strategy under the facts of the particular case. *Id*.

ISSUE ONE (Counsel's theory of the case for life)

281. Applicant has not established that trial counsel's investigation was deficient. *See Strickland*, 466 U.S. at 693-94.

282. Trial counsel and the rest of the defense team conducted a comprehensive and thorough investigation into applicant's psycho-social history. Applicant has not established that trial counsel was deficient for pursuing the theories of the case that they pursued at either phase of trial. *See Strickland*, 466 U.S. at 693-94.

283. Mr. Sanchez and Ms. Tucker's decision to defend this case based upon a simple-murder not capital-murder theory rather than diminished capacity or intoxication was part of trial counsel's reasonable trial strategy formed after an investigation into the law and facts.

284. Reasonable trial strategy, not any inadequacy of investigation, explains why counsel did not formulate a guilt-innocence theory that attachment rage and/or a flashback to a prior conversation with ex-girlfriend Amy Lodhi is what motivated applicant to kill Rachelle.

285. Applicant has failed to rebut the presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. *See Ex parte McFarland*, 163 S.W.3d 743, 756 (Tex. Crim. App. 2005) (finding that criticisms about the manner of conducting cross-examination in hindsight did not rebut presumption of reasonable professional assistance).

286. Applicant has not met his burden of showing that no reasonable counsel would have pursued the theories that counsel did. *Ex parte Ellis*, 233 S.W.3d 324, 331 (Tex. Crim. App. 2007) (counsel not ineffective for offering evidence of extraneous offenses when done pursuant to a reasonable trial strategy, even if other attorneys might view that strategy as risky).

287. Applicant's theories of catathymic homicide, brain impairment and underdevelopment, the adverse childhood experience study, and attachment disorder would not have been admissible to contest *mens rea* at the guilt phase of trial. *See Jackson v. State*, 160 S.W.3d 568, 573-75 (Tex. Crim. App. 2005).

288. Expert testimony on applicant's susceptibility to alcoholism and on the effects of his intoxication on applicant's impulsivity on the night of the murder (as is presented in Dr. Stephen Martin and Dr. Lundberg-Love's affidavits) would not have been admissible at the guilt phase since voluntary intoxication is not a defense to capital murder. *See* Tex. Pen. Code § 8.04.

289. Applicant cannot establish that counsel was deficient for failing to pursue a guilt-phase theory that was supported only by incredible or inadmissible evidence. *See, e.g. Hathorn v. State*, 848 S.W.2d 101, 119 (Tex. Crim. App. 1992) (finding counsel not deficient for failing to request *Jackson v. Denno* hearing where such a request would have been futile in light of a record showing that the confessions were clearly voluntary).

290. Applicant has not met his burden of establishing that counsel was deficient for not pursuing a catathymic homicide theory or for not presenting the themes of attachment disorder, adverse childhood experiences, or alcohol abuse to the extent habeas counsel would have presented them. *See Strickland,* 466 U.S. at 693-94.

291. The Court incorporates here the same conclusions regarding "Timeline and Genogram" that the Court later makes in Issue Four.

292. The Court incorporates here the same conclusions regarding the defense team's rapport with applicant and his family that the Court later makes in Issue Four.

Prejudice is neither presumed nor established

293. An applicant can establish a constitutional violation of the right to counsel without any showing of prejudice only when counsel was totally absent or entirely failed to subject the prosecution's case to meaningful adversarial testing. *See United States v. Cronic,* 466 U.S. 648, 658 (1984).

294. In order to presume prejudice, counsel must have failed to oppose the prosecution throughout the proceeding as a whole, and not merely at specific points. *Bell v. Cone,* 535 U.S. 685, 697 (2002).

295. Because applicant had counsel who subjected the State's evidence to meaningful adversarial testing, the proper standard for reviewing counsel's conduct is *Strickland v. Washington,* not *United States v. Cronic.*

296. Applicant has not established that he was prejudiced by his trial counsel's theory of the case at guilt or punishment. *See Strickland,* 466 U.S. at 694.

297. Applicant has not established that even with further investigation, no reasonable trial counsel would have presented the theories counsel did.

298. Even if this Court were to consider the juror affidavits, Applicant has not established that the jurors would have been persuaded to find in applicant's favor after hearing Kessner's "flashback" theory. *See Strickland,* 466 U.S. at 694.

299. Nor has Applicant established that the jurors would have been any more persuaded to find in applicant's favor if they had heard more expert testimony concerning applicant's lack of emotional attachment to his father at the guilt phase, even if such evidence was admissible. *See Strickland,* 466 U.S. at 694.

300. The Court recommends that relief be denied as to this issue.

ISSUE TWO (Counsel's decision not to raise diminished capacity at guilt)

301. Applicant has failed to rebut the presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. *See Ex parte McFarland,* 163 S.W.3d 743, 756 (Tex. Crim. App. 2005) (finding that criticisms about the manner of conducting cross-examination in hindsight did not rebut presumption of reasonable professional assistance).

302. Applicant has not established that counsel was deficient in their investigation and later decision not to challenge the *mens rea* element of capital murder. *See Strickland,* 466 U.S. at 693-94.

303. Trial counsel's decision to defend this case based upon a simple-murder not capital-murder theory rather than diminished capacity or intoxication was part of trial counsel's reasonable trial strategy formed after an investigation into the law and facts. *See Strickland,* 466 U.S. at 688-89.

304. Applicant has failed to prove by a preponderance of the evidence that his trial team's strategy not to challenge the *mens rea* element of capital murder was unreasonable. *See Strickland,* 466 U.S. at 693-94.

305. To challenge the *mens rea* element at trial, counsel would have been required to present testimony about what applicant was thinking at the time of trial. Given applicant's statement that he knew what he was doing when he murdered Rachelle, counsel cannot be deficient for failing to marshal a defense that depended on testimony that counsel knew applicant could not truthfully provide.

306. Counsel's conduct must be evaluated from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. Counsel cannot be found deficient for not pursuing a version of events that applicant had not yet constructed.

307. Counsel's conduct is not deficient simply because he did not shop around for a psychologist willing to testify to the presence of more elaborate or

grave psychological disorders. *Poyner v. Murray,* 964 F.2d 1404, 1419 (4th Cir. 1992).

Applicant's evidence does not negate *mens rea* and would therefore be inadmissible at the guilt phase

308. While the defense may present evidence negating the *mens rea* element of the offense, and on occasion, this evidence may take the form of a defendant's history of mental illness, the defense may not argue that the defendant is absolutely incapable of forming an intentional or knowing mental state. *Jackson v. State,* 160 S.W.3d 568, 573-75 (Tex. Crim. App. 2005).

309. Evidence of applicant's attachment disorder would not have been admissible at the guilt phase of trial because it is the type of generalized mental deficiency evidence prohibited by *Jackson.*

310. Dr. Paula Lundberg-Love's opinion that applicant's childhood experiences increased his risk for drug and alcohol abuse is not evidence of mental deficiency. *See* Application at 56. Consequently, it could not have been evidence of mental deficiency that negated his intent on this particular occasion, and thus it was not admissible as diminished capacity evidence at the guilt phase.

311. Similarly, evidence suggesting applicant had alcohol-induced brain impaim1ent, deficits in cognitive and emotional functioning, inadequate brain development, and a greater susceptibility to alcohol abuse would not have been admissible at the

guilt phase of trial because it is the type of generalized mental deficiency evidence prohibited by *Jackson*.

312. To negate *mens rea,* evidence of a defendant's mental deficiency must be more than an explanation or motive for the offense. *Jackson,* 160 S.W.3d at 572.

313. The culpable mental state required for a capital murder committed in the course of aggravated sexual assault, kidnapping, or burglary is intent. TEX. PEN. CODE § 19.03(a)(2).

314. Intent for capital murder requires a showing that it was the defendant's conscious desire or objective to cause the victim's death. TEX. PEN. CODE §§ 6.03(a); 19.03(a)(2).

315. Motive and intent are not the same. *Rodriguez v. State,* 486 S.W.2d 355, 358 (Tex. Crim. App. 1972).

316. A mental deficiency that motivates a defendant to kill is not necessarily evidence that negates *mens rea;* sometimes that evidence of mental deficiency will actually make it more likely that the defendant formed the required mental state. *Jackson,* 160 S.W.3d at 572.

317. Dr. Kessner's theory of a flashback causing applicant overwhelming anger would not have been admissible at guilt to "explain the killing" because it does not negate applicant's intent to kill; instead, applicant's rage made it more likely that he wanted to kill. *See Jackson,* 160 S.W.3d at 572.

318. Dr. Stephen Martin's opinion that "Mendoza's violent actions at the time of the offense could have been mediated by emotional factors as opposed to reason [because of brain impairment]" would not have been admissible under *Jackson* because it does not negate intent. *See Jackson,* 160 S.W.3d at 572; Dr. Martin Affidavit, Applicant's Writ Exhibit C at 7-8. The presence of even extreme emotion does not foreclose the possibility that applicant formed the intent to kill.

319. Expert testimony on the effects of applicant's intoxication on the night of the murder (as is presented in Dr. Stephen Martin and Dr. Paula Lundberg-Love's affidavits) would not have been admissible at the guilt phase since voluntary intoxication is not a defense to capital murder. *See* TEX. PEN. CODE § 8.04.

320. Since applicant's alleged diminished capacity evidence would not have been admissible, counsel cannot have been deficient for failing to offer such evidence. *See Holland v. State,* 761 S.W.2d 307, 319 (Tex. Crim. App. 1988) (finding trial counsel was under no obligation to do what would amount to a futile act).

Applicant has not shown prejudice

321. Applicant cannot establish that he was prejudiced by counsel's failure to pursue a guilt-phase diminished capacity theory that was supported only by incredible and inadmissible evidence. *See Strickland,* 466 U.S. at 694.

322. Applicant has failed to prove by a preponderance of the evidence that his trial team's failure

to offer evidence of applicant's diminished capacity theories prejudiced him. *See Strickland,* 466 U.S. at 694.

323. Even if the Court believed the evidence applicant relies on for his diminished capacity theory was credible, the State's evidence of intent was so compelling that the result of the proceeding would not have been different even if counsel had presented applicant's diminished capacity theory. *See Mallett v. State,* 65 S.W.3d 59, 63 (Tex. Crim. App. 2001) (reiterating the standard for establishing the *Strickland* prejudice prong).

Neuropsychological testing

324. Applicant fails to establish that no reasonable attorney, under the circumstances known to counsel at the time, would have declined to have neuropsychological tests performed on applicant.

325. Neither has Applicant established that no reasonable attorney, under the circumstances known to counsel at the time, would have declined to present evidence such as Dr. Martin now offers. *See Ex parte Ellis,* 233 S.W.3d 324, 331 (Tex. Crim. App. 2007).

326. Applicant has not established that counsel was deficient for not having neuropsychological testing performed on applicant. Nor has applicant established that the results of the proceeding would have been any different if counsel had such tests performed. *See Strickland,* 466 U.S. at 693-94.

327. The Court recommends that relief be denied as to this issue.

ISSUE THREE (Actual innocence)

328. The Court of Criminal Appeals recognizes two types of actual innocence claims. The first is a *Herrera* claim, which is a substantive claim in which the person asserts a "bare claim of innocence" based solely on newly discovered evidence. *Ex parte Brown,* 205 S.W.3d 538, 544 (Tex. Crim. App. 2006) (citing *Herrera v. Collins,* 506 U.S. 390 (1993). The other type of innocence claim is a *Schlup* claim, which "does not by itself provide a basis for relief," but provides a "gateway" for establishing an otherwise-barred constitutional error that renders a person's conviction constitutionally invalid. *Brown,* 205 S.W.3d at 545 n.10 (citing *Schlup v. Delo,* 513 U.S. 298,315 (1995)).

329. Since this is Applicant's initial application for a writ of habeas corpus where he has no need of a "gateway" claim, applicant's actual innocence claim must be evaluated as a "bare" claim of innocence under *Herrera,* not under *Schlup*. *See* Application at 62, 72.

330. To establish a bare claim of actual innocence, the applicant must show by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence. *Ex parte Brown,* 205 S.W.3d 538, 545 (Tex. Crim. App. 2006).

331. Even when considering only the affidavits of applicant's two psychologists Dr. Kessner and Dr. Martin, and even in their best light, applicant has

failed to prove by clear and convincing evidence that no reasonable juror would have convicted him:

a. Applicant's evidence of actual innocence—the opinions of two psychologists and his argument that he lacked the necessary *mens rea* for capital murder—on their face constitute no evidence of applicant's actual innocence because psychological opinion testimony about a defendant's mental state at the time of an offense cannot provide proof so convincing that it will convince all reasonable jurors to reject his guilt. *See Boyde v. Brown,* 404 F.3d 1159, 1168 (9th Cir. 2005) (concluding that "the mere presentation of new psychological evaluations . . . does not constitute a colorable showing of actual innocence"); *Griffin v. Johnson,* 350 F.3d 956, 965 (9th Cir. 2003) (same).

b. The Court of Criminal Appeals in *Ex parte Briggs* rejected an actual innocence claim where the expert opinions the applicant relied on were not "medically indisputable." *Ex parte Briggs,* 187 S.W.3d 458,465 (Tex. Crim. App. 2005).

c. As in *Briggs,* the opinions of psychologists Dr. Kessner and Dr. Martin cannot establish applicant's actual innocence claim because the opinion of psychiatrists and psychologists have nowhere near approached scientific consensus in being able to determine a person's mental state at a particular moment in the past.

332. Applicant has failed to prove by clear and convincing evidence that no reasonable juror would have convicted him in light of the opinions of Dr.

Kessner and Dr. Martin. *See Brown,* 205 S. W.3d at 545.

333. Even before the State's evidence of applicant's intent to kill in the trial record and in applicant's videotaped interview with police is taken into account, Dr. Kessner and Dr. Martin's affidavits do not by themselves establish applicant's innocence.

334. Given the abundant evidence that applicant intended to kill Rachelle, applicant has failed to meet his burden of establishing his actual innocence.

335. In addition to a truly persuasive showing of innocence, the habeas applicant must also prove that the evidence he relies upon is "newly discovered" or "newly available." *Brown,* 205 S.W.3d at 545. "Newly discovered evidence" is evidence that was not known to the applicant at the time of trial and could not have been known to him even with the exercise of due diligence. *Id.*

336. The factual basis for new expert opinion testimony must also have been newly discovered. *Briggs,* 187 S.W.3d at 464-65.

337. Applicant's mental state at the time of the offense is not a newly discovered fact. Like a defendant asserting an alibi as "newly discovered evidence" when that defendant would have known where he was and who he was with, applicant also must have know prior to trial what his intention was in twice strangling Rachelle to unconsciousness and stabbing her in the neck. *See Baker v. State,* 504 S.W.2d 872, 875 (Tex. Crim. App. 1974) (rejecting

alibi evidence raised in motion for new trial since it was not "newly discovered").

