93 pages this section!

259 pages this sheet

Clintons appeal

Me & Rene from 45 minutes. - Post -

The following is the appeal that was filed on Clintons behalf.
It covers the prosecutions case , as well as the defense lawyers case.
lawyers are required to give both sides when presenting the appeal. That is why the prosecutions side is as well presented.
If no 'bad' is presented then there would be nothing to appeal.
In thsi appeal theres talks of other bad acts.
One such subject is a claim of Clinton having been charged with Indecency of a child by exposure.
We feel that this needs to be further explained.
So that no one places Clinton in a improper catagory that he clearly does not deserve to be in.
Clinton at 14 got into a fight with another youth in a placemen
The other youth was 15. So he was not only older but bigger ther
clinton.
Due to the way that the laws are written in Texas. The other youth was classified as a 'child' because he was under the age of 17. Clintons age at the time doesnt matter. Only the victims age is taken into consideration in these matters.
The other youth has stated " clinton wasnt tryin to rape me or anything like that. We got into a fight, other guys was there. It was more to embarass me..."
Clinton will cover this and many other aspects of his life through his Loud & Clear blogs , as well as his Life story.
We felt it important to expand on this matter as when some one sees the term "indecency with a child" it brings to mind a predator/ child molester.Tnis is NOT the case in Clintons situation.
the state often misrepresents this case & others that you will read about in a manner to vilify clinton.
You will see in Clintons appeal how the prosecution intentionally prevented Clinton from putting forth a proper defense in his case.
The police as well greatly harmed Clintons case by their very poor investigation & failure to even investigate TWO major crime scenes.
You willalso read in the appeal & other legal postings on this site how Clintons lawyers repeatedly failed him.
These repeated errors resulted in Clinton being wrongfully convicted & sentenced to death.
Two of the co-defendants are already free! One was never arrested. Clinton is the ONLy person to be sent to prison for murder in this case.
You will read how the prosecution had witnesses lie & witnheld from Clintons lawyers that they had given the co-defendants special deals for them to testify.
You will see in Clintons appeal & following postings that there was systematic errors that greatly harmed Clinton.
Clinton did NOT in any shape form or fashion receive any kind of fair trial or even a fair appeal!
Many of the documents & testimony will be shocking.
Please read it all.
* The notes made on the trial transcripts is from Clinton working on his case.

IN THE 238TH JUDICIAL DISTRICT COURT
OF MIDLAND COUNTY, TEXAS

AND

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

EX PARTE CLINTON LEE YOUNG, APPLICANT	CAUSE NO. 27,181 -

SUBSEQUENT APPLICATION FOR A WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE

Applicant, Clinton Lee Young, respectfully requests that this Court issue a writ of habeas corpus and grant him relief from his unconstitutional conviction. The recent discovery of favorable evidence in the prosecution's possession that was never disclosed to the defense at trial or in state post-conviction proceedings requires a new trial. The newly discovered evidence demonstrates that the State sponsored perjured testimony at Mr. Young's capital trial. This suppression of favorable evidence and the perjured testimony prejudiced the trial, resulting in an unconstitutional conviction. This Court should find that Mr. Young's *Brady*[1] and *Napue/Giglio*[2] claims, as well as other claims including judicial bias and incompetency of state habeas counsel, raised herein, meet the requirements of section 5(a) of Article 11.071 of the Texas Code of Criminal Procedure, and

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972).

remand the case to the convicting court for further consideration, including holding an evidentiary hearing for the purpose of examining the merits of Mr. Young's claims.[3]

I.

STATEMENT OF FACTS

A. Introduction[4]

Not since 1970, and certainly not in Al Schorre's then seventeen-year ca as the District Attorney of Midland County, had Schorre's office been able to secure a death conviction.[5] With Clinton Young's arrest, however, Midland County decided that its luck was going to change, no matter what the cost.

In order to secure a death conviction, the State failed to turn over materia exculpatory evidence, and knowingly presented false testimony at Mr. Young's trial. Unbeknownst to the defense, David Page, the only person who was with Young at the time of both the Doyle Douglas and Samuel Petrey homicides, an Mark Ray, the individual who fired the final (and perhaps fatal) shot into Douglas's head the night of the crimes, secretly negotiated with the State for

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[3] In Section IV, *post*, Mr. Young fully explains how the Claims raised in this Application satisfy the state standards for filing a subsequent state habeas application within the meaning of Texas Code of Criminal Procedure, article 11.071, section 5. (*See* Pages 174 et seq., *post*.)

[4] "CR" "RR" and "SRR" respectively refer to the Clerk's Record, the Reporter's Record, and the Supplemental Reporter's Record of Mr. Young's tri "CWR" and "RWR" respectively refer to the Clerk's Writ Record and Reporter Writ Record of Mr. Young's state writ proceeding. Exhibits will be referred to an abbreviated manner as, "Ex,"and either have been previously filed in this Co or are being filed concurrently with this Application.

The majority of affidavits attached to this Application were first filed in Young's October, 2008 federal Petition for Writ of Habeas Corpus in *Young v. Quarterman*, 07-CV-0002-RAJ. Because, unlike the federal court, the State co prefer notarized affidavits to be filed in support of claims, counsel for Mr. You returned to his available declarants and had them notarize their previously sign declarations. Thus, most of the affidavits attached hereto contain two signature pages: one signed in 2008, and the other signed in 2009 and notarized.

[5] And, as of the date of the filing of this Application, has not been able t secure one since.

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reduced charges and sentences in exchange for their testimony against Mr. You Not only did the State fail to turn over this material, exculpatory evidence, the State knowingly presented testimony at a pre-trial hearing that no such deals existed. The withholding of the evidence regarding Page's and Ray's plea negotiations, and the knowing presentation of perjured testimony, mandate that Mr. Young's conviction be overturned. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Brady*, 373 U.S. at 87; *Napue*, 360 U.S. at 269; *Ex parte Adams* 768 S.W.2d 281, 290 (Tex. Crim. App. 1989).

The State further failed to turn over material, exculpatory evidence concerning State's witness A.P. Merillat. Unbeknownst to the defense, Merilla Senior Criminal Investigator with the Special Prosecution Unit of the Texas Department of Criminal Justice, was conferring benefits to inmates in Texas prisons. The communications between Merillat and various inmates were in di contradiction to facts testified to by Merillat at Mr. Young's trial, and raise dou as to Merillat's credibility and the accuracy of his testimony. This evidence wo have been used to impeach his credibility.

The State also interfered with Mr. Young's investigation and presentatio mitigating evidence in the punishment phase. After improperly receiving the sealed billing records of the defense's mitigation specialist/social historian, Ge Byington, the State reported Byington to the Texas Commission on Private Security, alleging Byington was conducting investigatory work illegally. The result of the prosecutor's actions was to foreclose the defense from properly investigating and presenting a social history of Mr. Young, which should have been presented at trial.

The State also failed to investigate two of the major crime scenes, and th police work at the Petrey murder scene was sloppy, at best. Specifically, the St never investigated the location where Douglas was originally shot (where authorities would have found shell casings on the ground which were fired fro

Page's gun, proving Page, not Young, shot Douglas), nor the place where Petrey was originally kidnapped (where eyewitnesses would have identified Page as the kidnapper, not Mr. Young).

Further, the State conducted sloppy police work at the Petrey murder scene, including, but not limited to: failing to secure and analyze the Petrey murder scene; overlooking evidence in plain view, including tire marks, a tire iron, and Page's gloves; and failing to make a photo log of everything that was collected at the scene.

Not only was Mr. Young the subject of rampant prosecutorial misconduct, Mr. Young was tried by a biased judge. The trial judge had "pre-judged" Mr. Young as a "dangerous man," worthy of the death penalty. The trial judge believed that not only was Mr. Young dangerous, but he was "fully capable" of harming other people if he was not convicted of capital murder. This same judge then sat as both judge and jury over Mr. Young's motion for new trial, and state post-conviction litigation. The convicting court's actual bias is structural error warranting a new trial. *Richardson v. Quarterman*, 537 F.3d 466, 473 (5th Cir. 2008), *citing Neder v. United States*, 527 U.S. 1 (1999); *see Edwards v. Balisok*, 520 U.S. 641, 647 (1997); Tex. Rules of Civ. Proc. 18b(2); *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992) (judicial bias may be grounds for disqualification when "it is shown to be of such nature and to such extent, as to deny the defendant due process of law"); *Richardson v. State*, 83 S.W.3d 332, 358-59 (Tex. App. Corpus Christi 2002) ("a reasonable member of the public, knowing all the circumstances involved, would have questions or doubts as to the impartiality of the trial judge").

Moreover, while Mr. Young's trial counsel tried hard to defend their client, their performance in key areas was objectively unreasonable, causing Mr. Young prejudice. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999).

Not only was Mr. Young a subject of ineffective trial counsel, Mr. Young was represented by incompetent counsel for purposes of his state post-conviction proceeding. *See Ex parte Graves*, 70 S.W.3d 103, 114 (Tex. Crim. App. 2002); *Ries v. Quarterman*, 522 F.3d 517, 526 n.5 (5th Cir. 2008). Gary Taylor was appointed by the convicting court to represent Mr. Young to challenge, at the state level, the constitutionally of his conviction for capital murder and his sentence of death, the ultimate punishment. Mr. Taylor's incompetence stemmed from his failure to adequately direct and supervise his primary investigator/mitigation specialist, Lisa Milstein, in this case and prior cases, despite evidence that Milstein was impaired by psychological problems and drug addiction that led Milstein to invent unmeritorious claims and to submit unsupportable affidavits. In Mr. Young's case, it came to light at the state evidentiary hearing that Milstein had bought and smoked crack cocaine with a witness, and offered herself sexually to that same witness so that the witness would sign an affidavit which supported Milstein's false allegation that Mr. Young's father sexually molested Mr. Young. Mr. Taylor did not adequately direct and supervise Milstein, and then withdrew from the case before the hearing. Taylor's incompetence caused prejudice to Mr. Young's state post-conviction litigation in that Taylor did not investigate and present meritorious claims as he spent all his energy focusing on the unsupportable sexual molestation claim.[6]

The question before this Court is whether there is constitutional redress for the multiple wrongs which befell Mr. Young. The answer to that question must be in the affirmative.

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[6] Mr. Young's appellate counsel, Rusty Wall, was also ineffective. For this matter, Mr. Wall and Ori White, who served as Mr. Young's prior federal habeas counsel, were also ineffective.

B. The Life History of Clinton Lee Young

1. Introduction

Mr. Young is a portrait of what can go wrong when a person is born into, and travels through, a life filled with emotional and physical abuse, lack of stability, structure, and support, and with no positive role models to emulate. A almost every turn, Mr. Young experienced failure -- at home, in school, with relationships, and at various community based systems like the Waco Center fo Youth and the Texas Youth Commission. Although these systems were established to provide treatment and structure to aid Mr. Young, they instead contributed to his continued failure because, although they identified some of h problems, they failed to implement appropriate treatment. (Ex. 96 [Decl. of To Knox at ¶ 183].)

Mr. Young was born genetically loaded toward mental illness and chemi dependency. To complicate matters, Mr. Young's educational and social development were affected by numerous social and familial problems which surrounded him. These combined factors affected Mr. Young's social function impulse control, and curbed development of basic life skills from a very young age. (Ex. 96 at ¶ 8 [Decl. of Knox].)

Mr. Young suffers from Attention Deficit Hyperactivity Disorder (ADHI which was diagnosed at an early age. Mr. Young's ADHD was and is a medica problem. ADHD is a biological and chemical malfunction in an immature brai The effects of Mr. Young's genetically and biologically determined impulsive a distractible response style was aggravated by the chaotic, traumatic home environment in which he spent his formative years. Children who suffer from severe ADHD disorder require intensive limit - setting and a stable environmen It was unlikely that any adult in Mr. Young's home could have provided such structure or stability. (Ex. 97 at ¶ 24 [Decl. of Dr. Daneen Milam].)

2. The Family Mr. Young Was Born Into

Mr. Young's mother, Carla Lynn Wade, was abandoned by her own biological mother who would not care for her.[7] And although Carla had a good relationship with her adoptive father, who was also her great uncle, she did not have a good relationship with her adopted mother, who was not nurturing. (Exs. 96 at ¶¶ 10, 12, 24-26 [Decl. of Knox]; 123 at ¶¶ 2-4 [Decl. of Carla Sexton].)

Mr. Young's father, Billy Young, was a womanizer who abused his wives. Billy had three children with his first wife, Rebecca. Those children were Sharo Renee, and twin boys, Dino and Dano. Billy was physically abusive to Rebecca and after he divorced her, soon after the birth of the twins, Rebecca "disappeare and subsequently had very little contact with her children. (Ex. 96 at ¶¶ 18, 29 [Decl. of Knox].)

Billy next met and married Frances May, a sixteen-year-old waitress. Bil was ten years older than Frances May when they met. Billy and Frances May ha one child together, Christy Lynn. Billy was physically abusive to Frances May, and the two separated soon after the birth of their daughter. (Ex. 96 at ¶¶ 19-20 [Decl. of Knox].)

Carla was seventeen when she met Billy in 1982. The two married in 198 And while Carla loved Billy's children, they all were "train wrecks," and she wa ill-equipped to handle the responsibility of raising four children. Billy was physically abusive to Carla, as he was with his previous wives. Carla was even abused by Billy when she was pregnant with Clint. (Exs. 96 at ¶¶ 25-26 [Decl. Knox]; 123 at ¶¶ 8, 10-11 [Decl. of Sexton].)

3. Mr. Young's Pre-disposition for Addiction and Mental Illness

A person can be predisposed to mental illness and addiction through genetics. (*See* Exs. 96 and 97.)

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[7] When the two met and reconciled years later, Carla's biological mother referred to Carla as her cousin. (Ex. 123 at ¶ 5 [Decl. of Carla Sexton].)

By all accounts, alcoholism and mental illness were present in Mr. Youn maternal family. It is reported that Carla's biological grandfather suffered fron alcoholism, and Carla had an aunt with serious mental illness. (Exs. 96 at ¶ 13 [Decl. of Knox]; 123 at ¶¶ 5, 7 [Decl. of Sexton].)

In Mr. Young's paternal family, both his father, Billy, and grandfather, William, were alcoholics. (Ex. 96 at ¶¶ 16, 21, 33, 46, 137, 139 [Decl. of Kno Billy also used marijuana and cocaine. (Ex. 96 at ¶¶ 23, 35, 46, 137-38 [Decl. Knox].) Billy's family also suffered from manic depression. (Ex. 96 at ¶ 139 [Decl. of Knox].)

4. Mr. Young's Early Years

Mr. Young was born on July 18, 1983, three weeks prematurely due to induced labor brought about by Carla's hypertension. (Exs. 1 and 2) Almost certainly Billy's physical abuse and the burden of caring for Billy's children contributed to Mr. Young's early birth. (Exs. 96 at ¶ 27 [Decl. of Knox]; 123 a 11 [Decl. of Sexton].)

After enduring Billy's drinking and physical abuse, Carla separated fron Billy in 1984. Carla first went to live with her family, from whom she had bee estranged, and then moved to a friend's house. Mr. Young celebrated his first birthday in this chaotic time. (Exs. 96 at ¶¶ 51-52 [Decl. of Knox]; 123 at ¶ 13 [Decl. of Sexton].)

On April 5, 1985, Mr. Young suffered a febrile seizure. Less than two months later, Mr. Young suffered a second seizure. Both times, a spinal tap an other tests were performed on Mr. Young. During this time period, Carla met began dating Quentin Sexton. (Exs. 96 at ¶¶ 52-53, 119 [Decl. of Knox]; 123 14, 16 [Decl. of Sexton].)

In 1986, while Carla and Quentin were engaging in an on-again, off-aga relationship, Billy took Mr. Young from Carla and refused to give him back un she signed papers relinquishing her custodial rights. Billy wanted custody righ

over Mr. Young not because he wanted to raise his son, but because he wanted avoid child support payments. Only when Carla signed the legal paperwork di Billy return Mr. Young. (Exs. 96 at ¶ 56 [Decl. of Knox]; 123 at ¶ 15 [Decl. of Sexton].)

Despite the constant fighting and instability in their relationship, Quenti and Carla married in March 1987 when Mr. Young was three years old. (Exs. at ¶ 58 [Decl. of Knox]; 123 at ¶ 16 [Decl. of Sexton].) By the age of four, Mr Young's hyperactivity was noticeable to Carla and others. The initial diagnosi was ADHD, an illness that plagues Mr. Young to this day. (Ex. 96 at ¶¶ 128-2 [Decl. of Knox].)

At first, Mr. Young was prescribed medication exclusively from the stimulant family. The popular drug for ADHD for many years was Ritalin. Mr Young was started on Ritalin in October 1989. He frequently reported "stomac aches" related to the drug. Later, school and medical records indicated that Mr Young frequently ran out of medication and that Carla did not always follow th prescribing instructions. (Ex. 96 at ¶ 129 [Decl. of Knox].)

5. Family Life and School

Billy was an uninvolved parent, and did not provide his children with parenting support or advice. (Ex. 96 at ¶ 31 [Decl. of Knox].) Billy was abusi to all his children, but especially to Mr. Young. When Mr. Young was betwee four and six years old, Billy threw Clint against a bathroom wall and began to "beat[] the hell out of [him]." (Exs. 96 at ¶¶ 33-34 [Decl. of Knox]; 123 at ¶ 1 [Decl. of Sexton].) On a couple of occasions, Billy hit Mr. Young with a wood board. On still another occasion, Billy knocked Mr. Young to the floor and dragged and beat him. Mr. Young was left with bruises. (Ex. 96 at ¶¶ 47-48, 1 155 [Decl. of Knox].) Billy was also emotionally abusive to Mr. Young. (Ex. at ¶ 157 [Decl. of Knox].)

Carla became so angry with Billy's unsupportive attitude and abusive

behavior that when Mr. Young was around five years old, she changed his nam from William Clifton Young, III to Clinton Lee Young. (Exs. 96 at ¶ 60 [Decl Knox]; 123 at ¶¶ 21-22 [Decl. of Sexton].)

Carla frequently felt torn between Quentin and her son. On the other ha Quentin was forced to take on the care of Mr. Young, who was not his biologi child. Mr. Young was very aware that Quentin did not love him and often rebe against his rigid rules and treatment. (Ex. 96 at ¶ 169 [Decl. of Knox].) Mr. Young was also physically and emotionally abused by Quentin. (Ex. 96 at ¶¶ 97, 157-58 [Decl. of Knox].)

Under this backdrop, Mr. Young found himself constantly getting into trouble at home and school, whether he was defacing a text book or dropping a match into the lawnmower burning his eyebrows and eyelashes. (Exs. 96 at ¶¶ 62 [Decl. of Knox]; 123 at ¶ 24 [Decl. of Sexton].)

Carla became so frustrated with her son's behavior that in 1993, she took him to a doctor for an EEG and CT scan. The EEG indicated slower brain wav for someone Mr. Young's age. (Ex. 96 at ¶¶ 61-62, 128, 162 [Decl. of Knox].)

Two days later, Mr. Young took an unloaded antique collector's item gu school. Carla was arrested for "endangering a child" because the gun was left that Mr. Young had access to it. Shortly after this incident, Mr. Young was evaluated at the school to determine if he met the criteria for "Emotionally Disturbed Special Education Services." A Dr. Walker determined that Mr. You met the criteria for special education services because of his behavior. Mr. Yo was administered the Wechsler Intelligence Scale for Children III (WISC III). Young's Full Scale IQ was 112. (Ex. 96 at ¶ 65 [Decl. of Knox].) After the incident at school and her arrest, and without waiting for the school year to end Carla sent Mr. Young to live with his father in Wyoming. (Exs. 96 at ¶¶ 65-66 [Decl. of Knox]; 123 at ¶ 27 [Decl. of Sexton].)

A few weeks later, while registered in the fourth grade at a school in

(SP?)
Gukkettem, Wyoming, Mr. Young was administered a Test of Conduct and Emotional Problems. This test indicated Mr. Young suffered from a high level dysfunction. (Ex. 96 at ¶¶ 67 [Decl. of Knox].)

By the Fall of 1993, Mr. Young was sent back to live with his mother. Carla enrolled Mr. Young into a special education program at Avinger Elementa School. (Ex. 96 at ¶ 70 [Decl. of Knox].)

