**No. 16-6795 (CAPITAL CASE)**

IN THE

# Supreme Court of the United States

CARLOS MANUEL AYESTAS,

*Petitioner,*

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice (Institutional Division),

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## JOINT APPENDIX


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*Petition for Writ of Certiorari Filed November 7, 2016*
*Certiorari Granted April 3, 2017*

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# APPENDIX A

## RELEVANT DOCKET ENTRIES

IN THE 230TH DISTRICT COURT OF
HARRIS COUNTY, TEXAS

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | |
| | § | |
| v. | § | Trial Court Cause No. |
| | § | 754409 |
| CARLOS MANUEL AYESTAS | § | |
| | § | |

| Date | Document |
|---|---|
| 02/15/1996 | Defendant's Motion for the Appointment of an Investigator, and Order of the Court |
| 02/15/1996 | Defendant's Motion for the Appointment of an Investigator, and Order of the Court |
| 02/15/1996 | Defendant's Motion for the Appointment of an Investigator, and Order of the Court |
| 02/15/1996 | Motion for Discovery of Punishment Evidence, and Orders of the Court |
| 02/15/1996 | Defendant's Motion to Discover State's Extraneous and/or Unadjudicated Acts of Misconduct to be Offered at Guilt or Punishment, and Order of the Court |
| 05/15/1996 | Motion for Discovery and Inspection of Evidence, and Orders of the Court |

| Date | Document |
|---|---|
| 02/15/1997 | Defendant's Motion for the Appointment of an Investigator, and Order of the Court |
| 03/07/1997 | Defendant's Motion for a Speedy Trial |
| 05/23/1997 | Demand for Individual Voir Dire, and Order of the Court |
| 05/23/1997 | Motion to Require the State to Reveal Agreements, and Order of the Court |
| 05/23/1997 | Motion to Discover Arrest and Conviction Records of Witnesses, and Order of the Court |
| 05/23/1997 | Motion to Compel Disclosure of Evidence Favorable to the Defendant, and Order of the Court |
| 05/23/1997 | Motion for Equal Access to Background Information on Prospective Jurors, and Order of the Court |
| 05/23/1997 | Motion to Suppress Identification, and Order of the Court |
| 05/23/1997 | Motion in Limine |
| 05/23/1997 | Motion to Introduce the Testimony of Defendant's Family and Friends Regarding their Feelings on the Prospect of a Death Sentence and the Impact an Execution Would Have on Them, and Order of the Court |
| 05/23/1997 | Motion to Limit State's Cross-Examination of Defendant to the Scope of the Direct, and Order of the Court |

| Date | Document |
|---|---|
| 05/23/1997 | Motion to Hold Unconstitutional V.A.C.C.P., Article 37.071 § 2(e) and (f) - Failure to Require Mitigation be Considered, and Order of the Court |
| 05/23/1997 | Motion to Hold Unconstitutional V.A.C.C.P., Article 37.071 § 2(e) and (f) - Burden of Proof, and Order of the Court |
| 05/23/1997 | Motion to Pound Specific Questions to Venireman Regarding the Burden of Proof on Special Issue, Mitigation, and Order of the Court |
| 05/23/1997 | Motion to Voir Dire on Parole Law - 40 Year Minimum, and Order of the Court |
| 05/23/1997 | Defendant's Motion to Present Written Questions to Jury Panel, and Order of the Court |
| 05/23/1997 | Defendant's Request to Utilize Peremptory Challenges Following Examination of the Entire Venire, and Order of the Court |
| 05/23/1997 | Motion for Jury List, and Order of the Court |
| 05/23/1997 | Motion for the Court to Direct Court Reporter to Take Voir Dire Examination of the Jury and Bench Conferences and all Final Arguments, and Order of the Court |

| Date | Document |
|---|---|
| 05/23/1997 | Motion for the Court to Direct Court Reporter to Take Voir Dire Examination of the Jury and Bench Conferences and all Final Arguments, and Order of the Court |
| 05/23/1997 | Motion for Hearing on Admissibility of Any Statement by Defendant Whether Written or Oral or Evidence Resulting from Same, and Order of the Court |
| 05/23/1997 | Motion to Discover the Portions of the Defendant's Statement Which the State Intends to Use at Time of Trial, and Order of the Court |
| 05/23/1997 | Motion to Inspect Premises, and Order of the Court |
| 05/23/1997 | Motion to View and Inspect Physical Evidence, and Order of the Court |
| 05/23/1997 | Motion to Disclose Existence of Any Testing Comparisons and Results Theret/of Conducted on Physical Evidence, and Order of the Court |
| 05/23/1997 | Defendant's Motion to Prevent Unfair Surprise During Trial, and Order of the Court |
| 05/23/1997 | Motion to Exclude Evidence of Unadjudicated Extraneous Offenses During the Punishment Phase, and Order of the Court |
| 05/23/1997 | Motion to Permit Voir Dire of Prospective Jurors on Mitigating Evidence, and Order of the Court |

| Date | Document |
|---|---|
| 05/23/1997 | Motion in Limine Character of the Complainant Victim Impact, and Order of the Court |
| 05/23/1997 | Motion to Preclude Prosecution from Seeking the Death Penalty, and Order of the Court |
| 05/23/1997 | Motion to Determine Constitutionality of 37.071 (2)(b)(2) - Parties Charge, and Order of the Court |
| 05/23/1997 | Defendant's Motion to Set Aside the Indictment (Unconstitutionality of Statute), and Order of the Court |
| 05/23/1997 | Motion to Declare the Texas Capital Sentencing Scheme Unconstitutional and Motion to Preclude Imposition of the Death Penalty, and Order of the Court |
| 05/23/1997 | Motion to Voir Dire Venireman on Victim Impact Testimony, and Order of the Court |
| 05/30/1997 | Notice of State's Intent to Use Extraneous Offenses and Prior Convictions for Impeachment and Punishment Purposes |
| 06/02/1997 | Indictment |
| 06/02/1997 | Order of Presentation of Indictments and Nobills |
| 06/03/1997 | Motion to Adopt and Transfer Motions Previously Filed Under Other Cause Number, and Order of the Court |

| Date | Document |
|---|---|
| 06/11/1997 | First Amended Notice of State's Intent to Use Extraneous Offenses and Prior Convictions for Impeachment and Punishment Purposes |
| 06/12/1997 | Motion in Limine |
| | * * * |
| 07/02/1997 | Second Amended Notice of State's Intent to Use Extraneous Offenses and Prior Convictions for Impeachment and Punishment Purposes |
| | * * * |
| 07/02/1997 | Capital Murder Jury Strike List |
| 07/07/1997 | Motion in Limine |
| 07/09/1997 | Charge of the Court on Guilt or Innocence, and Defendant's Exhibit No. 2 |
| 07/09/1997 | Verdict |
| 07/10/1997 | Charge of the Court on Assessment of Punishment, and Defendant's Exhibit No. 3 |
| 07/10/1997 | Request of the Jurors, and Defendant's Exhibit No. 4 |
| 07/10/1997 | A Sealed Envelope Labeled: Court Exhibit No. 1 ***DO NOT UNSEAL WITHOUT COURT ORDER! SIGNED: JUDGE PRESIDING 230TH DISTRICT COURT*** |
| 07/10/1997 | Judgment and Sentence |

| Date | Document |
|---|---|
| 07/15/1997 | Finding of Indigency and Desire for Appointment of Habeas Counsel, and Order of the Court |
| 07/22/1997 | Letter of Assignment to the Court of Criminal Appeals |
| 07/24/1997 | Motion for New Trial, and Order of the Court |
| 07/31/1997 | An Inventory List of Exhibits |
| **Relevant Court Proceeding Entries** | |
| 06/03/1997 | The Defendant, Ayestas, appeared in person with Counsel Diana Olvera & Connie Williams. Bill Hawkins, & Don Smythe appeared for the State.<br>Interpreter: Lynda Kroneman<br>Court Reporter: Jennifer Messinger<br>Judge Presiding: Bob Burdette<br><br>At 10:04 am Court came to order. Motions were heard, ruled on and read into the record. The defendant was duly arraigned to which he pled Not Guilty. Court was adjourned at 10:48 am. |

* * *

| Date | Document |
|---|---|
| 06/04/1997 | **General Orders of the Court**: At 10:01 am Court came to order. Witnesses were sworn and testimony began on the Motion to Suppress Identification. At 10:22 am the State rests. Defense testimony began at this time. At 10:40 am Defense rests. Both sides rest and close. Defense made brief arguments. Court denied said Motion. Court was adjourned at 10:41 am. |
| 06/05/1997 | Court came to order at 10:05 am. Witnesses were sworn and the Rule was invoked. State began testimony on the Motion to Suppress Evidence. State rested at 10:32 am. Defense introduced evidence by exhibits. The Motion to Suppress Evidence as it pertains to the Tech-9 clip and 14-round ammunition was denied by the Court. Court recessed at 10:42 am until Friday, June 13, 1997. |

* * *

| Date | Document |
| --- | --- |
| 07/08/1997 | At 1:35 pm the Jury was seated in open Court and Court came to order. The indictment was presented to which the defendant plead "Not Guilty." The State made a brief opening statement. State's testimony began at 1:45 pm. At 3:15 pm the Court took a brief recess. At 3:51 pm the Jury was seated in open court. State's testimony resumed at this time. At 5:05 pm the Court admonished the Jury briefly before releasing them for the day. The Defense made a Motion for a Mistrial which was denied by the Court. Court was adjourned at this time. |

| Date | Document |
| --- | --- |
| 07/09/1997 | At 8:40 am Court came to order and the Jury was seated. State's testimony resumed at this time. At 10:25 am the Court took a brief recess. At 10:45 am the Jury was seated in Court and the State's testimony resumed. At 12:36 pm the State rests. The Court began its lunch recess at this time. At 1:50 pm Court came to order. Objections to the charge were made. Defense made a Motion for an Instructed Verdict which was denied by the Court. At 2:02 pm the Jury was seated. Defense rests. Both sides close.<br><br>The Court's charge was presented at this time. State's arguments began at 2:25 pm and concluded at 2:30 pm. Defense arguments began at this time and concluded at 2:47 pm. State's arguments began at this time and concluded at 3:10 pm. The Jury was retired at this time to begin its deliberation. Juror #13 Sherry Collins was released from further services. At 3:43 pm the Jury was seated in open Court and returned a verdict of Guilty of Capital Murder. Defense made a request to poll the Jury, which was granted by the Court. The Court admonished he Jury briefly before releasing them for the day at 3:47 pm. Court was adjourned at this time. |

| Date | Document |
| --- | --- |
| 07/10/1997 | At 8:45 am Court came to order. The Jury was seated in open Court. State's testimony as to punishment began at this time. At 9:25 am the Jury was retired for a brief hearing outside of their presence. The hearing concluded at 9:50 am. At 10:00 am, the Jury was seated in open Court. State's testimony resumed. At 10:58 am, the Jury was retired briefly. At 11:06 am, the Jury was seated in open Court. State rests at this time. Defense testimony began at this time. At 11:08 am, Defense rests. State closes. The Court began its lunch recess at 11:10 am. At 12:45 pm, objections to the charge were made and other matters discussed. At 1:00 pm, the Jury was seated in Court. The Court's charge was presented at this time. Defense's final arguments began at 1:15pm and concluded at 1:30 pm. State's final arguments began at this time and concluded at 1:50 pm. At 2:15 pm, the Jury was seated in open court and assessed punishment at Death. Defense made a motion to have the jury polled which was granted. The Court pronounced sentence upon the defendant and released the Jury at 2:30 pm. Court was adjourned at this time. Notice of Appeal. |

| Date | Document |
|---|---|
| 07/15/1997 | On the 15th of July, 1997, came to be heard the Defendant's proof of indigency and it appearing to the Court, the defendant is indigent and the defendant specifically requests the Court of Criminal Appeals to prosecute his trial application for Writ of Habeas Corpus. |
| 08/25/1997 | Court comes to order at which time came to be heard Defense's Motion for New Trial. Defense puts on brief testimony. Arguments were heard from both sides. The Court denied the said motion. |

* * *

## APPENDIX B

## RELEVANT DOCKET ENTRIES

IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

| | | |
|---|---|---|
| EX PARTE | § | |
| | § | |
| | § | |
| CARLOS MANUEL AYESTAS, | § | No. WR-69,674-01 |
| | § | |
| Applicant | § | |

On Application for Writ of Habeas Corpus in Cause No. 754409-A in the 230th Judicial District Court of Harris County

| Date | Document |
|---|---|
| 07/09/1997 | Judgment and Sentence |
| 12/02/1997 | Court's Findings of Fact Under Art. 11.071, § 2(b), V.A.C.C.P. |
| 12/19/1997 | Findings of Indigencey and Desire for Appointment of Habeas Counsel and Order |
| 11/04/1998 | Opinion |
| 11/20/1998 | Mandate |
| | * * * |
| 12/09/1998 | Application for Writ of Habeas Corpus |
| | * * * |

| Date | Document |
|---|---|
| 01/08/1999 | Supplement to Applicant's Initial Application for Writ of Habeas Corpus Brought Pursuant to Article 11.071 |
| 02/01/2005 | Respondent's Original Answer |
| | * * * |
| 02/01/2005 | Affidavit of Diana Olvera |
| 02/01/2005 | Affidavit of Bill Hawkins |
| 02/01/2005 | Affidavit of Don Smyth |
| | * * * |
| 02/17/2005 | Applicant's Response to Respondent's Original Answer and Request for an Evidentiary Hearing |
| | * * * |
| 03/28/2005 | Applicant's Supplemental Response to Respondent's Original Answer and Request for an Evidentiary Hearing |
| | * * * |
| 09/22/2006 | Affidavit of Dennis Humberto Zelaya AKA Carlos Manuel Ayestas |
| 12/15/2006 | 11.071 Writ of Habeas Corpus Oath of Indigence/ Findings of Fact/ Order Appointing Counsel/ Statement of Facts |
| | * * * |
| 01/17/2008 | Applicant's Proposed Findings of Fact and Conclusions of Law on Applicant's Application for Writ of Habeas Corpus |
| | * * * |
| 01/17/2008 | Respondent's Proposed Findings of Facts and Order |

| Date | Document |
|---|---|
| 02/18/2005 | Order Adopting Respondent's Proposed Findings of Fact and Conclusions of Law |
| | * * * |
| 09/10/2008 | Order Denying Petition for Writ of Habeas Corpus |
| | * * * |

**APPENDIX C**

**RELEVANT DOCKET ENTRIES**

IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

No. 72,928

---

CARLOS MANUEL AYESTAS,
*Defendant-Appellant*
v.
THE STATE OF TEXAS,
*Plaintiff-Appellee*

---

Direct Appeal from the 230th District Court
Harris County

---

| Date | Document |
|---|---|
| 05/12/1998 | Appellant's Brief filed |
| 05/22/1998 | Appellant's Supplemental Brief filed |
| | * * * |
| 07/27/1998 | State's Brief filed |
| | * * * |
| 11/04/1998 | Opinion Issued (Affirmed) |
| 11/04/1998 | Opinion Issued (Affirmed) |
| | * * * |
| 11/20/1998 | Mandate Issued |

## APPENDIX D

## RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

No. 4:09-cv-02999

CARLOS MANUEL AYESTAS,
also known as Dennis Zelaya Corea,

*Petitioner*

v.

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

*Respondent*

| Date | ECF | Document |
|---|---|---|
| 09/11/2009 | 1 | PETITION for Writ of Habeas Corpus * * * filed by Carlos Manuel Ayestas * * * |
| | | * * * |
| 02/24/2010 | 8 | STATE COURT RECORDS by Nathaniel Quarterman * * * |
| | | * * * |
| 04/09/2010 | 11 | ANSWER to Petition for Writ of Habeas Corpus by Nathaniel Quarterman * * * |
| | | * * * |
| 10/26/2010 | 14 | RESPONSE to Answer to Habeas Petition, filed by Carlos Manuel Ayestas * * * |

| Date | ECF | Document |
|---|---|---|
| 12/21/2010 | 15 | Opposed MOTION to Stay *Habeas Proceedings*, Opposed MOTION to Abate * * * by Carlos Manuel Ayestas * * * |
| 12/21/2010 | 16 | Opposed MOTION for Leave to File Affidavits/Expand Habeas Record by Carlos Manuel Ayestas * * * |
| 01/30/2011 | 17 | ORDER denying Motion to Stay; denying Motion to Abate * * * |
| 01/25/2011 | 18 | Opposed MOTION for Appointment of Investigator by Carlos Manuel Ayestas * * * |
| 01/26/2011 | 19 | MEMORANDUM OPINION AND ORDER; Motion for Summary Judgment * * * is GRANTED; Petition for a Writ of Habeas Corpus * * * is in all respects DENIED and Petition is DISMISSED WITH PREJUDICE; Petitioner's Motion to Expand Record * * * is DENIED; Motion for the Appointment of an Investigator * * * is DENIED; No Certificate of Appealability shall issue in this case * * * |

| Date | ECF | Document |
|---|---|---|
| 01/26/2011 | 20 | FINAL JUDGMENT; This action is DISMISSED WITH PREJUDICE; No certificate of appealability shall issue. Case terminated on January 26, 2011 * * * |
| 02/23/2011 | 21 | Opposed MOTION to Alter Judgment by Carlos Manuel Ayestas * * * |
| 02/28/2011 | 22 | ORDER Denying Opposed MOTION to Alter Judgment * * * |
| 03/29/2011 | 23 | NOTICE OF APPEAL of US Court of Appeals for the Fifth Circuit re: Final Judgment, Memorandum and Opinion, by Carlos Manuel Ayestas * * * |
| | | * * * |
| 02/27/2012 | 30 | PER CURIAM of USCA for the Fifth Circuit; (certified copy) re: Notice of Appeal; USCA No. 11-70004. Motion for a certificate of appealability is DENIED * * * |
| | | * * * |
| 07/16/2012 | 32 | Order of USCA re: Notice of Appeal; USCA No. 11-70004. It is Ordered that the petition for rehearing is denied * * * |

| Date | ECF | Document |
|---|---|---|
| 06/06/2013 | 33 | The petition for a writ of certiorari filed with the Supreme Court has been GRANTED (USCA No 11-70004) (USSC No. 12-6656). The motion for petitioner for leave to proceed In Forma Pauperis and the Petition for a writ of certiorari are GRANTED. The judgment is VACATED and the case is REMANDED to the US Court of Appeals for the Fifth Circuit for further consideration * * * |
| 02/10/2014 | 34 | Order of USCA for the Fifth Circuit (certified copy) re: Notice of Appeal; USCA No. 11-70004. Motion to vacate the prior decision denying Ayestas's application for a COA. REMAND to the District Court * * * |
| | | * * * |
| 06/16/2014 | 40 | BRIEF On Remand by Carlos Manuel Ayestas * * * |
| | | * * * |
| 09/02/2014 | 44 | Supplemental BRIEF re: Order by Rick Thaler * * * |
| | | * * * |
| 10/06/2014 | 47 | REPLY to *Respondent's Supplemental Briefing*, filed by Carlos Manuel Ayestas * * * |

| Date | ECF | Document |
|---|---|---|
| 11/03/2014 | 48 | Opposed MOTION Proceed Ex Parte and Under Seal Under 18 U.S.C. § 3599 by Carlos Manuel Ayestas * * * |
| 11/03/2014 | 49 | Sealed Event * * * |
| | | * * * |
| 11/18/2014 | 51 | MEMORANDUM OPINION AND ORDER denying Sealed Motion for Funding of Ancillary Services, mooting Opposed MOTION Proceed Ex Parte and Under Seal under 18 U.S.C. § 3599. Petitioner's Ineffective Assistance of Counsel Claims are denied as procedurally defaulted. No Certificate of Appealability will issue in this case * * * |
| 11/18/2014 | 52 | FINAL JUDGMENT. This action is dismissed with prejudice. Case terminated on 11/18/2014 * * * |
| 12/16/2014 | 53 | Opposed MOTION to Alter Judgment by Carlos Manuel Ayestas * * * |
| 01/09/2015 | 54 | Opposed MOTION to Amend by Carlos Manuel Ayestas * * * |
| 01/14/2015 | 55 | Supplemental MOTION to Alter Judgment by Carlos Manuel Ayestas * * * |

| Date | ECF | Document |
|---|---|---|
| 01/14/2015 | 56 | Opposed MOTION to Stay *and Hold in Abeyance* by Carlos Manuel Ayestas * * * |
| | | * * * |
| 01/20/2015 | 59 | RESPONSE in Opposition to Opposed MOTION to Amend, Opposed MOTION to Stay *and Hold in Abeyance*, filed by Rick Thaler * * * |
| 01/21/2015 | 60 | RESPONSE in Opposition to Supplemental MOTION to Alter Judgment, Opposed MOTION to Alter Judgment, filed by Rich Thaler * * * |
| | | * * * |
| 01/27/2015 | 62 | REPLY to Response to Supplemental MOTION to Alter Judgment, Opposed MOTION to Amend, Opposed MOTION to Stay *and Hold in Abeyance*, filed by Carlos Manuel Ayestas * * * |
| 02/17/2015 | 63 | ORDER denying Motion to Amend, and denying Motion to Stay * * * |
| 04/01/2015 | 64 | MEMORANDUM OPINION AND ORDER denying Opposed MOTION to Alter Judgment denying Supplemental MOTION to Alter Judgment. No Certificate of Appealability shall issue * * * |

| Date | ECF | Document |
|---|---|---|
| 04/29/2015 | 65 | NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: Order on Motion to Amend, Order on Motion to Stay, Memorandum and Opinion, Final Judgment, Memorandum and Opinion, by Carlos Manuel Ayestas * * * |
| | | * * * |
| 06/10/2016 | 70 | Order of USCA re: Notice of Appeal. The Petition for Rehearing En Banc is DENIED. The Petition for Panel Rehearing is also DENIED * * * |
| 06/20/2016 | 71 | Order of USCA Judgment re: Notice of Appeal, USCA No. 15-70015. It is ordered and adjudged that the judgment of the District Court is affirmed. Appeal reinstated * * * |
| 06/20/2016 | 72 | Order of USCA Per Curiam re: Notice of Appeal, No. 15-70015. The request for a certificate of appealability is DENIED. The judgment rejecting Ayestas' Section 2254 application is AFFIRMED * * * |
| | | * * * |

| Date | ECF | Document |
|---|---|---|
| 04/04/2017 | 74 | The petition for a writ of certiorari filed with the Supreme Court has been granted limited to Question 2 (USCA No. 15-70015) (USSC No. 16-6795) * * * |
| | | * * * |

## APPENDIX E

## RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-70004

CARLOS MANUEL AYESTAS,
also known as Dennis Zelaya Corea,

Petitioner - Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent - Appellee

| Date | Document |
|---|---|
| 03/31/2011 | DEATH PENALTY CASE docketed. NOA filed by Appellant Mr. Carlos Manuel Ayestas * * * |
| | * * * |
| 04/05/2011 | RECORD ON APPEAL FILED * * * |
| | * * * |
| 06/15/2011 | OPPOSED MOTION filed by Appellant Mr. Carlos Manuel Ayestas for certificate of appealability * * * |
| 06/15/2011 | BRIEF IN SUPPORT filed by Appellant Mr. Carlos Manuel Ayestas in support of motion for certificate of appealability * * * |
| | * * * |

| Date | Document |
|---|---|
| 09/12/2011 | RESPONSE/OPPOSITION filed by Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Divisions to the motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas * * * |
| 02/22/2012 | UNPUBLISHED OPINION ORDER FILED * * * denying motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas * * * |
| 02/22/2012 | MANDATE ISSUED * * * |
| | * * * |
| 03/09/2012 | PETITION filed by Appellant Mr. Carlos Manuel Ayestas, *Petition* for Rehearing * * * |
| | * * * |
| 03/22/2012 | OPPOSED MOTION filed by Appellant Mr. Carlos Manuel Ayestas to vacate opinion and judgment filed * * * |
| | * * * |
| 04/02/2012 | RESPONSE/OPPOSITION filed by Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Divisions to the motion to vacate opinion and judgment filed by Appellant Mr. Carlos Manuel Ayestas * * * |

| Date | Document |
|---|---|
| 04/09/2012 | REPLY filed by Appellant Mr. Carlos Manuel Ayestas to the response /opposition filed Appellee Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Divisions * * * |
| 06/18/2012 | SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellant Mr. Carlos Manuel Ayestas * * * |
| 07/11/2012 | COURT ORDER denying motion to vacate opinion and judgment filed by Appellant Mr. Carlos Manuel Ayestas; denying motion to remand case filed by Appellant Mr. Carlos Manuel Ayestas; denying petition for rehearing filed by Appellant Mr. Carlos Manuel Ayestas * * * |
| | * * * |
| 07/31/2012 | OPPOSED MOTION filed by Appellant Mr. Carlos Manuel Ayestas for reconsideration of the Order dated 07/17/2012 * * * |
| 10/04/2012 | COURT ORDER denying motion for reconsideration filed by Appellant Mr. Carlos Manuel Ayestas; Judge(s): WED, JES, and LHS * * * |
| 10/12/2012 | SUPREME COURT NOTICE that petition for writ of certiorari was filed by Appellant Mr. Carlos Manuel Ayestas on 10/09/2012 * * * |

| Date | Document |
|---|---|
| 06/03/2013 | SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Carlos Manuel Ayestas in 11-7004 on 06/03/2013 * * * |
| 07/05/2013 | SUPREME COURT JUDGMENT filed on 07/05/2013 remanding case to the 5th Circuit * * * |
| | * * * |
| 09/16/2013 | APPELLANT'S BRIEF FILED by Mr. Carlos Manual Ayestas * * * |
| 09/18/2013 | RECORD EXCERPTS FILED by Appellant Mr. Carlos Manuel Ayestas * * * |
| | * * * |
| 11/20/2013 | APPELLEE'S BRIEF FILED by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Divisions * * * |
| | * * * |
| 12/09/2013 | APPELLANT'S REPLY BRIEF FILED by Mr. Carlos Manuel Ayestas * * * |
| | * * * |
| 01/30/2014 | UNPUBLISHED OPINION ORDER FILED. Judge: WED, Judge: JES, Judge: LHS. ISSUED AS & FOR THE MANDATE * * * |
| 01/30/2014 | MANDATE ISSUED * * * |

**APPENDIX F**

IN THE
SUPREME COURT OF THE UNITED STATES

No. 12-6656

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CARLOS MANUEL AYESTAS,
*Petitioner,*

v.

RICK THALER,
Director, Texas Department of Criminal Justice,
*Respondent.*

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On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

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| Date | Document |
|---|---|
| 10/09/2012 | Petition for a Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis filed. (Response due November 13, 2012) |
| | * * * |
| 01/14/2013 | Brief of Respondent Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed. |
| | * * * |
| 02/04/2013 | Reply of Petitioner Carlos Manuel Ayestas filed. (Distributed) |

| Date | Document |
|---|---|
| | * * * |
| 06/03/2013 | Motion to Proceed In Forma Pauperis and Petition for a Writ of Certiorari GRANTED. Judgment VACATED and case REMANDED for further consideration in light of *Trevino v. Thaler*, 569 U.S. ___ (2013). |
| 07/05/2013 | JUDGMENT ISSUED. |

## APPENDIX G

## RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70015

CARLOS MANUEL AYESTAS,
also known as Dennis Zelaya Corea,

Petitioner - Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent - Appellee

| Date | Document |
|---|---|
| 05/01/2015 | DEATH PENALTY CASE docketed. NOA filed by Appellant Mr. Carlos Manuel Ayestas * * * |
| | * * * |
| 07/23/2015 | MOTION for certificate of appealability. Document is insufficient for the following reasons: certificate of service reflects Mr. Wolff who is not appointed to represent appellant Motion due deadline satisfied * * * |

| Date | Document |
|---|---|
| 07/23/2015 | DOCUMENT RECEIVED - NO ACTION TAKEN. No action will be taken on the Appellant's Brief received from Appellant Mr. Carlos Manuel Ayestas because leave of the Court is required * * * |
| 07/23/2015 | DOCUMENT RECEIVED - NO ACTION TAKEN. No action will be taken on the Record Excerpts received from Appellant Mr. Carlos Manuel Ayestas because leave of the Court is required * * * |
| 07/23/2015 | BRIEF IN SUPPORT filed by Appellant Mr. Carlos Manuel Ayestas in support of motion for certificate of appealbility (INCORPORATED IN MOTION FOR COA) * * * |
| 07/28/2015 | MOTION filed by Appellant Mr. Carlos Manuel Ayestas for leave to file document * * * |
| 07/28/2015 | EXHIBITS IN SUPPORT of motion for leave to file document filed by Appellant Mr. Carlos Manuel Ayestas * * * |
| 07/30/2015 | The motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas in 15-70015 has been made sufficient * * * |

| Date | Document |
|---|---|
| 08/04/2015 | COURT ORDER granting motion for leave to file merits brief and record excerpts filed by Appellant Mr. Carlos Manuel Ayestas * * * |
| 08/04/2015 | APPELLANT'S BRIEF FILED * * * |
| 08/04/2015 | RECORD EXCERPTS FILED by Appellant Mr. Carlos Manuel Ayestas * * * |
| | * * * |
| 08/24/2015 | RESPONSE/OPPOSITION to the motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas in 15-70015 * * * |
| | * * * |
| 09/03/2015 | APPELLEE'S BRIEF FILED. Brief NOT sufficient as it requires the citations to the record. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT * * * |
| 09/15/2015 | BRIEF MADE SUFFICIENT filed by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division * * * |
| | * * * |
| 09/21/2015 | APPELLANT'S REPLY BRIEF FILED |

| Date | Document |
|---|---|
| 09/21/2015 | UNOPPOSED MOTION filed by Appellant Mr. Carlos Manuel Ayestas for leave to file a reply to the response/opposition filed by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division * * * |
| 09/22/2015 | COURT ORDER granting motion for leave to file a reply filed by Appellant Mr. Carlos Manuel Ayestas to the response to motion for certificate of appealability * * * |
| 09/22/2015 | REPLY filed by Appellant Mr. Carlos Manuel Ayestas to the response/opposition filed by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division; to the motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas * * * |
| | * * * |
| 03/22/2016 | PUBLISHED OPINION FILED. Judge: WED, Judge: JES, Judge: LHS. Mandate pull date is 04/12/2016; denying motion for certificate of appealability filed by Appellant Mr. Carlos Manuel Ayestas * * * |
| 03/22/2016 | JUDGMENT ENTERED AND FILED * * * |

| Date | Document |
|---|---|
| 03/24/2016 | COURT ORDER granting motion to place motion under seal filed by Appellant Mr. Carlos Manuel Ayestas; granting motion to seal tentative budget and budget order filed by Appellant Mr. Carlos Manuel Ayestas * * * |
| 03/24/2016 | COURT ORDER approving the tentative budget in this appeal. The approval of this budget in no way entitles counsel to do work or submit charges beyond what is reasonably necessary to represent the client * * * |
| | * * * |
| 04/19/2016 | PETITION for rehearing en banc * * * |
| 04/19/2016 | PETITION for rehearing * * * |
| | * * * |
| 05/23/2016 | RESPONSE/OPPOSITION to the court order Court directive requesting a response, petition for rehearing en banc filed by Appellant Mr. Carlos Manuel Ayestas * * * |
| 06/10/2016 | COURT ORDER denying petition for rehearing filed by Appellant Mr. Carlos Manuel Ayestas. Mandate pull date is 06/17/2016; denying petition for rehearing en banc filed by Appellant Mr. Carlos Manuel Ayestas. Without Poll * * * |
| 06/20/2016 | MANDATE ISSUED. Mandate pull date satisfied * * * |

| Date | Document |
|---|---|
| | * * * |
| 11/14/2016 | SUPREME COURT NOTICE that petition for writ of certiorari was filed by Appellant Mr. Carlos Manuel Ayestas on 11/07/2016. Supreme Court Number 16-6795 * * * |
| | * * * |
| 04/04/2017 | SUPREME COURT ORDER received granting petition for writ of certiorari, limited to Question 2 presented by the petition filed by Appellant Mr. Carlos Manuel Ayestas in 15-70015 on 04/03/2017 * * * |

## APPENDIX H

CAPITAL MURDER SUMMARY

PREPARED BY:
KELLY SIEGLER
SEPTEMBER 19, 1995

### I. PARTIES

| | |
|---|---|
| DEFENDANTS: | CARLOS AYESTAS<br>CAUSE NO. 703059;<br>230TH COURT<br>D.O.B. 7-30-69 (AGE 26) |
| | FEDERICO ZALDIVAR<br>CAUSE NO. 703060;<br>230TH COURT<br>D.O.B. 10-10-66 (AGE 28) |
| | ROBERTO MEZA<br>CAUSE NO. 703443;<br>230TH COURT<br>D.O.B. 10-19-67 (AGE 27) |
| VICTIM: | SANTIAGA PANEQUE<br>AGE 67 |
| DATE: | SEPTEMBER 5, 1995 |
| LOCATION: | 3530 SPEARS ROAD |
| TYPE OF CASE: | CAPITAL MURDER-<br>ROBBERY/BURGLARY<br>DEADLY WEAPON-DUCT<br>TAPE |

### II. STATEMENT OF FACTS

The victim was found by her son in a bathroom of her home strangled to death with duct tape around

her throat, her ankles, one wrist and around her head covering her eyes.

About one week before the murder, a witness spoke to two of the defendants, Ayestas and Zaldivar, about buying a car from her. The car for sale was located at her house which is directly across the street from the victim's home. The witness says she left both defendants outside of her house while she went inside to get them a glass of water. When she returned outside, she saw both of the defendants going into the home of the victim with the victim accompanying them. The defendants told the witness they had been talking to the victim about buying some of her furniture and had gone inside to look at the furniture. Defendant Meza was not present at this time.

Elim Paneque, the son of the victim who also lived with her, said several items were missing from the house after his mother was killed; including a 20" General Electric television, a 13" Magnavox television and a black and a white telephone with push-buttons.

Witness Casares who knows defendants Ayestas and Zaldivar by sight and name and who identified defendant Meza in a photospread, said all three came to sell the same merchandise to her and two others.

Deputy Rinehart, a print examiner and crime scene technician, says he lifted an identifiable fingerprint from a roll of tape and another from a plastic box containing cufflinks found in the bathroom where the deceased was found and a third from a ceramic bowl found in the living room which had last been sitting on top of the already mentioned

television. Rinehart says upon comparing the prints lifted to those of the three defendants he obtained the following results: the print from the tape roll was made by the defendant Ayestas, the print from the plastic box was made by the defendant Zaldivar and the print from the ceramic bowl was made by the defendant Meza.

All three defendants are currently at large.

* * *

CARLOS AYESTAS

III. AGGRAVATING CIRCUMSTANCES

A. THE VICTIM IS A HELPLESS 67 YEAR OLD WOMAN KILLED IN HER HOME.

B. ~~THE DEFENDANT IS NOT A CITIZEN.~~

IV. MITIGATING CIRCUMSTANCES

A. THE DEFENDANT'S ONLY PRIOR CONVICTION IS FOR MISDEMEANOR THEFT.

V. INDICTMENT RECOMMENDATION

A. COURT CHIEF-KELLY SIEGLER Capital - /s/ KRS 9/19/95

B. DIVISION CHIEF-CASEY O'BRIEN Capital /s/ Casey O'Brien 9/21/95

C. BUREAU CHIEF-KENO HENDERSON Capital /s/ KHenderson 9/21/95

D. DISTRICT ATTORNEY-JOHN B. HOLMES, JR. Capital /s/ JBH

VI. RECOMMENDATION FOR DISPOSITION AT TRIAL

A. COURT CHIEF-KELLY SIEGLER _____

B. DIVISION CHIEF-CASEY O'BRIEN _____

C. BUREAU CHIEF-KENO HENDERSON _____

D. DISTRICT ATTORNEY-JOHN B. HOLMES, JR. _____

/s/ OK to plead non-killers for Agg. Rob. Life, deadly weapon, see death on killer Ayestas. 2 pleading Δ's to testify -

/s/ JBH

done 6-5-97

## APPENDIX I

**DEFENDANT'S EXHIBIT 1**

Harris County Sheriff's Department
1301 Franklin
Houston, Texas 77002

Attention Probation Department

Re: **Carlos Ayestes, SPN 1473561**

Mr. Ayestes is currently enrolled as a student in my English as a Second Language Class that I teach in the Harris County Jail. He is a serious and attentive student who is progressing well in English.

Sincerely,

/s/ Mae J. Martin

Mae J. Martin, Instructor
Houston Community
College System

December 1, 1996

DEFENDANT'S
EXHIBIT
2

Harris County Sheriff's Department
1301 Franklin
Houston, Texas 77002

Attention Probation Department

Re: **Ayestes, Carlos, SPN 1473561**

Carlos Ayestas is currently enrolled as a student in my English as a Second Language Class that I teach in the Harris County Jail. Mr. Ayestas is a serious and attentive student who is progressing well in English.

Sincerely,

/s/ Mae J. Martin

Mae J. Martin, Instructor
Houston Community
College System

April 21, 1997

**DEFENDANT'S EXHIBIT 3**

Harris County Sheriff's Department
1301 Franklin
Houston, Texas 77002

Attention Probation Department

Re: **Ayestes, Carlos, SPN 1473561**

Carlos Ayestes has been currently enrolled for two semesters as a student in my English as a Second Language Class that I teach in the Harris County Jail. Mr. Ayestes is a serious and attentive student who continues to progress well in English.

Sincerely,

/s/ Mae J. Martin

Mae J. Martin, Instructor
Houston Community
College System

June 10, 1997

**APPENDIX J**

CHARGE OF THE COURT ON GUILT OR INNOCENCE

DEFENDANT'S EXHIBIT 2 MNT 8-25-97 JS

FILED: JULY 9, 1997

CAUSE NO. 754409

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 230TH |
| | § | DISTRICT COURT OF |
| VS. | § | HARRIS COUNTY, |
| | § | TEXAS |
| CARLOS MANUEL AYESTAS | § | MAY TERM, A.D., 1997 |

Members of the Jury:

The defendant, Carlos Manuel Ayestas, stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 5th day of September, 1995, in Harris County, Texas. The defendant has pleaded not guilty.

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual.

A person commits the offense of capital murder if he intentionally commits the murder in the course of committing or attempting to commit the offense of robbery or burglary.

Our law provides that a person commits the offense of burglary if, without the effective consent of the owner, he:

(1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony; or

(2) remains concealed, with intent to commit a felony or theft, in a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony or theft.

"Habitation" means a structure that is adapted for the overnight accommodation of persons, and includes: (a) each separately secured or occupied portion of the structure or vehicle and (b) each structure appurtenant to or connected with the structure or vehicle.

"Building" means any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use.

"Enter" means to intrude any part of the body, or any physical object connected to the body.

* * *

A person commits the offense of robbery if, in the course of committing theft, and with intent to obtain or maintain control of property of another he:

(1) intentionally or knowingly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in the immediate flight after the attempt or commission of theft.

"Attempt" to commit an offense occurs if, with specific intent to commit an offense, a person does an act amounting to more than mere preparation that

tends, but fails, to effect the commission of the offense intended.

"Theft" is the unlawful appropriation of property with intent to deprive the owner of said property.

"Appropriate" and "appropriation" means to acquire or otherwise exercise control over property other than real property. Appropriation of property is unlawful if it is without the owner's effective consent.

"Property" means tangible or intangible personal property, or a document, including money, that represents or embodies anything of value.

"Deprive" means to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner.

"Effective consent" means assent in fact, whether express or apparent, and includes consent by a person legally authorized to act for the owner. Consent is not effective if induced by force, threats, deception or coercion.

"Owner" means a person who has a greater right to possession of the property than the defendant.

"Possession" means actual care, custody, control, or management of the property.

"Deadly weapon" means anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

The definition of intentionally relative to the offense of capital murder is as follows:

A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

The definitions of intentionally or knowingly relative to the offense of murder are as follow:

A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

The definitions of intentionally or knowingly relative to the offenses of robbery and burglary are as follow:

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his

conduct when he is aware that his conduct is reasonably certain to cause the result.

All persons are parties to an offense who are guilty of acting together in the commission of the offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense.

Before you would be warranted in finding the defendant guilty of capital murder, you must believe from the evidence beyond a reasonable doubt not only that on the occasion in question the defendant was in the course of committing or attempting to commit the felony offense of robbery of Santiaga Paneque, as defined in this charge, but also that the defendant intentionally caused the death of Santiaga Paneque by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape with the intention of thereby causing the death of Santiaga Paneque and such act by the defendant did cause the death of Santiaga Paneque; or you must believe from the evidence beyond a reasonable doubt that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense of robbery, if any, solicited, encouraged, directed, aided, or attempted to aid Roberto Meza

and/or Rolando Gutierrez also known as Federico Zaldivar in strangling Santiaga Paneque, if he did, with the intention of thereby killing Santiaga Paneque; or you must believe from the evidence beyond a reasonable doubt not only that on the occasion in question the defendant was in the course of committing or attempting to commit the felony offense of burglary of Santiaga Paneque, as defined in this charge, but also that the defendant intentionally caused the death of Santiaga Paneque by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape with the intention of thereby causing the death of Santiaga Paneque and such act by the defendant did cause the death of Santiaga Paneque; or you must believe from the evidence beyond a reasonable doubt that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense of burglary, if any, solicited, encouraged, directed, aided, or attempted to aid Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar in strangling Santiaga Paneque, if he did, with the intention of thereby killing Santiaga Paneque. Unless you believe from the evidence beyond a reasonable doubt you cannot convict the defendant of the offense of capital murder.

Now, if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Carlos Manuel Ayestas, on or about the 5th day of September, 1995, did then and there unlawfully, while in the course of committing or attempting to commit the robbery of Santiaga Paneque, intentionally cause the death of Santiaga Paneque, by strangling Santiaga Paneque with a deadly

weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape; or if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar, on or about the 5th day of September, 1995, did then and there unlawfully, while in the course of committing or attempting to commit the robbery of Santiaga Paneque, intentionally cause the death of Santiaga Paneque, by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape and that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar to commit the offense, if he did; or

If you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Carlos Manuel Ayestas, on or about the 5th day of September, 1995, did then and there unlawfully, while in the course of committing or attempting to commit the burglary of Santiaga Paneque, intentionally cause the death of Santiaga Paneque, by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape; or if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar, on or about the 5th day of September, 1995, did then and there unlawfully, while in the course of committing or attempting to commit the burglary of Santiaga Paneque, intentionally cause the death of Santiaga Paneque,

by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape and that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar to commit the offense, if he did, then you will find the defendant guilty of capital murder as charged in the indictment.

* * *

Unless you so believe beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and next consider whether the defendant is guilty of felony murder.

A person commits the offense of felony murder if he commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

The definitions of intentionally and knowingly relative to the offense of felony murder are as follow:

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to

circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Therefore, if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Carlos Manuel Ayestas, on or about the 5th day of September, 1995, did then and there unlawfully, while in the furtherance of the commission of the felony of robbery of Santiaga Paneque or in immediate flight from the commission of the felony of robbery of Santiaga Paneque, the defendant committed an act clearly dangerous to human life, to-wit: by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape; or if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar, on or about the 5th day of September, 1995, did then and there unlawfully, while in the furtherance of the commission of the felony of robbery of Santiaga Paneque or in immediate flight from the commission of the felony of robbery of Santiaga Paneque, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar committed an act clearly dangerous to human life, to-wit: by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape and that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed,

aided or attempted to aid Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar to commit the offense, if he did; or

If you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Carlos Manuel Ayestas, on or about the 5th day of September, 1995, did then and there unlawfully, while in the furtherance of the commission of the felony of burglary of Santiaga Paneque or in immediate flight from the commission of the felony of burglary of Santiaga Paneque, the defendant committed an act clearly dangerous to human life, to-wit: by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape; or if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar, on or about the 5th day of September, 1995, did then and there unlawfully, while in the furtherance of the commission of the felony of burglary of Santiaga Paneque or in immediate flight from the commission of the felony of burglary of Santiaga Paneque, Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar committed an act clearly dangerous to human life, to-wit: by strangling Santiaga Paneque with a deadly weapon, namely, tape, or his hands, or his hand, or his hands and tape, or his hand and tape and that the defendant, Carlos Manuel Ayestas, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid Roberto Meza and/or Rolando Gutierrez also known as Federico Zaldivar to commit the offense, if

he did, then you will find the defendant guilty of felony murder.

* * *

Unless you so believe beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of felony murder.

* * *

If you believe from the evidence beyond a reasonable doubt that the defendant is guilty of either capital murder or felony murder but you have a reasonable doubt as to which of said offenses he is guilty, then you must resolve that doubt in the defendant's favor and find him guilty of the lesser offense of felony murder.

If you have a reasonable doubt as to whether the defendant is guilty of any offense defined in this charge then you will acquit the defendant and say by your verdict "Not Guilty."

* * *

You are instructed that certain evidence was admitted before you regarding the defendant allegedly having committed an extraneous offense or offenses. Such testimony was admitted for the purpose of aiding you, if it does aid you, in determining the guilty knowledge of the defendant, if any, and you must not consider it for any other purpose.

* * *

A defendant in a criminal case is not bound by law to testify in his own behalf therein and the failure of any defendant to so testify shall not be taken as a circumstance against him nor shall the same be alluded to nor commented upon by the jury, and you

must not refer to, mention, comment upon or discuss the failure of the defendant to testify in this case. If any juror starts to mention the defendant's failure to testify in this case then it is the duty of the other jurors to stop him at once.

* * *

A Grand Jury indictment is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the question of guilt of the defendant. The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the

prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not Guilty."

You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as your Foreman. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto and signing the same as Foreman.

During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you

may have about any fact or person connected with this case which is not shown by the evidence.

No one has any authority to communicate with you except the officer who has you in charge. After you have retired, you may communicate with this Court in writing through this officer. Any communication relative to the cause must be written, prepared and signed by the Foreman and shall be submitted to the court through this officer. Do not attempt to talk to the officer who has you in charge, or the attorneys, or the Court, or anyone else concerning any questions you may have.

Your sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this cause and restrict your deliberations solely to the issue of guilt or innocence of the defendant.

Following the arguments of counsel, you will retire to consider your verdict.

/s/ Bob Burdette
Bob Burdette, Judge Presiding
230th District Court
Harris County, TEXAS

**FILED**
**KATHERINE TYRA**
**District Clerk**
**JUL 09 1997**
**Time: 14:25**
**Harris County, Texas**
**By:_____**
**Deputy**

## APPENDIX K

CAUSE NO. 754409

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 230TH |
| VS. | § | DISTRICT COURT OF HARRIS COUNTY, |
| CARLOS MANUEL AYESTAS | § | TEXAS |
| | § | MAY TERM, A.D., 1997 |

**CHOOSE ONE**

"We, the Jury, find the defendant, Carlos Manuel Ayestas, not guilty."

_____
Foreman of the Jury

_____
(Please Print) Foreman

"We, the Jury, find the defendant, Carlos Manuel Ayestas, guilty of capital murder, as charged in the indictment."

/s/ Joseph O. Slovacek
Foreman of the Jury

/s/ Joseph O. Slovacek
(Please Print) Foreman

"We, the Jury, find the defendant, Carlos Manuel Ayestas, guilty of felony murder."

_____
Foreman of the Jury

_____
(Please Print) Foreman

**FILED**
**KATHERINE TYRA**
**District Clerk**
**JUL 09 1997**
**Time: 3:46pm**
**Harris County, Texas**
**By:_____**
**Deputy**

**APPENDIX L**

CHARGE OF THE COURT ON ASSESSMENT OF PUNISHMENT

FILED: JULY 10, 1997

DEFENDANT'S EXHIBIT 3 MNT 8-25-97 JS

Cause No. 754409

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 230TH |
| VS. | § | DISTRICT COURT OF HARRIS COUNTY, |
| CARLOS MANUEL AYESTAS | § | TEXAS |
| | § | MAY TERM, A.D., 1997 |

Members of the Jury:

By your verdict returned in this case you have found the defendant, Carlos Manuel Ayestas, guilty of the offense of capital murder, which was alleged to have been committed on or about the 5th day of September, 1995, in Harris County, Texas. In order for the Court to assess the proper punishment, it is necessary now for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues," in this charge. The Court instructs you in answering these "Special Issues" as follows:

The mandatory punishment for the offense of capital murder of which you have found the defendant guilty is death or confinement in the Texas Department of Criminal Justice, Institutional Division, for life.

In determining your answers to the questions, or special issues, submitted to you, you shall consider all the evidence submitted to you in this whole trial,

which includes that phase of the trial wherein you were called upon to determine the guilt or innocence of the defendant, and this punishment phase of the trial wherein you are now called upon to determine the answers to Special Issues submitted to you by the Court. However, in this punishment phase of the trial you should not consider the instructions given you in the first phase of trial that relate to the law of parties and the responsibility of parties for the acts of others in the commission of offenses. You shall consider only the conduct and state of mind of this defendant in determining what your answers to the Special Issues shall be.

You shall consider all evidence submitted to you during the whole trial as to the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

* * *

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character, background, record, emotional instability, intelligence or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there is a mitigating circumstance or circumstances in this case, you must decide how much weight it/they deserve, if any, and thereafter, give effect and consideration to it/them in assessing the defendant's

personal culpability at the time you answer the special issue.

You are instructed that mitigating evidence, if any, may be considered by you in answering the special issues under consideration. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence rather than a death sentence is an appropriate response, let your answers to the special issues reflect that.

You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issues.

* * *

Should you return an affirmative finding on Special Issue No. 1 and Special Issue No. 2 and a negative finding on Special Issue No. 3, the Court will sentence the defendant to death. Should you return a negative finding on Special Issue No. 1 or Special Issue No. 2 or an affirmative finding on Special Issue No. 3, the Court will sentence the defendant to confinement in the Institutional Division of the Texas Department of Criminal Justice for life.

* * *

The State must prove Special Issue No. 1 submitted to you beyond a reasonable doubt, and you shall return a Special Verdict of "YES" or "NO" on Special Issue No. 1.

In deliberating on Special Issue No. 1 you shall consider all the evidence admitted at the guilt or innocence stage and the punishment stage of trial,

including evidence of the defendant's background, character, record, emotional instability, intelligence, or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

You may not answer Special Issue No. 1 "YES" unless you agree unanimously.

You may not answer Special Issue No. 1 "NO" unless ten (10) or more jurors agree.

Members of the jury need not agree on what particular evidence supports a negative answer to Special Issue No. 1.

You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all of the evidence before you and in answering the Special Issue No. 1.

It is not required that the State prove Special Issue No. 1 beyond all possible doubt; it is required that the State's proof excludes all "reasonable doubt" concerning the defendant.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

The State must prove Special Issue No. 2 submitted to you beyond a reasonable doubt, and you shall return a Special Verdict of "YES" or "NO" on Special Issue No. 2.

In deliberating on Special Issue No. 2 you shall consider all the evidence admitted at the guilt or innocence stage and the punishment stage of trial, including evidence of the defendant's background, character, record, emotional instability, intelligence, or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

You may not answer Special Issue No. 2 "YES" unless you agree unanimously.

You may not answer Special Issue No. 2 "NO" unless ten (10) or more jurors agree.

Members of the jury need not agree on what particular evidence supports a negative answer to Special Issue No. 2.

You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all of the evidence before you and in answering the Special Issue No. 2.

It is not required that the State prove Special Issue No. 2 beyond all possible doubt; it is required that the State's proof excludes all "reasonable doubt" concerning the defendant.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person

hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

You are instructed that if you return an affirmative finding, that is a "YES" answer, to Special Issue No. 1 and Special Issue No. 2, and only then, are you to answer Special Issue No. 3.

You are instructed that in answering special Issue No. 3, you shall answer the issue "YES" or "NO."

You may not answer Special issue No. 3 "NO" unless you agree unanimously, and you may not answer Special Issue No. 3 "YES" unless ten (10) or more of you agree to do so.

You need not agree on what particular evidence supports an affirmative finding on Special Issue No. 3.

In answering Special Issue No. 3 you shall consider mitigating evidence to be the evidence that a juror might regard as reducing the defendant's moral blameworthiness, including evidence of the defendant's background, character, record, emotional instability, intelligence, or the circumstances of the offense that mitigates against the imposition of the death penalty.

You are again instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in

considering all of the evidence before you in answering Special Issue No. 3.

* * *

You are instructed that the defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance against him nor prejudice him in any way. The defendant has elected not to testify in this punishment phase of trial, and you are instructed that you cannot and must not refer to or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever.