338. The factual basis underlying Dr. Kessner's opinion (including Rachelle's words to applicant and the similarity to something Amy Lodhi said) are not newly discovered evidence. If these events had actually occurred, applicant would have known about them at the time they occurred and certainly before trial.

339. Applicant never claims that any mental deficiencies prevented him from being aware until now of his own mental state at the time he killed Rachelle.

340. The Court recommends that relief be denied as to this issue.

ISSUES FOUR AND FIVE (Trial counsel's mitigation investigation and presentation)

341. Applicant has not established that trial counsel's investigation was deficient. *See Strickland,* 466 U.S. at 693-94.

342. Trial counsel and the rest of the defense team conducted a comprehensive and thorough investigation into applicant's psychosocial history. Applicant has failed to rebut the presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. *See Ex parte McFarland,* 163 S.W.3d 743, 756 (Tex. Crim. App. 2005) (finding that criticisms about the manner of conducting cross-examination in hindsight did not rebut presumption of reasonable professional assistance).

343. Applicant has not met his burden of establishing that counsel was deficient for not pursuing a catathymic homicide theory or for not presenting the themes of attachment disorder, the adverse childhood experience study, and alcohol-induced brain impairment and underdevelopment to the extent habeas counsel would have presented them. *See Strickland,* 466 U.S. at 693-94.

344. Applicant has failed to prove by a preponderance of the evidence that no reasonable counsel would have made the decisions concerning investigation and presentation of mitigating evidence that counsel made. *See Strickland,* 466 U.S. at 693-94.

345. Applicant has failed to prove by a preponderance of the evidence that his trial team's investigation or presentation of mitigating evidence prejudiced him. *See Strickland,* 466 U.S. at 694.

346. To establish prejudice from counsel's failure to investigate, there must be a reasonable probability that, absent counsel's errors, the jury would have answered the mitigation issue differently, where the reasonable probability is sufficient to undermine confidence in the outcome. *Ex parte Gonzales,* 204 S.W.3d 391, 393-94 (Tex. Crim. App. 2006).

347. In order to establish prejudice from an allegation that counsel failed to conduct an adequate investigation, the new evidence that a habeas petitioner presents in post-conviction proceedings must differ in a substantial way—in subject matter and strength—from the evidence actually presented at sentencing. *See, e.g., Hill v. Mitchell,* 400 F.3d 308, 319 (6th Cir. 2005). Here, applicant has offered

nothing new and nothing so powerful that it might have influenced the jury's mitigation decision.

348. Applicant has neither overcome the presumption of reasonable professional assistance nor established that counsel was deficient for relying on Dr. Vigen to help conduct the mitigation investigation. *See Ex parte McFarland,* 163 S.W.3d 743, 756 (Tex. Crim. App. 2005) (finding that criticisms about the manner of conducting cross-examination in hindsight did not rebut presumption of reasonable professional assistance).

349. Applicant has failed to establish that counsel was deficient in the rapport the defense team created with applicant and his family.

350. Given applicant's family's reluctance to disclose negative information about their own family and the weakness of the additional facts alleged by applicant in his application and exhibits, applicant has not established that the family would have revealed anything favorable to him even if the trial team had established an even better rapport.

351. Applicant has not met his burden of establishing that counsel was deficient as evidenced by the testimony of Dr. Vigen. Applicant complains with the advantage of hindsight that Dr. Vigen's testimony "aided the prosecution." Application at 100. But Dr. Vigen's willingness to acknowledge that applicant's remorse was "somewhat . . . superficial" and that mitigating circumstances present in other capital murder cases are not present in applicant's history could very well have made him seem more objective and thus more credible in the eyes of

the jury. Moreover, applicant has not articulated exactly what counsel should have done differently to prepare Dr. Vigen so that he would not have testified as he did. Nor has applicant demonstrated that the results of the proceeding would have been any different without Dr. Vigen's concessions. *See Strickland,* 466 U.S. at 693-94.

352. As an expert relying on the opinions of other experts, Dr. Vigen was qualified based on his consultation with S. O. Woods to testify that TDCJ had the capacity to prevent applicant from being a future danger. *See* TEX. R. EVID. 703.

Habeas counsel's mitigation theories

353. Trial counsel was not deficient for not investigating or developing a theory of catathymic homicide at the punishment phase.

354. Trial counsel was not deficient in failing to explain why and how applicant's adverse childhood experiences (ACEs) paved the way to his alcohol abuse and brain damage. Applicant has neither alleged nor proven that no reasonable counsel would have failed to present these theories as habeas counsel would have. *See Ex parte McFarland,* 163 S.W.3d 743, 756 (Tex. Crim. App. 2005) (finding that criticisms about the manner of conducting cross-examination in hindsight did not rebut presumption of reasonable professional assistance).

355. *Strickland* requires more than showing that another attorney could have done things differently. *Strickland,* 466 U.S. at 689.

356. As the Fifth Circuit Court of Appeals recognizes:

> We must be particularly wary of "argument[s] [that] essentially come[] down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing.

Dowthitt v. Johnson, 230 F.3d 733, 743 (5th Cir. 2000).

357. Applicant has not established that by not presenting these theories in the same way habeas counsel suggests, counsel's performance was deficient.

358. Applicant has not met his burden of establishing that the results of the proceeding would have been any different had counsel pursued habeas counsel's adverse childhood experience theory and youthful brain theory. Given this particular jury's view on free will and personal choice and responsibility, this jury would not have given these mitigating factors weight in their decision.

359. Applicant alleges that counsel's investigation revealed that further investigation into attachment disorder was necessary and that counsel failed to follow up on such investigation. Application at 73-74, 102. Applicant has offered no evidence of what counsel's investigation initially revealed and what further investigation counsel should have pursued.

360. Applicant bas not established that counsel failed to uncover evidence of applicant's lack of attachment or that no reasonable counsel would have conducted the investigation and presentation of attachment that counsel did. The defense team presented evidence that applicant did not attach well to his father and argued that this contributed to applicant's associate with a negative peer group and applicant's taking on their values instead of his families. 24 RR 122, 187. Applicant cannot establish that the results of the proceeding would have been any different with a different emphasis on the importance of attachment disorder. *See Strickland,* 466 U.S. at 693-94.

361. The defense team interviewed applicant and each of the members of his immediate family and reviewed his school and mental health records. There is no reason to believe that there were any other sources of information to probe for evidence to support his claim of poor emotional attachment to his parents.

362. Jurors already understand from common sense and life experience that alcohol use can have a negative result on an individual's judgment and behavior. Counsel was not deficient for failing to produce expert testimony on this factor. Indeed, a jury may feel some offense at the defense calling an expert to tell them what they already know.

363. Applicant cannot demonstrate that a more robust presentation of applicant's alcohol use would have made a difference in the outcome, especially given the views of several of applicant's jurors on

personal responsibility and alcohol use. Trial counsel state that they "took great care in the manner in which [applicant's] drug and alcohol use was presented because Jurors in voir dire had indicated that they did not put much stock in voluntary intoxication as a defense or mitigating factor." State's Writ Exhibit 1 at 4. The voir dire record substantiates trial counsel's statement. Nine of the twelve sitting jurors voiced their beliefs that a defendant's alcohol use would not ameliorate his culpability. *See* 6 RR 68 (Marsha Schmoll); 6 RR 238 & 252-53 (John Stockdell); 7 RR 189-90 (John Comer); 10 RR 135 (Geri Johnson); 11 RR 25 (Michael Smith); 13 RR 53 (Dollie Jones); 14 RR 23 (Michael Lee); 18 RR 45-43 (Devesh Singh); 18 RR 88-89 (Richard Froebe).

364. Applicant also cannot establish that the result of the proceeding would have been different had counsel emphasized applicant's alcohol use since applicant himself admitted in his confession to police that being drunk was not an excuse "'Cause drunk people know what they're doing." SX 110 at counter 28:33 to 28:59.

365. Applicant cannot establish that counsel was deficient for not calling S. O. Woods. Applicant has offered no evidence that no reasonable attorney would have failed to call S. O. Woods in lieu of using Dr. Vigen to convey S. O. Woods's expertise to the jury. *See Ex parte Ellis,* 233 S.W.3d 324, 331 (Tex. Crim. App. 2007) (counsel not ineffective for offering evidence of extraneous offenses when done pursuant to a reasonable trial strategy, even if other attorneys might view that strategy as risky).

366. Applicant cannot establish that counsel was deficient for not calling S. O. Woods as a witness in light of counsel's concern that he was too easily led by the State on cross-examination and "law enforcement at heart."

367. Applicant has not established that counsel was deficient in failing to further investigate or present evidence that applicant may have had an underdeveloped brain.

Further investigation of family mental illness

368. Applicant alleged that counsel's investigation revealed that further investigation into applicant's maternal uncle's mental illness was necessary and that counsel failed to follow up on such investigation and develop its effect on applicant's development. Application at 73-74, 92. Applicant fails to prove that the defense team did not know of applicant's maternal uncle's mental health history, including his institutionalizations and diagnoses.

369. Applicant fails to allege how any failure on counsel's part to present this information before the jury contributed to his conviction or sentence. *See Ex parte Maldonado,* 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

370. Applicant does not allege, much less prove, that Dr. Vigen would have changed his testimony or psychological evaluation if he had known more about applicant's maternal uncle's mental health history.

371. Applicant has also not met his burden of establishing that no reasonable attorney would have

failed to present that applicant's maternal uncle had received diagnoses for schizophrenia and alcohol dependence in the 1980's. Neither has applicant established that if counsel had presented this information, it would have made a difference in the outcome of the proceedings. *See Strickland,* 466 U.S. at 687.

Presentation of family history of alcoholism

372. In support of his allegation that trial counsel failed to adequately investigate and develop the effect of applicant's maternal uncle's mental illness, applicant quotes a portion of Toni Knox's affidavit discussing applicant's maternal uncle's mental illness. At the end of the quoted portion, Toni Knox adds as an afterthought: "there was no presentation of the amount of alcohol abuse and/or dependence within the family, including Uncle Francisco." Applicant's Writ Exhibit I at 15-16; Application at 92.

373. Applicant himself never refers to this statement or alleges counsel's performance was deficient for failing to present any family history of alcohol abuse or dependence.

374. A statement by a witness in a passage quoted for a different purpose and not tied to any constitutional claim is not enough to state a claim. Applicant has procedurally defaulted any such claim by failing to plead a claim and failing to allege any facts to show how an error contributed to his conviction or sentence. *See Ex parte Maldonado,* 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

375. It is not for this Court or any other reviewing court to piece together applicant's claim for him

from afterthoughts and undeveloped ideas in affidavits attached to the application. Judges are not required to construct a habeas litigant's legal arguments for him. *Small v. Endicott,* 998 F.2d 411,418 (7th Cir. 1993). Neither is it the Court's responsibility to "conjure up unpled allegations." *McDonald v. Hall,* 610 F.2d 16, 19 (1st Cir. 1979). Applicant bears the burden of clearly pleading every element of his claim. *See Ex parte Maldonado,* 688 S.W.2d 114, 116 (Tex. Crim. App. 1985); *see also Ex parte Chappell,* 959 S.W.2d 627, 630 (Tex. Crim. App. 1998) (refusing to consider a claim unsupported by argument or authority).

376. In any event, applicant has offered no evidence in support of an unstated allegation that counsel was deficient for not presenting a family history of alcohol abuse or dependence. Applicant has not referenced any admissible evidence that counsel should have presented showing a family history of alcohol abuse or dependence. Neither has applicant met his burden of establishing that no reasonable counsel would have failed to present such evidence. Further, given the views of several of applicant's jurors that each individual still has a choice whether to use alcohol despite a family history of alcoholism, applicant has not established that the result of the proceeding would have been any different had counsel presented such evidence. *See Strickland,* 466 U.S. at 693-94.

Timeline and Genogram

377. Applicant has no direct evidence that the defense team failed to construct a timeline or genogram.

378. Applicant has produced no evidence about what factors trial counsel may have weighed in deciding not to construct or present a timeline or genogram. Therefore, he has not overcome the strong presumption that counsels' conduct was within the wide range of reasonable professional assistance. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

379. Because of applicant's defective pleading, applicant procedurally defaulted any claim that counsel was deficient for failing to generate a genogram. Applicant never alleges how a failure to generate a genogram contributed to his conviction or sentence. *See Ex parte Maldonado,* 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

380. Applicant has not presented any evidence from experts in the defense of capital murder cases to establish it was unreasonable for trial counsel to decline to introduce a timeline or genogram based on the facts that counsel knew at the time.

381. Applicant has not established that no reasonable counsel would have failed to construct or introduce a timeline or genogram. *See Ex parte Ellis,* 233 S.W.3d 324, 331 (Tex. Crim. App. 2007).

382. Applicant argues that had the defense team prepared a timeline, they would have recognized the critical role of Concepcion Mendoza's dysfunction in applicant's development and the need to investigate this issue further. Application at 20 & 96. But this allegation is not persuasive:

a. The overwhelming majority of Toni Knox's timeline is a restatement of information in Concepcion Mendoza's MHMR records, which this Court has found that the defense reviewed.

See Applicant's Writ Exhibit I, Attachment I-B.

b. Toni Knox's assertion that the timeline establishes that "everything revolved around Concepcion and his frailties" is not credible. *See* Applicant's Writ Exhibit I at 28. The dominance of applicant's father's medical records in Knox's timeline distorts their importance. Because applicant's father was the only person in the family being treated for his psychological problems, only his emotions and conflicts at the time were being documented. But this is not persuasive evidence that everything in the family revolved around him and his frailties.

383. Applicant has not met his burden of showing that had counsel offered a timeline such as Knox's into evidence it would have been relevant and not hearsay.

384. A genogram would not have been particularly helpful since it would have drawn attention to the fact that no one in applicant's immediate family had a history of drug or alcohol dependency or a history of violent crime. In a family that was largely free of substance abuse or criminal history, applicant's multi-colored box—indicating his drug and alcohol use, his mental health issues, and violent crimes—would have made him an anomaly.

385. Applicant has failed to prove by a preponderance of the evidence that constructing or presenting a genogram or timeline would have benefited him. Applicant has failed to show that counsel's alleged errors were so serious as to deprive him of a fair trial whose result is reliable. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984).

Failing to prepare family members

386. Applicant alleges that counsel's performance was deficient because:

> Due to the lack of a mitigation theory, there was not an effective presentation of the mitigation facts to the jury.
>
> – Minimal strategy and preparation in the testimony of family members
>
> – Minimal preparation of mitigation exhibits for the jury to better illustrate information

Application at 83.