6. Early Treatment

At age nine, Mr. Young was switched from Ritalin to a different stimulan Cylert. In 1994, Mr. Young was started on a trial of Thorazine, an anti-psychoti sedating drug. The Thorazine was stopped quickly because it caused Mr. Youn to suffer breathing problems and palpitations. Mr. Young remained on Cylert fo about three years. (Ex. 96 at ¶ 130 [Decl. of Knox].)

Mr. Young was charged with theft at the age of ten, and was seen by Dr. Ray Scardina at the Tyler Psychiatric Clinic. Mr. Young was again diagnosed with ADHD. (Ex. 96 at ¶¶ 70, 129 [Decl. of Knox].)

It was recommend that Mr. Young be admitted to a residential treatment facility where he would receive structure, medication, and individual and family therapy. However, instead of receiving the recommended treatment, Mr. Young was placed in a group home called Triangle Pines. While there, Mr. Young frequently begged to come home and promised his behavior would be better if h could return to living with Carla. (Exs. 96 at ¶¶ 71-72 [Decl. of Knox]; 123 at ¶ 28 [Decl. of Sexton].)

Mr. Young's placement at Triangle Pines provided only a displacement o his problems, although it offered some respite for Carla, who was growing wear of reacting and struggling to care for her troubled child. Mr. Young's placemer at this particular group home was a stark mismatch. Most such homes served as foster care facilities and/or re-entry and step-down type facilities for adolescents who had long term residential treatment, which was not the case with Mr. Youn

He did not fit in at Triangle Pines, and became an outstanding problem. (Ex. 96 ¶ 73 [Decl. of Knox].)

For Mr. Young to have been properly treated at Triangle Pines, the entire family, including Carla, Quentin, and Billy, would have had to be involved. Th would have had to make some sacrifices, which at the time, given their own personal and interpersonal challenges, they simply could not, or would not do. (Ex. 96 at ¶¶ 74, 169 [Decl. of Knox].)

Without adequate treatment for Mr. Young at Triangle Pines, there was n significant improvement in Mr. Young's mental health. The day before his eleventh birthday, Mr. Young was removed from the group home because he showed no signs of progress. (Ex. 96 at ¶ 75 [Decl. of Knox].)

In the fall of 1994, prior to being enrolled in public school, Mr. Young w re-evaluated by Dr. Scardina, who again diagnosed Mr. Young as suffering fron ADHD, Severe, Conduct Disorder, Undifferentiated; Developmental Written Language Disorder, and History of Febrile Seizures. (Ex. 96 at ¶¶ 76, 130 [Decl of Knox].) In addition to his problems at school, Mr. Young was also reacting t the worsening problems at home. Quentin's drinking had become heavy, and h was becoming increasingly verbally abusive to both Carla and Mr. Young. (Ex. 96 at ¶ 77 [Decl. of Knox].)

Mr. Young received further school testing in the winter of 1996. He was again administered the WISC-III. Mr. Young's scores were similar to his origin scores: his Full Scale IQ was 115, and he was again diagnosed with ADHD. (E 96 at ¶ 78 [Decl. of Knox].)

At age thirteen, with Carla working extensive hours, supervision of Mr. Young was badly compromised. On August 8, 1996, Mr. Young was arrested a charged with burglary. Mr. Young was enrolled in the eighth grade but was withdrawn five days later and sent to live with his father in North Carolina. Subject again to the family's emotionally charged twists and turns, destabilizati

and disruption had become the norm in Mr. Young's life. (Ex. 96 at ¶ 79 [Decl. o Knox].)

Mr. Young always felt like an "outsider" due to the fact he was tossed back and forth between his families. When Mr. Young went to stay with Billy, it was not because his father was anxious to have him, it was because his mother was usually frustrated with her son's behavior. Each time Mr. Young was thrust into another family setting, there was little planning or thought about his feelings. (Ex 96 at ¶ 170 [Decl. of Knox].)

While in North Carolina, Mr. Young had minimal supervision, smoked marijuana, and also tried crack cocaine and LSD. Mr. Young also drank alcohol on the weekends. When Mr. Young's father relocated from North Carolina to Daingerfield, Texas, Mr. Young was again withdrawn from school. (Ex. 96 at ¶¶ 79-80 [Decl. of Knox].)

During this last period that Mr. Young was living with Billy in Texas, Billy was arrested for injury to a child after he assaulted Mr. Young. Billy assaulted Mr. Young with his fists, striking him in the neck and body. Billy's sister finally stopped Billy from further hurting Mr. Young. (Ex. 96 ¶ 154 [Decl. of Knox].)

7. Mr. Young Enters a World of Institutions

When Mr. Young was fourteen years old, while Carla and Quentin were ou of town, Mr. Young stole a friend's car and took an eight-year-old boy and twelve-year-old girl to Louisiana with him. Soon after this incident, Mr. Young was withdrawn from Jefferson High School, which would be his last opportunity to interact as a teenager in a non-correctional school. (Ex. 96 at ¶ 82 [Decl. of Knox].)

In December 1997, Mr. Young was charged with burglary of a habitation. After his arrest, he was incarcerated at the juvenile detention center for more than a month until he could be placed. In January 1998, Mr. Young was admitted to th Waco Center for Youth by the Texas Department of Mental Health and Mental

Retardation. (Ex. 96 at ¶ 83 [Decl. of Knox].)

The Waco Center for Youth was the only state-funded residential progra for adolescents age thirteen to eighteen in Texas. Admission to the eighty-two unit required a mental health diagnosis. Dr. Helen Short was the only psychiat responsible for seeing the patients at the Waco Center. Dr. Short initially diagnosed Mr. Young with ADHD, Primarily Inattentive, Conduct Disorder an Disorder of Written Expression. (Ex. 96 at ¶¶ 83-85 [Decl. of Knox].)

When Mr. Young arrived at the Waco Center, he was taking Adderral. Although the drug had not appeared to be helpful for Mr. Young, Dr. Short decided to continue to treat Mr. Young with the drug. Mr. Young continued to exhibit hyperactive and impulsive behavior. After Mr. Young was involved in altercation with a peer, Dr. Short doubled the dose of the same medication. Mr Young became even more aggressive. Dr. Short eventually changed Mr. Youn another stimulant and he continued to exhibit aggressive behavior. When Mr. Young did not respond to the next stimulant drug, he was kept from all activiti including school and the cafeteria. While on total restriction, Mr. Young's behavior worsened and, on one occasion, he was put into restraints. (Ex. 96 at ¶ 86, 131 [Decl. of Knox].)

While being housed at Waco for several months, Mr. Young had receive little in the way of treatment. On restriction, he was unable to attend group therapy or any other therapeutic activities. After two months, Dr. Short change Mr. Young's medication from a stimulant to an anti-depressant: Wellbutrin. M Young did not respond to the Wellbutrin and got into an altercation with a peer (Ex. 96 at ¶¶ 87, 131-32 [Decl. of Knox].)

Despite Waco's mission statement -- "It is our responsibility to provide a long-term treatment environment that supports behavior change" -- Mr. Young' stay at Waco represented a worst-case scenario for a severe ADHD patient. He received no more than three hours per week of therapeutic activities, he was

restricted from school, and confined to an unstructured and punitive setting. Inevitably, the disciplinarian approach failed. (Ex. 96 at ¶¶ 88-89 [Decl. of Knox].)

In April 1998, Mr. Young was found to have committed an assault and indecency against another youth. The incident involved what was initially horseplay between Mr. Young and another Waco resident. The horseplay got out of hand, with both participants becoming angry, and it was alleged that Mr. Youn pulled his penis from his pants and attempted to stick it in the other youth's ear. (Ex. 96 at ¶ 90 [Decl. of Knox].)

Mr. Young was charged with Indecent Exposure to a Child and labeled a "sex offender." Due to the nature of the charges, Mr. Young was required to register on the State of Texas Sexual Offender list. Although this requirement wa later lifted in October 2001, it was yet another instance where Mr. Young was made to feel more like a criminal and re-enforced his own sense of failure. (Ex. 9 at ¶ 91 [Decl. of Knox].)

Throughout the years, Mr. Young has shown no signs that he is a sexual predator. However, the Waco event became a focal point in many of the conversations and interviews he has had with mental health professionals. The valuable time spent addressing this "problem" might well have been used to work with Mr. Young on tangible problems including his chemical dependency and mental health issues. (Ex. 96 at ¶ 92 [Decl. of Knox].)

In May 1998, after spending nearly five months at Waco, Mr. Young was given a psychological evaluation by Deborah Kintner. Mr. Young's Full Scale IQ was 112, but it appeared that Mr. Young might have been suffering from a mood disorder and that he had difficulty with impulse control. Projective testing revealed Mr. Young's feelings of inadequacy, insecurity, and inferiority. Ms. Kintner reported it was likely that Mr. Young compensated for his feelings of inadequacy with hostility and aggression. The tests also revealed that Mr. Young

viewed himself as a failure and was having feelings of hopelessness, perhaps a result of his childhood full of placements and replacements, dismissals and expulsions. Failing out of Waco, Mr. Young was placed at the Texas Youth Commission ("TYC"). (Ex. 96 at ¶¶ 95-96 [Decl. of Knox].)

8. Years at TYC

A TYC facility is a highly-structured and consequence-based environme Youths are monitored twenty-four hours a day, seven days a week. Routine evaluations are based on a youth's ability to follow the rules, maintain self-discipline, and integrate with others. Mr. Young's initial mental needs assessment at TYC was rated as having moderate needs and was described as having a mood disorder. Mr. Young's assessment also indicated he was likely have been subject to physical and emotional abuse and neglect. (Ex. 96 at ¶¶ 9 98 [Decl. of Knox].)

In August 1998, a psychiatrist, Dr. Groves, noted Mr. Young was having trouble with anger, impulsivity, and restlessness, as well as difficulty focusing, and that he was easily distracted. Dr. Groves diagnosed Mr. Young with ADH Combined and Conduct Disorder. Mr. Young was prescribed Wellbutrin. (Ex. at ¶ 135 [Decl. of Knox].)

In September 1999, in yet another attempt to properly medicate him, Mr. Young was prescribed Depakote, a mood stabilizer often used to treat bi-polar disorder. Mr. Young remained on Depakote until February 2001, when he was discharged from TYC. Mr. Young had also been restarted on Clonidine. Whil taking the combination of Depakote and Clonidine, Mr. Young's behavior, and symptoms, significantly improved. (Ex. 96 at ¶ 136 [Decl. of Knox].)

Although during his stay at TYC Mr. Young had numerous incidents of failure to comply with rules, there is evidence that Mr. Young attempted to ada by working with his psychiatrist to evaluate and improve his therapy. Mr. You also imposed sanctions upon himself in order to avoid conflicts with the rules,

TYC staff, and other youths. (Ex. 96 at ¶ 105 [Decl. of Knox].)

Mr. Young was also able to form good relationships with several of the guards at TYC. A female guard that knew Mr. Young for his entire stay at TY realized that Mr. Young was hyperactive and in turn, she tried to keep him bus which usually kept him out of trouble, and subsequently, she had no problems with him. This guard, recognizing Mr. Young's restlessness, would allow him come out of his "personal area" and help with chores. The correctional officer even had a pet name for Mr. Young, calling him "her boy." Mr. Young's beha with this guard exemplifies how well he responded to someone who furnished positive attention and support he needed. (Exs. 96 at ¶ 106 [Decl. of Knox]; 9 ¶ 20 [Decl. of Milam].)

Mr. Young spent his sixteenth and seventeenth birthdays at TYC. In fac Mr. Young spent the majority of his teenage years away from typical teenage activities and socialization. (Ex. 96 at ¶ 107 [Decl. of Knox].)

The main purpose for sending Mr. Young to TYC was to promote his rehabilitation in order for him to return to the free world and lead a productive However, due to the myriad of problems that plagued TYC during this time, m of Mr. Young's needs were not met or even addressed. For example, Mr. You was assessed as chemically dependent, but received no treatment for chemical dependency while at the facility. (Ex. 96 at ¶¶ 99-100, 108-10, 126-27 [Decl. Knox].)

9. Mr. Young's Return to the Outside World

On February 22, 2001, Mr. Young was released from TYC. As a youth, Young entered the prison-type environment without a mature identity or the ab to make sound independent judgments. When the controls of TYC were remo Mr. Young lacked an internal structure to revert to or rely upon. Institutionali at age seventeen, Mr. Young struggled to find a place he fit in the world. (Exs at ¶ 111 [Decl. of Knox]; 97 at ¶ 23 [Decl. of Milam].)

Prior to his release, Mr. Young's own internal control system remained undeveloped. Some development might have been possible after his discharge, had he been released to a structured, supportive environment that included stabl family relationships, work opportunities, helpful forms of parole supervision, support from the community, and provisions for chemical dependency and psychiatric treatment. But this was not the case with Mr. Young. (Ex. 96 at ¶¶ 112, 175 [Decl. of Knox].)

Carla was initially supportive and welcomed Mr. Young home, but Mr. Young was again exposed to the poor relationship with his stepfather and other negative influences. (Ex. 96 at ¶ 112 [Decl. of Knox]; 123 at ¶¶ 32-33 [Decl. of Sexton].)

Upon release from TYC, Mr. Young was referred to the Texas Mental Health Mental Retardation (MHMR) Centers. But those facilities were overwhelmed, understaffed, and underfunded, and appointments with psychiatri were not easy to make. Further, Mr. Young had limited transportation and no driver's license, which made getting to MHMR difficult, especially from the rur area in which he lived. (Ex. 97 at ¶ 15 [Decl. of Milam].)

For the first few months of his release, Mr. Young did well. He had a new sense of discipline, was working, and was fastidious about his appearance to the point he would always make his bed and keep his tennis shoes sparkling clean. (Ex. 123 at ¶ 32 [Decl. of Sexton].) Mr. Young had been considering other options for his future and he met with a recruiter for the armed forces. (Ex. 96 a 115 [Decl. of Knox].)

Mr. Young got a job as a dishwasher at a restaurant, but was soon off balance emotionally and psychologically. He soon fared poorly at his job and w terminated in the middle of April 2001. Mr. Young then started work at J. R. Construction with his father. By this time, Mr. Young had met Amber Lynch an was starting to hang around at the Shady Shores Motel, where Amber lived. (Ex

12.

96 at ¶¶ 113, 141-42, 176 [Decl. of Knox]; 123 at ¶ 33[Decl. of Sexton].)

Without a structured therapy or medication plan, Mr. Young turned to self-medication via other stimulants. With no external regulators to keep him on track, and instead surrounded by an abundance of street drugs, Mr. Young transitioned to methamphetamine, also known as "speed," "meth," or "crystal meth." Methamphetamine, albeit illegal, has properties similar to the FDA-approved medicine Young had been taking all his life. Despite its highly addictive nature and extremely dangerous side effects, it was a simple conversion for Mr. Young because of his long-term use of a chemically similar drug. (Ex. 9 at ¶ 17 [Decl. of Milam].)

After losing his job and using drugs with his half brothers, Mr. Young began to deteriorate and became more vulnerable to re-offending. The initial negative psychological factors affecting Mr. Young as a newly released prisoner manifested, and Mr. Young experienced internal chaos, disorganization, stress, and fear. (Ex. 96 at ¶¶ 114, 145 [Decl. of Knox].)

Mr. Young celebrated his eighteenth birthday on July 19, 2001, in t free world. But his drug use caused increased problems between him and Ambe It was at this time that Mr. Young met David Page, Darnell McCoy, and Mark Ray. The combination of hanging out with his brother Dano, who was using drugs, and other drug users in the Shady Shores area, contributed to Mr. Young' relapse and mental deterioration. Not only did Mr. Young's prior social history events and past experiences influence and affect his behavior, but here they wou "elicit, shape, and modify [his] thoughts and actions." (Ex. 96 at ¶ 117 [Decl. of Knox].)

Mr. Young's mother was also aware of the effect that Shady Shores was having on her son. Carla noticed that Mr. Young's behavior and even his appearance were changing, which she specifically recognized as clear signs of trouble. Carla attempted to contact Mr. Young's parole officer to encourage him

to monitor Mr. Young more closely. (Exs. 96 at ¶¶ 118, 146 [Decl. of Knox]; 1 at ¶¶ 33-36 [Decl. of Sexton].)

In November 2001, Amber went to spend the Thanksgiving holiday with grandmother in Midland, Texas. With Amber gone, Mr. Young became more involved in various illegal activities which culminated in his arrest for the murd of Doyle Douglas and Samuel Petrey. (Ex. 96 at ¶ 119 [Decl. of Knox].)

Mr. Young was continually told by his mother, step-father, father, and others that he would never amount to anything and would end up in prison. (Ex 96 at ¶ 147 [Decl. of Knox].) "Ultimately, Mr. Young's environmental factors severe negligence and abuse led to his identification and fulfillment of his fathe discouraging prediction." (Ex. 97 at ¶ 21 [Decl. of Milam].)

C. Mr. Young's Trial

1. Guilt/Innocence Phase -- Prosecution Case

The prosecution presented evidence that in late November, 2001, Mr. Young and three others, David Page, Mark Ray, and Darnell McCoy, rode with Doyle Douglas, in his car, from Marshall to Longview, Texas, to buy marijuana Page, Ray, and McCoy testified that once there, Mr. Young shot Douglas twice the head and commanded them to put Douglas in the trunk. Mr. Young then dr to a remote wooded area, where he ordered the group to push Douglas face dow in a creek and forced Ray, at gunpoint, to shoot Douglas for the third time.

According to the State's witnesses, Mr. Young, now driving Douglas's c dropped Ray and McCoy at their homes. Page volunteered to ride with Mr. Yo to Midland, where Mr. Young planned to see his girlfriend, Amber, who was at her grandmother's for Thanksgiving. Along the way, Mr. Young and Page abducted the second victim, Samuel Petrey, in his pick-up truck, and they abandoned the Douglas car. With Petrey sitting in the rear cab, Mr. Young and Page then drove to Midland.

Page testified that just south of Midland, at an oil pump site, Mr. Young

directed Page and Petrey to dispel evidence from the truck. Mr. Young then shot Petrey twice in the head, and Mr. Young and Page drove off. Aware now that the were wanted by the police for the Douglas murder, Mr. Young dropped Page in Midland, where Page turned himself in. Mr. Young met briefly with Amber outside a grocery store, then set out to return to east Texas. He was arrested alon Interstate 20.

Mr. Young was indicted by a grand jury for capital murder, which alleged that he intentionally murdered two people in the course of the same criminal scheme or in different criminal transactions committed pursuant to the same scheme or course of conduct and/or committed murder in the course of kidnappir and robbery. Ray and Page were held on murder charges and later pled guilty to lesser charges. McCoy, who had by his own volition directed the police to Douglas's body, was never charged.

The State's case against Mr. Young relied primarily on the testimony of Ray, Page, and McCoy. The State maintained that Young was the driving force i the murders and kidnapping, and that the others' involvement was the result of duress caused by Mr. Young. Ray, for example, testified that he only shot Douglas because Mr. Young threatened to harm him or his family if he didn't. Likewise, Page, who participated in the crimes from start to finish, said he did so only out of fear of Mr. Young. Mr. Young's sole purpose over the course of the two murders, according to the State, was to travel to Midland to see his girlfrienc

2. Guilt/Innocence Phase -- Defense Case

The defense's case focused mainly on three problems with the State's case conflicting testimony of the three eyewitnesses, inconsistent ballistic evidence, and signs of complicity among those who claimed to be threatened or held hosta by Mr. Young. Cross-examination of McCoy, Ray, and Page raised questions as to who among them was telling the truth. Ray had initially told police Mr. Youn fired all three shots at Douglas, then recanted when he learned McCoy had told

police Ray shot Douglas at the creek. Page, on the other hand, re-enacted the Petrey murder on videotape, then reversed his staging of the scene when he learned the coroner's report rendered his prior version implausible.

Page, Ray, and McCoy had trouble identifying who was sitting in which position in the Douglas car at the time of the murder. The three men never identified with any credibility whether they also carried weapons during the cri (there were several handguns recovered, two of which had been fired). The defense also highlighted the numerous occasions on which Page, who claimed t be a hostage of Mr. Young, could have easily parted company. Similarly, Petre had numerous opportunities to separate from his captors but chose to stay with them.

3. Punishment Phase -- Prosecution Case

The State put on evidence that Mr. Young had wanted to kill a drug deale only days before the killings for which he had been convicted, in addition to burglarizing a gun shop to acquire murder weapons found in the instant case. T State also presented evidence that Mr. Young was an unstoppable offender, wh life of crime had started as early as age nine, when he brought a gun to school, that he only showed signs of worsening.