* * *

You are instructed that under the law applicable in this case a prisoner serving a life sentence for the offense of capital murder is not eligible for release on parole until the actual calendar time the prisoner has served, without consideration of good time, equals forty (40) years. During your deliberations, you are not to consider or discuss the possible action of the Board of Pardons and Paroles or the Governor, nor how long the defendant would be required to serve to satisfy a sentence of life imprisonment, nor how the parole laws would be applied to this defendant after the expiration of forty (40) years. Eligiblity for parole does not guarantee that parole will be granted.

During your deliberations upon the "Special Issues," you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person

connected with this case which is not shown by the evidence.

In arriving at the answers to the "Special Issues" submitted, it will not be proper for you to fix the same by lot, chance, or any other method than by a full, fair and free exchange of the opinion of each individual juror.

After the reading of this charge, you shall not be permitted to separate from each other, nor shall you talk with anyone not of your jury. After argument of counsel, you will retire and consider your answers to the "Special Issues" submitted to you. It is the duty of your foreman to preside in the jury room and vote with you on the answers to the "Special Issues" submitted.

You are the exclusive judges of the facts proved and the credibility of the witnesses and the weight to be given to their testimony, but you are bound to receive the law from the Court which has been given you and you are bound thereby.

/s/ Bob Burdette
Bob Burdette, Judge Presiding
230th District Court
Harris County, TEXAS

**FILED**
**KATHERINE TYRA**
**District Clerk**
**JUL 10 1997**
**Time: 13:15**
**Harris County, Texas**
**By:_____**
**Deputy**

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Carlos Manuel Ayestas, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "YES."

/s/ Joseph O. Slovacek
Foreman of the Jury

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the probability that the defendant, Carlos Manuel Ayestas, would commit criminal acts of violence that would constitute a continuing threat to society, determine that the answer to this Special Issue is "NO."

_____
Foreman of the Jury

In the event that the jury has answered Special Issue No. 1 in the affirmative, and only then, shall the jury answer Special Issue No. 2 to be found on the following page.

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that Carlos Manuel Ayestas, the defendant himself, actually caused the death of Santiaga Paneque, the deceased, on the occasion in question, or if he did not actually cause the death of Santiaga Paneque, that he intended to kill Santiaga Paneque, or that he anticipated that a human life would be taken?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "YES."

/s/ Joseph O. Slovacek
Foreman of the Jury

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt that Carlos Manuel Ayestas, the defendant himself, actually caused the death of Santiaga Paneque, the deceased, on the occasion in question, or that he intended to kill Santiaga Paneque, or that he anticipated that a human life would be taken, determine that the answer to this Special Issue is "NO."

_____
Foreman of the Jury

In the event that the jury has answered Special Issue No. 2 in the affirmative, and only then, shall the jury answer Special Issue No. 3 to be found on the following page.

SPECIAL ISSUE NO. 3

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Carlos Manuel Ayestas, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER

We, the jury, unanimously find that the answer to this Special Issue is "NO."

/s/ Joseph O. Slovacek
Foreman of the Jury

OR

We, the jury, because at least ten (10) jurors find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed, find that the answer to this Special Issue is "YES."

_____
Foreman of the Jury

After the jury has answered each of the Special Issues under the conditions and instructions outlined above, the Foreman should sign the verdict form to be found on the last page of this charge.

VERDICT

We, the Jury, return in open court the above answers to the "Special Issues" submitted to us, and the same is our verdict in this case.

/s/ Joseph O. Slovacek
Foreman of the Jury

**APPENDIX M**

No. 754409

| | |
|---|---|
| THE STATE OF TEXAS<br>vs.<br>CARLOS MANUEL AYESTAS | IN THE 230th DISTRICT COURT OF HARRIS COUNTY, TEXAS<br>Change of Venue From: _____ |

**JUDGMENT – DEATH PENALTY**

| | |
|---|---|
| Judge Presiding:<br>BOB BURDETTE | Date of Judgment:<br>**JUL 09 1997** |
| Attorney for State: BILL HAWKINS | Attorney for Defendant:<br>DIANA OLVERA & CONNIE WILLIAMS |
| Offense Convicted of: CAPITAL MURDER | |
| Degree: CAPITAL<br>Punishment Assessed:<br>DEATH | Date Offense Committed: 9-5-1995 |
| Charging Instrument:<br>Indictment | Plea:<br>Not Guilty |

Affirmative Findings: (Circle appropriate selection – N/A not available or not applicable)

| | | |
|---|---|---|
| DEADLY WEAPON:<br>~~Yes~~\|~~No~~ \|N/A | FAMILY VIOLENCE:<br>~~Yes~~\|~~No~~ \|N/A | HATE CRIME:<br>~~Yes~~\|~~No~~ \|N/A |

The Defendant having been indicted in the above entitled and numbered cause for the felony offense indicated above and this cause being this day called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above, and both parties announced ready for trial.

A Jury composed of Joseph Osmond Slovacek and eleven others was selected, impanelled, and sworn. The indictment was read to the Jury, and the Defendant entered a plea of not guilty thereto, after having heard the evidence submitted; and having been charged by the Court as to their duty to determine the guilt or innocence of the Defendant and having heard argument of counsels, the Jury retired in charge of the proper officer and returned into open Court on 7-9-, 1997, the following verdict, which was received by the Court and is here entered on record upon the minutes:

> "We, the Jury, find the defendant, CARLOS MANUEL AYESTAS, guilty as charged in the indictment."
>
> /s/ Joseph Osmond Slovacek
> Presiding Juror

Thereupon, the Jury, in accordance with law, heard further evidence in consideration of punishment, and having been again charged by the Court, the jury retired in charge of the proper officer in consideration of punishment and returned into open court on the 10 day of July, 1997, the following verdict, which was received by the Court and is here entered of record upon the minutes:

(Special Issues/Verdict/Certification):

SPECIAL ISSUE NO. 1 Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, CARLOS MANUEL AYESTAS, WOULD commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER "Yes"

/s/ Joseph Osmond Slovacek
Presiding Juror

SPECIAL ISSUE NO. 2 Do you find from the evidence beyond a reasonable doubt that CARLOS MANUEL AYESTAS, the defendant himself, actually caused the death of SANTIAGA PANEQUE, the deceased, on the occasion in question, or if he did not actually cause the death of SANTIAGA PANEQUE, that he intended to kill SANTIAGA PANEQUE, or that he anticipated that a human life would be taken?

ANSWER "Yes"

/s/ Joseph Osmond Slovacek
Presiding Juror

SPECIAL ISSUE NO. 3 Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, CARLOS MANUEL AYESTAS, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER "No"

/s/ Joseph Osmond Slovacek
Presiding Juror

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense indicated above, a felony, as found by the verdict of the jury, and that the said Defendant committed the said offense on the date indicated above, and that he be punished as has been determined by the Jury, by death, and that Defendant be remanded to jail to await further orders of this court.

And thereupon, the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof.

Whereupon the Court proceeded, in presence of said Defendant to pronounce sentence against him as follows, to wit, "It is the order of the Court that the Defendant named above, who has been adjudged to be guilty of the offense indicated above and whose punishment has been assessed by the verdict of the jury and the judgment of the Court at Death, shall be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division, Texas Department of Criminal Justice or any other person legally authorized to receive such convicts, and said Defendant shall be confined in said Institutional Division in accordance with the provisions of the law governing the Texas Department of Criminal Justice, Institutional Division until a date of execution of the said Defendant is imposed by this Court after receipt in this Court of mandate of affirmance from the Court of Criminal Appeals of the State of Texas.

The said Defendant is remanded to jail until said Sheriff can obey the directions of this sentence. From

which sentence an appeal is taken as a matter of law to the Court of Criminal Appeals of the State of Texas.

Signed and entered on this the ___ day of JUL 10 1997, 19__.

/s/ Bob Burdette
Judge, 230th DISTRICT COURT
Harris County, Texas

**RECORDER'S MEMORANDUM**
**This instrument is of poor quality and not satisfactory for photographic recordation; and/or alterations were present at the time of filing.**

**AUG 25 1997**: *Defense Motion for New Trial DENIED.*

7-24-1997: *Defense Motion for New Trial FILED.*

## APPENDIX N

**INVESTIGATIVE MEMORANDUM**

**TO:** **Gary Hart**
**FROM:** **Tena S. Francis**
**DATE:** **February 14, 1998**
**CASE:** **Carlos Manuel Ayestas**
**RE:** **Preliminary Plan For Habeas Investigation**

As per your request. I have outlined a preliminary plan for the investigation of this case. This plan is based on the information provided to me, which consisted of your notes documenting your reading of the trial record.

Please note this "plan" is based only on the information I have reviewed. As the investigation progresses, it is likely that investigation tasks will be both added and deleted from this proposal. And, although it is difficult to estimate how many hours will be needed to complete this investigation, I am proposing at least 300 hours will be required to conduct the investigation tasks outlined in this memo.

It will be impossible to conduct a competent investigation in this case without going to Louisiana, or in the alternative, hiring someone there to do the investigation.

If you have any questions or comments concerning this proposal, please give me a call.

**Questions I have**

My review of the notes you provided has left with me with more questions than answers about this case.

It's my opinion that most of these questions should be answered in order for Ayestas to receive fair representation.

> Who was the person (or persons) from the Greenspoint area who told Detective Reynolds that "Dennis" and "Rolando" had confessed? Why did this person not testify at the client's trial? Is it because they failed to make an identification of the defendant? We need to review the police file on this case in order to answer this question. Then, it is possible we will need to interview the person(s) Reynold's referred to in his testimony. (This will take approximately 5.0-8.0 hours)
>
> Why were the items that belonged to the victim and that were recovered from the "luggage" in Louisiana not admitted into evidence? Was there a problem proving the client owned or had access to this luggage? If so, is this indicative of the co-defendant(s) being more culpable? This needs to be addressed with the trial attorneys, and by a review of the police records. (5.0 hours)
>
> What happened to the charges filed against the client in Louisiana? Were they dismissed before his Texas case came to trial? If so, we need as much information as possible about them, as there may be impeachment information with regard to witness Nuila. We must collect the court, prosecution, defense attorney, and police records for these charges, then interview any witnesses that are relevant. (10.0–20.0 hours)
>
> What are the details of the client's oral confession to Kenner, Louisiana authorities? Did he or the co-defendants say anything that could have helped him at trial? We need to review the file of

the Kenner police in order to answer this question. We may also need to interview the Kenner Police Department employees who worked on the case. (3.0–10.0 hours)

Who were the seven original "suspects" whose fingerprints were used to compare to those found at the crime scene? How were they identified? Does this matter? [Even though there were no matches to the prints found at the crime scene, it is possible these men were named suspects originally based on something the witness Anna McDugall (or others) said to the police.] Again, this information should be found in the HCSO file.

Was the uzi recovered in Louisiana identified as belonging to the defendant, or not? There seemed to be an issue at trial as to whether the weapon shown the jury was the weapon recovered in Louisiana and whether it was the weapon used to threaten the alleged victim, Martinez. Does this matter?

It certainly is suspect that so much of the state's evidence was discovered in 1997, even though the same forensic tests were run in 1995. I do not know if any of this is important at this point; but must point out how odd it was that the state's case fell together so nicely at the very last minute. Ditto for the change in the medical examiner's report. Why was the report changed to include the possibility the victim was strangled manually? Was there a statement that the defendants' killed her that way? What can we do about this information?

**Trial defense team**

We need to review the records of both trial attorneys, as well as their investigator and any expert witnesses they hired. Among other issues to cover with them, we must determine:

How well could they communicate with Ayestas, given his limited ability (if any at all) to speak English? (Did he fully understand the proceedings and was he able to assist his attorneys?) How much contact did they have with their client? If they used an interpreter, we need the person's name.

Did they conduct an investigation into possible mitigation issues? If so, we need details. Did they attempt to hire any expert witnesses for that stage of the proceedings? If so, we need names of the experts, their reports, and info in re their appointments. Did they investigate the validity of the California charges/convictions?

Did they conduct any investigation in Louisiana?

**The co-defendants**

We need to determine what happened to Federico Zaldivar and Roberto Meza. If they had trials, we need to review the records of these trials for inconsistencies in the evidence presented. This will involve reviewing the court records, as well as the police and prosecutor's trials for these defendants. (10.0 - 20.0 hours) We should interview the co-defendants as to their knowledge of our client and the case against them. (5.0 hours)

**Credibility of key witnesses**

A comprehensive background investigation must be conducted of key witness Henry Nuila of Louisiana. Such an investigation will include interviewing him, looking at his criminal history, and interviewing the members of his family who were involved int his case. Questions to be answered by such an investigation will include: Did the defense interview his sister and brother-in-law, with whom the defendants had been staying? Which of the three defendants was the "leader", who usually had possession of the gun, etc. Why did Nuila have a relationship with a local policeman? Had he been in legal trouble before or during this time? How was his original statement different from his trial testimony? Why was it different? Did the police threaten to charge his family with harboring? This investigation could take 20.0 - 30.0 hours to complete.

A comprehensive background investigation should also be undertaken with reference to punishment phase witness Candelario Martinez. Apparently, the description Martinez gave police the day of the assault differed from the description of Ayestas. We need to investigate this further. We also need to know what the police opined about the alleged crime against Martinez and his friend: did they suspect these two men were involved with drug dealing? If so, then the report of the police officers might have proven to be impeachment material for this witness. Was Martinez pressured into identifying the defendant, due to some legal

troubles of his own? In addition to interviewing him and compiling a criminal history for him, we should also obtain a complete copy of the police investigation pertaining to the assault of which he was a victim. Once we get this report, we will have the name of his friend, who was also victimized, and we should speak to that person also, in order to determine why he was not called as a witness against Ayestas. This investigation could take 25.0 - 40.0 hours.

**Records to collect:**

As is noted throughout this memo, we should make an effort to obtain these records, with regard to each of the three defendants:

Harris County Sheriff's Department file
Harris County D.A.'s file
Kenner, Louisiana Police file
Kenner prosecutor's file
Kenner defense attorney's file (if applicable)

**Mitigation investigation**

It is obvious no social history investigation was conducted. The lack of evidence at the punishment phase of the trial is indicative of this.

The jury heard nothing about this defendant's: family, real character, life experiences in Honduras, mental health, possible mental illness, substance abuse history, educational background, physical or psychological trauma he suffered, etc. We must collect this information now to see what his attorneys missed. We will begin by conducting a comprehensive social history interview of the client. In essence, a competent social history investigation will detail every

> aspect of the client's life: pre-natal care, birth, medical and psychological histories, education / academic achievements, religious background, employment history, military service experience, criminal activity, incarceration history, incidents of substance abuse, family background information, cultural considerations, inter-personal relations, the development of social skills, and many other factors. If possible, witnesses to be interviewed not only include the client and close members of his family, but also persons who are/were in a position to be more objective about the client and his surroundings. Other witnesses contacted are those persons who are able to provide professional assessments of the client and his family situation. Such an investigation will take up to 200.0 hours.

Additionally, at the very least, the trial attorneys could have pursued the following (and we should pursue this information now):

> The only defense evidence presented were the letters written by a teacher who met Ayestas at the jail. Remarkably, these letters were written to jail administrators; not to the defense attorneys. Did the attorneys even interview this potential witness?
>
> Skipper-type evidence from the California Department of Corrections and the Harris County Jail. This could have been accomplished by looking at the client's incarceration records from both institutions. If he was a good inmate, then guards should have been interviewed. At this point, we should obtain a copy of both these

prison and jail records, in order to see what had been available to trial counsel.

It is clear the defendant had a history of substance abuse. What we know from reviewing the trial evidence is that Ayestas probably abused heroine and/or cocaine while in California; that he had what appeared to be a drug-related run-in with alleged victim Martinez in Houston days after this murder, and that he had gotten so drunk he "passed out" on the day of his arrest. Would there have been a defense to his conduct due to some sort of addiction? We should look at substance abuse as mitigation. This will be accomplished by conducting a thorough interview of the client, as well as interviewing the Louisiana witnesses with whom the client had stayed for two weeks around the time of the crime.

Did trial counsel investigate the California cases? At the very least, we should look carefully at court and police records of these arrests and convictions, in order to ascertain as to whether there were grounds to challenge their admissibility as evidence.

I cannot help but wonder what items were removed from Ayestas's California pen packet before it was sent to the jury. We need to examine these items, which became SX 126-A and 126-B.

**Juror interviews**

There is a need for juror interviews for this case. Were they confused about the instruction regarding capital murder? Why were they out so

short a time? We need to touch bases with the attorney who cited juror misconduct during her representation of the client, to see what she knows about the jurors. Then, we may need to interview the jurors. (30.0 hours)

## APPENDIX O

### EXHIBIT "AA"

Affidavit of Zoila Corea, dated October 16, 1998

* * *

### DECLARACION JURADA DE ZOILA COREA

ESTADO DE TEXAS
CONDADO DE HARRIS

Mi nombre es Zoila Corea, soy mayor de edad y lo suficienternente competente para hacer esta declaración. Soy de nacionalidad Hondureña y resido permanentemente en la ciudad de San Pedro Sula, Honduras. Soy la madre de Dennis Humberto Zelaya, quien actualmente se encuentra condenado a la pena do muerte en Huntsville bajo el nombre de "Carlos Manuel Ayestas". Actualmente me estoy hospedando en una iglesia en Spring, Texas con visa temporal.

Dennis Humberto Zelaya nació el 2 de Julio de 1969, pero su nacimiento no fue registrado hasta mas tarde en el mes de Julio durante el mismo año. Dennis nació on un hospital público en Tegucigalpa, la cual es la capital de Honduras. Fue un embarazo normal de nueve meses y no se presentaron ningunas complicaciones durante su nacimiento. La niñez de Dennis fue normal; el aprendió a hablar y a caminar en edad normal, El era un nifio rnuy activo. Mi esposo y yo no tuvimos problemas rnaritales y siempre vivimos juntas durante el crecimiento y desarrollo de Dennis y mis otros hijos. Los primeros dace altos de vida de Dennis, vivimos en la eluded do

Tegucigalpa, alli manejamos un negocio pequeño y viviarnos en el niismo edificio del negccio. Mi esposo y ye siempre estuvimos presences y asumimos la responsablidad de criar a nuestros hijos. Yo cocinaba a la familia todo el tiempo. Dennis tiene una hermana mayor, Xiomara, que es asistente legal en Honduras y tiene tres hermanas menores, Blanca, quien es estudiante universitaria; Ruth Melany, quien se encuentra estudiando la carrera de Medicina y Nolvia Maritza, quien estudia Ingenieria. Dennis creció un tin ambiente estable de clase media. Fue criado con bastante apoyo en su hogar. ( Mi esposo ha sido casado anteriormente y los hijos de su primer matrimonio mantienen buenas relaciones con Dennis y sus hermanas, lo cual no es usual en Honduras.)

Dennis fue un niñio sano, y no sufrió lesiones a enferrnedades graves. Siempre mantuvo una buena relación con sus hermanas, Nunca pelió con sus hermanas ni les levantó el tono de voz. Siempre fue un hijo bien educado, quien nos obedeció y nos respetó. Dennis y su hermana, menor, Blanca, jugaban, ya que solo tiene una diferencia de tres años. Nunca les permitimos jugar fuera de nuestra case. En Honduras, los niños se quedan en la case y los amigos vienen a jugar a la casa. El castigo corporal no the utilizado en nuestro hogar, en ocasiones mi esposo le pegó a Dennis para disciplinarlo, pero sin violencia alguna. La forma usual de castigo era sencillamente el dialogo con los niños, y se les negaba el derecho a ver la television. No hobo abuso fisico o sexual de los niños. Dennis vivió en casa justo hasta el tiempo en el cual el se fue de Honduras.

Durante su primaria Dennis asistió a una escuela piiblica en Tegucigalpa. Cuando Dennis tenia como doce añ de edad, nos mudarnos a la ciudad de San Pedro Sula en donde comenzamos, un negocio pequeño. Dennis asistió a la secundaria en una escuela, privada en San Pedro Sula en donde estudió Contaduria Pública. Siempre obtuvo buenas calificaciones y no tuvo problemas de aprendizaje y nunca reprobó ningún grado academico. Dennis creció con enseñanza de la Iglesia Católica, asistiá. a misa todas las semanas y era devote a sus creencias. Durante su estadia en Honduras, Dennis nunca violó ninguna ley ni estuvo involucrado en ningún tipo de problema.

Dennis abandonó la casa a la edad de 18 años, informándonos que se dirigia a Guatemala. Después que se fue, se encontró una nota en su cuarto donde decia que se habia ido a Estados Unidos. La famila se sorprendió y se angustió. La primera vez quo Dennis vino a Estados Unidos fue solaxnente por unos pocos meses y luego regresó a Honduras. Despuós de esa visita él no mostró intents de regresar a Estados Unidos y comenzó a trabajar en negocios familiares. Luego decidió regresar a Estados Unidos. Dennis viajó a Estados Unidos come tres veces. Cada vez que regresaba a Honduras la familia esperaba que else quedara.. Siempre que regresaba de Estados Unidos él se hospedaba en la casa. La ultima vez que regreso a Honduras, en 1994, el pidió a la familia quo si alguien lo buscaba que dijeran que no estaba ahi, parecia que estaba alli. Parecia que estaba evitando a alguien. Posteriormente, el Sr. Federico Zaldivar comenzó a llegar a la easa, y era a él a quien Dennis

evitaba. No quisimos darle ninguna infbnuación sobre Dennis y le pedimos que no lo buscara más. Todos recordamos a Zaldivar como mala influencia para Dennis.

En Junio de 1997, fue cuando la familia recibió noticias del arresto y del juicio do Dennis. El 18 de Junio 1997, mi hija, Xiomara, recibió carta de la Sra. Olvera en donde informaba que Dennis tenia cargos paraira juicio en un caso de pena capital, La carta de la Sra. Olvera estaba con fecha del 9 de Junio, 1997, comunicándonos que el juicio comenzaria el 7 de Julio de 1997. Una vez que recibimos la carta, inmediatarnente nos contactamos por teléfono con la Sra. Olvera, y seguimos en contacto dia tras dia. La. Sra. Olvera deseaba que por lo menos Xiomara y yo estuvieramos presente en el juicio pars testificar y esperabamos una carta que nos iba a mandar via fax para llevarla a la Embajada Estados Unidos en Tegucigalpa explicando la urgencia de la situación y la necesidad de visa para viajar y presenciar el juicio. Sin embargo, nunca recibimos el Fax y e17 de Julio fulmos a la Embajada a tratar de obtener visa sin ninguna carta de la Sra. Olvera pero se nos fue negada. Se nos dijo que necesitabamos una carta de ella explicando la situacion y la necesidad de nuestra presencia en Houston. La familia más tarde logró obtener visas, pero ya era demasiado tarde porque el juicio habla terrninado.

Si los miembros de la familia hubiesen estado presente en el juicio, se hubiera testificado lo que anteicorrnente he dicho sobre los antecedentes y el caracter de Dennis, Tambien se hubiera testificado que "Carlos Manuel Ayestas" es la misma persona con Dennis Humberto Zelaya freflejado en los

documentos de Honduras, los cuales actualmente estaban en posesion del abogado defensor en el momento del juicio, pero que no pudieron introducir, demostrando qua Dennis no tiene record criminal de ninguna clase en Honduras.

/s/ Zoila A. Corea

ZOILA COREA

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

## AFFIDAVIT OF ZOYLA COREA

STATE OF TEXAS *
*
COUNTY OF HARRIS *

My name is Zoyla Corea. I am over the age of eighteen, and am competent in all respects to make this oath. I am a Honduran National, and my permanent residence is in San Pedro Sula, Honduras. I am the mother of Dennis Humberto Zelaya, who is currently on Texas's death row in Huntsville under the alias "Carlos Manuel Ayestas." At the present time I am staying with a church in Spring, Texas, on a temporary visa.

Dennis Humberto Zelaya was born on July 2, 1969, although his birth was not recorded until later in July of that year. He was born in a public hospital in Tegucigalpa, which is the capitol city of Honduras. It was a normal, full-term pregnancy, with no complications during the birth. Dennis's early development was normal; he learned to walk and talk at normal ages. He was an active child. My husband and I had no marital problems, and always lived together while Dennis and his sisters were growing up. For the first twelve years of Dennis's life, the family lived in Tegucigalpa. There we ran a small business, and we lived in the same building. My husband and I were always present, and shared the responsibility of raising the children. I cooked for the family all the time. Dennis has one older sister, Xiomara, who is now a legal assistant in Honduras. He also has three younger sisters, Blanca, who is a university student, Ruth Melany, who is studying medicine, and Nolvia Maritza, who

is studying engineering. Dennis grew up in a stable, middle class background. He was raised in a good, supportive home environment. (My husband had been married once before, but the children of his first marriage had a good relationship with Dennis and his siblings, which is unusual for Honduras.)

Dennis was a healthy child, and suffered no major injuries or illnesses. He always got along well with his siblings. He never fought with them, or even raised his voice. He was a well-mannered son, who always obeyed his parents and never talked back to us. Dennis and his younger sister, Blanca, were playmates, only three years apart in age. We never let them play outside of our own house and yard. In Honduras, children stay close to home, and friends come over to the house to play. Corporal punishment was not common in our household. On occasions my husband would strike Dennis to discipline him, but not with violence. The usual form of punishment was simply to talk to the children, and sometimes to deprive them of television privileges. There was no physical or sexual abuse of the children. Dennis lived at home right up until the time he left Honduras.

Dennis attended a public grade school in Tegulcigalpa. When Dennis was about twelve years old, the family moved to San Pedro Sula, where we started another small business. Dennis went to a private high school in San Pedro Sula, where he studied accounting. He always received above average grades, had no discernable learning disorders, and was never held back in school. Dennis grew up in the Catholic Church. Dennis went to mass every week, and was sincere and

devout in his beliefs. Dennis never broke the law or got into any kind of trouble whatsoever while growing up in Honduras.

Dennis first left home when he was eighteen. He told the family he was going to Guatemala. But after he left we found a note in his room saying he had gone to the U.S. instead. The family was very much surprised and upset. The first time Dennis came to the U.S., he stayed only a few months, then came back to Honduras. He gave no indication of any intent to go back to the U.S. after that, and he worked in the family business for a while. But then Dennis decided to go back to the U.S. He traveled back and forth about three times. Each time he returned to Honduras, the family always expected that he would stay. When he would come back from the U.S., he always lived at home. The last time Dennis returned to Honduras, in 1994, he told the family that if someone came looking for him, to say he was not there, He seemed to be avoiding somebody. Federico Zaldivar then began to come by the house, asking where he could find Dennis, and he was the one that Dennis was avoiding. We refused to tell him anything about Dennis, and begged him to leave him alone. We all regarded Zaldivar as a bad influence on Dennis.

The family did not receive word of Dennis's arrest and trial in Houston until late in June of 1997. On June 18, 1997, my daughter, Xiomara, received a letter from Diana Olvera informing her that Dennis was soon to stand trial for capital murder in Houston, Texas. This is the first occasion that anyone in the family was informed that Dennis had been charged with capital murder. The letter from

Ms. Olvera was dated June 9, 1997, and informed us that the trial was set to begin on July 7, 1997. Once we received the letter, we contacted Ms. Olvera immediately, and communicated with her by telephone every day after that. Ms. Olvera wanted at least to have Xiormara and myself come to Houston to testify at the punishment phase of Dennis's trial. It was our understanding that Ms, Olvera was going to fax us a letter to take to the U. S. Embassy in Tegucigalpa, explaining the urgency of the situation and the need to grant us visas to allow us to travel to Houston for the trial. However, we never received such a fax. On July 7, 1997, we went to the U. S. Embassy to try to obtain visas without a letter from Ms. Olvera, but were denied visas. We were told that a letter was required from Ms. Olvera explaining the situation and the need for our presence in Houston. The family later got approval for visas, but not until July 31, 1997, by which time the trial was long over.

Had members of the family been present at the trial, we could and would have testified to the facts set out above about Dennis's background and character. We also could and would have testified that "Carlos Manuel Ayestas" is the same Dennis Humberto Zelaya reflected in the documents from Honduras, which the defense lawyers had in their possession at the punishment phase of trial, but were not able to introduce, demonstrating that Dennis had no criminal record of any kind in Honduras.

/s/ Zoila A. Corea
Zoyla Corea

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

**CERTIFICATE OF TRANSLATOR'S COMPETENCE**

I, **DAX VENEGAS**, hereby certify that the above is an accurate translation of the original "AFFIDAVIT OF ZOILA COREA" in Spanish and that I am competent in both English and Spanish to render such translation.

**Date:** October 16, 1998

/s/ Dax Venegas
(Signature of translator)

## APPENDIX P

### EXHIBIT "BB"

Affidavit of Xiomara Zelaya, dated October 16, 1998

* * *

### DECLARACION JURADA DE XIOMARA ZELAYA

ESTADO DE TEXAS
CONDADO DE HARRIS

Mi nombre es Xiomara Zelaya. Soy mayor de dieciocho años y lo suficientemente competente para hacer ésta declaración jurada. Soy de. nacionalidad Hondureña y resido permanentemente en la ciudad de San Pedro Sula, Honduras. Soy la hermana mayor de Dennis Humberto Zelaya, quien actualrnente se encuentra condenado a la pena de muerte en Huntsville bajo el nombre de "Carlos Manuel Ayestas". Soy asistente legal, pero en el tiernpo presente me estoy hospedando en una iglesia en Spring, Texas con visa temporal.

Dennis Humberto Zelaya nació el 2 de Julio de 1969, pero su nacimiento no fue registrado hasty mas tarde en el mes de Julio durante el mismo año. Dennis nació en un hospital público en Tegucigalpa, la cual es la capital de Honduras. Fue un embarazo normal de nueve meses y no se presentaron ningunas complicaciones durante su nacimiento. La niñiez de Dennis fue normal; el aprendió a hablar y a caminar en edad normal. El era un niño muy activo. Nuestros padres nunca tuvieron problemas matrimoniales y siempre vivieron juntos durante el proceso de crecimiento mío y de Dennis. Los primeros doce años de vida de Dennis, mi familia

vivió en la ciudad de Tegucigalpa. Durante ese tiempo nuestros padres manejaron un negocio pequeño y vivíamos en el misino edificio del negocio. Ambos padres siempre estuvieron presentes con nosotros y asumieron la responsabilidad de criarnos comió hijos. Nuestra madre siempre nos preparad nuestra comida en casa. Dennis tiene tres hermanas, incluyendo a Blanca, quien es estudiante universitaria; Ruth Melany, quien se encuentra estudiando la carrera de Medicina y Nolvia Maritza, quien estudia Ingenieria. Dennis creció en un ambiente estabie de clase media. Fue criado con bastante apoyo en su hogar. ( Nuestro padre estuvo previamente casado una vez pero los niños de su primer matrimonio mantienen una buena relación con Dennis y sus hermanas,)

Dennis fue un niño sano, y no sufrió de enfermedades graves. Siempre mantuvo una buena relación con sus hermanas. Nunca pelió con nosotros y ni siquiera nos levantó el tono de voz. Siempre fue un hijo biern educado y nunca le contesto mal a miis padres. En nuestra casa no era comun el que fueramos castigados por nuestros padres mediante golpes. En ocasiones, nuestro padre le pegaba a Dennis para disciplinarlo, pero sin violencia alguna. La forma usual de castigarnos era sencillamente hablando con nosotros, y nos quitaba el derecho a ver la televisión, No hubo abuso fisico a sexual de los niño. Dennis vivió en casa junto hasta el tiempo en que se fue de Honduras.

Durante su primaria Dennis asistió a una escuela pública en Tegucigalpa. Cuando Dennis tenia como doce años de edad, la familia se mudó a la ciudad de San Pedro Sula en la cual nuestros padres

empezaron un pequeño negocio. Dennis asistió a la secundaria en una escuela privada en San Pedro Sula en donde estudió Contaduria Pública. Siempre obtuvo buenas calificaciones y no tuvo problemas de aprendizaje y nunca reprobó ningún grade academico. Dennis creió con enseñanza católica, asistià a misa todas las semanas y era devoto a sus creencias. Durante su estadià en Honduras, Dennis nunea violó ninguna ley ni estuvo involucrado en ningún tipo de problema,

Dennis se fue de la casa a la edad de 18 años. El informó a su familia quo se dirigirá a Guatemala. Después que se fue, se le encontró una nota en su cuarto donde decía quo se habla ido a Estados Unidos. La famila se sorprendió y se angustió. La primera vez quo Dennis vino a Estados Unidos fue solamente por unos pocos mesas y luego regresó a Honduras. Después de esa visita el no mostró intento de regresar a Estados Unidos y comenzó a trabajar en negocios familiares. Luego decidió regresar a Estados Unidos. Dennis viajó a Estados Unidos como tres veces. Cada vez que regresaba a Honduras la familia esperaba que él se quedara. Siempre que regresaba de Estados Unidos él se hospedaba en la casa. La ultima vez que regreso a Honduras, en 1994, él pidió a la familia que si alguien lo buscaba que dijeran que no estaba alli, Parecia que estaba evitando a alguien. Posteriormente, el Sr. Federico Zaldivar comenzó a llegar a la casa, y era a él. a quien Dennis evitaba. No quisimos darle ninguna información sobre Dennis y le pedimos que no lo buscara más. Todos recordamos a Zaldivar como mala influencia para Dennis.

Yo fui el primer miembro de la familia que recibió noticias sobre el arresto y juicio de Dennis en Houston, El 18 de Junio 1997, recibí carta de Diana Olvera informando que Dennis iria a juicio en un caso de pena de muerte en Houston, Texas. Esta fue la primera ocasión que se le informaba a la familia que Dennis presentaba cargos de pena de muerte. La carta de la Sra. Olvera estaba con fecha del 9 de Junio, 1997, comunicándonos que el juicio comenzaria el 7 de Julio de 1997, Una vez que recibimos la carta, inmediatamente nos contactamos por teléfono con la Sra. Olvera, y seguimos en contacto dia tras dia. La Sra, Olvera deseaba que por lo menos mi madre y yo estuvieramos presente en el juicio para testificar y esperabamos una. carta que nos iba a mandar via fax para llevarla a la Embajada de Estados Unidos en Tegucigalpa explicando la urgencia de la situación y la necesidad de visa para viajar y presenciar el juicio. Sin embargo, nunca recibimos el fax y el 7 de Julio fuimos a la Embajada a tratar de obtener visa sin ninguna carta de la Sra. Olvera pero se nos fue negada. Se nos dijo que necesitábamos una carta de ella explicando la situación y la necesidad de nuestra presencia, La familia más tarde logró obtener visas, pero ya era demasiado tarde porque el juicio habia terminado.

Si miembros de la familia hubiesen estado presente en el juicio, se hubiera testificado lo que anteriormente he dicho sobre los antecedentes y el caracter de Dennis. Tambien se hubiera testificado quo “Carlos Manuel Ayestas” es la misma persona con Dennis Humberto Zelaya reflejado en los documentos do Honduras, los cuales actualmente estaban en posesión del abogado defensor en el

momento del juicio, pero quo no pudieron introducir, demostrando qua Dennis no tiene record criminal de ninguna clase en Honduras.

/s/ Xiomara Zelaya
XIOMARA ZELAYA

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

## AFFIDAVIT OF XIOMARA ZELAYA

STATE OF TEXAS *
*
COUNTY OF HARRIS *

My name is Xiomara Zelaya. I am over the age of eighteen, and am competent in all respects to make this oath. I am a Honduran National, and my permanent residence is in San Pedro Sula, Honduras. I am the older sister of Dennis Humberto Zelaya, who is currently on Texas's death row in Huntsville under the alias "Carlos Manuel Ayestas." I am a legal assistant in Honduras, but at the present time I am staying with a church in Spring, Texas, on a temporary visa.

Dennis Humberto Zelaya was born on July 2, 1969, although his birth was not recorded until later in July of that year. He was born in a public hospital in Tegucigalpa, which is the capitol city of Honduras. It was a normal, full-term pregnancy, with no complications during the birth. Dennis's early development was normal; he learned to walk and talk at normal ages. He was an active child. Our parents had no marital problems, and always lived together while Dennis and I were growing up. For the first twelve years of Dennis's life, the family lived in Tegucigalpa. There our parents ran a small business, and we lived in the same building. Both our parents were always present, and shared the responsibility of raising the children. Our mother cooked for the family all the time. Dennis has three younger sisters, including Blanca, who is a university student, Ruth Melany, who is studying medicine, and Nolvia Maritza, who is studying

engineering. Dennis grew up in a stable, middle class background. He was raised in a good, supportive home environment. (Our father had been married once before, but the children of his first marriage had a good relationship with Dennis and his siblings, which is unusual for Honduras.)

Dennis was a healthy child, and suffered no major injuries or illnesses. He always got along well with his siblings. He never fought with us, or even raised his voice, He was a well-mannered son, who always obeyed his parents and never talked back to them. Corporal punishment was not common in our household. On occasions our father would strike Dennis to discipline him, but not with violence. The usual form of punishment was simply to talk to the children, and sometimes to deprive them of television privileges. There was no physical or sexual abuse of the children. Dennis lived at home right up until the time he left Honduras.

Dennis attended a public grade school in Tegucigalpa. When Dennis was about twelve years old, the family moved to San Pedro Sula, where our parents started another small business. Dennis went to a private high school in San Pedro Sula, and studied accounting. He always received above average grades, had no discernable learning disorders, and was never held back in school, Dennis grew up in the Catholic Church. He went to mass every week, and was sincere and devout in his beliefs. Dennis never broke the law or got into any kind of trouble whatsoever while growing up in Honduras.

Dennis first left home when he was eighteen. He told the family he was going to Guatemala. But after

he left we found a note in his room saying he had gone to the U.S, instead. The family was very much surprised and upset. The first time Dennis came to the U.S., he stayed only a few months, then returned to Honduras. He gave no indication of any intent to go back to the U.S. after that, and he worked in the family business for a while. But then Dennis decided to go back to the U.S. He traveled back and forth between Honduras and the U.S. about three times. Each time he returned to Honduras, the family always expected that he would stay. When he would come back from the U.S., he always lived at home. The last time Dennis returned to Honduras, in 1994, he told the family that if someone came looking for him, to say he was not there. He seemed to be avoiding somebody. Federico Zaldivar then began to come by the house, asking where he could find Dennis, and he was the one that Dennis was avoiding. We refused to tell him anything about Dennis, and begged him to leave him alone. We all regarded Zaldivar as a bad influence on Dennis.

I was the first member of the family to receive word about Dennis's arrest and trial in Houston. On June 18, 1997, I received a letter from Diana Olvera informing me that Dennis was soon to stand trial for capital murder in Houston, Texas. This is the first occasion that anyone in the family was informed that Dennis had been charged with capital murder. The letter from Ms. Olvera was dated June 9, 1997, and informed me that the trial was set to begin on July 7, 1997. Once we received the letter, the family contacted Ms. Olvera immediately, and communicated with her by telephone every day after that. Ms. Olvera wanted at least to have me and our mother come to Houston to testify at the punishment

phase of Dennis's trial. It was our understanding that Ms. Olvera was going to fax us a letter to take to the U. S. Embassy in Tegucigalpa, explaining the urgency of the situation and the need to grant us visas to allow us to travel to Houston for the trial. However, we never received such a fax. On July 7, 1997, we went to the U. S. Embassy to try to obtain visas without a letter from Ms. Olvera, but were denied visas. We were told that a letter was required from Ms. Olvera explaining the situation and the need for our presence in Houston. The family later got approval for visas, but not until July 31, 1997, by which time the trial was long over.

Had members of the family been present at the trial, we could and would have testified to the facts set out above about Dennis's background and character. We also could and would have testified that "Carlos Manuel Ayestas" is the same Dennis Humberto Zelaya reflected in the documents from Honduras, which the defense lawyers had in their possession at the punishment phase of trial, but were not able to introduce, demonstrating that Dennis had no criminal record of any kind in Honduras.

/s/ Xiomara Zelaya
Xiomara Zelaya

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

**CERTIFICATE OF TRANSLATOR'S COMPETENCE**

I, **DAX VENEGAS**, hereby certify that the above is an accurate translation of the original "AFFIDAVIT OF XIOMARA ZELAYA" in Spanish and that I am competent in both English and Spanish to render such translation.

**Date:** October 16, 1998

/s/ Dax Venegas
(Signature of translator)

## APPENDIX Q

### EXHIBIT "CC"

(Affidavit of Blanca Zelaya, dated October 16, 1998)

* * *

### DECLARACION JURADA DE BLANCA ZELAYA

ESTADO DE TEXAS
CONDADO DE HARRIS

Mi nombre es Blanca Zelaya. Soy mayor de dieciocho años y lo suficientemente competente para hacer ésta declaración jùrada. Soy de nacionalidad Hondureña y resido permanentemente en la ciudad de San Pedro Sula, Honduras. Soy la hermana menor de Dennis Humberto Zelaya, quien actualmente se encuentra condenado a pena de muerte en Huntsville bajo el nombre de "Carlos Manuel Ayestas." Soy estudiante universitaria en Honduras, y actualmente me estoy hospedando en una iglesia en Spring, Texas con visa temporal.

Dennis Humberto Zelaya nació el 2 de Julio de 1969, pero su nacimiento no fue registrado hasta mas tarde en el mes de Julio durante el mismo año. La niñez de Dennis fue normal; el aprendió a hablar y a caminar en edades normales. El era un niño muy activo. Nuestros padres nunca, tuvieron problemas matrimoniales y siempre vivieron juntos durante el proceso de crecimiento mío y de Dennis. Los primeros doce años de vida de Dennis, mi familia vivió en la ciudad de Tegucigalpa. Durante ese tiempo nuestros padres manejaron un negocio pequeño y vivíamos en el mismo edificio del negocio. Ambos padres siempre estuvieron presentes con

nosotros y asumieron la responsabilidad de criarnos coma hijos. Nuestra madre siempre nos preparó nuestra comida en casa. Dennis tiene una hermana mayor, Xiomara, que actualmente es asistente legal en Honduras. Tambien tiene a otra hermana menor, Ruth Melany, quien se encuentra estudiando la carrera de Medicina y otra menor, Nolvia Maritza, que estudia Ingenieria. Dennis creció en un ambiente estable de clase media. Fue criado con bastante apoyo en su hogar. (Nuestro padre estuvo previamente casado una vez, pero los niños de su primer matrimonio mantienen una buena relación con Dennis y sus hermanas.)

Dennis fue un niño sano, y no sufrió lesiones o enfermedades graves. Siempre mantuvo una buena relación con sus hermanas. Nunca pelió con nosotros y nisiquiera nos levantó el tono de voz. Siempre fue un hijo bien educado y nunca le contesto mal a mis padres. Dennis y yo siempre jugábamos dado a que solo teníamos una diferencia de tres años de edad. Nuestras padres nunca nos dejaron jugar fuera de nuestra casa. En Honduras, los niños siempre están cerca de la casa, y los amigos viene a jugar a la casa. En nuestra case el castigo corporal no fue común. En ocasión, nuestro padre le pegaba a Dennis para disciplinarlo, pero sin violencia alguna. La forma usual de castigarnos era sencillamente hablando con nosotros, y nos quitaba el privilegio de ver la televisión. No hubo abuso físico o sexual de los niños. Dennis vivió en casa durante su estadía en Honduras.

Durante su primaria Dennis asistió a una, escuela pública en Tegucigalpa, Cuando Dennis tenia como doce años de edad, la familia se mudo a la

ciudad de San Pedro Sula en la cual nuestros padres empezaron un negocio pequeño. Dennis asistió a la secundaria en una escuela privada en San Pedro Sula en donde estudió Contaduría Pública. Siempre obtuvo buenas calificaciones y no tuvo problemas de aprendizaje y nunca reprobó ningún grado académico. Dennis creció con enseñanza católica, asistía a misa todas las semanas y era devoto a sus creencias. Durante su estadía en Honduras, Dennis nunca violó ninguna Ley ni estuvo involucrado en ningún tipo de problema.

Dennis se fue do la casa a la edad de 18 años. El le dijo a su familia que se dirigía a Guatemala. Despues que se fue se encontró una nota en su cuarto donde decía que se había ido a Estados Unidos. La famila se sorprendió y se angustió. La primera vez que Dennis vino a Estados Unidos fue solamente por unos pocos meses y luego regresó a Honduras. Despues de esa visita él no mostró intento de regresar a Estados Unidos y comenzó a trabajar en negocios familiares. Luego decidió regresar a Estados Unidos. Dennis continuó viajando Estados Unidos-Honduras aproximadamente tres veces. Cada vez que regresaba a Honduras la familia esperaba que él se quedara. Siempre quo regresaba de Estados Unidos él se hospedaba en la casa. La ultima vez que regreso a Honduras, en 1994, él pidió a la familia que si alguien lo buscaba que dijeran que no estaba ahí. Parecía quo estaba evitando a alguien, Posteriormente, el Sr. Federico Zaldívar comenzó a llegar a la casa preguntando por él, y era a él a quien Dennis evitaba. No quisimos darle ninguna información sobre Dennis y le pedimos que no lo buscara más. Todos recordamos a Zaldívar como mala influencia para. Dennis.

Yo estudiaba en la Universidad en San Pedro Sula cuando mi familia se enteró del arresto de Dennis y del juicio en Houston, El 18 de Junio, mi hermana, Xiomara, recibió una carta de Diana Olvera informando que Dennis iría a juicio en un caso de pena de muerte en Houston, Texas. Esta fue la primera ocasión que se le informaba a la familia sobre la situación de Dennis. La carta de la Sra. Olvera estaba con fecha del 9 de Junio, 1997, comunicándonos que el juicio comenzaría el 7 de Julio de 1997. Una vez que recibimos la carta, inmediatamente nos contactamos per teléfono con la Sra. Olvera, y seguimos en contacto día tras día. La Sra. Olvera deseaba que por lo menos Xiomara y nuestra madre estuvieran presente en el juicio para testificar y esperabamos una carta que nos iba a mandar vía fax para llevarla a la Embajada de Estados Unidos en Tegucigalpa explicando la urgencia de la situación y la necesidad de visa para viajar y presenciar el juicio. Sin embargo, nunca recibimos el Fax y el 7 de Julio fuimos a la Embajada a tratar de obtener visa sin ninguna carta de la Sra. Olvera pero se nos fue negada. Se nos dijo que necesitabamos una carta de ella explicando la situación y la necesidad de nuestra presencia. La familia más tarde logró obtener visas, pero ya era demasiado tarde porque el juicio labia terminado.

Si los miembros de la familia hubiesen estado presente en el juicio, se hubiera testificado lo que anteriormente he dicho sobre los antecedentes y el caracter de Dennis. Tambien se hubiera testificado quo “Carlos Manuel Ayestas” es la misma persona con Dennis Humberto Zelaya reflejado en los documentos de Honduras, los cuales actualmente estaban en posesión del abogado defensor en el

momento del juicio, pero que no pudieron introducir, demostrando que Dennis no timene record criminal de ninguna clase en Honduras.

/s/ Blanca Zelaya
BLANCA ZELAYA

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

## AFFIDAVIT OF BLANCA ZELAYA

STATE OF TEXAS *
*
COUNTY OF HARRIS *

My name is Blanca Zelaya. I am over the age of eighteen, and am competent in all respects to make this oath. I am a Honduran National, and my permanent residence is in San Pedro Sula, Honduras. I am the younger sister of Dennis Humberto Zelaya, who is currently on Texas's death row in Huntsville under the alias "Carlos Manuel Ayestas." I am a university student in Honduras, but at the present time I am staying with a church in Spring, Texas, on a temporary visa.

Dennis Humberto Zelaya was born on July 2, 1969, although his birth was not recorded until later in July of that year. Dennis's early development was normal; he learned to walk and talk at normal ages. He was an active child. Our parents had no marital problems, and always lived together while Dennis and I were growing up. For the first twelve years of Dennis's life, the family lived in Tegucigalpa. There our parents ran a small business, and we lived in the same building. Both our parents were always present, and shared the responsibility of raising the children. Our mother cooked for the family all the time. Dennis has one older sister, Xiomara, who is now a legal assistant in Honduras. He also has a younger sister, Ruth Melany, who is currently studying medicine, and another younger sister, Nolvia Maritza, who is studying engineering. Dennis grew up in a stable, middle class background. He was raised in a good, supportive home environment. (Our father had been married once before, but the

children of his first marriage had a good relationship with Dennis and his siblings, which is unusual for Honduras.)

Dennis was a healthy child, and suffered no major injuries or illnesses. He always got along well with his siblings. He never fought with us, or even raised his voice. He was a well-mannered son, who always obeyed his parents and never talked back to them. Dennis and I were playmates, only three years apart in age. Our parents never let us play outside of our own house and yard. In Honduras, children stay close to home, and friends come over to the house to play. Corporal punishment was not common in our household. On occasions our father would strike Dennis to discipline him, but not with violence. The usual form of punishment was simply to talk to the children, and sometimes to deprive them of television privileges. There was no physical or sexual abuse of the children. Dennis lived at home right up until the time he left Honduras.

Dennis attended a public grade school in Tegucigalpa. When Dennis was about twelve years old, the family moved to San Pedro Sula, where our parents started another small business, Dennis went to a private high school in San Pedro Sula, and studied accounting. He always received above average grades, had no discernable learning disorders, and was never held back in school. Dennis grew up in the Catholic Church. He went to mass every week, and was sincere and devout in his beliefs. Dennis never broke the law or got into any kind of trouble whatsoever while growing up in Honduras.

Dennis first left home when he was eighteen. He told the family he was going to Guatemala. But after he left we found a note in his room saying he had gone to the U.S. instead. The family was very much surprised and upset. The first time Dennis came to the U.S., he stayed only a few months, then returned to Honduras. He gave no indication of any intent to go back to the U.S. after that, and he worked in the family business for a while. But then Dennis decided to go back to the U.S. He traveled back and forth between Honduras and the U.S. about three times. Each time he returned to Honduras, the family always expected that he would stay. When he would come back from the U.S., he always lived at home. The last time Dennis returned to Honduras, in 1994, he told the family that if someone came looking for him, to say he was not there. He seemed to be avoiding somebody. Federico Zaldivar then began to come by the house, asking where he could find Dennis, and he was the one that Dennis was avoiding. We refused to tell him anything about Dennis, and begged him to leave him alone. We all regarded Zaldivar as a bad influence on Dennis.

I was a student at the University in San Pedro Sula when the family got word about Dennis's arrest and trial in Houston. On June 18, 1997, my sister, Xiomara, received a letter from Diana Olvera informing her that Dennis was soon to stand trial for capital murder in Houston, Texas. This is the first occasion that anyone in the family was informed that Dennis had been charged with capital murder. The letter from Ms. Olvera was dated June 9, 1997, and informed us that the trial was set to begin on July 7, 1997. Once we received the letter, we contacted Ms. Olvera immediately, and communicated with her by

telephone every day after that. Ms. Olvera wanted at least to have Xiomara and our mother come to Houston to testify at the punishment phase of Dennis's trial. It was our understanding that Ms. Olvera was going to fax us a letter to take to the U. S. Embassy in Tegucigalpa, explaining the urgency of the situation and the need to grant us visas to allow us to travel to Houston for the trial. However, we never received such a fax. On July 7, 1997, we went to the U. S. Embassy to try to obtain visas without a letter from Ms. Olvera, but were denied visas. We were told that a letter was required from Ms. Olvera explaining the situation and the need for our presence in Houston. The family later got approval for visas, but not until July 31, 1997, by which time the trial was long over.

Had members of the family been present at the trial, we could and would have testified to the facts set out above about Dennis's background and character. We also could and would have testified that "Carlos Manuel Ayestas" is the same Dennis Humberto Zelaya reflected in the documents from Honduras, which the defense lawyers had in their possession at the punishment phase of trial, but were not able to introduce, demonstrating that Dennis had no criminal record of any kind in Honduras.

/s/ Blanca Zelaya
Blanca Zelaya

SIGNED under oath before me on October 16th, 1998.

/s/ Sergio T. Miranda
Notary Public, State of Texas

**CERTIFICATE OF TRANSLATOR'S COMPETENCE**

I, **DAX VENEGAS**, hereby certify that the above is an accurate translation of the original "AFFIDAVIT OF BLANCA ZELAYA" in Spanish and that I am competent in both English and Spanish to render such translation.

