**BEFORE THE GOVERNOR OF THE STATE OF TEXAS**

**AND**

**THE TEXAS BOARD OF PARDONS AND PAROLES**

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In re

**Bernardo Aban Tercero**

Petitioner.

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**APPLICATION FOR**

**COMMUTATION OF SENTENCE**

**OR, IN THE ALTERNATIVE, A 120-DAY REPRIEVE**

**AND**

**REQUEST FOR HEARING PURSUANT TO**

37 Texas Administrative Code § 143.43(f)(3) and

Administrative Procedures Act § 2001.001 et seq.

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**INTRODUCTION**

Mr. Tercero stands convicted and sentenced to death for the march 31, 1997 murder of Robert Berger during the course of a robbery in Houston, Texas.

A.

It is impossible to adequately document the effect of this offense on the victim’s family. Given that the victim’s daughter was present during the homicide, it can be safely assumed that the effect was profound.

B. History of Mr. Tercero’s Litigation

After Mr. Tercero’s conviction and sentence of death on October 16, 2000, he appealed his conviction to the Texas Court of Criminal Appeals. That court, in an unpublished decision, affirmed Mr. Tercero’s conviction on September 18, 2002. State v Tercero, #73621, (2002). Houston attorney, Sid Crowley represented Mr. Tercero in these proceedings. No motion for rehearing was filed nor did Mr. Crowley file a petition for writ of certiorari.

Pursuant to Texas’ dual track system, Mr. Tercero filed a state petition for writ of habeas corpus on May 12, 2002; Houston attorney, Richard “Dick” Whelan, represented him in this action. Mr. Tercero filed his own pro se motion to amend his petition raising claims Mr. Whelan had not raised. He also filed a motion to discharge Mr. Whelan and asking the court to appoint new counsel. These requests were denied on June 7, 2005. The Trial Court recommended that relief be denied and the Texas Court of Criminal Appeals filed an order concurring in that denial on November 6, 2006. The Court also denied Mr. Tercero’s motion to amend his writ.

Mr. Tercero then filed a pro se petition for writ of habeas corpus in the United States District Court for the Southern District of Texas and, on November 10, 2006, with the aid of appointed counsel, filed an Amended Petition, including an allegation that he was under 18 at the time of the offense and thus, ineligible for execution for Roper v Simmons, 543 U.S. 551 (2005). In March, 2008, the District Court stayed all of the proceedings to allow Mr. Tercero to pursue his claim in the state courts.

On May 5, 2008, Mr. Tercero filed a successor petition for writ of habeas corpus; the Court of Criminal Appeals issued its order permitting that action to proceed on October 29, 2008. The state district court ultimately denied relief on November 13, 2009 and the Court of Criminal Appeals concurred on March 3, 2010.

Mr. Tercero then returned to federal court with a Second Amended Petition for Writ of Habeas Corpus on July 14, 2010. Ultimately, the Court denied him relief on February 7, 2013. Mr. Tercero filed a notice of appeal on March 5, 2013. The United States Court of Appeals denied his request for a certificate of appealability on December 18, 2013. The United States Supreme Court denied Mr. Tercero’s Petition for Writ of Certiorari on June 30, 2015.

C. Issues Raised in Prior Litigation

On direct appeal, Mr. Crowley raised only four issues: the sufficiency of the evidence to sustain Mr. Tercero’s death sentence, the trial court’s excusal for cause of a potential juror, the failure of the trial court to submit a jury instruction on a lesser included offense, and the use of an unconstitutional identification process. All four issues were overruled.

In the state habeas proceedings, Mr. Wheelan raised only record based claims, claims that the Court of Criminal Appeals had ruled could not be raised in state post conviction proceedings. See *Ex parte Gardner*, 959 S.W.2d 189 (Tex.Crim.App. 1996). See also *Ex parte Rich*, 194 S.W.3d 508 513, fn 9 (Tex.Crim.App. 2006); *Ex parte Nelson*, 137 S.W. 3d 666, 667 (Tex.Crim.App. 2004) (“We have said countless times that habeas corpus cannot be used as a substitute for appeal and that it may not be used to bring claims that could have been brought on appeal.”).