The State's key witness at punishment was the medical director at Waco Center for Youth. She testified that her attempts to treat Mr. Young for severe ADHD had failed, and she opined Mr. Young was suffering from Anti-Social Personality Disorder. She eventually concluded Mr. Young was irredeemable, that he left her with no choice but to commit him to the TYC after an alleged "sexual" assault on another young male. The State presented over 1,200 pages records from the TYC, which represented countless attempts to medicate, discipline, and punish Mr. Young. One juvenile officer testified that Mr. Youn was "the worst [she] ha[d] ever seen."

The State also presented evidence by way of psychiatry experts and

correctional experts that Mr. Young could not be "fixed." Over objection, the prosecutor elicited testimony from one doctor that likened Mr. Young to a "serial killer"and a "psychopath." Experts from the Special Prosecution Division of the Department of Criminal Justice testified that a "Life Without Parole" sentence would not provide any guarantee that Mr. Young would not harm or kill again. The State's proposition to the jury was that the only way to stop Mr. Young from harming others again would be by a sentence of death.

4. Punishment Phase -- Defense Case

Trial counsel presented evidence that Mr. Young came from a broken and transitory family. Experts and medical professionals for the defense testified about Mr. Young's ADHD. On cross- examination, many of the State's witnesses agreed that Mr. Young had been mishandled or ignored while he was in various therapeutic/correctional institutions, or that the facilities were altogether ill-equipped for a case such as his.

The defense presented expert testimony by a neurologist who examined Mr. Young's brain function with an EEG, once at age nine, and again at trial. The doctor testified that both test results indicated an abnormality in Mr. Young's brain. Further expert testimony was presented to educate the jury on the nature of ADHD, and how it could be treated.

II.

PROCEDURAL HISTORY

Mr. Young is confined under a sentence of death pursuant to the judgment of the 238th District Court, Midland County, Texas, case number CR27181, which was rendered on April 11, 2003 and entered on April 14, 2003.[8] (CR at 866; 37 RR at 29.)

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[8] Judge John G. Hyde presided over Mr. Young's trial, motion for new trial and state post-conviction proceedings.

A. Trial Court Proceedings

1. Appointment of Counsel

On December 10, 2001, Paul Williams was appointed to represent Mr. Young. On December 20, 2001, Ian Cantacuzene was appointed as co-counsel Mr. Young. (CR at 8, 9.) On December 26, 2002, J. K. (Rusty) Wall was appointed as appellate counsel on Mr. Young's behalf. (CR at 691.)

2. Indictment and Re-Indictment

On December 20, 2001, a grand jury indictment was filed charging Mr. Young with the capital murder of Samuel Petrey. (CR at 3.) On February 7, 20 Mr. Young was re-indicted. In the first count of the re-indictment, it was allege that Mr. Young murdered both Samuel Petrey and Doyle Douglas pursuant to th same criminal transaction or in different criminal transactions committed pursu to the same course of conduct, within the meaning of Texas Penal Code Section 19.03(a)(7). In the second paragraph of the re-indictment, it was alleged that M Young intentionally murdered Mr. Petrey during the commission of robbery an kidnapping. (CR at 4-5.)

3. Trial

The First Amended Indictment was read to the defendant on March 17, 2003. (21 RR at 14-16.) Opening statements in the guilt/innocence phase commenced the same day. (21 RR at 16-42.) On March 25, 2003, both sides rested their presentation of evidence. (27 RR at 296.) The case was submitted the jury for guilt/innocence deliberations on March 27, 2003. (29 RR at 72.) T jury returned guilty verdicts as to both paragraphs of the first amended indictm the same day. (29 RR at 72-73.)

On March 28, 2003, the punishment phase began. (30 RR at 11-22.) Th punishment phase was completed on April 10, 2003. (36 RR at 71.) The jury commenced deliberations that afternoon. (36 RR at 134.) A few hours later, th

jurors sent a note to the judge asking for clarification on Special Issue No. 2.[9] RR at 134-35.) The following morning April 11, 2003, the jurors sent another note, this one regarding whether Mr. Young was medicated while in the custo the Midland County Jail.[10] (37 RR at 5.) That afternoon, a hearing was held i open court, outside the presence of the jury, regarding the fact that Midland County Sheriff Gary Painter had eaten lunch with the jurors during the recent break. (37 RR at 6-27.) Soon after that lunch break, the jurors returned their answers to the special questions, answering questions one and two in the affirmative, and question three in the negative. The court sentenced Mr. You death. (CR at 866-71; 37 RR at 29.)

4. Motion for New Trial

On May 9, 2003, Mr. Young filed a motion for new trial based upon th following claims: (1) Sheriff Painter's improper fraternization with the jury; insufficiency of the evidence concerning paragraph one of the amended indic - murder of more than one person in the same course or scheme of conduct; (insufficiency of the evidence concerning paragraph two of the amended indic - robbery and kidnapping of Mr. Petrey; (4) insufficiency of the evidence concerning the special issues at the punishment phase; and (5) ineffective assistance of trial counsel at both phases of trial. (CR at 901-12.) The court granted an evidentiary hearing with respect to Mr. Young's new trial motion. RR et seq., 39 RR at 100.) On June 20, 2003, the motion for new trial was de (CR at 922; 39 RR at 100-05.)

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[9] Specifically, the jury asked: "Regarding Issue No. 2 . . . 'cause the d of deceased individuals,' 'intended to kill the deceased individuals.' Questio Do you have to believe both or at least one?" (36 RR at 134-35.)

[10] Specifically, the jury asked: "We find no record of his current medication for ADHD during his stay in Midland County. Is this in the reco are we just not finding it?" (37 RR at 5.)

B. State Appellate Proceedings

On June 8, 2004, Mr. Wall filed an opening brief on appeal, *Clinton Lee Young v. The State of Texas*, Texas Court of Criminal Appeals (CCA) cause number AP-74,643.[11] On December 8, 2004, the Attorney General filed the

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[11] The grounds raised in Mr. Young's appeal included, but were not limi to:

(Point One) The trial court's supplementary instruction improperly coerc the jury to answer issue number two.

(Point Two) The trial court's supplementary instruction allowed the jury answer "yes" to special issue number two without requiring all twelve jurors to answer in the affirmative.

(Point Three) The trial court's supplementary instruction directed the jur answer to issue number two and was an impermissible comment on the weight the evidence by the trial court.

(Point Four) The trial court's supplementary instruction prevented the ju from considering circumstances of the offense favorable to Mr. Young that mig have been considered mitigation evidence.

(Point Five) The jury's fraternization with Sheriff Painter during deliberations was improper.

(Point Six) The Texas statutory scheme, allowing prosecutorial discretio deciding which capital murders will involve seeking the death penalty, denies process.

(Point Seven) The Texas statutory scheme allows prosecutorial discretio determining those who are death penalty eligible in violation of the Eighth Amendment.

(Point Eight) Mr. Young's jury had no vehicle to give effect to Mr. Youn ADHD and other mitigating evidence.

(Point Nine) The trial court erred in overruling Mr. Young's motion to quash the indictment.

(Point Ten) The trial court committed reversible error by failing to requi the third special issue to be submitted in accordance with *Apprendi v. New Jers*

(Points Eleven and Twelve) There was insufficient evidence, both factua and legally, to prove capital murder by committing multiple murders in the sam criminal transaction or in the same scheme or course of conduct.

(Points Thirteen and Fourteen) The evidence was insufficient, both factu and legally, to sustain the jury verdict on the theory of an intentional murder in course of the commission of a robbery.

(Point Fifteen) Texas Penal Code section 19.03(a)(2) is unconstitutional.

(Point Sixteen) The trial court erred in granting the state's challenge for cause to prospective juror Danie Lynn Roberts.

(Points Seventeen and Eighteen) The evidence is legally and factually insufficient to warrant an affirmative finding by the jury to special issue numbe one.

(Points Nineteen and Twenty) The evidence was legally and factually insufficient to warrant an affirmative finding by the jury to the anti-parties issu

(Points Twenty-One and Twenty-Two) The evidence was factually and legally insufficient to warrant a "no" answer to the mitigation special issue.

(Points Twenty-Three to Twenty-Five) The trial court erred when it deni Mr. Young's request to include the *Gessa* reasonable doubt instruction in its

State's Brief. Mr. Young filed a supplemental brief on January 25, 2005. On September 28, 2005, the CCA, in an unpublished opinion, denied Mr. Young' appeal. *Clinton Lee Young v. State* 2005 WL 2374669 (Tex. Crim. App. 2005

The Supreme Court denied a petition for writ of certiorari from the affirmance of judgments on April 3, 2006. *Clinton Lee Young v. Texas*, 547 U 1056 (2006).

C. State Habeas Proceedings

On April 16, 2003, Gary Taylor was appointed to represent Mr. Young purposes of the state application for writ of habeas corpus. (CR at 876(a).) O January 5, 2005, Mr. Taylor filed a request for an extension of time to file the application for writ of habeas corpus. (CWR at 351.) Judge Hyde granted the motion the following day, giving Mr. Taylor an additional ninety days to file t application. (CWR at 355.) On April 22, 2005, Mr. Taylor filed a state application for writ of habeas corpus on behalf of Mr. Young. The applicatio raised fourteen grounds for relief.[12] (CWR 001-162.) On July 13, 2005, Mr.

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punishment charge.

(Point Twenty-Six) The court failed to instruct the jury as to the meanin "probability," "criminal acts of violence," and "a continuing threat to society."

(Point Twenty-Seven) The trial court erred by denying Mr. Young's mo requesting the court to define that "probability" means "more likely than not."

(Point Twenty-Eight) The trial court erred in failing to instruct that the burden of proof on the mitigation issue was on the state to prove beyond a reasonable doubt that there was not sufficient mitigating evidence to warrant a sentence.

(Points Twenty-Nine to Thirty-One) Article 37.071 is unconstitutional.

(Point Thirty-Two) The court committed reversible error by disallowing Young's polygraph impeachment of David Page.

(Point Thirty-Three) Texas Penal Code section 8.07 violates the federal Constitution.

(Point Thirty-Four) Article 35.16(b)(1) specifically establishes a challe for cause which violates the First Amendment.

[12] The grounds included, but were not limited to:

(Ground One) The trial judge's assessment of costs associated with tria constituted a due process violation.

(Ground Two) The trial judge's assessment of costs associated with tria constituted an equal protection violation.

(Ground Three) The trial judge's assessment of costs associated with t

Taylor moved to withdraw as Mr. Young's counsel. (CWR at 359-61.) Mr. Young, in pro se, filed letters with the state writ court raising additional claims raised in Mr. Taylor's state application. (Ex. 51.) On August 8, 2005, the cour relieved Mr. Taylor and appointed Ori White to represent Mr. Young. (CWR a 365.) On August 19, 2005, the State filed its answer to Mr. Young's applicatio (CWR at 366.)

On November 7, 2005, Mr. White requested permission to file supplemental claims to the application. On February 6, 2006, the Court ordere evidentiary hearing in this case. (CWR at 738.) The evidentiary hearing was h on March 1, 2, 3, 9, and 10, 2006. (RWR at Vols. 1-7.) Telephonic deposition which became part of the evidentiary record, were held on March 17 and 24, 20 (Exs. 42-44.)

The State filed its findings of fact and conclusions of law on June 1, 200

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violated the Eighth Amendment.

(Ground Four) The trial judge's assessment of costs associated with tria not supported by Texas law or any constitutional provision.

(Ground Five) The trial judge's assessment of costs associated with this proceeding was an unconstitutional taking without due process.

(Ground Six) The Texas Court of Criminal Appeals' refusal to review th sufficiency of the mitigating evidence constituted a violation of due process un the Fifth and Fourteenth amendments.

(Ground Seven) The Texas Court of Criminal Appeals' refusal to review sufficiency of the mitigating evidence constituted a violation of the Eighth Amendment.

(Ground Eight) The execution of Mr. Young would constitute a violation the Eighth and Fourteenth amendments.

(Ground Nine) The Eighth and Fourteenth Amendments prohibit execut of Mr. Young based on his age and immaturity.

(Ground Ten) Mr. Young's right to the effective assistance of counsel under the Sixth Amendment was violated by trial counsel's failure to discover present evidence of physical, emotional, and sexual abuse.

(Ground Eleven) Additional evidence discovered since conviction, and n heard by the jury, would make execution a violation of Mr. Young's Due Proc rights.

(Ground Twelve) Mr. Young's rights to the effective assistance of trial counsel was violated.

(Ground Thirteen) Mr. Young's right to Due Process under the Fourteen Amendment was violated by the actions of the prosecutor in this case.

(Ground Fourteen) The prosecutor and police interfered with Mr. Young right to the effective assistance of counsel.

Mr. Young's proposed findings were filed on June 6, 2006. The state court denied Mr. Young's application on June 26, 2006. (Ex. 30 at 424.) The CCA denied the application in an unpublished boiler plate denial on December 20, 2006. *See Ex Parte Young*, 2006 WL 3735395 (Tex. Crim. App. 2006).

D. Federal Court Proceedings

On January 3, 2007, Ori White filed in the federal district court, Western District of Texas, Midland Division, a motion for appointment of federal habeas counsel on behalf of Mr. Young. On January 17, 2007, the district court appointed Mr. White and Mr. Wall to represent Mr. Young. Mr. Young's federal habeas petition was filed in that court on December 20, 2007.

On January 24, 2008, the district court conducted a hearing regarding Mr. Young's request for appointment of new federal habeas counsel. (Ex. 57.) On January 30, 2008, the court granted Mr. Young's request for new counsel. On March 3, 2008, the federal district court appointed Don Vernay and the Office of the Federal Public Defender, Central District of California, to represent Mr. Young. On March 13, 2008, counsel requested until October 18, 2008 to file an amended federal petition. On March 25, 2008, this district court granted Mr. Young until October 20, 2008 to file the amended petition. Respondent filed a motion for summary judgment on March 20, 2008, which was based on the prior federal habeas petition.

On October 20, 2008, Mr. Young filed his First Amended Petition for Writ of Habeas Corpus in the federal district court. On that same day, Mr. Young filed a Motion to Stay the Federal Habeas Action in order to return to the State court to exhaust newly discovered claims. On February 9, 2009, almost four months later, Respondent filed a Response to Mr. Young's First Amended Petition and an Opposition to Mr. Young's request for a stay of the federal action. On February 12, 2009, Mr. Young filed a Reply to Respondent's Opposition to Stay. On February 25, 2009, the federal district court granted Mr. Young's Motion to Stay

the Federal Habeas Action, ordering Mr. Young to file his successor application within thirty days. (Ex. 147.)

III.

CLAIM ONE

THE PROSECUTION'S FAILURE TO PRODUCE EXCULPATOR EVIDENCE, AND THE PRESENTATION OF FALSE TESTIMONY VIOLATED MR. YOUNG'S CONSTITUTIONAL RIGHTS

Mr. Young's convictions, confinement, and sentence violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, a comparable state law, because the prosecution violated its duty to disclose exculpatory evidence (that David Page and Mark Ray were offered deals by the State), and knowingly presented perjured testimony (that Page and Ray had not engaged in plea negotiations with the district attorney). This allowed Page and Ray to give a false impression of the evidence to the jury and allowed false evidence to go uncorrected.

If Respondent disputes any of the facts alleged below, Mr. Young reques an evidentiary hearing so that the factual disputes may be resolved. The declarations and other exhibits accompanying this Application, as well as the allegations and facts set forth elsewhere in this Application, are hereby incorporated by reference into this claim as though set forth in full.

The facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include the following.

A. Introduction

Habeas relief is compelled here because the State created false impressio that were material and which could, in reasonable likelihood, have affected the judgment of the jury. Further, the information contained herein was not availab to state habeas counsel at the time the first applications were filed (April, 2005

June, 2006). (*See* subsection B.3, and section IV, *post.*)

Mark Ray and David Page, unbeknownst to the defense, were testifying against Mr. Young in exchange for reduced charges and lenient sentences. Not only were the Ray and Page plea arrangements not disclosed to the defense, the prosecution actively obfuscated the fact that Ray and Page were testifying in exchange for leniency. The facts below establish that false information had a prejudicial impact on Mr. Young's capital case.

B. Relevant Facts

In March of 2002, counsel for Mr. Young filed a motion with the trial court requesting that any and all plea agreements between any prosecuting attorney and any prosecution witness be revealed. (Exs. 33 [March motion]; *see also* 31 [Feb. motion].) In April 2002, the motion was granted by the court. (Exs. 34; *see also* 35 [Sept. 2002 order].)

The State's case against Mr. Young, with regard to the Douglas killing, was based on the testimony of the same individuals who were involved in Douglas's death: Mark Ray, David Page, and Darnell McCoy. The State's case against Mr. Young, with regard to the Petrey homicide, was almost entirely based upon the testimony of Page.

Because the evidence regarding the Douglas and Petrey murders was based on accomplice testimony, it was incumbent upon the State to portray those witnesses as trustworthy, and to reduce the possibility of their impeachment, which would have materially weakened the prosecution's case and materially strengthened the defense case. In furtherance of that goal, the State failed to disclose to the defense its plea negotiations with Ray and Page and further, presented false evidence regarding those pleas negotiations.

1. Ray's Plea Deal

On November 25, 2001, Doyle Douglas was killed. Mark Ray was arrested for Douglas's murder on November 26, 2001. (Ex. 71 at 804 [Douglas Murder

Report - Ray].) At the time of his arrest, Rick Berry was the District Attorney Harrison County, the locus of the crime. (Ex. 70 [Rick Berry DA Info.].)[13] Ra was charged on November 29 with the murder of Douglas, a class one felony within the meaning of Texas Penal Code section 19.03. (Ex. 69 at 798 [Ray - Murder Charge].) Ray spoke to the police on November 26 and November 27, 2001. (Ex. 71 [Douglas Murder Report - Ray].)

Several months after his arrest for murder, Ray was offered a deal by District Attorney Berry which consisted of a reduced charge of aggravated homicide and a prison term of sixty years. Ray turned down the deal. (Ex. 11 ¶ 6 [Decl. of Mark Ray].) Several months later, District Attorney Berry revise the plea offer to "something like" forty or forty-five years. Ray again turned d the offer. (*Id.* at ¶ 7.)

About a month later, Mr. Berry offered Ray a new deal of thirty years. this deal, Berry told Ray, "Look, I'm not after you. We already have the guy w want." The thirty-year deal was "on the table" for a very long time. Richard Hurlburt, Ray's attorney, told Ray that Berry really wanted Ray to testify agai Mr. Young. Ray decided to reject the deal, and Hurlburt began to prepare for t (*Id.* at ¶ 8 [Decl. of Ray].)

Later, Berry offered Ray a deal of twenty years, for a reduced charge of aggravated kidnapping. Ray again rejected that deal. Berry then offered Ray a deal of ten years. Right before the general election for District Attorney, Berry offered Ray a deal for five years for a reduced charge of second degree kidnapping. Berry assured Ray that he would not serve much time if Ray testi against Mr. Young. (*Id.* at ¶¶ 9-10 [Decl. of Ray].)

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[13] In 2002, incumbent Rick Berry was challenged by Joe Black for the Democratic nomination for Harrison County District Attorney. Black won the nomination on March 12, 2002. Black also won the November general electio (http://www.sos.state.tx.us/elections/historical/index.shtml.) Berry remained t District Attorney until January 1, 2003, when Black was sworn in. (2 SRR at 116.)

At one point, Berry told Ray, in the presence of Ray's attorney, that he did not want to publically acknowledge that a plea bargain was in the works. Instead, Berry wanted Ray to sign a plea deal after the trial. With that understanding, Ray agreed to testify against Mr. Young. (Ex. 117 at ¶ 11 [Decl. of Ray].)

In March 2003, Ray was transferred from Harrison County to the Ector County jail in Odessa. (Ex. 61 [Ector County Jail Records].) According to Ray, during the months leading up to the trial (and during the trial itself), the authoritie made it clear to Ray that his testimony was important to convict Mr. Young of capital murder. (Ex. 117 at ¶ 12 [Decl. of Ray].)

This message was repeated not only by District Attorney Berry, but also by Midland County District Attorney Al Schorre and Midland County District Attorney Investigator J.D. Luckie. Luckie urged Ray to remain silent about the plea deal. Luckie "pretty much told [Ray] to keep [the plea deal] under wraps." (Ex. 117 at ¶ 13 [Decl. of Ray]; Ex. 146 at ¶ 5 [2009 Decl. of Ray].) Luckie told Ray that if "it got out" that he had been offered a plea deal, "it would give the defense a stronger case and make it harder to convict Clint." (Ex. 117 at ¶ 13 [Decl. of Ray]; Ex. 146 at ¶ 5 [2009 Decl. of Ray]; *see* 22 RR at 168-69 [J.D. Luckie talked to Ray during a break in his testimony at trial].)