**Date:** October 16, 1998

/s/ Dax Venegas
(Signature of translator)

**APPENDIX R**

**IN THE COURT OF CRIMINAL APPEALS OF TEXAS**

No. 72,928

**CARLOS MANUEL AYESTAS, Appellant**

**v.**

**THE STATE OF TEXAS**

**DIRECT APPEAL FROM THE 230th DISTRICT COURT HARRIS COUNTY**

***Mansfield, J., delivered the opinion of the Court, in which McCormick, P.J., and Baird, Overstreet, Meyers, Keller, Price, Holland, and Womack, JJ., joined.***

**OPINION**

On July 9, 1997, a Harris County jury found appellant, Carlos Manuel Ayestas, guilty of capital murder. See Tex. Penal Code § 19.03(a)(2). His conviction stemmed from a killing he committed on September 5, 1995.[1] At the punishment stage of trial, the jury answered the special issues in such a manner as to require the trial court to sentence appellant to death. See Art. 37.071 §§ 2(b),(e), &

[1] The State sought to convince the jury that appellant, and two other men, Frederico Zaldivar and Roberto Meza, were all involved in the murder of the victim.

(g).[2] Direct appeal to this Court is automatic pursuant to Article 37.071 § 2(h). Appellant brings twelve points of error to this Court, and, with the exception of those points alleging insufficient evidence, which will be discussed first, we will address each issue in the order in which it occurred at trial. We will affirm the judgment of the trial court.

The first point of error brought by appellant for our review asserts the evidence was legally insufficient in that "a rational trier of fact could never have found, beyond a reasonable doubt, that appellant committed all the essential elements of the offense charged." Appellant claims the evidence was insufficient to indicate he "personally committed the homicide in the course of a robbery or burglary, or that [he], in connection with the conduct of others, harbored a specific intent to promote or assist the commission of an intentional murder."

Texas Penal Code § 19.03(a)(2), the statutory provision under which appellant was charged and convicted, provides, in relevant part, that a person commits an offense if he "intentionally commits [a] murder in the course of committing, or attempting to commit, burglary [or] robbery. . . ." Texas Penal Code § 30.02 states that a person commits the offense of burglary if, without the effective consent of the owner, he: (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony; (2) remains concealed, with the intent to commit a felony or

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[2] All references to articles are to those in the Texas Code of Criminal Procedure.

theft, in a building or habitation; or (3) enters a building or habitation and commits or attempts to commit a felony or theft. Texas Penal Code § 29.02 states a person commits robbery if, in the course of committing theft, and with intent to obtain or maintain control of the property, he intentionally, knowingly, or recklessly causes bodily injury to another; or intentionally, knowingly, or recklessly threatens or places another in fear of imminent bodily injury. In returning a general verdict of guilty of capital murder, the jury implicitly found appellant guilty of committing or attempting to commit burglary or, in the alternative, robbery.

To determine if appellant presents a meritorious argument, it is necessary to review both the circumstances of the crime and appellant's actions before and after its commission. The State presented nine witnesses and accompanying evidence to prove its case.[3] Anna McDougal, a neighbor who lived across the street from the victim in the northwest portion of Harris County, told the jury about an encounter appellant had with the victim in mid-August of 1995, approximately two weeks before the murder took place. McDougal had picked up two men, one of whom she identified as appellant, at a nearby apartment complex and drove them to her home so they could look at a car she was hoping to sell. Leaving the two men alone to inspect her car, McDougal went inside for approximately fifteen minutes. Upon returning outside, she looked across the street and saw appellant and the other man leaving the victim's house. McDougal inquired

[3] Appellant presented no evidence at the guilt/innocence stage of trial.

about what the two men were doing, and they responded that the victim had called them over to look at some furniture she had been trying to sell. McDougal testified she then drove the men back to their apartment complex.

The victim's son, hereafter E.P., informed the jury he left the house between 8:30 a.m. and 8:35 a.m. on the day the crime took place. Upon returning home for lunch, he specifically noted the time as 12:23 p.m., and said he rang the doorbell, as was customary, but there was no response. E.P. then put his key in the doorknob and found the door was unlocked. After opening the door and walking inside, E.P. saw that the room had been ransacked and certain items were missing. A cursory inspection determined the remainder of the house was in much the same condition. E.P. then left and headed for a neighbor's house to call 9-1-1. He testified that he then called his employer and remained on the line as he walked back into his home. E.P. finally found his mother's body lying on the floor in the master bathroom, partially blocking the door. He could only see her from the waist down and observed silver duct tape encircling her ankles. E.P. fled to the same neighbor's house, and asked her to go back to make sure his mother was dead.

The neighbor, Maria Diaz, was called to the stand and testified that she walked into the victim's house, calling her name. She found the decedent face down on the floor and observed that her face was a dark color, and she was not breathing. Diaz testified on cross-examination that she had been home all morning and never saw any activity at the victim's household.

Detective Mark Reynolds, of the Harris County Sheriff's Department, took the stand and told the jury of his observations at the crime scene and his later attempts to track down those responsible. He described how the house itself appeared ransacked but bore no signs of forced entry. The victim was face down on the floor, and a pool of blood and vomit partially surrounded her head. Her wrists had been bound together with the electrical cord from an alarm clock and then wrapped in silver duct tape. This tape, as the victim's son had observed, also secured the victim's feet. A strip of it was placed across her eyes, and a substantial amount of tape also encircled the victim's neck. According to Detective Reynolds, it was apparent the decedent had been beaten. Her swollen face was covered with numerous cuts and bruises, and in his words, "something had made contact with her face with a lot of force." After talking with neighbors, including Anna McDougal, Detective Reynolds and his fellow officers developed leads pointing to potential suspects known only at that time as "Dennis" and "Rolando." Reynolds said he acquired photographs of these suspects, and they were positively identified by McDougal as the same men who had been at the victim's house approximately two weeks earlier. Detective Reynolds testified that the suspect "Dennis" was, in fact, appellant, and the suspect "Rolando" was Frederico Zaldivar, one of the two men eventually arrested with appellant.

The body of the decedent was taken to the office of the Harris County Medical Examiner, and the autopsy was performed by an assistant medical examiner, Dr. Marilyn Murr. Dr. Murr testified that the victim received numerous bruises and

lacerations from multiple blows inflicted while she was still alive. The bone in her right elbow had been fractured. Two bruises were discovered on each side of the pelvic area just above the hips. The internal examination revealed extensive hemorrhaging in the neck and head area. The hyoid bone in the neck had been fractured. Another fracture caused by a "significant amount of force" was discovered in the roof of the orbit containing her right eye. It was determined these injuries, however, were not substantial enough to cause death. The cause of death was asphyxiation due to continual pressure applied to the neck for three to six minutes. It was brought out on direct examination that the initial autopsy report had indicated the asphyxiation was caused by ligature strangulation (use of a belt or rope, for example), but, shortly before trial, at the request of the district attorney, Dr. Murr was asked to reexamine the evidence. As a result of this subsequent review, she changed her report to "asphyxiation due to strangulation" which left open the possibility a hand, or hands, might have been involved. In response to the State's inquiries, Dr. Murr gave her opinion that the hemorrhaging in the neck area occurred while the victim was alive and resulted from pressure placed upon her neck by either pulling on a length of tape that was attached to the tape around her neck or by placing a hand or hands directly on the tape around her neck.

The acquisition of fingerprints and other trace evidence was the responsibility of Harris County Deputy Sheriff Michael Holtke. He testified about his efforts to verify that the various lengths of tape that bound the victim all came from the same roll of tape that was found next to the body. This tape,

along with the entire crime scene, was also processed for latent fingerprints. This search of the house resulted in the discovery of fingerprints from the three individuals identified as suspects in the case, including four prints belonging to the appellant himself. Two latent prints were discovered on the tape from the decedent's ankles, and it was Holtke's opinion that these had sufficient characteristics to match the prints on appellant's right palm and left index finger. Holtke also found success matching two prints from appellant's right thumb to prints found on the roll of tape. On cross-examination, defense counsel brought to light the fact that the prints found on the tape around the victim's ankles[4] were only discovered shortly before trial, approximately twenty months after the first prints were identified as belonging to appellant. Just as the revision of the autopsy report by the pathologist was at the request of the district attorney's office, this subsequent re-examination of the latent prints was also at the D.A.'s request.

Henry Nuila, a resident of Kenner, Louisiana, was called by the State to tell the jury about the events leading up to appellant's capture. Over a two week period in mid-September of 1995, Nuila

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[4] There does appear to be some confusion with regard to which set of latent prints was identified shortly before trial, the two prints from the roll of tape or the two prints from the tape around the decedent's ankles. Appellant's brief suggests the prints on the tape around the ankles were discovered first. However, our review of the record indicates otherwise. It was in fact the latent fingerprints found on the roll of tape that were first identified on September 8th of 1995, as belonging to appellant. The prints on the tape around the victim's ankles were discovered June 12th and 18th of 1997.

encountered appellant and two other men at his sister's house in Kenner. Nuila knew appellant only as "Dennis" but accurately identified him at trial, in part, by a rose tattoo on appellant's right shoulder. Nuila and appellant engaged in a conversation that took place on September 20th while appellant was in an intoxicated state. According to Nuila's testimony, appellant told him about his involvement in the murder of a woman in Houston. Nuila went on to say appellant asked for his help to kill the other two men he was with because "they had spoken too much," and if Nuila chose not to help, appellant would have to kill him as well. It was at this point appellant brandished a gun in front of Nuila. Fearing for his life, Nuila managed to keep appellant talking until appellant passed out. As soon as Nuila felt it was safe to leave, he contacted the police and appellant, still in possession of the gun, was ultimately arrested.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution "forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt." *Tibbs v. Florida*, 102 S.Ct. 2211, 2220 (1982). Our guiding standard of review in determining the legal sufficiency of the evidence in a case consisting of either direct or circumstantial evidence calls upon this Court to determine whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 99 S.Ct. 2781, 2789 (1979); *Jones v. State*, 944 S.W.2d 642, 647 (Tex.Crim.App. 1996), *cert. denied*, 118 S.Ct. 100 (1997); *Robertson v. State*, 871 S.W.2d 701, 705

(Tex.Crim.App. 1993). In conducting such a review, we measure sufficiency "by the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Ctim.App. 1997). This standard of review is applied to each theory of the offense as submitted to the jury through the court's charge. *Rabbani v. State*, 847 S.W.2d 555, 558 (Tex.Crim.App. 1992). The jury is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. *Barnes v. State*, 876 S.W.2d 316, 321 (Tex.Crim.App.), *cert. denied*, 115 S.Ct. 174 (1994). And reconciliation of conflicts in the evidence is within the exclusive province of the jury. *Losada v. State*, 721 S.W.2d 305, 309 (Tex.Crim.App. 1986). When the jury returns a general verdict, as was done in this case, and the evidence is sufficient to support a guilty finding under any of the allegations submitted, the verdict will be upheld. *Rabbani v. State*, 847 S.W.2d at 558; *Fuller v. State*, 827 S.W.2d 919, 931 (Tex.Crim.App. 1992).

This is a crime prosecuted primarily on circumstantial evidence. No eyewitness testimony can place appellant at the crime scene the morning it occurred, but sufficient evidence exists that could lead a rational trier of fact to the conclusion that a murder occurred during the commission of a burglary and appellant was directly involved as a party. That some conflict existed with regard to the identification of the fingerprints or the official cause of death is immaterial for our immediate purposes. Jurors are the exclusive judges of the facts, and this Court is not to sit as a thirteenth juror re-evaluating the credibility or weight of the evidence. *Soria v. State*, 933 S.W.2d 46, 49 (Tex.Crim.App. 1996);

*Abdnor v. State*, 871 S.W.2d 726, 731 (Tex.Crim.App. 1994). We must assume the jury, as the final judge of the facts, resolved any conflict in favor of the verdict reached. See Arts. 36.13 & 38.04 The aforementioned evidence could indicate to a rational trier of fact that appellant used his prior relationship with the victim as a means to deceptively gain access to her house, which was found to have been ransacked and looted, and that he actively participated in the restraint of the victim. Appellant's fingerprints were found at the scene and, in particular, on the decedent herself, and he admitted his involvement in the crime to a third party. See *Patrick v. State*, 906 S.W.2d 481, 486 (Tex.Crim.App. 1995), *cert. denied*, 116 S.Ct.1323 (1997).

As mentioned, appellant also contends in this point of error that the evidence introduced at trial was insufficient to establish the necessary intent to commit murder. Intent can be inferred from the acts, words, and conduct of the accused. *Id., at 487; Robertson v. State*, 871 S.W.2d at 705. Perhaps the most damning evidence is the words of appellant just prior to his capture in Kenner, Louisiana. Appellant admitted, against his own personal interest, that he, or they, had murdered a woman in Houston. Appellant's statement could be construed to indicate personal involvement or participation as a party to a deliberate killing, and this could lead a rational trier of fact to the conclusion that appellant either murdered the victim or participated in the crime by promoting or assisting its commission. Appellant's first point of error is overruled.

Appellant's seventh point of error claims the

evidence was legally insufficient to support the jury finding that he would constitute a continuing threat to society. See Article 37.071 § 2(b)(1). The State is required to prove the issue of future dangerousness beyond a reasonable doubt, i.e., the burden was on the State to prove there existed a probability, as opposed to a mere possibility, that appellant would commit criminal acts of violence in the future, so as to constitute a continuing threat, whether in or out of prison. *Narvaiz v. State*, 840 S.W.2d 415, 425 (Tex.Crim.App. 1992), *cert. denied*, 113 S.Ct. 1422 (1993); *Smith v. State*, 779 S.W.2d 417, 421 (Tex.Crim.App. 1989); *Rougeau v. State*, 738 S.W.2d 651, 660 (Tex.Crim.App. 1987), *cert. denied*, 108 S.Ct. 1586 (1988). In its determination of the issue, the jury was entitled to consider all the evidence presented at both the guilt/innocence and punishment phases of the trial. *Valdez v. State*, 776 S.W.2d 162, 166-67 (Tex.Crim.App. 1989), *cert. denied*, 110 S.Ct. 2575 (1990). To determine whether sufficient evidence exists to support a jury's finding that there is a probability the defendant will commit criminal acts of violence that will constitute a continuing threat to society, this Court must examine all of the evidence in the light most favorable to its finding and determine whether based on that evidence, any rational jury could have found beyond a reasonable doubt, that the answer to the "future dangerousness" issue was "yes." *Matamoros v. State*, 901 S.W.2d 470, 474 (Tex.Crim.App. 1995); *Narvaiz v. State*, 840 S.W.2d at 425. The existence of a prior criminal record, and prior unadjudicated acts of violence against people and property have been held by this Court to constitute evidence of future dangerousness. *Moore v. State*, 935 S.W.2d

124, 126 (Tex.Crim.App. 1996), *cert. denied*, 117 S.Ct. 1711 (1997); *Farris v. State*, 819 S.W.2d 490, 498 (Tex.Crim.App. 1990), *cert. denied*, 112 S.Ct. 1278 (1992). In fact, the circumstances of the offense itself, including the forethought, deliberateness and calculated nature, can provide ample indication appellant presents a sufficiently violent and continuing threat to society. *Williams v. State*, 937 S.W.2d 479, 483 (Tex.Crim.App. 1996); *Martinez v. State*, 924 S.W.2d 693, 696 (Tex.Crim.App. 1996); *Sonnier v. State*, 913 S.W.2d 511, 516-17 (Tex.Crim.App. 1995).

We have already discussed the circumstances of the crime itself. It is also necessary, however, to look at the State's evidence of appellant's future dangerousness presented during the punishment stage of trial. This consisted of testimonial and documentary evidence from the Texas criminal justice system and the California criminal justice system concerning appellant's criminal background. In addition, the State elicited the testimony of Candelario Martinez, who described an encounter he experienced with appellant just days after the murder in question.

We first look at appellant's criminal record in determining the societal threat he poses. Through California penal records, it was revealed that appellant received probation and a suspended sentence for possession, and purchase for sale, of narcotics. That probation was subsequently revoked after appellant was convicted on a burglary charge. Appellant was also the subject of a California warrant for the illegal transportation of aliens. In Texas, approximately two months prior to the

murder of which we now consider, appellant had also served a ten day sentence for misdemeanor theft.

As mentioned, the State also called Candelario Martinez to the stand to tell the jury about his experience with appellant three days after the murder. Martinez told how he was waiting for a friend outside a hotel in Harris County on September 8, 1995, when appellant approached and started to make conversation. After a brief discussion, appellant pulled out a gun and ordered Martinez into one of the hotel rooms, which also contained the friend for whom Martinez had been waiting. Martinez said he was ordered onto the floor as appellant made constant threats to kill him. Martinez's personal belongings were taken by appellant and two others in the room and then he was ordered into the bathroom where he was again informed he would be killed. Martinez begged for his life as his captors argued over who would actually carry out the killing. Ultimately, appellant said he would let Martinez live but threatened to return and kill his family if Martinez informed the police. Appellant and the others then left the scene in Martinez's truck.

As previously mentioned, the circumstances of the crime itself are probative in making this determination of future dangerousness. See *Williams v. State*, 937 S.W.2d at 483; *Martinez v. State*, 924 S.W.2d at 696. The evidence shows the victim in this case permitted appellant and his fellow suspects into her home only to have it ransacked and its contents taken and, she, herself, was bound with duct tape, beaten, and choked to death. The pathological evidence revealed this

beating caused extensive bruising on the victim's arms and legs, a broken bone in her elbow, and severe trauma to her head and neck evidenced by broken bones and internal bleeding. The culmination of this crime was then the strangulation death of a 67 year old woman for three to six minutes, which the jury found appellant either carried out personally or actively participated in.

The circumstances of the crime, taken into consideration with appellant's criminal background, and his actions during the encounter with Candelario Martinez, indicate that a rational jury could have found there is a probability appellant would commit criminal acts of violence in the future and constitute a continuing threat to society. Point of error number seven is overruled.

In his eighth point of error, appellant argues the trial court erred in accepting the jury's verdict pursuant to Article 37.071 § 2(b)(2) because the evidence was legally insufficient to support the finding that the appellant "actually caused the death of the deceased, or did not actually cause the death but intended to kill the deceased or another, or anticipated that a human life would be taken." Appellant contends that since the victim in this case was tied up and restrained before being murdered then the intent to murder was not made until after the burglary or robbery had actually commenced. In addition, appellant argues that since his prints were found only on the tape encircling the ankles of the deceased and on the roll of tape, there was insufficient evidence to indicate appellant was personally responsible for carrying out the strangulation of the victim. These alleged

inconsistencies, he argues, combined with what he considers questionable alterations in the reports by the pathologist and the fingerprint specialist, make the evidence insufficient to support the jury's finding under Article 37.071 § 2(b)(2), the "§ 2(b)(2)" charge.

Our guiding standard, as in all legal sufficiency reviews of the punishment stage, is whether, based on the evidence viewed in a light most favorable to the verdict, a rational jury could have found beyond a reasonable doubt that the answer to the § (2)(b)(2) charge was "yes." *Martinez v. State*, 924 S.W.2d at 696. Submission of the § (2)(b)(2) special issue is appropriate when a jury was permitted to find the defendant guilty as a party under Texas Penal Code §§ 7.01 & 7.02. Its goal is to ensure that the trier of fact, during punishment, considers only the actions of the defendant and does not sentence someone to death based upon the culpability of others. See *Enmund v. Florida*, 102 S.Ct. 3368 (1982). To even be subject to the provisions of Article 37.071 § 2(b), a defendant must have already been found guilty as a primary actor or as a party. See *Lawton v. State*, 913 S.W.2d 542, 555 (Tex.Crim.App. 1995), *cert. denied*, 117 S.Ct. 88 (1996); *McFarland v. State*, 928 S.W.2d 482, 517 (Tex.Crim.App. 1996), *cert. denied*, 117 S.Ct. 966 (1997). Appellant freely admitted that he was directly involved in a Houston murder and stated his desire that his two cohorts be killed to keep them from revealing the circumstances of the crime. A jury could rationally infer from this statement that appellant "actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased… or anticipated that a human life would be taken." Art. 37.071 § 2(b)(2). The evidence was sufficient to

support the jury's affirmative answer to the § (2)(b)(2) issue submitted during punishment. Point of error number eight is overruled.

Point of error number three claims the trial court erroneously denied a pre-trial motion to declare Article 37.071 § 2(b)(2) violative of the Eighth Amendment to the United States Constitution and also "contrary to state law." Appellant reasserts this issue on direct appeal. With regard to the federal claim of unconstitutionality, appellant argues that the phrase "anticipation that a human life be taken," Art. 37.071 § 2(b)(2), lowers the level of personal culpability necessary to receive a sentence of death, thus violating the Eighth Amendment proscription against cruel and unusual punishment. To support his position, appellant additionally argues the statute "requires the jury to find nothing more than [it was] required to find in order to convict a defendant of capital murder under the law of parties." The Supreme Court decisions from *Tison v. Arizona*, 107 S.Ct. 1676 (1987), and *Enmund v. Florida*, 102 S.Ct. 3368 (1982), are relied on as authority that the death penalty is not appropriate against a defendant who did not possess the appropriate intent.

This claim of unconstitutionality has been argued before, and it has been answered by this Court. Both *Tison and Enmund* are inapplicable in light of the circumstances of appellant's crime and conviction. At the guilt/innocence phase of trial, the jury was specifically charged that it could not reach a verdict of guilt unless appellant intentionally murdered the victim or intentionally assisted in the commission of

the murder and the aggravating offense.[5] See *Cantu v. State*, 939 S.W.2d 627, 645 (Tex.Crim.App.), *cert. denied*, 118 S.Ct. 557 (1997); *McFarland v. State* 928 S.W.2d at 517. This finding of guilt was a testament to the jury's belief that appellant possessed the appropriate intent, and any Eighth Amendment requirements were thus satisfied. *Webb v. State*, 760 S.W.2d 263, 268 (Tex.Crim.App. 1988), *cert. denied*, 109 S.Ct. 3202 (1989). See *Lawton v. State*, 913 S.W.2d at 555.

Appellant, in the same argument, claims the § (2)(b)(2) statute is "contrary to state law," and says in his brief that Texas Penal Code § 7.02(a)(2), under which the jury was charged, "does not mention anticipation or foreseeing that a crime would be committed as creating criminal liability under the law of parties." Appellant is mistaken because the law of parties was not applicable at the punishment phase of trial. *Webb v. State*, 760 S.W.2d at 268; *Green v. State*, 682 S.W.2d 271 (Tex.Crim.App. 1984), *cert. denied*, 105 S.Ct. 1407 (1985). During the guilt/innocence stage of trial, the jury was properly instructed that appellant could be found criminally responsible as either the primary actor or as a party who intended to promote or assist in the commission of the offense. Tex. Penal Code 7.02(a)(2). The § (2)(b)(2) special issue was included during punishment to ensure that the jury consider only appellant's culpability and not the culpability of his cohorts. *McFarland v. State*, 928 S.W.2d at 517; *Martinez v. State*, 899 S.W.2d 655 (Tex.Crim.App. 1994), *cert. denied*, 116 S.Ct. 378 (1995). No contradictions exist between the two provisions as

[5] See Tex. Penal Code §§ 7.01(a) & 7.02(a)(2).

they are applicable at different points during trial. Point of error number three is overruled.

Appellant, in his fourth point of error, argues the trial court erred in denying a pre-trial motion to hold Article 37.071 §§ 2(e) & (f) unconstitutional under the Fourteenth Amendment's Due Process Clause and Article I, § 10 of the Texas Constitution. Appellant argues that Article 37.071 § 2(e), the mitigation issue, impermissibly shifts the burden of proof to the defendant. This assertion has been addressed on numerous occasions in the past and has been held to be without merit. We refer appellant to those decisions for a more complete analysis of the issue. See *Cantu v. State*, 939 S.W.2d at 641; *Matchett v. State*, 941 S.W.2d 922, 935 (Tex.Crim.App. 1996), *cert. denied*, 117 S.Ct. 2487 (1997); *Barnes v. State*, 876 S.W.2d at 330. Turning to appellant's concern regarding the constitutionality of Article 37.071 § 2(f), no argument or authority is provided explaining why a review by this Court is warranted. We dismiss this issue as inadequately briefed. See Tex. R. App. Pro. 38.1(h). The fourth point of error is overruled.

In his fifth and sixth points of error, appellant argues the present statutory system is contradictory to the Eighth Amendment because it fails to require that a jury consider all mitigating evidence, and the definition of mitigating evidence provided in Article 37.071 § 2(f)(4) is unconstitutionally narrow. It was argued at trial, and it is argued now, that the definition of mitigating evidence "impermissibly limits the Eighth Amendment concept of mitigation to factors that render a capital defendant less 'morally blameworthy' for commission of capital

murder." This Court has consistently held there are no limits upon what evidence a juror can consider when determining whether a sentence less than death is appropriate. *Shannon v. State*, 942 S.W.2d 591, 597 (Tex.Crim.App. 1996). And Article 37.071 § 2(f)(4) "does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness as appellant alleges." *Ibid.* See also *King v. State*, 953 S.W.2d 266, 274 (Tex.Crim.App. 1997). Points of error five and six are overruled.

Appellant questions the constitutionality of the "10-12 Rule" in Article 37.071 § 2(f)(2) in his tenth point of error. He claims this portion of the Texas Code of Criminal Procedure runs afoul of Eighth Amendment concerns. This identical argument has been addressed and dismissed on numerous prior occasions. *Cantu v. State* 939 S.W.2d at 645; *McFarland v. State*, 928 S.W.2d at 519. Point of error ten is overruled.

Within point of error number twelve, appellant claims Article 37.071 § 2(a),[6] is violative of the Eighth and Fourteenth Amendments because it prevents the jury from knowing that, pursuant to Article 37.071 § 2(g),[7] a single holdout juror can force

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[6] Article 37.071§ 2(a) reads in relevant part:

> . . . The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) of this article.

[7] Article 37.071§ 2(g) reads in relevant part:

> . . . If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an

the imposition of a life sentence upon the defendant. Appellant directs us to the decisions of other state jurisdictions as support. It is well-settled in this state, however, that the command of Article 37.071 § 2(a), does not contradict Article 37.071 § 2(g), and does not run contrary to either the Eighth or Fourteenth Amendments. Members of a jury shall not be instructed on the effects of their individual answers to the special punishment issues of Article 37.071. See *Pondexter v. State*, 942 S.W.2d 577, 586 (Tex.Crim.App. 1996), *cert. denied*, 118 S.Ct. 85 (1997); *Emery v. State*, 881 S.W.2d 702, 711 (Tex.Crim.App. 1994), *cert. denied*, 115 S.Ct. 1257 (1995); *Draughon v. State*, 831 S.W.2d 331, 337 (Tex.Crim.App. 1992), *cert. denied*, 113 S.Ct. 3045 (1993); *Nobles v. State*, 843 S.W.2d 503, 508-10 (Tex.Crim.App. 1992). Point of error twelve is overruled.

The second point of error deals with the trial court's admission of two autopsy photographs, each one of which appellant considers cumulative of others already admitted into evidence. Appellant claims Exhibit 113B, a shot of the victim's face and upper shoulders showing extensive trauma, blood, and duct tape around the eyes and neck, was duplicative of a previous photograph that showed the clothed decedent from the thighs up to the head with an identification placard across her waist. Appellant

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affirmative finding on an issue submitted under Subsection (e) of this article or is unable to answer any issue submitted under Subsection (b) or (e) in this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life.

also argues Exhibit 113J, a picture of decedent's bruised left bicep and inner elbow, along with an identification placard, was duplicative of a prior photograph that showed the unclothed upper body of the decedent with her left arm extending off the autopsy table. The identification placard rested on her chest and arm. Both photographs were objected to as needlessly cumulative and unfairly prejudicial under Rule 403 of the Texas Rules of Criminal Evidence.

The admission in evidence of photographs is within the sound discretion of the trial court judge, who determines whether they serve a proper purpose in the enlightenment of the jury. *Long v. State*, 823 S.W.2d 259, 270 (Tex.Crim.App. 1991), *cert. denied*, 112 S.Ct. 3042 (1992). The judge's action will not be disturbed in the absence of a showing of an abuse of discretion. *Terry v. State*, 491 S.W.2d 161, 163 (Tex.Crim.App. 1973); *Martin v. State*, 475 S.W.2d 265, 267 (Tex.Crim.App.), *cert. denied*, 93 S.Ct. 469 (1972). If a verbal description of the body and the scene would be admissible, a photograph depicting the same is admissible. *Id.*, at 267. The two photographs in question cannot be considered irrelevant to the case, and they are not so shocking or gruesome that "a juror of normal sensitivity would necessarily encounter difficulty rationally deciding the critical issues of this case after viewing them." *Narvaiz v. State*, 840 S.W.2d at 429. See also *Fuller v. State*, 829 S.W.2d 191, 206 (Tex.Crim.App. 1992), *cert denied*, 113 S.Ct. 2418 (1993). Both photographs offered the jurors an opportunity to view the bruising and other trauma inflicted upon the decedent and reinforced testimony that had already been presented at trial. Appellant's alternative

argument that the photographs were cumulative must fail as well. Texas Rule of Criminal Evidence 403 provides, in part, that relevant evidence may be excluded if its probative value is *substantially* outweighed by the countervailing consideration of the *needless* presentation of cumulative evidence. The photographic evidence was unavoidably cumulative to a certain degree, but appellant has shown us no basis for concluding that a reasonable trial judge would necessarily find that the probative value of the photographs was substantially outweighed by its detrimental effect on the efficiency of the trial process. *Alvarado v. State*, 912 S.W.2d 199, 213 (Tex.Crim.App. 1995) (plurality opinion). We discern no abuse of discretion. The second point of error is overruled.

The eleventh point of error brought to this Court claims the district court erred in permitting the decedent's son to testify at punishment regarding "victim impact" testimony. Our review of the record, however, reveals appellant made no objection to the evidence, and, "in order for an issue to be preserved on appeal, there must be a timely objection which specifically states the legal basis for the objection." *Rezac v. State*, 782 S.W.2d 869, 870 (Tex.Crim.App. 1990). See Tex. R. Crim. Evid. 103(a)(1); Tex. R. App. Pro. 33.1. Point of error number eleven was not preserved for appeal and is consequently overruled.[8]

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[8] With regard to the issue presented, we indicate to appellant that this Court has previously upheld the admissibility of this type of victim-impact testimony. See *Mosley v. State*, No. 72,281, __ S.W.2d __ (Tex.Crim.App. July 1, 1998), slip op. at 83; *Smith v. State*, 919 S.W.2d 96 (Tex.Crim.App. 1996).

In the ninth and final point of error, appellant argues, as he did in a pre-trial motion, and during the punishment phase of trial, that he was entitled to take the stand for the limited purpose of testifying that he was the person named in a foreign document[9] and cross-examination must have been limited to only that subject. In sum, appellant asks this court for a modification of the established rule regarding Texas' policy allowing wide-open cross-examination of witnesses. See Tex. R. Crim. Evid. 611(b). Appellant argues a defendant should be permitted to testify "in [collateral] mitigation matters relating to possible death sentences" and be subject to cross-examination only on those matters brought out on direct examination. To follow appellant's suggestion would contradict almost a century and a half of Texas case law on the matter. See *Wentworth v. Crawford*, 11 Tex. 127, 132 (1853). An accused may not take the witness stand for a limited purpose. *Myre v. State*, 545 S.W.2d 820, 825 (Tex.Crim.App. 1977) (overruled on other grounds); *Brumfield v. State*, 445 S.W.2d 732, 735 (Tex.Crim.App. 1969); *Tyler v. State*, 293 S.W.2d 775 (Tex.Crim.App. 1956) (defendant could not testify for limited purpose of showing who had possession of, and resided in, apartment where heroin was located); *Holder v. State*, 143 S.W.2d 613 (Tex.Crim.App. 1940) (defendant who took stand for limited purpose of proving up his application for a

[9] The document was in Spanish and listed the name Denys Humberto Zelaya Corea. Appellant stated at trial, and in his brief, that he was the only individual who could testify he was, in fact, that individual named in the document, and it would demonstrate he had no criminal record in the jurisdiction listed.

suspended sentence was subject to cross-examination about the crime charged). If a defendant chooses to testify, he is subject to the same rules governing examination and cross-examination as any other witness, whether he testifies at the guilt-innocence stage or at the punishment stage of the trial. *Felder v. State*, 848 S.W.2d 85, 99 (Tex.Crim.App. 1992), *cert. denied*, 114 S.Ct. 95 (1993); *Cantu v. State*, 738 S.W.2d 249, 255 (Tex.Crim.App.), *cert. denied*, 108 S.Ct. 203 (1987). See Tex. R. Crim. Evid 611(b). We will not endorse the exception appellant seeks. The trial court properly forbade appellant from taking the stand subject only to limited cross-examination. Point of error number nine is overruled.

Finding no reversible error in this case, we affirm the judgment of the trial court.

MANSFIELD, J.

DELIVERED: NOVEMBER 4, 1998

DO NOT PUBLISH

**APPENDIX S**

BEHAVIORAL MEDICINE CONSULTANTS

CLINICAL PSYCHOLOGY * NEUROPSYCHOLOGY *
REHABILITATION OCCUPATIONAL PSYCHOLOGY *
HEALTH PSYCHOLOGY

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Francisco I. Perez, Ph.D.,
ABPP/ABCN
Diplomate In Clinical
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May 28, 2003

J. Gary Hart
2906 Skylark Drive
Austin, Texas 78757
FAX: 512/206-3119

RE: **Carlos Ayestas (aka Dennis Zelaya)**

Dear Mr. Hart:

At your request, I traveled to the Polunsky Unit in Livingston, Texas, on 5/23 to conduct an intellectual assessment of your client, Carlos Ayestas. Specifically, you wanted me to assess his intellectual status. Your client was cooperative during the testing.

On the Wechsler Adult Intelligence Scale-Spanish version, he obtained a Full IQ of 115 which places him in the high average range. On the Test of Nonverbal Intelligence, he obtained a score of 99. His performance is within the average to high average range.

There is no evidence for mental retardation. However, I have some concerns regarding Mr. Ayestas' psychological pattern. During my clinical interview, it became apparent that Mr. Ayestas is developing some delusional thinking that clearly needs to be monitored. He told me that he has been placed on antipsychotic medication recently and clearly his mental status needs to be evaluated closely.

Thank you once again for the opportunity to work with your client.

If you have any questions, please don't hesitate to contact me.

Best regards,

/s/ Francisco I. Perez, Ph.D.

Francisco I. Perez, Ph.D.

## APPENDIX T

### UTMB MANAGED CARE
### MENTAL HEALTH SERVICES

Outpatient Psychiatric Follow-up

**Patient Name**: AYESTAS, CARLOS M
TDCJ# 999240 Date: 02/10/2004 15:00

Facility: POLUNSKY (formerly TERRELL)

**Medications:**
ENZTROPINE MESYLATE 1MG TABS,
1 TABS ORAL(po) QPM

Special Instructions: EQUI=COGENTIN. *NON-KOP*, VERY IMPORTANT TO TAKE OR USE THIS EXACTLY AS DIRECTED

TRIFLUOPERAZINE HCL 5MG TABS,
1 TABS ORAL(po) QPM

Special Instructions: EQUI=STELAZINE. **NON-KOP**, MAY CAUSE DROWSINESS OR DIZZINESS, MAY IMPAIR THE ABILITY TO DRIVE OR OPERATE MACHINERY, VERY IMPORTANT TO TAKE OR USE THIS EXACTLY AS DIRECTED

**Allergies:**
Most recent vitals from 01/13/2003: BP: 146/80 (Sitting) Wt. 171 Lbs. Height Pulse: 57 (Sitting) Resp.: 20/min Temp: 97.8 (Oral)

**CASE SUMMARY**

Problems:
DENTAL EXAMINATION [V72.2] first observed 02/18/2003 (Active)
GINGIVAL/PERIODONTAL [523] first observed

02/03/2004 (Active)
SCHIZOPHRENIA, UNDIFFERENTIATED TYPE [295.90] first observed 10/29/2003 (Active)
TB CLASS 0 (NO EXPOSURE PULM. TUBERCULOSIS) [011.] first observed 10/10/2003 (Active)
VARICELLA WITHOUT MENTION OF COMPLICATION [052.9] first observed 10/08/2003 (Active)
ANNUAL PPD SKIN TEST [V74.4] first observed 10/08/2003 ()

S: The patient reports: "alright." he is doing well. Currently asymptomatic. Good appetite/sleep

Medication effects: good response
Medication side effects: none
Medication compliance:100%
Laboratory results:
Psychotherapy participation:

O: Mental Status: A+0 x 3 , appearance - wnl, behavior - wnl, speech - wnl, thought content — no a/v hallucinations or delusions, no SI, mood and affect - normal range

A: Axis I: SCHIZOPHRENIA, UNDIFFERENTIATED TYPE [295.90]
Axis II: defer
Axis III: none

P: Medications: Renew current Rx plan

1. d/c Stelazine and Cogentin
2. Start Stelazine 5mg 1 tab po qpm x30d, 5 rf
   Cogentin lmg 1 tab po qpm x30d, 5 rf

Psychotherapy:

Laboratory: LFT TSH chem-10 lipids HgbA1C

Procedures Ordered:
CARDIAC RISK PANELS (LIPIDS) *: schizophrenia, undifferentiated type
CHEM 10: schizophrenia, undifferentiated type
HGB A1C*: schizophrenia, undifferentiated type
LIVER (LFS) PANEL *: schizophrenia, undifferentiated type
THYROID STIMULATING HORMONE *: schizophrenia, undifferentiated type

Referrals:
Follow-up: 3 mos

The risks, benefits, side effects, and alternatives to ____ Stelazine and Cogentin _____ have been discussed and the patient agrees.

* * *

Outpatient Psychiatric Follow-up

Patient Name: AYESTAS, CARLOS M
TDCJ#: 999240Date: 02/10/2004 15:00

Facility: POLUNSKY (formerly TERRELL)

Interpreter Used Yes No Name of interpreter:

Electronically Signed by FONG, GEORGE G P.A-C on 02/10/2004.
##And No Others##

* * *

**CORRECTIONAL MANAGED CARE**
**CLINIC NOTES - MID LEVEL PROVIDER**

**Patient Name**: AYESTAS, CARLOS M
**TDCJ#**: 999240 **Date**: 06/16/2006 07:12
**Facility**: POLUNSKY (formerly TERRELL)

AGE: 36 Years RACE: H SEX: Male

**CASE SUMMARY**

**Problems:**

**Cars:**

**Mental Health Cars 2 First Observed 11/14/2005 03:49PM**
**Dental Cars 0 First Observed 03/06/2006 03:23PM**

**Cid:**

**Annual Ppd Skin Test First Observed 09/28/2005 07:27PM**

**Dental:**

**Hard Tissue Disease First Observed 03/09/2004 09:46AM**
**Dental Examination First Observed 05/18/2005 07:27AM**
**Gingival/periodontal First Observed 10/14/2005 09:14AM**

**Mental Health:**

**Schizophrenia, Undifferentiated Type First Observed 04/20/2004 12:37PM**

**Mh Other:**

**Mental Status Exam First Observed 02/01/2005 04:54PM**
**Mental Status Exam First Observed 02/01/2005 04:54PM**
**Mental Health Behavioral Observations First Observed 07/21/2005 03:49PM**

**Not Specified:**

**Tb Class 0 (no Exposure Pulm. Tuberculosis) First Observed 10/10/2003**

**08:47AM**
**Observation- Cond Not Found First Observed 07/30/2004 09:32AM**
**Brief Psychiatric Rating Scale First Observed 03/04/2005 10:00AM**
**Observation For Unspecified Suspected Condition First Observed 07/15/2005 08:51AM**
**Arthritis First Observed 11/07/2005 12:19PM**
**Mental Health Case Mgmt Problems And Trmt Objectives First Observed 12/28/2005 10:21AM**
**Medical Cars 2 First Observed 03/31/2006 11:30AM**

**Medications:**
BENZTROPINE MESYLATE I MG TABS, 1 TABS ORAL(po) QPM

*Special Instructions*: EQUI=COGENTIN, *NON-KOP*, VERY IMPORTANT TO TAKE OR USE THIS EXACTLY AS DIRECTED

TRIFLUOPERAZINE HCL 2MG TABS, 1 TABS ORAL(po) QPM

*Special Instructions*: EQUI=STELAZINE. **NON-KOP**, MAY CAUSE DROWSINESS OR DIZZINESS, MAY IMPAIR THE ABILITY TO DRIVE OR OPERATE MACHINERY, VERY IMPORTANT TO TAKE OR USE THIS EXACTLY AS DIRECTED

Allergies: NO KNOWN ALLERGIES

**Current Lab Tests**:
**Most recent vitals from 06/16/2006**: BP: 144/84 (Sitting) Wt. 174 Lbs. Height 64 In. Pulse: 57 (Sitting) Resp.: 16/min Temp: 97.9 (Oral)

**Patient Language: ENGLISH**
**Name of interpreter, if required**:

**Chief Complaint:**
**scr for constipated, wants results of blood tests**
**o- abd soft ,normoactive bs, nt**

| **AUTOMATED CHEMISTRY** | **05/17/2006 11:59** |
|---|---|
| BILIRUBIN TOTAL | 0.4 |
| CHEMISTRY | 05/17/2006 11:59 |
| ANION GAP | 8 |
| BUN | 8 |

## APPENDIX U

Cause No. 754409

| | | |
|---|---|---|
| EX PARTE | § | IN THE 230TH DISTRICT COURT |
| CARLOS MANUEL AYESTAS, | § | OF HARRIS COUNTY, |
| Applicant | § | TEXAS |

## AFFIDAVIT

| | | |
|---|---|---|
| STATE OF TEXAS | § | DATE: January 26, 2005 |
| HARRIS COUNTY | § | |

Before me, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared Diana Olvera, who being by me duly sworn, upon his oath deposes and says:

"My name is Diana Olvera. I am presently licensed to practice law in the State of Texas and have been licensed since November, 1987. My Texas bar number is 15278650. I have been practicing since that time, and at least 75 percent of my practice has been criminal. I have been appointed on several capital cases that were either reduced or tried as non-death cases. I have tried five capital cases that were death cases. Judge Keegans appointed me to represent the defendant, Carlos Manuel Ayestas, in his 1997 capital murder trial in cause no. 754409 in the 230th District Court of Harris County, along with defense counsel Connie Williams.

As part of the pre-trial investigation and preparation, the defense prepared and filed pre-trial

motions, interviewed witnesses, talked to the defendant's family, obtained discovery from the State, reviewed the State's file, employed the services of an investigator, John Castillo, talked with the defendant numerous times about the offense and pending trial, and reviewed juror questionnaires. We also talked to the defendant about his background and life. Because I am fluent in the Spanish language, I was able to easily communicate with Mr. Ayestas.

Presiding Judge Bob Burdette conducted an extensive voir dire of the prospective jurors regarding imposition of the death penalty. Judge Burdette then asked each juror that indicated an unwillingness to impose the death penalty individually if they could consider the death penalty. Each juror answered that under no circumstance would they impose the death penalty as punishment. We did not object to these jurors being struck because we believed that the Judge had established their inability to follow the law. Also, we did not object as a form of trial strategy. Jurors who would always give the death penalty regardless of the circumstances of the offense were also excused by agreement with the State.

I do not recall Carlos wanting to testify at trial or insisting on testifying at trial. Co-counsel and I discussed whether or not Carlos should testify, and we made the strategic decision that it would not be a good idea for Carlos to testify. We considered the amount of physical evidence that would be introduced at trial, the language problem, the intelligence level of Carlos and how Carlos would perform under cross-examination by the prosecutor,

Bill Hawkins. Other considerations included opening the door to the Defendant's extraneous offenses. Additionally, I do not recall Carlos ever stating that he only saw the victim after she was already bound by tape and all he did was to pull the tape down from around her mouth.

We requested and received over the objection of the prosecutor, Bill Hawkins, a charge on felony murder. Both Connie Williams and myself argued for felony murder during guilt-innocence closing argument, and we presented the evidence we had to support felony murder such as the cross-examination of Dr. Murr as to whether or not an individual would vomit after death.

I had numerous conversations with the Defendant regarding his family and their presence at trial. The Defendant continuously stated that he did not want his family contacted due to problems he and his family had in his home country. To the best of my recollection, the Defendant did not acquiesce to having his family contacted until after jury selection was completed. At that time, I made every effort to contact his family. On May 29, 1997, my investigator, John Castillo, sent a letter to the Defendant's family. On June 10, 1997, I sent a letter to the family at an address provided by the Defendant. Once we made contact with the family, I informed them about the trial date and requested their presence, and I, or a representative from my office, communicated with them on many occasions by telephone. Only July 2, 1997, I faxed a letter to the American Embassy in Honduras to expedite the family's travel to the United States. In this letter, I informed the American Embassy the need for the

Defendant's family's presence at his trial for the instant offense. I also set up a meeting at the embassy for the Defendant's family on July 3, 1997 at 8:00 a.m. I included a copy of the June 10, 1997 letter as well.

I also communicated to the family via telephone the requirements for travel to the United States. Per my telephone conversation with the Defendant's sister, Somara Zalaya, on June 25, 1997, she indicated that there were additional reasons the family would have difficulty leaving Honduras for the Defendant's trial, including their father's illness and economic reasons. In my conversation with the Defendant's mother, Zoila Zalaya, on June 26, 1997, she did not appear concerned for the Defendant and was evasive in her responses. Per my notes, she stated the Defendant knew what he was doing, and she would call me back and let me know what they could do.

I did not object to the victim impact testimony of Elim Paneque for several reasons. In preparation for trial, we filed a motion to voir dire on victim impact testimony, a motion in limine regarding the complainant's character, and a motion for discovery of the victim impact testimony. The State provided discovery of the victim impact testimony before trial, and the testimony of the victim was in compliance with the information provided to us by the State. The victim impact testimony was legally admissible. We also made the strategic decision not to object and interrupt the victim while he testified.

I did not request an instruction requiring the jury to only consider the Defendant's extraneous offenses against him only if they first found he committed

them beyond a reasonable doubt. The Jury was properly instructed during trial to only consider it for purposes of determining the Defendant's guilty knowledge. Furthermore, the jury was given the appropriate instruction in the charge to only consider the extraneous conduct in determining the guilty knowledge of the Defendant, if any, and to not consider it for any other purpose.

I did not object when the prosecutor refreshed Henry Nuila's memory, because the Witness stated he couldn't be specific about a particular statement he made. At that point, the prosecutor properly refreshed the witness' memory with his statement. The witness stated his memory was refreshed after reviewing the statement. The prosecutor properly refreshed the witness' memory, and there was no need for me to object.

During closing argument, the prosecutor argued that he would not have asked the assistant medical examiner to change her opinion regarding the victim's manner of death. The prosecutor was responding to an inference made during closing argument of defense counsel that was appropriate and did not require an objection. During jury argument, as well as throughout trial, we made the objections we thought were appropriate and beneficial to the Defendant.

The Honduran Consulate was made aware of Carlos' situation as I, myself, informed them in person of his arrest, indictment and upcoming trial for capital murder. Carlos knew of my contact with the Consulate, and he did nothing to assist me in my efforts to contact his family. Carlos did not want them contacted by the Consulate or me.

I have read the above statement and find it to be true and correct to the best of my knowledge."

/s/ Diana Olvera
DIANA OLVERA
Affiant

SWORN AND SUBSCRIBED before me, under oath, on this the 26th day of January, 2005.

/s/ Alicia Trevino
NOTARY PUBLIC in and for the State of Texas

My commission expires:
2-12-05

## APPENDIX V

## [HANDWRITTEN] AFFIDAVIT OF DENNIS HUMBERTO ZELAYA, A/KA CARLOS MANUEL AYESTAS

**STATE OF TEXAS x**
**x**
**COUNTY OF POLK x**

My name is Dennis Humberto Zelaya. I am above the age of eighteen and am competent in all respects to make this affidavit.

I was born in in Tegucigalpa, Honduras, and am a Honduran national. I was convicted of capital murder in the 230th District Court of Harris County, Texas, under the name Carlos Manuel Ayestas, in cause number 754409 in July of 1997.

I have read the affidavit that was executed by my trial counsel, Diana Olvera, which she signed on January 26, 2005. Many statements that Ms. Olvera has made in her affidavit are inaccurate. For example, she states that she had "numerous" conversations with me prior to my trial regarding my family and their presence at trial. This is not true. Ms. Olvera only talked to me on one occasion . . .

[remaining text of sentence not available]

* * *

testify on my behalf. This conversation took place in the courtroom on an occasion shortly before trial began. Ms. Olvera asked me to give her an address and phone number for my family in Honduras. I gave her an address and two phone numbers. The address I gave her was my sister's business address.

I did not tell Ms. Olvera, on this occasion or on any other occasion, that I did not want her to contact my family. It is not true that I "continuously" stated that I did not want my family contacted. In fact, I never told her that I did not want my family contacted. When Ms. Olvera asked me for information to contact my family, I willingly gave it to her. I had no objection to her contacting my family.

In addition, Ms. Olvera states in her affidavit that I was aware that she had contacted the Honduran Consolate [sic] on my behalf. I do not know whether that is true or not, but if she did, she never informed me of it. I never told Ms. Olvera or the Honduran Consulate that I did not want them to contact my family. In fact, I . . .

[remaining text of sentence not available]

* * *

duran Consulate, or how they could have helped me during the course of my capital murder trial, until the Consulate finally contacted me for the first time several days after I was convicted, in July of 1997. Before that I never knew that I could have tried to get help from the Honduran Consulate under the Vienna Convention on Consular Relations. Had I known about the Honduran Consulate, I could have called them myself from the county jail.

Ms. Olvera only came to see me once in the county jail. At one of the pre-trial hearings I had asked her how much it would cost to hire her as my private attorney, instead of having her represent me under appointment by the court. On that one occasion when Ms. Olvera came to see me at the county jail, we did not talk about my case. We only talked about

how much it would cost for me to retain her. The only time Ms. Olvera talked to me about my case, it always happened either in the courtroom or in the holding cell right next door to the courtroom.

On the one occasion when Ms. Olvera talked to me about getting my family to come testify on my behalf, she did not explain to me why she wanted to them to testify, or how their testimony could help in my case. She just asked me to give her information to contact them, which I gave her. In fact, my family already knew that I was in the county jail, because I had made as many as six collect calls to them from the county jail to Honduras. During those phone calls I told my family that I was in jail. I did not tell them I was facing the death penalty, however, because I myself did not really believe that I would be sentenced to death. Had Ms. Olvera fully explained to me the seriousness of my situation, and how my family could have contributed at the punishment phase of my trial, I would have been eager for her to contact them and help them make arrangements to get to my trial in time.

/s/ Dennis Humberto Zelaya
Dennis Humberto Zelaya a/k/a
Carlos Manuel Ayestas

Executed on this 10th day of February, 2005

/s/ Stacy Edwards
Notary Public, State of Texas

## APPENDIX W

FILED
CHARLES BACARISSE
District Clerk
NOV 06 2006
Time:_____
Harris County, Texas
By: /s/_____
Deputy

Cause No. 754409-A

| | | |
|---|---|---|
| EX PARTE | § | IN THE 230TH DISTRICT COURT |
| CARLOS MANUEL AYESTAS, | § | OF HARRIS COUNTY, |
| Applicant | § | TEXAS |

## AFFIDAVIT

| | | |
|---|---|---|
| STATE OF TEXAS | § | DATE: October 24, 2006 |
| HARRIS COUNTY | § | |

Before me, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared Diana Olvera, who being by me duly sworn, upon his oath deposes and says:

Before me, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared Diana Olvera, who being by me duly sworn, upon his oath deposes and says:

"My name is Diana Olvera. I am presently licensed to practice law in the State of Texas and have been licensed since November, 1987. My Texas bar number is 15278650. I have been practicing since that time, and at least 75 percent of my practice has been criminal. I have been appointed

on several capital cases that were either reduced or tried as non-death cases. I have tried five capital cases that were death cases. Judge Joe Keegans appointed me to represent the defendant, Carlos Manuel Ayestas, in his 1997 capital murder trial in cause no. 754409 in the 230th District Court of Harris County, along with defense counsel Connie Williams.

As part of the pre-trial investigation and preparation, the defense prepared and filed pre-trial motions, interviewed witnesses, talked to the defendant's family, obtained discovery from the State, reviewed the State's file, employed the services of an investigator, John Castillo, talked with the defendant numerous times about the offense and pending trial, and reviewed juror questionnaires. We also talked to the defendant about his background and life. Because I am fluent in the Spanish language, I was able to easily communicate with Mr. Ayestas.

I had numerous conversations with the defendant regarding his family and their presence at trial, and I pleaded with Carlos to allow me to contact his family. The defendant continuously stated that he did not want his family contacted due to problems he and his family had in his home country. To the best of my recollection, the defendant did not acquiesce to having his family contacted until right before jury selection began.