387. While applicant discusses trial counsel's mitigation theory in his application, he never again develops—much less mentions—the complaint concerning counsel's preparation of witnesses.

388. Other than his complaint about not constructing a timeline or genogram (which is addressed above), applicant never again mentions a complaint about not preparing mitigation exhibits for the jury.

389. These allegations are procedurally barred due to deficient pleading. It is not sufficient that the petition allege that witnesses were inadequately

prepared or that too few exhibits were prepared; these are mere conclusions of law. *See Ex parte Maldonado,* 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). Applicant must allege facts specific to his case by referencing particular testimony, name particular exhibits that were missing, or discuss what counsel did or failed to do regarding the preparation of certain named witnesses.

390. Judges are not required to construct a habeas litigant's legal arguments for him nor "conjure up unpled allegations." *Small v. Endicott,* 998 F.2d 411, 418 (7th Cir. 1993); *McDonald v. Hall,* 610 F.2d 16, 19 (1st Cir. 1979). Applicant bears the burden of clearly pleading every element of his claim, including how counsel's alleged deficiency contributed to his conviction or sentence. *See Ex parte Maldonado,* 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

391. Without evidence supporting applicant's bare conclusory allegations, applicant fails in his burden to establish that counsel was deficient or that the results of the proceeding would have been any different. *See Strickland,* 466 U.S. 668, 687-88.

Rebutting alleged aggravating factors

392. Applicant has not established that counsel was deficient for failing to rebut the State's evidence of aggravating factors.

393. Since it was not the State's theory that applicant kidnapped and raped Amy Lodhi, counsel could not have been deficient for not rebutting a theory that the State never argued.

394. Applicant has not shown that further investigation into Amy Lodhi and her family would have resulted in anything admissible and beneficial for the defense.

395. Given the absence of State's evidence about a kidnapping or rape of Amy Lodhi and the evidence applicant's trial counsel presented-that any such kidnapping was fake, Applicant cannot show that there would have been any difference in the outcome of the proceeding even if counsel had conducted further investigation into Amy Lodhi.

396. Applicant has not established that no one on the defense team conducted interviews with applicant's new group of friends.

397. Applicant fails to plead the names of the particular friends that counsel should have interviewed, what they would have testified to at the time of trial, and how this would have benefited the defense. This issue is procedurally defaulted for failing to adequately plead facts. *See Ex parte Maldonado,* 688 S.W.2d 114, 116 (Tex. Crim. App. 1985) (holding that applicant bears the burden of clearly pleading every element of his claim).

398. Applicant has not demonstrated that any of applicant's new group of friends were willing to · cooperate with the defense at the time of their investigation. Applicant has also not established that applicant's new group of friends had anything admissible or beneficial to the defense for applicant's trial counsel to uncover through their investigation.

There is no reason to believe the result of the proceeding would have been any different. *See Strickland,* 466 U.S. at 496-94.

Neurological testing

399. Applicant fails to establish that no reasonable attorney, under the circumstances known to counsel at the time, would have declined to have neuropsychological tests performed on applicant.

400. Neither has Applicant established that no reasonable attorney, under the circumstances known to counsel at the time, would have declined to present evidence such as Dr. Martin now offers. *See Ex parte Ellis,* 233 S.W.3d 324,331 (Tex. Crim. App. 2007).

401. Applicant has not established that counsel was deficient for not having neuropsychological testing performed on applicant. Nor has applicant established that the results of the proceeding would have been any different if counsel had such tests performed. *See Strickland,* 466 U.S. at 693-94.

Lack of prejudice

402. Nothing in the theories that applicant complains that trial counsel should have presented is on par with the graphic descriptions of a "nightmarish childhood" uncovered in *Wiggins* and *Williams v. Taylor*. *See Wiggins,* 539 U.S. at 522; *Williams,* 529 U.S. 362, 395 (2000).

403. At their core, the theories of catathymic homicide, poor emotional attachment, the adverse childhood experience study, applicant's adolescent brain, and his alcohol-induced brain impairment

would clash with the jurors' fundamental philosophical beliefs concerning free will and choice.

404. Even if counsel had presented these theories as habeas counsel would have liked, he could not have persuaded the jurors to reject their fundamental philosophical beliefs in order to adopt his view that he was a victim of factors beyond his control, and that he did not choose to commit violence against Rachelle and his other victims.

405. The Court recommends that relief be denied as to this issue.

ISSUE SIX (Exclusion of Dr. Sorensen's testimony at trial)

406. Because applicant failed to object at trial that the exclusion of Dr. Sorensen's testimony violated his right to present mitigating evidence, applicant has procedurally defaulted his habeas claim on such grounds. *See Ex parte Boyd,* 58 S.W.3d 134, 136 (Tex. Crim. App. 2001); *Ex parte Pena,* 71 S.W.3d 336, 338 (Tex. Crim. App. 2002) (citing *Ex parte Bagley,* 509 S.W.2d 332, 334 (Tex. Crim. App. 1974)).

407. Because Dr. Sorensen expressly stated that his testimony was not being offered in regard to the mitigation special issue, the defense disavowed that it was asserting any claim regarding the exclusion of relevant mitigating evidence under the constitution, and thus applicant has procedurally defaulted this claim. *See Ex parte Boyd,* 58 S.W.3d 134, 136 (Tex. Crim. App. 2001); *Ex parte Pena,* 71 S.W.3d 336, 338 (Tex. Crim. App. 2002) (citing *Ex parte Bagley,* 509 S.W.2d 332,334 (Tex. Crim. App. 1974)).

408. Because applicant's evidentiary issue will be addressed on direct appeal, the evidentiary issue need not be considered again in this proceeding, and the evidentiary claim is procedurally defaulted. *See Ex parte Hood,* 211 S.W.3d 767, 776 (Tex. Crim. App. 2007) (holding issues that can be litigated on direct appeal, should be litigated there, and not re-litigated on habeas corpus).

409. With the exception of applicant's introduction and conclusion to issue six, the remainder of applicant's issue six presents an argument about why he believes this Court should have admitted Dr. Sorensen's testimony under the Rules of Evidence. *See* Application at 151-67. Consequently, this issue is merely a challenge to a trial ruling under the rules of evidence, a mere evidentiary claim, and is not cognizable on habeas corpus. *See Ex parte Douthit,* 232 S.W.3d 69, 71 (Tex. Crim. App. 2007) (explaining that the writ of habeas corpus is available only for relief from jurisdictional defects and violations of constitutional or fundamental rights); *Ex parte McCain,* 67 S.W.3d 204, 209-210 (Tex. Crim. App. 2002) (finding that procedural errors or statutory violations are not "fundamental" or "constitutional" errors which require relief on a writ of habeas corpus).

410. Applicant's introduction and concluding paragraphs of issue six are not enough to plead a cognizable claim regarding a limitation on his constitutional right to present relevant mitigating evidence. *See* Application at 147-151, 167. Applicant fails to plead how Dr. Sorensen's evidence is mitigating evidence under *Lockett v. Ohio,* 438 U.S. 586

(1978), and thus the constitutional claim is procedurally defaulted. *See Ex parte Maldonado,* 688 S.W.2d 114, 116 (Tex. Crim. App. 1985) (holding that applicant bears the burden of clearly pleading every element of his claim).

411. Because Dr. Cunningham's affidavit and attachments concerning Dr. Sorensen's exclusion (Applicant's Writ Exhibit L and attachments) were not presented at the time of trial, applicant has procedurally defaulted any reliance on this evidence. *See Brown,* 205 S.W.3d at 543 (holding that the trial is the "main event"; it is not a try-out on the road to a post-conviction writ of habeas corpus). The Court sustains the State's objection to this evidence and will not consider it for any purpose. *See* State's Answer at 75-76.

412. But even if the Court were to consider the evidence applicant did not share with this Court during trial, applicant has not demonstrated that this Court's original ruling was an abuse of discretion because applicant has not shown that Dr. Sorensen's study was relevant and reliable. *See Apolinar v. State,* 155 S.W.3d 184, 186 (Tex. Crim. App. 2005).

413 Applicant also does not establish that this Court abused its discretion in excluding Dr. Sorensen's testimony under Rule of Evidence 403. Not only was Dr. Sorensen's study severely limited in its relevance to the future-danger issue that the jury would have to answer, but the seeming precision of Dr. Sorensen's 23.8% prediction presented a significant risk that the jury would misunderstand

the true level of accuracy that the figure had in predicting applicant's future behavior.

414. Applicant has not pled facts that show that Dr. Sorensen's exclusion resulted in harm to the defense. *See Ex parte Maldonado,* 688 S.W.2d 114, 116 (Tex. Crim. App. 1985) (holding that applicant bears the burden of clearly pleading every element of his claim).

415. Applicant has not established that Dr. Sorensen's exclusion affected his substantial rights. *See* TEX. R. EVID. l03(a).

416. The United States Supreme Court defines "mitigating evidence" as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett,* 438 U.S. at 604; *Eddings v. Oklahoma,* 455 U.S. 104, 110 (1982).

417. In *Lockett,* the Court carefully noted that "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett,* 438 U.S. at 605 n.12. Consequently, in order for the exclusion of evidence to violate the Eighth Amendment's requirement that the jury be able to give effect to mitigating evidence, that evidence must bear upon the defendant's character, record, or circumstance of the offense. *Id.*

418. Even without Dr. Sorensen's testimony, applicant's jury was already able consider and give effect to the same factors Dr. Sorensen's model took

into account: applicant's age, the fact that a burglary was involved, applicant's lack of a prior prison term or prison gang affiliation or multiple murder victims. Consequently, applicant was not prevented from presenting relevant, mitigating evidence. *See Reyes v. State,* 84 S.W.3d 633, 639 (Tex. Crim. App. 2002).

419. In any event, applicant has not met his burden of showing that the exclusion of Dr. Sorensen's testimony affected the jury's verdict. *See Hitchcock v. Dugger,* 481 U.S. 393, 399 (1987) (finding *Lockett* error subject to harm analysis on habeas review); *Brecht v. Abrahamson,* 507 U.S. 619, 631 (1993) (establishing that on collateral review an error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict"); *Hall v. State,* 160 S.W.3d 24, 36 (Tex. Crim. App. 2004) (recognizing that a habeas petitioner has a more onerous standard to show harm in the habeas context than in the direct appeal context).

420. The Court recommends that relief be denied as to this issue.

ISSUE SEVEN (Trial counsel's decision not to call Dr. Cunningham)

421. Applicant has not overcome the presumption that counsel's decision not to call Dr. Cunningham was reasonable trial strategy and that such a decision was beyond even the wide range of reasonable professional assistance. *See Ex parte McFarland,* 163 S.W.3d 743, 757-58 (2005) (upholding a trial attorney's decision not to call a witness when

there were significant hazards to the defense on cross-examination).

422. Applicant has failed to establish that no reasonable counsel would have declined to call Dr. Cunningham to testify. *See Ex parte Ellis,* 233 S.W.3d 324, 331 (Tex. Crim. App. 2007).

423. Given Dr. Cunningham's susceptibility to impeachment and his stilted, unpersuasive delivery style, counsel's strategic choice not to call him was reasonable. Applicant has not established that counsel was deficient for failing to call Dr. Cunningham as a testifying expert. *See Strickland,* 466 U.S. at 693-94.

424. Applicant has not established that counsel was deficient for calling Dr. Vigen to give an opinion on applicant's future dangerousness. *See Strickland,* 466 U.S. at 693-94.

425. Applicant has also not rebutted the presumption that counsel's decision to call Dr. Vigen to testify on future dangerousness was within the wide range of reasonable professional assistance. *See Ex parte McFarland,* 163 S.W.3d 743, 756 (Tex. Crim. App. 2005)

426. An expert may rely on the opinions of other experts if such information is reasonably relied upon by those in the field. *See* TEX. R. EVID. 703. Dr. Vigen was qualified, based on his own experience and training and his consultations with S. O. Woods and Dr. Cunningham, to testify that TDCJ had the capacity to prevent applicant from being a future danger.

427. When challenging an attorney's failure to call a particular witness, an applicant must show that the witness had been available to testify and that his testimony would have been of benefit to the defense. *Ex parte Ramirez,* No. WR-25057-06, 2007 WL 4322007, at *5 (Tex. Crim. App. Dec. 12, 2007); *Holland v. State,* 761 S.W.2d 307, 319 (Tex. Crim. App. 1988).

428. Applicant has not shown that Dr. Cunningham was available to testify or that his testimony would have been of benefit to the defense. *See Ex parte Ramirez,* 2007 WL 4322007, at *5.

429. Applicant has not established that but for counsel's decision not to call Dr. Cunningham, the result of the proceeding would have been different. *See Strickland,* 466 U.S. at 694.

430. The Court recommends that relief be denied as to this issue.

RULINGS ON MOTIONS AND OTHER CONCLUSIONS

431. The Court has considered applicant's Motion for Discovery and hereby denies the motion.

432. The Court has considered applicant's Motion for Evidentiary Hearing and hereby denies the motion.

433. The Court has considered applicant's Motion that this Court Refrain from Rubber-Stamping the State's Findings of Fact and Conclusions of Law and Enter Its Independent Findings of Fact and

Conclusions of Law. The Court has carefully considered both parties' proposed findings and has exercised the Court's independent judgment.

434. The organization of conclusions of law by particular issue is solely for reader convenience and not an indication that the Court would not make the identical conclusion of law if germane to another issue.

HAVING GIVEN DUE CONSIDERATION to the claims raised in the application for writ of habeas corpus, this Court recommends that the Court of Criminal Appeals **DENY** Applicant habeas corpus relief.

SIGNED, this, the 18 day of June, 2008.

/s/ _____

JUDGE PRESIDING

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-70035

MOISES SANDOVAL MENDOZA,

Petitioner-Appellant,

v.

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:09-CV-86

ON PETITION FOR REHEARING EN BANC

(NOVEMBER 13, 2023)

Before RICHMAN, *Chief Judge*, and HIGGINBOTHAM and SOUTHWICK, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing

en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX G

REPORTER'S RECORD

VOLUME 24 OF __

TRIAL COURT CAUSE NO. 401-80728-04

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

PUNISHMENT PHASE

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

Proceedings reported by computerized machine shorthand.

* * *

MARK VIGEN,

having been first duly sworn, testified as follows:

[101] DIRECT EXAMINATION

BY MR. SANCHEZ:

Q. Good afternoon, Doctor.

A. Good afternoon, sir.

Q. Doctor, can you please introduce yourself to the jury.

A. Yes. Ladies and gentlemen, my name is Mark Vigen.

Q. Do you want me to call you Doctor? Mark?

A. Whatever you would like is fine.

Q. For purposes of this trial, I'm going to call you Doctor.

A. Yes, sir.

Q. Can you please tell the jury your education, accreditations and professorships?

A. Yes. My education is -- I earned a bachelor of arts degree in philosophy and English with a minor in **[102]** secondary education at St. Thomas College in Denver, Colorado. That was affiliated with Denver University. That was in 1969.