Ray was also told by the authorities that he could not sign the plea deal before Mr. Young's trial because then Ray could truthfully testify on the witness stand that he had not entered into a plea deal. (Ex. 117 at ¶ 14 [Decl. of Ray].)

Mr. Young's trial began on March 17, 2003. (21 RR at 14.) Ray testified a Mr. Young's trial on March 18, 2003. In summary, Ray testified that Mr. Young shot Douglas twice in the head, took the others hostage, and later forced Ray to shoot Douglas in the head. (22 RR at 37-258.)

On a lunch break during Mr. Young's trial, Ray was told by then Special Assistant District Attorney Berry that the five year plea deal was still "on the

table." (Ex. 117 at ¶ 15 [Decl. of Ray]; *see* CR at 738.)[14]

The evidence that Ray received assurances regarding a plea deal, in exchange for his testimony against Mr. Young, were never disclosed to defense counsel. (Exs. 126 at ¶¶ 3-4 [Decl. of Paul Williams]; 116, 145 at ¶ 14 [Decl. of Nancy Piette].) To that end, the State presented false evidence regarding this d before and during Mr. Young's trial.

At a pre-trial hearing on January 21, 2003, Midland County District Attorney Al Schorre called Rick Berry as a witness. DA Schorre asked Berry whether he was aware of any deals being made with any of the witnesses durin the time he was the District Attorney of Harrison County. Berry replied that he was not:

> No, sir. I am unaware of any deals with any witnesses either that I have done or that anyone else has done, either during the time I was District Attorney or during the time I've been in private practice.

(2 SRR at 109-10.)

During cross-examination, defense counsel questioned Berry abou plea deals:

> Q. [Ian Cantacuzene] Now, as far as Mark Ray goes, do you know whether any plea arrangements have taken place between him and his attorney and your office, or your former office?
>
> A. [Rick Berry] No, I'm not -- I have not participated in any type of plea negotiations to elicit any type of testimony from him.

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[14] After the trial, District Attorney Black told Ray that he could not give five years offered by Berry. On June 18, 2003, Ray pled guilty to kidnapping, second degree felony. Ray agreed to a fifteen year term. (Exs. 72 [Ray Plea Papers - Harrison County]; 117at ¶ 16 [Decl. of Ray].)

Q. Has a plea offer been made to him as far as you're aware?

A. No.

Q. Would somebody else have that responsibility or would someone else have had that responsibility prior to you leaving office and going into private practice?

A. No. In my office beforehand, I was the only one to have responsibility. Now it would be Mr. Black or someone in Mr. Black's office.

(2 SRR at 112-13.) Later that same day, both newly elected Harrison County District Attorney Joe Black and Harrison County investigator Hall Reavis both testified that they were not aware of any deals being made with Ray. (2 SRR at 124, 127, 130-31.)

At trial, Special Assistant District Attorney Rick Berry (appointed by Midland County to assist in Mr. Young's prosecution) questioned Ray on direct examination as to whether he had "received any kind of deal, any kind of promis any kind of favor from any District Attorney's Office or anyone in exchange for your testimony today?" Ray answered, "None whatsoever, sir." (22 RR at 147.) On cross-examination, defense counsel asked Ray about any leverage the State had over him with respect to his testimony. Berry objected to the question. (22 RR at 239-40; *see also* 242-44.)

2. Page's Plea Deal

As previously stated, David Page was involved in both the Douglas and Petrey homicides. Page turned himself into the authorities in Midland, Texas, on November 26, 2001. (26 RR at 149-55.) Page was represented by Midland attorney, H.W. "Woody" Leverett, Jr. (Ex. 111 at ¶ 2 [Decl. of Woody Leverett].)

Beginning in February of 2001, Leverett attended at least three meetings

with Midland County District Attorney Al Schorre, and his staff (including prosecutor Clingman, Investigator Luckie, and Deputy Sheriff Paul Hallmark), about Page's case. The meetings were intended to work out a plea arrangement for Page, where Page would receive a reduced sentence in exchange for his testimony against Mr. Young. (*Id.* at ¶ 3 [Decl. of Leverett].)

Throughout the discussions, Leverett was attempting to get the best deal Page in exchange for Page's agreement to testify against Young. The DA verba committed to a plea offer in the fifteen to thirty year range, provided that Page not throw the prosecution a curve ball when testifying. According to Leverett, "only open questions were what the final offer would be, in terms of years, and whether Page would accept the offer." Leverett kept Page informed of all plea offers and all discussions. (*Id.* at ¶ 5.)

The meetings between Page, Leverett, and the Midland County District Attorney's office continued until January 2003, a few months before Mr. Young trial. At one of the final meetings, DA Schorre went over Pages's testimony in preparation for Mr. Young's trial. (*Id.* at ¶ 7 [Decl. of Leverett]; Ex. 63 at 725- [Leverett Billing Records and Letter]; *see also* 27 RR at 16, 147.)

Page testified at Mr. Young's trial on March 24 and 25, 2003. In summa Page testified that Mr. Young shot Douglas in the head, forced Page to drive to Midland with him, and Mr. Young kidnapped and murdered Sam Petrey. (26 R at 128, et. seq., and 27 RR at 6-243.)

At trial, on direct examination, Midland County prosecutor Clingman ask Page whether he had received " any kind of an agreement to give you any particular sentence," to which Page responded, "No, ma'am." (26 RR at 257.) cross-examination, Page testified that he had not been offered any type of deal agreement by the State in exchange for his testimony. At one point, Page testif that "[t]hey haven't came to me with anything." (27 RR at 127, 130-31.)

After Mr. Young's trial, Page agreed to a thirty year sentence for aggrav

kidnapping. Leverett was angry with DA Schorre because he believed Page had testified for the State exactly as Page had been expected to, and Leverett felt "we had been led to believe we could very likely receive a pleas offer well below thirty years." (Ex. 111 at ¶ 9 [Decl. of Leverett].)

3. Investigation into the Plea Deals

In March 2005, Tena Francis interviewed Mark Ray pursuant to state habeas counsel's direction. At that interview, Ray denied having a deal with prosecutors. (Exs. 141 at ¶¶ 18-20 [2009 Decl. of Tena Francis]; 146 at ¶ 6 [2009 Decl. of Ray].) Ray did not confirm the existence of a plea deal until July, 2008, when he was interviewed by the federal habeas team. (Exs. 117 [Decl. of Ray]; 146 at ¶¶ 8-9 [2009 Decl. of Ray]; 143 at ¶ 9 [2009 Decl. of Greg Krikorian] 144 ¶ 2 [Decl. of Brad Levenson].) (*See* Section IV, *post*.)

An investigator for state habeas counsel interviewed David Page in March, 2005. At that interview, Page denied the existence of a plea agreement. (Ex. 144 at ¶ 5 [Decl. of Levenson].) Page was interviewed again on July 9, 2008 by the federal habeas team. Page again denied entering into plea discussions with the prosecution prior to his testimony against Mr. Young. (Exs. 143 at ¶ 10 [2009 Decl. of Krikorian]; 144 at ¶ 3 [Decl. of Levenson].) However, due to Ray's recent admission, and based upon Page's demeanor and answers to questions during the interview, the federal habeas team had reason to believe that Page was not telling the truth and interviewed Page's trial attorney, Woody Leverett, in September 2008. (Exs. 143 at ¶ 10 [Decl. of Krikorian]; 144 at ¶¶ 3-4 [Decl. of Levenson].) Mr. Leverett admitted to engaging in plea negotiations with the prosecution in exchange for Page's testimony against Young. Mr. Leverett also admitted that Page knew about these pleas negotiations. (Ex. 111; *see* Section IV *post*.)

With the new evidence regarding Ray and Page in hand, federal habeas counsel filed a petition in federal court in October, 2008, and asked the federal

court to grant a stay so that Mr. Young could return to state court to exhaust the claims. (Exs. 148.) The federal court granted the stay in February, 2009, givin Mr. Young thirty days to return to this Court. (Ex. 147.)

C. Relevant Legal Authority

1. *Brady v. Maryland*

"[T]he suppression by the prosecution of evidence favorable to an accus upon request violates due process where the evidence is material either to guilt to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *accord Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Mahler v. Kaylo*, 537 F. 3d 494, 499 (5th Cir. 2008); *Dickson v. Quarterman*, 462 F.3d 470, 477 (5th Cir. 2005). In order to prevail on a *Brady* claim, a petitioner must demonstrate that (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State either willfully or inadvertently; and (3) prejudice mus have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *accord Mahle* 537 F.3d at 500; *Tassin v. Cain*, 517 F. 3d 770, 780 (5th Cir. 2008); *Dickson*, 4 F. 3d at 477; *Thomas v. State*, 841 S.W.2d 399, 402-04 (Tex. Crim. App. 1992

For prejudice to ensue, the suppressed, favorable evidence must be "material." *Brady*, 373 U.S. at 87. Evidence is material under *Brady* if a reasonable probability exists that, had the evidence been disclosed to the defen the result of the proceeding would have been different. *United States v. Bagle* 473 U.S. 667, 682 (1985). A reasonable probability is one that sufficiently undermines confidence in the outcome of the trial. *Id.*; *Mahler*, 537 F. 3d at 5 "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). When determining

whether the *Brady* information was material and therefore prejudicial, the evidence must be considered in light of the evidence available for trial that supports the petitioner's conviction. *See Towns v. Smith*, 395 F. 3d 251, 260 (6th Cir. 2005); *United States v. Bencs*, 28 F. 3d 555, 560 (6th Cir. 1994) ("[m]ateriality pertains to the issue of guilt or innocence, and not to the defendant's ability to prepare for trial") (citing *United States v. Agurs*, 427 U.S. 97, 112 n.20 (1976)).

2. *Napue v. Illinois*

A conviction obtained using knowingly perjured testimony violates due process. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (due process violated when prosecution allows jury to be presented with a materially false impression). A state denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 199 (*citing Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)); *United States v. Barnham*, 595 F.2d 231, 240-41 (5th Cir. 1979).

The prohibition against the use of false testimony applies even when the testimony in question was relevant only to the witness's credibility. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). When this happens, reversal of the defendant's conviction is a near certainty because courts do not employ a strict materiality test or a harmless-error analysis. *See Alcorta*, 355 U.S. 28 (reversing conviction and death sentence where sole eyewitness lied about his romantic involvement with the victim -- lies the government condoned and covered up).

The presentation of false evidence is intolerable because it perpetrates a fraud on the judge and the jury and undermines the "rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935). The fraud is also insupportable because of its corrosive effect on the

judicial process and because the instrument of deceit is a prosecutor, "whose obligation . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). To prevail on a claim based on *Napue*, the petitioner must show "(1) the testimony evidence) was actually false, (2) the prosecution knew or should have known th the testimony was actually false, and (3) the false testimony was material." *Ree v. Quarterman*, 504 F.3d 465, 473 (5th Cir. 2007); *Pyles v. Johnson*, 136 F.3d 986, 996 (5th Cir. 1998).

"False evidence is 'material' only if there is any reasonable likelihood tha [it] could have affected the jury's verdict." *Goodwin v. Johnson*, 132 F.3d 162 185 (5th Cir. 1997).

D. Because The Prosecutor Failed to Disclose Material Exculpatory Evidence and Presented False Testimony Regarding Page's and Ray' Plea Deals with the State, Mr. Young's Application Should be Grant

The State in this case not only suppressed evidence that it had engaged in extensive plea negotiations with Page and Ray (*see Brady/Strickler)*, the State a used knowingly perjured testimony at trial (*see Napue*). Both constitute constitutional violations that require habeas relief.

With regard to the elements of the *Brady* claim, first, the evidence in question was favorable to Mr. Young because it impeached Ray and Page. *Strickler*, 527 U.S. at 281-82; *United States v. Miller*, 520 F.3d 504, 514 (5th C 2008) ("Impeachment evidence falls within *Brady's* reach"); *accord Mahler*, 5 F.3d at 503 (habeas relief granted where State's case against Mahler likewise depended on the reliability of the very witness whose pretrial statements were suppressed). Had counsel known that Ray and Page agreed to testify against M Young in exchange for reduced charges and a lenient sentence, counsel would have used that information to impeach Page's and Ray's credibility i.e., Ray wa lying about his own culpability in the Douglas murder and untruthfully shifted

blame to Young, and Page was lying about his own culpability in the Douglas and Petrey murders and untruthfully shifted the blame to Young. (*See* Ex. 126 at ¶ 5 [Decl. of Williams].) Any reasonable defense counsel would have used this impeachment evidence.

Counsel also would have used the plea information in an attempt to bleed Ray's and Page's deal with McCoy -- if Ray and Page had a deal with the State, it was to be expected that McCoy was also testifying against Mr. Young in exchange for an undisclosed benefit. Darnell McCoy also appears to have had a deal with the State.[15] (*Id.* at ¶ 8 [Decl. of Williams].)

Further, if this information had come out during trial, counsel would have asked the court for a mistrial based on government misconduct as the prosecution had testified under oath during pre-trial motions that no plea agreements had been reached, and that no plea discussions had occurred. (Ex. 126 at ¶ 6 [Decl. of Williams].) And if this information had come to light before the start of trial, counsel would have questioned prospective jurors how they would react to State witnesses who received "back hand" deals with the State. (*Id.* at ¶ 11.)

With respect to the second prong of *Brady*, the evidence was suppressed by the State. *Strickler*, 527 U.S. at 281-82. Specifically, Mr. Young's trial counsel was never informed that the State had discussed a plea agreement with either Ray

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[15] Unlike Ray and Page, who were arrested and charged with crimes against Douglas or Petrey, McCoy became the State's "star witness," which meant, for the State, secretly "sanitizing" McCoy's rap sheet before Young's trial. (Ex. 110 at ¶ 4 [Decl. of Greg Krikorian].) To that end, between the time he became the State's "start witness" against Mr. Young, and the time of Mr. Young's trial, McCoy was stopped for various drug and traffic crimes in at least Longview, Gilmer, Gladewater, and Ore City, but was never held by the authorities. Rather, McCoy would be arrested, charged, and then released. According to McCoy's wife, Patricia, these cases would just go away, as if they never happened. (*Id.* at ¶¶ 5-6; *see also* Ex. 68 [McCoy Criminal Records].) At one point, shortly before Mr. Young's trial, Harrison County Investigator Hall Reavis and at least one other investigator or policeman came to the McCoy house. Patricia overheard Reavis tell Darnell, "We know you got in trouble for marijuana." When Reavis said this he was smiling, as if to assure Darnell McCoy that the charge would somehow be taken care of by authorities. (*Id.* at ¶ 7.)

or Page. And while the district attorney's file was open for counsel to review, i did not contain any information that would have led counsel to know about such deals. (Exs. 126 at ¶ 4 [Decl. of Williams]; 116, 145 at ¶ 14 [Decl. of Piette].) that matter, the State affirmatively presented evidence at a pretrial hearing that deal was in place with Ray. (2 SRR at 109-10, 112-13.)

With respect to the third prong of *Brady*, the fact that counsel was never informed that Ray and Page were agreeing to testify against Mr. Young in exchange for reduced charges and lenient sentences, was prejudicial to Mr. Young's case. It was clear that the State wanted the jury to believe Ray's and Page's testimony and thus, it attempted to bolster their credibility by not reveali the deals. Had the jury not credited Ray's and Page's version of the events, Mr Young would not have been eligible for capital murder. (*See* Exs. 101 at ¶ 3 [Decl. of Juror Michael Byrne]; 100 at ¶¶ 5-6 [Decl. of Juror James Bobo].)

Bolstering Ray's and Page's credibility significantly strengthened the State's theory that Mr. Young was the crime leader of the entire enterprise i.e., Mr. Young was the person who orchestrated both the Douglas and Petrey killin Said another way, by bolstering Ray's and Page's credibility, the state was able minimize their involvement in the Douglas and Petrey murders and at the same time, increase Mr. Young's culpability for the crimes charged.

It was important for the State to portray Ray and Page as victims, along v McCoy. Had the jury known about the existence of a deal, there is a reasonable probability the jury would have viewed Ray's and Page's involvement in the murder in a much different light: that Ray's and Page's testimony was self-serving; they were not held hostage as they testified to; with regard to Ray, he alone willingly fired the last and what could have been the fatal shot into Doug and with regard to Page, it was he who fired the shots that killed Petrey. *Davis Alaska*, 415 U.S. 308, 316 (1974) (exposing motivation of witness in testifying proper and important function); *see Wilkerson v. Cain*, 233 F.3d 886, 890 (5th

2000).

Moreover, had the jury known of the deals, it would have been able to discern that Ray and Page had vested interests in the final outcome of the trial - that Mr. Young be viewed as the sole murderer of Douglas and Petrey. The State verified this when J.D. Luckie told Ray that it would be harder to convict Mr. Young should knowledge of the plea deal be made public. (Ex. 117at ¶ 13 [Decl. of Ray].)

With regard to the Douglas murder, had the jury known that Ray and Page were receiving deals for their testimony, the State would have been left solely wit the testimony of McCoy and Brook. Brook, however, was tainted based on his own prior criminal history including the very recent Torres robbery. (21 RR at 234.) And with regard to McCoy, he, too, presented the State with a problem as McCoy had a year before Mr. Young's trial been accused of molesting fourteen-year old Megan [redacted]. McCoy had also recently attempted suicide, which, it could be argued, was a result of his complicity in the Douglas murder. (21 RR at 93.)

Ray, without a criminal past, was the State's crucial star witness for the Douglas killing. Thus, Mr. Young's conviction, at least as far as the Douglas killing went, was primarily based on Ray's credibility.

And with regard to the Petrey homicide, had the jury known that Page was receiving leniency for his testimony, the jury would have discredited his version events, which placed the blame of the kidnapping, robbery, and murder of Petrey squarely on Mr. Young.

Mr. Young was charged under Texas's Law of the Parties statute, making him vicariously liable for capital murder through the actions of his cohorts. *See* Tex. Penal Code § 19.02(b). Had the jury known that Ray and Page were receiving promised deals (Ray for five years and Page for aggravated kidnapping instead of murder), it was reasonably probable that the jury would not have

convicted Mr. Young of murder based upon the instructions given, let alone capital murder.

To make matters worse, in closing guilt/innocence phase argument, the prosecutor argued that Ray was going to face capital murder charges following Mr. Young's case, and Page was going to face murder charges. (29 RR at 25-2 The State knew this to be untrue.

The evidence of Ray's and Page's plea deals were also material to the punishment phase. In order to evaluate Mr. Young's conduct under Special Iss No. 2, the jury was told to look at Mr. Young's conduct alone, not in conjuncti with the conduct of the other parties. By believing Ray's and Page's testimony the jury believed Mr. Young was the cause of both murders or intended to caus the deaths. Had the jury known of the deals, Ray's and Page's credibility woul have been severely impeached, and it is reasonably probable Mr. Young would have been given the death penalty.

The fact that there was no specific written plea deal between the prosecu and Ray and Page does not mean there was not a deal in place. To that end, the State specifically told Ray that it did not want to memorialize the plea deal unt after the trial and that the verbal agreement should not "get out" to the public. (Ex. 117 at ¶¶ 11, 13 [Decl. of Ray].) However, once Ray and Page agreed to testify in exchange for reduced charges and a lenient sentence, the deal was complete. *Tassin*, 517 F.3d at 778 ("The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction") (*quoting Bagley*, 47 U.S. at 683 (opinion of Blackmun, J., joined by O'Connor, J.) (emphasis added *Wilkerson*, 233 F.3d at 890-91 ("what tells, of course, is not the actual existenc a deal but the witness' belief or disbelief that a deal exists"); *accord Burbank* v *Cain*, 535 F.3d 350, 359 (5th Cir. 2008) (not important that the agreement was

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never finalized); *see Giglio*, 405 U.S. at 153 n.4 (Court reversed defendant's conviction and remanded for a new trial under *Brady* because prosecutor failed to disclose a leniency promise to a principal witness); *accord Mahler*, 537 F.3d at 503; *Duggan v. State*, 778 S.W. 2d 465, 468 (Tex. Crim. App. 1989) (rejecting the assertion that an agreement of leniency must be "formalized" to writing before it could be introduced as evidence finding that "[i]t makes no difference whether the understanding is consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal. A deal is a deal"); *Burkhalter v. State*, 493 S.W. 2d 214, 216-18 (Tex. Crim. App. 1973) (the evidence of "suggestion and innuendos" of such a deal should have been introduced to the jury).