Once the defendant agreed to have his family contacted, I made every effort to contact his family. On May 29, 1997, my investigator, John Castillo, sent a letter to the defendant's family (Letter dated May 29, 1997, attached hereto as Exhibit A). On

June 10, 1997, I sent a letter to the family at an address provided by the defendant, which states that the defendant finally agreed to have them contacted (Letter dated June 10, 1997, attached hereto as Exhibit B). On July 2, 1997, I faxed a letter, which I also sent to the defendant's family, to the American Embassy in Honduras to expedite the family's travel to the United States (Letter dated July 2, 1997, to family attached hereto as Exhibit C; see also fax transmission record of fax to American Embassy attached hereto as Exhibit D). In this letter, I informed the American Embassy the need for the defendant's family's presence at his trial for the instant offense. I also set up a meeting at the embassy for the defendant's family on July 3, 1997 at 8:00 a.m. I included a copy of the June 10, 1997 letter as well.

Additionally, I communicated to the family via telephone the requirements for travel to the United States. Once we made contact with the family, I informed them about the trial date and requested their presence, and I, or a representative from my office, communicated with them on many occasions by telephone. I first contacted the family by telephone on June 3, 1997, at a number provided by the defendant (see phone record of June 3, 1997 call attached hereto as Exhibit E). I believe I spoke with Carlos' mother, and although the call was brief, I identified myself, explained Carlos' situation, and requested their presence at the defendant's trial. Carlos' mother stated they would call me back, and I encouraged them to do so as soon as possible.

On June 25, 1997, I received a call from the defendant's family. Per my telephone conversation

with the defendant's sister, Somara Zalaya, she indicated that there were reasons the family would have difficulty leaving Honduras for the defendant's trial, including their father's illness and economic reasons. Zalaya also informed me that their father had killed their neighbor, another reason the family would have difficulty leaving Honduras for the defendant's trial (Record of June 25, 1997, phone call attached hereto as Exhibit F).

I also called the defendant's family on June 26, 27, and July 2. In my conversation with the defendant's mother, Zoila Zalaya, on June 26, 1997, she did not appear concerned for the defendant and was evasive in her responses. Per my notes, she stated the defendant "knew what he was doing," and she would call me back and let me know what they could do (Record of June 26, 1997, phone call attached hereto as Exhibit G). My assistants also noted that the defendant's mother exhibited an apparent lack of concern for her son's situation (Records of June 26, 1997, telephone call attached hereto as Exhibits H & I).

The Honduran Consulate was made aware of Carlos' situation as I, myself, informed them in person of his arrest, indictment and upcoming trial for capital murder. I went to the Honduran Consulate on Monday, June 9, 1997 (Calendar excerpt noting visit to Honduran Consulate attached hereto as Exhibit J; See also business card received from Honduran Consulate attached hereto as Exhibit K). Although I do not recall the name of the individual with whom I spoke, I know I did not speak with the Consul General. However, I made sure the consulate staff was aware of Carlos'

situation. Based on my conversation with the Honduran Consulate employee and my experience in dealing with another foreign consulate, I determined the Honduran Consulate would not be able to provide assistance in securing Carlos' family members' presence at his trial. Thereafter, I learned of and contacted the American Embassy in Honduras to ask for assistance in bringing Carlos' family members to Houston. Carlos knew of my contact with the Consulate. He did nothing to assist me in my efforts to contact his family and did not want them contacted by the Consulate or me.

I have read the above statement and find it to be true and correct to the best of my knowledge."

/s/ Diana Olvera
DIANA OLVERA
Affiant

SWORN AND SUBSCRIBED before me, under oath, on this the 24th day of October, 2006.

/s/ Teresa Ann Lopez
Notary Public in and for
the State of Texas

My commission expires:
12-15-08

## APPENDIX X

**CAUSE NUMBER 754409-A**

| | |
|---|---|
| **EX PARTE** | **IN THE 230TH DISTRICT COURT** |
| **CARLOS MANUEL AYESTAS,** APPLICANT | **OF HARRIS COUNTY, TEXAS** |

## RESPONDENT'S PROPOSED FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus, the Respondent's Original Answer, the evidence elicited at the applicant's capital murder trial in cause no. 754409, the evidence elicited during all habeas proceedings, the affidavits of trial counsel, and official court documents and records, makes the following findings of fact and conclusions of law:

### FINDINGS OF FACT

1. Carlos Manuel Ayestas, the applicant, was indicted and convicted of the offense of capital murder in cause number 754409 in the 230th District Court of Harris County, Texas.

2. The applicant was represented at trial by counsel Diana Olvera and Connie Williams.

3. On July 10, 1997, after the jury answered affirmatively the first and second special issues and negatively answered the third special issue, the trial court sentenced the applicant to death (XXI S.F. at 242).

4. On November 4, 1998, the Court of Criminal Appeals affirmed the conviction in an unpublished

opinion. *Ayestas v. State*, No. 72,928 (Tex. Crim. App. Nov. 4, 1998)(not designated for publication).

GUILT-INNOCENCE EVIDENCE

5. The Court finds, based on the evidence presented during the applicant's trial, that the applicant and Frederico Zaldivar looked at a car for sale by Ana McDougal in August, 1995; that McDougal went inside her house at one point and came outside to find the applicant and Zaldivar coming out of the neighboring home of Santiaga Paneque, the complainant; and, that the men told McDougal that they were looking at furniture the complainant was selling (XX S.F. at 119-131, 154).

6. The Court finds, based on the evidence presented during the applicant's trial, that Elin Paneque arrived home on September 5, 1995, to find the house unlocked, the television missing, the kitchen drawers open, some dishes missing, the complainant's bedroom ransacked, and the complainant's body lying on the bathroom floor (XX S.F. at 80-99).

7. The Court finds, based on the evidence presented during the applicant's trial, that the complainant was bound with tape around her wrist, eyes, neck, and ankles and an alarm clock cord was tied to her wrist; that a partial shoe print was on the bathroom floor; and, that a pair of eyeglasses was by the complainant's feet and a small box containing cufflinks was inside the bathroom (XX S.F. at 91, 110-2, 154).

8. The Court finds, based on the evidence presented during the applicant's trial, that Michael D. Holtke, Harris County Sheriff's Department, later

determined that the pieces of tape removed from the complainant's body came from a roll of duct tape recovered from the bathroom counter and that the piece of tape around the complainant's neck was the first piece torn from the roll of tape (XX S.F. at 213-216, 237).

9. The Court finds, based on the evidence presented during the applicant's trial, that the applicant's prints were found on the roll of duct tape and also on the piece of tape from the complainant's ankles (XX S.F. at 233); that fingerprints of the applicant's co-defendant, Federico Zaldivar, were found on the bathroom door and on the small box containing cufflinks in the bathroom (XIX S.F. at 127, 129-131); and, that fingerprints lifted from the bottom of a planter base matched those of Robert Meza, the applicant's other co-defendant (XIX S.F. at 129-130).

10. The Court finds that, during the applicant's trial, Henry Nuila testified that he met the applicant, who had two other men with him, in Louisiana on September 20TH and 21ST, 1995; that the applicant told Nuila his name was "Dennis" and he had murdered a woman in Houston; that the applicant asked Nuila to kill the two other men because they knew too much; and, that the applicant showed Nuila an Uzi machine gun and threatened to kill Nuila if he would not help (XIX S.F. at 158-74).

STATE'S PUNISHMENT EVIDENCE

11. The Court finds, based on the evidence presented during the applicant's trial, that the applicant gave the following information to Harris County Pre-trial Services when he was arrested for theft in July, 1995: that he was from Mexico, had no

criminal history, spoke English, had graduated from high school, and had no health, alcohol, or drug problems (XXI S.F. at 80-83).

12. The Court finds that the State presented evidence that the applicant was convicted and received probation for possession for sale of cocaine and possession for sale of heroin in California in June, 1990; that the applicant's probation was revoked in 1991 when he was convicted of burglary; that the applicant was sentenced to three years in prison for the drug cases and two years for the burglary conviction; and, that the applicant was convicted of misdemeanor theft and was sentenced to ten days in the Harris County Jail in July, 1995 (XXI S.F. at 93-94).

13. The Court finds, based on the evidence presented during the applicant's trial, that the applicant approached Candelario Martinez in a hotel parking lot, pointed a machine gun at Martinez, and forced him into a room where a man was already holding a knife on Martinez's friend, Jose, and another man put a knife to Martinez's back; that the applicant took Martinez's money before putting Martinez and Jose in the bathroom; that Martinez heard the men arguing about who would kill him and Jose; and, that the applicant threatened to kill Martinez and his family if he called the police (XXI S.F. at 101-6).

14. The Court finds, during the applicant's trial, Evan Holtsclaw, Kenner, Louisiana Police Department, testified that he spoke to Henry Nuila on September 21, 1995; that Holtsclaw went to Nuila's sister's house afterwards and arrested the applicant and two other men (XXI S.F. at 155); and,

that a machine gun was found underneath the applicant who was lying on the floor (XXI S.F. at 159, 170).

15. The Court finds that, during the applicant's trial, Elin Paneque, the complainant's son, testified that he was in therapy for six months immediately after the complainant's death and was in therapy at the time of trial; that the complainant's death left a void in Paneque's life that would never be filled; that Paneque took the oath to become a United States citizen two days after the complainant's murder; and, that Paneque regretted that the complainant was not there (XXI S.F. at 185-6).

DEFENSE PUNISHMENT EVIDENCE

16. The Court finds, based on the evidence presented during the applicant's trial, that the applicant offered three letters from an English teacher at the Harris County Jail stating that the applicant was a serious and attentive student (XXI S.F. at 190).

***First Ground: alleged ineffective assistance of counsel***

17. The Court finds, based on the credible affidavit of trial counsel Diana Olvera, that trial counsel prepared and filed pre-trial motions, interviewed witnesses, talked to the applicant's family, obtained discovery from the State, reviewed the State's file, employed the services of an investigator, John Castillo, talked with the applicant numerous times about the offense and pending trial, reviewed juror questionnaires, spoke to the applicant about his background and life, and attempted to secure the presence of the applicant's family at the

applicant's trial. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

BURDEN OF PROOF - *VOIR DIRE*

18. The Court finds that, during voir dire examination in the applicant's trial, the trial court questioned the following prospective jurors and elicited information that they would not impose the death penalty under any circumstances: Laura Hilborn, Diane Drummond, Myrna Salaun, Brenda Allison, Rose Dominguez, John Wilson, Travis Pickrom, Marjorie Rayson, Maclovio Orozco, Carmen Harris, Lydia Newell, Joyce Green, Sherry Brown, and Nancy Johnson (V S.F. at 30-31)(11 S.F. at 22)(XV S.F. at 41-3).[1]

19. The Court finds that the prospective jurors who maintained that they would never impose the death penalty under any circumstances were challengeable for cause based on their bias or prejudice against a phase of the law upon which the State was entitled to rely for punishment, just as prospective jurors who maintained that they would always give the death penalty regardless of the circumstances were challengeable for cause by the applicant.

20. The Court finds, based on the credible affidavit of trial counsel Diana Olvera, that trial counsel made the reasonable, strategic decision to agree with the State to excuse prospective jurors who maintained that they would always give the death penalty regardless of the circumstances and to

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[1] The volume of the appellate record dated June 20, 1997 is designated as Vol. 11 and the volume dated June 23, 1997 is designated as Vol. XI.

excuse prospective jurors who maintained that they would never give the death penalty regardless of the circumstances. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

21. The Court finds that the agreement to excuse prospective jurors who demonstrated a bias or prejudice against a phase of the law upon which the State was entitled to rely for punishment did not lessen the State's burden to establish that the prospective jurors were challengeable for cause and that the State's burden was met through the responses elicited by the trial court during *voir dire* examination of the noted prospective jurors.

FELONY MURDER - INTENT

22. The Court finds that the applicant's habeas claim of ineffective assistance of trial counsel based on an alleged failure to present evidence to show that the applicant, if guilty, was allegedly only guilty of felony murder is essentially an attack on the sufficiency of the evidence.

23. The Court finds that the applicant's habeas claim of ineffective assistance of trial counsel based on an alleged failure to present evidence to show that the applicant allegedly neither actually caused the complainant's death nor intended or anticipated that the complainant's life would be taken is essentially an attack on the sufficiency of the evidence.

24. The Court finds that the applicant's attacks on the sufficiency of the evidence are not cognizable in the instant writ proceeding or any subsequent state writ proceedings.

25. The Court finds that, during the applicant's trial, Marilyn Murr, Harris County Assistant Medical Examiner, testified that she performed the autopsy on the complainant's body; that the complainant suffered petechiae in the upper and lower eyelids, bruising and swelling around her right eye, bruising of her lips, a laceration on inside her mouth and on her chin, bruises to the front areas outside her groin area, bruises and contusions to her left arm, a large contusion on the back of her head, a bone protruding from her broken right elbow, a fractured hyoid bone, and bleeding to her neck muscles, esophagus, and skull; and, that the complainant was alive at the time she sustained such injuries (XX S.F. at 145, 175, 180-4).

26. The Court finds that Murr testified that she originally concluded that the cause of the complainant's death was asphyxiation due to ligature strangulation; that Murr amended the cause of death to asphyxiation due to strangulation after considering the large amount of bleeding to the complainant's neck, the fracture of the hyoid bone, and the bleeding around the tip of the thyroid cartilage; and, that the amended cause of death did not exclude asphyxiation due to ligature strangulation (XX S.F. at 188-90).

27. The Court finds that Murr testified that the tape found around the complainant's neck was tight enough to cause the complainant's death, and that one or both hands could have been used to strangle the complainant who was alive when she was strangled (XX S.F. at 193).

28. The Court finds trial counsel elicited testimony that vomit was found at the crime scene

and that, in response to trial counsel's questions, Murr acknowledged that a person would not vomit after death (XX S.F. 197).

29. The Court finds, during guilt-innocence argument, trial counsel argued that the complainant was alive when the applicant and his co-defendants left the scene but choked afterwards; that the applicant, if guilty, was only guilty of felony murder; and, that the State failed to show that the applicant had a specific intent to kill the complainant (XX S.F. at 294).

30. The Court finds that Trial court granted trial counsel's request for a jury instruction on the lesser included offense of felony murder (XX S.F. at 257).

31. The Court finds that trial counsel pursued the reasonable strategy that the applicant, if guilty, was only guilty of the lesser included offense of felony murder and that the applicant neither intended to cause the death of the complainant nor intended or anticipated that the complainant's life would be taken.

32. The Court finds unpersuasive and speculative the habeas affidavit of Randall Frost, M.D., asserting that the complainant's autopsy findings are "highly suggestive" of compressive force applied to the neck, as one would find in strangulation and that it is possible to strangle a person without causing death and then causing death by placing a hand or material over the mouth and nostrils, i.e., suffocation. *See applicant's writ exhibit c.*

33. The Court finds that Randall Frost, M.D., admits the speculative nature of his habeas

conclusion, acknowledging that the acceptance of his hypothesis would require compelling investigative evidence that the victim actually exhibits signs of life after a strangulation with subsequent application of a suffocating barrier to the face. *Id*.

34. The Court finds, based on the credible affidavit of trial counsel, that trial counsel does not recall applicant wanting to testify or insisting on testifying at trial; that trial counsel discussed whether the applicant should testify and made the strategic decision that it would not be a good idea for the applicant to testify; and, that counsel made that decision based on the amount of physical evidence that would be introduced at trial, the language problem, the intelligence level of the applicant, his ability to withstand cross-examination, and the fact that the applicant's testimony would have opened the door to his extraneous offenses. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera*.

35. The Court finds that the applicant's self-serving habeas affidavit asserting that he returned to the complainant before leaving her house and pulled down the duct tape covering her mouth is at odds with evidence that the applicant told Henry Nuila that he killed a woman in Houston and at odds with Frost's speculative scenario of strangulation without death followed by suffocation.

ATTENDANCE OF APPLICANT'S FAMILY AT TRIAL

36. The Court finds, based on the credible affidavit of trial counsel, that trial counsel spoke with the applicant numerous times about his family attending the trial; that the applicant repeatedly

told counsel that the did not want his family contacted because of problems he and his family had in their home country of Honduras; that, to the best of counsel's recollection, the applicant did not agree to having his family contacted until after jury selection was completed; and, that trial counsel made every effort to contact the applicant's family once the applicant agreed. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera; State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera.*

37. The Court finds, based on the credible affidavit of trial counsel, that defense investigator John Castillo sent a letter to the applicant's family in Honduras on May 29, 1997; that trial counsel sent another letter to the applicant's family at an address provided by the applicant on June 10, 1997; that counsel's letter states that the applicant finally agreed for his family to be contacted; that counsel sent another letter to the applicant's family on July 2, 1997 and faxed a letter to the American Embassy in Honduras to expedite the family's travel to the United States; that trial counsel informed the American Embassy of the need for the presence of the applicant's family at the applicant's trial; that trial counsel arranged a meeting at the American Embassy for the applicant's family on July 3, 1997; and, that counsel also included a copy of the June 10, 1997 letter to the applicant's family. *See State's Exhibits A, January 26, 2005 Affidavit of Diana Olvera; State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera; State's Exhibit D, May 29, 1997 letter from John Castillo; State's Exhibit E, June 10, 1997 letter from Diana Olvera; State's Exhibit F, July 2, 1997 letter from Diana Olvera; State's Exhibit*

*G, July 2, 1997 letter to American Embassy; State's Exhibit J, Fax Transmission Record of Fax to American Embassy*.

38. The Court further finds, based on the credible affidavit of trial counsel, that trial counsel communicated with the applicant's family via telephone; that counsel told the applicant's family of the requirements for travel to the United States; that counsel first contacted the applicant's family by telephone on June 3, 1997, at a number provided by the applicant; that counsel believes that she spoke with the applicant's mother; that, although the call was brief, counsel identified herself, explained the applicant's situation, and requested their presence at the applicant's trial; that the applicant's mother stated they would call counsel back; and, that counsel encouraged the applicant's family to do so as soon as possible. *See State's Exhibits A, January 26, 2005 Affidavit of Diana Olvera; State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera; State's Exhibit K, Phone Record from June 3, 1997*.

39. The Court finds, based on the credible affidavit of trial counsel, that trial counsel received a call from the applicant's family on June 25, 1997, that, according to the applicant's sister, Somara Zalaya, there were reasons the family would have difficulty leaving Honduras for the applicant's trial, including their father's illness, economic reasons, and their father's murder of a neighbor. *See State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera; State's Exhibit L, Phone Record from June 25, 1997*.

40. The Court further finds, based on the credible affidavit of trial counsel, that counsel also

called the applicant's family on June 26, 27, and July 2; that the applicant's mother, Zoila Zalaya, did not appear concerned for the applicant and was evasive in her responses during counsel's conversation with her on June 26, 1997; that Zoila Zalaya stated the applicant "knew what he was doing;" that Zoila Zalaya stated she would call counsel back and let counsel know what they could do; and, that counsel's assistants also noted that the applicant's mother exhibited an apparent lack of concern for the applicant's situation. *See State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera; State's Exhibit M, Phone Records from June 26, 1997.*

41. The Court finds, based on the credible affidavit of trial counsel, that the Honduran Consulate was aware of the applicant's situation; that trial counsel informed the Honduran Consulate in person of the applicant's arrest, indictment and upcoming trial for capital murder; that counsel went to the Honduran Consulate on Monday, June 9, 1997; that counsel did not speak with the Consul General but made sure the consulate staff was aware of the applicant's situation; that counsel determined the Honduran Consulate would not be able to provide assistance in securing presence of the applicant's family at his trial based on counsel's conversation with the employee of the Honduran Consulate and counsel's experience in dealing with another foreign consulate; and, that counsel thereafter learned of and contacted the American Embassy in Honduras to ask for assistance in bringing the applicant's family members to Houston. *See State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera; State's Exhibit N, Calendar Notation*

*Regarding Honduran Consulate; State's Exhibit O, Honduran Consulate business card.*

42. The Court finds, based on the credible affidavit of trial counsel, that the applicant knew of counsel's contact with the Honduran Consulate and did nothing to assist counsel's efforts to contact his family and did not want them contacted by the consulate or counsel. *See State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera.*

43. The Court finds that, during the punishment phase of the trial, trial counsel presented letters from Mae J. Martin, an instructor from the Houston Community College System, regarding the applicant (XXI S.F. at 190); that according to Martin's letters, the applicant was enrolled in a class for English as a second language at the Harris County Jail in December 1996, and April and June, 1997; that the applicant was a serious and attentive student who was progressing well in English (XXI S.F. at 190-91); that the applicant had no other problems with the law and there was no evidence that the applicant committed terrible crimes in California (XXI S.F. at 219); and, that the applicant had no history of violent crime (XXI S.F. at 224).

44. The Court finds that trial counsel made reasonable, diligent efforts to secure the attendance of the applicant's family at the applicant's trial, notwithstanding the applicant's initial decision not to have his family contacted.

45. The Court further finds that information now asserted in the habeas affidavits of the applicant's family, i.e., that the applicant had a normal childhood and family, had no major injuries, illnesses, or problems with the law in Honduras, and

made average grade, is not significantly different than the evidence counsel presented at trial through the letters from Mae J. Martin.

VICTIM-IMPACT EVIDENCE

46. The Court finds, based on the credible affidavit of trial counsel, that trial counsel filed a pre-trial motion to conduct *voir dire* examination on victim impact testimony, a motion in limine regarding the complainant's character, and a motion for discovery of victim impact testimony; that the State provided discovery of the victim impact testimony before trial; that the testimony was in compliance with the information provided by the State before trial; that trial counsel did not object to the legally admissible victim impact testimony; and, that counsel made the strategic decision not to object to the testimony of the complainant's son. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

47. The Court finds that, during the punishment phase of the trial, Elin Paneque, the complainant's son, testified without objection about the effects of his mother's death on their family, including testimony that he had not been the same person for the last two years; that he did not sleep very well anymore; that he was fearful of trusting people; that he was in therapy for six months after his mother's death and was having to start therapy again; that he would never know his mother as an adult; and, that he was sworn in as a Untied State's citizen without his mother's presence (XXI S.F. at 184-86).

JURY INSTRUCTION - EXTRANEOUS OFFENSE

48. The Court finds that, prior to the testimony of Henry Nuila and outside the presence of the jury, the trial court addressed the effect on the applicant's motions in limine of the State's intention to elicit evidence from Henry Nuila that the applicant pointed a gun at him and asked Nuila to help him kill co-defendants Meza and Zaldivar (XIX S.F. at 136-7).

49. The Court finds that trial counsel objected to the admission of the evidence, arguing that it was irrelevant at the guilt-innocence phase of the trial; that it was precluded under TEX. R. EVID. 404(b) at this stage, and that trial counsel requested that the trial court do a balancing test under Rule 403 and find it unfairly prejudicial to admit the testimony during guilt-innocence (XIX S.F. at 137).

50. The Court finds that the trial court found that the evidence would be probative on the issue of consciousness of guilt (XIX S.F. at 137).

51. The Court finds that trial counsel, without waiving objection to the admission of evidence, alternatively requested that the trial court verbally give the jury a limiting instruction before the jury heard the extraneous testimony and the trial court informed counsel of the limiting instruction the trial court planned to give prior to the admission of such testimony (XIX S.F. at 138-9).

52. The Court finds that Henry Nuila testified that he met the applicant, known to him as "Dennis," at a house in Kenner, Louisiana on September 21 and 22, 1995; that the applicant was accompanied by two men; that the applicant told Nuila that he

murdered a woman in Houston; and, that the applicant suggested or requested that Nuila do something for him (XIX S.F. at 157-68).

53. The Court finds that after the prosecutor asked what the applicant had suggested or requested Nuila to do, trial counsel objected, saying "we renew our objection that we raised previously;" that the trial court stated that the ruling was the same; that Nuila then testified that the applicant told him he wanted help in killing the two men with him, would kill him if he did not help, and pulled out an Uzi (XIX S.F. at 168).

54. The Court finds that trial counsel then objected to the testimony that Nuila was about to give and re-urged counsel's previous objection; that the trial court overruled counsel's objection; and, that Nuila testified that the applicant pulled out a small machine gun and showed it to the applicant and said that he would also eliminate Nuila if he did not help (XIX S.F. at 169).

55. The Court finds that the trial court then verbally instructed the jury that "certain evidence was admitted before you regarding the defendant having allegedly committed an extraneous offense or offenses[;] such testimony is admitted for the purpose of aiding you, if it does aid you, in determining the guilty knowledge of the defendant, if any, and you must not consider that testimony for any other purpose" (XIX S.F. at 169).

56. The Court finds that, during cross-examination of Nuila, trial counsel attempted to impeach Nuila by eliciting evidence concerning Nuila's statement to Kenner, Louisiana police, his possible bias, and his seemingly illogical action of

leaving his sister and her family with the applicant in light of the applicant's admission and threat to Nuila (XIX S.F. at 184-91).

57. The Court finds that, at the conclusion of the guilt-innocence phase, the trial court instructed the jury that it was the exclusive judges of the facts, the credibility of witnesses and the weight to be given their testimony, and that trial counsel argued that the jury could choose to believe all, part, or none of Nuila's testimony (XX S.F. at 276, 285).

58. The Court finds that, at the conclusion of the guilt-innocence phase, the trial court instructed the jury that the State must prove the offense of capital murder or the lesser offense of felony murder beyond a reasonable doubt (XX S.F. at 266-9, 271-4).

59. The Court finds that, at the conclusion of the guilt-innocence phase, the trial court instructed the jury that certain evidence was admitted regarding the applicant allegedly having committed an extraneous offense or offenses; that such evidence was admitted for the purpose of aiding the jury, if it does aid the jury, in determining the guilty knowledge, if any, of the applicant; and, that the jury must not consider it for any other purpose (XX S.F. at 274).

60. The Court finds that Nuila's testimony was relevant to show consciousness of guilt, i.e., guilty knowledge, if any, of the applicant, and that Nuila's testimony concerning the extraneous offenses was relevant to rebut the demonstrated defensive theory that the applicant, if guilty, was only guilty of felony murder and that the applicant neither intended to cause the death of the complainant nor intended or

anticipated that the complainant's life would be taken.

61. The Court finds, based on the credible affidavit of trial counsel, that counsel reasonably chose not to request an instruction requiring the jury to consider the applicant's extraneous offenses only if the jury first found he committed them beyond a reasonable doubt because the jury was properly instructed during trial to consider the extraneous offense or offenses only for purposes of determining the applicant's guilty knowledge, if any, and the jury was given the appropriate instruction in the charge to consider the extraneous conduct only in determining guilty knowledge, if any, of the applicant and not to consider it for any other purpose. *See State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

62. The Court finds the applicant's case is distinguishable from the holding in *Ex parte Varelas*, 45 S.W.3d 627 (Tex. Crim. App. 2001), where defense counsel was found ineffective for not requesting a limiting instruction for an extraneous admitted during guilt-innocence of a capital trial and for not requesting that the jury be instructed that it was required to find that the defendant committed the extraneous beyond a reasonable doubt when counsel later asserted that the lack of request was due to oversight and not based on strategy; the extraneous offenses were similar in nature to the charged offense; the State argued that the defendant must have been responsible for the victim's death because he committed the extraneous acts, and such extraneous acts were likely considered as direct evidence of the defendant's guilt.

JURY INSTRUCTION - LESSER INCLUDED OFFENSE

63. The Court finds that the trial court granted the applicant's request for an instruction on felony murder at the conclusion of the guilt-innocence phase of the trial, and that the trial court charged the jury that "a person commits the offense of felony murder if he commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual" (XX S.F. at 269-70).

64. The Court finds that the application paragraphs concerning felony murder in the guilt-innocence charge contained the phrase "committed an act clearly dangerous to human life, to wit: by strangling..." and did not include the phrase "cause the death" (XX S.F. at 271-3).

65. The Court finds that the applicant did not object to the guilt-innocence charge based on the absence of the phrase "cause the death" in the application paragraphs of felony murder.

66. The Court finds, based on the guilt-innocence charge as a whole, that the jury was aware that the offense of felony murder necessarily contains the element of the death of an individual and that it is unreasonable and improbable that the jury mistakenly believed that the distinction between felony murder and capital murder is whether the victim actually died.

REFRESHING MEMORY OF HENRY NUILA

67. The Court finds that, during direct examination, Henry Nuila testified that the applicant identified himself to Nuila as "Dennis" on the 20TH and 21ST in Kenner, Louisiana; that "Dennis" had a rose tattoo on his arm; that their conversation was in Spanish; that Nuila's sister was staying at their parents' house while their parents were in Honduras; that Nuila thought that "Dennis" was from Honduras; that "Dennis" said that he had come from Houston and they had murdered a female over there; and, that the other men with "Dennis" had "spoken too much" (XIX S.F. at 162-67).

68. The Court finds, during direct examination, the prosecutor asked Nuila whether the applicant said "he" or "they" did [the murder], and that Nuila replied "I can't really be specific on that" (XIX S.F. at 164-65).

69. The Court finds that, during direct examination, the prosecutor then showed Nuila State's Exhibit 118 and asked if he recognized it (XIX S.F. at 165); that Nuila identified State's Exhibit 118 as the statement he gave to the Kenner, Louisiana police after the incident with the applicant; that Nuila read his statement silently; that the prosecutor asked Nuila if that refreshed his memory concerning what he told the Kenner police about his conversation with the applicant; that Nuila stated that it did; and, that Nuila then testified "he" when asked if the applicant referred to "he" or "them" doing the killing (XIX S.F. at 165-7).

70. The Court further finds that, during cross-examination, Nuila again acknowledged that his memory was refreshed by his review of his

statement to the Kenner police, and that trial counsel attempted to impeach Nuila's memory of events (XIX S.F. at 187, 191-92).

71. The Court finds, based on trial counsel's cross-examination of Nuila, that Nuila's statement to Kenner police was made available to trial counsel, pursuant to former TEX. R. CRIM. EVID. 611, now enacted as TEX. R. EVID. 612.

72. The Court finds, based on the credible affidavit of trial counsel, that counsel did not object and had no need to object to the State's proper refreshing of Nuila's memory after he testified that he could not be specific about the particular statement he made. *State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

GUILT-INNOCENCE ARGUMENT

73. The Court finds that trial counsel argued at guilt-innocence that "I don't know what you make about her [Murr] changing her mind. All I know is here a month before trial and we come up with a completely different opinion from the same data with no formal second opinion" (XX S.F. at 289-91).

74. The Court finds that the prosecutor responded to trial counsel's argument by arguing that defense counsel "suggests there is something kind of nebulous about her [Dr. Murr] changing her opinion" [about cause of death], and that the prosecutor further argued that he did not think there was any question in jurors' minds that Murr would not change the cause of death for the prosecutor and the prosecutor would not ask that (XX S.F. at 305-6).

75. The Court finds, based on the credible affidavit of trial counsel, that trial counsel did not object to the prosecutor's argument about Dr. Murr amending the cause of death that was made in response "to an inference made during closing argument of defense counsel that was appropriate and did not require an objection," and that trial counsel made objections during jury argument that counsel thought were appropriate and beneficial to the applicant. *State's Exhibit A, January 26, 2005 Affidavit of Diana Olvera.*

***First, Second, Third, and Fourth Grounds: Vienna Convention/alleged ineffective assistance of counsel***

76. The Court finds that the applicant did not object either pre-trial or during trial to any alleged violation of the Vienna Convention on Consular Relations.

77. The Court finds, based on the appellate record, that the applicant told a pre-trial services interviewer on July 7, 1995, two months before the instant offense, that he was twenty-six years old and was born in Mexico, rather than Honduras (XXI S.F. at 80-1).

78. The Court finds, based on the credible affidavit of trial counsel, that the provisions of the Vienna Convention were complied with by trial counsel's informing the Honduran Consulate in person of the applicant's arrest, indictment and upcoming trial for capital murder. *See State's Exhibit I, October 24, 2006 Affidavit of Diana Olvera.*

79. The Court finds, based on the credible affidavit of trial counsel, that the applicant did nothing to assist counsel in efforts to contact his family and he did not want his family contacted by the Honduran Consulate, even though he was aware of counsel's contact with the Honduran Consulate. *Id*.

80. The Court finds that there is no affirmative showing that the applicant expressed to police or counsel any desire that the Honduran Consulate or any other foreign consulate be notified or that he be allowed to contact the Honduran Consulate or any other foreign consulate.

81. The Court finds that there is no affirmative showing that the applicant is a Honduran national, notwithstanding his family living in Honduras and trial counsel informing the Honduran Consulate of the applicant's arrest and indictment for capital murder.

82. The Court finds that trial counsel appointed experienced trial counsel Diana Olvera and Connie Williams to represent the applicant after the applicant's arrest; that counsel Olvera speaks Spanish; that that the applicant's skilled counsel were far more qualified to explain the Texas criminal justice system to the applicant than a representative of a foreign consulate; and, that the applicant was familiar with the criminal justice system as a result of his arrests and convictions prior to the instant offense.

83. The Court finds, based on the appellate record, that the applicant had lived in the United States in California and Houston; that the applicant had an apartment in Harris County; that applicant

had been living in that apartment for at least four months; that the applicant lived alone; that the applicant spoke English; that the applicant graduated from high school; and, that the applicant had been employed in the United States (XXI S.F. at 81-2).

84. The Court finds that the preamble of the Vienna Convention specifically provides that "the purpose of [the] privileges and immunities [discussed in the Convention] is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992)(emphasis added).

85. The Court finds that, in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), the United States Supreme Court, assuming without deciding that the Vienna Convention might create some individual rights criminal defendants could invoke in a legal proceeding, held that the exclusionary rule does not apply to evidence obtained after a Vienna Convention violation; that ordinary state rules of procedural default may be properly applied to Vienna Convention claims; and, that the opinions of the International Court of Justice are not binding on United States courts.

86. The Court finds that, in *Sanchez-Llamas*, the Supreme Court further noted that the protections allegedly advanced by Article 36 of the Vienna Convention are provided by constitutional and statutory requirements already in place, including the right to an attorney and protection against compelled self-incrimination.

87. The Court finds that in, *Ex parte Jose Ernesto Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006), the Court of Criminal Appeals dismissed Medellin's subsequent application for postconviction writ of habeas corpus on the grounds that recent developments involving the Vienna Convention on Consular Relations do not constitute either a new factual or legal basis for a claim that could not have previously have been raised in prior writ applications, and that the International Court of Justice's decision in *Avena* does not trump procedural default provisions of art. 11.075, § 5, under the Supremacy Clause of the U. S. Constitution.

88. The Court finds that the United States Supreme Court subsequently granted Medellin's petition for certiorari to address the question of whether the President's memo sent to the Attorney General after the *Avena* decision constitutes an executive order and, if so, whether it exceeds the President's authority, and that the United States Supreme Court has not yet issued an opinion in Medellin's case.

89. The Court finds that the United States Supreme Court's consideration of the issue of the President's memo does not impact the disposition of the applicant's Vienna Convention claims in the instant writ proceeding.

90. The Court finds that the applicant was provided the statutory and constitutional protections afforded citizens of the United States, including right to counsel, and that trial counsel are not ineffective for not objecting to the constitutionality of

the applicant's death sentence based on an alleged violation of the Vienna Convention.

***Fifth, Sixth, and Seventh Grounds: alleged false testimony/witness Henry Nuila***

91. The Court finds that the applicant presents the hearsay habeas affidavit of defense investigator Gerald Bierbaum asserting that Rolando Guitterez, Roberto Meza and Franklin Torres allegedly told Bierbaum that Henry Nuila was allegedly not present in the house [Kenner, Louisiana house] on the evening prior to the arrest. *See applicant's writ exhibit o.*

92. The Court finds that the hearsay affidavit of the defense investigator does not constitute competent, supported evidence; thus, it is not dispositive of any habeas claims.

93. The Court finds, based on the credible affidavits of prosecutors Bill Hawkins and Don Smyth, that they had no reason to believe that Nuila was not present at the house as he testified; that they met with co-defendant Zaldivar who never stated anything inconsistent with the witnesses' testimony, including Nuila's testimony; that they initially planned to call Zaldivar as a witness but did not because of Zaldivar's fear of the applicant; and, that they did not suppress *Brady* information. *See State's Exhibits B and C, Affidavits of prosecutors Bill Hawkins and Don Smyth, respectively.*

94. The Court finds that jury was free to accept or reject any or all portions of Henry Nuila's testimony, and the Court further finds that the State did not knowingly present false testimony of Henry Nuila and did not suppress any alleged statement of

Zaldivar purportedly indicating that Nuila was not present in the Kenner, Louisiana house.

## CONCLUSIONS OF LAW

### ***First Ground: alleged ineffective assistance of counsel***

1. Trial counsel are not ineffective for making the reasonable, strategic decision to agree with the State to excuse prospective jurors who maintained that they would always give the death penalty regardless of the circumstances and to excuse prospective jurors who maintained that they would never give the death penalty regardless of the circumstances, in light of questioning by the trial court establishing that such prospective jurors were challengeable for cause. *See* TEX. CODE CRIM. PROC. art. 35.16 (a)(9) and (b)(3); *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App.1999)(noting that any prospective juror who would automatically answer special issues so that death penalty would result is challengeable for cause for having bias or prejudice against law applicable to case on which defense entitled to rely).

2. Because the applicant's habeas contention of ineffective assistance of counsel, based on alleged failure to show that the applicant was allegedly guilty, if guilty, only of felony murder and to show that the applicant allegedly neither actually caused the complainant's death nor intended or anticipated that the complainant's life would be taken, are actually attacks on the sufficiency of the evidence, such habeas claims are not cognizable in state writ proceedings. *See Ex parte Christian*, 760 S.W.2d 659 (Tex. Crim. App. 1988).

3. In the alternative, trial counsel cannot be considered ineffective for not showing that the applicant was allegedly guilty only of felony murder or not showing that the applicant allegedly neither actually caused the death of the complainant nor intended or anticipated that the life of the complainant would be taken, in light of trial counsel's apparent and reasonable, albeit unsuccessful, strategy to show that the applicant, if guilty, was only guilty of the lesser included offense of felony murder and that the applicant neither intended to cause the death of the complainant nor intended or anticipated that the complainant's life would be taken. *Passmore v. State*, 617 S.W.2d 682, 686 (Tex. Crim. App. 1981)(holding that fact that another attorney might have pursued different strategy will not support finding of ineffectiveness of counsel); *see also Rachal v. State*, 917 S.W.2d 799, 805 (Tex. Crim. App. 1996)(holding that reconciliation of conflicts in witnesses' testimony is within exclusive province of jury).

4. Trial counsel are not ineffective for employing the reasonable trial strategy of not having the applicant testify based on the amount of physical evidence that would be introduced at trial, the language problem, the intelligence level of the applicant, his ability to withstand cross-examination, and the fact that the applicant's testimony would have opened the door to his extraneous offenses. *See Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993)(noting that counsel's strategic choices made after thorough investigation of relevant law and facts are "virtually unchallengeable"); *see also Ex parte Ewing*, 570 S.W.2d 941 (Tex. Crim. App. 1978)(holding that trial

strategy will be reviewed only if record shows that action was without plausible basis).

5. Trial counsel cannot be considered ineffective based on the applicant's family not attending the applicant's trial, in light of the applicant's numerous, initial assertions that he did not want his family contacted and in light of trial counsel's extensive efforts to attempt to secure the presence of the applicant's family from Honduras after the applicant changed his mind. *See Sonnier v. State*, 914 S.W.2d 511, 522 (Tex. Crim. App. 1995)(holding counsel not ineffective for following defendant's expressed wishes not to present punishment evidence in capital case); *Wilkerson v. State*, 726 S.W.2d 542, 551 (Tex. Crim. App. 1986)(holding that, absent showing that witnesses were available or that their testimony would have benefited defendant, claim of ineffective assistance of counsel cannot be sustained); *cf. Rompilla v. Beard*, 545 U.S. 374, 388-90 (2005)(noting difference between counsel failing to pursue "sure bet" investigation of information in easily-available State's file of prior conviction, knowing that State intended to introduce evidence, and debatable obligation to pursue some "potential lines of enquiry).

6. Trial counsel fails to show ineffective assistance of trial counsel based on lack of objection to Elin Paneque's proper victim impact testimony about the effects of the death of his mother, the complainant, on his family. *Payne v. Tennessee*, 501 U.S. 808 (1991(holding that eighth amendment is not *per se* bar to admission of evidence of victim's personal characteristics or impact of victim's death upon his family and loved ones; noting that

relevancy of victim-character or victim-impact evidence is tied to jury's decision at punishment); *Mosley v. State*, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998)(holding that "both victim impact and victim character are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence."); *Solomon v. State*, 49 S.W.3d 356 (Tex. Crim. App. 2001)(holding that admission of photos of victim's wedding, victim in his uniform, victim's children, and victim swimming with his children did not constitute inadmissible victim impact evidence).

7. The applicant fails to ineffective assistance of counsel based on trial counsel not requesting a jury instruction that the jury must find that the applicant committed extraneous misconduct beyond a reasonable doubt before the jury could consider evidence of such conduct, in light of (a) trial counsel objecting to the admission of the extraneous offense or offenses based on lack of relevance and prejudice outweighing probative value; (b) trial counsel requesting that the trial court give a limiting instruction; (c) trial court verbally instructing the jury during Nuila's testimony and also instructing the jury in the guilt-innocence charge that the extraneous offense or offenses were admitted for the purpose of aiding the jury, if it does aid the jury, in determining the guilty knowledge, if any, of the applicant and not for any other purpose; (d) trial counsel's making a reasonable strategic decision not to request an instruction concerning the burden of proof of such offense or offenses; and (e) such testimony rebutting the applicant's defensive theory that he did not intend or anticipate the

complainant's death. *See Ransom v. State*, 920 S.W.2d 288, 299-301 (Tex. Crim. App. 1996)(holding that trial court did not abuse its discretion in admitting extraneous offenses during guilt-innocence of capital trial to show consciousness of guilt and to rebut defensive theories raised by cross-examination of State's witnesses); *see also Delgado v. State*, 235 S.W.3d 244, 253 (Tex. Crim. App. 2007)(noting defendant is entitled to limiting instruction on use of extraneous offenses during guilt phase only if he first requests those instruction when evidence introduced; noting that trial counsel could make a strategic decision not to request such instruction); *cf. Jackson v. State*, 992 S.W.2d 469, 477 (Tex. Crim. App. 1999)(reaffirming holding that no burden of proof instruction for extraneous offense admitted during punishment phase of capital trial where jury properly charged on burden of proof for special issue(s)).

8. The applicant fails to show ineffective assistance of counsel for lack of objection to the guilt-innocence charge based on the absence of the phrase "cause the death" in the application paragraphs of felony murder; the charge, when read as a whole, instructed the jury that the offense of felony murder necessarily includes the death of the complainant. *See Smith v. State*, 541 S.W.2d 831, 839 (Tex. Crim. App. 1976)(holding jury charge must be read as a whole when reviewing).

9. Trial counsel are not ineffective for lack of objection to the State's proper refreshing of Henry Nuila's memory with his written statement to Kenner police after Nuila testified that he could not remember a specific part of the statement. *See*

former TEX. R. CRIM. EVID. 611, now TEX. R. EVID. 612; *Welch v. State*, 576 S.W.2d 638, 641 (Tex. Crim. App. 1979)(holding counsel may attempt to refresh witness' memory when witness has personal knowledge at some point in the past but cannot now remember).

10. Trial counsel are not ineffective for properly responding to trial counsel's jury argument concerning Dr. Murr amending the cause of the complainant's death. *Harris v. State*, 784 S.W.2d 5, 12 (Tex. Crim. App. 1989)(holding that counsel during jury argument may properly summarize evidence, make reasonable inferences from evidence, answer argument of opposing counsel, and make plea for law enforcement).

11. The applicant fails to show that his constitutional rights were violated based on alleged ineffective assistance of trial counsel.

***First, Second, Third, and Fourth Grounds: Vienna Convention/alleged ineffective assistance of counsel***

12. The applicant did not object either pre-trial or during trial based on any alleged violation of the Vienna Convention on Consular Relations; thus, the applicant is procedurally barred from presenting such habeas claim. *See Sanchez-Llamas*, 126 S.Ct. at 2687 (holding that states may apply procedural default rules to Convention claims); Tex. R. APP. P. 33.1(a); *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978); *see also Hughes v. Johnson*, 191 F.3d 607, 614 (5TH Cir. 1999)(holding that defendant's failure to comply with Texas contemporaneous objection rule constituted

adequate and independent state-law procedural ground sufficient to bar federal habeas).

13. In the alternative, the applicant fails to show a violation of the Vienna Convention based on trial counsel contacting the Honduran Consulate and making the consulate aware that the applicant had been arrested and charged with capital murder and was awaiting trial for capital murder.

14. In the alternative, the applicant fails to affirmatively establish that he is a Honduran national and he fails to show that his constitutional rights, pursuant to U.S. CONST. amends. VI, VIII, and XIV, were violated based on an alleged violation of the Vienna Convention. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985)(holding applicant must plead and prove facts which, if true, entitle him to relief); *Ex parte Barber*, 879 S.W.2d 889 (Tex. Crim. App. 1994)(holding that applicant must show that complained-of error affected fact or length of confinement in order to be cognizable on habeas); *see also Sierra v. State*, 218 S.W.3d 85, 87-8 (Tex. Crim. App. 2007)(holding that treaties do not constitute "laws" for purpose of art. 38.23 and declining to reconsider statutory analysis and holding in *Rocha v. State*, 16 S.W.3d 1, 19 (Tex. Crim. App. 2000)).

15. The applicant fails to show ineffective assistance of counsel based on counsel not objecting to the constitutionality of his sentence based on an alleged violation of the Vienna Convention. *See Busby v. State*, 990 S.W.2d 263, 268 (Tex. Crim. app. 1999)(holding appellate court's judicial scrutiny of counsel's performance must be highly deferential when reviewing claim of ineffective assistance and

representation is not to be judged by hindsight or by facts unknown at time of trial).

***Fifth, Sixth, and Seventh Grounds: alleged false testimony/witness Henry Nuila***

16. Because defense investigator Bierbaum's hearsay affidavit is not substantive evidence, it provides no evidence to support the applicant's meritless claim that the State either presented false testimony through witness Henry Nuila or suppressed evidence, i.e., Zaldivar supposedly indicating that Nuila was not present in the house, based on the hearsay affidavit of defense investigator. *See Hogue v. Johnson*, 131 F.3d 466, 505 (5th Cir. 1997)(noting hearsay affidavit is not substantive evidence of anything). Thus, the applicant fails to show a *Brady* violation. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963); *see also May v. Collins*, 904 F.2d 228, 232 (5TH Cir. 1990)(citing *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988)(holding that State not obligated to furnish information available to defendant or that could be obtained through reasonable diligence)); *See Castellano v. State*, 863 S.W.2d 480 n.4 (Tex. Crim. App. 1993)(citing *Mooney*, 294 U.S. at 112, 55 S. Ct. at 342)(noting no due process violation where State has no knowledge of perjured testimony and knowledge is not imputed)).

17. In the alternative, the applicant fails to show that such information, other than being merely helpful or favorable, if at all, was material to the applicant's guilt or punishment in light of the record as a whole, including evidence of the applicant's fingerprints on the tape found around the complainant's ankles. *See United States v. Bagley*,

473 U.S. 667, 105 S.Ct. 3375 (1985); *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989)(adopting materiality standard set forth by Supreme Court in *Bagley* and holding that reasonable probability is probability sufficient to undermine confidence in outcome); *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 1568 (1995)(citing *Bagley*, 473 U.S. at 675, 105 S. Ct. at 3380)(noting that materiality is determined by considering evidence collectively and prosecution's knowledge of item of favorable evidence unknown to defendant does not, alone, constitute *Brady* violation).

18. The applicant fails to show that his constitutional rights, pursuant to U.S. CONST. amends. VIII and XIV, were violated by presentation of Henry Nuila's testimony.

19. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

CAUSE NUMBER 754409-A

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| EX PARTE | IN THE 230TH DISTRICT COURT |
| CARLOS MANUEL AYESTAS, APPLICANT | OF HARRIS COUNTY, TEXAS |

**ORDER**

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 754409-A and transmit same to the Court of Criminal Appeals, as provided by TEX. CODE CRIM. PROC. art. 11.071; the transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 754409-A, including his application for writ of habeas corpus;
2. all of the Respondent's pleadings filed in cause number 754409-A, including the Respondent's Original Answer;
3. this court's findings of fact, conclusions of law and order denying relief in cause no. 754409-A;
4. any proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent in cause no. 754409-A; and,
5. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 754409, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Kurt Wentz, 5629 FM 1960 Road W, Suite 115, Houston, Texas 77069 and to Respondent: Neelu Sachdeva; Harris County District Attorney's Office; 1201 Franklin, Suite 600; Houston, Texas 77002.

* * *

**BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 754409-A.**

SIGNED this 18 day of February 2008.

/s/ Belinda Hill
BELINDA HILL
Presiding Judge
230th District Court
Harris County, Texas

**APPENDIX Y**

**IN THE COURT OF CRIMINAL APPEALS OF TEXAS**

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**NO. WR-69,674-01**

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**EX PARTE CARLOS MANUEL AYESTAS**

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**ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 754409-A IN THE 230TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY**

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***Per curiam.***

**ORDER**

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.

In July 1997, a jury convicted applicant of the offense of capital murder. The jury also answered the special issues submitted pursuant to Article 37.071 of the Texas Code of Criminal Procedure in the favor of the State. The trial court, accordingly, set punishment at death. This Court subsequently affirmed applicant's conviction and sentence on direct appeal in an unpublished opinion. *Ayestas v. State*, No. AP-72,928 (Tex. Crim. App. delivered Nov. 4, 1998).

In this writ application, applicant presents seven allegations, including ten sub-allegations of ineffective assistance of counsel, in which he

challenges the validity of his conviction and the resulting sentence. The trial judge entered findings of fact and conclusions of law recommending that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We agree with the trial court's recommendation and adopt the trial judge's findings and conclusions except for the following: Findings of Fact 10, 23, 24, 54, 78, and 84 and Conclusions of Law 2, 7(d), 10, 13, and 17. Based upon these findings and conclusions and our own review of the record, relief is denied.

IT IS SO ORDERED THIS THE 10TH DAY OF SEPTEMBER, 2008.

Do Not Publish

* * *

APPLICANT CARLOS MANUEL AYESTAS

APPLICATION NO. 69,674-01

11.071 APPLICATION FOR WRIT OF HABEAS CORPUS XXX

DENY HABEAS CORPUS APPLICATION WITH WRITTEN ORDER.

/s/ Per Curiam 9/10/08
JUDGE DATE

## APPENDIX Z

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| CARLOS AYESTAS, | § | |
| Petitioner, | § | |
| | § | |
| v. | § | |
| | § | |
| RICK THALER, | § | CIVIL ACTION NO. |
| Director, Texas | § | H-09-2999 |
| Department of Criminal | § | |
| Justice-Correctional | § | |
| Institutions Division, | § | |
| Respondent. | § | |

## MEMORANDUM OPINION AND ORDER

Petitioner Carlos Ayestas has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state court conviction and death sentence for capital murder. Respondent Rick Thaler has filed a motion for summary judgment. Having carefully considered the petition, the summary judgment motion, the state court record, the parties' submissions, and the applicable law, the court will grant respondent's motion for summary judgment and will deny Ayestas's petition for a writ of habeas corpus, entering final judgment by separate order. The reasons for these rulings are set out in detail below.

## I. Background[1]

Ayestas was convicted of capital murder for murdering Santiaga Paneque during the course of committing or attempting to commit robbery or burglary. About two weeks before the murder, Ayestas and a friend went to look at a car offered for sale by Anna McDougal, who lived across the street from Paneque. McDougal went inside her house for about 15 minutes while the men inspected the car. When she came back outside, McDougal saw the two men leaving Paneque's house. When she asked what they were doing, the men told McDougal that Paneque called them over to look at some furniture she was trying to sell.

Paneque's son, Elin, left the house at about 8:30 a.m. on September 5, 1995. He returned home for lunch at 12:23 p.m.[2] and rang the doorbell, but there was no response. He put his key in the doorknob, but noticed that the door was unlocked. Upon entering, he saw that the room was ransacked and items were missing. The rest of the house was in much the same condition. Elin went to the house of a neighbor, Maria Diaz, and called 911. Upon returning to his house, he found his mother's body on the floor of the master bathroom. She had silver duct tape on her ankles. Elin returned to Diaz's house and asked her to go make sure that his mother was dead. Diaz entered the Paneque house and

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[1] This statement of facts is adapted from the Texas Court of Criminal Appeals ("TCCA") opinion affirming Ayestas's conviction and sentence. *See Ayestas v. State*, No. 72,928 (Tex. Crim. App. Nov. 4, 1998). Where this opinion diverges from, or expands upon, the TCCA's discussion of the facts, the difference will be noted by a specific citation to the record.