Then I earned Master's degrees at the University of Michigan in Ann Arbor, Michigan in 1971. In 1972 a master's degree -- that was in psychology. Then in 1972 a Master's degree in philosophy/theology at the University of Detroit in Detroit, Michigan.

Then in 1976 I earned a Ph.D degree in psychology, clinical and counseling psychology, at the University of Utah in Salt Lake City, Utah.

Then I moved to Shreveport, Louisiana, was recruited there to teach in the LSU system and taught there at the college and at the medical school for seven years until 1982.

Then have been in -- was doing some private practice during that time. Then essentially I've been in private practice of psychology since that time in Shreveport.

Q. We hear the term psychology all the time. What is psychology and what do psychologists do?

A. Psychology, just real quickly, is the study of human behavior. It's the study of cognition and mental processes, emotional processes and behavior itself. So the goals of psychology, I guess, are to observe, **[103]** explain, predict and sometimes control behavior. Essentially, the three axels on which psychology rests are – we're interested in human development, how do human beings develop from childhood into adulthood.

Secondly, we're interested in learning. How do people learn to -- how do they learn what they learn for educational purposes, developmental purposes, etcetera.

Then, thirdly, psychology's third area is tests and measurement. We're attempting as a field to measure these areas of human behavior and so on.

So in their different divisions of psychology -- like, clinical psychology is the diagnosis and treatment of mental and emotional disorders. Industrial psychology is psychological principles applied to business and industry. Educational psychology is the psychological principles applied to schools and the education system, child psychology, etcetera.

Q. Doctor, what are your major areas of practice?

A. There are three major areas. One is I treat patients every day, people who have anxiety disorders, depressive disorders, personality disorders. Don't treat a lot of people who have psychotic disorders.

Then the second area is I do a lot of **[104]** evaluation work for Shreveport Police Department, the Caddo Parish -- Caddo County Parish Sheriff's Department and the Shreveport Fire Department. Then we have small cities that surround Shreveport, and I help in the screening of those law enforcement officers for their departments.

Then if an officer or a fire fighter – for example, if he makes a mistake or if there's some question about his fitness for duty, we're required to evaluate – they're called fitness for duty evaluations. Is there some psychological reason that this officer or this fire fighter or this deputy shouldn't be functioning or does he need some kind of help in some way.

And then if an officer shoots and kills someone, we automatically have the opportunity to interview and work with that officer until he's prepared to return to duty. So all officers who either have been shot or are -- have shot someone or have been involved with a team of other officers where someone has been killed, we would -- I and my partner, Dr. Gable, would be evaluating and working with those men and women.

The third area is – I'm sorry, sir. The third is some court work which is called forensic psychology. It's the application of psychological principles to the courtroom like we're doing here. **[105]** Generally, in the criminal area it's competency to stand trial and

the issue of sanity or did a mental illness prevent the knowledge of right and wrong at the time of a killing. Competency, sanity and then mitigation issues in death penalty cases, like we're dealing with here.

And then in the civil area, child custody evaluations. It's a little different in Texas than it is in Shreve- -- or Louisiana. Louisiana judges make child custody decisions and so on, and I think it's a little bit different here.

And so both in criminal and civil matters I testify and evaluate people that are, you know, somehow interacting with the legal system.

Q. Doctor, so basically you treat individuals on a clinical basis, correct?

A. Yes.

Q. What portion of your practice is that?

A. That's the great majority of my practice. Probably about 40 percent of my time is spent doing that.

Q. About how many patients have you treated over the years?

A. Oh, I have no idea.

Q. Can you give -- more than a thousand? More than –

A. I'm sure more than a thousand, but I just don't **[106]** know.

Q. Is that over what -- what period of time?

A. Twenty-five to 30 years.

Q. What are some of the things -- or what's your approach in treating people in the clinical setting?

A. Well, I guess a shorthand is soap, S-O-A-P. People come, you know, voluntarily for a psychological treatment, and then you make subjective opinions and hypotheses about what's happening to them; you know, if they're fearful or if they have anxiety or if they have sleep problems or attention -- concentration problems in school. So you have their subjective assessment that I make with them.

Then sometimes we may use psychological tests to gain some objective information about what's happening with a person. For example, if a person comes in and complains of depression, I would use several psychological tests to measure the depression to see what kind it is and, you know, how it's affecting the individuals, and that's objective.

Then there's some type of appraisal. The appraisal is what is the diagnosis and what's the evidence to support the diagnosis, what's the evidence against the diagnosis, and could there be another diagnosis called differential diagnosis where you figure **[107]** out what are all the possibilities.

Then there's a plan, a treatment plan, and research in psychology shows that certain disorders have better treatment outcomes with different types of psychological counseling or psychological therapy. Some require medication management. Some require both. And so I sort of go through that evaluation process, make recommendations, let other people who would be better suited to treat the individual than I would or if I could, I might.

Our goal is to try and understand the person and try and help them or see if we can get them to a person who's more qualified to help them than we are.

Q. Doctor, you also are involved in pre-employment screening, like you told us. What portion of your practice is that?

A. That's a good portion of it. Probably another 20 to 30 percent would be in law enforcement and public safety work.

Q. Are your goals in pre-employment screening the same as in your -- the clinical portion of your practice?

A. No, no. They're different goals.

Q. How are they different?

A. Well, in the clinical practice we're trying to understand and treat, and that's -- you know, that's **[108]** one -- that's the role there.

In the assess process we're trying to identify officers who would be officers and firefighters who would be excellent candidates for police service and working in law enforcement. Not an easy job. A lot of people want to be police officers and some who ought not to be police officers. So we wanted to really look at candidates to see -- in the officer school, candidates in this pool, who would be the best officers to choose from from a psychological or mental health point of view.

So we're just doing assessment work there. We're not doing any kind of treatment. We're trying to

help the police department or the sheriff's department or the fire department make informed decisions as one part of their overall selection process.

Q. Has anything changed recently about your pre-screening evaluations? That you're screening different types of people that are applying for jobs at the police department?

A. The biggest change recently are veterans who are returning from Iraq or Afghanistan, men and women who have been in combat. That's the most noticeable recent change, that some of these men and women – these soldiers, you know, they've been driving in vehicles and bullets have been going through the vehicles, some of **[109]** them have killed the enemy combatants. That's – that's – that's a major area of concern.

Q. Now, there's a forensic psychology portion of your practice, correct?

A. Yes.

Q. Explain to the jury what that's all about.

A. Well, again, just forensic psychology is the application of psychological principles to the law. It's not an easy fit at all because the law is operating in one area, and we are totally in a different area, and we don't often meld very well.

In the criminal area, again, it's – it's competency to stand trial and issues of sanity and insanity. It's mitigation issues in death penalty cases, things that the jury should consider in making their decision or its decision about a particular defendant.

Recently we've had child pornography cases where men -- generally men, have had a lot of child pornography, which is against the federal law and some of the state laws, and possess it and maybe mail it elsewhere and so on.

Then there are cases involving internet situations where a man, for example, might correspond with a young girl, and they might end up meeting, and then there's inappropriate sexual behavior directed **[110]** against the young girl by an adult man, indecent behavior, you know, etcetera. It's against the law. Rape cases and so on.

Then there are criminal cases involving, you know, rape and child abuse cases involving pedophilia, child sexual abuse. Those are all criminal areas.

Then in the civil area the main issue -- the main thing that I do in the civil area is try and work with parents who have been separated from each other and/or are getting a divorce. In Louisiana the standard is what's in the best interest of the child. What we're trying to determine is what resources does the mom and what resources does the father bring to this child and how to structure and help the court make a decision about visitation and custody of the children.

Those are the most demanding cases, involving children and parents and a lot of times the acrimony that exists and so on.

Q. Now, Doctor, with what's at hand, I mean, you also do capital evaluations, right?

A. Yes.

Q. Are capital evaluations any different than what do you in the other portions of your practice?

A. Yes.

[111] Q. How are they different?

A. Well, essentially, when I'm doing a capital evaluation I'm assuming that the individual who's been accused of a particular killing of an individual is guilty of murder, so I come with that assumption. Then my task is to follow the lawyers' directions and try to, you know, do -- answer their questions.

You know, they may want an understanding of this person or they want a rule in or rule out sanity issues, competency issues. They want to see if there are mitigating factors that are -- that the jury should consider. Are there aggravating factors that the jury should consider? So they're just asking for a personality assessment.

You know, the big question so often is why did this individual kill this other individual? It's a very hard question to answer because no -- there's no one reason any of us do one behavior. All behavior is multi-determined. There are so many factors that go into motivation and why we behave.

We, as a science or as an art and a science, we're trying to understand so many of these factors. Do we ever understand it fully? No. So often we're trying to help the lawyers understand their client, and sometimes -- sometimes the lawyers choose to use us **[112]** in a situation like this in a courtroom and sometimes they don't.

Q. So you don't always find -- or your findings are not always -- is there pressure on you to always find what the attorneys want you to find, or are you going to find whatever you want -- whatever -- not what you want, but whatever you're going to find. And you're going to report that to the attorneys, and then they're going to decide whether to use you or not as a witness, correct?

A. Yes, your question is correct. I mean, there are excellent attorneys and there are poor attorneys. I don't mean to be critical. There are excellent psychologists and poor psychologists, too, so I'm not picking on you.

Poor attorneys will tell you they want this. Excellent attorneys will say what did you find, and they never tell you what they want in terms of, you know, whatever.

So I have the opportunity, being in a small area and maybe being the only stupid one to do this kind of work, I get a chance to work with the very best attorneys. And I don't have to -- I don't have a lot of pressure from attorneys to tell me or forcing me or pressuring me one way or the other.

Q. Now, you said you're stupid enough to do that. **[113]** I mean, is it financially lucrative to you?

A. No. No, it's not.

Q. What does it subject you to doing this kind of work?

A. Well, this work is demanding because it's easy in one sense that if I can stay focused, I -- only – the

only thing I have to do is tell you or answer the attorneys' questions as honestly and accurately as I can. That's the easy part. The most difficult part is knowing the research. Secondly, understanding the client.

The clients are not easy to understand. A lot of their families are not cooperative. They're not cooperative. They're not cooperative with their lawyers. They're not open or honest. We don't always have all the information to bring you. That's difficult.

We're under strict and very difficult and demanding cross-examination from excellent – very excellent district attorneys. That's demanding.

Friends of mine are critical of me, you know, because –

MR. DAVIS: I'm going to object to that as being hearsay.

THE COURT: Sustained.

Q. (By Mr. Sanchez) Doctor, do you always just listen to the accused and that's what you base your **[114]** opinion on, or do you do other things?

A. We do other things.

Q. Like what?

A. Well, generally, I try to interview the client extensively. I try to talk to family members to get their perspective on the client or the Defendant.

I try to read some records about what happened at the particular crime and so on and the killing or the murder.

I try to read medical records and legal records and gather corroborative information because a lot of times the Defendant won't reveal things and a lot of times he exaggerates things, so there's always some distortion. So we expect distortions, so we want to gather information from multiple sources of info- -- of multiple sources in order to offer opinions.

Q. Okay. Now, were you called to -- to – to examine Moises Mendoza?

A. Yes.

Q. Can you please tell the jury what you did in order to -- to examine him and to get to the opinions that you're about to talk about?

A. Yes. I interviewed Moises on December 16th for five-and-a-half hours. Then I interviewed him again for three-and-a-half hours on January 31st of this year, and **[115]** then five hours on March 17th of this year for a total of 13 hours.

Q. Is that all you did?

A. That's all I did with him.

Q. Okay. What else did you do?

A. I read some letters from him; I was going to add that, that he had written to me.

I interviewed -- both I and -- I have a nurse that helps me, Fran Dezendorf. She and I – she participated in one of the interviews with him. But we interviewed, as well, the family members; his mother, Mercedes; his father, Concepcion; Mario, the oldest son; Paul, the second son; Elizabeth, the third

daughter; then Ruthie, who is the youngest sister. So we interviewed them.

And then Fran also spoke with the high school principal and one of the teachers, I believe, where Moises had been in school.

Q. Now, you've said today that you looked at some records, that you looked at police reports and other documentation from law enforcement. Did you also look at medical records?

A. Yes.

Q. What type of medical record did you look at?

A. I looked at the medical records from the jail **[116]** where Moises is incarcerated right now, and I also reviewed the medical records from his father. His father had been -- had been in the hospital and treated for depression and suicidal behavior. I reviewed those medical records.

Q. And did you also -- did you also look at witness statements that were taken by law enforcement?

A. Yes, I did.

Q. Did you also look at disciplinary records from the jail?

A. Yes, I did.

Q. Is there anything we've left out that you can think of right now that you've done?

A. I viewed his -- the sheriff's department has two tapes where he had made confessions, and I viewed those.

Q. Did you look at LifePath records, also? Is that what you -- you said that already, haven't you?

A. Well, he -- he went -- both his father and Moises himself was seen at that mental health clinic, yes, and there's some records from there that we looked at.

Q. Did you also look at school records and work records?

A. Yes.

Q. Now, based on all this work you've done, you've **[117]** been able to form some opinions that you're going to share with us today, correct?

A. Yes.

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

A. Yes, I do.

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

Can you please tell us your first opinion?

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

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

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

We all have behaviors, and we all have body. We all have thoughts, and we all have feelings. **[118]** All of those are things that we possess, but we are not necessarily -- we are more than our feelings. We are more than our thoughts.

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

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

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

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

A. Yes. There are developmental psychologists - names that you may have heard of are Peashay (phonetic) **[119]** or Eric Erikson. But psychologists have studied development through human -- through the human life span, and there are certain developmental tasks that children master from zero to one-year-old. Then there are other developmental tasks from 2 to 5 and 5 to 13. Then the period of adolescence begins, 13 -- and it generally ends legally at 18 or 21. Sometimes for men it's generally longer, and then for women it's generally shorter.

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

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

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

Q. Yeah. Tell us what you based that on, things **[120]** that you've seen.

A. Well, for example, he was very proud of himself. And you'll excuse me, but, you know, there --

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

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

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

He often reacts to criticisms or – you know, or -- with anger when he perceives that somebody is criticizing him. And -- you know, or if he doesn't get what he wants. It's sort of like an automatic **[121]** reactivity. He's just reacting and reacting and reacting. There's no –

He doesn't yet have the developmental skills to say, well, this is so-and-so's opinion of me. I have a different opinion of me. We differ. But he's just emotionally reactive.