If Ray's and Page's plea deal had come to light during trial, the State would have lost complete credibility with the jury (*see* Ex. 126 at ¶ 7 [Decl. of Williams]), especially in light of the problems that the jurors had with the Midland County investigation, especially that which involved Investigator Paul Hallmark. (38 RR at 135, 141-42.) If the jury was concerned about the sheriff's handling of the crime scene (which it appeared they were), that concern can be interpreted as questioning the integrity of the forensic evidence, thus increasing the jury's reliance on the testimony of the cohorts in reaching the verdict. If the Ray and Page deals had come to light during the trial, the jury would not have relied upon their testimony **and** that information would have further reduced the jury's confidence in the handling of the forensic evidence.

Relief should also be granted on Mr. Young's *Napue* claim -- that Mr. Young's conviction was based upon the use of knowingly perjured testimony i.e., the States's insistence that Ray and Page were not given deals before trial.

With respect to Ray, DA Rick Berry's testimony that Ray had not received a plea deal (2 RR at 111) was actually false. To that end, Berry was the person who negotiated a plea deal with Ray. Second, the prosecution knew the testimony was

false. For that matter, Black solicited this false testimony from Berry, and in tu Berry solicited the false testimony from Ray.[16] And third, the false testimony w material, for the same reasons explained above with regard to the *Brady* claim.

And with respect to Page, prosecutor Clingman specifically asked Page d re-direct examination whether he had received "any kind of an agreement" for h testimony, to which Page responded, "No, ma'am." (26 RR at 257.) However, State had, in fact, been negotiating with Page since February of 2002. (Exs. 63 [Billing Records of Woody Leverett]; 111at ¶¶ 3-4 [Decl. of Leverett].) Secon the prosecution knew the testimony was false. And third, the false testimony w material, for the same reasons explained above with regard to the *Brady* claim. *See Barnham*, 595 F.2d at 243 (failure to testify about benefits promised).

Mr. Young's conviction for capital murder, and his punishment of death, was based upon suppressed evidence, that Ray and Page were given secret plea deals, and upon knowingly presented perjured testimony, that the State had nev entered into plea negotiations with Ray and Page. Accordingly, Mr. Young's conviction for capital murder, and his sentence of death, are not "worthy of confidence." *Kyles*, 514 U.S. at 434. Moreover, the disclosure of this evidence would have painted the State's case against Mr. Young in "such a different ligh to undermine confidence in the verdict." *Id.* at 435.

The State, in this case, should have been a seeker of truth and justice rath than a competitor intent on winning at all costs. It was the jury who should hav been permitted to review all the evidence necessary to make an informed decis Instead, the State chose to present a case full of lies and half truths. Mr. Young should be afforded relief in this case.

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[16] Even if Black did not know the testimony was false, Black was charg with constructive knowledge of every fact that any member of the prosecution team was actually aware of. *Ex Parte Adams*, 768 S.W.2d at 292.

E. The State Deprived Mr. Young of His Right to Confront the Witnesses Against Him When it Instructed Mark Ray Not to Reveal the Plea Agreement When He Testified at Young's Trial

Independent of the errors described above, the State deprived Mr. Young o his right to confront witnesses when it instructed Mark Ray not to reveal his plea agreement when he testified at Young's trial.

As previously stated, Harrison County District Attorney Rick Berry told Ray not to publically acknowledge that a plea deal was in the works. Further, Midland County District Attorney Chief Investigator J.D. Luckie urged Ray to stay silent about the plea deal, to "keep it under wraps" and that "if it got out that [Ray had] been offered a plea deal, it would give the defense a stronger case and make it harder to convict Clint." (Ex. 117 at ¶¶ 11, 13 [Decl. of Ray].)

By instructing Ray not to divulge the plea deal he had entered into, the Sta deprived Mr. Young of his constitutional right to rebut the State's evidence through cross-examination. *Kittelson v. Dretke*, 426 F.3d 306, 318 (5th Cir. 2005).[17]

As stated by trial counsel, had the defense known that Ray and/or Page we in plea negotiations with the State, it would have "vigorously cross examined the about the deals, using the plea discussions as impeachment evidence." (Ex. 126 ¶ 5 [Decl. of Williams].)

This error, in conjunction with the errors described above, warrant habeas relief.

F. Conclusion

The constitutional violations set forth in this claim alone mandate relief from the convictions and sentence. However, even if these violations are deemed

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[17] The same can be said about David Page. While the evidence is less clea that Page was *specifically* told not to divulge his plea deal, the State certainly did not turn that information over to the defense prior to, or during trial.

to not mandate relief standing on their own, relief is required when this claim is considered together with the additional constitutional errors outlined in the remainder of this Application. Cumulatively, these errors mandate relief from M Young's convictions and sentence.

Further, this claim could not be raised before because the State not only failed to turn this evidence over to the defense, it took steps to hide this evidenc from view.

CLAIM TWO

THE PROSECUTION'S SUPPRESSION OF EVIDENCE CONCERNING STATE WITNESS A. P. MERILLAT VIOLATED MR. YOUNG'S CONSTITUTIONAL RIGHTS

Mr. Young's convictions, confinement, and sentence violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, a comparable state law, because the prosecution suppressed evidence regarding State witness A. P. Merillat, and the State's suppression of the evidence preven the defense from challenging the witnesses' credibility. Further, the informatio contained herein was not available to state habeas counsel at the time the first applications were filed (April, 2005 and June, 2006). (*See* subsection C, and section IV, *post*.)

If Respondent disputes any of the facts alleged below, Mr. Young reque an evidentiary hearing so that the factual disputes may be resolved.

The declarations and other exhibits accompanying this Application, as w as the allegations and facts set forth elsewhere in this Application, are hereby incorporated by reference into this claim as though set forth in full.

The facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include the following.

A. Merillat's Testimony at Mr. Young's Trial

On April 21, 2003, defense counsel filed a motion to exclude the testimony of A. P. Merillat ("Merillat"), arguing, in part, that Merillat would testify as an expert on future dangerousness without being qualified to do so. (CR at 844.) Defense counsel reiterated his motion at trial, arguing that Merillat would refer to specific instances of violence within the Texas prison system, which were not relevant to the allegation that Mr. Young himself would commit acts of violence while incarcerated. (35 RR at 48.)

In response, the State argued Merillat's testimony was relevant to Mr. Young's punishment phase because Merillat would testify to the following: the various levels of classifications of prisoners; opportunities for violence and types of violence that can occur in prison; opportunities inmates have to make weapons while in prison; and what types of drugs are available in prison, including psychotropic drugs, and how inmates hide those drugs. (35 RR at 48.) The State proffered that Merillat would not offer expert opinion as to Mr. Young's future dangerousness. (*Id.*)

Upon prompting by the trial court, the State assured the court Merillat would testify as to events or circumstances based on his personal knowledge. (35 RR at 50). On those bases, the court allowed Merillat to testify. (*Id.*)

According to his curriculum vitae ("CV"), Merillat was a Senior Criminal Investigator with the Special Prosecution Unit, whose responsibilities included investigating felonies occurring in the Texas prison system, "[p]roviding special investigative assistance to local district attorneys . . . [and] Statewide Capital Murder prosecution assistance" since 1989. (Ex. 129 [Merillat CV].) In his CV, Merillat described himself as a "[c]onsultant to local Texas police departments/District Attorneys offices in major assault, homicide and child sex crimes," and as an "[i]n-court second chair with prosecutors in one hundred (100) jury trials" from 1989 through 2002. (*Id.*)

During the punishment phase of Mr. Young's trial, Merillat testified that considered the Special Prosecution Unit ("SPU"), an office created and funded the Texas Governor's office since 1984, independent from the Texas prison system. (35 RR at 56.) Because the governor's grant was administered through Walker County, Merillat considered himself "not a state employee [but] a count employee." (*Id.*)

According to Merillat, the Governor of Texas created the SPU to prosecu crimes committed within the prison system which could not be prosecuted by counties where a given prison was located. (35 RR at 56.) According to Meril his office prosecuted 794 cases, from capital murder to improper sex with an inmate, the year before Mr. Young's trial. (*Id.* at 65.) Merillat testified that ou of those 794 cases, 130 cases were drug related. (*Id.* at 66.)

According to Merillat, contraband, including drugs, arrived into prison though the legal mail. (*Id.* at 67.) Merillat testified that prison gangs controlle the trade of contraband in prison. (*Id.* at 67-68.) Merillat also testified that prescription drugs, including drugs distributed to a given inmate through a "pil line," could be used as contraband and traded by the inmate who was prescribe that medication. Over defense objection, Merillat testified that even Ritalin co become contraband in prison. (35 RR at 71.)

> Q. All right. Do pills that you receive in the pill line, do those ever act as currency or money, have a value for the inmate in prison? In other words, can I, if I'm an inmate that's prescribed Ritalin, let's say, can I, rather than take my Ritalin pill and use it for something?
>
> A. Yes, ma'am. Drugs, medicine, narcotics, anything like that, it won't have the same type of value that a jar of foot powder will, but it will mean

something to the person that you're trying to sell it to or who has ordered you to go get it, steal it, hide it and bring it to him, such as that, so it's valuable, but not – doesn't have a dollar amount.

Q. I see. Would you say that it's valued in a very positive way or just in a menial way, medication, pills?

A. The rarer and harder to obtain an item is, the more value it has, so if it's an aspirin, it's not very valuable, but if it's a pill or something that nobody knows what it is, it looks like something from a drugstore, well, it's going to be worth a lot of money to somebody, or a lot of value, we'll say.

Q. Do inmates ever use things of that nature, such as pills, to curry favor with other inmates in prison?

A. Yes, ma'am. I know the Texas Syndicate does that quite heavily.

(35 RR at 76-77.)

Merillat testified that violence was pervasive within the prison system. According to Merillat, inmates avoided assaults by paying other inmates for protection. (35 RR at 83-84.) Another way to avoid being assaulted, including being raped within a prison when first assigned to a particular unit, was for an inmate to "catch out," or engage in an activity that would lead that inmate to incu a disciplinary violation so that the inmate could be housed in a disciplinary cell and thus isolated from other inmates. (*Id.* at 84.) A way of "catching out" included fabricating a weapon. (*Id.* at 84-85.)

Q. But does that count against them as far as potentially raising their level of housing?

A. It's very difficult, because -- well, we prosecuted a hundred -- almost 200 weapons cases last year alone. We have hundreds of weapons. That's probably our most frequent crime. It's hard to determine what's a catch out and what is really going to be used to cut an officer's throat or kill another man, so that's one of my jobs is to get that case in, that report of the case and try to determine through witnesses or through the man himself, through the circumstances, through the documentation of what he's been through the past several weeks to see if that matches up, and if it does, we won't prosecute. We'll dismiss those cases. We're not out just to hang inmates at all. So it's a difficult situation, and whereas there are many catch out cases, there are many, many more that are not, that are serious crimes that when it's time to go to trial, the inmates all of a sudden say hey, that was a catch out case, I was getting hogged or I was getting ho checked by these guys, I had to make that thing, so it's real hard to determine.

(35 RR at 85-86.)

According to Merillat, the highest level of security available within the prison system was high security and death row, which were similar in most respects but for the fact that those on death row received a capital sentence. (3 RR at 122.) According to Merillat, even within the more restrictive high secur cells, opportunities for violence still existed:

Now, there are only a few high security units in the state. They're reserved for the absolute worst that you can do nothing else with, nothing else would help, so they put him in this high security. That's a whole nother [sic] story. Everything an inmate does is done inside the cell, eat, shower, everything. He gets out one hour a day if he's been good by himself to go recreate in a small yard by himself. He has to be escorted by two officers to come out of that cell in handcuffs, so he's fed through that -- that's called a bean slot, that little door that opens that looks into the cell down at the bottom . . . .

(35 RR at 90-91.) Merillat also testified that inmates made weapons out of virtually anything in prison. (35 RR at 86, 93.)

Asked whether there would be a way to ensure Mr. Young was confined within the highest level of security in the prison system, Merillat testified that no one could tell the prison system how to house an inmate:

Q. Okay. Is there any way that these ladies and gentlemen of the jury can be assured as to what an inmate's classification will be other than what you've already told us about or what type or housing an inmate will have in prison?

A. It will depend on the inmate, no one else.

Q. Okay. So even if they wanted to send a message to prison and say, "House this guy in Administrative Segregation," could a jury do that?

A. A jury or a judge, nobody can tell the prison where or how to house an inmate.

(35 RR at 96-97.)

According to Merillat, if an inmate was "a member of one of seven recognized street gangs, he'll never get out of Seg. That's about the only person who will never get out of Ad Seg is one of those seven street gang members. Ev an escapee will sooner or later work his way out of Ad Seg if he behaves." (35 R at 120.)

According to Merillat, inmates have escaped from prison, including from death row, and he considered that the statistics published by the Texas Departme of Criminal Justice did not accurately reflect such incidents. (35 RR at 126.) According to Merillat, his definition of when an escape occurred within the pris system was more accurate than the definition of the Texas Department of Corrections. (35 RR at 127.)

B. Suppressed Evidence

Unbeknownst to defense counsel at trial, Merillat's testimony was false, a his credibility could have been challenged but for the State's suppression of the evidence.

As far back as 1998, Merillat was assisting an inmate achieve "deconfirmation" as a gang member (a benefit in the prison system) so that the inmate could procure information for the SPU which the SPU would in turn use against other inmates. (Ex. 132 [SPU 6/15/98 Letter].) Merillat continued assisting that inmate even though Merillat knew the inmate had not given up hi gang activity. (Ex. 133 [Eason letter to Merillat 6/2000].)

As far back as 1999, Merillat acknowledged that although an inmate who had been providing SPU with information concerning another inmate had been caught manufacturing a weapon by prison authorities, "just because a disciplin case was written, it does not mean that our office will file a criminal charge." (134 [SPU 10/14/99 Letter].)

As far back as 2000, Merillat was arranging for inmates to be transferred within the prison system (Ex.135 [SPU 7/12/2000 Letter]), and even get out of

segregation units. (Ex. 136 [Whited 4/4/2000 Letter].)

Also as far back as March 2000, Merillat was making arrangements with prison officials to allow letters from gang members to reach an inmate informant, even though that inmate, with help from Merillat, had informed prison authorities he had renounced his gang affiliation. (Ex. 137 [Innes Notes 3-01-00].)

Unbeknownst to Mr. Young's defense team, the SPU prosecutorial team in capital murder case against an inmate had suppressed exculpatory evidence again that defendant. *See Anibal Canales Jr. v. Quarterman*, CV No. 03-69-TJW (E. Dist. Tex). Merillat, as a Senior Criminal Investigator and part of that SPU team, was intrinsically involved with that suppression. (*See e.g.* Ex. 138 [Merillat 6/12/2000 Letter]) ("As far as a witness list, we haven't sent one out yet, Mr. Mullin [the SPU prosecutor] and I are holding off as long as we can.").[18]

C. Investigation into Merillat Claim

The information described above only came to light in September, 2008 when the attorney for another inmate on Texas's death row, Anibal Canales, sent to Mr. Young's federal habeas attorneys information on Mr. Merillat that Mr. Canales's attorney was only able to uncover through his access to federal discovery procedures in Mr. Canales's case. (Ex. 142 at ¶¶ 4, 7 [Decl. of Pamela Gomez].) Thus, the soonest counsel could have learned of this evidence was in September, 2008. (*See* Section IV, *post*.)

With the new evidence regarding Merillat in hand, federal habeas counsel filed a petition in federal court in October, 2008, and asked the federal court to grant a stay so that Mr. Young could return to state court to exhaust these claims. (Exs. 148.) The federal court granted the stay in February, 2009, giving Mr.

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[18] In his pending petition for federal habeas relief, Mr. Canales alleges the prosecutorial team: suppressed evidence, contrary to *Brady*; allowed a material witness to testify falsely in violation of *Napue* and its progeny; and that the SPU, including Merillat, deliberately elicited information from a defendant in custody and under indictment in violation of *Massiah v. United States*, 377 U.S. 201 (1964), and its progeny. (*Canales v. Quarterman*, CV03-69 [Docket no. 7].)

Young thirty days to return to this Court. (Ex. 147.)

D. Relevant Law

As previously stated, it is clearly established federal law that "[t]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilty or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. 87; *Mahler*, 537 F.3d at 499; *Kopycinski v. Scott*, 64 F.3d 223, 225 (5th Cir. 19 The duty to provide favorable evidence applies "even when the accused fails to specifically request such evidence." *Mahler*, 537 F.3d at 499 (*citing Strickler*, U.S. at 280; *Kyles*, 514 U.S. at 433).

To prevail on a *Brady* claim, a petitioner "must show that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense and (3) the evidence was material" to his guilt or punishment. *Mahler*, 537 F.3 500 (*citing Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994)).

E. The Prosecution Suppressed Evidence Concerning A. P. Merillat

Under *Brady*, the prosecution's duty to disclose favorable evidence is n limited to evidence within the actual knowledge or possession of the prosecuto It is well-settled that *Brady* obligates the "individual prosecutor . . . to learn of favorable evidence known to the others acting on the government's behalf . . . including the police." *Mahler*, 537 F.3d at 499 (*citing Kyles*, 514 U.S. at 437). Furthermore, under certain circumstances, the prosecution may be deemed in constructive possession of *Brady* material. *See United States v. Webster,* 392 787, 798 n.20 (5th Cir. 2004) (*citing Martinez v. Wainwright*, 621 F.2d 184, 186-87 (5th Cir. 1980) (finding no suggestion in *Brady* "that different 'arms' the government are severable entities" and thus holding that prosecutor had suppressed deceased's rap sheet, which resided in medical examiner's office a had been provided by the FBI); *United States v. Auten*, 632 F.2d 478, 481 (5th 1980) (finding prosecution was in possession of criminal history of witness ev

though no background check was conducted, reasoning, in part, that "[i]f disclosure were excused in instances where the prosecution has not sought out information readily available to it, [the court] would be inviting and placing a premium on conduct unworthy of representatives of the United States Government."); *United States v. Deutsch*, 475 F.2d 55, 57-58 (5th Cir. 1973) (finding prosecutor was, for purposes of *Brady*, in possession of information in Postal Service files).

Although the availability of information is measured in terms of whether th information is in the possession of some arm of the State, *Crivens v. Roth*, 172 F.3d 991, 997-98 (9th Cir. 1999) (*citing United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991)), for purposes of *Brady* "the prosecution is deemed to have knowledge of information readily available to it." *Williams v. Whitley*, 940 F.2d 132, 133 (5th Cir. 1991).

In Mr. Young's case, the State was in possession of evidence challenging Merillat's credibility. As Merillat testified, part of his responsibilities included investigating felonies occurring in the Texas prison system, and providing specia investigative assistance to local district attorneys and Statewide Capital Murder prosecution assistance. Thus, Merillat's assistance to the prosecutorial team in Mr. Young's case in the form of his testimony, at the minimum, means the prosecutorial team against Mr. Young was in possession of Merillat's knowledge concerning Merillat's dealings in the Canales's case. *See e.g. United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) (imputing knowledge of state law enforcement team that witness' lawyer had been paid from state funds to federal prosecuting team and finding that "nondisclosure, whether stemming from negligence or design, was the responsibility of the prosecutor.").

Furthermore, as the Fifth Circuit has held in the past, there is no suggestio in *Brady* "that different 'arms' of the government are severable entities." *Martinez*, 621 F.2d at 186-87. As in *Martinez*, here, the prosecutor team was in

constructive possession of the letters written by Merillat, when Merillat, funded the Governor's office of the State of Texas, was required to assist and consult w local district attorney's offices as part of the Statewide Capital Murder prosecut assistance.

As in the case of *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 198(the prosecution in Mr. Young's case cannot argue that it did not possess the impeaching evidence against Merillat because it did not seek it. As in *Auten*, "[disclosure were excused in instances where the prosecution has not sought out information readily available to it, [the court] would be inviting and placing a premium on conduct unworthy" of representatives of a State seeking the death penalty against a defendant. *Id.*

The State will no doubt argue that it did not suppress the evidence becau the defense team could have easily access the information through the "well-honored, traditional non-*Brady* method of simply asking the witness while he i testifying." *See e.g. Crivens v. Roth*, 172 F.3d at 998; *Titsworth v. Dretke*, 401 F.3d 301, 307 (5th Cir. 2005). As in *Crivens* and *Titsworth*, that principle is pushed too far on the facts of Mr. Young's case. Merillat would not have told complete truth if asked about his participation in the prosecution of the Canale case based on the fact that SPU had not disclosed that evidence to Canales's tr counsel and had only been obtained by federal counsel during the pendency of Canales' federal habeas petition. (*Canales* post-stay briefing, Doc # 36 at 4).