[2] He stated that he specifically noted the time.

called Ms. Paneque's name. She found Ms. Paneque lying face down on the floor. Her face was a dark color and she was not breathing.

Detective Mark Reynolds of the Harris County Sheriff's Department testified that the house was ransacked but bore no signs of forced entry. Paneque's body was face down in a pool of blood and vomit. Her wrists were bound with the cord from an alarm clock and then wrapped in silver duct tape. She also had duct tape over her eyes and around her neck. Reynolds also testified that it was apparent that Paneque was beaten. Her face was swollen and covered with cuts and bruises. Reynolds showed neighbors photographs of two suspects and McDougal identified them as the same two men who were in Paneque's house about two weeks before the murder. One of the suspects was Petitioner and the other was Frederico Zaldivar.

An autopsy conducted by Dr. Marilyn Murr, an assistant medical examiner for Harris County, revealed that Paneque suffered multiple blows while she was still alive, resulting in numerous bruises and lacerations. She had fractured bones in her right elbow and neck, and bruises on each side of her pelvic area, just above the hips. An internal examination revealed extensive hemorrhaging in the neck and head. She had another fracture, caused by a "significant amount of force," in the roof of the orbit containing her right eye. Dr. Murr determined that none of these injuries was substantial enough to kill Paneque. The cause of death was asphyxiation due to continual pressure applied to her neck for three to six minutes. Dr. Murr testified that her initial report indicated asphyxiation by ligature

strangulation, but she reexamined the evidence shortly before trial at the request of the prosecutor. She then changed her conclusion to "asphyxiation due to strangulation," which allowed for the possibility that a hand or hands might have caused the asphyxia.

Police recovered fingerprints from the crime scene. Two prints recovered from the tape around Paneque's ankles, and two recovered from the roll of tape, matched Ayestas. On cross examination, the defense brought out that the two prints on the tape around Paneque's ankles were only discovered shortly before trial, approximately 20 months after the murder, based on a reexamination undertaken at the prosecutor's request.

Henry Nuila testified that he met Ayestas in mid-September 1995 at Ayestas's sister's house in Kenner, Louisiana. On September 20, an intoxicated Ayestas told Nuila that he was involved in the murder of a woman in Houston. Ayestas asked Nuila for help in killing the other two participants in the murder because "they had spoken too much." Ayestas told Nuila that, if he declined, Ayestas would kill him. Ayestas brandished a gun. Nuila kept Ayestas talking until Ayestas passed out. Nuila then called the police. They arrested Ayestas, still in possession of the gun. Based on this evidence, the jury found Ayestas guilty of capital murder for murdering Paneque during the commission or attempted commission of a burglary, robbery, or both.

During the penalty phase, the State presented evidence that Ayestas served time in prison in California and Texas for possession, and purchase

for sale, of narcotics, burglary, and misdemeanor theft. He was also the subject of a California warrant for illegal transportation of aliens. Candelario Martinez testified that three days after the murder, Ayestas approached him outside a motel where he was waiting for a friend. After a brief conversation, Ayestas pulled a gun on Martinez and ordered him into one of the rooms. Martinez's friend was also in the room. Ayestas ordered Martinez onto the floor and threatened to kill him. Ayestas and two others took Martinez's personal belongings and forced him into the bathroom, where they again told him that they would kill him. Martinez begged for his life as the three discussed who would kill him. Ayestas finally said that he would let Martinez live, but threatened to kill his family if Martinez told the police. Ayestas and his accomplices left in Martinez's truck.

Based on this evidence, along with the evidence of the brutality of Paneque's murder, the jury found that there is a likelihood that Ayestas would commit future acts of criminal violence posing a continuing threat to society, that Ayestas actually caused Paneque's death or intended to kill her or anticipated that a human life would be taken, and that the mitigating evidence did not warrant a sentence of life imprisonment. Accordingly, the trial court sentenced Ayestas to death.

The TCCA affirmed Ayestas's conviction and sentence, *Ayestas v. State*, No. 72,928 (Tex. Crim. App. Nov. 4, 1998), and denied his application for habeas corpus relief, *Ex parte Ayestas*, No. WR-69,674-01 (Tex. Crim. App. Sept. 10, 2008). Ayestas filed a petition for a writ of habeas corpus in this

Court on September 11, 2009. Thaler moved for summary judgment on April 9, 2010, and Ayestas responded to that motion on October 26, 2010.

## II. The Applicable Legal Standards

### A. The Antiterrorism and Effective Death Penalty Act

This federal petition for habeas relief is governed by the applicable provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Kitchens v. Johnson*, 190 F.3d 698, 700 (5th Cir. 1999). For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this court may grant relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). Under the "contrary to" clause, this court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially

indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 406 (2000)).

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc), *cert. denied sub nom. Neal v. Epps*, 537 U.S. 1104 (2003). The sole inquiry for a federal court under the 'unreasonable application' prong becomes "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir.

2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'").

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d)(2); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000), *cert. denied*, 532 U.S. 1039 (2001). The state court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).

**B. The Standard for Summary Judgment in Habeas Corpus Cases**

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). In ordinary civil cases a district court considering a motion for summary judgment is required to construe the facts in the case in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Where, however, a state prisoner's factual allegations have been resolved against him by express or implicit findings of the state courts, and the prisoner fails to demonstrate by clear and convincing evidence that

the presumption of correctness established by 28 U.S.C. § 2254(e)(1) should not apply, it is inappropriate for the facts of a case to be resolved in the petitioner's favor. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981). In reviewing factual determinations of the Texas state courts, this court is bound by such findings unless an exception to 28 U.S.C. § 2254 is shown.

## III. Analysis

### A. Ineffective Assistance of Counsel

In his first two claims for relief, Ayestas contends that his counsel rendered ineffective assistance. First, he alleges that counsel was ineffective during the penalty phase by failing to investigate and present mitigating evidence.Specifically, he contends that counsel failed to develop evidence of: (a) his good character traits; (b) his kindness and reputation for helping those less fortunate; and (c) his lack of criminal history in his native Honduras; that (d) his co-defendant, Francisco Zaldivar, was a bad influence on him; and (e) he suffers from mental illness, alcoholism, and drug addiction. Second, he alleges that counsel was ineffective at the guilt/innocence phase by failing to: (a) object to a jury charge; (b) object to an allegedly racially discriminatory jury strike; (c) perform a complete *voir dire* regarding jurors' conscientious scruples against the death penalty; (d) object to a statement by the prosecutor; and (e) object to the failure of the police to inform Ayestas of his right to contact the Honduran consulate.

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

**1. Procedural Default**

Ayestas did not present sub-claims 1 (b) and (e), and 2 (a) and (b) to the TCCA. The AEDPA requires that a prisoner exhaust his available State remedies before raising a claim in a federal habeas petition.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). As the Fifth Circuit explained in a pre-AEDPA case, "federal courts must respect the autonomy of state courts by requiring that petitioners advance in state court all grounds for relief, as well as factual allegations supporting those grounds. "[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief." *Orman v. Cain*, 228 F.3d 616, 619-20 (5th Cir. 2000). This rule extends to the evidence establishing the factual allegations themselves. *Knox v. Butler*, 884 F.2d 849, 852 n.7 (5th Cir. 1989) (citing 28 U.S.C. § 2254(b)); *see also Jones v. Jones*, 163 F.3d 285, 298 (5th Cir. 1998) (noting that "[s]ubsection (b)(1) [of AEDPA] is substantially identical to pre-AEDPA § 2254(b)").

A petitioner fulfills the exhaustion requirement, however, if "all crucial factual allegations were before the state courts at the time they ruled on the merits" of the habeas petition. *Dowthitt v. Johnson*, 230 F.3d 733, 746 (5th Cir. 2000). This court may also consider evidence presented for the first time in federal habeas proceedings if the evidence supplements, as opposed to fundamentally altering, claims presented to the state court. *Morris v. Dretke*, 379 F.3d 199, 204-05 (5th Cir. 2004); *Dowthitt*, 230 F.3d at 746. If the petitioner presents material evidentiary support for the first time in federal court, then he has not exhausted his state remedies. *Morris*, 379 F.3d at 204-05.

Ayestas's evidence of his kindness and reputation for helping others merely supplements his exhausted claim that he has good character traits. Therefore,

subclaim 1(b) is properly before this Court. Ayestas's evidence of his alleged mental illness and substance abuse, however, raises a new, unexhausted, claim, as do his claims that counsel failed to object to the jury charge and the alleged racially discriminatory jury strike.

Ordinarily, a federal habeas petition that contains unexhausted claims is dismissed without prejudice, allowing the petitioner to return to the state forum to present his unexhausted claims. *Rose v. Lundy*, 455 U.S. 509 (1982). Such a result in this case, however, would be futile because Petitioner's unexhausted claims would be procedurally barred as an abuse of the writ under Texas law. On habeas review, a federal court may not consider a state inmate's claim if the state court based its rejection of that claim on an independent and adequate state ground. *Martin v. Maxey*, 98 F.3d 844, 847 (5th Cir. 1996). A procedural bar for federal habeas review also occurs if the court to which a petitioner must present his claims to satisfy the exhaustion requirement would now find the unexhausted claims procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

The Texas abuse of the writ statute, TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a), provides, in relevant part, that the TCCA may not consider a subsequent habeas application unless a petitioner can show either that the claim could not have been timely raised in state court or that the claim raises a compelling federal claim:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the

> merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
> >
> > (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
> >
> > (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial . . .

TEX. CODE CRIM. PROC. ANN. art. 11.071. The TCCA has held that, to avoid dismissal under § 5(a), a petitioner must satisfy *both* the state procedural requirement of § 5(a)(1) *and* the federal constitutional merits requirements of § 5(a)(2) or 5(a)(3). *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007) ("We have interpreted [§ 5(a)] to mean that . . . 1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and

2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence.").

Petitioner argues that because the TCCA's standard boilerplate dismissal under § 5(a) does not specify whether dismissal was premised on a failure to satisfy state procedural law or on the merits, federal courts must presume that unexhausted claims are not necessarily procedurally defaulted. In support, he cites *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007), in which the Fifth Circuit concluded that no adequate and independent state procedural basis for dismissal could be discerned from the TCCA's "boilerplate" dismissal under § 5(a). *Ruiz*, however, is distinguishable. There, it was plain that an assessment of the merits played a significant role in the dismissal. One TCCA panelist filed a concurring opinion concluding that Ruiz did not allege a meritorious Sixth Amendment claim. Two other panelists filed a dissent from the dismissal, urging the merits of the Sixth Amendment claim. *Id.* at 528.

The facts of this case are much more like those in *Hughes v. Quarterman*, 530 F.3d 336 (5th Cir. 2008), *cert. denied*, 129 S.Ct. 2378 (2009). In that case the Fifth Circuit concluded that an adequate and independent state procedural basis for dismissal was evident because it was plain that the factual and legal bases for the petitioner's claims were available well before he filed his subsequent habeas application, and because there was "nothing in [the TCCA's] perfunctory dismissal of the claims that suggest[ed] that it actually considered or ruled on

the merits." *Id.* at 342. Petitioner does not contend that the factual or legal bases for these claims were unavailable when he filed his initial habeas petition. Because the claims were available, it is clear that the TCCA would dismiss any successive application under the independent and adequate state procedural bar of § 5(a)(1). That bar precludes this Court from reviewing Petitioner's claim absent a showing of cause for the default and actual prejudice attributable to the default, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

"Cause" for a procedural default requires a showing that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule, or a showing of a prior determination of ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). Petitioner makes no such showing.

A "miscarriage of justice" means actual innocence, either of the crime for which he was convicted or of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). "Actual innocence of the death penalty" means that, but for a constitutional error, he would not have been legally eligible for a sentence of death. *Id.* Ayestas makes no showing that he is actually innocent of capital murder, or that he is legally ineligible for a death sentence. Therefore, his unexhausted claims are procedurally defaulted.

**2. Failure to Investigate/Penalty Phase**

Ayestas contends that several of his family members would have come to the United States from Honduras to testify if asked. He claims that they would have testified about his upbringing and good character and reputation for kindness. Citing affidavits submitted by family members, Ayestas contends that they would have testified that he grew up in a stable, middle class environment, and had a good relationship with his siblings and step siblings. Ayestas states that it is unusual in Honduras for step siblings to have a good relationship. Ayestas was a well-behaved child. Ayestas states that the family moved when Ayestas was 12 years old. He continued to do well in school and was a devout Catholic. He was never in trouble with the law as a child. He left home when he was 18. He told his family that he was going to Guatemala, but left a note in his room saying that he went to the United States instead. He returned to Honduras several times, always staying with his parents when he did.

Ayestas states that the last time he returned to Honduras was 1994, after his incarceration in California. He told his family that if someone came looking for him, they were to say he was not home. Frederico Zaldivar, Ayestas's co-defendant in this case, began to come to the house looking for Ayestas. The family refused to tell Zaldivar where Ayestas was and asked him to leave Ayestas alone. They regarded Zaldivar as a bad influence. Ayestas also contends that counsel would, with minimal investigation, have found evidence that he had no criminal record in Honduras.

The state habeas court found, based on a credible affidavit by trial counsel, that counsel, among other things, interviewed witnesses, talked to Ayestas's family, employed an investigator, reviewed juror questionnaires, spoke to Ayestas about his background and life, and attempted to secure the presence of Ayestas's family at trial. 3 SH. at 647.[3] Regarding the attendance of the Ayestas family at trial, the state court found that Ayestas repeatedly told counsel that he did not want his family to attend the trial and did not agree to have his family contacted until after jury selection was complete. The court also found that counsel made every effort to contact the family after Ayestas permitted her to do so. S.H. at 651. The court further found that the defense investigator sent a letter to the family in Honduras on May 29, 1997, six weeks before the penalty phase began. Counsel sent a second letter on June 10, 1997, stating that Ayestas finally agreed to let counsel contact his family. Counsel sent a third letter on July 2, 1997, and faxed a letter to the United States embassy in Honduras to expedite the family's travel to the United States. Counsel informed the embassy of the need for the family's presence at trial, arranged a July 3, 1997, meeting for the family at the embassy, and included a copy of the June 10, 1997, letter. The court also found that counsel communicated with the Ayestas family by phone beginning on June 3, 1997. She spoke with Ayestas's mother, explained the situation, and requested the family's presence at trial. Ayestas's mother said she would call back. Counsel heard from the family on June 25, when Ayestas's sister,

[3] "SH" refers to the transcript of Ayestas's state habeas corpus proceeding.

Somara Zalaya, informed counsel that the family would have difficulty leaving Honduras for the trial. Among the reasons stated were their father's illness and economic reasons. Counsel called the family again on June 26 and 27, and July 2. Ayestas's mother appeared unconcerned and gave evasive responses. Counsel's assistants also noted the mother's apparent lack of concern. The Court further found that counsel informed the Honduran consulate of Ayestas's arrest, indictment, and upcoming trial on June 9, 1997. SH. at 651-653. The court found that counsel was not ineffective based on the failure of petitioner's family to attend trial "in light of the [petitioner's] numerous, initial assertions that he did not want his family contacted and in light of trial counsel's extensive efforts to attempt to secure the presence of [petitioner's] family from Honduras after [he] changed his mind." SH. at 665.

During the penalty phase, counsel presented letters from an instructor in the Houston Community College system who taught Ayestas in an English as a second language program at Harris County Jail. She stated that Ayestas was a serious and attentive student, had no other problems with the law, and had no history of violent crime. SH. at 653.

Based on this evidence, the Court found that counsel made diligent efforts to secure the family's presence at trial. The Court also found that the evidence the family would have offered regarding Ayestas's childhood and background was not significantly different from the evidence in the instructor's letters. SH. at 654.

Counsel has a duty to investigate possible mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510 (2003). The record establishes, however, that counsel did attempt to investigate and develop evidence concerning Ayestas's background and childhood.

First, Ayestas instructed counsel not to call his family. Neither the Supreme Court nor the Fifth Circuit has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence. In fact, the Fifth Circuit has held on several occasions that a defendant cannot instruct his counsel not to present evidence at trial and then later claim that his lawyer performed deficiently by following those instructions. In *Autry v. McKaskle*, 727 F.2d 358 (5th Cir. 1984), the defendant prevented his attorney from presenting any mitigating evidence during the punishment phase of his capital trial. The Fifth Circuit rejected Autry's claim that counsel was ineffective for heeding his instructions: "If Autry knowingly made the choices, [his lawyer] was ethically bound to follow Autry's wishes." *Id.* at 362;[4] *see also Nixon v. Epps*, 405 F.3d 318, 325-26 (5th Cir. 2005) (finding that counsel was not ineffective for failing to present additional mitigating evidence over client's objection: "A defendant cannot block his counsel from attempting one line of defense at trial, and then on appeal assert that counsel was ineffective for failing to introduce evidence supporting that defense."); *Roberts v.*

[4] The *Autry* court also rejected the defendant's claim that counsel was required to request a competency hearing before agreeing to comply with the client's decisions. *Id.*

*Dretke*, 356 F.3d 632, 638 (5th Cir. 2004) (noting that defendant may not obstruct attorney's efforts, then claim ineffective assistance of counsel); *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000) (finding that counsel was not ineffective for failing to call family members during punishment phase where defendant stated that he did not want family members to testify).[5] Second, the state court's finding that counsel acted promptly and reasonably to secure the family's presence once Ayestas relented is amply supported by the record. Therefore, Ayestas fails to demonstrate deficient performance.

**3. Guilt/Innocence Phase**

As noted above, Ayestas's claims that counsel was ineffective for failing to object to the jury charge and to an allegedly racially discriminatory jury strike are unexhausted and procedurally defaulted.

**a. Failure to Perform Complete *Voir Dire***

In his first non-defaulted claim of ineffective assistance of counsel during the guilt/innocence phase, Ayestas contends that his counsel was ineffective for failing to effectively *voir dire* potential jurors who expressed opposition to the death penalty and in failing to object to the dismissal of these potential jurors. In *Witherspoon v. Illinois*, 391 U.S.

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[5] *Cf. Schriro v. Landrigan*, 550 U.S. 465, 475-77 (2007) (stating that, if defendant instructed counsel not to present mitigating evidence, "counsel's failure to investigate further could not have been prejudicial under *Strickland"); Amos v. Scott*, 61 F.3d 333, 348-49 (5th Cir. 1995) (denying ineffective assistance claim for want of prejudice where defendant "strongly opposed" presenting any witnesses during punishment phase of trial).

510 (1968), the Supreme Court noted that "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it." *Id.* at 519. Accordingly, the Court held that

> a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

*Id.* at 522. In *Adams v. Texas*, 448 U.S. 38, 45 (1980), the Court clarified that *Witherspoon* established "the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror . . . ."

In this case, 14 venire members were dismissed, without objection, after expressing opposition to the death penalty. Before dismissing them, however, the trial court spoke individually to each venire member in an effort to determine if the juror could set aside personal feelings and consider the death penalty. For example, the court stated to one such group of prospective jurors:

> [M]y question specifically is going to be to you this: is what you're saying that no matter what the facts of the case, under no situation

> ever could you ever consider death as a possible punishment?

11 Tr. at 120. In response to this question, some jurors asserted that they could not, under any circumstances, vote to impose the death penalty. Others stated that they could in an appropriate case. *Id.* at 120-22. The jurors who were eventually dismissed stated that they could never impose a death sentence. Clearly, a juror who could never consider a death sentence holds "views [that] would prevent or substantially impair the performance of his duties as a juror . . . ." *Adams*, 448 U.S. at 45. Because the jurors in question stated that they could never vote to impose a death sentence, any failure by Ayestas' counsel to attempt to rehabilitate them and any objection to their dismissal would have been futile. Counsel was therefore not deficient in this regard.

**b. Failure To Object To Closing Argument**

Harris County Assistant Medical examiner Dr. Marilyn Murr initially concluded that the cause of death was ligature strangulation. She later changed the cause of death to asphyxiation due to strangulation after the prosecutor pointed out certain inconsistencies.

In closing argument, defense counsel stated:

> And then we go to the doctor's testimony, Dr. Murr. Nobody tells me what to do. I believe her. On September 6th, she gave one opinion. On June 2nd, she gave another opinion from the same material that she looked at the first time they did this autopsy.

The same material that was reviewed by another doctor . . . and had the same opinion she had. And yet we come back on June 2nd and we look at that same data and we reach a different conclusion. Or maybe not a different conclusion, but a further conclusion.

What's so important about that? The importance in that is that a ligature strangulation might be interpreted by 12 citizens of this county as being an act clearly dangerous to human life as opposed to the intentional killing of a human being, whereas manual strangulation, choking somebody to death, is clearly an act of intent. That is the difference between the two.

I don't know what you make about her changing her mind. All I know is here it is a month before trial and we come up with a completely different opinion from the same data with no formal second opinion. And when questioned about, well, don't you think it would be good to get another opinion, particularly when you're changing your mind? I don't need one. Well, wasn't that the policy before? Yeah, it was the policy. Aren't two heads better than one? Of course they are. Depends on the head.

Well, Dr. Bellas' 17 years, that's a pretty good head to me. He's her boss. Don't you think particularly if you're changing your mind, that would be the best time, the time you really need somebody else to step in and say, hey, take a look at this? What do you think?

> Didn't happen, folks. What does it mean to you?

20 Tr. at 290-91. In response, the prosecutor argued:

> [Counsel] suggests there is something kind of nebulous about her changing her opinion. I don't think there is any question in any mind in this jury box she wouldn't change the cause of death for me. I wouldn't ask it and God knows she's not about to do something like that.

20 Tr. at 305-06. Ayestas argues that counsel was ineffective for failing to object to this statement because it amounted to the prosecutor testifying and commenting on facts outside the record.

Under Texas law, a prosecutor may present argument to the jury on four types of issues: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) responses to opposing counsel's argument; and (4) pleas for law enforcement. *Moody v. State*, 827 S.W.2d 875, 894 (Tex.Crim.App.), *cert. denied sub nom. Moody v Texas*, 506 U.S. 839 (1992). The state habeas court found that the prosecutor's comments were a permissible response to defense counsel's argument. SH at 660, 667. This conclusion is reasonable and is entitled to deference under the AEDPA.

**c. Failure To Object To Vienna Convention Violation**

The Vienna Convention is a 79-article, multilateral treaty negotiated in 1963 and ratified by the United States in 1969. Per Article 36, the treaty requires an arresting government to notify a foreign national of his right to contact his consul.

*United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001). Ayestas claims that the arresting authorities never informed him of his right to contact his consulate, and that counsel was ineffective for failing to raise this issue.

Assuming that counsel was deficient for failing to raise an objection, Ayestas nonetheless fails to demonstrate any prejudice. Ayestas contends that the consulate might have helped him procure evidence and witnesses, including his family's presence at trial. As discussed above, however, trial counsel did seek consular assistance in obtaining evidence and witnesses once Ayestas removed his prohibition on counsel contacting his family. The record establishes that Ayestas himself delayed counsel's work in seeking this evidence. Once counsel could contact Ayestas's family members, they did not cooperate. Ayestas thus fails to demonstrate any prejudice flowing from counsel's alleged ineffectiveness.

**B. Future Dangerousness**

Ayestas raises two claims concerning the future dangerousness special issue. First, he contends that the evidence was insufficient to support the jury's finding that he poses a future danger to society. Second, he contends that predictions of future dangerousness are so inherently unreliable that the special issue is unconstitutional. Because Ayestas never raised the second claim in state court, it is unexhausted and procedurally defaulted.

Ayestas did raise a claim in state court that the evidence was insufficient to support the jury's finding, but he based his argument on state law; he did not cite any provision of the United States

Constitution or other federal law, cited no federal case law, and did not otherwise alert the Texas Court of Criminal Appeal to the federal constitutional nature of the claim. *See* Appellant's Brief at Pgs. 33-36. The Supreme Court has stated that, not only must a petitioner present the state court with his claim, he must also alert the state court of the constitutional nature of the claims. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."). Because Ayestas did not alert the state court to the federal nature of his claim, this claim is also unexhausted and procedurally defaulted. Moreover, even if Ayestas has preserved this claim, it would not entitle him to habeas relief because the conclusion of the Texas Court of Criminal Appeals that the evidence was sufficient to support the jury's finding of future dangerousness was not contrary to and did not involve an unreasonable application of federal law.

**C. Jury Unanimity**

Ayestas was charged with capital murder for murdering Paneque in the course of committing or attempting to commit robbery, burglary, or both. Ayestas contends that the trial court violated his right to due process by not requiring jury unanimity on which underlying crime he committed. Ayestas never presented this claim to the Texas state courts, however, and it is therefore unexhausted and procedurally defaulted.

**D. Vienna Convention**

Ayestas next claims that his conviction is unconstitutional because the arresting authorities violated his rights under the Vienna Convention by failing to notify him of his right to contact his consulate. Ayestas presented this claim in his state habeas petition. The TCCA found that the claim was procedurally defaulted because Ayestas did not raise an objection at trial based on the alleged violation of his Vienna Convention rights. SH at 667. Because this finding of default is based on an independent and adequate state ground, i.e., Texas's contemporaneous objection rule, this Court cannot review Ayestas's Vienna Convention claim. *See*, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 731-32(1991).

**E. Burden Of Proof In Mitigation Special Issue**

Ayestas next argues that the mitigation special issue unconstitutionally places the burden on the defendant to prove that there are mitigating circumstances sufficient to warrant imposition of a life sentence rather than a death sentence. This claim has no merit.

The Supreme Court has recognized a distinction

> between facts in aggravation of punishment and facts in mitigation. . . . If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the

> defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

*Apprendi v. New Jersey*, 530 U.S. 466, 491 n.16 (2000). The Supreme Court has thus drawn a critical distinction between aggravating and mitigating circumstances in sentencing proceedings. To the extent that some aggravating circumstance is required before the court may exceed an otherwise-prescribed sentencing range, the State must prove those aggravating circumstances beyond a reasonable doubt. Under the Texas capital sentencing statute the statutory maximum sentence in the absence of proof of aggravating circumstances is life imprisonment. A court cannot sentence a defendant to death unless the State proves beyond a reasonable doubt that there is a probability that the defendant will commit future acts of violence constituting a continuing threat to society, and that he acted with the requisite mental state. Once the State has proven these two factors, the defendant may be sentenced to death. The sentencing scheme, however, gives a defendant another opportunity to show that death should not be imposed, even though the State has met its burden of proof. The mitigation special issue is, in this sense, analogous to an affirmative defense. *Apprendi* does not prohibit placing the burden of proof on this special issue on the defendant. The mitigation special issue does not address a factor necessary to increase the

maximum sentence; rather, it addresses factors that allow the jury to impose a sentence *less than* the statutory maximum. Ayestas is not entitled to relief on this claim.

### F. Consideration Of Evidence In Connection With Mitigation Special Issue

Ayestas next argues that the mitigation special issue unconstitutionally limits the evidence the jury can consider. Ayestas contends that, by limiting the jury to consideration of evidence that in some way reduces Ayestas's blameworthiness, the special issue only allows the jury to consider evidence with some nexus to the crime. This, he argues, did not allow the jury to give full consideration to his evidence, specifically the letters from his prison English teacher stating that Ayestas was learning English and was a good student. The record does not support Ayestas's claim.

In *Lockett v. Ohio*, 438 U.S. 586, 608 (1978), a plurality of the Supreme Court held "that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . as a basis for a sentence less than death." 438 U.S. at 604 (emphasis in original). This holding is based on the plurality's conclusion that death "is so profoundly different from all other penalties" as to render "an individualized decision . . . essential in capital cases." *Id.* at 605. In *Penry v. Johnson*, 532 U.S. 782 (2001), the Supreme Court clarified that a capital sentencing jury must "be able to consider and *give effect to* a defendant's mitigating evidence in imposing sentence." *Id.* at 797 (internal quotation marks, citation and brackets omitted). In

Penry's trial, the jury was told to determine whether the evidence supported a finding on any of three statutory special issues. It was then told that it must consider mitigating evidence and, if it concluded that the weight of the mitigating evidence dictated in favor of a life sentence, it should answer "no" to one of the special issues. *Id.* at 789-90.

The Supreme Court found that there were two plausible interpretations of the instructions given to Penry's jury. First, it could be understood as instructing the jurors to weigh the mitigating evidence in determining its answer to each special issue. *Id.* at 798. The Court held, however, that none of the special issues were broad enough for the jury to give mitigating effect to the evidence of Penry's retardation and the abuse he suffered as a child. *Id.* For example, the jury could fully credit the mitigating evidence, believe it required a sentence less than death, but find that Penry's retardation actually made him *more dangerous* in the future, thereby compelling a positive answer to the future dangerousness special issue. The Court found that a second plausible interpretation was that the jury could simply nullify, i.e., give a negative answer to a special issue which it actually found was supported by the evidence. *Id.* The Court found that this interpretation made the jury instructions "internally contradictory, and placed law-abiding jurors in an impossible situation." *Id.* The Court therefore concluded that the instructions injected an element of capriciousness into the sentencing decision. *Id.* at 800.

In contrast, Ayestas's jury was instructed:

> Do you find from the evidence, taking into consideration all the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Carlos Manuel Ayestas, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

SH at 778. Petitioner's jury received a separate special issue that specifically allowed it to return a life sentence if it found that the mitigating evidence so dictated. The jury thus had *two* opportunities to act on the mitigating evidence of Petitioner's character, as reflected in the letters from his teacher: First, as a factor weighing against an affirmative finding on the future dangerousness special issue; and second, as free standing mitigating evidence to be weighed in its own right in determining sentence. There was no express or implied requirement of a nexus between the mitigating evidence and the crime. *Cf. Tennard v. Dretke*, 542 U.S. 274, 285 (2004). Nothing in the instructions given to the jury precluded the jurors from giving full weight to any of the mitigating evidence. The instructions were proper and did not violate Petitioner's rights under the United States Constitution.

### G. Failure To Inform The Jury Of The Effect Of A Single "No" Vote

In his final claim for relief, Ayestas argues that the Texas capital sentencing scheme is unconstitutional because it fails to inform the jurors of the effect of a single "no" vote on a special issue

No. 3, the mitigation issue. Although Respondent argues that Ayestas did not present this claim to the Texas state courts, it appears that he did present it as his tenth point of error on direct appeal.

Petitioner argues that Texas Code of Criminal Procedure art. 37.071, which requires a jury instruction informing the jury that it must have at least 10 "yes" votes to answer the mitigation special issue "yes" violates the Eighth Amendment. Petitioner argues that this misleads the individual jurors into thinking that they cannot return a life sentence unless at least ten jurors agree on an answer to the special issue.

In *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Supreme Court held that capital sentencing schemes requiring the jury to unanimously find the existence of any mitigating factor before giving that factor any weight violated the Eighth Amendment. The Court held that each juror must be free to give any mitigating evidence any weight that juror deems appropriate in weighing mitigating against aggravating evidence. The Texas statute complies with that requirement. *See McKoy*, 494 U.S. at 442-43.

While the trial court in this case informed the jury that it could not affirmatively find that the mitigating evidence was sufficient to warrant a life sentence unless at least 10 jurors agreed, it never instructed the jury that any particular number of jurors had to agree that any particular piece of evidence was mitigating. In other words, even if only one juror felt that a specific piece of evidence was mitigating, that juror could give the evidence

any weight he deemed appropriate. The instruction only stated that at least 10 jurors, individually weighing mitigating evidence, had to agree that there was sufficient mitigating evidence to impose a life sentence. This instruction does not suffer from the constitutional flaw underlying *Mills* and *McKoy*.

To the extent that Ayestas argues that the jury was misled as to the effect of a single "no" vote, the Supreme Court has held that there is no constitutional requirement of an instruction on the effect of a deadlock. *See Jones v. United States*, 527 U.S. 373, 381-82 (1999).

## IV. Certificate of Appealability

Although Ayestas has not requested a certificate of appealability ("COA"), the court may nevertheless determine whether he is entitled to this relief in light of the court's rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does").

A COA may issue only if the petitioner has made a "substantial showing of the denial of a

constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "[T]he determination of whether a COA should issue must be made by viewing the petitioner's arguments

through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

The court has carefully considered each of Ayestas's claims and concludes that each of the claims is foreclosed by clear, binding precedent. The court concludes that under such precedents Ayestas has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court therefore concludes that Ayestas is not entitled to a certificate of appealability on his claims.

## V. Petitioner's Motion to Expand Record

Petitioner has filed a motion to expand the record to add two affidavits in support of his claim that trial counsel rendered ineffective assistance. (Docket Entry No. 16) The Court has concluded that the Texas courts reasonably found that counsel did not render deficient performance. Because the affidavits do nothing to change that conclusion, the affidavits are unnecessary to the resolution of this case. Accordingly, Petitioner's Motion To Expand Record will be denied.

## VI. Motion for the Appointment of an Investigator

On January 25, 2011, Ayestas filed a motion for funding to hire an investigator to develop further evidence about his background in support of his *Wiggins* claim. Federal law provides that "[u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues

relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant[.]" 18 U.S.C.A. § 3599(f). Neither the Supreme Court nor the Fifth Circuit has defined the phrase "reasonably necessary" beyond the statute's plain language. The Fifth Circuit, however, requires a petitioner to show "that he ha[s] a substantial need" for investigative or expert assistance. *Clark v. Johnson*, 202 F.3d 760, 768 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000); *see also Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir.), *cert. denied*, 522 U.S. 963 (1997) ("In light of the statutory language, we first note that Fuller did not show a substantial need for expert assistance."). The Fifth Circuit upholds the denial of funding "when a petitioner has (a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (b) when the sought-after assistance would only support a meritless claim, or (c) when the sought after assistance would only supplement prior evidence." *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005); *see also Woodward v. Epps*, 580 F.3d 318, 334 (5th Cir. 2009), *cert. denied*, 130 S.Ct. 2093 (2010).

Title 28, section 2254(d)(2) of the United States Code prohibits a federal court from granting habeas corpus relief

> with respect to any claim that was adjudicated on the merits in State court . . . unless the adjudication of the claim . . . 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.

As discussed above, the Texas courts' conclusion that counsel did not render deficient performance was reasonable. Moreover, the evidence Ayestas now seeks would merely supplement the evidence he presented to the state habeas court. Because Ayestas is not entitled to relief on this claim, investigative services are not reasonably necessary. Accordingly, Ayestas's motion (Docket Entry No. 18) will be denied.

## VII. Conclusion and Order

For the foregoing reasons, it is **ORDERED** as follows:

1. Respondent Rick Thaler's Motion for Summary Judgment (Document No. 11) is **GRANTED**;
2. Petitioner Carlos Ayestas's Petition for a Writ of Habeas Corpus (Document No. 1) is in all respects **DENIED** and Ayestas's Petition is **DISMISSED WITH PREJUDICE**; and
3. No Certificate of Appealability shall issue in this case.
4. Petitioner's Motion to Expand Record (Docket Entry No. 16) is **DENIED**.
5. Petitioner's Motion for the Appointment of an Investigator (Docket Entry No. 18) is **DENIED**.

**SIGNED** at Houston, Texas, on this the 26th day of January, 2011.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

**APPENDIX AA**

| | | |
|---|---|---|
| CARLOS AYESTAS,<br>Petitioner,<br><br>v.<br><br>RICK THALER,<br>Director, Texas<br>Department of Criminal<br>Justice-Correctional<br>Institutions Division,<br>Respondent. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO.<br>H-09-2999 |

**FINAL JUDGMENT**

For the reasons set forth in the Court's Memorandum Opinion And Order granting respondent Rick Thaler's motion for summary judgment this action is **DISMISSED WITH PREJUDICE**. Because petitioner Ayestas has not made a substantial showing of the denial of a constitutional right, no certificate of appealability shall issue.

This is a **FINAL JUDGMENT**.

SIGNED this 26th day of January, 2011, at Houston, Texas.

/s/ Sim Lake
Sim Lake
United States District Judge

**APPENDIX BB**

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| CARLOS AYESTAS, | § | |
| Petitioner, | § | |
| | § | |
| v. | § | |
| | § | |
| RICK THALER, | § | CIVIL ACTION NO. |
| Director, Texas | § | H-09-2999 |
| Department of Criminal | § | |
| Justice-Correctional | § | |
| Institutions Division, | § | |
| Respondent. | § | |

Order Denying Petitioner's Motion To Alter
Or Amend Judgment

On January 26, 2011, this Court entered judgment for the respondent and dismissed Petitioner Carlos Manuel Ayestas's petition for a writ of habeas corpus with prejudice. On February 23, 2011, Ayestas filed a motion to alter or amend the judgment under Fed.R.Civ.P. 59(e) (Docket Entry 21).

A motion to alter or amend under Fed.R.Civ.P. 59(e) "must clearly establish either a manifest error of law or must present newly discovered evidence." *Schiller v. Physicians Resource Grp., Inc.,* 342 F.3d 563, 567 (5th Cir. 2003) (internal quotation marks omitted). "Relief under Rule 59(e) is also appropriate where there has been an intervening change in controlling law." *Id.* Ayestas fails to demonstrate grounds for relief.

Ayestas cites no new evidence or change in controlling law. While Ayestas vociferously disagrees with this Court's interpretation of controlling law and application of that law to the facts of this case, including this Court's conclusion that Ayestas is not entitled to a certificate of appealability, such disagreement does not clearly establish manifest error and Ayestas is not entitled to relief. Moreover, because this Court's finding that Ayestas has not demonstrated manifest error is not debatable among jurists of reason, Ayestas is not entitled to a certificate of appealability from this Order. *See Hernandez v. Johnson,* 213 F.3d 243, 248 (5th Cir.), *cert. denied,* 531 U.S. 966 (2000). Accordingly,

IT IS ORDERED that Petitioner's Motion To Alter Or Amend Judgment (Docket Entry 21) is **Denied**; and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue.

SO ORDERED.

SIGNED this 28th day of February, 2011, at Houston, Texas.

/s/ Sim Lake
Sim Lake
United States District Judge

## APPENDIX CC

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

No. 11-70004

**FILED**
February 22, 2012
Lyle W. Cayce
Clerk

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-2999

BEFORE DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

A Texas jury sentenced Carlos Manuel Ayestas to death for a murder he committed during a home robbery. The Texas Court of Criminal Appeals affirmed. That court also denied his application for habeas corpus. Ayestas then applied for a writ of

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

habeas corpus from the United States District Court for the Southern District of Texas. It, too, was denied. Ayestas now seeks a certificate of appealability ("COA") from this court on four issues. We DENY the COA.

**FACTS**

On September 5, 1995, Carlos Manuel Ayestas and two other men entered into the Houston, Texas home of Santiaga Paneque, to commit a robbery. Paneque was killed during the robbery. Her son later discovered her body lying in a pool of blood on the floor of the master bathroom. She had been bound with the cord of a clock as well as by duct tape. Duct tape had also been placed over her eyes and around her neck. The wounds on her face resulted from a severe beating. The autopsy showed that she had numerous fractures as well as internal hemorrhaging. These injuries were inflicted prior to death. While they were serious, none were fatal. Rather, Paneque was killed by strangulation.

The roll of duct tape used to bind Paneque was found at the scene. Ayestas's fingerprints were on the roll and also on the pieces of tape which were used to bind Paneque's ankles.

A few weeks later, while in Kenner, Louisiana, Ayestas confided to another man that he had killed a woman in Houston in the course of a robbery earlier that month. Ayestas sought the man's assistance in killing his two accomplices because he feared they would say too much. If the man did not help, Ayestas said he would kill him as well. To make his point, he brandished a machine gun.

After Ayestas went to sleep, the man called the

police. Ayestas was arrested and in time returned to Texas for prosecution.

Ayestas was indicted for capital murder and convicted after a jury trial. At the punishment stage, Texas presented evidence that, three days after Paneque's murder, Ayestas and two other men burglarized a hotel room. Ayestas, armed with a machine gun, forced the two occupants into the bathroom and threatened to kill them. After one of the men begged for his life, Ayestas decided not to murder them. He warned the men that if either called the police, Ayestas would kill their families. Ayestas introduced into evidence three letters from the English teacher at the Harris County Jail stating he was a serious, well-behaved student who had no history of committing violent crimes.

The jury determined that Ayestas would likely commit future violent crimes. He was sentenced to death.

Ayestas appealed to the Texas Court of Criminal Appeals. That court affirmed both his conviction and his sentence. He then filed an application for habeas corpus with that court. It was denied.

Ayestas then applied for a writ of habeas corpus from the United States District Court for the Southern District of Texas. *See* 28 U.S.C. § 2254. He alleged he received ineffective assistance of counsel, the evidence was insufficient to convict, the jury instructions were unconstitutional, his rights under the Vienna Convention were violated, and multiple portions of the trial violated his Fourteenth Amendment right to due process.

The district court denied Ayestas's petition. It

also refused to grant a COA. Before this court, Ayestas requestes a COA on the following issues. (1) His counsel was ineffective by failing to investigate mitigating evidence and not preparing for trial in a timely manner. (2) His Sixth, Eighth, and Fourteenth Amendment rights were violated when the police did not inform him of his rights under the Vienna Convention and his counsel failed to object to this fact at trial. (3) He received ineffective assistance when his trial counsel did not object to the dismissal of certain prospective jury members and this failure led to a constitutionally infirm trial. (4) He should be allowed to return to state court to exhaust certain claims.

**DISCUSSION**

To obtain a certificate of appealability, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That showing is made if "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Our review is distinct from a ruling on the merits of the applicant's claims. It "requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* at 336. This court does not have jurisdiction to resolve the merits unless a certificate of appealability is granted. *Id.* at 342. In a capital case, "any doubts as to whether a COA should issue must be resolved in the petitioner's favor." *Mitchell v. Epps*, 641 F.3d 134, 142 (5th Cir. 2011) (quotation marks and citation omitted).

These examinations must be made through AEDPA's deferential lens. *Reed v. Quarterman*, 504 F.3d 465, 471 (5th Cir. 2007). Federal habeas relief is permitted only if "the state court's adjudication on the merits (1) 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States' or (2) 'resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.'" *Rocha v. Thaler*, 619 F.3d 387, 393 (5th Cir. 2010) (quoting 28 U.S.C. § 2254(d)), *cert. denied*, 132 S. Ct. 397 (2011). Any factual determinations made by the state court are "presumed to be correct" and the applicant can overcome this presumption only "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

### *1. Ineffective Assistance of Counsel in Failing to Investigate*

Ayestas argues that his counsel was ineffective during the punishment phase. Generally, to prove a violation of the Sixth Amendment right to counsel, a defendant must show his counsel's representation fell below "prevailing professional norms," and that there is a reasonable probability prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Under the usual circumstances of direct review, it is "strongly presumed" that counsel has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (quotation marks and citation omitted). "To overcome that presumption, a

defendant must show that counsel failed to act reasonably considering all the circumstances." *Id.* (quotation marks and citation omitted).

A counsel's decision to limit any investigation is permissible "to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "[S]crutiny of a counsel's performance must be highly deferential" and "every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Bell v. Cone*, 535 U.S. 685, 698 (2002) (quotation marks and citation omitted).

In addition to proving the unreasonableness of the representation, a petitioner must prove prejudice. *Strickland*, 466 U.S. at 692. The prejudice must be of the kind there is a "substantial, not just conceivable," likelihood of a different result. *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011). That is, after independently reviewing the evidence for and against aggravation presented at trial and before the state habeas court, "there is a reasonable probability that, absent the errors, the jury would have answered the mitigation issue differently." *Ex Parte Gonzales*, 204 S.W.3d. 391, 394 (Tex. Crim. App. 2006).

Because of AEDPA, when the court is asked to review a state habeas court's decision regarding the effectiveness of trial counsel, its review is "doubly deferential." *Druery v. Thaler*, 647 F.3d 535, 538-39 (5th Cir. 2011) (quotation marks and citation omitted). To obtain a COA, a petitioner must show

that it was "necessarily unreasonable for the [state court] to conclude: (1) that he had not overcome the strong presumption of competence; and (2) that he had failed to undermine confidence in the jury's sentence of death." *Cullen*, 131 S. Ct. at 1403. Therefore, in the AEDPA context, this court does not ask whether the trial counsel's conduct was sufficiently deficient. Rather, the correct question is whether the state habeas court's decision that the attorney was constitutionally adequate was objectively unreasonable. *Amos v. Thornton*, 646 F.3d 199, 204-05 (5th Cir.), *cert. denied*, 132 S. Ct. 773 (2011). Because an incorrect application of federal law is not by itself unreasonable, *Pape v. Thaler*, 645 F.3d 281, 287 (5th Cir. 2011), *cert. denied*, 2012 WL 117632 (Jan. 17, 2012), relief may be granted only "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Richter*, 131 S. Ct. at 786.

For a COA, we are limited to deciding whether jurists of reason would find the answers to these questions debatable or whether the issues deserve encouragement to proceed. *Mitchell*, 641 F.3d at 142.

Ayestas claims that his counsel was ineffective by waiting until shortly before trial to investigate whether mitigating evidence might exist which could be used during the trial's punishment phase. In support of his argument, Ayestas relies on the ABA 1989 Death Penalty Guidelines. Those guidelines provide that investigations regarding the punishment phase of a capital trial "should begin immediately upon counsel's entry into the case and

should be pursued expeditiously." ABA 1989 Guidelines, Guideline 11.4.1.A. An investigation should occur "regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence." *Id.* Guideline 11.4.1.C. He stresses the immediacy required by the Guidelines.

He asserts that his trial counsel failed to follow the Guidelines by not investigating possible mitigating evidence until days before trial. Texas disputes this factual assertion, arguing that defense counsel diligently investigated mitigating evidence long before the eve of trial and would have done more but for Ayestas's refusal to cooperate.

The ABA Guidelines do not control our assessment. The Supreme Court has explained that "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (quotation marks and citation omitted). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Premo v. Moore*, 131 S. Ct. 733, 740 (2011) (quoting *Strickland*, 466 U.S. at 690). We look for guidance about the norms in the relevant state as they existed at the time of the trial. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Ayestas cites cases from other circuits, but he fails to identify any authority that explains the professional norms of the Texas bar.

The Guidelines are helpful only if they "reflect

prevailing norms of practice." *Van Hook*, 130 S. Ct. at 17 n.1 (quotation marks and citation omitted). The Guidelines also "must not be so detailed that they would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* (quotation marks and citation omitted). Whether a counsel's decisions are legitimate will depend on the circumstances. *Id.* at 16. We now turn to the circumstances of this case.

The state habeas court found that before trial, Ayestas repeatedly told his attorney that he did not want his family in Honduras to be contacted. After the jury was selected, Ayestas changed his mind. Once Ayestas relented, the state habeas court determined that his counsel acted diligently. She employed an investigator and sought the assistance of the American Embassy in Honduras. According to the state court, "Ayestas's sister stated there were reasons the family would have difficulty leaving Honduras for the applicant's trial, including their father's illness, economic reasons, and their father's murder of a neighbor." The totality of the circumstances led the state court to conclude that Ayestas's trial counsel was not ineffective.

Ayestas argues that the state court decision conflicts with two Supreme Court cases, *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 130 S. Ct. 447 (2009). In *Rompilla*, the Court held that counsel was ineffective for failing to review the state's file regarding the defendant's prior conviction. 545 U.S. at 383-84. This file was important because the state had indicated that it planned to use the defendant's past conviction as

evidence of his violent character. *Id.* at 383. Counsel reviewed a part of the file only after being warned twice by the state that it would present a portion of the transcript of the prior victim's testimony. *Id.* at 384. Once counsel retrieved the file, he only reviewed her testimony. He "apparently examined none of the other material in the file." *Id.* at 385. Counsel's efforts were unreasonable: the file was readily available, concerned a crime similar to the one charged, and counsel knew the state would review the file for aggravating evidence. *See id.* at 389.

Here, Ayestas complains of counsel's failure to investigate and interview persons in Honduras regarding his childhood and lack of a criminal record. His counsel's task was much more arduous than simply reviewing a "file sitting in the trial courthouse, open for the asking." *Id.* She was delayed in beginning the effort by Ayestas's own conduct.

Ayestas also refers us to a case in which a jury sentenced to death a decorated Korean War veteran who suffered from post-traumatic stress disorder, was mildly retarded, and had been beaten severely throughout his childhood by his father. *Porter*, 130 S. Ct. at 448-49. Although his counsel noted these "other handicaps," the mitigating evidence introduced at trial consisted of inconsistent testimony regarding Porter's behavior while intoxicated and that he and his son had a good relationship. *Id.* at 449. His counsel failed to introduce additional evidence because the counsel had only a brief meeting with Porter, failed to obtain any of Porter's school, medical, or military records,

and did not interview any members of his family. *Id.* at 453. The Court held that the counsel's conduct was unreasonable because "counsel did not even take the first step of interviewing witnesses or requesting records." *Id.* It did not matter that Porter had asked that his ex-wife and son not be interviewed – he did not forbid speaking with anyone else. *Id.* The trial counsel's conduct was objectively unreasonable because he failed "to conduct *some* sort of mitigation investigation." *Id.*

Unlike in *Porter*, the trial counsel here requested documents from the state and interviewed numerous persons regarding the mitigation phase of trial.

AEDPA provides relief "if the state court (1) arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; or (2) confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and reaches an opposite result." *Simmons v. Epps*, 654 F.3d 526, 534 (5th Cir. 2011) (quotation marks and citation omitted).

We considered a related claim by a state prisoner who alleged ineffective assistance because his counsel failed "to hire an investigator or contact and interview witnesses for trial including [the prisoner's] family members about testifying at the punishment phases of the trial." *Roberts v. Dretke*, 356 F.3d 632, 638 (5th Cir. 2004). That argument failed because before trial the prisoner had instructed his attorney not to contact his family or hire an investigator. *Id.* at 635, 639. He could not claim after-the-fact that his counsel was ineffective for following his instructions. *Id.* at 639. "Under Fifth Circuit case law, 'when a defendant blocks his

attorney's efforts to defend him, including forbidding his attorney from interviewing his family members for purposes of soliciting their testimony as mitigating evidence during the punishment phase of the trial, he cannot later claim ineffective assistance of counsel.'" *Sonnier v. Quarterman*, 476 F.3d 349, 362 (5th Cir. 2007) (quoting *Roberts*, 356 F.3d at 638).

As noted, we do not ourselves decide whether Ayestas received ineffective assistance of counsel. AEDPA requires this court to ask "whether it is possible fairminded jurists could disagree" that the state court's decision conflicts with Supreme Court precedent. *Richter*, 131 S. Ct. at 786. If the answer to that question is yes, federal habeas relief is unavailable. *Id*. The state court supported its conclusions with citations to Texas precedent for instances where similar representation was found to not be ineffective. "A state court must be granted deference and latitude" to determine whether the counsel's conduct fell below the Sixth Amendment's floor. *Id*. at 785. Due to the leeway AEDPA provides, our general review shows that "it is not debatable that the state court's resolution of this issue was not unreasonable." *Druery*, 647 F.3d at 540.

### *2. Ayestas's Rights Under the Vienna Convention*

Ayestas argues that his constitutional rights were violated because he was never told of the protections afforded to him by Article 36 of the Vienna Convention. *See Vienna Convention on Consular Relations*, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820. This argument was not made at

trial. For this reason, the state habeas court held it was procedurally defaulted. Usually, a federal court may not entertain a claim when the state court did not address it due to the prisoner's failure to comply with a state procedural requirement so long as the court's determination was based upon "independent and adequate state procedural grounds." *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012) (quotation marks and citation omitted). The Texas contemporaneous objection rule is a procedural requirement that serves as an independent and adequate ground. *Cardenas v. Dretke*, 405 F.3d 244, 249 (5th Cir. 2005).

Ayestas argues that, notwithstanding his default, he should be allowed to pursue the claim because cause for the default exists due to his trial counsel's ineffectiveness. This prejudiced him because, had the Honduran Consulate been notified sooner, "it would have been in a better position to lend support."