Q. Now, Doctor, you also came up with a second opinion. Does your first opinion somehow play into your second opinion?

A. Yes. The second opinion is that Moises comes from a psychologically dysfunctional family.

Q. And can you explain to the jury why you think that?

A. Yes. And I want to be careful. I'm not trying to be critical of the family. It's a good family.

But no family is perfect, and families offer their children a smorgasbord of their good behaviors and their not-so-good behaviors. Parents don't control what children come and take from them.

You can have two good parents, and a child turns out poorly. You can have two lousy parents, and a child turns out well. It's difficult to explain that. Sometimes the kids listen. Sometimes they don't. Sometimes they should listen. Sometimes they shouldn't listen.

[122] Mr. Mendoza was depressed early and – had an injury and was depressed early in Moises' life, and I think his -- he had a major affective disorder, a major depression, which was recurrent. That really took him somewhat outside the family and pulled him away from the role of being the strong father.

Apparently the rules that applied to the older three children no longer applied to Moises. So Moises saw that there were these strict rules that had been there and that were talked about, but he didn't really live by them or have to abide by them.

The mother, I think, in many ways is good-hearted and hard working and doing all that she can. Moises said and -- that, you know, she really taught me to be sneaky. He was amazed at how she would know things, and she covered for him in a lot of ways and minimized the problems he had and took away the negative consequences.

So Moises, while respecting his father, was respecting a man who was a fragile man, who really didn't have the power to be the dad. The mom was sort of covering in some ways, and I think she continually rescued him.

My theory about it is that, you know, he really didn't experience the consequences of some of his **[123]** negative behavior. He didn't have the same rules that the older three had had and got away with more and saw the discrepancy between what the rules were and that he could break the rules and that they didn't apply to him. He could get away with that.

I thought that was bad learning. I thought it taught him things that -- a sense of entitlement and so on that he shouldn't have.

Q. Okay. So now as he got older, you -- when -- you looked at his life and you came up with another view of his life after he got to a certain age, correct?

A. Yes, that was my third opinion.

Q. And explain to the jury what that opinion is.

A. The opinion is that Moises' behavior changed radically for the worse when he began smoking marijuana and drinking. He told me that that occurred

at a senior camp-out, but it's probably earlier than that. And began associating with a new set of friends that themselves were drinking and possibly using drugs and having parties. Moises felt very accepted by this new group of people because he could be funny and he could be the clown, and they accepted him.

So his behavior, I think with the introduction of drugs and alcohol, changed in a negative way for him.

[124] Q. Now, let me just back you up just a little bit. You mentioned earlier that Concepcion, the father, suffered from depression. Did you evaluate Mr. Mendoza?

A. No, I didn't.

Q. How did you come to the conclusion that he suffered from depression?

A. I reviewed -- well, he told me that, and the -- you know, the other children told me, as well. Moises mentioned it but minimized it. Then I looked through the medical records that he had from various hospitalizations.

Q. So that's all documented. That's not something that just the family is saying. It's something that's in hospital records, correct?

A. It's, like, two books like this of hospital records.

Q. Okay.

A. So I have two books filled with just -- just on him alone.

Q. Do you remember what hospitals those were?

A. I can look.

Q. Can you look?

A. The Head and Spine Institute of Texas. The dates of those are December '91 to March '92. Green Oaks Hospital, May of '92 to June of '92. Wichita Falls State Hospital, October of '92 to November of '92. Collin County Mental Health Mental Retardation Center, 1992 to 2000. LifePath Systems, 2000 to 2005. North Star, 2005.

Q. Okay. And in those records it was indicated to you that there were suicide attempts, correct?

A. Yes.

Q. Now, getting back to your Opinion Number 3 about him again and how he changed radically worse, that was supported by the family, also, correct?

A. Yes.

Q. What other basis did you have for that opinion?

A. Well, he -- his drinking and use of marijuana escalated during that time.

He had two or more counts of aggravated assault and robbery during that time. He stole money during that time from his brother, and he -- he offered to steal things for other people.

He stayed out all night or more, and he was placed in jail for several months and was released on bond, I believe, and put on an electronic monitor.

Stayed on the monitor for awhile, and then he cut off that monitor and disengaged the monitor and didn't comply with probation or with the rules that applied during the time he was on bond.

Q. Now, Opinion Number 4, why don't you tell the **[125]** jury what that is.

A. I think Moises' new friends, from what I can glean, lived a -- sort of a depraved and disrespectful, aggressive and drug and alcohol lifestyle in which -- what I call empty sexuality was involved. It was where people could or would engage in sexual behavior without any real connection or emotional -- without respect and without care and just casually.

There was open use of marijuana, apparently, in this group, and alcohol. There was some incidences I saw of threats of violence and, you know, attacking each other and so on.

There was a video of sexual behavior in which Moises was involved engaging with a young woman, an underaged woman, in sexual behavior. I didn't see a video. I mean, there's not a video, but I'm told that a video was made, and there were multiple people involved in this.

So that kind of peer group is what Moises was involved in after he graduated from high school and after he had completed some nine months of air-conditioning and heating training.

Q. You based this, also, on statements that were given to the police by those -- those friends, right?

A. Yes.

[127] Q. Opinion Number 5 -- Number 5, I'm sorry. Can you please tell the jury what that is.

A. Well, it's my belief that the Texas Department of Criminal Justice has the expertise, has the capability to house and incarcerate Moises in such a manner that he will be a low or minimum risk for future violence in the prison system.

Q. What do you base that on?

A. Well, I've only been in one prison, one unit in Texas, so I don't have a lot of direct experience with correctional officers in Texas, but I've read a lot of research having to do with the Texas Department of Corrections. I've looked at some statistical data regarding assaultive behavior against inmates and assaultive behavior against officers, and those incidents are low, I guess, in comparison to the tremendous number of inmates that the Texas Department of Criminal Justice houses and cares for.

I've talked to S.O. Woods, who is the former assistant director of classifications, about -- and he's given me sort of a general idea about the classification system and how inmates are processed and all the information that's taken into account. So there's an elaborate system of well-trained professional people that run the Texas Department of Criminal Justice.

[128] So I guess, in my opinion -- I mean, I've seen inmates like this young man in my experience, and I've followed some of those inmates over the years in the Louisiana penitentiary that's at Angola. It's the Louisiana State Penitentiary at Angola where the violent inmates are placed.

I've watched them over time and talked with them over the years, and so I've seen how Louisiana -- the Louisiana prisons are a very safe place to be both for officers and for staff and for inmates. I'm sure -- I mean, I assume that Texas is even better than Louisiana. But Texas has many, many more inmates, and they have much more resources. The research that I've read and the literature about the Texas system is very positive.

Q. So you've dealt with inmates in a prison setting –

A. Yes.

Q. -- where you've had to evaluate and interview, correct?

A. Yes.

Q. Did you also work in the -- for some type of prison system when you first got out of school or did you do any kind of studies up in Michigan at all?

A. Yes. When I was a graduate student in Ann Arbor **[129]** at the University of Michigan, I worked -- I was placed -- I didn't have a choice. I was placed in the Myland Federal Penitentiary. It was a medium-security prison. I interviewed and evaluated and worked in some treatment settings under two psychiatrists and a psychologist, under their supervision. A lot of the graduate students in psychology worked there, and we got a lot of our initial training in that setting.

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

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

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

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

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

A. It's my opinion that Moises has the potential to develop a sense of self and the potential for rehabilitation and some type of spiritual conversion, **[130]** whatever that -- however that will be for him, you know, as he moves into the latter half of his life. That's my opinion.

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

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

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

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

He's expressed some initial and somewhat, I guess, superficial -- I don't mean to be the judge of it **[131]** or be critical of it, but some beginning remorse to me in some of his letters.

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

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

But -- and all the fight and all the antisocial reactivity is gone. And they're more centered individuals, and they have a chance for some kind of spiritual conversion and a movement towards looking at what life is really about and what the goal that they're -- you know, that they're going to die there and how are they going to die there and under what circumstance, and that there's some chance for, I guess, redemption or salvation through their good works at that facility.

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

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

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

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

A. Yes. Yeah, that's a good way. I mean, he's 21 chronologically and biologically, but nowhere -- I don't see him as having that level of maturity. That's why I **[133]** said, I think he's immature psychologically and underdeveloped.

MR. SANCHEZ: I pass the witness, Your Honor.

THE COURT: Mr. Davis.

MR. DAVIS: Thank you, Judge.

CROSS-EXAMINATION

BY MR. DAVIS:

Q. Dr. Vigen, who contacted you about working on this case?

A. Mr. Juan Sanchez.

Q. Are you donating your services?

A. No. He's paying my hourly rate for the time that I spend.

Q. What is your hourly rate?

A. $200 an hour.

Q. How many hours have you devoted to this case?

A. I don't know the hours. I don't know the number of hours. I think we've been paid -- our office -- myself and my staff about $16,000 to do the evaluation.

Q. Do you anticipate billing for additional hours?

A. I will bill only for my courtroom time or for the time -- you know, the time that I'm here today.

Q. Doctor, this is not the first time that you've testified in a capital murder case.

[134] A. That's correct, sir.

Q. Approximately how many capital murder cases have you testified in?

A. I think it's somewhere between -- or somewhere around fifty or so. I've been involved in – my secretaries are working on my data, the data that I handed you earlier, is up to 2003. But she thinks it's probably over a hundred cases that I've evaluated and worked on.

Q. How many cases have you testified as a mitigation expert?

A. In many of those. I don't know the answer.

Q. In those cases, the capital murder cases where you've been called as a mitigation expert, you've always been called by the Defense?

A. Yes.

Q. You've testified in the State of Louisiana on several cases, have you not?

A. Yes.

Q. You've also testified in Texas before?

A. On two occasions, yes.

Q. Do you remember Brandon Hays?

A. Yes, I remember him very well.

Q. Do you remember Brandon Hays was an individual who raped –

[135] MR. SANCHEZ: Your Honor, at this time I'm going to object to the relevancy of this other case.

THE COURT: Mr. Davis.

MR. DAVIS: It goes to the credibility. It goes to the jury's opportunity to judge his credibility and

his bias in these types of matters, and they're entitled to hear that other types of cases in which he has testified to judge his credibility. That's simply what I'm doing.

THE COURT: Your objection is overruled.

MR. SANCHEZ: Your Honor, I would further object that this deprives Mr. Mendoza of particularized individualized sentencing under the U.S. constitution.

THE COURT: Your objection is overruled.

Q. (By Mr. Davis) Do you remember that Brandon Hays raped and stabbed a Chinese exchange student and then threw her off the roof of the LSU Medical Center?

A. Yes. It's Brandon Haynes, H-A-Y-N-E-S. And, yes, I know him very well.

Q. You testified as a mitigation expert?

A. Yes.

Q. Do you remember Percy Davis?

A. Yes. Very well.

Q. That was a crime that occurred in Shreveport, correct?

[136] A. Yes.

Q. Do you remember that Percy Davis walked into a convenience store there in Shreveport, and he shot and killed both the store clerks that were on duty?

A. Yes, I know he did.

Q. And you testified as a mitigation expert?

A. Yes, I did. Can I explain a little bit about that case?

Q. Mr. Sanchez can ask you if he'd like.

A. Okay.

Q. Dr. Vigen, do you remember a man by the name of Michael Cooks?

A. Yes.

Q. Do you remember that he also went by street name of Mad Monster Crip?

A. Mad Monster Crips, yes.

Q. Do you remember that Michael Cooks led a band of men into a Shreveport apartment? Do you recall that?

A. Tell me a little bit more.

Q. This was where they went in, and they shot three people. One of them died and two of them, although they'd been shot in the head, they survived.

A. Right.

Q. Do you remember that case?

A. Yes, I remember the case now.

[137] Q. Do you remember before trial the Defendant ordered the two survivors to be killed so they couldn't testify against him?

A. Yes, execution.

Do you remember Mr. Cooks had a prior aggravated battery case?

A. Yes, he did.

Q. You testified as a mitigation expert?

A. Yes.

Q. Where is Michael Cooks?

A. He's on death row at Angola, Louisiana Stat Penitentiary. He is currently on death row.

Q. Do you remember Cedric Edwards?

A. I remember him. I have his picture. I think I testified in that case, as well.

Q. Maybe you remember his street name; Gun Slinger?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. Do you remember, Cedric Edwards followed the Kennedy family. I think the Kennedy family -- do you remember, they were returning from a revival that night.

Do you remember that?

A. Yes.

Q. The victims.

[138] A. Okay.

Q. Do you remember the Defendant was outside of their apartment, confronted the husband, shot him in the arm?

A. I don't remember that specifically, but I believe you if you're saying that that's what happened.

Q. Do you remember after he did that, the husband ran back into the apartment. The Defendant followed him in where Mr. Kennedy's wife and daughter were located?

A. Um-hum.

Q. Do you remember that the Defendant then shot the wife in the head. Do you remember that?

A. I don't remember -- I don't have those facts right in front of me, but I'm just assuming that that -- that you're accurate that that is what happened. These are horrendous crimes.

Q. Do you remember when she fell to the ground that he went over and shot her again in the head?

A. Yes. Okay.

Q. While the daughter was watching?

A. Watching, yes.

Q. When Cedric Edwards finished that, do you remember that he went up there to the husband and he pistol whipped him, caused several skull fractures?

A. I don't remember that detail, but it doesn't **[139]** surprise me.

Q. Do you remember that when he had done that – do you remember Cedric Edwards had already been convicted of manslaughter?

A. Yes, he had.

Q. He had been sentenced to 15 years, but he only did half of that term, didn't he?

A. It was in a northern state, I believe; Indiana or something. I remember the victim of that crime coming and testifying during the case.

Q. Cedric Edwards did about 7-and-a-half years. He came to Louisiana. He'd only been out three months at the time that he attacked the Kennedy family, hadn't he?

A. Yes, that's right.

Q. And you testified as a mitigation expert in that case?

A. Yes.

Q. Do you recall an individual by the name of Nathaniel Code?

A. Very, very well, yes.

Q. He was a serial killer, wasn't he?

A. He was.

Q. On three separate occasions he killed a total of eight people, didn't he?

A. I believe -- I believe he killed eight people. **[140]** He was convicted, I believe, on five killings, five murders.

Q. Do you recall the first instance where he stabbed a 25-year-old woman, stabbed her nine times in the chest. Then he slashed her throat?

A. Yes, I believe that's right. He had a signature for his killings. He would bind the victims with cords from lamps and so on.

Q. Then about a year later he killed four people, including a 15-year-old girl, her mother and two male friends. Do you recall that?

A. Yes. I think he's killed about eight people.

Q. In that crime do you remember that with the little girl that he never -- that he nearly severed her head from her body?

A. I don't remember that directly, but he was – he's -- he is a serial killer.

Q. The last three that he killed, do you remember that he took a grandfather and two young nephews, ages 8 and 12, and he strangled the two boys, then he stabbed the grandfather five times in the chest and seven times in the back. Does that sound familiar to you?