Thus, evidence that could be used to impeach Merillat's testimony was suppressed at Mr. Young's death penalty trial.

Independent of this error, to the extent this information was available at time of trial, counsel was ineffective for investigating and presenting it.

F. Evidence That Could Be Used to Impeach Merillat Was Favorable t Mr. Young

"*Brady* encompasses evidence that may be used to impeach a witness's

credibility." *Kopycinski*, 64 F.3d at 225 (citing *Bagley*, 473 U.S. at 676).

The communications between Merillat and various inmates raises doubt as to Merillat's credibility and the accuracy of his testimony. While Merillat testifie that no one, either a judge or a jury, could tell the prison system where or how to house an inmate (35 RR at 96), Merillat's letters show that he, although independent from the prison system, could tell the prison system how to house an inmate who was assisting SPU obtain evidence against other inmates. (Exs. 132 [SPU 6/15/98 Letter]; 133 [Eason to Merillat 6/2000]; 135 [SPU 7/12/2000 Letter]; 136 [Whited 4/4/2000 Letter].)

While Merillat testified that the "only person who will never get out of Administrative Segregation is one of those seven street gang members" (35 RR at 120), he neglected to mention that gang members, even while still participating in gang related activities, can get out of Administrative Segregation in exchange for their cooperation with SPU. (Ex. 136 [Whited 4/4/2000 Letter].)

While Merillat testified that it was extremely difficult to investigate a "catch out" allegation, where the inmate had manufactured a weapon in order to be placed in a safer location (35 RR at 85-86), letters from Merillat contradicted the difficulty of such investigation, and in some circumstances, all Merillat needed was the inmate's self-serving statement. (Ex. 134 [SPU 10/14/99 Letter].)

The suppressed evidence concerning Merillat's role in the Canales investigation and prosecution was favorable to Mr. Young's case because it is quintessential impeaching evidence.

G. The Suppressed and Favorable Evidence Was Material for Mr. Young's Sentence to the Death Penalty

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *Kopycinski*, 64 F.3d at 225-26. "[O]nce a reviewing court applying *Bagley* has found constitutional error there is no need

for further harmless-error review. Assuming, *arguendo*, that a harmless-error enquiry were to apply, "a *Bagley* error could not be treated as harmless, since a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, necessarily entails the conclusion that the suppression must have had substantial and injurious effect o influence in determining the jury's verdict." *Kyles*, 514 U.S. at 435 (internal quotation marks and citations omitted). A "reasonable probability" is a probabi sufficient to undermine confidence in the outcome. *Bagley*, 473 U.S. at 682.

Merillat's credibility was instrumental to the finding that there was a probability that Mr. Young would commit acts of violence while in the prison system if given a life sentence, because Merillat testified that opportunities of violence were abundant there. Merillat went as far as saying that his testimony least when it came to the number of escapes within the prison system, was mor believable than what the Department of Corrections itself published. (35 RR at 126.)

As Merillat himself has described in his article, "[i]n the numerous capit cases [he has] been called to testify in, that question -- the "future danger" issu has become the central, significant matter under consideration." (Ex. 130 at 11 [A. P. Merillat, *The Question of Future Dangerousness of Capital Defendants*, Tex. B.J. 738, 738 (2006)].) According to Merillat himself, his testimony is instrumental in capital death cases, because:

> [T]he information that I bring to juries quite frequently rebuts defense testimony and theories that if a capital murderer is given a life sentence, the restrictions placed upon him would make it nearly impossible for him to continue a course of violence after arriving at prison. It is not uncommon for capital murder juries to hear testimony from many retired TDCJ administrators who

> travel across the state testifying for the defense. If jurors hear only testimony from these witnesses who attempt to portray a picture of a super-secure prison system designed to prevent convicted killers from victimizing anyone during their time in prison, then verdicts can render favorably to defendants. But those verdicts might not be rendered on what is factual. The information that follows is a sampling of what I testify to when called into capital trials. The facts will illustrate why jurors over the years may have been convinced to issue affirmative answers to the future dangerousness question after hearing this testimony. A benefit to you readers who are on the defense bar is that you can examine and dissect this information, put your heads together, and come up with ways to rebut my testimony and convince jurors that I am a crackpot. Most important, however, the citizens who pay for the Texas prison juggernaut deserve to know the facts. When I write articles, give lectures, or even have informal conversations regarding the crime situation in Texas prisons, I never fail to receive reactions betraying the fact that few people know what it's really like in our state's penitentiary system.

(Ex. 130 at 1175 [Merillat Article].)

While the defense bar may not yet be able to convince a jury that Merillat is a "crackpot," a complete disclosure of Merillat's actions, including those in the case of Mr. Canales, would have allowed Mr. Young to come up with ways to rebut his testimony, by showing that Merillat has himself suppressed exculpatory evidence in at least one death penalty case, thereby putting into question his

credibility.

Had Merillat's trickery in the investigation of Mr. Canales and his trial be revealed,[19] defense counsel in Mr. Young's case would no doubt had reminded t trial court, as well as the jury, of the utmost duty a prosecutorial team has to follow the law. As the Supreme Court has stated:

> [A Prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (19

As part of the SPU, and in particular, as part of the prosecutorial team th prosecuted Mr. Canales, Merillat not only struck hard blows, as he should hav but he also struck foul ones. Without the disclosure of the evidence illustratin Merillat's foul strokes in other death penalty cases, Mr. Young's defense team could not challenge Merillat's credibility.

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[19] Canales was prosecuted by the Special Prosecution Unit out of Hunstville. *Canales v. State*, 98 S. W. 3d 690 (Tex. Crim. App. 2003); Appell Canales' Opening Brief, 2001 WL 34386405, *3. Trial in the Canales case w conducted from October 24 to October 27, 2000. *Id.* at *9.

In Mr. Young's case, Merillat's testimony as to inmates' opportunities to distribute prescribed drugs was particularly instrumental to the jury's finding as to the future dangerous issue. Mr. Young presented evidence that, with proper medication, his ADHD induced disciplinary problems while in an institutionalized setting were controlled. By testifying that inmates housed anywhere but death row or High Security could use their medications as contraband, Merillat testified as to the "probability" that Mr. Young would do so if sentenced to life, simply because, according to Merillat, the opportunity in prison to do so existed.[20] Thus, although Mr. Young presented unrefuted evidence that his ADHD behavior was controlled under the proper medication and that he had never refused to take his medication while institutionalized, let alone that he had used such prescribed medications as contraband, Merillat's testimony allowed for the "possibility" that Mr. Young "could" refuse to take his medication and instead, use it as contraband if given a life sentence.

Because Texas law requires the jury to be unanimous when voting for death "the proper frame of reference, at least with regard to the punishment assessed, is whether the mind of one juror could have been changed with respect to the imposition of the sentence of death." *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993) (discussing Louisiana law). Without Merillat's testimony, Mr. Young's evidence that his behavior was controlled with the proper medication, went unrefuted. Thus, there is a reasonable probability that, had the evidence been disclosed to the defense, at least one juror could have changed with respect to the imposition of the death penalty. In Mr. Young's case, the suppressed evidence is sufficient to undermine confidence in the outcome of Mr. Young's death

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[20] Although Royce Smithey, Merillat's fellow investigator, also testified at trial as to prison conditions (31 RR at 168 et seq.), Smithey did not testify as to prescription drugs being a source of contraband.

sentence.[21]

Because the State suppressed impeaching evidence concerning Merillat, a because Merillat's testimony was material to the jury's finding that Mr. Young could commit acts of violence while in prison if given a life sentence, rather tha death penalty, Mr. Young's sentence to death was the result of a *Brady* violation which deprived Mr. Young of due process. As such, Mr. Young's sentence to death does not pass constitutional muster and should therefore be vacated.

H. The State Deprived Mr. Young of His Right to Confront Merillat

Independent of the error described above, the State deprived Mr. Young his right to confront Merillat when it suppressed the evidence described above. *See Burbank*, 535 F.3d at 358 (defendant's confrontation rights violated where refused to permit cross examination on witnesses' plea deal); *Davis*, 415 U.S. a 316-17.

This error, in conjunction with the error described above, warrants habea relief.

I. Conclusion

The constitutional violations set forth in this claim alone mandate relief from the convictions and sentence. However, even if these violations do not mandate relief standing on their own, relief is required when this claim is considered together with the additional constitutional errors outlined in the remainder of this Application. Cumulatively, these errors mandate relief from Young's convictions and sentence.

This claim could not be raised before because the State not only failed t turn this evidence over to the defense, it took steps to hide this evidence from

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[21] If, through the course of Mr. Young's habeas proceedings, counsel discovers that the prosecutors were aware that Merillat was testifying falsely o allowed his untrue testimony to go uncorrected, in violation of *Napue* and its progeny, counsel will amend his Application accordingly.

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view.

CLAIM THREE

THE JUDGE WHO PRESIDED OVER MR. YOUNG'S TRIAL, MOTION FOR NEW TRIAL, AND STATE POST-CONVICTION PROCEEDING WAS NOT IMPARTIAL

Mr. Young's convictions, confinement, and sentence violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, an comparable state law, because Judge Hyde was biased, and if counsel had known of this bias, they would have moved to recuse the judge from presiding over Mr. Young's motion for new trial and state writ hearing.

If Respondent disputes any of the facts alleged below, Mr. Young requests an evidentiary hearing so that the factual disputes may be resolved.

The declarations and other exhibits accompanying this Application, as wel as the allegations and facts set forth elsewhere in this Application, are hereby incorporated by reference into this claim as though set forth in full.

The facts in support of this claim, among others to be presented after full investigation, discovery, access to this Court's subpoena power, and an evidentiary hearing, include the following.

A. Underlying Facts Related to this Claim

The jury in this case returned its verdict of death on April 11, 2003. Judge Hyde, who presided over Mr. Young's trial, sentenced Mr. Young to death that same day. (CR at 866-71; 37 RR at 29.)

Three days later, Judge Hyde sent a letter to each of the jurors. (*See* Ex. 1 at ¶ 5 [Decl. of Michael Byrne].)[22] In that letter, Judge Hyde told the jurors that they had made the correct decision informing them of his own belief that Mr.

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[22] Since they were written, the letters had been stored in Judge Hyde's chambers and had never been made available to the defense at trial. (Ex. 140 [Decl. of John Beaver].)

Young was a dangerous man who was capable of harming someone else:

> After spending several weeks with the Defendant in jury selection before the trial began, I gained some insight into his personality and I got to hear and see much more than the jury heard. In my view, he is a dangerous man who is fully capable of harming someone else. Your jury made the correct decision.

(Ex. 93 [Juror Letters from Judge Hyde].) According to the letter, the judge's opinion was based upon evidence the jury did not hear and his own personal opinion. (*Id.*)

Judge Hyde then presided over, and denied, Mr. Young's motion for new trial. (38 RR at 6, et. seq.) Later, Judge Hyde presided over, made factual findings against, and denied Mr. Young's state habeas application. (Ex. 30 at 4 [Hyde's Denial of Writ of Habeas Corpus].)

B. Investigation in Judicial Bias

All records pertaining to Young's trial were certified and transmitted to t CCA in August 2003. The letter from Judge Hyde was not included in the clerk record on appeal.

Per state habeas counsel's request, investigator Nancy Piette interviewed Mr. Young's jurors in January, 2005. None of the jurors who were willing to b interviewed informed Ms. Piette of Judge Hyde's letter. (Exs. 116, 145 at ¶¶ 9 15-16 [Decl. of Nancy Piette].)

In May 2008, while reviewing documents at the Midland County Courthouse, John Beaver, a paralegal for current federal habeas counsel, was handed documents from Judge Hyde's chambers, including the letter in questio The letter had been kept stored in Judge Hyde's chambers since the conclusion Young's trial. (Ex. 140 at ¶¶ 3-4 [Decl. of John Beaver]; *see* Section IV, *post.*)

Under these circumstances, the soonest Mr. Young could have been awa

of the claim raised here was in May 2008, when the files were turned over. With the new evidence regarding judicial bias, federal habeas counsel filed a petition i federal court in October, 2008, and asked the federal court to grant a stay so that Mr. Young could return to state court to exhaust these claims. The federal court granted the stay in February, 2009, giving Mr. Young thirty days to return to this Court. (Ex. 147.)

C. Relevant Law

Among those basic fair trial rights that cannot ever be treated as harmless i a defendant's right to an impartial judge. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987); *accord Gomez v. United States*, 490 U.S. 858, 876 (1989). It is well settled that "[n]o matter what the evidence against [a defendant], he had the right to have an impartial judge." *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *accord Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) ("the floor established by the Du Process Clause clearly requires a fair trial in a fair tribunal . . . before a judge wit no actual bias against the defendant . . .", internal quotations omitted); *accord Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *In re Murchison*, 349 U.S. 133, 136 (1955); *Richardson*, 537 F.3d at 474; *Buntion*, 524 F.3d at 672; *Bigby v. Dretke*, 402 F.3d 551, 558 (5th Cir. 2005) (cornerstone of American judicial system is right to fair and impartial process).

A defendant may establish denial of this right by demonstrating actual bia or merely the appearance of bias. *Taylor v. Hayes*, 418 U.S. 488, 501-04 (1974); *Withrow v. Larkin*, 421 U.S. 35, 47 (1972); *Richardson*, 537 F.3d at 474-75. Actual bias occurs when the judge harbors personal animosity toward the defendant or has a personal interest in the outcome of the particular case. *Liteky United States*, 510 U.S. 540, 555 (1994); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S 813, 823 (1986) (calling for recusal where state supreme court justice's interest was "direct, personal, substantial, [and] pecuniary"); *Tumey*, 273 U.S. at 523; *In re Murchison*, 349 U.S. at 138 (finding bias where judge acting as one-man gran

jury in secret hearings charged two witnesses with contempt and then presided over witnesses' contempt hearings); *Taylor v. Hayes*, 418 U.S. at 501-03 (findi bias where judge was subject to litigant's direct personal insults).

The standard for determining implied bias requires a petitioner to establis that a "genuine question exists" concerning the judge's impartiality. *Buntion*, 5 F.3d at 669; *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997) ("'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'"); *see Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

Structural error occurs when a trial judge is biased. *Richardson*, 537 F.3d 473, *citing Neder v. United States*, 527 U.S. 1 (1999). "A criminal defendant w is tried by a partial judge is entitled to have his conviction set aside, no matter h strong the evidence against him." *Edwards v. Balisok*, 520 U.S. 641, 647, 117 S Ct. 1584, 137 L. Ed. 2d 906 (1997); *Buntion*, 524 F.3d at 672.

D. Judge Hyde Was Actually Biased Against Mr. Young and Mr. Young Conviction must Be Reversed

Here, there is clear evidence that Judge Hyde was actually biased against Mr. Young. In a letter to jurors sent three days after the conclusion of Mr. Young's trial, Judge Hyde told the jurors that they had made the correct decisio and he informed them of his own pre-disposed belief that Mr. Young was a dangerous man who was capable of harming someone else:

> After spending several weeks with the Defendant in jury selection before the trial began, I gained some insight into his personality and I got to hear and see much more than the jury heard. In my view, he is a dangerous man who is fully capable of harming someone else. Your jury made the correct decision.

(Ex. 93 [Juror Letters from Judge Hyde].) These statements show that Judge H

was not an impartial judicial officer who should have been removed from Mr. Young's case. *See Bracy*, 520 U.S. at 909 (petitioner needs evidence that the judge was actually biased in petitioner's *own* case); *Taylor*, 418 U.S. at 501 (bias shown where there is a mounting display of unfavorable personal attitude toward the petitioner); Tex. R. of Civ. Proc. 18(b).

For purposes of the trial, as the proverbial gate keeper, Judge Hyde was entrusted with the responsibility of deciding what evidence the trier of fact would be permitted to see and hear in this case. However, Judge Hyde himself had already decided, before the trial had even begun, that Mr. Young was a dangerous person worthy of the death penalty. Any rulings made by the judge with respect t evidence admitted or excluded was tainted by the judge's personal animosity toward Mr. Young. Such bias clearly violated Mr. Young's due process rights. *Tumey*, 273 U.S. at 535; *see Franklin v. McCaughtry*, 398 F.3d 955 (7th Cir. 2005); *see also* Texas Code of Judicial Conduct, Canon 3.B.(5) ("A judge shall perform judicial duties without bias or prejudice"), (6) (A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so").

To make matters more improper, Judge Hyde sat as both judge and jury during Mr. Young's motion for new trial. With the jury's job now complete, Judge Hyde alone decided Mr. Young's fate while presiding over the motion for new trial. Judge Hyde, however, had already made up his mind that Mr. Young was worthy of the death penalty, a sentiment he did not hesitate to convey to the jurors in his letter. Judge Hyde's bias most probably led him to protect the juror' verdict of guilt, a verdict the judge agreed with, and tainted his rulings during Mr Young's motion.

The prospect of judicial bias is intolerable in any case, let alone one wher the ultimate sentence, death, has been imposed. *See Spaziano v. Florida*, 468 U 447, 468 (1984).

> [B]ecause the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." [Citation omitted.] The right to an impartial adjudicator, be it judge or jury, is such a right. [Citations omitted.]
>
> . . . [A] capital defendant's constitutional right not to be sentenced by a tribunal organized to return a verdict of death surely equates with a criminal defendant's right not to have his culpability determined by a tribunal organized to convict.

Gray, 481 U.S. at 668, internal quotations omitted. As Mr. Young has shown Judge Hyde was biased against him, his conviction and sentence must be overturned. "[W]hat matters is not the reality of bias or prejudice but its appearance." *Liteky*, 510 U.S. at 548.

E. Because of Judge Hyde's Bias Against Mr. Young, Any Claim Rulec upon by Judge Hyde During the State Post-Conviction Proceeding Should Be Reviewed De Novo by this Court

Not only did Judge Hyde preside over Mr. Young's trial and motion for trial, the judge presided over Mr. Young's state writ hearing. The appearance bias is heightened by the fact that Judge Hyde served as the sole trier of fact in state writ hearing. As a result, Mr. Young was forced to have all substantive a procedural issues decided by the same judge who had a bias against him. *See*

Alexander v. Primerica Holdings, 10 F.3d 155, 163 (3d Cir. 1993) (granting recusal motion based in part on "the fact that this is a non-jury case, and that Judge Lechner will be deciding each and every substantive issue at trial"); *see In re Murchison*, 349 U.S. at 133 (judge disqualified because he acted as both a one-man grand jury and trial judge). Every decision Judge Hyde rendered was tainted by his desire to protect the death verdict against Mr. Young. Every ruling he mad was to keep "a dangerous man" from "harming someone else." (Ex. 93.) By word and by deed, the judge assumed the role of the prosecutor. *Vasquez-Ramire v. United States Dist. Court (In re Vasquez-Ramirez)*, 443 F.3d 692, 701 (9th Cir. 2006) ("the judge oversteps his bounds when he forces the prosecutor to pursue charges the prosecutor would rather not"). "It is no doubt a position that h could fill with distinction, but it is occupied by another person." *In re United States*, 345 F.3d 450, 453 (7th Cir. 2003). Because Judge Hyde was biased against Mr. Young, any claim ruled upon by Judge Hyde during the state post-conviction proceeding should be reviewed de novo by this Court.[23] *Liteky*, 510 U.S. at 548.

CLAIM FOUR

DUE TO THE INCOMPETENCE OF STATE HABEAS COUNSEL, THE FOLLOWING CLAIMS SHOULD HAVE BEEN RAISED IN MR. YOUNG'S INITIAL STATE WRIT APPLICATION

The entire state post-conviction procedure in Mr. Young's case violated du process because the convicting court appointed incompetent state habeas counsel and because the judge who presided over the state post-conviction litigation was biased. Thus, this Court should reach the merits of the following claims.

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[23] Based upon the incompetence of state habeas counsel, discussed *post*, and the bias of Judge Hyde, the proper remedy here is for Mr. Young to receive a entirely new state habeas proceeding, including the filing of a new state writ application.