His claim is not debatable among jurists of reason nor does it deserve encouragement to proceed. To prove ineffective assistance, he must show that his counsel's performance was unreasonable and that he was thereby prejudiced. *Druery*, 647 F.3d at 538. He cannot prove either because this Article of the Vienna Convention "does not create individually-enforceable rights." *Rocha*, 619 F.3d at 407. Because any objection would have been futile, his counsel's failure to object was neither unreasonable nor prejudicial. *See Meanes v. Johnson*, 138 F.3d 1007, 1011-12 (5th Cir. 1998). Additionally, he does not show prejudice because he fails to claim that the Honduran consulate would

have provided any support. He simply contends that it would have been in a better position to be supportive had it been informed. He invites this court to speculate whether the consulate would have acted in specific ways. We decline to do so. His request for a COA on this issue is denied.

***3. Dismissal of Prospective Jurors***

Ayestas claims the *voir dire* was inadequate and that he received ineffective assistance of counsel when his counsel did not object to the dismissal of prospective jurors who were disinclined to impose the death penalty. This alleged error, he argues, led to a jury prone to sentence him to death.

A prospective juror may be excused for cause "if their views on capital punishment would prevent or substantially impair the performance of their duties in accordance with the instruction and oath." *United States v. Fields*, 483 F.3d 313, 357 (5th Cir. 2007) (quotation marks and citation omitted). For example, it is proper to strike a venire member who states he "could never, regardless of the facts and circumstances, return a verdict which resulted in the death penalty." *Id.* It is also proper to strike a member who, in response to being asked whether she could vote for death under any circumstances answers, "No, I don't think so." *Williams v. Collins*, 16 F.3d 626, 632-33 (5th Cir. 1994).

The state habeas court found that the trial court individually questioned each member of the venire and "elicited information that they would not impose the death penalty under any circumstances." The state court held that this approach "did not lessen the State's burden [to strike a potential juror] for cause and that the State's burden was met through

the responses elicited by the trial court during voir dire examination." Ayestas has failed to rebut these findings with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Ayestas also argues that his counsel should have further questioned the venire members. We do not find that failure to be improper. Once prospective jurors have indicated during general *voir dire* that they would not impose the death penalty under any circumstances, further questioning is not required. *See Ortiz v. Quarterman*, 504 F.3d 492, 503 (5th Cir. 2007). A COA will not issue.

***4. Unexhausted Claims***

Before the district court, Ayestas requested a stay and abeyance so that he could return to state court to pursue admittedly unexhausted claims. A "stay and abeyance should be available only in limited circumstances." *Rhines v. Weber*, 544 U.S. 269, 277 (2005). Courts should be cautious about granting these motions as they "undermine[] AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition." *Id.* A district court's denial of a stay and abeyance is reviewed for abuse of discretion. *Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir.), *cert. denied*, 131 S. Ct. 506 (2010).

When an applicant for a writ of habeas corpus brings an unexhausted claim in federal court, as Ayestas has done here, "stay and abeyance is appropriate when the district court finds that there was good cause for the failure to exhaust the claim; the claim is not plainly meritless; and there is no indication that the failure was for purposes of delay."

*Id.*

Ayestas fails to show good cause. His position is premised on the belief that his state habeas counsel failed to raise certain claims. Assuming his allegation to be true, it is nonetheless insufficient. Generally, errors by "habeas counsel cannot provide cause for a procedural default." *Cantu v. Thaler*, 632 F.3d 157, 166 (5th Cir. 2011) (quotation marks and citation omitted).

Further, any claim is meritless because it is procedurally barred. *See Williams*, 602 F.3d at 309. With only a few exceptions, Texas bans subsequent habeas petitions. *See* Tex. Code Crim. Proc. art. 11.071, § 5(a). The exceptions clause requires a prisoner to prove the factual or legal basis for his current claims was unavailable when he filed his previous petition and that "the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex Parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). Ayestas has failed to allege that the factual and legal basis for his claim was unavailable when he filed his previous petition. Rather, he asserts that a better attorney would have pressed the claims. Such a statement is a tacit admission that the claims he now seeks to exhaust could have been advanced in his previous state habeas proceeding. Therefore, his unexhausted claims are procedurally barred. That Ayestas has not shown that the district court abused its discretion by denying the motion for stay and abeyance is beyond reasonable debate.

Ayestas's motion for a certificate of appealability is DENIED.

## APPENDIX DD

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

No. 11-70004

**FILED**
July 11, 2012
Lyle W. Cayce
Clerk

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-2999

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

IT IS ORDERED that the petition for rehearing is DENIED.

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Petitioner has also moved that this court vacate its prior opinion and remand to the district court for consideration of his previously made claim of ineffective assistance of state habeas counsel in light of the Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). This court recently addressed *Martinez*'s applicability in Texas. *See Ibarra v. Thaler*, No. 11-70031, 2012 WL 2620520, at *4 (5th Cir. June 28, 2012). We held that, because Texas does not mandate ineffective assistance claims to be brought first in habeas proceedings, *Martinez* does not apply in Texas. *Id*. Accordingly, we DENY the motion.

## APPENDIX EE

**(ORDER LIST: 569 U.S.)**

**MONDAY, JUNE 3, 2013**

**CERTIORARI - SUMMARY DISPOSITIONS**

* * *

| | |
|---|---|
| 12-6656 | AYESTAS, CARLOS M. V. THALER, DIR., TX DCJ |
| 12-6760 | HAYNES, ANTHONY C. V. THALER, DIR., TX DCJ |

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Trevino v. Thaler*, 569 U.S. ___ (2013).

**APPENDIX FF**

**SUPREME COURT OF THE UNITED STATES**

***No.* 12-6656**

**CARLOS MANUEL AYESTAS,**
*Petitioner*

**v.**

**RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION**
*Respondent*

**ON PETITION FOR WRIT OF CERTIORARI** to the United States Court of Appeals for the Fifth Circuit.

**THIS CAUSE** having been submitted on the petition for writ of certiorari and the response thereto.

**ON CONSIDERATION WHEREOF**, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the above court is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Trevino v. Thaler*, 569 U.S. ___ (2013).

June 3, 2013

A True copy, WILLIAM K. SUTER
Clerk of the Supreme Court of the United States

By: /s/ Cynthia Rapp

**APPENDIX GG**

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

No. 11-70004

**FILED**
January 30, 2014
Lyle W. Cayce
Clerk

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-2999

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BEFORE DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

A Texas jury sentenced Carlos Manuel Ayestas to death for a murder he committed during a home robbery. His conviction was affirmed by the Texas Court of Criminal Appeals, which also denied his application for habeas corpus. Ayestas subsequently sought federal habeas relief. In his federal application, Ayestas raised additional claims of ineffective assistance of counsel not raised in his state habeas application. Ayestas conceded these claims were unexhausted and requested a stay so that he could return to state court to exhaust the claims. On January 26, 2011, the district court denied the motion for a stay, concluding the unexhausted claims were procedurally barred because the Texas Court of Criminal Appeals would apply its bar to successive petitions and refuse to consider the new evidence on the merits. The district court also denied his application for a certificate of appealability ("COA").

On February 22, 2012, we also denied Ayestas's motion for a COA on the issue of the stay, concluding that Ayestas had failed to show good cause for failure to exhaust the claim and that any claim would be meritless because it would be procedurally barred by Texas law banning subsequent habeas petitions. To the extent Ayestas had argued a better attorney would have raised the claims in state court, we concluded that, generally, errors by "habeas counsel cannot provide cause for a procedural default." *See Cantu v. Thaler*, 632 F.3d 157, 166 (5th Cir. 2011), *cert. granted, judgment vacated*, 132 S. Ct. 1791 (2012). Accordingly, we denied COA on the district court's denial of Ayestas's motion for stay and abeyance.

In March 2012, Ayestas filed a motion to vacate our judgment and remand to the district court in light of the Supreme Court's holding in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). *Martinez* created a limited exception to the rule that the ineffectiveness of habeas counsel could not provide cause for procedural default. We denied Ayestas's motion to vacate and remand in reliance on one of this court's decisions that *Martinez* categorically does not apply to claims from Texas inmates. *See Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012), *overruled by Trevino v. Thaler*, 133 S. Ct. 1911 (2013). On June 3, 2013, the Supreme Court granted Ayestas's petition for writ of certiorari, vacated our judgment, and remanded for further consideration in light of *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

In light of the Supreme Court's order, we GRANT Ayestas's motion to vacate our prior decision denying Ayestas's application for a COA. We REMAND to the district court to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of *Trevino*. We express no view on what decisions the district court should make on remand.

## APPENDIX HH

STATE OF NEVADA §
§
COUNTY OF CLARK §

### AFFIDAVIT OF TENA FRANCIS

1. My name is Tena Francis. I am an investigator employed by the Law Office of the Federal Public Defender, District of Nevada. Prior to holding this position, I ran a private investigations firm in Texas. We specialized in capital case defense at both the pretrial and post-conviction stages. In total, I have twenty-seven years of experience in the field of capital case defense.

2. In January/February 1998, I was contacted by Gary Hart to conduct a post-conviction investigation for Carlos Manuel Ayestas. At the time, Gerald Bierbaum, who had considerable investigative experience in capital cases, was working for me as an investigator. Though Mr. Hart retained my investigation firm, the work of investigating the case was assigned to Mr. Bierbaum.

3. In 1996, shortly after the new post-conviction framework for capital cases, as set out in Article 11.071 of the Texas Code of Criminal Procedure, went into effect, Mr. Hart and Robin Norris left their employment as staff attorneys on the Court of Criminal Appeals and formed a law partnership primarily devoted to representing death-sentenced individuals in their state post-conviction proceedings. They accepted at least ten cases initially and continued to accept additional cases in the years after leaving the

court. Mr. Ayestas's case was one of those later appointments. Mr. Hart and Mr. Norris retained me to work on many of these cases, including Mr. Ayestas's case.

4. At the time, the Court of Criminal Appeals paid appointed attorneys under the 11.071 framework very little -- amounts that were hardly sufficient compensation to attorneys, considering the amount of work these cases required—and it provided very little funding for ancillary services, such as investigation and expert assistance. At least initially, I believe that Mr. Hart and Mr. Norris envisioned being able to work within these monetary constraints by limiting investigation and by raising mostly record-based claims.

5. Furthermore, it was my experience in working with Mr. Hart and Mr. Norris on many of their initial 10 cases that they were not interested in investigating mitigation evidence or in fully developing evidence related to the punishment phase. While this was true of Mr. Hart initially, over time he developed a better understanding of the value of a comprehensive mitigation investigation in post-conviction proceedings. However, at the time he worked on Mr. Ayestas's case, it is possible Mr. Hart was not as concerned about conducting a comprehensive mitigation investigation in his cases and he did not seek adequate funding for them.

6. As a result of these circumstances, I typically developed what I considered to be comprehensive, but preliminary, investigation plans that detailed the need for a complete mitigation investigation.

One of the purposes of the investigation plans was to urge Mr. Hart and Mr. Norris to conduct a complete investigation, which included potential punishment issues and to document this fact in the files. A second purpose was to arm the attorneys with the ammunition needed to convince their judge that adequate funding was required in order for them to effectively represent their clients.

7. I developed a preliminary investigation plan in this case at Mr. Hart's request. Mr. Hart provided limited information about the case; my recollection is that the only thing he gave me was his notes from reading the trial record. I made an effort to formulate a fairly detailed investigation plan, which covered topics in both the guilt-innocence and the punishment phases of the case based on this limited information. The investigation plan in this case lacked details in some areas simply because I had so little information on which to base a list of specific things to do. I informed Mr. Hart, via the preliminary investigation plan, that more tasks would likely be added as the investigation got underway.

8. I knew that the jury had heard virtually no mitigation evidence concerning Mr. Ayestas's background and life history, and I knew he was raised in Honduras. I also knew that Mr. Ayestas's trial counsel had compiled no bio-psycho-social history of Mr. Ayestas. Based on this and my experience in other cases, I knew there was a definite post-conviction issue relating to trial counsels' inefficient representation and

their failure to investigate mitigation issues at all. I advised Mr. Hart of this, via the investigation plan, in the following manner:

> "The jury heard nothing about this defendant's: family, real character, life experiences in Honduras, mental health, possible mental illness, substance abuse history, educational background, physical or psychological trauma he suffered, etc. We must collect this information now to see what his attorneys missed. We will begin by conducting a comprehensive social history of the client."

9. I advised Mr. Hart that a competent social history would have to be comprehensive and include extensive document collection as well as numerous witness interviews with virtually everyone who knew Mr. Ayestas -- from Honduras, to California, Mexico, and Houston -- in order to "detail every aspect of the client's life . . . ." With respect to witness interviews, I advised Mr. Hart to "include [not only] the client and close members of his family, but also persons who are/were in a position to be more objective about the client and his surroundings." Mr. Hart and I went through the same process of developing a plan for the investigation in each of the cases we worked together and I know he understood from our past experiences there was an absolute necessity to conduct a comprehensive mitigation investigation. I estimated that the investigation of mitigation issues alone would take up to 200 hours. This was likely a very conservative estimate given that the

investigation would cross both state and national boundaries.

10. Even with the little information Mr. Hart provided me, it was clear there were issues to be developed that could have been used to defend against the charges and the aggravators, as well as to mitigate punishment for Mr. Ayestas. There was clear indication that Mr. Ayestas was addicted to drugs. Drug use would have impacted his ability to form the culpable mental state of premeditation and deliberation required for a conviction of first degree murder. Additionally, drug use would have inhibited the ability of Mr. Ayestas to refrain from violent behavior, a fact that could have been used as mitigation during the punishment phase of his trial. There were many issues related to his addiction that needed to be investigated. For example, because there is a genetic component to addiction, a background investigation of Mr. Ayestas' family was necessary, including witness interviews and records collection related to addiction issues. This is relevant to mitigating the client's punishment in many ways, For example, in a situation where there is a family history of addiction, Fetal Alcohol Spectrum Disorder is a possibility for the client. At the time of our work on behalf of Mr. Ayestas, it was well-established that drug addiction changes the brain in fundamental ways and results in devastating injury to the parts of the brain that regulate behavior. The subjects of drug addiction and the neuropathology of drug use were presented at many seminars I attended during

the late 1990's, at least one of which I know Mr. Hart attended.

11. There is a high rate of comorbidity between substance and abuse and mental illness. In some cases, drug use brings about the symptoms of a mental illness. In other cases, drug addiction begins as a means by the drug user to self-medicate symptoms of mental illness. A comprehensive investigation into the bio-psycho-social history of Mr. Ayestas was warranted in order to explore the issues related to addiction and mental health.

12. Prior to our work on the Ayestas case, I had worked with Mr. Hart on cases where mental illness was a mitigating factor. On more than one case, my firm developed more mitigation evidence to be used for the client's post-conviction filings. On this case, however, Mr. Hart did not follow my advice to conduct a comprehensive investigation. Though he interviewed Mr. Ayestas's mother and two sisters who were in Houston, this fell well short of the type of investigation I recommended and the type of investigation we had done in past cases we worked together.

Further Affiant sayeth not.

/s/ Tena Francis
Tena Francis

SWORN TO and SUBSCRIBED before me, the undersigned authority, on the 16 day of June, 2014, by Tena Francis, Las Vegas, Nevada.

STATE OF NV
COUNTY OF CLARK

/s/ Tiffani D. Hurst
Notary Public
State of Nevada
Tiffani D. Hurst

My commission expires:
3-15-2016

**APPENDIX II**

**IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION**

| | | |
|---|---|---|
| **CARLOS MANUEL AYESTAS, a/k/a Dennis Humberto Zelaya Corea, Petitioner,** | § | |
| **v.** | § | **USDC No. 4:09-cv-2999** |
| **WILLIAM STEPHENS, Director, Texas Department of Criminal Justice Correctional Institutions Division, Respondent.** | § | **Capital Case** |

**PETITIONER'S MOTION FOR FUNDING FOR ANCILLARY SERVICES IN ACCORDANCE WITH 18 U.S.C. § 3599(f)**

NOW COMES, Petitioner, Dennis Humberto Zelaya Corea ("Mr. Zelaya"), under the name Carlos Manuel Ayestas, in accordance with 18 U.S.C. § 3599(f), and requests funding in the amount of $20,016 for a mitigation investigator to assist his counsel in efforts to demonstrate cause and prejudice under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), to prove his entitlement to relief on the underlying ineffective assistance of trial counsel ("IATC") claims, and to

obtain any other relief that may be available to him. As outlined below, the mitigation expert's services "are reasonably necessary for the representation of the defendant." *See* 18 U.S.C. § 3599(f).

## I. Introduction

Mr. Zelaya raised a number of IATC claims in his original habeas petition before this Court. Though state habeas counsel raised an IATC claim that complained primarily that trial counsel failed to secure the attendance of his mother and two sisters as witnesses at the punishment phase of his death penalty trial, counsel failed to raise a fully-developed claim alleging that trial counsel failed to investigate, in the comprehensive manner required by prevailing professional norms, Mr. Zelaya's social, medical, and psychological history (commonly called a *Wiggins*[1] claim). In particular, state habeas counsel failed to investigate Mr. Zelaya's history of drug and alcohol abuse and mental health issues. Though Mr. Zelaya presented a more traditional *Wiggins* failure to investigate claim, this Court agreed with the respondent that the "new evidence" rendered the claim unexhausted and, thus, procedurally barred. *Memorandum Opinion and Order*, at 11-16 (DE 19). The Fifth Circuit affirmed. *Ayestas v. Thaler*, No. 11-70004, slip op. at 13 (5th Cir., Feb. 22, 2012).

In the wake of this decision, the Supreme Court of the United States decided *Martinez*; however, the Fifth Circuit refused to vacate and remand based on the teachings in that case. Mr. Zelaya sought certiorari review in the Supreme Court, and the Court, after declaring in *Trevino* that *Martinez*

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[1] *Wiggins v. Smith*, 539 U.S. 510 (2003).

applies in Texas cases, granted Mr. Zelaya's petition for writ of certiorari, vacated the Fifth Circuit's judgment, and remanded to that court to consider the impact of *Martinez* and *Trevino* on this case. *Ayestas v. Thaler*, 133 S. Ct. 2764 (2013). After allowing the parties to brief the issue, the Fifth Circuit, in turn, vacated and remanded to this Court for the same consideration. *Ayestas v. Stephens*, 533 Fed. Appx. 422 (5th Cir. 2014).

The parties have submitted briefing on the effect of *Martinez* and *Trevino* to this Court. Mr. Zelaya argued that the cases open a pathway in which he can excuse the default this Court found and, thus, lead to *de novo* merits review of the full *Wiggins* claim. He requested that the Court first enter a schedule in which investigation, discovery, and supplemental briefing can occur, and then, ultimately, determine whether a hearing is warranted. Mr. Zelaya files this request for funding in order to conduct the comprehensive investigation that is warranted and reasonably necessary for him to show that he is entitled to relief.

## II. Request for Funding Under 18 U.S.C. § 3599(f)

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

The federal habeas statute authorizes the district courts to grant funds for investigative and other expert services in the course of federal post-conviction litigation. 18 U.S.C. § 3599(f). In

*McFarland v. Scott*, 512 U.S. 849 (1994), a case addressing the statutory right to federal post-conviction counsel under the predecessor funding provision, the Supreme Court of the United States explained that, in addition to counsel, "[t]he services of investigators and other experts may be critical in the pre-application phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *Id.* at 855. "[E]stablished habeas corpus and death penalty precedent suggests that Congress intended to provide prisoners with 'all resources needed to discover, plead, develop, and present evidence determinative of their "colorable" constitutional claims . . . [because] [t]he determination of a habeas claim often depends on the full development of factual issues, and experts play an important role in the fact-finding process.'" *Patrick v. Johnson*, 48 F. Supp. 2d 645, 646 (N.D. Tex. 1999) (citation omitted). The standard for providing investigative or expert assistance is whether such assistance is "reasonably necessary." 18 U.S.C. § 3599(f) ("Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant . . ."). *See also Fuller v. Johnson* 114 F.3d 491, 502 (5th Cir. 1997) (addressing requirements of predecessor funding statute 21 U.S.C. § 848(q)).

Though courts in the Fifth Circuit have routinely rejected funding to investigate defaulted IATC claims because any such efforts would be futile given that federal review was unavailable no matter what

evidence was developed, *see Smith v. Dretke*, 422 F.3d 269, 288-89 (5th Cir. 2005); *Riley v. Dretke*, 362 F.3d 302, 307-08 (5th Cir. 2004); *Fuller v. Johnson*, 114 F.3d at 502, *Martinez* and *Trevino* have undermined this underlying basis for denying such requests. Because ineffective assistance of state habeas counsel may now excuse the default and in turn lead to merits review of the underlying IATC claims, a petitioner may now show funding not only to be reasonably necessary, but in fact indispensable in the development of the factual basis of the relevant issues. *See Patterson v. Johnson*, 3:99-CV-0808-G, 2000 WL 1234661, at *2 (N.D. Tex., Aug. 31, 2000) (not designated for publication) (holding that investigative services are generally reasonably necessary in order to establish the factual predicate needed to prove cause and prejudice).

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

Prevailing professional norms require that a defense team have a mitigation specialist at all stages in capital litigation, which includes federal post-conviction proceedings. The Texas Guidelines and Standards for Texas Capital Counsel sets out the comprehensive nature of the investigation required of post-conviction counsel and admonishes that counsel may not rely the previously compiled record and must conduct a full and independent investigation. *See* STATE BAR OF TEXAS: 2006 GUIDELINES AND STANDARDS FOR TEXAS CAPITAL

COUNSEL, Guideline 12.2.B.1.b.[2] Importantly, counsel should seek the services of a trained mitigation specialist. *Id.* at Guideline 12.2.B.5.c. Correspondingly, counsel is strongly discouraged from relying upon "his or her own observations of the capital client's mental status," and must seek to include at least one person on the defense team, typically the mitigation specialist, who is "qualified to screen for mental or psychological disorders or defects and recommend further investigation of the client if necessary." *Id.* at Guideline 12.2.B.5.b. The mitigation specialist must have the ability to

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

*Id.* at Guideline 12.2.B.5.c. The investigation required is exhaustive and probes every aspect of the

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

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

The ABA Guidelines are in accord with the Texas Guidelines and similarly detail the comprehensive investigation that is required and the fact that a trained mitigation specialist is essential to that end. *See* 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.7 (reprinted in 31 HOFSTRA L. REV. 913 (2003)) (setting out the investigation requirements and requiring use of a mitigation specialist as essential to the efforts). Mitigation specialists are a required and essential component of any capital defense team, and those without one fail to meet the requisite standard of care owed to their clients. *See id*. at Guideline 4.1.A (requiring at least two attorneys, an investigator, and a mitigation specialist).[3] As a result, "[t]he

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

defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history." *See* 2008 ABA SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 5.1.B (reprinted in 36 Hofstra L. Rev. 677, 689-90 (2008)). Furthermore, "[m]itigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information." *Id.* at Guideline 5.1.C. Importantly, a mitigation specialist must be a skilled interviewer "who can recognize and elicit information about mental health signs and symptoms...." *Id.* This is particularly important in developing evidence that can later be used by a mental health professional in providing expert assistance. *Id.* at Guideline 5.1.E (noting the specialized training required "in identifying, documenting and interpreting symptoms of mental and behavioral impairment...."). *See generally* Richard G. Dudley, Jr., & Pamela Blume Leonard, *Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963 (2008) [hereinafter *Getting it Right*]. Additionally, a mitigation specialist must be able to

> establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of

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attorneys need the assistance of a mitigation specialist; capital defense is simply too large a task.").

> sensitive information and to assist the client with the emotional impact of such disclosures.

*Id.* at Guideline 5.1.C. Finally, mitigation specialists must "possess the knowledge and skills to obtain all relevant records pertaining to the client and others." *Id.* at Guideline 5.1.F. In other words, the mitigation specialist possesses important skills that few attorneys have.

> C. In counsel's opinion, it is necessary to retain a mitigation specialist to conduct a thorough punishment phase investigation and to assist counsel in locating necessary experts, in developing and framing referral questions, and in compiling the documents necessary to provide to the expert.

As elaborated upon extensively in his post-*Martinez/Trevino* briefing, Mr. Zelaya has accumulated significant evidence demonstrating that his state habeas counsel performed deficiently, failing to heed his investigator's advice to conduct a thorough and comprehensive investigation, particularly into documented areas that revealed Mr. Zelaya had a history of drug and alcohol abuse and suspected mental illness or impairments. Rather counsel limited himself to his own brief interviews with Mr. Zelaya's mother, Zoila, and his two sisters, Xiomara and Blanca. He proposed raising a claim that trial counsel failed to secure their attendance at trial, though he expressed doubts that this claim would garner much favor from the trial court or the Court of Criminal Appeals. Moreover, he failed to request funding to conduct the needed investigation. Instead, he let the matter go altogether, notwithstanding the presence of red flags

that any reasonable attorney would have pursued. Even after it became apparent that Mr. Zelaya was in fact mentally ill, having been diagnosed with schizophrenia, counsel continued to do nothing.

Moreover, Mr. Zelaya has presented evidence that trial counsel knew about many of the same leads that Mr. Zelaya abused drugs and alcohol and was potentially mentally impaired, having suffered numerous head injuries, but like state habeas counsel, she did nothing to investigate these matters. Additionally, Mr. Zelaya has presented evidence that tends to undermine trial counsel's explanation for her greatly delayed investigatory efforts (that Mr. Zelaya told her not to contact his family in Honduras and only relented shortly before trial). In fact, counsel did very little preparation on any aspect of the case until shortly before jury selection began, which included her attempts to contact Mr. Zelaya's family in Honduras. Tellingly, even these efforts preceded Mr. Zelaya's so-called "permission" to investigate. Simply put, counsel waited until the last minute to prepare for this case, regardless of Mr. Zelaya's instructions.

Finally, trial counsel presented virtually no mitigation evidence at trial. Even the good character evidence state habeas counsel developed, which has been greatly expanded in the federal proceedings (including with witnesses who did not fall under Mr. Zelaya's alleged instruction to trial counsel not to contact), would have given the jury at least something to show Mr. Zelaya was not the purely evil person the prosecution made him out to be. But assuming Mr. Zelaya is able to develop evidence of his drug and alcohol abuse and that he

suffered from a deteriorating mental state because of the onset of schizophrenia in the prodromal phase of the disease, there is an even greater likelihood that he will be able to show a reasonable probability of a different result under *Strickland*.[4]

The fact that this case is on remand from the Supreme Court and the Fifth Circuit should not matter to whether funding is warranted. The efforts of building a mitigation case do not cease with the filing of a petition and continue throughout the federal litigation.[5] This is particularly true in this case, because as demonstrated in Mr. Zeyala's briefing on remand, he will likely be entitled to an evidentiary hearing in order to establish cause and prejudice under *Martinez* and *Trevino* and entitlement to relief on his underlying IATC claims. Thus, it is necessary to retain a mitigation specialist.

Counsel has located a qualified investigator, Nicole VanToorn, who is available to undertake the proposed investigation into mitigation. Ms. VanToorn is qualified under the Texas and ABA Guidelines, and her assistance to the defense team would be invaluable. Ms. VanToorn has 15 years of experience as a mitigation specialist, and she has conducted investigations in approximately 25 capital

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[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

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

cases. She has a degree in Criminal Justice and has attended numerous conferences and seminars related to mitigation investigation. She has worked at various public defenders offices at both the state and federal level and is a licensed private investigator in California and Texas.

Ms. VanToorn has worked on this case in an investigatory role previously and based on her investigative results and the other documentation accumulated in this case, she has provided an extensively detailed investigation plan, which is attached to this motion as Appendix "A," and is incorporated in this motion as if fully set forth. The average mitigation investigation usually requires hundreds of hours to review and analyze existing records, formulate an efficient and effective investigation plan, and locate witnesses to be interviewed. In this case, some of the work has been accomplished through the investigatory efforts undertaken pre-petition, during the pendency of the case in this Court, and during the pendency of the case while it was on appeal; however, as demonstrated in Ms. VanToorn's investigation plan, much remains to be done. Particularly, investigations in Mexico, California, Texas, and Louisiana remain to be done, and much document collection is either pending or needs to be done.

Mr. Zelaya has been diagnosed with schizophrenia.[6] Additionally, he has a documented

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[6] Federal post-conviction team consulted with REDACTED, Ph.D., a preeminent psychologist who specializes in schizophrenia and has testified in a number of high-profile death penalty cases. Dr. REDACTED volunteered some time to assist in assessing the significance of the diagnosis and to

history of drug and alcohol abuse. He left his home in Honduras abruptly when he was 18 years old and traveled to the United States on four occasions. He travelled through Mexico on his journeys to the United States, and he stayed for extended periods in Guadalajara, Mexico. For the most part, he settled in Long Beach, California. His spiral into drug and alcohol dependency occurred there. Moreover, as detailed in Ms. VanToorn's investigation plan and in Mr. Zelaya's briefing on remand to this Court, schizophrenia most typically manifests after a

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identify potential lines of inquiry for a proposed investigation. He essentially reviewed the documents attached to the *Petitioner's Brief on Remand* documenting Mr. Zelaya's diagnosis of schizophrenia, which are attached to the brief as Exhibits "W," "X," and "Y." Dr. REDACTED believed that the diagnosis was both significant and that there was a need for a comprehensive investigation. Dr. REDACTED explained that with schizophrenia, the illness typically progresses for many years prior to a diagnosis. More importantly, just because a person has not yet been diagnosed with schizophrenia does not mean that the person is not severely mentally ill. The prodromal and premorbid phases of schizophrenia, which precede the psychotic episode and the final diagnosis, are typically characterized by impairments, sometimes severe, in the person's judgment, perception, and ability to function. Dr. REDACTED indicated that it was not unusual, given that most schizophrenics exhibit anosogosia, that Mr. Zelaya would not report any significant history of mental illness. Dr. REDACTED also thought that Mr. Zelaya possibly exhibited perseverative thinking, in which Mr. Zelaya latches onto a thought or idea and will not let it go regardless of how unreasonable it is or how much others dissuade him that it reflects reality, which could be symptomatic of schizophrenia and could have existed in the prodromal phase. It could also explain why Mr. Zelaya was a challenging client to the trial team. With Dr. REDACTED assistance, Mr. Zelaya's defense has been able to hone the investigation plan being presented as part of this motion.

person is at least 18 years of age and most likely during the early to mid 20s. In most cases, it is characterized by (1) a long prodromal phase (insidious onset) in which a person's mental functioning can be severely impaired and (2) anosogosia, in which the afflicted person is incapable of knowing he is mentally ill. Mr. Zelaya lived in California after he turned 18 years old and lived there during his 20s. He encountered many people there, he lived with a girlfriend and fathered a son with her, and he entered the California penal system. Additionally, Ms. VanToorn developed evidence from people in Honduras who knew Mr. Zelaya during this timeframe that indicates his functioning may have been impaired or was deteriorating. Thus, at this point in the investigation, evidentiary indications point to California and Mexico as the next logical phase for the investigation. Mr. Zelaya therefore requests that the Court fund an investigation into his history of mental illness and drug and alcohol abuse as they may have developed and manifested themselves to those around him while in California and Mexico.

Ms. VanToorn will attempt to complete this phase of the investigation in 160 hours, though more time may be required. Her hourly rate is $100/hour, which is consistent with what mitigation specialists in the area charge for this type of work. She will review the documents collected to date, update or revise investigation plan as needed, prepare a documents list and issue needed records requests, locate and interview witnesses, prepare memoranda detailing the results of her interviews and investigation, consult with counsel, and secure affidavits from witnesses as needed.

Additionally, Ms. VanToorn will be invaluable to the defense team as the case progresses. She can assist counsel in locating a qualified expert witness, compiling documents for the expert to use, and formulating referral questions for the expert. Finally, she can assist counsel in preparing for an evidentiary hearing on the claims that require resolution of material and disputed issues of fact. It is counsel's opinion that the requested assistance is reasonably necessary to develop the needed facts in order to establish the underlying merits of the IATC claims and that the default of those underlying claims is excused under *Martinez* and *Trevino*. Ms. VanToorn's primary role will be to investigate mitigation evidence and evidence demonstrating trial counsel's deficient performance in order to support the *Wiggins* claim, which alleged that trial counsel failed to investigate mitigation evidence in a timely and comprehensive manner.

In all likelihood, it will be necessary for the defense to retain a psychologist or psychiatrist, such as Dr. REDACTED, to assist the defense. However, it is first necessary to accumulate the evidence as proposed in Ms. VanToorn's investigation plan. *See Getting it Right*, at 974-75 ("As a general rule, it is never appropriate to expect a mental health expert to deliver a comprehensive mental health assessment until the life history investigation is complete."). *See also id*. at 975 ("In capital litigation, an accurate and reliable life history investigation is the foundation for developing and presenting pivotal mental health issues."). This is particularly true because any expert retained in this case will be expected to review historical data and render an

opinion concerning its significance concerning Mr. Zelaya's past mental functioning.

Under 18 U.S.C. § 3599(g)(2), fees for "investigative, expert, and other reasonably necessary services" are presumptively capped at $7,500, "unless payment in excess of that limit is certified by [this Court] . . . as necessary to provide fair compensation for services of an unusual character or duration . . . ." *Id.* Moreover, the "amount of the excess payment" must be "approved by the chief judge of the circuit." Obviously, the amount requested in this motion, and the amount ultimately that will be required to investigation this case fully, will exceed this amount. The circumstances in this case clearly demonstrate a need for services of "an unusual character or duration." No attorney prior to current counsel has undertaken the sort of investigation this case requires; thus, there is no prior record upon which an investigation can be built. Instead, the investigation must begin from the beginning. It touches two central American countries and three States. This distance alone reveals the unusual nature of the investigation. The number of witnesses that have been identified numbers in the dozens. But more importantly, this case involves extraordinarily complex investigatory tasks to piece together the manifestations of Mr. Zelaya's mental illness in the years leading up to the commission of this crime. This will require identifying percipient witnesses, probing their memories for clues whether Mr. Zelaya manifested signs of mental illness and the nature of his ability to function, and developing evidence that a psychologist or psychiatrist could determine whether Mr. Zelaya was mentally ill

during this time. It will encompass complex cultural issues that must be addressed and accounted for. It will also require extensive document collection.

At this point in the investigation, Mr. Zelaya is seeking only funding to continue the investigation in California and Mexico, because the indications from past investigation reveal that this may be the most productive. Once this evidence is developed, Mr. Zelaya can then seek additional needed funding for investigation and expert assistance, which will be based upon the results of the presently proposed investigation and the investigation that has preceded it to date. In turn, the Court will have additional evidence upon which it can determine whether further investigation beyond that requested in this motion, qualifies under (g)(2) because of its unusual character or duration.

WHEREFORE, PREMISES CONSIDERED, Mr. Zelaya respectfully requests that this Court authorize the requested funding as reasonably necessary under 18 U.S.C. § 3599(f) in the amount of $20,016. Mr. Zelaya also requests any and all other relief to which he may be entitled.

Respectfully submitted,

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/s/ Paul E. Mansur
Attorneys for Petitioner

**IN THE**
**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS,**
**HOUSTON DIVISION**

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|---|---|---|
| **CARLOS MANUEL AYESTAS, a/k/a Dennis Humberto Zelaya Corea,** **Petitioner,** | § | |
| **v.** | § | **USDC No. 4:09-cv-2999** |
| **WILLIAM STEPHENS, Director, Texas Department of Criminal Justice Correctional Institutions Division,** **Respondent.** | § | **Capital Case** |

**ORDER**

Before the Court is Petitioner Carlos Manuel Ayestas's Motion for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f).

WHEREFORE all things considered, the Motion is **GRANTED**.

The Court finds that Mr. Zelaya has demonstrated that the funds in the amount of $20,016 for an investigation are reasonably necessary under the circumstances of this case. Moreover, because of the unusual character and duration of the proposed investigation, the Court approves excess funds under 18 U.S.C. § 3599(g)(2). The Court recommends that the Chief Judge of the

Fifth Circuit approve the fees and expenses set forth in the motion.

ORDERED this _____ day of _____, 2014

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UNITED STATES DISTRICT JUDGE

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**APPENDIX "A"**

**Proposed Investigation Plan**
**Submitted by Nicole VanToorn**

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**MEMORANDUM**

TO: Paul E. Mansur & Ben Wolff

FROM: Nicole VanToorn

DATE: November 3, 2014

RE: *Carlos Manuel Ayestas v. William Stephens*, Cause No. 4:09-cv-2999

**Investigation plan for California and Mexico portions of the mitigation investigation; estimates of costs and expenses.**

The defense team in the above referenced case has requested that I provide a detailed investigation plan for the continued mitigation investigation—specifically the portions of the investigation to be conducted in Long Beach, California, and surrounding areas and in Guadalajara, Mexico. The following is a description of the mitigation investigation conducted to date, an explanation of the need for further investigation, and an estimate of the costs and expenses to conduct the proposed investigation.

I am a private investigator and mitigation specialist. I have worked as a mitigation specialist for some 15 years and have participated in that capacity in more than 25 capital murder trial and post-conviction investigations. I was a mitigation specialist with the Capital Habeas Unit, Office of the

Federal Public Defender, in Las Vegas Nevada. In 2013, I relocated to Fort Worth, Texas, and I work as a mitigation specialist under the name VanToorn Investigations. Prior to my work in capital mitigation investigations, I worked as a criminal investigator for various defender offices in California and Missouri. I hold a Bachelor's degree in Justice Systems and a Master's degree in Business Administration. I have attended many annual conferences and seminars as part of my training, including federal habeas corpus conferences, Capital Habeas Unit conferences for Federal Public Defender employees, and conferences sponsored by the National Defender Investigator Association. I am fluent in Spanish. My CV is attached as Exhibit "A," and is incorporated herein as if fully set forth. My CV details my employment and training history as a mitigation specialist.

I am familiar with the client, Dennis Zelaya, who was convicted of capital murder and sentenced to death under the name of Carlos Manuel Ayestas, and with the facts of the case. After relocating to Texas from Nevada, I volunteered to assist Mr. Zelaya's defense team with a mitigation investigation in Honduras; however, because of limited resources, I was only able to spend two weeks in Honduras. Though I interviewed a number of witnesses (including family, both immediate and extended; friends of Mr. Zelaya and of his family; acquaintances; medical providers who treated Mr. Zelaya; a teacher; and his soccer coach) and collected relevant documents in Honduras, the investigation is far from complete. It is my opinion that a complete investigation will require additional document collection and interviewing witnesses we

have identified in Mexico, California, Texas, and Louisiana, particularly given Mr. Zelaya's diagnosis of schizophrenia.[1]

Some background concerning my role in a capital defense team and the nature of a mitigation investigation is necessary to understand why additional investigation is warranted in this case. A mitigation investigator works as part of a team of attorneys, investigators, and other experts in the defense of death penalty case. A mitigation specialist is essential to a capital defense team and is required under the prevailing profession norms, as reflected in the Guidelines and Standards for Texas Capital Counsel and the ABA Death Penalty Guidelines.[2] Mitigation specialists are required at

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[1] The investigation is particularly complex given Mr. Zelaya's diagnosis with schizophrenia. In such a case, the investigator must tailor the investigation to seek out evidence of early manifestations of this debilitating mental illness, particularly in its prodromal and premorbid phases, which precede any psychotic episodes. Thus, particular sensitivity is required to discern limitations or impairments in functioning that could be indicative of schizophrenia. Interviews with percipient witnesses must focus on the behaviors, expressions, demeanor, and beliefs that the client may have exhibited during the relevant time in the years preceding a diagnosis.

[2] *See* 2006 GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL, Guideline 12.2.B.5.b (stating that at least one person, typically a mitigation specialist, must be qualified to screen for mental or psychological disorders or defects and recommend further investigation if necessary"); *id*. at Guideline 12.2.B.5.c (setting out comprehensive duties for mitigation specialist); 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 4.1.A (reprinted in 31 HOFSTRA L. REV. 913 (2003)) (requiring at least two attorneys, an investigator, and a mitigation specialist in every capital proceeding) (hereinafter

every stage of capital proceedings in which a death sentence has been imposed. In post-conviction proceedings in which a complaint has been raised that trial counsel failed to investigate mitigation evidence for use in a punishment defense, this is particularly true, because the post-conviction defense team must conduct the investigation that trial counsel failed to undertake.

A mitigation investigation generally involves a multigenerational inquiry into the biological, psychological, and social influences on the development and adult functioning of the accused. It involves parallel tracks of (1) conducting multiple, in-person, face-to-face interviews and (2) collecting and analyzing life-history records. The fruits of a thorough mitigation investigation not only provide capital defendants with the effective representation to which they are entitled, but they also assure that the decision-maker has a meaningful opportunity to consider all the relevant evidence in making a reasoned moral and legal judgment and that the outcome of the proceedings is reliable and just.

The process of identifying and interviewing life history witnesses is a laborious and time-consuming

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2003 ABD DEATH PENALTY GUIDELINES]; *id.* at Guideline 10.4 (stating capital defense team must have at least one member who is qualified to screen for mental or psychological disorders or impairments); *id.* at Guideline 10.7 & 10.11 (requiring a thorough and comprehensive investigation relating to the penalty phase of a capital trial); 2008 ABA SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 5.1.B.-F (requiring a mitigation specialist and specifying the qualifications, training, skills, and duties of all mitigation specialist) [hereinafter 2008 ABA SUPPLEMENTARY MITIGATION GUIDELINES].

endeavor. Simply, a mitigation investigation cannot be completed in a matter of hours or days, particularly in a case as complex as Mr. Zelaya's, in which he had significant lifetime contact in Honduras, Mexico, California, Texas, and Louisiana. Face-to-face interviews with witnesses are indispensable, and often-times multiple interviews with some witnesses will be required. It takes time to establish rapport with the client, his family, and others who may have important information to share about the client's history. It is quite typical, in the first interview with life history witnesses to obtain incomplete, superficial, and defensive responses to questions about family dynamics, socio-economic status, religious and cultural practices, the existence of inter-familial abuse, and mentally-ill family members. These inquiries impose upon the darkest and most shameful secrets of the client's family, expose raw nerves, and often cause interviewees to re-experience past trauma. As one set of commentators explained:

> [Life history witnesses] need the time and respect of the mitigation specialist if they are to comprehend the process of a capital trial and the critical nature of life history information. It is common for physical, emotional, and/or sexual trauma in the lives of the client and his family members to come to light during the life history investigations. Revealing trauma can be re-traumatizing and this process must not be rushed or minimized.

Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting it Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*,

36 HOFSTRA L. REV. 963, (2008) [hereinafter *Getting it Right*]. Additionally, when addressing a client and family members from a foreign country, as in this case, there are cultural differences that must be addressed.[3] In sum, there are often many barriers to the disclosure of sensitive information, and it is only with time that an experienced mitigation specialist can break down these barriers and obtain accurate and meaningful responses to these sorts of questions. As a result, a comprehensive mitigation investigation typically requires hundreds of hours to complete.

For clients who suffer from mental illness or other psychological impairments, as here, mitigation evidence may explain the succession of facts and circumstances that led to the crime, and how that client's disabilities distorted his judgment, reactions, and overall general functioning. Of all the diverse frailties of humankind, mental illness or impairment is singularly powerful in its ability to explain why individuals from the same family growing up in the same setting turn out differently. It is an objective scientific fact, and it does not reflect a volitional choice made by the client. An accurate medical and

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[3] *See* Scharlette Holdman & Christopher Seeds, *Cultural Competence in Capital Mitigation*, 36 HOFSTRA L. REV. 883, passim (2008); *Getting it Right*, at 967 & n.32. *See also* 2008 SUPPLEMENTARY MITIGATION GUIDELINES, Guideline 5.1(c) ("Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information. . . They must be able to establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information.").

social history is essential to a competent mental health evaluation. Because mentally ill individuals, particularly those suffering from schizophrenia as Mr. Zelaya, by definition are likely to be poor historians, a reliable evaluation requires historical data from sources independent of the client. *See Getting it Right*, at 980. Additional components of a reliable evaluation include a thorough physical examination (including neurological examination) and appropriate diagnostic testing.

For these reasons, it is essential for the mitigation specialist to conduct a thorough social history investigation *before* retaining mental health experts. "As a general rule, it is never appropriate to expect a mental health expert to deliver a comprehensive mental health assessment of the client until the life history investigation is complete." *Getting it Right*, at 975. In a capital case, a mental health assessment is not simply a matter of rendering a diagnosis; rather it must be integrated into the broader mitigating narrative. *Id*. ("Addressing an acute circumstance and formulating a mitigation narrative are different endeavors."); *see also id*. ("In capital litigation, an accurate and reliable life history investigation is the foundation for developing and presenting pivotal mental health issues."). While in a clinical setting, the diagnosis may be useful for mental health professionals to describe what they observe, in a capital setting, in which a comprehensive understanding of the capital defendant is required, a diagnosis "offers little insight into the cause of the diagnosed condition or the lived experience of the person diagnosed . . . . " *Id*. at 983.

> A deeper understanding of the subject is rendered through a psychodynamic formulation, which takes into account influences in a subject's life that contributed to his mental state, considers how environmental and personality factors are relevant to analyzing the subject's symptoms, and considers how all these influences interacted with the person's genetic, temperamental, and biological makeup.

*Id.* Until a complete life history investigation is completed, a mental health professional can only render a diagnosis based on incomplete information that is available and cannot place the diagnosis into the entire context of the client's life. *Id.* at 984. Thus, only after the social history data have been meticulously digested and the multiple risk factors in the client's biography have been identified will counsel be in a position to determine what kind of culturally competent expert is appropriate to the needs of the case, what role that expert will play, and what referral questions will be asked of the expert. In sum, in order to make informed decisions about the kind of experts that may be needed and the referral questions such experts will address, the defense team first needs a reliable social history investigation. *See*, *e.g.*, 2008 SUPPLEMENTARY MITIGATION GUIDELINES, Guideline 5.1.

A mitigation investigation also should include a thorough collection of objective, reliable documentation about the client and his family, typically including medical, educational, employment, social service, and court records. The collection of records and analysis of this

documentation involve a slow and time-consuming process. Many government record repositories routinely take months to comply with appropriately authorized requests. Great diligence is required to ensure compliance. Careful review of records often discloses the existence of collateral documentation that, in turn, needs to be pursued. Both the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases emphasize the importance of collecting records containing life-history information. The commentary to ABA Guideline 10.7 states:

> Records-from courts, government agencies, the military, employers can contain a wealth of mitigating evidence documenting or providing clues to childhood abuse, retardation, brain damage, and or mental illness and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children . . . .The collection of corroborating information from multiple sources-a time-consuming task-is important whenever possible to ensure the reliability and this the persuasiveness of the evidence.

2003 ABA DEATH PENALTY GUIDELINES, Guideline 10.7, commentary. Finally, when the original documentation is in Spanish, as much of the documentation obtained to date in this case is, considerable time and resources must be expended to

translate them into English to make them useful to the defense and to the courts.

Prior to my involvement in the case, the federal post-conviction defense team had already begun the process of investigating Mr. Zelaya's social history: they had obtained some social history documents, including TDCJ records; created a comprehensive timeline; obtained affidavits of family members who were in the United States; and created lists of potential witnesses in Honduras to interview and documents to obtain. In addition, they had compiled and digested the trial and habeas records from the state court proceedings, and established a valuable working relationship with the Honduran Government. I was able to review many of these documents, and together, after a day-long investigation strategy meeting, we devised a comprehensive investigation plan for Honduras. Because the witness list was very large, and I only had two weeks in which to interview witnesses, establish critical rapport with them, type affidavits, and then arrange to have them notarized (which in Honduras is a much more difficult task than it is in the United States), it was necessary to prioritize which people I would interview and which of those would receive most of my attention during my time in Honduras.

Before I travelled to Honduras on the mitigation investigation trip, federal habeas defense team compiled considerable evidence of Mr. Zelaya's good character qualities, describing specific instances of Mr. Zelaya's caring nature and helpfulness to others. Though the issue in the state proceedings had been limited to trial counsel's failure to present Mr.

Zelaya's mother and two sisters, Xiomara and Blanca, as witnesses at trial, we knew that there were numerous other witnesses, both inside and outside the family, who could have provided similar information and could have testified about specific, concrete instances of good character. Both Xiomara and Blanca provided affidavits to the federal post-conviction team that expanded on this detail and identified specific witnesses who could provide testimony. *See Affidavit of Xiomara Zelaya, dated December 20, 2010* ¶¶ 36-39) and *Affidavit of Blanca Keller, dated December 20, 2010* ¶¶ 30-35), which are attached as Exhibits "EE" and "FF" to *Petitioner's Brief on Remand from the Fifth Circuit Concerning the Effect of* Martinez v. Ryan *and* Trevino v. Thaler *on the Issues in this Case*. Thus, we knew that these witnesses existed and should be interviewed. I did so and collected affidavits from many of them.

Nevertheless, our investigative goals extended beyond obtaining this previously identified evidence. Because Mr. Zelaya had been diagnosed with schizophrenia, one of our objectives was to seek out evidence of manifestations of mental illness when Mr. Zelaya was in Honduras. Both the DSM-V and the DSM-IV-TR indicate that the flagrant onset of schizophrenia (an acute psychotic episode) typically occurs in the late teens to the early thirties; however, the peak age for the first psychotic episode for males is typically in the mid-20s. *See* Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, at 102 (DSM-V); Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, at 307 (DSM-IV-TR). Moreover, though onset can be abrupt, "the majority of individuals display some type of prodromal phase manifested by

the slow and gradual development of a variety of signs and symptoms." DSM-IV-TR, at 308. Prodromal symptoms may include mild or subthreshhold forms of hallucinations or delusions: individuals may express a variety of unusual or odd beliefs that are not of the delusional proportions; evidence unusual perceptual experiences; their speech may be understandable but vague; their behavior may be unusual but not grossly disorganized; individuals who had been socially active may become withdrawn from previous routines. *See* DSM-V, at 101.

Though Mr. Zelaya left Honduras when he was 18 years old and had limited contact with anyone in Honduras in the years between leaving home for the first time and his arrest in Houston, we sought out witnesses who may have traveled with Mr. Zelaya to the United States or had observed him during this period of time. We also attempted to obtain medical records and to talk to physicians and other medical personnel who may have treated him. Other investigation objectives included exploring the family dynamics and economic situation, Mr. Zelaya's education, evidence related to his birth and early childhood, his work history, and the family's experience with the trial defense team.

In the two weeks that I was in Honduras, I interviewed some two dozen witnesses. I began my investigation in San Pedro Sula. Because it was not safe to venture into many of the neighborhoods where the witnesses lived, Mr. Zelaya's younger sister, Nolvia REDACTED, arranged to have the witnesses brought to a safe location in which I could interview them. I was also assisted by Ms. Flabia

REDACTED, an employee of the Department of Exterior Relations, who acted as my guide during the time I was in Honduras. I was able to visit Mr. Zelaya's schools, the soccer field where he played soccer, and the neighborhoods in which he grew up, and I documented much of this in photographs. I was also able to gather some documentation concerning Mr. Zelaya's life in Honduras. After a little more than a week in San Pedro Sula, I went to the capital city, Tegucigalpa, where I interviewed additional witnesses. Fortunately, I was also able to visit with Mr. Zelaya's father, Francisco REDACTED, who was 85 years old and was living outside Tegucigalpa in Danli. He has since passed away.

With as many witnesses as I ended up interviewing in such a short time, it was hard to establish any sort of rapport, and I had little opportunity to conduct follow up interviews with any of the witnesses.[4] In short, I believe I was only able to gain superficial information from many of the

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[4] During the first few days, I had a hard time getting Nolvia to understand that we had to prioritize our time and focus on witnesses we believed would have the most pertinent information about Mr. Zelaya and his family. Initially, she kept bringing in people who had only tangential contact with the family and who had little to offer as far as mitigation evidence. Also, Nolvia and some of the other family members were concerned about Ms. REDACTED role-they feared government interference with my efforts. It took considerable effort on my part to convince Nolvia that I, along with Mr. Zelaya's attorney, were setting the investigation goals and schedule and that the government was not interfering in any way with our investigation. Once I convinced Nolvia that we should direct the investigation, she became more cooperative and my investigation became more productive.

witnesses. However, with no assurance that I, or any other investigator, would return to Honduras, we decided to obtain affidavits from 13 witnesses. These include:

1. Jose REDACTED - Mr. Zelaya's maternal uncle.
2. Nolvia REDACTED - Mr. Zelaya's younger sister.
3. Ruth REDACTED - Mr. Zelaya's other younger sister.
4. Zoila REDACTED - Mr. Zelaya's mother.
5. Francisco REDACTED - Mr. Zelaya's father.
6. Luis REDACTED - Mr. Zelaya's older half-brother.
7. Mario REDACTED - Mr. Zelaya's cousin.
8. Mauricio REDACTED - Mr. Zelaya's older half-brother.
9. Dilberth REDACTED - Mr. Zelaya's oldest son.
10. Oscar REDACTED - Mr. Zelaya's friend.
11. Jose REDACTED - Mr. Zelaya's soccer coach.
12. Fidel REDACTED - Mr. Zelaya's teacher.
13. Reina REDACTED - a family friend.