A. Familiar, yes.

Q. You testified as a mitigation expert in that case?

[141] A. I testified as a mitigation expert in the case, having advised the defense lawyers that they should not call me because I did not think I could help them. Nonetheless, they called me anyway, and I testified to my findings about Nathaniel Code. I just told what I had found.

Q. You recall Patrick Murphy, don't you?

A. Yes.

Q. Is that how you came to know Mr. Sanchez?

A. Yes. He -- Mr. Sanchez was co-counsel in the Patrick Murphy case in Dallas.

Q. Patrick Murphy was a member of the Texas Seven, wasn't he?

A. Yes, he was.

Q. Do you remember what Patrick Murphy was serving time for in the Texas Department of Criminal Justice, Institutional Division?

A. Without looking at my notes, I think he was involved in a sexual crime. He'd made a sexual attack on a young woman.

Q. In fact, he had raped a woman at knife point back in 1984, had he not?

A. Yes, that's correct. That's correct.

Q. Do you remember what his sentence was for that?

A. I don't –

[142] MR. SANCHEZ: I'm going to object at this point to the relevancy.

THE COURT: Sustained.

MR. DAVIS: I'm sorry. It has everything to do with relevancy since he has indicated he's an expert on future dangerousness, how individuals mellow over age and how they have a -- the potential for rehabilitation.

MR. SANCHEZ: Your Honor -- and I would object to the speaking objection.

MR. DAVIS: And I have the right to go into that since he has --

MR. SANCHEZ: I would, again, object to the speaking objection.

MR. DAVIS: -- expressed opinions in that case.

THE COURT: Gentlemen, I sustained the objection to the question. I am not prohibiting you from going other places, Mr. Davis.

MR. DAVIS: Yes, sir.

Q. (By Mr. Davis) Do you recall Patrick Murphy escaped from the Kenedy Unit near San Antonio with six other inmates?

A. From the Connally --

Q. I'm sorry. From the Connally Unit in Kenedy, **[143]** actually.

A. Yes, the Connally. Yes, he did. He escaped with seven other inmates.

Q. When they left there, do you remember what they -- do you remember that they committed an aggravated robbery before they got to Dallas County? You remember that, don't you?

A. Yes.

Q. You recall the capital murder in Dallas County, don't you?

A. Yes. They killed an officer who was being called to a scene where they were robbing a large store, and they killed the police officer.

Q. Shot him multiple times, didn't they?

A. Yes.

Q. After they shot Officer Hawkins – Aubrey Hawkins was the officer's name, wasn't it?

A. Yes, Aubrey Hawkins.

Q. After they did that they fled to Colorado, didn't they?

A. Yes, they did.

Q. Started attempting to obtain body armor, correct?

A. Yes. They were -- I believe they were arrested with vests and -- and so on.

[144] Q. You testified as a mitigation expert in that case?

A. Yes.

Q. And as an expert on future dangerousness, as well?

A. I don't remember that I commented on that. I remember making the diagnosis that he had a sexual disorder not otherwise specified, and I saw him to be a narcissistic personality disorder.

Q. But in that case you do remember testifying as a mitigation expert?

A. Yes.

Q. Dr. Vigen, would you agree with me that when you're rendering opinions as important as you are in this court that it's important to have as much information available as possible?

A. Yes, I would agree. And seldom do we have all the information. It's very hard to get all the information.

Q. In this case, sir, were there any limitations placed on you by Defense counsel?

A. Not directly. I would have liked to have been able to interview more of the witnesses and more of the people that knew him, but we were not able to do that. Like, for example, Farukh -- or Amy Lodhi, the girlfriend. For example, I wanted to interview her, and she was not willing. Several other witnesses were not willing.

So it would have been good to be able to get their view of him, but I was not able to do that.

Q. Sir, did you ever speak with any law enforcement personnel who had dealt with the Defendant?

A. Just -- just the officers that took me back to his -- to the interviewing room and so on. But no one -- no one in -- not the directors or commanders at the jail.

Q. Well, did you ever talk with anyone from the Farmersville Police Department?

A. No, sir, I did not.

Q. Did you ever talk with Officer Scott Collins, for instance?

A. No, I did not.

Q. Did you ever talk with anyone from the Texas Rangers?

A. No, did not talk to any of the investigating -- I just read their reports.

Q. Did you ever talk with any of the investigators in the Collin County Sheriff's Office?

A. No, sir.

Q. In fact, you made no effort to do so?

A. Right. I really didn't interview them.

[146] Q. Did you ever speak or try to interview any of the Defendant's neighbors?

A. No, I did not.

Q. Specifically, did you ever attempt to talk with an individual by the name of Fred Bratton?

A. No, sir.

Q. As I understand it, you did not interview any of the Defendant's friends.

A. No. I wanted to interview some of his friends but was not able to do that.

Q. Well, you talked about Amy Lodhi, correct?

A. Yes.

Q. What other friends did you attempt to interview?

A. I wanted to talk with Stacie Garcia and wasn't able to do that.

Cody Wilbanks, Travis Rose -- I wanted to talk with Priscilla Silva, Marvin Mervez, James Pierce. These were some of his other friends that we wanted to get in touch with and were not able to do that.

Q. Some of those names had been supplied by the Defendant?

A. Yes, that's correct.

Q. Because you knew that they might have information that may be helpful to you in arriving at your opinions, correct?

[147] A. They could have, both helpful -- well, helpful. But positive and negative information, whatever it was.

Q. But as you sit there you have no idea what they may have been able to tell you?

A. I don't know. I don't know.

Q. Did you ever talk with Laura Decker?

A. No, I didn't. I've read information about her, but I didn't speak to her.

Q. You never even attempted to, did you?

A. No, I didn't. I didn't know -- no, I never attempted to speak to her.

Q. How about Matt Raymond?

A. No.

Q. How about Jeremy Croyle?

A. No, I didn't talk to any of these others. Only the people I've told you.

Q. So I take it you didn't talk with anybody from the Dallas County Community Supervision, from the probation department down there?

A. No, I did not.

Q. Doctor, did you talk with any of the Dallas Police Officers that worked the two aggravated robberies at Richland College?

A. No, I didn't speak to the officers.

Q. How about Nhat Vu? When did you speak with him?

[148] A. I didn't. I didn't speak to Nhat Vu.

Q. How about Melissa Chavez?

A. No. No, sir.

Q. Besides the detention officers that brought you into the visitation room so you could speak with the Defendant, have you spoken with any other detention officers out there at that jail?

A. No. Just the -- just those men and women who attended him and brought me to him.

Q. Have you spoken with any of the medical personnel in that jail?

A. No, I did not.

Q. Doctor, I believe that you testified earlier that it's not uncommon for defendants in cases like this, they have a very strong motive at times to lie, don't they?

A. Yes.

Q. To exaggerate?

A. Either exaggerate or minimize, yes.

Q. That's not uncommon at all for defendants in a case such as this to minimize their participation or their level of activity in a crime, is it?

A. Very common.

Q. Very common for them to try to make someone else out to be the villain or to make them a scapegoat, isn't **[149]** it?

A. Very common, yes.

Q. That's exactly what this Defendant did in this case, isn't it --

A. Yes.

Q. -- with regards to this crime?

A. I believe he did, yes.

Q. Because when you talked to him, Doctor, about the crime that he committed here, he told you that he had consensual sex with Rachelle Tolleson, didn't he?

A. Yes.

Q. And he also told you that Andrew Tolleson, Rachelle's husband, had participated actively in this crime, didn't he?

A. Yes, he did.

Q. You didn't believe that for a moment, did you?

A. No, I didn't. I didn't believe that.

Q. He told you that Andrew Tolleson helped him take the body out there to that area where he burned the body, too, didn't he?

A. Didn't make sense to me.

Q. You didn't believe him for a minute, did you?

A. No. In every case where psychologists are involved there's always going to be distortion. In a child custody case people are going to try and present **[150]** themselves as better than they are. In a criminal case people are going to try and present themselves as better than they are. In personal injury cases people present themselves as more ill than they really are. So there's always distortion.

Q. Well, Doctor, not everyone's a liar, are they?

A. Everyone has lied. Not everyone has -- the vast majority of people are not -- do not have a pattern of chronic lying.

Q. The Defendant has shown a pattern of chronic lying, hasn't he?

A. I would have to agree with you and say yes.

Q. Let me talk to you, if I may, about some of your opinions, Doctor.

You say the Defendant is immature. You said that -- first of all, let me make sure that I have this from you. Did you notice any signs of mental retardation during any of the times that you spent with this Defendant?

A. No, sir.

Q. Would you say that he's at least average intelligence?

A. I would estimate certainly -- if the average range is between 90 and 110, he's definitely in that average range, yes. I would think that he is, yes.

[151] Q. He's impulsive, isn't he?

A. Reactive and impulsive.

Q. He's got a temper?

A. Yes.

Q. Which at times in the past has been an explosive temper?

A. Yes.

Q. He acts without thinking?

A. And without -- yes. Without -- without planning and so on, yes.

Q. Without considering the consequences of his actions?

A. Yes. He has a history of doing that. He doesn't do it all the time, but he does do that.

Q. You said -- you said just a few minutes ago that you think that he's been acting out at the jail to try to get attention; is that right?

A. I think that's part of his motivation, yes.

Q. You have some disciplinary reports in your notebook, correct?

A. Yes, I do.

Q. And you've reviewed them prior to your testimony?

A. Yes, sir.

Q. You're aware of the incident on June the 6th of 2004, aren't you? This was the incident where he was having to be placed on a restraint bed in the infirmary after he had disobeyed orders in his cell?

A. Right. June 6th, **[152]** 2004. Failure to stand for head count and disruptive behavior, resisting.

Q. Sir, when he spit in the officers' faces, do you think he was just trying to get attention then?

A. No. I think he was angry and reactive and disrespectful.

Q. When he tried to bite the officers who were trying to tend to him, do you think he was just trying to get attention then?

A. No. I think he's angry and acting out his anger.

Q. When he used racial slurs against the guards, do you think he was just trying to get attention?

A. It's taunting behavior, nuisance, aggressive, verbal -- verbal aggressive behavior.

Q. When the Defendant attacked the inmate by the name of Melvin Johnson on September 22nd, 2004, do you think he was just trying to get attention?

A. Let's see. September 22nd, 2004, he was involved in a fight with another inmate. The two of them were involved in mutual combat is the way I looked at it, and they were fighting.

[153] Q. That was your understanding?

A. Yes, that he was fighting with another inmate.

Q. Do you know what the real circumstances were?

A. I just have the report. That's all I know.

Q. You haven't talked -- you haven't talked to Detention Officer Hinton, have you --

A. No, I haven't, sir.

Q. -- who witnessed the incident?

A. No, I'm not.

Q. You're not aware that the Defendant came out of the rec yard and ran and attacked Inmate Melvin Johnson?

A. No, sir, I didn't know that. Could I reference -- just look that up for a minute?

Q. Yes, sir.

A. All I know is -- is what I -- what I thought I knew which was written in the jail incident report dated September 22nd, 2004, at 17:35 hours. I just reviewed this record. I don't know more than what it says.

Q. At the time of that attack or that fight, were you aware that the Defendant was already in administrative segregation in the Collin County Jail?

A. Yes.

Q. He's been in ad seg here since the time he was arrested, hasn't he?

[154] A. Pretty much. I think -- I think he's been mainly in administrative segregation, yes.

Q. A single cell?

A. Yes, he is now.

Q. He has been for some time, hasn't he?

A. Yes, I believe so.

Q. Doctor, you said just a few moments ago the Mendoza home was a dysfunctional home. Let me ask you, there's no evidence that there was ever any violence in that home, is there?

A. I think there was an altercation between Moises and his sister one time where they were fighting, but there was never any violence where any first aid or any medical attention beyond first aid was needed, to my knowledge.

Q. In some of these homes, for instance, these young people have to witness violence between their parents, correct?

A. Yes, that happens.

Q. Some of them have to witness violence between a sibling and a parent or other siblings, correct?

A. That's correct.

Q. In a lot of these homes violence is actually

used against the young person themselves, correct?

A. Yes.

[155] Q. That never happened to this Defendant, did it?

A. Not to my knowledge.

Q. There was never any alcohol abuse inside that home, was there?

A. Not that I could discover.

Q. There was no drug abuse in that home, either?

A. Not that I could discover.

Q. Would you agree with me that the parents exhibited a good work ethic for all of their children, including the Defendant?

A. Yes. I think the parents worked very hard to do the very best that they could.

Q. That's not always true in these types of homes, is it?

A. No, it's not.

Q. Would you agree with me, too, that the parents exhibited very good values for all of their children?

A. I think, again, parents put forth their very, very best. But they also put forth their own limitations, and the fact of the matter is that children come up and take what they want. We, as parents, don't control what our children take and what they learn. We only control somewhat what we give, and we can't always prevent ourselves from showing our limitations to our children.

But on the surface the import of your question is correct. I think these parents tried very hard, given who they were and given the depression that they were experiencing.

Q. Provided an opportunity for religious training?

A. Yes.

Q. Appeared to have attempted to teach all the children the difference between right and wrong?

A. Yes.

Q. Supportive?

A. I think they were supportive.

Q. Again, these are things that we find absent in a lot of these homes, isn't it?

A. It's very true. In most of the cases that I have seen in mitigation similar to this, mitigation issues in first degree cases, you will have extensive alcohol abuse or extensive violence or extensive sexual abuse or extensive criminal histories, and this family does not have any of those factors.

Q. Would you agree with me that the Defendant in this particular case had several great role models to pattern his life after?

A. He did. He could have chosen that and patterned his life after his brother, for example, Mario.

Q. I mean, Mario -- Mario is a very responsible **[157]** individual, isn't he?

A. Yes. I think Mario is a responsible individual. He's about 15 years older than Moises, and I think left when Moises was still a young boy. He left for, I believe, the military service when he was 18. Moises would have been 3 or 4 years old and didn't have a lot of time to pattern his behavior over -- after Mario. But Mario tried to offer that when he came back into the family after being away.

Q. Paul was another good role model, wasn't he?

A. Yes, he was. And he's done well in his life.

Q. And in a lot of these homes one of the big problems is that the children, particularly the males, have no good male role model, do they?

A. Yes. The absence of the fathers is a significant factor in family dysfunction.

Q. But in this case the Defendant had at least two very good male role models in that home, didn't he?

A. Well, both of those -- those men are significantly older than Moises. Mario is sort of a very strict, upright, this is the way you do things. The problem is he really feels that he left too early and that he wishes he had been more of a role model.

Paul is much more like Mercedes. He's very forgiving. Moises even stole money from him, like, **[158]** $1,000 or $2,000. Paul really minimized that and wasn't angry about it, wasn't upset about it. Never really confronted Moises over that and sort of let him get away with that.