A. Incompetence of State Habeas Counsel

1. The CCA's Failure to Appoint Competent Counsel and to Monitor Counsel Once Appointed Constitute an External, Objective Factor, Which Cannot Fairly Be Attributed to Mr. Young, Thus Excusing Mr. Young's Inability from Previously Presenting His Numerous Valid Claims in His First State Application

In *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002), the CCA held that the statutory mandate of "competent counsel" concerned only "habeas counsel's qualifications, experience, and abilities at the time of his appointment," and not "the final product of representation." *Graves*, 70 S.W.3d at 114. *Graves* thus established that an indigent death row prisoner was entitled, at a minimum, t competent counsel at the time of appointment. *Id.*

Likewise, the Fifth Circuit has found that state habeas counsel's ineffective performance cannot constitute 'cause' for purposes of avoiding a procedural default, *see, eg., Blanton v. Quarterman,* 489 F. Supp. 2d 621, 655-56 (W. D. Tex 2007),[24] but has yet to address whether the appointment of incompetent counsel, within the meaning of *Ex Parte Graves*, constitutes such cause, leaving the door open for future litigants. *See Ries v. Quarterman*, 522 F.3d 517, 526 n.5 (5th Cir

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[24] A district court, recognizing the inherent unfairness of such a situation, stated:

> Patently unfair though it may be, the reality facing a convicted Texas criminal defendant under current Fifth Circuit precedent is that either a negligent failure or a malicious refusal by that convicted defendant's state habeas counsel to present a potentially meritorious claim in the course of the defendant's state habeas corpus proceeding effectively precludes federal habeas review of that claim, unless the defendant can satisfy the fundamental miscarriage of justice exception to the federal procedural default doctrine.

Blanton v. Quarterman, 489 F. Supp. 2d at 655-56.

2008).

2. Statutory Right to Representation by Competent Counsel

Under State law, at a minimum, Mr. Young has a statutory right to representation by competent counsel. Texas Code of Criminal Procedure, Article 11.071, Section 2, in effect at the time in question, stated that:

> (a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed *pro se* and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.
>
> . . . .
>
> (c) At the earliest practical time . . . the convicting court shall appoint competent counsel, unless the applicant elects to proceed pro se or is represented by retained counsel.
>
> (d) The Court of Criminal Appeals shall adopt rules for the appointment of attorneys as counsel under this section and the convicting court may appoint an attorney as counsel under this section only if the appointment is approved by the court of criminal appeals in any manner provided by those rules.

Act of June 18, 1999, Ch. 803, § 1, 1999 Tex. Sess. Law Serv. Ch. 803 (H.B. 151 (effective Sept. 1, 1999 (codified as Tex.Code Crim. Proc. Ann. art. 11.071).

Section 3 of the same article stated:

> (a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of

habeas corpus.

Id.

As the CCA has recognized, under Texas Code of Criminal Procedure, Article 11.071, section 2(a), habeas petitioners have a statutory right to representation by competent counsel. *Ex parte Graves*, 70 S.W.3d at 114. Whi recognizing that "a potted plant appointed as counsel is no better than no couns at all," the CCA has interpreted the statutory right as limited to counsel competency at the time of appointment. *Id.* The CCA stated that the statute's reference to 'competent counsel' "concerns habeas counsel's qualifications, experience, and abilities at the time of his appointment. *Id., citing Ex parte Mi* 26 S.W.3d 910, 912 (Tex. Crim. App. 2000). *Ex parte Mines* itself, however, d not explain how the court arrives at that limitation, nor what the CCA meant by qualifications, experience, and the abilities of such counsel.

In 1999, the CCA adopted rules concerning the appointment of state hab counsel under Article 11.701. (Ex. 37 [Texas Court of Criminal Appeals' Rule for the Appointment of Attorneys as Counsel Under Article 11.701, Sec. 2(d), V.A.C.C.P., ("1999 Rules")].) The 1999 Rules state nothing concerning couns 'competency,' let alone what makes a particular lawyer eligible for appointmer Under the 1999 Rules, the CCA was to maintain a list of those attorneys eligib for appointment, and the convicting courts were instructed to appoint an attorn from the list maintained by the CCA. (*Id.* at ¶¶ 1 and 2.) The 1999 Rules furth state that "[t]hose attorneys seeking to be added to the list of attorneys eligible appointment . . . shall complete and submit an 'Application for Appointment a Counsel Pursuant to Art. 11.071, V.A.C.C.P.' from the Court of Criminal App (*Id.* at ¶ 4.)

The process established by the CCA in 1999 is reminiscent of the proce found lacking in *Mata v. Johnson*, 99 F.3d. 1261, 1266-67 (5th Cir. 1996), *va in part on other grounds*, 105 F.3d 209 (5th Cir. 1997). In *Mata*, the court

evaluated whether the State of Texas met the then expedited procedures under the AEDPA, conditioned on a state establishing rules of court or statutes providing standards of competency for the appointment of such counsel. *Id.* In finding that Texas was not eligible to take advantage of the provisions afforded to opt-in states under AEDPA, the court reasoned that the Texas mechanism for evaluating the qualifications of prospective counsel based on a questionnaire listing counsel's qualifications did not constitute "specific, mandatory standards for capital habeas counsel." *Id.* Although the CCA adopted rules for the appointment of counsel in 1999, as stated above, those rules do not specify what constitutes competent counsel, leaving the CCA's decision to appoint counsel to the same type of questionnaire as the court found inadequate in *Mata*.

Absent the CCA's expression of any guidelines to evaluate the competency of counsel at the time of appointment,[25] and given the CCA's cryptic definition of competency in terms of counsel's "qualifications, experience, and abilities" at the time of his appointment, *Ex parte Graves*, 70 S.W.3d at 114, it is difficult to evaluate whether competent counsel has been appointed by referring solely to the state scheme. In the absence of guidelines from the CCA, and because the findings of *Graves* and *Mines* provide no basis for analyzing whether an attorney appointed by the CCA is competent, there is nothing to which this Court can defer. Thus, this Court may look to other persuasive sources.

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[25] In June, 2005, in apparent recognition of the inadequacy of the 1999 Rules, the Texas Legislature, once again, amended Article 11.071, this time stating explicitly that the CCA "rules must require that an attorney appointed as lead counsel under this section not have been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case." Act of June 17, 2005, Ch. 787, § 13, 2005 Tex. Sess. Law Serv. Ch. 787 (S.B. 60 (effective Sept. 1, 2005) (codified as Tex. Code Crim. Proc. Ann. art. 11.071). Although the Legislature commanded that the CCA "shall amend rules adopted under Section 2(d), Article 11.071, Code of Criminal Procedure, as necessary to comply with that section, as amended by this Act, not later than January 1, 2006," the CCA missed the Legislature's deadline by over twelve months, adopting the new rules on December 11, 2006. (Ex. 38 [2006 CCA Rules].)

At the time of Mr. Young's state habeas proceedings, his attorneys' competency was governed by the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 2003 ("Guidelines") and the AB Standards for Criminal Justice (3d Ed. 1993) ("Standards").[26]

As the Commentary to the Guidelines state: "[h]abeas corpus and other procedures for seeking collateral relief are especially important in capital cases." (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1, comment. (rev. ed.2003), reprinted in 31 Hofstra L.Re 913, 932 (2003) (footnotes omitted).) "Quality representation in both state and federal court is essential if erroneous convictions are to be corrected." (*Id.*) The Guidelines recognized that while "[c]ounsel's obligations in state collateral revi proceedings are demanding," the lack of standards for the selection of counsel, such as the case in Texas, lead to "a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance."[27]

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[26] In April of 2006, the Texas State Bar Board of Directors adopted a Te specific version of the ABA Guidelines, known as The Guidelines and Standard for Texas Capital Counsel. These guidelines offer specific guideposts regardin counsel's duties with respect to state post-conviction litigation. (Texas Guideli 12.2.)

[27] The Guidelines state, in pertinent part,

> Moreover, even in those states that nominally do provide counsel for collateral review, chronic underfunding, lack of standards, and a dearth of qualified lawyers willing to accept appointment have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance. (*See, e.g.*, TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, ch. 7 (2002), available at http://www.texasdefender.org/study/study.html (reporting that a review of 103 post-conviction petitions filed by court-appointed counsel in Texas death penalty cases between 1995 and 2000 indicated that 25 percent of the petitions were 15 pages long or less, and that counsel offered no evidence outside the trial record in 40 percent of the cases reviewed).)

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As the Guidelines state:

> Unless legal representation at each stage of a capital case reflects current standards of practice, there is an unacceptable risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. Accordingly, any jurisdiction wishing to impose a death sentence must at minimum provide representation that comports with these Guidelines.

31 Hofstra L.Rev. 913, 938 (internal citations omitted).

Thus, the Guidelines call for the creation of a Responsible Agency, which "should develop and publish qualification standards for defense counsel in capital cases." Guideline 5.1 - Qualifications of Defense Counsel; 31 Hofstra L.Rev. 913, 961. The standards "should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation." *Id.* The commentary adds,

> As described in the Commentary to Guideline 1.1, the abilities that death penalty defense counsel must possess in order to provide high quality legal representation differ from those required in any other area of law. Accordingly, quantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case,

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(*Id.* at 932 n.47.)

should not be placed on the appointment roster.

(*Id.* Guideline 5.1, comment; 31 Hofstra L.Rev. 913, 963-964, *citing* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but f the Worst Lawyer,* 103 YALE L.J. 1835, 1871 n.29 (1994) ("Standards for the appointment of counsel, which are defined in terms of number of years in practi and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications.").)

The Responsible Agency's duties do not stop at publishing proper standa and selecting qualified attorneys. Under the Guidelines, the Responsible Agenc must monitor the performance of all defense counsel, and remove from its roste of attorneys who have been certified to accept appointments, attorneys where "there is evidence that an attorney has failed to provide high quality legal representation." (Guideline 7.1; 31 Hofstra L. Rev. 913, 970-71.) In addition, the Guidelines also mandate the establishment of performance standards, which turn, "should be utilized in determining the eligibility of counsel for appointme or reappointment to capital cases and when monitoring the performance of counsel." (Guideline 10.1 and commentary; 31 Hofstra L. Rev. 913, 989-92.)

Among those performance standards that, in turn, should be relied upon when determining the eligibility of counsel for appointment, the Guidelines mandate that "[l]ead counsel bears overall responsibility for the performance o the defense team, and should allocate, direct, and supervise its work in accorda with these Guidelines and professional standards. (Guideline 10.4; 31 Hofstra Rev. 913, 999.)[28]

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[28] Guideline 5.03 of the Texas State Bar (Responsibilities Regarding Nonlawyer Assistants) has a similar provision:

> Lawyers generally employ assistants in their practice, including secretaries, *investigators*, law student

With the assistance of clear and enunciated guidelines, it becomes apparent that Mr. Young's state habeas counsel, Gary Taylor, was not competent at the tim of his appointment.

3. Relevant Facts

Mr. Young's initial state application was due on January 22, 2005 (CWR at 321.). That application was filed pm that date by Gary Taylor, Mr. Young's initia state habeas counsel. On July 11, 2005, Taylor asked to be relieved as Mr. Young's counsel, Taylor was granted permission to withdraw on August 8, 2005. Ori White was appointed to replace him on the same day. (CWR at 359-65.)

On January 17, 2006, before the start of the evidentiary hearing, Mr. White filed a supplemental state writ alleging one claim, Ground 15 (CWR at 674-710). (*See* Section C, *post.*). The state hearing in this case began on March 1, 2006. During that hearing, as will be explained in more detail below, it came to light tha Lisa Milstein, the defense investigator/mitigation specialist hired by Gary Taylor, had engaged in inappropriate behavior with at least one witness and had encouraged at least one witness to falsify an affidavit, alleging facts which were not true.

Once this came to light, White requested a continuance of the hearing. On June 21, 2006, White filed another supplemental application, alleging Grounds 16 through 22 (CWR at 1136-41).

> interns, and paraprofessionals. Such assistants act for the lawyer in rendition of the lawyer's professional services. *A lawyer should give such assistants appropriate instruction and supervision* concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, *and should be responsible for their work product.* The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

(Italics added.)

Before his first state application was even filed, Mr. Young asked Taylor t raise various claims in the state application. Taylor did not do so.

Taylor's incompetence stems from his failure to adequately direct and supervise his primary investigator/mitigation specialist, Lisa Milstein, despite a long history, pre-dating Taylor's appointment as counsel for Mr. Young, that Milstein was experiencing psychological problems, abusing drugs, and performi her job deficiently. Among other things, Milstein submitted affidavits that witnesses later renounced, to the detriment of her clients, including Mr. Young. Counsel's failure to supervise led Taylor to focus in Mr. Young's state habeas case, on a sexual molestation claim that could not be supported and was doome to failure. The focus on that claim left insufficient time and resources to investigate and present meritorious claims that any competent counsel would ha presented.

Even though Gary Taylor was not appointed to Mr. Young's case until 2003, the problems which arose concerning Milstein, which were or reasonably should have been known to Taylor, started years before.

a. Life Before Milstein Became a P.I.

Milstein was arrested in December of 1984 for theft and was given a probationary sentence. (Ex. 81 [Milstein Theft Record].) Before becoming an investigator, Milstein worked in various nightclubs throughout Houston as an exotic dancer. Records show that Milstein became a licensed private investiga in 1998. (Ex. 82 [Milstein Licensing File].)

b. The Practice Group

Lisa Milstein began her legal career in Houston at the capital resource center in the mid-1990s, where she was an intern. Also working with Milstein

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investigator Gerald Bierbaum.[29] When the resource center lost its funding in September 1995, Bierbaum was hired by investigator Tena Francis, who worked i the Dallas area. Bierbaum moved into office space in Houston, Texas with attorney Michael Charlton. At some point, Milstein moved into the same office space. (Exs. 43 at 8-9, 27 [Gerald Bierbaum Deposition (Bierbaum Depo.) dated 3-17-06]; 105, 141 at ¶¶ 3, 5 [Decl. of Tena Francis].)

Attorneys Gary Taylor and Alex Calhoun worked in the same office in Austin, Texas.[30] (Exs. 43 at 27 [Bierbaum Depo.]; 42 at 7-8 [Gary Taylor Deposition (Taylor Depo.) dated 3-17-06]; 102 at ¶ 4 [Decl. of Alexander Calhoun].)

While everyone paid their own rent, and all were independent employees, Taylor, Charlton, Calhoun, Frances, Bierbaum, and Milstein worked together. Fo example, if Taylor was appointed to a case, Milstein was hired as Taylor's investigator/mitigation specialist. Milstein, in turn, often sought advice from Bierbaum, even if he was not working on that particular case. Likewise, if Milstein was investigating a case for Charlton or Bierbaum, she turned to Taylor or Francis for guidance. (Exs. 43 at 9, 26-27, 32 [Birebaum Depo.]; 42 at 7-8, 26 [Taylor Depo.]; 105, 141 at ¶ 8 [Decl. of Francis].) The attorneys, too, worked closely together, talking several times a day, and connecting through the internet and instant messaging. (Ex. 42 at 9 [Taylor Depo.].)

Charlton, Bierbaum, and Milstein moved a number of times in the five or six years they shared office space together. Their first office was located on Yoakum, the next office was located on Southwest Freeway, and the last office was at 1744 Norfolk. The Norfolk location, a house, was owned by attorneys

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[29] Bierbaum eventually passed the bar and became a lawyer licensed to practice in Texas in 2000. (Ex. 43 at 8 [Bierbaum Depo.].)

[30] Taylor remembers first working with Milstein and Bierbaum in 1997. (Ex. 42 at 7, 14 [Taylor Depo.].)

Herb Ritchie and Greg Glass. (Ex. 42 at 26-27 [Bierbaum Depo.].)

c. Milstein's Early Career (1995-1997)

One of Milstein's first experiences as an investigator came in late 1995 o early 1996, before she was a licensed private investigator. Charlton hired Milst to conduct mitigation work on an upcoming capital trial. (Exs. 105, 141 at ¶ 5 [Decl. of Francis].)

In February 1996, Charlton was hired by international death penalty activ Barbara Bacci, a resident of Rome, Italy, to assist in the defense of Texas death row inmate, Dominique Green. Taylor and Milstein were later brought onto the case by Charlton. (Ex. 99 at ¶¶ 1-3 [Decl. of Barbara Bacci].)

In 1997, Taylor and Charlton sent Milstein to speak on their behalf at an anti-death penalty conference in Rome. To Bacci, it was clear from Milstein's presentation at the conference that she knew little, if anything, about death pen work. (Ex. 99 at ¶ 5 [Decl. of Bacci].) Bacci later complained to Taylor about Milstein's lack of knowledge about the death penalty. Taylor told Bacci that sh was being too hard on Milstein. (*Id.* at ¶ 6.)

Knowing about the disappointment surrounding her presentation at the conference, Milstein told Bacci that she was going through a rough time in her personal life. (*Id.* at ¶ 7.)

When Milstein returned to work on Green's case, she engaged in behav that Bacci considered to be inappropriate. For example, Milstein sent Green letters on death row that smacked of a flirtatious nature. (*Id.* at ¶¶ 8-9.)

Having serious doubts about Milstein's competence, on several occasio Bacci conveyed her concerns about Milstein's work on Green's case to both Taylor and Charlton via telephone calls. (*Id.* at ¶ 10.) Bacci told both attorne that Milstein was so easily upset that any attempts to focus her work would br her to tears. (*Id.* at ¶ 11.) Taylor never provided any response to Bacci's concerns. (*Id.* at ¶ 12 [Decl. of Bacci].)

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d. Michael Rodriguez Case (2001)

Had Taylor adequately directed and supervised Milstein, her problems would have been known to him as far back as 2001, during their work on Michael Rodriguez's case. Taylor was on notice of Milstein's deficient work at the time h was appointed to Mr. Young's case.

In January 2001, Michael Rodriguez was arrested and charged with murder. *See Rodriguez v. State*, 2006 WL 827833 (Tex. Crim. App. 2006). Soon thereafter, Gary Taylor was appointed as Rodriguez's lead trial counsel. (Ex. 118 at ¶ 2 [Declaration of Michael Rodriguez].) Taylor selected Lisa Milstein as his investigator/mitigation specialist. (*Id.* at ¶ 3.)

Rodriguez met with Milstein throughout the spring and summer of 2001. (Ex. 118 at ¶ 6 [Decl. of Rodriguez].) At the punishment phase of Rodriguez's trial, Taylor presented evidence that Rodriguez, as a teenager, was molested by a Catholic clergy named Eugene Morgan.[31] The molestation, according to the defense, caused Rodriguez to suffer psychological difficulties. *Rodriguez*, 2006 WL 827833, at *14-15. The claim of molestation, however, was false according t Rodriguez. (Ex. 118 at ¶ 4 [Decl. of Rodriguez].) He states that not only did Milstein know the molestation charge was false, it was Milstein who invented the fabrication. He also states that Taylor never asked him about the molestation claim. (*Id.* at ¶¶ 4-5.)

e. David Lynn Carpenter Case (2001-2006)

Milstein's problems also should have been evident to Taylor during their work together on David Lynn Carpenter's case. Carpenter was convicted of capital murder in March, 1999. On August 20, 2000, Carpenter filed an initial state application. *See Ex Parte Carpenter*, 2007 WL 678622 (Tex. Crim. App.

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[31] Morgan's true name was Eugene Fitzsimmons. Morgan was the name given to the priest in order to hide his identity. (Ex. 118 at ¶ 4 [Decl. of Rodriguez].)

2007).

After the filing of the state application, Taylor was retained by Carpenter replace original state habeas counsel. Taylor again used Lisa Milstein as his investigator. In the Fall of 2001, Milstein conducted interviews with a number witnesses in the Carpenter case, including Dana Chamberlin. Milstein memorialized these interviews into affidavits, which Milstein notarized. These affidavits were then submitted in support of Carpenter's amended state application.

In August of 2002, attorney Bruce Anton was appointed as Carpenter's federal habeas counsel (*Carpenter v. Quarterman*, CV02-1145-B)). Carpenter requested that Anton consult with state habeas attorney Taylor. Taylor recommended that Anton use Milstein for the federal habeas case. Anton agree as Carpenter had requested that he use Milstein, and because Anton believed Milstein would already be familiar with the case due to her work on the state application with Taylor. Anton had never before used, nor heard of, Milstein. (98 at ¶¶ 2-4 [Decl. of Bruce Anton].)

Although Anton assigned investigatory tasks to Milstein, she never completed Anton's requests and almost never responded to his telephone calls. Anton finally gave up on Milstein and hired new investigators. (Ex. 98 at ¶ 5 [Decl. of Anton].)