In federal court, Mr. Tercero’s federal counsel raised the *Roper v Simmons*, 543 U.S. 551 (2005), noted above. That claim was rejected by both the state and the federal courts, including the United States Supreme Court.

D. Mr. Tercero’s case for a Reprieve

Mr. Tercero received virtually no representation throughout the course of his proceedings in the Texas state courts. His trial counsel never began his investigation of the penalty phase proceedings until shortly before the trial commenced and essentially presented nothing to the sentencing jury. Despite that failure, neither the counsel on direct appeal, Sid Crowley, nor the counsel in post conviction, Richard “Dick” Wheelan, made any effort to address that issue in any fashion. Mr. Wheelan never made any effort to even investigate the claim of ineffective trial counsel. Despite the importance given to the idea of effective trial counsel by the Supreme Court (see *Martinez v Ryan*, 132 S.Ct. 1309 (2012) – “The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*v. *Wainwright,*[372 U. S. 335](https://apps.fastcase.com/Research/Pages/Document.aspx?LTID=3R0UJuWZGRBQ3%2bYqrQlYxw9b6t3zyYi76blS3vKpt4wqbfK8uWG5P7bO2%2bF9HKPuOAnDyW6ATCMSFzSU23ZSX6lVtYYPAaiExldt10FUFKv6kYyUb%2bamMXUqMqf%2bCzNmHavtvtYqaqK%2f3Rhx2%2bWtST3%2bcRcdcL9L55UX6otCWnE%3d&ECF=372+U.+S.+335), 344 (1963). Indeed, the right to counsel is the foundation for our adversary system. “), no one raised this issue. In short, every opportunity Mr. Tercero had to effectuate the most basic of principles in American criminal justice, the right to a competent lawyer at trial was foreclosed because of incompetent counsel on both appeal and in post conviction. [[1]](#footnote-1)

That issue, however is currently being addressed by the InterAmerican Commission on Human Rights. That body has accepted Mr. Tercero’s claims and his counsel have filed the equivalent of a brief to that body urging the Commission to conclude that Mr. Tercero was denied effective assistance of counsel. We are awaiting that ruling. We ask for a reprieve of 60 days to enable the commission to reach a conclusion and, if favorable, to give Mr. Tercero the opportunity to enforce a favorable ruling, if it occurs.

E. Mr. Tercero’s Case for Commutation.

The effect of the incompetence of Mr. Tersero’s post – conviction counsel is profound. They are set forth here but have never been addressed by any court simply because no one raised the issue.

1.

The Sandanista Revoluation and the Contra- Sandinista Civil War

In 1979, after Mr. Tercero was born, a left wing party in Nicaragua succeeded in overthrowing the Somaza family regime. The Sandanistas staged strikes and the Somoza regime responded with extreme acts of violence, so much so that the United States condemned their conduct and cut off all aid to the Somozan government. Tens of thousands of people were killed, including many in the Chinandega province where Mr. Tercero was born and raised. The city of Chinandega, approximately 15 miles from Mr. Tercero’s home village of Posoltega was virtually destroyed in fighting between government forces and the Sandanistas with brutal acts of violence committed by both sides of the conflict. The fighting began on September 8, 1978 and by September 18, hundreds of people had been killed by indiscriminate bombing. There were also similar incidents in rural areas.

2. Hurricane Mitch

What was left of Posoltega was degraded even more by Hurricane Mitch in 1998 which devastated the village and left most of the village’s residents in dire straits. Since the Hurricane, the Nicaraguan government has done little to reconstruct the village.