Most of these witnesses provided information about Mr. Zelaya's character growing up - he was a good, well-mannered child; he went to school and studied

hard; he worked in the family business; he was a good, obedient son; he had a good reputation in the neighborhood; he was outgoing and had numerous girlfriends. In other words, the witnesses I interviewed, including those who provided affidavits, were able to corroborate all of the assertions made in federal court about Mr. Zelaya's good character qualities and his caring nature to his family and to others.

Though Mr. Zelaya's family described themselves as "middle-class," what I observed in Honduras was primitive by standards in the United States. The family held a higher status in the neighborhood because they owned a small business—essentially a pawn shop or second-hand store; however, they were very poor. Many witnesses described Mr. Zelaya's father as being a strict disciplinarian, but none confirmed that he was abusive. Nevertheless, he had five children with Mr. Zelaya's mother when he was married to another woman, and he split his time between the two families. He also had numerous children with other women. He would often bring his children from other women into the household in which Mr. Zelaya and his sisters lived. Though no one in the family thought this family arrangement was strange, Ms. REDACTED informed me that this is not normal for Honduras and cannot be explained by reference to a different culture. After Mr. Zelaya's father murdered a neighbor, he fled to Tegucigalpa and never returned. Thus, though no one reported any physical or sexual abuse, the family did exhibit dysfunction that we have documented.

In state habeas proceedings, trial counsel described Mr. Zelaya's family as unconcerned with his situation and uncaring in general. My interactions with Mr. Zelaya's mother, along with descriptions of her from other witnesses, reveal that she has a reserved demeanor and a passive personality. To someone who had not taken the time to get to know her, she might present as being aloof or uncaring. Furthermore, her cautiousness with strangers could be attributed to cultural factors and distrust of the government, which is common in Honduras. However, she shows tremendous concern for the plight of her son. She and, indeed, the entire family have gone to great lengths to assist him. After learning of the news that Mr. Zelaya was facing capital murder charges and, later, in the wake of his conviction and death sentence, the family has strived to assist him. They put a tremendous amount of pressure on the Honduran government, through their organization, OHPROLIDEZ (an acronym translated as the Honduran Organization Pro Life and Freedom for Zelaya). One of our investigation objectives was to document their efforts in order to rebut trial counsel's assertion, based apparently on a snap judgment, that the family was unwilling to assist the defense. I obtained numerous documents-newspapers, flyers, letters, media reports, and so forth-documenting their efforts.

Not surprisingly, because of the nature of schizophrenia-its typically slow progression through the prodromal phase and its eventual manifestation in an acute episode after a person reaches the age of 18 years-I was unable to develop much evidence relating to Mr. Zelaya's mental health through the

Honduran phase of the investigation. Medical records for Mr. Zelaya and the family had long since been destroyed; so I was unable to collect documentation concerning his medical history. I talked to Dr. James REDACTED, Mr. Zelaya's physician, and to Areceli REDACTED, a nurse. They reported nothing remarkable about Mr. Zelaya's health history, and they knew little about his mental health, which was not unexpected because Mr. Zelaya had left Honduras when he was 18 years old. Other witnesses I interviewed provided similarly sparse evidence. Because of the cultural stigma placed on mental illness in Honduras, it is my belief that it was difficult to get witnesses to discuss it openly, particularly in the brief time I could spend with each witness.

Nevertheless, I was able to uncover promising leads. I located two witnesses who reported suspicious changes in Mr. Zelaya's demeanor and behavior during the post-18 year-old period. Jose REDACTED accompanied Mr. Zelaya to the United States during one of his travels, and they settled in Long Beach, California. Jose stayed in Long Beach with Mr. Zelaya for about two weeks and then continued on to New York. He reported: "During that time, I could see that Dennis had changed a bit. He looked worried and stressed out, but I don't know why . . .." He attributed it to Mr. Zelaya missing his family. Also, Nolvia REDACTED saw Mr. Zelaya when he returned to Honduras after being in the United States. She observed: "When Dennis returned from the United States for the first time, he was very sensitive and was not the same person as a result of what he suffered on the trip; he was very thin." The Affidavits of Jose REDACTED and Nolvia

REDACTED are attached as Exhibits "B" and "C," respectively. I know that in documenting schizophrenia, many witnesses will attribute changes in a family member or a friend to other causes, such as stress, a phase that they are going through, religious experience, or the effects of drug and alcohol use. Though these witnesses may not have recognized that Mr. Zelaya may have been exhibiting signs of mental illness, their observations can be valuable to a psychologist or psychiatrist, later retained, who can then offer a professional viewpoint, not only to these witnesses' recollections and observations, but to the entire evidentiary picture that we develop and can then determine if Mr. Zelaya exhibited signs of mental illness and impaired functioning typical of someone in the prodromal phase of schizophrenia.

It is my belief that we have only scratched the surface in the investigation into Mr. Zelaya's history of significant and debilitating mental illness. Because it is rare for the first acute episode to occur in a person's 30s and is much more common in the 20s, our investigation must determine whether anyone who encountered Mr. Zelaya observed dysfunctional, bizarre, or psychotic behavior. We must seek out evidence concerning whether Mr. Zelaya expressed delusional or disorganized thinking and whether his mental functioning was impaired. This evidence, to the extent it exists, will be found in those places Mr. Zelaya was during the time period after he left Honduras—in other words, Mexico, California, Texas, and Louisiana.

Between 1987 and 1995, Mr. Zelaya traveled to the United States four times. Each time he would

cross Guatemala and Mexico and then enter the United States, typically in California. He was apprehended many times in southern Mexico, in the State of Chiapas, and was deported back to Guatemala. He would immediately return to Mexico in another attempt to cross into the United States. As stated, Mr. Zelaya made it to the United States at least four times during this time period, and he was deported three of those times. He reports that he always used his real name, Dennis Zelaya, with United States immigration authorities. We have made requests for his immigration documents from the United States, and the status of these requests is pending. We still need to make similar requests of Mexican immigration authorities.

Mexico also features prominently in Mr. Zelaya's social history and likely contains clues about the development of Mr. Zelaya's mental illness. Because he traveled the length of the country to get to the United States, Mr. Zelaya typically stayed with a Mexican family in Guadalajara (at a place he referred to as the "casa") each time he passed through Mexico. He would stay here three to four months at a time and would pay for his lodging. Through this contact, Mr. Zelaya met Jesus REDACTED, who was the head of a Jehovah's Witnesses community in Las Aquilas, a colonia of Guadalajara. Mr. Zelaya would sometimes stay with him, rather than have to pay for his lodging at the casa. Mr. Zelaya worked as a gardener when he stayed in Guadalajara. During one journey through Mexico, Mr. Zelaya's cousin, Mario REDACTED, accompanied him, and they stayed with the Jehovah's Witnesses for several months. The Affidavit of Mario REDACTED is attached as

Exhibit "D." When investigating the social history of a client who has been diagnosed with schizophrenia, it is important to talk to clergy—pastors, ministers, priests, and other church workers—who may have interacted with the client and discussed religious topics. These witnesses can be an important source in documenting strange and delusional beliefs indicative of schizophrenia. We also know that when Mr. Zelaya lived in Houston, Texas, he stayed with a church group, attended the church, and had a number of personal interactions with the pastor. This will also be an important investigative objective.

Mr. Zelaya and his family also report that Mr. Zelaya had been held captive for a period of weeks in Mexico by a "coyote" (a term referring to human smugglers who transport immigrants across Mexico and into the United States) until his family paid an additional $1,000 to release him. It is obvious that the human trafficking business is fraught with peril and can cause tremendous stress and suffering to those "customers" who place their lives in the hands of the coyotes. *See* Damien Cave, et al., *A Smuggled Girl's Odyssey of False Promises and Fear*, N.Y. TIMES, Oct. 5, 2014, reprinted at http://nyti.ms/lxfekny. But being held captive can also be a significant stressor that could trigger onset of a mental illness, such as schizophrenia.

Mr. Zelaya settled in Long Beach California, where he stayed with a relative, Wilfredo REDACTED. Mr. Zelaya worked at a car wash, called the Castillo Car Wash that Wilfredo managed, and through this employment, Mr. Zelaya was introduced to a criminal element, particularly other

immigrants who were in the drug trade. Mr. Zelaya started using drugs, particularly cocaine, and drinking alcohol excessively during this time. He was arrested twice—for heroin and cocaine distribution—and he ended up being incarcerated in Tehachapi prison in California for nearly two years. He was deported again after being released. Mr. Zelaya also had a girlfriend, Maria REDACTED, when he lived in Long Beach. She had a son, Dennis REDACTED, through him. In accordance with the ABA Guidelines as well as the Supplementary Guidelines, we have identified a number of potential witnesses who could provide valuable information about Mr. Zelaya—particularly, his mental functioning during this time and his drug and alcohol use:

1. Maria REDACTED (Dennis' girlfriend; mother of Dennis son born in Long Beach)
2. Dennis REDACTED (Dennis' son)
3. Wilfredo REDACTED (Dennis lived and worked with Wilfredo)
4. Kathy (wife of Wilfredo)
5. Carol (sister of Kathy)
6. Wilfredo's Mexican girlfriend (lived with Dennis)
7. Cynthia (daughter of Mexican girlfriend; lived with Dennis)
8. Male (son of Mexican girlfriend; lived with Dennis)
9. Ana REDACTED (Friends of Wilfredo and Dennis)

10. Javier REDACTED (Friends of Wilfredo and Dennis)
11. Omar (El Salvadoran drug dealer)
12. Elsa (Omar's Honduran girlfriend)
13. Isabel (Honduran sister of Elsa; Sahun's girlfriend)
14. Sahun (Honduran drug dealer; doing 25 years in federal prison)
15. Armando (Honduran who worked with Dennis and Wilfredo)
16. Humberto (Honduran who worked with Dennis and Wilfredo)
17. Javier (Honduran who worked with Dennis and Wilfredo)
18. Javier (Mexican who worked with Dennis and Wilfredo)

We have also started making records requests; however, because of the inertia in the California bureaucratic system, many of these requests remain pending:

1. REDACTED Jail/Police records:
   REDACTED
2. Court Records:
   REDACTED
3. DOJ Records:
   REDACTED
4. Prison Records:
   REDACTED

5. Prison Medical Records:
   REDACTED
6. Parole Records:
   REDACTED

These records can provide potentially valuable information about Mr. Zelaya's mental health and his history of drug and alcohol abuse.

As stated, Mr. Zelaya also had many contacts in Houston, Texas, and in Kenner, Louisiana, where he was arrested. A comprehensive investigation will include people who knew him and interacted with him in these places. It will also include identifying and questioning witnesses who interacted with Mr. Zelaya around the time of the crime, during the pretrial and trial periods, and in the post-trial period.

At the present time, based on the investigation to date, particularly with respect to the evidence we uncovered in Honduras, the next phase of the investigation should focus on Mr. Zelaya's time in California and Mexico. Mr. Zelaya lived for many years in California during the period of time in his life when prodromal symptoms of schizophrenia would start to appear. He settled there to live, fathered a child, and eventually was placed into an institutional setting. In Mexico, the investigation will center around Mr. Zelaya's experiences in Guadalajara, where he lived, worked and worshiped on repeated and extended stays. The investigation will also center on his migratory experiences; it is essential to investigate the circumstances under which Mexican smugglers kidnaped and held Mr. Zelaya for ransom, because such a traumatic event may precipitate the development of mental illness.

As such, we must investigate Mr. Zelaya's other Mexican immigration-related experiences to develop a clear picture of the Mr. Zelaya's social history during the prodromal and premorbid phases of schizophrenia. To this end, Mr. Zelaya lived in Villa Hermosa, Tabasco, Comitan, Chiapas, and Mazatlan, Sinaloa for varying periods of time.

To complete a comprehensive investigation in California and Mexico a minimum of 160 hours will be required. I estimate the following time allotment for each task:

1. Travel to Long Beach, California; Tehachapi prison; and the surrounding communities, in order to interview witnesses and collect related documents: 80 hours.
2. Travel to Guadalajara, Mexico, and surrounding communities, in order to interview witnesses and collect related documents: 60 hours.
3. Drafting reports of investigation results for the defense team, team meetings concerning which witnesses to seek affidavits from; drafting affidavits and securing their execution with witnesses; and translating Spanish language affidavits to English: 20 hours.

The customary rate for mitigation specialists in Texas is currently $100.

## Proposed Budget For Auxiliary Defense Services

| | **Out of court hours** | **Rate** | **Fees (subtotal)** | **Expenses** | **Estimated total fees & expenses** |
|---|---|---|---|---|---|
| Long Beach, CA[5] | 80 | $100/ hr | $8,000 | $2,740<br>Hotel: $1,380 (10 nights @ $138/night)<br>Meals and Incidental Expenses: $710 (10 days @ $71/day)<br>Rental car & gas: $650 (10 days @ $65 day)<br>Airfare: $500 | $11,240 |
| Other: Report drafting; Team Meetings; Correspondence | 20 | $100/ hr | $2,000 | N/A | $2,000 |

[5] These are the per diem and expense rates for the Los Angeles, CA metropolitan area, of which Long Beach is part, as determined by the United States General Accounting Office. The rates quoted are those in effect for Fiscal Year 2015. See http://www.gsa.gov/portal/category/100120.

| | | | | | |
|---|---|---|---|---|---|
| Guadalajara, Mexico, and other parts of Mexico[6] | 60 | $100/hr | $6,000 | $1776<br>Hotel: $816 (8 nights @ $102/night)<br>Meals and Incidental Expenses: $460 (8 days @ $65/day)<br>Airfare: $500 | $7776 |
| | | | | | |
| | | | | **Total:** | $20,016 |

These estimates are not inclusive of all of expenses that will be required, but rather a best estimate.

[6] Foreign per diem rates for lodging and meals/incidentals are established monthly by the Office of Allowances, U.S. Department of State for the reimbursement of U.S. Government civilians traveling on official business in foreign areas. See http://aoprals.state.gov/content.asp?content_id=184&menu_id=78. The lodging and the meals & incidentals rates quoted by the Office of Allowances for the month of November 2014. While the State Department's Guadalajara's per diem hotel rate is $161/night and the meals/incidentals per diem is $79/day, in the interest of economy, we ask that this court reimburse expenses at the much lower overall Mexico rate.

* * *

**EXHIBIT "A"**

**CV of Nicole VanToorn**

THIS DOCUMENT HAS BEEN REDACTED
IN ITS ENTIRETY

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**EXHIBIT "B"**

**Affidavit of Jose REDACTED**

* * *

**Republica de Honduras**

Secretaria De Relaciones Exteriores
De La Republica De Honduras

**Apostille Oficial**

Convention de la Haye du 5 Octobre 1961

En Honduras el Presente Documento públic ha sido firmado por:

**LUCILA CRUZ MENENDEZ**

Quien actua en calidad: **SECRETARIA GENERAL**

y lleva sello/ timbre correspondiente a: **CORTE SUPREMA DE JUSTICIA**

Certificado en Tegucigalpa, M.D.C. Honduras, C.A., lunes, 29 de abril de 2013

/s/ Maria Dolores Suazo Suazo
Maria Dolores Suazo Suazo
Asistente de la Secretaria General

* * *

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**SECRETARIA DE LA CORTE**
**SUPREMA DE JUSTICIA**
REPUBLICA DE HONDURAS

AUTENTICA No. 5747-13

La Infrascrita, Secretaria de la Corte Suprema de Justicia CERTIFICA:
Que es auténtica la firma que antecede y dice:

ROBERTO CARLOS GUZMAN VARELA
puesta en su caracter de:

NOTARIO

**Descripcion**:

Quien en Certificado de Autenticidad Serie "C" No. 117623 de fecha 17 de abril de 2013, autentica las firmas de LUIS REDACTED, MARIO REDACTED, JOSE REDACTED, OSCAR REDACTED, JOSE REDACTED, NOLVIA REDACTED, RUTH REDACTED y ZOILA REDACTED, puestas en la misma fecha en las DECLARACIONES a favor de DENNIS HUMBERTO ZELAYA COREA.- Documentos para realizar trámites en Estados Unidos de América.

* * *

/s/ Lucila Cruz Menendez
Lucila Cruz Menendez
Secretaria General

***Colegio de Abogados de Honduras***
***Certificado de Autenticidad***

El infrascrito, Notario, **ROBERTO CARLOS GUZMAN VARELA**, con domicilio en la ciudad de Tegucigalpa, Municipio del Distrito Central, y en tránsito por esta ciudad de San Pedro Sula Departamento de Cortes, inscrito con registro de la Honorable Corte Suprema de Justicia Numero mil cuatrocientos dieciocho (1418) e inscrito en el Ilustre Colegio de Abogados de Honduras con carnet numero tres mil ochocientos ochenta y ocho (3888). Con oficina profesional en la Residencial Palma Real, bloque k, casa 82, Comayagüela, Municipio del Distrito Central, **CERTIFICA**: Que las fermas que calzan en los documentos denominados Declaraciones de fecha diecisiete de abril del presente año y que corresponden a: 1) LUIS REDACTED, con cedula de identidad número REDACTED; 2) MARIO REDACTED, con cedula de identidad número REDACTED, 3) JOSÉ REDACTED, con cedula de identidad número REDACTED, 4) OSCAR REDACTED, con cedula de identidad número REDACTED, 5) JOSÉ REDACTED, con cedula de identidad número REDACTED, 6) NOLVIA REDACTED, con cedula de identidad número REDACTED, 7) RUTH REDACTED, con cedula de identidad número REDACTED, 8) ZOILA REDACTED, con cedula de identidad número REDACTED, **SON AUTHENTICAS**: por haber sido puestas en mi presencia y haberse identificado con su respectivo documento legal correspondiente.- **DOY FE**.

Yo JOSE REDACTED, mayor de edad, con Identidad numero REDACTED, residente en laCiudad de San Pedro Sula, en el pleno goce de mes facuetades mentales, libre y espontáneamente rindo la siguiente declaracion, asegurando que es cierto lo que en ella expreso.

1. Soy hermano de Zoela Corea, la madre de Dennis Zelaya. Soy como 4 años mayor que Denniscuando el era pequeño lo sacaba a pasear.
2. Cuando era ya un adolescente como de 12 años el y su familia se traseadaron a vivlr a la Ciudad de San Pedro Sula. Sus padres eran estrictos y siempre estaban al cuidado de sus hijos; les enseñaban a Dennis y sus hermanastrabajar en los negocios que tenian.
3. Yo recuerdo que Dennis siempre estudlaba y jugaba el futbol. El estuvo en un equipo de futbol y pasaba mucho tiempo practicando con sus compañeros.
4. Salfamos a pasear a bares y tomábamos cervezas, pero todo dentro de lo normal. Nunca mire a Dennis comportarse agresivo, como toda persona tiene su carácter pero siempre un chico normal; todo era diversión sana.
5. Dennis siempre sabia comportarse bien en todos los lugares donde ba.
6. Después de un tiempo Dennis se fue pare los Estados Unidos. Cuando yo viajaba para ese pais, me hospedaba en su apartamento por un lapso de 15 dias mientras me trasladaba a New York. Durante ese tiempo pude observar

que Dennis habia cambiado un poco; el se miraba preocupado y estresado, perono supe porque, cuando uno está en otro pais extraña a su familia.

7. Dennis vivia en un lugar que se llama Long Beach, California; en esa zona hablan muchas personas de la Colonia Rivera Hernández.
8. Dennisse preocupaba por sus hijos y mantenia comunicación con ellos y los apoyaba desde allá.
9. Dennis en los Estados Unidos trabajaba en la construcción con contratistas o lo que encontraba. También, recuerdo que le gustaba salir mucho a fiestas con diferentes amistades.
10. Estando yo en New York, cuando me entere de la noticia por television de lo que estaba pasando con Dennis. La situación fue duro y su madre sufrio mucho.
11. Desde ese momenta he estado en la disposicion de atestiguar de estos hechos, pero no tuve contacto con el equipo de defensa que el tenia.

Hablendo leido el contenido de esta declaración, firmo la presente a los 17 dias del mes de abril de dos mil trece.

/s/ Jose REDACTED
JOSE REDACTED

Por medea de la presente, doy de que la firma que antecede es autenticapor haber sido puesta en mi presencia.

* * *

I, Suzana Trevino, declare under the penalty of perjury that I understand the Spanish language and the English language, and that, to the best of my knowledge and belief, the following statements in the English language have the same meanings as the statements in the Spanish language in the Affidavit of Jose REDACTED, signed and notarized on April 17, 2013.

I, JOSE REDACTED, of legal age, identification number REDACTED, resident of the city of San Pedro Sula, in full possession of my mental faculties, freely and spontaneously give the following statement, ensuring that what I express is true,

1. I am a brother of Zoila Corea, Dennis Zelaya's mother. I am about 4 years older than Dennis. When he was little, I would take him on walks.
2. When he was an adolescent around 12 years old, Dennis and his family moved to the city of San Pedro Sula. His parents were strict and always took care of their children; they taught Dennis and his sisters to work in the businesses that they had.
3. I remember that Dennis was always studying and playing soccer. He was on a soccer team and spent a lot of time practicing with his teammates.
4. We went out to bars and drank beer, but always within a normal amount. I never saw Dennis behave aggressively, as every person has his own character; but Dennis was always a normal guy, everything was healthy fun.

5. Dennis always knew to behave well everywhere he went.
6. After a while, Dennis left for the United States. When I traveled to that country, I stayed in his apartment for a period of 15 days while I was moving to New York. During that time, I could see that Dennis had changed a bit. He looked worried and stressed out, but I didn't know why, when one is in another country one misses one's family.
7. Dennis lived in a place called Long Beach, California; in this area there were many people from Colonia Rivera Hernández.
8. Dennis was worried about his children, maintaining communication with them and supporting them from there.
9. In the United States, Dennis worked in construction with contractors or in whatever he could find. Also, I recall that he liked to go out to parties a lot with different friends.
10. While I was in New York, I heard the news on the television of what was going on with Dennis. The situation was hard and his mother suffered greatly.
11. Since that time I have been willing to testify to these facts, but I had no contact with the defense team that Dennis had.

Having read the content of this declaration, signed the 17th day of April, 2013.

/s/ Jose REDACTED
JOSE REDACTED

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

/s/ Suzana Trevino
Suzana Trevino

Signed and sworn before me this 29 day of Sept., 2014.

/s/ Gloria A. Flores
Notary Public, State of Texas

My commission expires 1/26/2015

* * *

**EXHIBIT "C"**

**Affidavit of Nolvia REDACTED**

* * *

**Republica de Honduras**

Secretaria De Relaciones Exteriores
De La Republica De Honduras

**Apostille Oficial**

Convention de la Haye du 5 Octobre 1981

En Honduras el Presente Documento públic ha sido firmado por:

**LUCILA CRUZ MENENDEZ**

Quien actua en calidad: **SECRETARIA GENERAL**

y lleva sello/ timbre correspondiente a: **CORTE SUPREMA DE JUSTICIA**

Certificado en Tegucigalpa, M.D.C. Honduras, C.A., lunes, 29 de abril de 2013

/s/ Maria Dolores Suazo Suazo
Maria Dolores Suazo Suazo
Asistente de la Secretaria General

* * *

**SECRETARIA DE LA CORTE**
**SUPREMA DE JUSTICIA**
REPUBLICA DE HONDURAS

AUTENTICA No. 5747-13

La Infrascrita, Secretaria de la Corte Suprema de Justicia CERTIFICA:
Que es auténtica la firma que antecede y dice:

ROBERTO CARLOS GUZMAN VARELA
puesta en su 325ealizer325 de:

NOTARIO

**Descripcion**:

Quien en Certificado de Autenticidad Serie "C" No. 117623 de fecha 17 de abril de 2013, autentica las firmas de LUIS REDACTED, MARIO REDACTED, JOSE REDACTED, OSCAR REDACTED, JOSE REDACTED, NOLVIA REDACTED, RUTH REDACTED y ZOILA REDACTED, puestas en la misma fecha en las DECLARACIONES a favor de DENNIS HUMBERTO ZELAYA COREA. Documentos para ealizer trámites en Estados Unidos de América.

* * *

/s/ Lucila Cruz Menendez
Lucila Cruz Menendez
Secretaria General

***Colegio de Abogados de Honduras***
***Certificado de Autenticidad***

El infrascrito, Notario, **ROBERTO CARLOS GUZMAN VARELA**, con domicilio en la ciudad de Tegucigalpa, Municipio del Distrito Central, y en tránsito por esta ciudad de San Pedro Sula Departamento de Cortes, inscrito con registro de la Honorable Corte Suprema de Justicia Numero mil cuatrocientos dieciocho (1418) e inscrito en el Ilustre Colegio de Abogados de Honduras con carnet numero tres mil ochocientos ochenta y ocho (3888). Con oficina profesional en la Residencial Palma Real, bloque k, casa 82, Comayagüela, Municipio del Distrito Central, **CERTIFICA**: Que las fermas que calzan en los documentos denominados Declaraciones de fecha diecisiete de abril del presente año y que corresponden a: 1) LUIS REDACTED, con cedula de identidad número REDACTED; 2) MARIO REDACTED, con cedula de identidad número REDACTED, 3) JOSÉ REDACTED, con cedula de identidad número REDACTED, 4) OSCAR REDACTED, con cedula de identidad número REDACTED, 5) JOSÉ REDACTED, con cedula de identidad número REDACTED, 6) NOLVIA REDACTED, con cedula de identidad número REDACTED, 7) RUTH REDACTED, con cedula de identidad número REDACTED, 8) ZOILA REDACTED, con cedula de identidad número REDACTED, **SON AUTHENTICAS**: por haber sido puestas en mi presencia y haberse identificado con su respectivo documento legal correspondiente.- **DOY FE**.

Yo NOLVIA REDACTED, mayor de edad, con identidad No. REDACTED residente en la Ciudad de

San Pedro Sula, en el pleno goce de mis facultades mentales, libre y espontáneamente rindo la siguiente declaración, asegurando que es cierto lo que en ella expreso.

1. Soy hermanade Dennis Zelaya con una diferencia de l0años menor que él. Cuando éramos pequeños,vivimos con nuestros padres y hermanos en la Ciudad de Tegucigalpa.
2. Durante ese tiempo, Dennis y mis hermanas asistían a la escuela y ayudaban a nuestros padres a atender el negocio que teníamos en la casa. Después nos trasladamos a la Ciudad de san Pedro Sula.
3, Dennis siempre fue chistoso yalegre. Nos cuidaba era protector y jugaba con nosotros.
4. Con sus amigos tenia carácter firme, pero se llevaba bien con ellos. Les ayudaba cuando lo necesitaban, confiaba en ellos, jugaba futbol y caminaba en su moto.
5. Le gustaba hater ejercicio, y a mi me gustaba verio cuando lo hacia. El me llevaba en su moto y me enseño a usarla.
6. Cuando Dennis regresóla primera vez de los Estados Unidos, venía muy sensible y no era el mismo por lo que había sufrido en el viaje; se veía muy delgado. Cuando se fue por segunda vez yo ya tenia 15 años.
7. Atendía a sus hijos y le compraba a Dilbert todo. Llevaba a los niños a la casa y las fotos de ellos.
8. Crecimos en un ambíent tranquilo. Cuando Dennis estaba grande, trabajo en otros lugares

afuera de la casa. Salía con sus amigos a reuniones y tomaba cerveza, pero no frente a nosotros.

9. Con las personas adultas, Dennis siempre fue respetuoso y colaborador.

10. Mis padres siempre se preocuparon para que fuéramos personas de bien, que estudiáramos y nos superáramos porque ellos solo tuvieron la oportunidad de estudiar algunos años de educatión primaria.

11. Puedo describir a Dennis como una persona amable, servicial, trabajador, orgulloso en algunas cosas, pero siempre fue bondadoso.

12. Cuando recibimos la noticia que Dennis estaba detenido, fue muy triste para la familia. Buscamos ayuda en todas partes, realizamos actividades con miembros de la comunidad y de la iglesia para recaudar dinero y para que nuestra madre viajara a los Estados Unidos.

13. Yo tuve que viajar a Tegucigalpa para iniciar mis estudios en la universidad, pero estaba impactada y profundamente triste y no pude continuar mis estudios. Mis hermanas y mi madre decidieron traerme neuvamente a San Pedro Sula así podia ayudar en las gestiones para ayudar a mi hermano. Mientras tanto mi madre y mis hermans trataban de obtener la visa Americana, per fue negada. En ese momento acudimos a Relaciones Exteriores y nos brindaron la colaboración necesaria para poder obteneria.

14. Si el equipo de defensa en aquel momento me hubiesen preguntado acerca de Dennis, hubiera estado dispuesta a testiguar sobtre la vida de Dennis aqui en Honduras.

Habiendo leído el contenido de estra declaración, firmo la presente a los 17 días del mes de abril de dos mil trece.

/s/ Nolvia REDACTED
NOLVIA REDACTED

* * *

I, Suzana Trevino, declare under the penalty of perjury that I understand the Spanish language and the English language, and that, to the best of my knowledge and belief, the following statements in the English language have the same meanings as the statements in the Spanish language in the Affidavit of Nolvia REDACTED, signed and notarized on April 17, 2013.

I, NOLVIA REDACTED, of legal age, Identification number REDACTED, resident of the city of San Pedro Sula, in full possession of my mental faculties, freely and spontaneously give the following statement, ensuring that what I express is true.

1. I am Dennis Humberto Zelaya's sister, 10 years younger than he. When we were children, we lived with our parents and siblings in the city of Tegucigalpa.
2. During this time, Dennis and my sisters attended school and helped our parents with the business we ran out of our home. Thereafter, we moved to the city of San Pedro Sula.
3. Dennis had always been a jokester and cheerful. He took care of us, he was our protector and he played with us.
4. Among his friends, he had a firm character, but he got along well with them. He helped them when they needed it, he confided in them, played football and rode his motorcycle.
5. He enjoyed exercising and I enjoyed watching him. He would take me for rides on his motorcycle and taught me to use it.

6. When Dennis returned from the United States for the first time, he was very sensitive and was not the same person as a result of what he suffered on the trip; he was very thin. When he left for the second time, I was already 15 years old.

7. He cared for his children and he bought Dilbert everything. He would bring his children to our house as well as photos of them.

8. We grew up in a tranquil environment. When Dennis was older, he worked in other places outside of our home. He went out with his friends to parties and drank beer, but never in front of us.

9. With adults, Dennis was always very respectful and helpful.

10. My parents always took pains to ensure that we were good people that we would study and overcome because they only had the opportunity to study for a few years during elementary school.

11. I would describe Dennis as a lovable, helpful, hard-working, proud in some regards, but always generous person.

12. When we received the news that Dennis was imprisoned, it was very sad for our family. We searched for help everywhere, coordinated activities with members of the community and church to raise funds and so our mother could travel to the United States.

13. I had to travel to Tegucigalpa to begin my university studies, but I was heavily impacted and saddened and could not continue my studies. My sisters and mother decided to bring me back to San Pedro Sula so that I could help with the efforts to help my brother. During all this, my mother and sisters tried to obtain American visas, but were denied. At this point, we went to the Department of Foreign Relations and they extended the help necessary to obtain it.

14. If Dennis's defense team had at that time asked me about Dennis, I would have been ready to testify regarding Dennis's life here in Honduras.

Having read the content of his declaration, signed the 17th day of April, 2013.

/s/ Nolvia REDACTED
NOLVIA REDACTED

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

/s/ Suzana Trevino
Suzana Trevino

Signed and sworn before me this 29 day of Sept., 2014.

/s/ Gloria A. Flores
Notary Public, State of Texas

My commission expires 1/26/2015

* * *

**EXHIBIT "D"**

**Affidavit of Mario REDACTED**

* * *

**Republica de Honduras**

Secretaria De Relaciones Exteriores
De La Republica De Honduras

**Apostille Oficial**

Convention de la Haye du 5 Octobre 1981

En Honduras el Presente Documento públic ha sido firmado por:

**LUCILA CRUZ MENENDEZ**

Quien actua en calidad: **SECRETARIA GENERAL**

y lleva sello/ timbre correspondiente a: **CORTE SUPREMA DE JUSTICIA**

Certificado en Tegucigalpa, M.D.C. Honduras, C.A., lunes, 29 de abril de 2013

/s/ Maria Dolores Suazo Suazo
Maria Dolores Suazo Suazo
Asistente de la Secretaria General

* * *

**SECRETARIA DE LA CORTE**
**SUPREMA DE JUSTICIA**
REPUBLICA DE HONDURAS

AUTENTICA No. 5747-13

La Infrascrita, Secretaria de la Corte Suprema de Justicia CERTIFICA:
Que es auténtica la firma que antecede y dice:

ROBERTO CARLOS GUZMAN VARELA
puesta en su ealizer de:

NOTARIO

**Descripcion**:

Quien en Certificado de Autenticidad Serie "C" No. 117623 de fecha 17 de abril de 2013, autentica las firmas de LUIS REDACTED, MARIO REDACTED, JOSE REDACTED, OSCAR REDACTED, JOSE REDACTED, NOLVIA REDACTED, RUTH REDACTED y ZOILA REDACTED, puestas en la misma fecha en las DECLARACIONES a favor de DENNIS REDACTED.- Documentos para ealizer trámites en Estados Unidos de América.

* * *

/s/ Lucila Cruz Menendez
Lucila Cruz Menendez
Secretaria General

***Colegio de Abogados de Honduras***
***Certificado de Autenticidad***

El infrascrito, Notario, **ROBERTO CARLOS GUZMAN VARELA**, con domicilio en la ciudad de Tegucigalpa, Municipio del Distrito Central, y en tránsito por esta ciudad de San Pedro Sula Departamento de Cortes, inscrito con registro de la Honorable Corte Suprema de Justicia Numero mil cuatrocientos dieciocho (1418) e inscrito en el Ilustre Colegio de Abogados de Honduras con carnet numero tres mil ochocientos ochenta y ocho (3888). Con oficina profesional en la Residencial Palma Real, bloque k, casa 82, Comayagüela, Municipio del Distrito Central, **CERTIFICA**: Que las fermas que calzan en los documentos denominados Declaraciones de fecha diecisiete de abril del presente año y que corresponden a: 1) LUIS REDACTED, con cedula de identidad número REDACTED; 2) MARIO REDACTED, con cedula de identidad número REDACTED, 3) JOSÉ REDACTED, con cedula de identidad número REDACTED, 4) OSCAR REDACTED, con cedula de identidad número REDACTED, 5) JOSÉ REDACTED, con cedula de identidad número REDACTED, 6) NOLVIA REDACTED, con cedula de identidad número REDACTED, 7) RUTH REDACTED, con cedula de identidad número REDACTED, 8) ZOILA REDACTED, con cedula de identidad número REDACTED, **SON AUTHENTICAS**: por haber sido puestas en mi presencia y haberse identificado con su respectivo documento legal correspondiente.- **DOY FE**.

Yo MARIO REDACTED, mayor de edad, con identidad numero REDACTED, residente en la

Ciudad de San Pedro Sula, en el pieno goce de mis facuitades mentales, libre y espontáneamente rindo la siguiente declaración, asegurando que es cierto lo que en ella expreso.

1. Soy primo de Dennis Zelaya por parte del Señor Francisco Blaz Zelaya, padre de el.
2. Cuando tenia como 13 años, me traslade por un periodo corto de tiempo de Danlf hacia Tegucigalpa pars realizar estudios y vivi en la casa de los padres de Dennis.
3. Yo soy mayor de edad de Dennis, con una diferencia como de 5 o 6 años. El era un niño con un comportamiento normal.
4. Lo padres de Dennis siempre estaban trabajando. Su padre ha sido estricto, pero siempre han sido una familia con buenas relaciones, aun cuando mi tío en ese momento tenia dos familias compartía dos hogares diferentes.
5. Cuando Dennis o sus hermanos desobedecían su padre los castigaba con una fja (cinturón).
6. Cuando Dennis tenía como 12 años, se trasiadaron a vivir a la Colonia Rivera Hernández en San Pedro Sula, donde siempre tenían negocio en casa.
7. Como la familia de Dennis tenían negocio de abarrotería y casa de empeño ymantenían relaciones cordiales con sus vecinos.
8. Durante ese tiempo Dennis, le ayudaba a sus padres en el negocio; asistía al colegio, practicaba futbol y como todo muchacho de su edad salía con sus amigos a fiestas.

9. Tuve la experiencia de viajar a los Estados Unidos con Dennis en su segundo viaje a esepeís. Llegamos hasta Guadalajara, Mexico, donde trabajamos con pastor de iglesia Testigos de Jehováen la Jardinería por unos meses. Alquilábamos una habitación donde luego la dueña viendo nuestra buena conducta nos hospedo en la casa de elle. Durante ese tiempo, continuamos trabajando con el pastor. Después de dos meses, tomé la decisión de regresar a Honduras, y Dennis continuo su viaje hacia los Estados Unidos.

10. Dennis deseaba viajar a los Estados Unidos pare mejorar sus condiciones de vida.

11. Recuerdo que el padre de Dennis tuvo un problema con un vecino que vivía en la esquina opuesta de la casa. Ambos tenían carácter fuerte y hubo una discusión en la quelos dosestaban armados. De acuerdo a lo expresado por la familia que mi tío disparo en defensa propia, lamentablemente el vecino falleció.

Habiendo leído el contenido de esta declaración, firmo la presente a los _17_ dias del mes do abril de dos mil trece.

/s/ Mario REDACTED
MARIO REDACTED

* * *

I, Suzana Trevino, declare under the penalty of perjury that I understand the Spanish language and the English language, and that, to the best of my knowledge and belief, the following statements in the English language have the same meanings as the statements in the Spanish language in the Affidavit of Mario REDACTED, signed and notarized on April 17, 2013.

I, MARIO REDACTED, of legal age, Identification number REDACTED, resident of the city of San Pedro Sula, in full possession of my mental faculties, freely and spontaneously give the following statement, ensuring that what I express is true.

1. I am a cousin of Dennis Zelaya, on his father Francisco Blaz Zelaya's side of the family.
2. When I was around 13 years old, I moved from Danli to Tegucigalpa to continue my studies and lived in Dennis's parents' house for a short period of time.
3. I am older than Dennis by 5 or 6 years. He was always a boy with normal behavior.
4. Dennis's parents were always working. His father was strict, but they have always been a family that got along well, even at that time when my uncle had two families and shared two different households.
5. When Dennis or his sisters disobeyed their father, he punished them with a belt.
6. When Dennis was about 12 years old, the family moved to Colonia Rivera Hernández in San Pedro Sula, where they always had a business in the home.

7. Dennis's family ran a grocery business and a pawn shop and had friendly relations with their neighbors.

8. During that time, Dennis helped his parents in the business; he was also attending school, practicing soccer and like any boy his age, he went out to parties with his friends.

9. I had the experience of traveling to the United States with Dennis on his second trip to that country. We reached Guadalajara, Mexico, where we worked with the pastor of a Jehovah's Witnesses church, gardening for several months. We were renting a room there where the owner, seeing our good behavior, then lodged us in her home. During that time, we continued working with the pastor. After two months, I made the decision to return to Honduras, and Dennis continued his journey to the United States.

10. Dennis wanted to travel to the United States to improve his living conditions.

11. I remember that Dennis's father had a problem with a neighbor who lived on the corner opposite of their house. Both men had strong characters and there was a discussion in which the two were armed. According to the views expressed by the family, my uncle shot the man in self-defense. Regrettably, the neighbor died.

Having read the content of this declaration, signed the 17th day of April, 2013.

/s/ Mario REDACTED
MARIO REDACTED

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

/s/ Suzana Trevino
Suzana Trevino

Signed and sworn before me this 29 day of Sept., 2014.

/s/ Gloria A. Flores
Notary Public, State of Texas

My commission expires 1/26/201

**IN THE**
**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS,**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| **CARLOS MANUEL AYESTAS, a/k/a Dennis Humberto Zelaya Corea,** **Petitioner,** | § | |
| **v.** | § | **USDC No. 4:09-cv-2999** |
| **WILLIAM STEPHENS, Director, Texas Department of Criminal Justice Correctional Institutions Division,** **Respondent.** | § | **Capital Case** |

**PETITIONER'S MOTION FOR LEAVE TO FILE *EX PARTE* AND UNDER SEAL A MOTION FOR FUNDING FOR ANCILLARY SERVICES IN ACCORDANCE WITH 18 U.S.C. § 3599(f) (Opposed Motion)**

NOW COMES, Petitioner, Dennis Humberto Zelaya Corea ("Mr. Zelaya"), under the name Carlos Manuel Ayestas, in accordance with 18 U.S.C. § 3599(f), and requests leave to file *ex parte* and under seal a motion for funding for ancillary services to assist in the litigation of the issues before the Court. Mr. Zelaya would show the Court the following:

## I. Introduction

This case was remanded to this Court by the Fifth Circuit to reconsider Mr. Zelaya's defaulted ineffective assistance of counsel ("IATC") claims and whether he could excuse the default under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). The parties have presented supplemental briefs concerning the impact of these cases on the issues in this case. Mr. Zelaya argued that further factual development is necessary before this Court may adjudicate the issues of cause and prejudice and the underlying merits of the IATC claims.

Accordingly, Mr. Zelaya seeks funding for ancillary services to assist in the necessary factual development. Mr. Zelaya seeks to file his motion for such services *ex parte* and under seal. In accordance with § 3599 and the procedure set forth in *Dowthitt v. Johnson*, No. H-98-3282, 1998 WL 1986954, at *2-*3 (S.D. Tex., Dec. 2, 1998), he files this motion in order to make a "proper showing . . . concerning the need for confidentiality." 18 U.S.C. § 3599(f).

## II. Request to Proceed *Ex Parte* and Under Seal

A. Mr. Zelaya has a statutory right to the provision of ancillary services under 18 U.S.C. § 3599(f) when those services are reasonably necessary to ensure adequate representation in complex capital litigation.

Federal statutory law provides indigent persons a right to "adequate representation" in any post-conviction proceeding under 28 U.S.C. § 2254 seeking to vacate a death sentence. 18 U.S.C. §

3599(a)(2). Adequate representation includes a statutorily mandated right to an attorney, *id*., and the furnishing of investigative, expert, or other reasonably necessary services "upon a finding that . . . [such] services are reasonably necessary for the representation of the defendant." 18 U.S.C. § 3599(f). In *McFarland v. Scott*, the Supreme Court made clear that the right to adequate representation through counsel "reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'" 512 U.S. 849, 855 (1994) (quoting 21 U.S.C. § 848(q)(7) (re-codified without substantial change as 18 U.S.C. § 3599(d)). The right to counsel "necessarily includes a right for that counsel meaningfully to research and present a defendant's . . . claims." *Id*. at 858.

As developed more fully in *Petitioner's Brief on Remand from the Fifth Circuit Concerning the Effect of* Martinez v. Ryan *and* Trevino v. Thaler *on the Issues in this Case* and *Petitioner's Reply to Respondent's Supplemental Briefing Addressing the Impact of* Martinez v. Ryan *and* Trevino v. Thaler, Mr. Zelaya must establish two layers of ineffective assistance of counsel—both at the state habeas and trial levels—in order to establish cause and prejudice under *Martinez* and *Trevino* and ultimately to prevail on the underlying IATC claims. This necessarily requires that counsel conduct the investigation that his prior counsel failed to undertake, which is itself a daunting task given the nature of the claims and the seriousness of the penalty. Prior to *Martinez* and *Trevino*, courts in this circuit routinely denied funding for procedurally

defaulted IATC claims because ineffective assistance of state habeas counsel could never justify federal review of such claims. *See Petitioner's Reply to Respondent's Supplemental Briefing*, at 7-8. This made sense under prior law because any factual development would only service an otherwise futile effort in light of the fact that federal review was precluded. *Martinez* and *Trevino* have undermined this justification and have paved the way for fruitful and reasonably necessary investigation and other ancillary services. *Id.* at 8-10.

As described in greater detail in the pleadings before this Court, Mr. Zelaya has been diagnosed with schizophrenia, undifferentiated type. Though the diagnosis occurred after his arrival on death row, the nature of schizophrenia progresses through a series of phases leading up to the psychotic episode that is both sufficiently serious and enduring to justify a diagnosis. Specifically, the prodromal phase of the disease can precede the diagnosis for many years and is often characterized by serious mental impairments. Mr. Zelaya also has a long history of drug and alcohol abuse. Mr. Zelaya left his home in Honduras when he was 18 and spent considerable time in both California and Texas. It is likely that he exhibited both mental illness and the development of substance abuse issues during this timeframe. Based on the pleadings and the evidence before the Court, because there is ample "reason to believe" that if Mr. Zelaya is afforded the opportunity to develop his claims fully through further factual development he will demonstrate that he is ultimately entitled to relief, the provision of resources under § 3599(f) are both reasonably necessary and required. *Petitioner's Reply to*

*Respondent's Supplemental Briefing*, at passim. *See In re Hearn*, 376 F.3d 447, (5th Cir. 2004); *Patterson v. Johnson*, No. 3:99-cv-808-G, 2000 WL 1234661, *2 (N.D. Tex., Aug. 31, 2000) (not designated for publication). *See generally Harris v. Nelson*, 394 U.S. 286, 300 (1969).

B. Mr. Zelaya has a need for confidentiality in presenting his request for investigative assistance to this Court.

Under § 3599(f), this Court may not consider any "ex parte proceeding, communication, or request . . . unless a proper showing is made concerning the need for confidentiality." 18 U.S.C. § 3599(f). In *Dowthitt v. Johnson*, No. H-98-3282, 1998 WL 1986954 (S.D. Tex., Dec. 2, 1998), the Court adopted a procedure for defendants to follow in seeking *ex parte* funding requests under § 3599(f):

> The petitioner must file and serve a brief motion seeking generally authorization for investigative or expert expenses, and must include a short case-specific statement of the need for confidentiality. The statement of need for confidentiality merely must identify generically the type of services needed and the broad issue or topic (*e.g.*, innocence) for which the services are necessary. Simultaneously, the petitioner must file *ex parte* and under seal his detailed application for authorization for the investigator or expert, and must estimate the amount of fees or expenses likely to be incurred. The petitioner must provide factual support for the funding request. The motion, but not the application with supporting materials, must be served on the respondent.

> If the Court concludes that the petitioner has established good cause for confidentiality as required by [§ 3599(f)], the Court will maintain the application (and supporting materials) under seal and will consider the merits of the request. Otherwise, the Court will give the petitioner the option of (i) withdrawing the application and having all associated materials returned to the petitioner or (ii) filing the application publicly and serving a copy on the respondent. The respondent will not be given an opportunity to comment on the detailed application or issues raised therein unless the Court so orders.

*Id.* at *2 (relying upon and adopting procedure set out in *Mitcham v. Calderon*, No. C-94-2854 (N.D. Cal., Dec. 20, 1996)). Other federal district courts in Texas have similarly applied this standard, and it appears to be the extant procedure applied in the Southern District of Texas. *See Patrick v. Johnson*, 37 F. Supp. 2d 815, 816 (N.D. Tex. 1999) (adopting procedure set out in *Dowthitt*). *See also Bradford v. Johnson*, 162 F. Supp. 2d 578, 579 n.1 (N.D. Tex. 2001) (citing *Patrick* for use of procedure outlined in *Dowthitt*); *Shields v. Johnson*, 48 F. Supp. 2d 719, 720-21 (S.D. Tex. 1999) (adopting procedure set out in *Dowthitt*).

Presently, Mr. Zelaya desires to retain the services of an experienced investigator to assist him in investigating the *Wiggins* claim and in gathering the necessary evidence to show cause and prejudice under *Martinez* and *Trevino*. The reasons this investigation is warranted are set out in great detail in Mr. Zelaya's *Brief on Remand from the Fifth*

*Circuit Concerning the Effect of* Martinez v. Ryan *and* Trevino v. Thaler *on the Issues in this Case* and his *Reply to Respondent's Supplemental Briefing Addressing the Impact of* Martinez v. Ryan *and* Trevino v. Thaler. Mr. Zelaya incorporates those arguments in this motion as if fully set forth. Respondent has had ample opportunity to respond to those arguments. Under § 3599(g)(2), this Court may grant up to $7,500 for investigative and expert services without further authorization from the Fifth Circuit. *See* 18 U.S.C. § 3599(g)(2). Mr. Zelaya anticipates that the proposed investigation ultimately will exceed $7,500, as more fully explained in his *ex parte* and sealed motion for funding.

Beyond this, Mr. Zelaya cannot provide any more detail concerning the nature and scope of the proposed investigation without revealing the details and results of his investigations to date, the types of evidence he desires to secure, and the identity and potential contact information of proposed witnesses, and the identity and nature of services of proposed experts, all of which would enable Respondent to become privy to potentially privileged and confidential information and would require that Mr. Zelaya forego the protections and benefits of the attorney work-product doctrine and force him to reveal his strategies ahead of the presentation of the fully developed IATC claims. In *United States v. Nobles*, 422 U.S. 225 (1975), the Court described the work product privilege expansively:

> At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze

> and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself. Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case.

*Id.* at 238-39. *See also Hickman v. Taylor*, 329 U.S. 495 (1947) (discussing the nature of federal work product protection). Furthermore, revealing more potentially would expose the identity of the person providing the services and the scope and nature of the proposed investigation plan prepared by that person. *See* 2003 ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases, Guideline 4.1(B)(2), *reprinted in* 31 HOFSTRA L. REV. 913 (2003) (recommending that procedures relating to funding requests for ancillary services should be structured so as to preserve confidentiality between counsel and the person providing the services).

As a result, Mr. Zelaya seeks to provide this Court with an expanded discussion of the proposed ancillary services and why they are reasonable and necessary to the litigation of this case in an *ex parte*,

sealed motion, which is being filed contemporaneously with this motion. Mr. Zelaya requests that the Court adopt the procedure outlined in *Dowthitt*, and should the Court determine that he has not made a proper showing under § 3599(f) of the need for confidentiality, that the Court allow him to either withdraw the application and have all associated materials returned to him or file the application publicly and serve a copy on Respondent.

WHEREFORE, PREMISES CONSIDERED, Mr. Zelaya respectfully requests that this Court authorize him to file *ex parte* and under seal, his Application for Authorization for Funding for Ancillary Services to Assist in Preparation of the Claims Before this Court, as well as any supplemental requests, under 18 U.S.C. § 3599(f). Mr. Zelaya also requests any and all other relief to which he may be entitled.

Respectfully submitted,

* * *

/s/ Paul E. Mansur
Attorneys for Petitioner

***Certificate of Conference***

I certify that I discussed the merits of this motion with opposing counsel, Jeremy Greenwell, and Mr. Greenwell informed me that Respondent is opposed to the relief sought.

/s/ Paul E. Mansur

* * *

**IN THE**
**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS,**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| **CARLOS MANUEL AYESTAS, a/k/a Dennis Humberto Zelaya Corea, Petitioner,** | § | |
| **v.** | § | **USDC No. 4:09-cv-2999** |
| **WILLIAM STEPHENS, Director, Texas Department of Criminal Justice Correctional Institutions Division, Respondent.** | § | **Capital Case** |

**ORDER**

Before the Court is Petitioner Carlos Manuel Ayestas's Opposed Motion for Leave to File *Ex Parte* and Under Seal a Motion for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f).

WHEREFORE all things considered, the Motion is **GRANTED**.

The Clerk is directed to keep Petitioner Carlos Manuel Ayestas's Motion for Authorization of Funding for Ancillary Services Under 18 U.S.C. § 3599(f), which will be considered by the Court *ex parte*, under seal. The Clerk may not file the Motion electronically, nor release it to opposing counsel.

ORDERED this _____ day of _____, 2014.

UNITED STATES DISTRICT JUDGE

## APPENDIX JJ

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION**

| | | |
|---|---|---|
| CARLOS AYESTAS, Petitioner, | § | |
| v. | § | |
| WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent. | § | CIVIL ACTION NO. H-09-2999 |

## MEMORANDUM OPINION AND ORDER

Petitioner Carlos Ayestas filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state court conviction and death sentence for capital murder. On January 26, 2011, this court granted the respondent's motion for summary judgment and entered judgment for the respondent. On February 28, 2011, this court denied petitioner's motion to alter or amend the judgment. On February 22, 2012, the Fifth Circuit denied Ayestas' request for a certificate of appealability. Ayestas v. Thaler, No. 11-70004 (5th Cir., Feb. 22, 2012).