But both men, regardless of their personality styles, I would agree with you are good role models.

Q. You said that based upon your interviews with the family, your review of the records, that you feel that the Defendant went through a dramatic or drastic change after he started using marijuana during his senior year; is that right?

A. Yes, sir.

Q. Well, Dr. Vigen, isn't it true, according to your interviews, the Defendant had been engaging in violent behavior for some time before that, hadn't he?

A. Um, what are you speaking about particularly?

Q. Well, do you remember when you interviewed Mario that Mario provided a history for you? Do you remember that?

A. I have it. Just refer me to where you're speaking.

Q. Doctor, I'm looking -- I believe it's Page 3 of Mario's interview. It's in handwritten form. It says "Moises" at the top.

[159] A. Yes.

Q. Mario told you the Defendant got into trouble early in life, didn't he?

A. Yes.

Q. As a child he would hurt other kids, wouldn't he?

A. He was stronger. The import of that is that he was a big kid and that when he would play with other kids he would hurt them. The idea is not that he would intentionally try to hurt them, but he would accidentally try to hurt them because he was bigger. I didn't get the idea that he was trying to hurt other kids.

Q. Well, your notation says stronger and hurt other kids, correct?

A. Yes, that's what it says, hurt other kids.

Q. As a matter of fact, he hurt his sisters, too, didn't he?

A. Yes.

Q. Ruthie and Elizabeth?

A. He would pick on them and do this immature behavior, picking on them and hitting them. Yes, that's what Mario's report was.

Q. It says pick on and hit them.

A. Yes.

Q. Those were his two sisters?

[160] A. Right.

Q. Mario told you by the age of 3 or 4 he knew there was something strange about the Defendant then.

A. No. It says at 3 or 4 years old he realized he was stronger.

Q. Okay.

A. It doesn't mean -- it wasn't "strange." I'm sorry. It's not written well.

Q. Okay. He knew that the Defendant was impulsive?

A. Um-hum. Yes. He says -- Mario said he never learned consequences. He would just impulsively do something and think about it later. He -- he said he was an impulsive kid.

Q. Right. That's not behavior that he started to show during his senior year in high school, is it?

A. Oh, no.

Q. I mean, that – he's been exhibiting that since an early age, hasn't he?

A. Yes.

Q. He's been getting into trouble at school since an early age?

A. He described him as sort of a hyperactive kid. He said that he would have been a good fit for Ritalin, that he was bouncing off the walls.

Q. Do you remember him saying Moises, always in **[161]** trouble, talking back, overactive. And this seemed to increase in middle school, didn't it?

A. Right.

Q. So that by the time he got to middle school he was already exhibiting these types of behaviors, wasn't he, Doctor?

A. Actually, he began, I think, in the -- if you looked at my notes, in the 2nd/3rd grade he took on the role of class clown which is --

Q. Doctor, right now I'm trying to focus in on talking back, overactive. My question was: By the time middle school rolled around, this activity was already increasing with the Defendant, wasn't it?

A. Yes, that's right. That's what Mario said, yes.

Q. And by the time he got out of -- to middle

school Mario says he's out-of-hand in middle school.

A. Yes. Um-hum.

Q. I did understand -- and I've only had just a few moments during the lunch hour to review these records. But the next line appears to say that when the subject was confronted with drugs, school, stealing -- I mean, that's activity that was occurring during school, wasn't it?

A. During high school, yes. Later -- later than middle school, or high school.

[162] Q. And the notation is he just couldn't resist impulsive options, could he?

A. That's what -- yes. That's what he's saying is impulsive and couldn't resist being impulsive.

Q. I mean, he has a history of violence towards several people, doesn't he?

A. Well, in terms of fighting with or hitting his sisters and doing that kind of impulsive behavior, if that's what you mean by violence. He was -- he was doing that. That's -- Mario said he was much more impulsive, much more active than Mario's two sons at 6 and 8. Moises was much more of a handful to handle than Mario's two sons.

Q. Do you remember when the Defendant assaulted his own mother in their home?

A. I knew about that, and Mario came and had to control him.

Q. Yeah. As a matter of fact, the Defendant at that time was only 15 or 16 years old, wasn't he?

A. Yes. He was 15 -- 16 at the time.

Q. Struck his own mother, correct?

A. Can you point me to that so I can review --

Q. Yes, sir. This appears to be on Page 7. It says 15-16, harder to control.

A. Yeah. By the time he was 15 and 16 he was being **[163]** harder to control, and one time he hit

his mother. It was the year before graduation, so he would have been 17.

Q. It says here the mother was so afraid -- she was afraid to go back into her own home because her son had assaulted her in her home.

A. And Mario said that he --

Q. I'm sorry. Is that what Mario told you?

A. Yes. He said that his mother was afraid to go back into the house. He came over and confronted him, and he -- Mario restrained him, and it says hit him, and he thought that that was one of the times when Mario (sic) was high perhaps on marijuana.

Q. Now, the Defendant was not arrested on that, was he?

A. No.

Q. His reaction was that he left the house angry and bitter, correct?

A. Let's see. It says that he, Mario, felt terrible about the incident.

Q. But do you see down there? It says left house angry, bitter, hostile.

A. Against -- for Mario for intervening. It says that the police came. They didn't arrest him. The parents stopped the arrest, and he did not know why he was not arrested. But he did leave angry, bitter and **[164]** hostile toward Mario and began spending more time with his friends.

Q. He's also beaten up Travis Rose, hasn't he?

A. They got in a fight, yes, that's true.

Q. He told you that he beat the boy up, correct?

A. Can you refer me again to where you're speaking?

Q. Doctor, I'm not -- that I believe this will be one of your interviews with the Defendant. And I'm looking at a Page 5. You have -- you have several numbers that have been circled. You have a Number 2, a Number 3, and then down toward the bottom of the page you have a Number 1 and then again a Number 2.

A. Yes, I think --

Q. Do you see the notation in the bottom left-hand corner that he beat up Travis Rose because he cheated on his sister? On the Defendant's sister?

A. I believe Ruthie, yes. Or he thought he cheated on Ruthie. He hit him, and he went down, and they later became good friends.

Q. So he knocked him down, hit him a couple more times, then they later became friends?

A. Those were the words of Moises.

Q. He also assaulted Amy Lodhi.

A. Yes. Can we refer to the notes on that or --

Q. I believe – I'm not sure that I have that at **[165]** hand. But you remember that he hit her once when she said that she suspected him of flirting or cheating on her?

A. I remember that incident. That's one of the reasons I wanted to talk with Amy Lodhi or Farukh Lodhi to really understand what seems to me to be

a very unusual and strange relationship which I don't thoroughly understand with the fake abduction and so on and so forth. I just don't know enough before that.

Q. Well, at the time that he hit Amy Lodhi she surely was not using force against him, was she?

A. I don't know, but I would doubt it. But I don't know.

Q. He admitted that he did push Robert Thorp Ramirez up beside a truck and pulled a knife out on him? Do you remember that?

A. Yes. He admitted that to me.

Q. He did that to intimidate Robert Thorp, didn't he?

A. Yes. That's what he said.

Q. Do you remember the incidents in high school where he started stealing?

A. I remember several, yes. One -- do you want me to speak about one?

Q. Was he the football team manager?

[166] A. I think he was.

Q. I understood one of the thefts to be one of the footballs from the high school. Do you remember that? Or was that just a notation that he stole from some of the players up there?

A. My thought about it, as I remember the notes, are that he was some kind of manager, and there was, like, $60 or $50. Sneakily, very proud of himself, again, he stole only $30 rather than steal all of

the money which would make it more obvious that money was gone. He stole just some of the money and very clever -- very proud of himself for that kind of clever maneuver, which I think is pretty adolescent.

Q. Well, it was pretty calculating, wasn't it?

A. Yeah.

Q. He gave it a lot of thought. Stole from his mother, as well, didn't he?

A. He admitted to me stealing from his mother and stealing from his football team.

Q. Stole from his own sisters, Ruthie and Elizabeth, too, didn't he?

A. And also he stole money from Paul when he -- after he broke the electronic monitor and went on – went traveling with Amy Lodhi.

Q. He talked to you about the incident with Laura **[167]** Decker, too, didn't he?

A. Yes.

Q. He claimed that Laura Decker had consensual sex with him and several other boys there at that party, didn't he?

A. What I remember about it is he -- he admitted to having sex with her when picking her up and sex with her on the videotape. He was called by someone -- this is his version. Called by someone and said, would you like to participate, and he said, sure, yes. And then a whole group of people must have been involved to carry out this sex -- sexual behavior on video.

Q. And he claimed when he talked with you that Laura Decker was just fine with being videotaped. Do you remember that? She consented to that, as well?

A. He told me that it was consensual. I don't remember the exact -- his exact words about it.

Q. And he told you that several other boys had sex with her, as well?

A. I don't remember that. Can you point me to my note on that? Let me just check. On my January 31, 2005, note I don't see where he said that other boys had sex with her, too.

Q. Okay.

A. I don't see that.

[168] Q. Did you believe him when that he said Laura Decker had consensual sex with him that evening?

A. I don't really know that I believed him or disbelieved him. I just -- again, it just went into my thoughts about him, you know, engaging in these kinds of drug and alcohol behaviors with a group of kids. I know that because he lacks such a sense of himself, that his need for approval and need for attention is so high, but, you know, I was just concerned that it was such – it's such empty sexuality. It doesn't speak of healthy psychological development.

Q. It's depraved, isn't it? A depraved lifestyle?

A. I think it is.

Q. How many women has the Defendant claimed – when you talked with him, did you ask him how many women he had had sex with?

A. Again, I have no idea how many he has, but he claims many.

Q. Fifty, isn't it?

A. Something like that. You know, just an unbelievable number.

Q. Is that what you mean by empty sex?

A. Yeah, empty. Just body mechanics without connection, without care, without a relationship.

When I asked him how many girlfriends he's **[169]** had, he mentions two or three. So there were two or three girls with whom he had a relationship, I assume a sexual relationship, where he actually -- you know, which sounded more normal.

But having multiple sexual partners like that is just empty.

Q. Well, these people that were such an influence on him, how many of those people had committed aggravated robberies?

A. Well, all I can say about that is I don't know of anybody else in his peer group who has committed an aggravated robbery.

Q. How about --

A. All I --

Q. How about aggravated rape?

A. Again, I don't -- I have no knowledge of their criminal behavior or their criminal histories or their activities. I don't know those.

Q. How about kidnapping, burglary or capital murder?

A. Again, I don't know any of them. I don't know what their -- I don't -- I can't comment on it. I just don't know.

Q. Dr. Vigen, I want to talk to you about your last two opinions here.

[170] THE COURT: Can I interrupt you, Mr. Davis?

MR. DAVIS: Yes, sir.

THE COURT: Do you need a break?

COURT REPORTER: No, sir.

Q. (By Mr. Davis) Dr. Vigen, when you expressed some opinions about Texas Department of Corrections, sir, have you ever worked for the Texas Department of Corrections Institutional Division?

A. No, sir, I never have.

Q. Of all of the units here in this state, how many units of the Texas Department of Corrections have you been in?

A. I think there are 114, and I've only been in one.

Q. Texas prisons are violent, aren't they?

A. Can I --

Q. Well, let me ask you. There are violent people inside the Texas penitentiary system, correct?

A. There are men and women in the system who have committed violent acts outside the prison, yes.

Q. And there is violence that is committed inside the Texas prisons every single month of the year, isn't there?

A. I would assume -- I would assume that. Let me -- let me just check a note or two.

[171] Q. Well, do you need to -- let me -- I'm just asking you. Is there violence that is committed inside the Texas prison systems?

A. Yes.

Q. Okay. There's violence on administrative segregation units, isn't there?

A. Yes, I imagine there is. There are three levels of segregation, and they get more and more strict. So if someone breaks a rule or engages in some kind of aggressive or violent behavior he would lose more and more privileges, more and more time, and be moved into a more and more severe -- more and more secure situation.

Q. Dr. Vigen, you know from talking to S.O. Woods that a man convicted of capital murder, when he gets to the prison system, is going to be placed into the general population, isn't he?

A. I learned from S.O. Woods that since the escape, the Connally escape of the Texas Seven, that the whole classification system has been revised. There are now, like, five different categories in

which a person would fall. Most of the capital offenders are going to go into Section -- into Level III or Level IV, which is not in an open dormitory or not in an open situation. They'll be housed individually or with one individual in a cell block.

[172] Q. It's not going to be administrative segregation, is it?

A. No, it will not initially be administrative segregation.

Q. You see when a capital murderer, regardless of how violate his crime, gets to the prison system we can't automatically put him in administrative segregation, can we?

A. According to S.O. Woods he would be put into --

Q. Well, let me -- sir, is a man going to automatically, as soon as he gets to the prison system, go into administrative segregation?

A. I don't know that. I don't know whether he would automatically do that.

Q. And you can't keep a man indefinitely in administrative segregation, either, can you?

A. In Louisiana there are some inmates --

Q. This is Texas, sir. In Texas.

A. I don't know the answer to that.

Q. You're not aware that a man's case is routinely, regularly monitored, and he can get out of administrative segregation?

A. Yes. I know that the classification system reviews the status of each individual on a regular basis, and depending on his conduct over the amount of time in **[173]** question that his status can be raised or his status can be lowered. That's sort of an automatic process that's going on independently of any choice he has.

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

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

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

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

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

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

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

[174] A. No, sir, I have not.

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

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

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

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

Q. Do you consider shanks to be a nuisance?

A. No, sir.

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

A. I --

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

A. I'm aware that he was making some kind of instrument, if you want to call it that, or a weapon, if you want to call it that on the other end, out of **[175]** aluminum foil probably from some kind of container.

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

So I've seen just those two examples.

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

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

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

A. Yes.

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

A. Yes.

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

A. Right.

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

A. Yeah.

Q. Do you remember him telling you that?

A. I do, yes.

Ask your question again so I can really **[176]** listen to it carefully.

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

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

A. Yes, sir.

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

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

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

A. Yes. Yes, I do.

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

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

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

[177] Q. Toby Shook.

A. Yes. He asked whether I believed him, George Rivas. And, you know, I don't really approach clients on whether I believe them or I don't believe them because I know that in most defendants I'm going to get a lot of distortion or a lot of lying or a lot of misrepresentations. That's just the persons we deal with.

But I was -- I guess what I said to Mr. Shook was that I -- I thought he was more truthful when he was talking about other people and less truthful when he was really talking about himself.

Q. Once an inmate -- once an inmate is in TDC, you can't force him to change for the better, can you?

A. You can only control the consequences of his behavior, and from a psychological point of view we call it behavior modification. You can punish negative behavior that's not in compliance, and you can reward behavior that is constructive and good. So -- or the desired behavior. So this kind of behavior modification or token economy or privileges and rank of privileges, restriction and freedom, all of that is so well-regulated that you can control behavior.