3. Pesticide exposure

Organophosphate pesticides (OP) were used extensively in the cotton fields of Chinandega. Studies have reported widespread contamination of soluble organophosphorus compounds in the water of Chinandega province. Fernando P. Carvalho, et al *Ecological risk assessment of pesticides in coast lagoons of Nicaragua*, J. Environ.Monit. 2002, 4 p. 778. As early as 1952, 454 tons of methyl parathion, a very toxic organophosphate, was applied in the cotton fields of Nicaragua. The extreme use continued through the 1970’s and 1980’s.

Exposure to organophosphates can be devastating to humans especially children. OP’s were the byproducts of nerve agents developed in the Second World War; they are neurotoxins which attack the central nervous system of insects and humans; they were developed in the 1940’s as highly toxic biological warfare agents. The modern equivalents of the weaponized versions of OP include Sarin gas, used by terrorist in the 1995 Subway attack in Japan.

Exposure to the commercial version of OP can cause among other symptoms dizziness, vomiting, seizures, paralysis, loss of mental function, even death. OP’s function as cholinesterase inhibitors that interfere with the central nervous system. Acetylcholinesterase acts to control nerve impulses by sending chemical signals to halt the nerve impulse at the appropriate time. When OP’s impede this process, the nervous system becomes severely overstimulated, resulting in immediate neurological dystunction. Many OP’s are now banned or their use severely restricted. The neurodevelopmental problems associated with OP exposure in prenatal and early childhood include impaired short term memory and mental development, increased reaction time and mental and emotional problems.

In cases of violent behavior, OP exposure can, in effect, short circuit the appropriate fight or flight response, resulting in a distorted view of threats and an often violent response to ordinarily innocuous behavior.

4. Witness statements

An investigator funded in part by the InterAmerican Commission on Human Rights, Nicole Vantoorn of Fort Worth, Texas, traveled to Nicaragua to develop some of these issues. Upon arriving in Posoltega where much of Mr. Tercero’s family still lives, “the deplorable living conditions were still apparent.”

Luisa Amanda Huete is Mr. Tercero’s 82 year old grandmother. She raised Mr. Tercero as her own son when his mother abandoned him as a baby. She already had a dozen children of her own but took him in anyway. Even though Mr. Tercero’s father was both alive and living in the area, the father refused to have anything to do with Mr. Tercero even going to far to refuse to buy his son a pair of shoes for school.

Because of the abject poverty, everyone in the family, including the children had to work. There was no electricity or running water when the family lived in Las Casitas and no access to any health care at all. In 1982, the family moved to Posoltega but the poverty continued; the family lived in a shack.

At the time of the family move to Posoltega, the Contra war with the Sandanista regime was going on and everyone in Posoltega was frightened. Evidence of the war was everywhere, with visibly armed soldiers and the frequent sound of gunfire. Food was rationed; Luisa Amanda had to wait in long lines for food to feed the children.

As noted, children worked in farming fields because of the extensive poverty. Luisa Amanda confirms this. When not in school Mr. Tercero worked in the coffee, sugar cane and cotton fields with Luisa Amanda when he was ten years old. Planes sprayed toxic pesticides every two days during the growing season. Often the workers were in the fields when the planes flew over and while everyone wore hats and long sleeves, they had no gloves or masks to protect themselves.

After the planes sprayed the fields, workers became sick and vomited, including Mr. Tercero. They’d rest for thirty to sixty minutes and then resume work, even if they did not feel well. Because the pesticide use was so heavy, workers were sprayed weekly; the pesticides caused physical deformities in newborns; so called mongoloid babies were not uncommon.

Luisa Amanda noted that Mr. Tercero suffered severe headaches several days a week and when he did, he became depressed and cried from the overwhelming pain. He did not feel like working or going to school when he felt like this. Eventually, Luisa Amanda sent him to a doctor who gave him pills for his headache but they did no good; the pain continued. It was difficult for the boy to endure this much pain.