On June 6, 2013, the Supreme Court granted certiorari and remanded the case to the Fifth Circuit for reconsideration in light of the Supreme Court's decisions in Martinez v. Ryan, 132 S. Ct. 1309 (2012) (holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute

cause to excuse a procedural default of an ineffective assistance of trial counsel claim), and Trevino v. Thaler, 133 S. Ct. 1911 (2013) (holding that Martinez is applicable to the Texas capital postconviction process). The Fifth Circuit subsequently remanded the case to this court.

The parties have filed supplemental briefing on the effect of Martinez on this case. Having carefully considered Ayestas's petition, the state court record, the parties' submissions, and the applicable law, the court finds that Ayestas fails to establish cause and prejudice to excuse the procedural default of his claims of ineffective assistance of trial counsel. Therefore, the court will deny Ayestas's petition for a writ of habeas corpus on these claims. The reasons for these rulings are set out in detail below.

## I. Background[1]

Ayestas was convicted of capital murder for murdering Santiaga Paneque during the course of committing or attempting to commit robbery or burglary. About two weeks before the murder Ayestas and a friend went to look at a car offered for sale by Anna McDougal, who lived across the street from Paneque. McDougal went inside her house for about 15 minutes while the men inspected the car. When she came back outside, McDougal saw the two men leaving Paneque's house. When she asked what they were doing, the men told McDougal that Paneque called them over to look at some furniture she was trying to sell.

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[1] This statement of facts is repeated from this court's January 26, 2011, Memorandum Opinion and Order granting the respondent's motion for summary judgment.

Paneque's son, Elin, left the house at about 8:30 a.m. on September 5, 1995. He returned home for lunch at 12:23 p.m.[2] and rang the doorbell, but there was no response. He put his key in the doorknob, but noticed that the door was unlocked. Upon entering, he saw that the room was ransacked and items were missing. The rest of the house was in much the same condition. Elin went to the house of a neighbor, Maria Diaz, and called 911. Upon returning to his house, he found his mother's body on the floor of the master bathroom. She had silver duct tape on her ankles. Elin returned to Diaz's house and asked her to go make sure that his mother was dead. Diaz entered the Paneque house and called Ms. Paneque's name. She found Ms. Paneque lying face down on the floor. Her face was a dark color and she was not breathing.

Detective Mark Reynolds of the Harris County Sheriff's Department testified that the house was ransacked but bore no signs of forced entry. Paneque's body was face down in a pool of blood and vomit. Her wrists were bound with the cord from an alarm clock and then wrapped in silver duct tape. She also had duct tape over her eyes and around her neck. Reynolds also testified that it was apparent that Paneque was beaten. Her face was swollen and covered with cuts and bruises. Reynolds showed neighbors photographs of two suspects, and McDougal identified them as the same two men who were in Paneque's house about two weeks before the murder. One of the suspects was Petitioner and the other was Frederico Zaldivar.

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[2] He stated that he specifically noted the time.

An autopsy conducted by Dr. Marilyn Murr, an assistant medical examiner for Harris County, revealed that Paneque suffered multiple blows while she was still alive, resulting in numerous bruises and lacerations. She had fractured bones in her right elbow and neck, and bruises on each side of her pelvic area, just above the hips. An internal examination revealed extensive hemorrhaging in the neck and head. She had another fracture, caused by a "significant amount of force," in the roof of the orbit containing her right eye. Dr. Murr determined that none of these injuries was substantial enough to kill Paneque. The cause of death was asphyxiation due to continual pressure applied to her neck for three to six minutes. Dr. Murr testified that her initial report indicated asphyxiation by ligature strangulation, but she reexamined the evidence shortly before trial at the request of the prosecutor. She then changed her conclusion to "asphyxiation due to strangulation," which allowed for the possibility that a hand or hands might have caused the asphyxia.

Police recovered fingerprints from the crime scene. Two prints recovered from the tape around Paneque's ankles, and two recovered from the roll of tape, matched Ayestas. On cross-examination the defense brought out that the two prints on the tape around Paneque's ankles were only discovered shortly before trial, approximately 20 months after the murder, based on a reexamination undertaken at the prosecutor's request.

Henry Nuila testified that he met Ayestas in mid-September 1995 at Ayestas's sister's house in Kenner, Louisiana. On September 20 an intoxicated

Ayestas told Nuila that he was involved in the murder of a woman in Houston. Ayestas asked Nuila for help in killing the other two participants in the murder because "they had spoken too much." Ayestas told Nuila that, if he declined, Ayestas would kill him. Ayestas brandished a gun. Nuila kept Ayestas talking until Ayestas passed out. Nuila then called the police. They arrested Ayestas, still in possession of the gun. Based on this evidence the jury found Ayestas guilty of capital murder for murdering Paneque during the commission or attempted commission of a burglary, robbery, or both.

During the penalty phase the State presented evidence that Ayestas served time in prison in California and Texas for possession and purchase for sale of narcotics, burglary, and misdemeanor theft. He was also the subject of a California warrant for illegal transportation of aliens. Candelario Martinez testified that three days after the murder Ayestas approached him outside a motel where he was waiting for a friend. After a brief conversation, Ayestas pulled a gun on Martinez and ordered him into one of the rooms. Martinez's friend was also in the room. Ayestas ordered Martinez onto the floor and threatened to kill him. Ayestas and two others took Martinez's personal belongings and forced him into the bathroom, where they again told him that they would kill him. Martinez begged for his life as the three discussed who would kill him. Ayestas finally said that he would let Martinez live, but threatened to kill his family if Martinez told the police. Ayestas and his accomplices left in Martinez's truck.

Based on this evidence, along with the evidence of the brutality of Paneque's murder, the jury found that there is a likelihood that Ayestas would commit future acts of criminal violence posing a continuing threat to society, that Ayestas actually caused Paneque's death or intended to kill her or anticipated that a human life would be taken, and that the mitigating evidence did not warrant a sentence of life imprisonment. Accordingly, the trial court sentenced Ayestas to death.

The TCCA affirmed Ayestas's conviction and sentence, Ayestas v. State, No. 72,928 (Tex. Crim. App. Nov. 4, 1998), and denied his application for habeas corpus relief, Ex parte Ayestas, No. WR-69,674-01 (Tex. Crim. App. Sept. 10, 2008). Ayestas filed a petition for a writ of habeas corpus in this court on September 11, 2009. As discussed above, this court denied the petition and the Fifth Circuit denied a certificate of appealability. This case is now back before this court of remand for reconsideration of several procedurally defaulted claims in light of the Supreme Court's decision in Martinez.

## II. The Applicable Legal Standards

In Martinez the Supreme Court carved out a narrow equitable exception to the rule that a federal habeas court cannot consider a procedurally defaulted claim of ineffective assistance of counsel.

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim . . . where appointed counsel in the initial-review collateral proceeding . . .

> was ineffective under the standards of Strickland v. Washington, 466 U.S. 668 . . . (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Martinez, 132 S. Ct. at 1318.

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the Strickland test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id. at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. Id. at 688. Review of counsel's performance is deferential. Id. at 689.

In the context of a capital sentencing proceeding, "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." Strickland, 465 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

## III. Analysis

### A. Ineffective Assistance of Counsel

Ayestas contends that his counsel rendered ineffective assistance during the penalty phase by failing to investigate and present mitigating evidence of Ayestas's history of mental illness and substance abuse. He argues that trial counsel was ineffective for failing to investigate and develop this evidence, and that habeas counsel was ineffective for failing to investigate the evidence and argue that trial counsel rendered ineffective assistance.

As discussed in this court's original Memorandum Opinion and Order denying Ayestas's petition (Docket Entry No. 19), the state habeas court found that Ayestas did not agree to let counsel contact his family until after jury selection was complete. The court also found that counsel made every effort to contact the family after Ayestas permitted her to do so. The court further found that the defense investigator sent a letter to the family in Honduras on May 29, 1997, six weeks before the penalty phase began. Counsel sent a second letter on June 10, 1997, stating that Ayestas finally agreed to let counsel contact his family. Counsel sent a third letter on July 2, 1997, and faxed a letter to the United States Embassy in Honduras to expedite the family's travel to the United States. Counsel informed the embassy of the need for the family's presence at trial, arranged a July 3, 1997, meeting for the family at the embassy, and included a copy of

the June 10, 1997, letter. The court also found that counsel communicated with the Ayestas family by phone beginning on June 3, 1997. She spoke with Ayestas's mother, explained the situation, and requested the family's presence at trial. Ayestas's mother said she would call back. Counsel heard from the family on June 25, when Ayestas's sister, Somara Zalaya, informed counsel that the family would have difficulty leaving Honduras for the trial. Among the reasons stated were their father's illness and economic reasons. Counsel called the family again on June 26 and 27, and July 2. Ayestas's mother appeared unconcerned and gave evasive responses. Counsel's assistants also noted the mother's apparent lack of concern. The state habeas court further found that counsel informed the Honduran consulate of Ayestas's arrest, indictment, and upcoming trial on June 9, 1997.

Counsel has a duty to investigate possible mitigating evidence. Wiggins v. Smith, 539 U.S. 510 (2003). The record establishes, however, that counsel did attempt to investigate and develop evidence concerning Ayestas's background.

Ayestas instructed counsel not to call his family. Neither the Supreme Court nor the Fifth Circuit has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence. In fact, the Fifth Circuit has held on several occasions that a defendant cannot instruct his counsel not to present evidence at trial and then later claim that his lawyer performed deficiently by following those instructions. In Autry v. McKaskle, 727 F.2d 358 (5th Cir. 1984), the defendant

prevented his attorney from presenting any mitigating evidence during the punishment phase of his capital trial. The Fifth Circuit rejected Autry's claim that counsel was ineffective for heeding his instructions: "If Autry knowingly made the choices, [his lawyer] was ethically bound to follow Autry's wishes." Id. at 362;[3] see also Nixon v. Epps, 405 F.3d 318, 325-26 (5th Cir. 2005) (finding that counsel was not ineffective for failing to present additional mitigating evidence over client's objection: "A defendant cannot block his counsel from attempting one line of defense at trial, and then on appeal assert that counsel was ineffective for failing to introduce evidence supporting that defense."); Roberts v. Dretke, 356 F.3d 632, 638 (5th Cir. 2004) (noting that defendant may not obstruct attorney's efforts, then claim ineffective assistance of counsel); Dowthitt v. Johnson, 230 F.3d 733, 748 (5th Cir. 2000) (finding that counsel was not ineffective for failing to call family members during punishment phase where defendant stated that he did not want family members to testify).[4]

Ayestas now contends that a properly conducted investigation would have uncovered evidence of mental illness and substance abuse. Respondent

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[3] The Autry court also rejected the defendant's claim that counsel was required to request a competency hearing before agreeing to comply with the client's decisions. Id.

[4] Cf. Schriro v. Landrigan, 550 U.S. 465, 475-77 (2007) (stating that, if defendant instructed counsel not to present mitigating evidence, "counsel's failure to investigate further could not have been prejudicial under Strickland"); Amos v. Scott, 61 F.3d 333, 348-49 (5th Cir. 1995) (denying ineffective assistance claim for want of prejudice where defendant "strongly opposed" presenting any witnesses during punishment phase of trial).

points out, however, that Ayestas has not presented any medical records supporting his claim that he suffered from mental illness before his trial. While he submits some medical records from TDCJ, these records were created after Ayestas's conviction. Therefore, Ayestas fails to demonstrate that counsel had any reason to believe that Ayestas suffered from mental illness, or was deficient for failing to conduct an investigation into Ayestas's alleged mental illness.

The record also shows that state habeas counsel retained two investigators. Petitioner's Brief on Remand (Docket Entry No. 40) at Exhibits A and B. In addition to speaking with Ayestas's family, counsel obtained Ayestas's birth certificate and school records, and was aware of his criminal history and history of substance abuse. Id. at 26, Exhibit V. Habeas counsel also had Ayestas evaluated by a psychologist. Habeas counsel raised 16 claims for relief, including 10 claims of ineffective assistance of trial counsel. SH at 2-195. While it may be possible that habeas counsel could have raised an ineffective-assistance-of-trial-counsel claim regarding trial counsel's failure to investigate Ayestas's history of substance abuse, it cannot be said that the failure to do so constituted deficient performance. As the Supreme Court has noted in addressing an ineffective-assistance-of-appellate-counsel claim, counsel are not required to raise every possible non-frivolous claim. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). Moreover, in light of the extremely

brutal nature of Ayestas's crime and Ayestas's history of criminal violence, it is highly unlikely that evidence of substance abuse would have changed the outcome of the sentencing phase of trial or of the state habeas corpus proceeding. Therefore, Ayestas fails to demonstrate ineffective assistance of state habeas counsel and cannot show cause for his procedural default of his claims of ineffective assistance of trial counsel.

**B. Investigative Funding**

Ayestas contends that Martinez entitles him to time and funding to investigate and further develop his ineffective assistance claims, and he filed a motion for funding to hire an investigator to develop additional evidence in support of his ineffective assistance claim. Martinez did not create any new claims for relief or new rights. The decision, by its own terms, serves only to create a limited equitable exception to the longstanding procedural default rule articulated in Coleman v. Thompson, 501 U.S. 722 (1991). Thus, to qualify for investigative funding a petitioner must satisfy the conditions of the funding statute, 18 U.S.C. § 3599(f).

That statute provides that "[u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant[.]" 18 U.S.C.A. § 3599(f). Neither the Supreme Court nor the Fifth Circuit has defined the phrase "reasonably necessary" beyond the statute's plain language. The Fifth Circuit, however, requires a petitioner to show

"that he ha[s] a substantial need" for investigative or expert assistance. Clark v. Johnson, 202 F.3d 760, 768 (5th Cir.), cert. denied, 531 U.S. 831 (2000); see also Fuller v. Johnson, 114 F.3d 491, 502 (5th Cir.), cert. denied, 522 U.S. 963 (1997) ("In light of the statutory language, we first note that Fuller did not show a substantial need for expert assistance."). The Fifth Circuit upholds the denial of funding "when a petitioner has (a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (b) when the sought-after assistance would only support a meritless claim, or (c) when the sought after assistance would only supplement prior evidence." Smith v. Dretke, 422 F.3d 269, 288 (5th Cir. 2005); see also Woodward v. Epps, 580 F.3d 318, 334 (5th Cir. 2009), cert. denied, 130 S. Ct. 2093 (2010).

As discussed above, Ayestas fails to demonstrate that trial counsel was deficient, that there is a reasonable probability that his claimed evidence of substance abuse would have changed the outcome of either his trial or his state habeas corpus proceeding, or that his state habeas counsel was ineffective. Therefore, he fails to demonstrate that the funding he requests is reasonably necessary. Accordingly, Ayestas's motion (Docket Entry No. 49) will be denied.

## IV. Certificate of Appealability

Although Ayestas has not requested a certificate of appealability ("COA"), the court may nevertheless determine whether he is entitled to this relief in light of the court's rulings. See Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny [a]

COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. See Whitehead v. Johnson, 157 F.3d 384, 388 (5th Cir. 1988); see also Hill v. Johnson, 114 F.3d 78, 82 (5th Cir. 1997) ("the district court should continue to review COA requests before the court of appeals does").

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also United States v. Kimler, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.), cert. denied, 531 U.S. 966 (2000). The Supreme Court has stated that

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason

> would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The court has carefully considered Ayestas's argument and concludes that his ineffective assistance of trial claims are foreclosed by clear, binding precedent. The court concludes that under such precedents Ayestas has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). The court therefore concludes that Ayestas is not entitled to a certificate of appealability on his claims.

## V. Conclusion and Order

For the foregoing reasons, it is **ORDERED** as follows:

1. Ayestas's ineffective assistance of counsel claims are denied as procedurally defaulted;
2. No Certificate of Appealability shall issue in this case;
3. Petitioner's Motion for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f) (Docket Entry No. 49) is **DENIED;** and
4. Petitioner's Motion for Leave to File *Ex Parte* and Under Seal a Motion for Funding for Ancillary Services in Accordance with 18 U.S.C. § 3599(f) (Docket Entry No. 48) is **MOOT.**

**SIGNED** at Houston, Texas, on this 18th day of November, 2014.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

## APPENDIX KK

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| CARLOS AYESTAS, Petitioner, | § | |
| v. | § | |
| WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent. | § | CIVIL ACTION NO. H-09-2999 |

## FINAL JUDGMENT

For the reasons set forth in the court's Memorandum Opinion and Order denying petitioner Carlos Ayestas's remanded claims of ineffective assistance of counsel, this action is **DISMISSED WITH PREJUDICE**. Because petitioner Ayestas has not made a substantial showing of the denial of a constitutional right, no certificate of appealability shall issue.

This is a **FINAL JUDGMENT**.

**SIGNED** at Houston, Texas, on this 18th day of November, 2014.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

**APPENDIX LL**

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| CARLOS AYESTAS, Petitioner, | § | |
| v. | § | |
| WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent. | § | CIVIL ACTION NO. H-09-2999 |

**ORDER**

Petitioner Carlos Ayestas filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging his state court conviction and death sentence for capital murder (Document #1). On January 26, 2011, this court granted the respondent's motion for summary judgment and entered judgment for the respondent (Document #20). On February 28, 2011, this court denied petitioner's motion to alter or amend the judgment (Document #22). On February 22, 2012, the Fifth Circuit denied Ayestas' request for a certificate of appealability. Ayestas v. Thaler, No. 11-70004 (5th Cir., Feb. 22, 2012).

On June 6, 2013, the Supreme Court granted certiorari and remanded the case to the Fifth Circuit for reconsideration in light of the Supreme Court's decisions in Martinez v. Ryan, 132 S. Ct. 1309 (2012) (holding that ineffective assistance of state habeas

counsel could, in certain circumstances, constitute cause to excuse a procedural default of an ineffective assistance of trial counsel claim), and Trevino v. Thaler, 133 S. Ct. 1911 (2013) (holding that Martinez is applicable to the Texas capital postconviction process). The Fifth Circuit subsequently remanded the case to this court.

On November 18, 2014, this court entered a Memorandum Opinion and Order finding that no cause existed under Martinez for Ayestas' procedural default of his ineffective assistance of counsel claims (Document #51). The court therefore denied relief on these claims.

On December 16, 2014, Ayestas filed a Motion to Alter or Amend the Judgment (Document #53). On January 14, 2015, he filed a Supplement to Petitioner's Rule 59 Motion to Alter or Amend the Judgment Urging Court to Grant Leave to Amend Original Petition for Writ of Habeas Corpus (Document #55). These motions remain pending.

On January 9, 2015, Ayestas filed a Motion for Leave to Amend Original Petition for Writ of Habeas Corpus (Document #54). On January 14, 2015, he filed a Motion to Stay this case to allow him to return to state court to exhaust a new claim for relief (Document #56). Respondent opposes these motions (Documents #59 and #60).

Ayestas' motions are based on a document his counsel discovered in December of 2014. The document, attached as an exhibit to Ayestas' motion for leave to amend, is a capital murder summary from the District Attorney's file. The document appears to summarize the case and contains the recommendations of several high ranking attorneys

from the District Attorney's office as to whether to seek the death penalty. Under the heading "Aggravating Circumstances," the document states: "A. THE VICTIM IS A HELPLESS 67 YEAR OLD WOMAN KILLED IN HER HOME. B. THE DEFENDANT IS NOT A CITIZEN." The second of these two statements has a line drawn through it. Ayestas now contends that this document shows that the decision to seek the death penalty was motivated by Ayestas' national origin in violation of his rights under the cruel and unusual punishment clause of the Eighth Amendment and the equal protection and due process clauses of the Fourteenth Amendment.

**A. Motion for Leave to Amend**

Rule 15(a) (2) of the Federal Rules of Civil Procedure provides that a court should freely grant leave to amend when justice so requires. Ayestas argues that justice requires that he be permitted to raise his new claim based on the newly discovered document.

28 U.S.C. § 2244(b) (2) states that "[a] claim presented in a second or successive habeas corpus application . . . that was not presented in a prior application shall be dismissed" unless certain exceptions apply. Ayestas argues that his claim falls under the exception of 28 U.S.C. § 2244(b) (2) (B), that the factual predicate of the claim could not have been discovered previously through the exercise of due diligence.

While Ayestas contends that he only discovered the document on December 22, 2014, he does not allege that the document could not have been discovered previously through the exercise of due diligence. Specifically, he does not allege that the

prosecutor's file was previously unavailable to him, or that the document was omitted from the file when it was produced. Rather, Ayestas argues only that "the State . . . never made [Ayestas] aware of the memorandum or its contents at any previous time." Motion for Leave to Amend, Document #54, p. 4 n.2. While the State may not actively hide relevant material that may have some exculpatory value, it bears no responsibility to direct the defense toward potentially exculpatory evidence that either is in the possession of the defense or can be discovered through the exercise of reasonable diligence. Rector v. Johnson, 120 F.3d 551, 558-59 (5th Cir. 1997). Ayestas fails to make any showing that this document, which is dated September 19, 1995, could not have been previously discovered through the exercise of reasonable diligence. Therefore, he fails to demonstrate that the claim falls under an exception to the bar on successive petitions. Because it appears that the claim would be futile, justice does not require granting leave to amend.

**B. Motion to Stay**

Ayestas also requests that this court stay proceedings to allow him to raise this unexhausted claim in state court. "[S]tay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless." Rhines v. Weber, 544 U.S. 269, 277 (2005).

The Texas Court of Criminal Appeals will not consider the merits or grant relief on a subsequent habeas application unless the application contains sufficient specific facts establishing the following:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; [or]
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (Vernon Supp. 2002) . The Texas Court of Criminal Appeals applies its abuse of the writ doctrine regularly and strictly. Fearance v. Scott, 56 F.3d 633, 642 (5th Cir. 1995) (per curiam).

As discussed above, Ayestas fails to make any showing that this document could not have been discovered years ago through the exercise of reasonable diligence. As a result, he fails to demonstrate that the factual or legal basis of the claim was previously unavailable. Therefore, it is clear that, under Texas law, the Texas Court of Criminal Appeals would dismiss any petition raising this claim as an abuse of the writ. Because the claim is futile as a matter of Texas law and, as discussed above, would constitute a successive petition if

raised in this court, there is no basis for staying this case.

**C. Conclusion**

For the foregoing reasons, it is **ORDERED** that Petitioner's Motion for Leave to Amend Original Petition for Writ of Habeas Corpus (Document #54) and Petitioner's Motion to Stay and Hold in Abeyance the Proceedings Under *Rhines v. Weber* to Allow Petitioner to Exhaust the New Claims (Document #56) are **DENIED**.

**SIGNED** at Houston, Texas, this 17th day of February, 2015.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

**APPENDIX MM**

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

| | | |
|---|---|---|
| CARLOS AYESTAS, Petitioner, | § | |
| v. | § | |
| WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent. | § | CIVIL ACTION NO. H-09-2999 |

**Memorandum Opinion and Order**

Petitioner Carlos Ayestas filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state court conviction and death sentence for capital murder. On January 26, 2011, this Court granted the respondent's motion for summary judgment and entered judgment for the respondent. On February 28, 2011, this Court denied petitioner's motion to alter or amend the judgment. On February 22, 2012, the Fifth Circuit denied Ayestas' request for a certificate of appealability. Ayestas v. Thaler, No. 11-70004 (5th Cir., Feb. 22, 2012).

On June 6, 2013, the Supreme Court granted certiorari and remanded the case to the Fifth Circuit for reconsideration in light of the Supreme Court's decisions in Martinez v. Ryan, 132 S.Ct. 1309 (2012) (holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute

cause to excuse a procedural default of an ineffective assistance of trial counsel claim), and Trevino v. Thaler, 133 S.Ct. 1911 (2013) (holding that Martinez is applicable to the Texas capital postconviction process). The Fifth Circuit subsequently remanded the case to this Court.

Following supplemental briefing by the parties, the Court, on November 18, 2014, again denied relief. On December 16, 2014, Ayestas filed a motion to alter the judgment. On January 14, 2015, he filed a supplemental motion to alter or amend the judgment.

A motion to alter or amend under Fed.R.Civ.P. 59(e) "must clearly establish either a manifest error of law or must present newly discovered evidence." Schiller v. Physicians Resource Grp., Inc., 342 F.3d 563, 567 (5th Cir. 2003) (internal quotation marks omitted). "Relief under Rule 59(e) is also appropriate where there has been an intervening change in controlling law." Id. Ayestas fails to demonstrate grounds for relief.

Ayestas cites no new evidence or change in controlling law. While Ayestas vociferously disagrees with this Court's interpretation of controlling law and application of that law to the facts of this case, such disagreement does not clearly establish manifest error and Ayestas is not entitled to relief. Moreover, because this Court's finding that Ayestas has not demonstrated manifest error is not debatable among jurists of reason, Ayestas is not entitled to a certificate of appealability from this Order. See Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.), cert. denied, 531 U.S. 966 (2000).

In his supplemental motion, Ayestas seeks to amend his petition to add an equal protection claim based on newly discovered evidence. The newly discovered evidence is not relevant to the ineffective assistance of counsel claims considered by this Court on remand from the Fifth Circuit.

While Ayestas frames his attempt to raise this new claim as merely amending his petition, the new claim is not within the scope of the remand. The remainder of Ayestas' petition has long since been dismissed, with that dismissal affirmed on appeal. Rather than seeking to amend his existing petition, Ayestas' supplemental motion actually seeks leave to file a successive petition.

"Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b) (3)(A); Felker v. Turpin, 518 U.S. 651, 664 (1996) ("The Act requires a habeas petitioner to obtain leave from the court of appeals before filing a second habeas petition in the district court."). "Indeed, the purpose and intent of [28 U.S.C. § 2244(b)(3)(A)] was to eliminate the need for the district courts to repeatedly consider challenges to the same conviction unless an appellate panel first found that those challenges had some merit." United States v. Key, 205 F.3d 773, 774 (5th Cir. 2000) (citing In re Cain, 137 F.3d 234, 235 (5th Cir. 1998)).

This Court is without jurisdiction to consider a successive petition at this late date. See Key, 205 F.3d at 774 ("Accordingly, § 2244(b)(3) (A) acts as a jurisdictional bar to the district court's asserting

jurisdiction over any successive habeas petition until [the circuit court] has granted the petitioner permission to file one.").

Accordingly,

IT IS ORDERED that Petitioner's Motion To Alter Judgment (Docket Entry 53) and Supplemental Motion To Alter Judgment (Docket Entry 55) are **Denied**; and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue.

SO ORDERED

SIGNED this 1st day of April, 2015, at Houston, Texas.

/s/ Sim Lake
Sim Lake
United States District Judge

**APPENDIX NN**

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

No. 15-70015

**FILED**
March 22, 2016
Lyle W. Cayce
Clerk

CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Southern District of Texas

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:

The district court denied Carlos Manuel Ayestas relief from his capital sentence under 28 U.S.C. § 2254. It then denied him investigative assistance under 18 U.S.C. § 3599(f) to develop evidence that might prove his previous attorneys were ineffective. Ayestas appeals these decisions. We AFFIRM.

Separately, after these district court rulings, Ayestas discovered new evidence suggesting his prosecution was based improperly on his national

origin. He moved to amend his Section 2254 application to raise this new claim. The district court denied the motion. The court also denied a certificate of appealability, and so do we.

FACTUAL AND PROCEDURAL BACKGROUND

Carlos Manuel Ayestas[1] was sentenced to death for the murder of Santiaga Paneque, who was killed during a robbery in her home in Houston, Texas, in August 1995. The Texas Court of Criminal Appeals affirmed his conviction and sentence on November 4, 1998.

In December 1998, Ayestas sought state habeas relief. His two court-appointed lawyers raised several claims, including an ineffective assistance of trial counsel ("IATC") claim. Ayestas, through his state habeas lawyers, argued that his trial counsel was ineffective because he failed to secure the attendance of Ayestas's family members from Honduras for sentencing mitigation. According to Ayestas, they "could have testified to [his] good character traits, positive upbringing, good scholastic record, and lack of juvenile or criminal record while growing up in Honduras." Ayestas did not claim that his trial counsel failed to conduct a reasonable investigation into all potentially mitigating evidence.

The State of Texas presented an affidavit from Ayestas's trial counsel in which he asserted that Ayestas ordered him not to contact Ayestas's family. According to trial counsel, Ayestas later relented and allowed him to contact Ayestas's family, either

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[1] Carlos Manuel Ayestas's true name is Dennis Zelaya Corea. We refer to the defendant as. Ayestas because that is the name under which he was charged and convicted.

shortly before or just after jury selection. The family was unable to attend sentencing. Counsel said Ayestas's mother seemed "unconcerned" about her son's trial. The Texas state district court denied relief, holding that Ayestas's trial counsel made reasonable and diligent efforts to secure the attendance of Ayestas's family and was not ineffective. The Texas Court of Criminal Appeals affirmed in 2008.

In 2009, new counsel for Ayestas filed in federal district court an application under 28 U.S.C. § 2254. For the first time, Ayestas asserted the claim that his trial counsel was ineffective by failing to make a reasonable investigation of all potentially mitigating evidence. Ayestas's federal habeas counsel argued that had trial counsel conducted a thorough investigation, he would have uncovered other mitigating evidence. Examples were Ayestas's lack of criminal history in Honduras, that one of his co-defendants in this case was a "bad influence" on him, that Ayestas suffered from schizophrenia, and that he was addicted to drugs and alcohol.

The district court determined that because this claim was not raised in the Texas state habeas proceeding, Ayestas had procedurally defaulted the claim. The court refused to excuse the default because Ayestas had failed to show "cause," as no factor external to Ayestas's defense impeded his state habeas attorneys' ability to present the broader IATC claim. In 2012, we denied Ayestas's request for a certificate of appealability ("COA"). *Ayestas v. Thaler*, 462 F. App'x 474 (5th Cir. 2012).

Shortly thereafter, the Supreme Court decided *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), which held that the ineffectiveness of state habeas counsel in failing to claim IATC may provide cause to excuse a default; if so, prejudice would need to be shown. After *Martinez*, Ayestas filed a motion for rehearing, asking us to vacate our prior judgment. We denied that motion, holding that *Martinez* did not apply in Texas because its procedures were distinguishable. The Supreme Court then extended *Martinez* to Texas in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). The Court vacated and remanded the present case to us for further consideration in light of *Trevino*. *Ayestas v. Thaler,* 133 S.Ct. 2764 (2013). We then remanded to the district court "to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of *Trevino*." *Ayestas v. Stephens,* 553 F. App'x 422 (5th Cir. 2014).

On remand, Ayestas filed a motion for investigative assistance under 18 U.S.C. § 3599(f), requesting a mitigation specialist in order to develop his broader IATC claim. On November 18, 2014, the district court entered a memorandum opinion and judgment, denying Ayestas habeas relief, denying a COA, and denying investigative assistance. The district court determined that neither Ayestas's trial counsel nor his state habeas counsel were ineffective, and thus the broader IATC claim was still procedurally defaulted. It then determined that because Ayestas's underlying IATC claim was still without merit, a mitigation specialist was not "reasonably necessary." On December 16, 2014, Ayestas filed a Federal Rule of Civil Procedure Rule 59(e) Motion to Alter or Amend the Judgment, re-urging many of his prior arguments.

Issues that arose after the district court's November 18 decision are also before us. On December 22, 2014, Ayestas's counsel, while reviewing portions of the prosecution's file at the Office of the District Attorney in Houston, discovered a Capital Murder Summary memorandum, prepared by the prosecution, stating that Ayestas's lack of citizenship was an "aggravating circumstance[]." Ayestas argues this indicates that the prosecution, at least in part, sought capital punishment on the improper basis of national origin.

On January 9, 2015, Ayestas filed a "Motion for Leave to Amend Original Petition for Writ of Habeas Corpus" where he, through Rule 15(e), sought to amend his Section 2254 application to add claims based on this newly discovered memorandum. He argued the state conviction and sentence violated the Equal Protection Clause and the Cruel and Unusual Punishment Clause of the Constitution. On January 14, 2015, Ayestas supplemented his December 16 Rule 59(e) motion to expand the basis upon which the district court should grant the motion.

Realizing the district court would not be able to review his new claims even if it were to grant his Rule 59(e) motion because they were not exhausted in state court, Ayestas, on the same day, filed a motion to stay the federal proceedings until the new claims could be exhausted. Ayestas argued that he had good cause for not presenting these claims previously in state court. On February 17, 2015, the district court denied Ayestas's motions for leave to amend and for a stay. The district court then denied the Rule 59(e) motion on April 1, 2015, and again denied a COA.

## DISCUSSION

The procedural posture requires Ayestas to appeal multiple aspects of the district court's decisions in order for us to reach the merits of his habeas appeal and his new claims.

First, because the district court rendered final judgment by denying Ayestas habeas relief in the November 18 decision and then entered the April 1 order denying Ayestas's Rule 59(e) motion, the final judgment must be vacated before Ayestas may amend his petition and add new claims. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 n.1 (5th Cir. 1981). Ayestas asks us to vacate the judgment so he may amend his petition to include these new claims. Second, Ayestas appeals the part of the February 17, 2015 order denying his motion for leave to amend under Rule 15. Finally, because Ayestas's new claims are unexhausted in state court, he appeals the part of the February 17 order denying his motion for a stay and abeyance.

Generally, under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), we do not have jurisdiction to review a district court's "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" denying an inmate habeas relief unless the inmate first obtains a COA. 28 U.S.C. § 2253(c)(1)(A). While both the district court judge and the relevant court of appeals may issue a COA, the inmate must first seek a COA from the district court. *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 n.5 (2012). The district court denied Ayestas a COA in both its November 18, 2014 and April 1, 2015 decisions. For Ayestas to appeal these two decisions, therefore, we

must first grant him a COA. We grant a COA only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies an applicant's constitutional claims on procedural grounds, as the case here, a COA will issue only if the applicant shows that reasonable jurists would debate whether the district court was correct in its procedural ruling and whether the petition states a valid claim on the merits. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Somewhat separately, however, Ayestas appeals an aspect of the district court's November 18 decision denying him investigative assistance. We do have jurisdiction to review this without first requiring a COA. This is because a COA is only required of appeals of "final orders that dispose of the *merits* of a habeas corpus proceeding." *Harbison v. Bell*, 556 U.S. 180, 183 (2009) (emphasis added). "An order that merely denies a motion to enlarge the authority of appointed counsel (or that denies a motion for appointment of counsel [or assistance]) is not such an order and is therefore not subject to the COA requirement." *Id.* As such, as to the district court's decision to deny Ayestas investigative assistance, we review for abuse of discretion. *See Hill v. Johnson,* 210 F.3d 481, 487 (5th Cir. 2000). "A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States v. Ebron*, 683 F.3d 105, 153 (5th Cir. 2012).

We will discuss first the issues arising from the denial of Ayestas's request for investigative assistance. We will then address the merits of

Ayestas's IATC claim. Finally, we address Ayestas's claim that new evidence required some form of relief.

*I. Investigative Assistance*

As mentioned above, an appeal of a denial of investigate assistance does not require a COA and is reviewed for abuse of discretion. For this particular claim, Ayestas argues the district court should not have examined the merits of his IATC claims until it provided him with a mitigation specialist and allowed the results of that investigation to be presented. Ayestas argues that under *Martinez* and *Trevino*, in order to prove that his prior lawyers were ineffective, he must be allowed to develop and discover what his prior lawyers should have developed or discovered. As Ayestas explains:

> By prematurely deciding that [Ayestas's] IATC claims were facially meritless, without affording resources for factual development under 18 U.S.C. § 3599(f). . . . the district court summarily dismissed [Ayestas's] petition based solely on its review of the allegations contained in the original petition filed in 2009.

Ayestas argues that the merits of the IATC claim cannot rest on the record from the state habeas proceeding, which allegedly is infected with the work of ineffective counsel. Instead, he must be allowed to develop new evidence to support his factual allegations. The argument, at least in part, is foreclosed by circuit precedent. A district court is within its discretion to deny an application for funding "when a petitioner has [] failed to supplement his funding request with a viable constitutional claim that is not procedurally barred."

*Brown v. Stephens*, 762 F.3d 454, 459 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1733 (2015). Though *Brown* dealt with a defendant bringing an initial federal habeas claim and Ayestas's current appeal is before us on remand from the Supreme Court, the difference in procedural postures is not significant. The district court properly considered the procedural default prior to approving Section 3599(f) funding for this federal habeas claim.

In two recent post-*Martinez* and *Trevino* opinions, this court held that Section 3599(f) funding is available if the district court finds that there is a "substantial need" for such services to pursue a claim that is not procedurally barred. *Allen v. Stephens*, 805 F.3d 617, 626, 638–39 (5th Cir. 2015); *Wade v. Stephens*, 777 F.3d 250, 266 (5th Cir.), *cert. denied*, 136 S. Ct. 86 (2015). Ayestas argues the district court, and by extension these two precedents, required an impossibility: proving deficient performance in order to be given resources to discover the evidence of deficient performance. He mischaracterizes the requirement. There must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented. *Brown*, 762 F.3d at 459. The basic point is that a prisoner cannot get funding to search for whatever can be found to support an as-yet unidentified basis for holding that his earlier counsel was constitutionally ineffective. Instead, there must be a substantiated argument, not speculation, about what the prior counsel did or omitted doing. Ayestas indeed offered such an argument. We interpret the district court's ruling as being that any evidence of ineffectiveness, even if found, would not support relief.

The district court did not abuse its discretion when it declined to authorize a mitigation specialist for Ayestas before it determined the viability of Ayestas's claim. We still must decide if the district court properly denied Ayestas investigative assistance on the basis that a mitigation specialist was not "reasonably necessary" because his claim was meritless. For this, we must briefly analyze the underlying merits of Ayestas's claim. *See id.* We turn now to that question.

*II. Overcoming Procedural Default*

In order for the *Martinez/Trevino* exception to excuse a prior procedural default, Ayestas must present a viable claim that his trial counsel was ineffective and his state habeas attorneys were ineffective in failing to raise trial counsel's errors. *See Martinez*, 132 S. Ct. at 1321.

Ineffective assistance requires deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it falls "below an objective standard of reasonableness" based on "prevailing professional norms." *Id.* at 687–88. "[C]ounsel has a duty to make reasonable investigations," *id.* at 691, including an "obligation to conduct a thorough investigation of the defendant's background," *Porter v. McCollum*, 558 U.S. 30, 39 (2009). Nonetheless, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

The specific deficiencies Ayestas raises concern his trial counsel's alleged failure to investigate and present evidence about his drug use and possible mental illness. Such evidence allegedly would have

been discoverable if counsel had contacted family and friends in Ayestas's home country of Honduras. Ayestas also points out that his trial counsel, for 15 months, stopped pursuing mitigation evidence, only resuming his activities 10 days prior to jury selection. He also claims his counsel in the initial state habeas proceedings should have made an issue of this alleged ineffectiveness by trial counsel.

The district court rejected the claim because Ayestas barred his attorneys from contacting his family, finally relenting around the time of jury selection for his sentencing. Trial counsel then pursued evidence from the family in Honduras and California by sending letters to them and finally seeking the assistance of the United States embassy in Honduras. A few days after Ayestas allowed contact, trial counsel also telephoned Ayestas's mother in Honduras. As we have already discussed and as detailed in the district court's opinion, the mother showed a lack of zeal in assisting the defense. The district court relied on caselaw in which we held that an attorney is not ineffective for failing to present evidence in mitigation at sentencing if the defendant orders counsel not to do so. *See Autry v. McKaskle,* 727 F.2d 358, 362–63 (5th Cir. 1984). We conclude that an attorney's compliance with a capital-case client's demand that contact not be made with his family is similarly permitted.

On appeal now, counsel argues that such interference by the defendant heightens the need for counsel to search for other sources of information about the defendant's background. We do not agree with such a standard. Regardless of the specific problems that arise in the investigation for

mitigation evidence, the issue is whether counsel made "reasonable investigations or . . . a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 691). The district court pointed out trial counsel's efforts and discoveries despite the limitations under which counsel worked. Counsel spoke by phone with Ayestas's family. He acquired Ayestas's school records and was aware of the substance abuse. Ayestas was also examined by a psychologist.

The district court's analysis of the argument about Ayestas's mental illness relied in part on the absence of any evidence that medical records existed at the time of trial that would have shown Ayestas was suffering from any mental illness. Therefore, defense counsel were not on notice of the need to pursue this line of inquiry at his initial trial. This analysis injects the question of whether current counsel has shown a need for funding to pursue what evidence might have existed to alert trial counsel of Ayestas's mental state in 1997. The briefing here discusses at great length the progression of schizophrenia, the mental disease with which Ayestas has now been diagnosed. The diagnosis was not made until 2000 while he was in prison after his conviction for this crime. Perhaps, counsel posits, a thorough investigation now would uncover evidence that early-stage symptoms of this disease were exhibiting themselves in 1997, making trial counsel's unawareness of those symptoms constitutionally ineffective representation.

We find no error in the rejection of the claims about mental illness. Trial counsel in 1997 had

Ayestas examined by a psychologist. The briefing does not suggest that the examination itself revealed a basis for further investigation. Whatever medical understandings could be applied now to evidence about Ayestas's mental condition in 1997, with the benefit of hindsight and perhaps additional knowledge about this disease, does not undermine that trial counsel was not constitutionally ineffective in pursuing what appeared at that time to be unproductive lines of inquiry.

Moreover, even if trial counsel had pursued such lines of inquiry, the results would not have been fruitful. A *Strickland* ineffective representation requires deficient performance *and* prejudice. Prejudice means "a reasonable probability . . . the result of the proceeding would have been different." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014). A reasonable probability is a "substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quotation marks omitted). The district court held that regardless of any deficiencies in the investigation about substance abuse, no prejudice resulted because, in light of the brutality of the crime, it was "highly unlikely that evidence of substance abuse would have changed the outcome of the sentencing phase of trial or of the state habeas corpus proceeding." That finding is valid. Further, even if Ayestas had entered the early stages of an as-yet undiagnosed mental illness, we find it at best to be conceivable, but not substantially likely, that the outcome may have been different.

As to the district court's refusal to fund an investigation into Ayestas's mental condition as it

existed almost 20 years ago, we find no abuse of discretion. The arguments about what might be discovered still have to be examined from the perspective of what trial counsel reasonably should have known and done those many years ago. *See Strickland*, 466 U.S. at 689. The district court did not err in failing to allow this inquiry to proceed.

Because we agree with the district court that there is no basis to hold trial counsel was constitutionally ineffective for failing to investigate further the possible questions of mental illness and substance abuse, Ayestas's state habeas counsel were not ineffective for failing to pursue that line of investigation. Raising every conceivable claim is neither required nor beneficial. Ayestas's state habeas counsel raised 16 claims for relief, including 10 ineffective assistance of counsel arguments. There was no shortage of claims, though mere numbers of claims do not dispel the possibility of constitutional ineffectiveness. Because we have already held that trial counsel was not ineffective in failing to raise these particular claims, at most, Ayestas's arguments deal with the strategic choices the state habeas lawyers had to make. Such choices are not subject to second-guessing by a court. *Strickland*, 466 U.S. at 689.

In summary, the district court correctly rejected the assertion that Ayestas's trial and state habeas attorneys were ineffective. As a result, because Ayestas cannot show that his claim is viable and that assistance was reasonably necessary, the district court properly determined that Ayestas was not entitled to a mitigation specialist under Section 3599(f).

To the extent that Ayestas also appeals the district court's November 18, 2014 memorandum opinion denying habeas relief on the merits, and the April 1, 2015 order denying his Rule 59(e) motion, these appeals are foreclosed. For these appeals, Ayestas requires a COA. As mentioned above, one requirement for the granting of a COA is a valid claim on the merits. For the same reasons that we have explained above for why Ayestas is not entitled to a mitigation specialist, we also deny Ayestas a COA.

*III. Amendment to Section 2254 Application*

We now turn to the issues that arise from the district court's denial of Ayestas's motion to supplement his claims with arguments about the Capital Murder Summary memorandum. That is the document that suggested that Ayestas's non-citizen status was one of two factors that led to the recommendation that the death penalty should be sought.

Ayestas's appellate brief supporting his application for a COA acknowledged that in district court, he had "sought to amend with a claim wholly unrelated to the IATC claim litigated under *Trevino*," which was the matter we had remanded to the court. Under what is called the "mandate rule," a district court on remand is limited to consideration of the matters that were the subject of the order from the appellate court. *Henderson v. Stadler*, 407 F.3d 351, 354 (5th Cir. 2005). We have used this articulation of the requirement:

> [T]he mandate rule compels compliance on remand with the dictates of a superior court

> and forecloses relitigation of issues expressly or impliedly decided by the appellate court.

*Id.* (quoting *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004)). The district court held that adding the unrelated claims to the subject of the remand would violate the mandate rule. Ayestas disagrees, first arguing the district court misinterpreted our remand order as limiting its discretion, and then arguing the mandate rule does not preclude the addition of a new claim. We disagree on both fronts.

As to his first argument, Ayestas claims that the last sentence of our remand order shows that we expressly declined to constrain the district court:

> We REMAND to the district court to reconsider Ayestas's procedurally defaulted ineffective assistance of counsel claims in light of Trevino. *We express no view on what decisions the district court should make on remand*.

*Ayestas v. Stephens*, 553 F. App'x 422, 423 (5th Cir. 2014) (emphasis added). Ayestas reads too much into this sentence. As the penultimate sentence clearly reads, the remand was limited to the reconsideration of the defaulted IATC claim. The last sentence simply indicates that we express no view as to how the district court should decide or approach this IATC claim.

As to his second argument, Ayestas relies heavily on a Supreme Court case as standing for the proposition that "the circuit court may consider and decide any matters left open by the mandate of this court." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895). But as explained above, our remand

order did not leave open any matter other than the defaulted IATC claim. If anything, *Sanford Fork* supports our decision in this case. The district court did not err in its interpretation of our remand order or its application of the mandate rule.

Additionally, Ayestas's new constitutional claims are unexhausted in state court and therefore cannot now be reviewed here on the merits. 28 U.S.C. § 2254(b)(1)(A). Realizing the need for exhaustion, Ayestas filed a motion to stay and hold the proceedings in abeyance in order to return to state court to exhaust the new claims. "When a petitioner brings an unexhausted claim in federal court, stay and abeyance is appropriate when the district court finds that there was good cause for the failure to exhaust the claim; the claim is not plainly meritless; and there is no indication that the failure was for purposes of delay." *Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010). "[W]hen a petitioner is procedurally barred from raising [his] claims in state court, his unexhausted claims are plainly meritless." *Id.* (quotation marks omitted).

Hence, we turn to examining whether Ayestas would be barred under Texas law from bringing his new claims.

In Texas, subsequent petitions for writ of habeas corpus in a death penalty case based upon newly available evidence, are handled as follows:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the

> application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application . . . .

TEX. CRIM. PROC. CODE art. 11.071 § 5(a)(1). Section 5(e) further provides that "[f]or purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date." *Id.* art. 11.071 § 5(e).

Thus, Ayestas must show he exercised reasonable diligence in trying to obtain evidence such as the memorandum. Ayestas's briefing in this court and in the district court never suggests he sought to examine the prosecution's file prior to the December 22 search that uncovered the memorandum. A defense counsel's "duty to investigate" includes "efforts to secure relevant information in the possession of the prosecution [and] law enforcement authorities." ABA STANDARDS FOR CRIMINAL JUSTICE: DUTY TO INVESTIGATE AND ENGAGE INVESTIGATORS 4-4.1(c) (4th ed. 2015); *Rompilla v. Beard*, 545 U.S. 374, 385–89 (2005) (explaining that counsel's failure to look at a "readily available" prosecution file was deficient performance for the purposes of

*Strickland*). Moreover, Ayestas makes no claim "that [the memorandum] was unavailable to [his] trial counsel through a reasonably diligent examination of the case file the prosecution had made available." *Amador v. Dretke*, No. Civ.SA-02-CA- 230-XR, 2005 WL 827092, at *18 (W.D. Tex. Apr. 11, 2005).

Ayestas offers two explanations for his failure to investigate the prosecution's file. First, he argues that the state was under an affirmative duty to turn the memorandum over to him. Second, he argues he properly assumed a search of the folder would not uncover information as material as this document.

The first explanation is based on Ayestas's having made two demands under *Brady v. Maryland,* 373 U.S. 83 (1963). Under *Brady*, the state must disclose exculpatory evidence upon a proper demand by the defendant. *Id*. at 87. While the state was under an obligation to turn over such evidence in this case, there is no *Brady* violation if counsel, "using reasonable diligence, could have obtained the information." *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994). Though Ayestas is not asserting a *Brady* claim, the fact that there would be no *Brady* violation unless Ayestas were reasonably diligent in discovering evidence suggests to us that any alleged failings on the part of the state in not turning over the memorandum do not mitigate Ayestas's own responsibility to undertake a reasonably diligent investigation for the purposes of Section 5 of Article 11.071. Hence, even though Ayestas filed two *Brady* demands, Ayestas was under an independent obligation to use reasonable diligence in attempting to discover exculpatory evidence, which, as explained above, he failed to do.

Ayestas's latter justification is that he "rightly assume[d] that the District Attorney would redact its file of all privileged work product, such as the capital murder summary." This justification is circular and without merit. Ayestas essentially argues that he assumed no material information was contained in the file, and that had he known such material information was in the file, he would have investigated the file. Of course, had Ayestas known the memorandum was in the file he would have no doubt searched it, but the point of reasonable diligence is to ensure that such evidence is found when it is unclear where such evidence may lie. Ayestas's assumption does not serve to excuse his duty to secure information in the possession of the prosecution. ABA STANDARDS FOR CRIMINAL JUSTICE: DUTY TO INVESTIGATE AND ENGAGE INVESTIGATORS 4-4.1(c) (4th ed. 2015).

Additionally, as discussed above, even if not procedurally defaulted, Ayestas's claims are not likely to succeed on the merits. The district court did not err in concluding Ayestas's trial counsel and his state habeas attorneys were not ineffective. Hence, even if Ayestas could prove he exercised reasonable diligence in discovering the memorandum, he still cannot exhaust his new claims in the Texas courts because his claims are not meritorious.

Ayestas did not exercise reasonable diligence in attempting to discover the memorandum earlier. Therefore, he is unable to prove under Section 5 of Article 11.071(a) of the Texas Code of Criminal Procedure that he would be entitled to a subsequent state habeas hearing to exhaust his new claims that are based on the newly discovered memorandum.

Hence, Ayestas has not exhausted, and will not be able to exhaust, these claims in state court. Because we are unable to review unexhausted claims, the district court did not abuse its discretion in denying Ayestas's motion for a stay and abeyance.

The request for certificate of appealability is DENIED. The judgment rejecting Ayestas's Section 2254 application is AFFIRMED.

**APPENDIX OO**

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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No. 15-70015

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CARLOS MANUEL AYESTAS, also known as Dennis Zelaya Corea,

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

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Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND REHEARING EN BANC

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:

No member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, the Petition for Rehearing En Banc is DENIED. *See* FED. R. APP. P. 35; 5TH CIR. R. 35.

The Petition for Panel Rehearing is also DENIED.

In the petitions, Ayestas makes two arguments to which we will respond. First, he alleges errors with our holding under *Rhines v. Weber*, 544 U.S. 269 (2005). Specifically, he claims we held that "because federal habeas counsel did not locate the Siegler Memo sooner, it was insufficiently diligent under" Article 11.071 § 5(a)(1) of the Texas Code of Criminal Procedure. We were not, though, referring to the diligence of federal habeas counsel in locating the memo. It was the diligence of Ayestas's trial counsel that we were describing. Our analysis is consistent with *Rhines*.

Ayestas also points out that he was not in fact examined by a psychologist in 1997, but we stated he had been in our opinion. Our analysis is nonetheless unchanged. In our opinion, we held that even if Ayestas had shown there had been deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), he did not show prejudice, that is, a "substantial, not just conceivable, likelihood of a different result." *Ayestas v. Stephens*, No. 15-70015, 2016 WL 1138855, at *6 (5th Cir. Mar. 22, 2016) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)). Ayestas does not challenge this aspect of our panel opinion. Our conclusion that *Strickland* ineffectiveness was not shown remains unchanged.

FILED June 10, 2016

## APPENDIX PP

**(ORDER LIST: 581 U.S.)**

**MONDAY, APRIL 3, 2017**

*** * ***

**CERTIORARI GRANTED**

16-6795 AYESTAS, CARLOS M. V. DAVIS, DIR., TX DCJ

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question 2 presented by the petition.