Now, whether that ultimately changes the internal moral compass of an individual, you don't – it **[178]** won't always do that. It will sometimes do that.

Q. Well, you can't force an individual to go through a spiritual conversion if he doesn't want to, can you?

A. No, you cannot force him.

Q. As a matter of fact, you can't even make an inmate go through counseling down there if he doesn't want to, can you?

A. I think you could probably order it, but he probably wouldn't -- if he didn't want to, he would show up but not participate psychologically. He would resist psychologically.

Q. And if we put the Defendant in general population down in the Texas penitentiary, he's going to be around a lot of violent people, isn't he?

A. He will be around a lot of people who have been violent in society but who may not necessarily -- as a matter of fact, the majority of them will not necessarily be violent in the prison system. But they will have had a history of violent behavior in society, yes.

Q. The Defendant has already proven to us, hasn't he, that in a free society he is a very dangerous individual, isn't he?

A. I think that's -- the jury has decided that, and I certainly agree with that.

[179] Q. Doctor, do you remember on January 31st, 2005, speaking with the Defendant about a certain fantasy that he had?

A. Yes, I remember. But can you refer me to my notes if you're going to question me about it?

Q. Yes, sir. It looks to be -- this is a typewritten piece of paper. It's Page 2.

MR. DAVIS: May I approach the witness, Your Honor?

THE COURT: Yes, sir, you may.

MR. DAVIS: That might speed things up.

Q. (By Mr. Davis) Do you recall that, Doctor?

A. I haven't reviewed it in a long time. May I read it?

Q. Yes, sir. If you wouldn't mind, if you would just read that to the jury, please.

A. He got up about 4:00 a.m. the next --

Q. I'm sorry. I'm referring to what is labeled as a fantasy at the bottom of the page. If you would, read that to the members of the jury.

I take it this is something that the Defendant related to you?

A. I didn't talk with him about it.

Q. This was in your notes, correct?

A. Yes.

[180] Q. From your -- I guess, was your nurse conducting the interview at that time?

A. Yes.

Q. Would you read that to the members of the jury, please?

A. He gathers ten women and seven guys and keeps three people in each four-by-four-by-four cell. He names some of the people; Farukh, Stacie Garcia, Amy's mom. All of the girl's that lied on him in this case, Stephanie Tucker and his cousin Alex and Amy's two brothers. He hires an Asian woman to feed the people. She had electrolysis because of facial hair. She lives in his house. Two Chinese people abused her, but they are now in prison. The people he is keeping do not know where they are or why. He wears a black mask, and he is very muscular. He never lets them out. He turns the lights on at night so to disorient them. He only harms them if they grab the Chinese woman, and he breaks their arms.

His wife and children know about this. He's married to Priscilla.

Q. That's all the questions I have.

REDIRECT EXAMINATION

BY MR. SANCHEZ:

Q. Doctor, was that a fantasy or a dream? Can you tell?

[181] A. I don't know.

Q. You couldn't tell by those notes?

A. No.

Q. Now, let's talk a little bit about the cases that the prosecution asked you about. Now, when you were there to testify and he kept saying you were there to testify in mitigation, were you there to tell the jury to let this person walk the streets?

A. No, absolutely not.

Q. Were you there to tell the jury to let them out of jail?

A. No, no.

Q. You were there to testify about your findings and be truthful about them, weren't you?

A. Yes. The good, the bad and the ugly.

Q. Just like you have today?

A. Yes, sir.

Q. Now, they'd asked about Percy Davis, and you wanted to explain something about that. What did you want to tell us?

A. I wanted to tell you a lot about Percy Davis. Percy did do the very -- did do the killings that Mr. Davis reported. I evaluated Percy Davis, and I really -- at the time of those killings, at the time of his trial, I couldn't find anything wrong with him. That **[182]** was about 15 or 20 years ago, and I really feel like I missed the diagnoses of the neurological illnesses and the psychotic illnesses that later occurred.

He became very psychotic in prison and on death row and became completely incompetent. A second team of doctors has recently evaluated him, and he was found not competent to die because of -- his mental condition is so terribly deteriorated. I didn't even recognize him when I saw him 15 years – I've seen him, like, at five years and 10 years. But I have not seen him in five years.

He's recently been taken off death row and given a life sentence because of his incompetence and his psychosis. He's not – he's gone.

Q. Did you feel you missed some signs there that you could have seen or is it – you're not sure?

A. Well, I mean, I could have -- there may have been some signs of severe mental illness that I missed. That's – that's what hangs on my conscience about this, that he became so mentally ill that he's incompetent to die and that I may have missed those that -- and that should have been considered by the jury early on.

Q. And you've also evaluated people for competency to die, and you found them competent, didn't you?

A. Yes. I evaluated -- I evaluated Winthrop Eaton, **[183]** for example; a man in Monroe that killed a female minister. He was psychotic at the time.

I wasn't involved in the trial, but the -- his mental health history was so bad that the lawyers, who were inexperienced, didn't use any of the psychological evaluations or findings. He later was put on death row. He was found guilty of murder, capital murder, and was sentenced to death. He --

I was then appointed to evaluate him, and my opinion was that when he is not on the antipsychotic medications he is incompetent and not competent to die. But when he was placed on the antipsychotic medications he was competent to die, even though he was a very --

He has hebrephrenic schizophrenia, a very serious mental illness. I still had to testify that he's competent to die, even though I believe that he's seriously, seriously mentally ill.

Q. And in that case at that time when you were doing the evaluation, you weren't working for the defense, were you?

A. I was appointed by the court.

Q. You were working for the court?

A. No, I was -- I was hired by the Defense. I'm sorry.

Q. Okay. Let's talk about Patrick Murphy. The **[184]** State has talked to you a lot about him.

Patrick Murphy was a person who was accused in this capital murder who was a non-shooter; is that correct? Do you recall that?

A. Yes. During the killing of Officer Hawkins he was across the street in an apartment complex. But he was still part of this whole group that had escaped, and his job was to wait for them to come out. They were going to signal him, and he would come up and pick them up and off they would go. In between, they killed Officer Hawkins.

Q. They found that he was a party, but he wasn't the one -- he wasn't near the shooting, was he?

A. No, no.

Q. Now, the State asked you a lot about the people that you haven't talked to. Not everybody wants to talk to you, correct?

A. Right.

Q. As a matter of fact, I think our investigator -- you had given us a list of people you wanted to talk to. Our investigator tried to locate some of them. Isn't it true some were located and some weren't. And the ones that were located, hardly any of them were cooperative with us; is that correct?

A. That's true. That's right.

[185] Q. He asked you if you had talked to community supervision officers or the officers involved in the aggravated robberies or Nhat Vu. You read their reports and you read their statements, didn't you?

A. Yes.

Q. And you've indicated that defendants or people who are accused that you evaluate tend to minimize or not tell you or distort. Is that the reason you just don't rely on them solely and look at other records that would give you a better idea of what's going on?

A. Yes. All defendants that I've seen distort and many lie. That's pretty common.

Q. So it's your job to go around and try to get a better view of what's going on by things that are available to you?

A. Yes.

Q. Now, they've asked you about this assault that they -- in the jail. You took it as mutual combat based on the records you have in front of you. Wasn't Moises Mendoza -- or was he – didn't he sign an affidavit of nonprosecution?

A. I thought both people -- both men signed affidavits to not prosecute, so there was never any adjudication about it. Neither one of them pressed charges.

[186] Q. Did that indicate to you that neither of them wanted that thing to go further?

A. Yes.

Q. And that it was mutual combat?

A. That's how I understood it, yes.

Q. Now, you said that the family was dysfunctional, and Mr. Davis gave you certain classic dysfunctional scenarios. Explain to the jury -- and, like, you already have. But do you mean that they were

dysfunctional in that the father was never there and that there were beatings in the family all the time? Were you explaining that in a psychological dysfunction, the fact that the family was dysfunctional?

A. If I understand your question, in cases -- people just don't stand up one day and say, I'm going to molest a child or I'm going to murder somebody today. The roots of this type of behavior generally go back a long ways in people's lives, and in most of the cases that I've seen there are incidents – there's the criminal history in the family or there's an alcohol and drug instance in the family or there's a mental health issue in the family and a lot of mental health problems and a lot of alcohol and drug problems are familiar and move from one generation to another.

There are genetic predispositions for this **[187]** and these abnormalities cause or contribute to – there's no one cause for anything, but contribute to aberrant behavior like killing another human being.

There's something missing in this case for me as a psychologist. There is none of that there. There's something I don't know. I can't tell you. From a -- my intuition.

So in this case, those general factors that Mr. Davis was talking about are just not present, and the family is really on one level trying to work very hard and do their very, very best. On the other level, there is some dysfunction in terms of attachment.

Moises didn't attach to his dad. He worked with him all the time, but he never could talk to him. They could never connect. He credits his mother

with teaching him to be sneaky, you know, with all of that. He sees all of that.

But there was never any attachments. By that I mean really attaching and connecting emotionally with another human being and taking in values, etcetera, and using those values and developing his own moral compass. That has not happened for him yet. Or if it is happening, it's in a very immature stage. It will happen.

So I think the import of the counselor's **[188]** question is that in this case there aren't those traditional things that we often -- more often than not see which, you know, are traumatic to an individual which contribute to his aberrant behavior of taking another person's life.

Q. Did you get the feeling that the family didn't really want people to know or didn't want you to know about some of these dysfunctions that you described in your opinions?

A. Yes. Mario reported -- or someone reported that -- that I think the mom, Mercedes, wanted the family to not tell us things, to not say anything bad about the family or to not tell the truth but to minimize. And so there's an effort to be a proud family, to be a healthy family. We're not going to talk about the things that really happened or the import of them.

So there's some indication that there's some motivation to distort and present -- or fake good as a family to look better than we are.

Q. And you were asked about his other friends, whether they had committed other crimes. You're just not aware of those. You're not saying they haven't committed any other crimes, right, his other friends?

A. The friends, I don't know them. I don't know their histories. I would predict that if their drug and **[189]** alcohol behavior continues that they will -- some of them will engage in criminal behavior.

We know that there's a correlation. Drug and alcohol abuse don't cause violence, but there's a high correlation. The more drug and alcohol that's used, the more chronic it becomes, the greater the risk of violent behavior.

Q. Do you know whether there's any connection with depression in families and the next generation that comes along?

A. Oh, absolutely. May I read you a quotation?

Q. Yes.

A. This book is the Diagnostic and Statistical Manual of Mental Disorders IV. It's sort of the five hundred or so psychological disorders and the criteria for each of them.

One major area is called affective disorders that have to do with depression, and it says -- under family pattern, it says, major depressive disorder is 1.5 to 3 times more common among first degree biological relatives of persons with this disorder than among the general population. There is evidence of an increased risk of alcohol dependency in adult first degree biological relatives, and there may be

an increased incidence of attention deficit hyperactivity **[190]** disorder in the children of adults with depression.

In this case there's no doubt in my mind that Mr. Mendoza, Concepcion, that he has a major affective disorder. And there is the possibility, because of what the data say, that because Moises is a first degree relative that depressive disorder may, in some way, predispose Moises to alcohol dependency in an adult first degree biological relative and an increased risk for attention deficient hyperactivity disorder in the children.

He certainly was a hyperactive kid. I don't know that he had attention deficit disorder. But everybody describes him, including Mario, as being much more hyperactive than Mario's own children.

Q. Now --

A. I just -- that may be a biological link there.

Q. So you've described the procedures that they use in prison in order to control people and to not reward them for bad behavior. You've also described the fact that you believe that Moises is fairly bright and can learn quickly.

Do you think over a life sentence he would learn that bad behavior would not be condoned, that the walls of the prison are not going to get any thinner and that the steel is not going to get any weaker, that he's **[191]** going to have to go along with the flow or else things are going to go bad for him?

A. Well, there's all kinds of constraints that are going to be placed on him, including the steel and

the concrete, but very well-trained officers and the constricted environment and more constricted and more constricted if he engages in behavior that's not acceptable; less constrictive if he's engaging in correct behavior.

But then there's the inmates themselves. They don't want a lot of trouble generally. If he has a cell mate, the cell mate isn't going to want a lot of trouble. So there's going to be a lot of peer pressure to live by the rules and stop focusing on everybody else and start looking at how am I responsible for my behavior and what do I need to do to live here in peace and in a constructive way and how can I grow my personality.

Q. So we're talking about a life sentence?

A. Yes.

Q. A life -- a punishment of life sentence in the Texas Department of Criminal Justice?

A. Yes.

MR. SANCHEZ: I pass the witness.

RECROSS-EXAMINATION

BY MR. DAVIS:

[192] Q. I forgot to ask you about one statement the Defendant made to you.

Do you remember the Defendant telling you that before he went over to Rachelle's home that night he was at a party at Travis Rose's, and he got in a confrontation with two young ladies. Do you remember that?

A. Yes.

Q. Chassidy Gibson and Stacy Sauls?

A. Was that about the --

Q. The tent. I believe they were having a disagreement about a tent or something. And do you remember the Defendant telling you that he threatened to cut the throats of those young ladies with a rusty saw?

A. Right. Let me -- let me review my note on that. I do remember that, yes. Are you looking at a particular page?

Q. No, sir. I just made a note during the lunch hour.

A. Okay. I remember the incident, and I just want -- and I questioned him a second -- a second and third time about that, so I don't want to not have that fully in my memory.

It's the reference to the -- the rusty saw or –

[193] Q. Yes, sir. Do you remember that?

A. I remember it, yes. I'm sorry. I can't get to it quickly. I didn't put these back in the proper way since I got them back from you. I'm sorry. I don't want to take --

Q. As long as you can tell me that you remember a reference to that at some point?

A. Yes, I do.

Q. That's sufficient for me.

MR. DAVIS: Thank you, Your Honor. That's all.

FURTHER REDIRECT EXAMINATION

BY MR. SANCHEZ:

Q. Doctor, from reviewing your notes, how did you view the way these people communicated to each other, this group of friends in general?

A. Well, Moises said -- and I guess you can see it in the reports that there's a lot of threats and joking, but joking with threats involved in them. Moises says we were just joking, but there are threatening languages such as the prosecutor has said. But he wasn't the only one to be doing that; others were doing that, too. You know, hitting people with baseball bats and getting this person and getting that person, so there was a threat of disrespect, again, in this group.

[194] MR. SANCHEZ: That's all I have, Your Honor.

MR. DAVIS: Nothing further.

THE COURT: Is this witness excused or reserved by the Defense?

MR. SANCHEZ: We'll reserve.

THE COURT: Okay. Doctor, you can step down but do me a favor. Have a seat outside my courtroom, and we'll call you if we need you.

* * *