The children including Mr. Tercero worked in the fields for years because it was necessary in order for Luisa Amanda’s extensive family to survive their abject poverty. When Mr. Tercero was not in class, he was in the fields. The family could not get ahead even with everyone working. The contra wars and then Hurricane Mitch as well as Nicaragua’s reluctant government made progress impossible.

According to Luisa Amanda, Hurricane Mitch devastated Posoltega and the surrounding region. Flooding swept across the land. Livestock drowned, homes were destroyed and family members simply disappeared, never to be seen. People were trapped in their homes because of rapidly rising water; they had no time to escape. Mr. Tecero’s family was decimated by the hurricane. Government help came too late to be of any use; everyone knew someone that was either seriously injured or killed in the flooding.

Jose Tercero Huete is Mr. Tercero’s maternal uncle. He lives with Luisa Amanda in the same tiny house along with his brother, Vidal, Mr. Tercero’s son, Franklin, and their wives. He is a few years older than Mr. Tercero but they worked the fields together.

Mr. Huete described the planes that sprayed the plantations located very close to their home (just across the highway); the plantations surrounded Polsoltega. He noted that Mr. Tecero regularly got sick and vomited right after the planes had finished spraying the fields. He also noted Mr. Tercero’s constant headaches after the exposures. It was impossible to avoid the exposure.

It was common knowledge, according to Huete, that pesticides were dangerous and that they caused serious health problems; babies were born with serious physical deformities because of the exposure.

Huete noted that Mr. Tercero had to work in the fields simply to pay for a pair of pants to go to school and for his supplies. Nothing was provided to the students by the schools. Mr. Tercero wore the same pair of pants every day.

Huete noted that Mr. Tercero was a young boy when the Contras were fighting in the area. Battles took place all over the country and wounded civilians and soldiers were present in the streets. Mr. Huete experiences the war first hand; it was traumatic, both physically and emotionally. The war permanently affected the village; everyone was alert, nervous and never resting. No one knew what danger they might encounter.

Once the war was over, Hurricane Mitch hit the region. Flooding destroyed their homes and all that they owned. Subsequent landslides caused even more devastation. Mr. Tercero, according to Huete, rescued a few families from the rising waters but there was no government help until the 1990’s.

Mr. Huete’s brother Vidal was severely traumatized by the Contra war and found the war very difficult to discuss. Everyone was traumatized; soldiers would storm villages and invade schools while the children were present. Everyone was frightened after that. Many innocent civilians were killed, so many that it became a common fact of life.

Huete thought that Mr. Tercero was the most affected family member from the pesticide exposure because of his near constant headaches. The pain was so strong that Mr. Tercero could not work or play with his friends.

Pedro Pablo Canales is one of Mr. Tercero’s oldest friends. He viewed the same pesticide exposure and Mr. Tercero’s physical reactions as Mr. Tercero’s family and remembered the same violence occasioned by the Contra war. He believed that Mr. Tercero was more strongly affected by the war because his uncles fought in the war as soldiers.

D. Hearing Request

Mr. Tercero requests a hearing in front of the Board. Additionally, a neuropsychologist is evaluating Mr. Tercero; his report will be submitted once it is completed but after submission of this petition.

F. Conclusion

Mr. Tercero has never had a fair opportunity to raise these issues in any fashion because of the incompetence of his counsel. It is clear that there were profound issues in his life that had they been raised at the trial, he very likely would never have been sentenced to death. The execution should be halted and a recommendation of clemency sent to the Governor of Texas.

Respectfully submitted,

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1. This isn’t the first time Messers Crowley and Wheelan have failed to protect the rights of their clients. In 2009, the Austin American Statesman ran an article that was the result of an extensive investigation by one of their reporters, Chuck Lindell. Lindell examined hundreds of post conviction documents and then listed what he concluded were the five worst lawyers in Texas to handle death penalty post conviction work. Crowley and Wheelan were both on that list. A copy of the article is attached. [↑](#footnote-ref-1)