In June 2004, after securing a stay in the federal court, Anton returned t state court to litigate an actual innocence claim which was supported by declarations Milstein had filed in conjunction with Taylor's amended state application. In June 2005, the state sent its own investigator to talk with at lea two of the affiants. At that time, it came to light that some of the affiants foun major inaccuracies in the declarations typed up and notarized by Milstein, and they had never seen Milstein's final affidavit. In August 2006, Anton was for to file new affidavits in support of his pending state application, excising the

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information supplied by Milstein. (Ex. 98 at ¶¶ 6-8 [Decl. of Anton].)

f. Milstein's Polunksy Incident (2003)

In early 2003, Texas attorney Morris Moon was visiting death row clients a the Polunsky Unit in Livingston, Texas. While there, Moon had a conversation with a female prison guard named Williams about a private investigator named Lisa Milstein. (Ex. 115 at ¶ 2 [Decl. of Morris Moon].)

As Moon was purchasing food for one of his clients, Williams asked him if he knew Milstein, and, if so, what he thought of her. Moon asked the guard why she was inquiring about Milstein. Williams told Moon that Milstein had recently visited the prison and her behavior had been quite bizarre. (*Id.* at ¶¶ 3-4 [Decl. of Moon].)

Williams told Moon the following story. Milstein had finished visiting one client at Polunsky and, while waiting to meet the next client, asked permission to go out to the parking lot to her car. To Williams, Milstein appeared to be very agitated. When Williams told Milstein that she could not go to her car, Milstein "flipped out." Milstein continued to press for permission to go to her car and grew more agitated and angry when she was refused. (Id. at ¶¶ 4-5 [Decl. of Moon].)

Williams told Moon that it seemed, based on Milstein's physical demeanor and emotional reaction, that Milstein wanted to go to her car because she was using drugs and needed a fix. (*Id.* at ¶ 6 [Decl. of Moon].)

Moon recalled this incident some time later when he heard that Milstein wa alleged to have used drugs with a witness in Mr. Young's state habeas case. (*Id.* ¶ 7 [Decl. of Moon].)

Moon was shocked by Milstein's alleged conduct in Mr. Young's case, but not completely surprised because, like others in the Texas death penalty community, he had previously heard comments that Milstein had a drug problem. (*Id.* at ¶¶ 7-8 [Decl. of Moon].)

g. Taylor Appointed as Mr. Young's State Habeas Counsel (April 2003)

Taylor's practice of failing to adequately supervise investigators continue when he was appointed to Mr. Young's case, and beyond. Unfortunately, the cases mentioned above were not isolated incidents, and the failure to supervise Milstein continued after Taylor's appointment as Mr. Young's counsel.

On April 16, 2003, Judge Hyde appointed Taylor to represent Mr. Young for purposes of the state application. (Ex. 27 [Appt. Taylor].) On April 29, 200 Taylor requested from Judge Hyde the prepayment of investigative expenses fo Lisa Milstein, "[c]ounsel's primary investigator," representing to the court that Milstein was capable of undertaking the required investigation in a death penalt case. (Ex. 40 [Taylor Request for Funding 2003].) On May 6, 2003, the CCA officially appointed Taylor as Mr. Young's habeas counsel. (Ex. 28 [CCA Appointment].)

h. Walter Sorto's Case (2003)

Milstein's problems surfaced with other legal teams as well as it did in th capital murder case of Walter A. Sorto. Sorto was charged with the May 31, 20 capital murders of Maria Rangel and Roxana Capulin. *Sorto v. State*, 173 S.W 469, 471 (Tex. Crim. App. 2005). Sorto was a citizen of El Salvador. *Id.* at 47

Sorto's state legal team consisted of attorneys Alvin Nunnery, Cruz Cervantes, and Gerald McCann, and investigator Milstein. Criminal defense attorney Nicholas Trenticosta, and his wife, attorney/mitigation specialist Susa Herrero, in cooperation with the El Salvadorian Capital Assistance Project, we hired by the El Salvadorian Government to monitor and assist Sorto in his mitigation defense. (Exs. 124 at ¶¶ 1-2 [Decl. of Nicholas Trenticosta]; 108 at 1-2 [Decl. of Susana Herrero].)

Trenticosta and Milstein spoke by telephone before their September, 20 trip to El Salvador. From his first conversation with Milstein, it was apparent

Trenticosta that the Sorto defense case was heading for a "train wreck." After talking to Milstein about the development of the mitigation case on Sorto's behalf, it appeared to Trenticosta that Milstein was unprepared to help develop mitigation in this case due to her lack of knowledge of the case. (Ex. 124 at ¶¶ 3-4 [Decl. of Trenticosta].)

Trenticosta conveyed his concerns about Milstein to attorney Gerald Bierbaum, an associate of Milstein's. During several telephone calls with Bierbaum, Trenticosta told him that Milstein did not understand mitigation defense in general, and that in particular, Milstein seemed unqualified for the type of investigation she would be expected to conduct in El Salvador. (Ex. 124 at ¶¶ 5-6 [Decl. of Trenticosta].) Bierbaum was close mouthed about Milstein and never responded to any of Trenticosta's concerns about Milstein's abilities. (*Id.* at ¶ 7.)

The Trenticostas and Milstein arrived in El Salvador on September 3, 2003. The first face to face meeting with Trenticosta and Milstein got off to a bad start. Milstein disregarded Trenticosta's suggestions for investigation questions specific to El Salvador even though Milstein was unfamiliar with the culture and language of the country. (Ex. 124 at ¶ 8 [Decl. of Trenticosta].). Because of the friction between Trenticosta and Milstein, Herrero stepped in to coordinate the work with Milstein. (*Id.* at ¶ 9.)

Herrero met Milstein for the first time in the lobby of the hotel where they were all staying. Herrero encouraged Milstein to allow Herrero to accompany her the following day to meet the Sorto family. Milstein had hired two interpreters-photographers for the trip. During the meeting, Milstein told Herrero that she did not speak Spanish, had never met the client, and that she had accepted the case at the last minute because she was friends with the trial attorney. (Ex. 108 at ¶¶ 4-5 [Decl. of Herrero].) During the meeting, Milstein became visibly upset because pigs had run through the Sorto shack that day and had gotten her shoes

dirty. Milstein cried as she showed Herrero her dirty sneakers. (Ex. 108 at ¶ 5 [Decl. of Herrero].)

The following morning, Herrero accompanied Milstein to interview Sorto relatives and neighbors, including his mother. The two interpreters/photograph rode in the front, and Milstein and Herrero sat in the back. During the three-hou drive, Milstein told Herrero she was going through a rough time and that she wa taking psychotropic medications for anxiety and depression. To Herrero, Milste was clearly in a personal crisis. (Ex. 108 at ¶¶ 6-7 [Decl. of Herrero].)

As Milstein spoke about her minimal time and experience on the Sorto ca combined with her personal problems, it became obvious to Herrero that Milstei should not have been working at that time on any case as complex and significa as a death penalty case. Trenticosta felt the same way as his wife. (Exs. 108 at ¶ [Decl of Herrero]; 124 at ¶ 10 [Decl. of Trenticosta].)

I. Vaughn Ross's Case (2003-2004)

Milstein's problems surfaced again during Taylor's representation of deat row inmate Vaughn Ross.

In September, 2002, Vaughn Ross was convicted of capital murder. *See Ross v. State*, 133 S.W.3d 618 (Tex. Crim. App. 2004). In February of 2003, Taylor was appointed to represent Ross on Ross's state habeas application. (Ex 85 [CCA Appointment for Ross]; 122 at ¶ 2 [Decl. of Vaughn Ross].) In turn, he had done in numerous cases before, Taylor selected Milstein as his investigator/mitigation specialist. (Ex. 122 at ¶ 3.)

Milstein first visited Ross in prison in early 2003. It was during that visit that Ross spoke with Milstein about areas of investigation he wished to conduct (Ex. 122 at ¶ 4 [Decl. of Ross].)

Later in 2003, Milstein went to St. Louis and interviewed members of Ross's family, Ross's former girlfriend, and Ross's friends. Ross's younger sister, Michelle Ross, was one of those family members interviewed by Milstein

(Ex. 120 at ¶ 3 [Decl. of Michelle Ross].) To Michelle, Milstein appeared to be under the influence of cocaine as Milstein's eyes were red, she was sniffling, she appeared jittery, and she was not focused in her questioning. Michelle had seen people on cocaine, and Milstein exhibited the same physical symptoms and characteristics of someone on cocaine. (Ex. 120 at ¶ 4.) Michelle did not think Milstein was listening to the answers given during the interview, and felt that Milstein was only interested in turning Michelle's comments into negative statements about Vaughn and the family. (Ex. 120 at ¶ 5.)

Milstein also interviewed Ross's older sister, Valeria Martin. Throughout that interview, Milstein seemed "jumpy" and "jittery" in her movements. Valeria thought Milstein's skin looked pasty, and noticed that Milstein's appearance was "scraggly and unpresentable." (Ex. 113 at ¶¶ 3-4 [Decl. of Valeria Martin].) According to Valeria, Milstein spent the first half of the interview talking about her own personal life including the fact she was a recovering alcoholic who was going through periods of depression for which she was seeking medical help. Milstein also talked to Valeria about being estranged from her mother. (*Id.* at ¶ 5.

Valeria did not understand why Milstein was talking about these personal things as they were out of context to the interview. During the second half of the interview, Milstein focused on the Ross family. Milstein repeatedly asked Valeria if Ross had been abusive to women. When Valeria told Milstein that she did not know of any such behavior, Milstein persisted in the questioning as if Valeria was hiding something. (Ex. 113 at ¶¶ 6-7 [Decl. of Valeria Martin].)

Milstein also interviewed Tiffany Ross. Tiffany was Ross's middle sister. Tiffany only met with Milstein for approximately forty minutes because she felt Milstein wanted her to say things about Ross which were untrue, like that Ross was violent with former girlfriends. (Ex. 121 at ¶¶ 2-3 [Decl. of Tiffany Ross].) To Tiffany, Milstein seemed very anxious during the interview:

Her behavior did not sit right me. I can normally tell from a person's

eyes how genuine they are. There was something shifty about her that I did not trust. I knew something was not right about her.

(*Id.* at ¶ 4.)

Milstein made two appointments to interview Ross's mother, Johnnie, bu Milstein cancelled both appointments. Johnnie called Taylor at least five or six times and left voicemail messages. In the messages, Johnnie notified Taylor th she wanted to talk about Vaughn's case and the fact that Milstein had cancelled the appointments. Taylor never returned Johnnie's calls. (Ex. 119 at ¶¶ 2-4 [D of Johnnie Ross].)

Milstein also interviewed Marcia Green, Ross's former girlfriend. In 20 Milstein came to St. Louis and asked to interview Green about Ross. Green wa prepared to tell Milstein that she, Green, had never seen a bad side to Ross and that she and Ross had never fought during their relationship. (Ex. 106 at ¶ 2 [Decl. of Marcia Green].)

During the interview, Milstein asked Green the same questions in differe ways, trying to get Green to provide answers that would make it appear that Ro and Green argued a lot, saying things like, "Come on, you can do better than th (Ex. 106 at ¶ 4 [Decl. of Green].)

Milstein then asked Green questions like: if she had ever been stalked by Ross; if Ross had ever come to Green's place of work; if Ross ever appeared jealous; had Ross been controlling; and, whether Ross had ever become physically abusive to Green. (Ex. 106 at ¶ 5 [Decl. of Green].)

Green responded that during the two years she and Ross dated, Green ha never found him to be any of those things. Green remembered telling Milstein something to the effect that she did not recognize the man Milstein was attempt to describe. (Ex. 106 at ¶ 6 [Decl. of Green].)

Milstein then asked Green to close her eyes and imagine the following scenario:

> Green was coming home to an empty house and was suddenly surprised by a man who had a knife. The man held Green tight and began cutting at her face and breasts so viciously that the man almost cut off Green's nipple. Green was terrified as she listened to the story. Milstein told Green to open her eyes and then said, "That woman could have been you."

(Ex. 106 at ¶¶ 7-8 [Decl. of Green].)

Milstein told Green that Ross had attacked a former girlfriend in just the way she had described. Milstein again pressed Green to say negative things about her relationship with Ross. (Ex. 106 at ¶ 9 [Decl. of Green].)

Green was really uncomfortable at that point and ended the interview. Green thought that Milstein was "off her rocker" as her questions appeared more likely to hurt Vaughn's case than to help. (Ex. 106 at ¶¶ 10-11 [Decl. of Green].)

Ross's state application was filed in March, 2004.

At some point after the filing, Taylor sent Ross the state application, and, among other things, an affidavit Milstein signed and notarized. That affidavit summarized interviews Milstein had conducted in St. Louis. After speaking to some of the people interviewed and included in Milstein's affidavit, Ross concluded that the contents of Milstein's summary was exaggerated and/or witnesses were wrongly quoted. (Ex. 122 at ¶ 5 [Decl. of Vaughn Ross].)

Ross expressed those concerns to Taylor in a letter dated September 1, 2004. (*Id.* at ¶ 5.) In that letter, Ross discussed with Taylor Milstein's affidavit:

> It has come to my knowledge that [Milstein] misquoted and or exaggerated the things that were told to her during the few interviews that she did do, which you submitted a summary of in the state writ of habeas corpus that I had no idea was filed for me. The various people I spoke

with said [Milstein] was more interested in any negative feedback about me that they could provide against me.

(Ex. 78 at 874-75 [Letter dated 9-1-04].)

Milstein again visited Ross on October 19, 2004. Before that visit, Mils had cancelled two prior scheduled visits. (Ex. 122 at ¶ 6 [Decl. of Ross].) At t October visit, Ross thought Milstein displayed signs of being under the influen of drugs. For example, Milstein could not keep her train of thought, and was jumping from one subject to another. She also could not stay focused on what was discussing with Ross. (*Id.* at ¶ 7.)

Ross also noted that Ms. Milstein's eyes were dilated. Milstein tried to her eyes from Ross during the interview. Ross also noticed that Milstein's complexion was very pale, and she had a sore on her face that looked as if she been picking and scratching at. During the interview, Milstein constantly scratched herself as if she was itching uncontrollably. Milstein also fell asleep the middle of her sentences. Further, Milstein was dressed in multi-layers of clothing, even though the outside temperature was quite warm. (Ex. 122 at ¶¶ [Decl. of Ross].)

When Ross questioned Milstein about the interviews she had conducted St. Louis, she told Ross facts that he believed to be untrue. For example, Mils told Ross that she had spoken with a Liza McVade at Liza's grandmother's ho However, Ross knew that Liza was in prison. When Ross confronted Milstein with this and other inconsistencies in her reports, she became very loud and ma a scene in the prison visitation room. (Ex. 122 at ¶ 9 [Decl. of Ross].)

Officer Williams, who was monitoring the visitation room at the time, attempted to calm Milstein. When that did not work, Ross asked for the visit t terminated. (Ex. 122 at ¶ 10 [Decl. of Ross].) Officer Vaness, who escorted R out of the visitation room, remarked to Ross that Milstein appeared to be unde influence of drugs. (*Id.* at ¶ 10.)

On October 26, 2004, Ross wrote Taylor a letter, narrating the events that had transpired during Ms. Milstein's visit. In that letter, Ross discussed Milstein's apparent drug induced state and strange behavior, and expressed concern about Ms. Milstein's performance in this case. (Exs. 78 [Letter dated 10-26-04]; 122 at ¶ 11 [Decl. of Ross].)

Apparently in response to Ross's letter outlining Milstein's drug problems and bizarre behavior, on November 13, 2004, Taylor filed in Mr. Young's case an under seal letter to Judge Hyde. In that letter, Taylor stated, in relevant part:

> I originally informed the Court that Ms. Lisa Milstein will be my primary investigator. However, *due to personal issues which have arisen for Ms. Milstein*, I may be required to use different investigators for different parts of the investigation.

(Ex. 80 [Letter- Order re Milstein], emphasis added.)[32]

Taylor replied to Ross on December 9, 2004. Taylor acknowledged receiving Ross's letter and having talked to Milstein about Ross's concerns. Taylor suggested that Ross and Milstein again meet. Ross never heard from Ms. Milstein. (Exs. 77 [Taylor to Ross Letter]; 122 at ¶ 12 [Decl. of Ross].)

The affidavit that Milstein signed and notarized, which allegedly memorialized the interviews Milstein conducted in St. Louis, contained numerous factual errors. (*See* Exs. 121 at ¶ 5 [Decl. of Tiffany Ross]; 120 at ¶ 7 [Decl. of Michelle Ross]; 113 at ¶ 9 [Decl. of Valeria Martin].)

j. Alfred Bourgeois's Case (Fall 2004 - Winter 2005)

Bierbaum noticed Milstein's problems as early as 2004. Bierbaum and

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[32] On November 24, 2004, Judge Hyde approved the amount requested for investigative expenses. (Ex. 80[Letter- Order re Milstein].) The Order stated that "[a]fter reviewing the request which came to the Court by letter from applicant's post-conviction counsel[,] the Court is of the opinion that the motion should be granted." (*Id.*) The court did not mention Taylor's request from April 29, 2003, nor does the record reflect the court took any action based on such request prior to November 24, 2004.

Milstein were appointed to work as mitigation specialists on the federal capital habeas trial of *United States v. Alfred Bourgeois* (CR02-00216). Bierbaum and Milstein were assigned to interview more than thirty witnesses in the case. According to Bierbaum, Milstein never completed any of her witness interview the case, leaving all the work to Bierbaum. (Ex. 43 at 11-12, 25 [Bierbaum Depo.].)

k. The Practice Group Talks About Milstein's Problems

According to his state habeas deposition, Taylor did not became aware t Milstein had "problems" until late 2004. Taylor thought Milstein's "problems" stemmed from her brother being in the hospital and Milstein suffering from neurological issues. (Ex. 42 at 8-9, 11 [Taylor Depo.].) Taylor admitted that h tried to limit his contact with Milstein because she "would drive you crazy wit phone calls and stuff like that." (*Id.* at 11.)[33] Taylor scaled back on the work h gave to Milstein. However, Taylor "pushed" Milstein to complete the work he already given her. (*Id.* at 9-10.)

At some point, Taylor, Charlton, Bierbaum, and Francis had a telephone conference with Milstein about the fact she was not getting her work done. Ta believed the group asked Milstein whether she was on drugs. Milstein denied was on drugs. According to Taylor, he had no other evidence at that time to substantiate Milstein's drug use. (Ex. 42 at 21-22, 34 [Taylor Depo.].)

In late 2004, while working on a case, Francis stayed at Milstein's apartment in Houston. Francis felt that something was amiss with Milstein du this visit. On the night Francis stayed over, Milstein stayed up all night. Fran did not know what was going on with Milstein, and did not ask. (Exs. 105, 14 ¶ 11 [Decl. of Francis].)

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[33] Milstein's friend, Tena Francis, described Milstein as having a life fu drama. According to Francis, Milstein always had her share of problems, whe it was with boyfriends or family members. (Exs. 105, 141 at ¶ 7 [Decl. of Francis].)

A few weeks later, Francis returned to Houston and again stayed with Milstein. It was during this stay that Milstein told Francis that she had become addicted to crack cocaine. Milstein acknowledged that she had a real problem with the drug and that she needed treatment. (Ex. 141 at ¶ 12 [2009 Decl. of Francis].)

A short time later, Milstein checked herself into a short-term treatment facility in Houston. Milstein was encouraged to find a longer-term treatment facility due to the extent of her drug addiction. (*Id.* at ¶ 13.)

By this time, however, Milstein was already working on Mr. Young's case. (*Id.* at ¶ 14.) In December of 2004, because of Milstein's problems, Taylor asked Francis to assist him in completing the Young investigation. (Ex. 42 at 12-13 [Taylor Depo.].)

Around this same time, Milstein told Taylor that she was going to a psychologist. She might have also told Taylor she had been diagnosed with a tumor. When it came to Milstein's "personal stuff, [Taylor] tried [his] best to not be involved." Taylor testified he was only concerned with Milstein as it related t his cases. (Ex. 42 at 13-14 [Taylor Depo.].) However, by ignoring Milstein's personal problems, Taylor turned a blind eye to Milstein's inability to perform he investigatory work.

l. Taylor Puts the Court on Further Notice Regarding Milstein's Problems

On January 5, 2005, Taylor asked the state court for additional time to file Mr. Young's application. Among the reasons given by Taylor was that Milstein had reported her brother was hospitalized in serious condition in Houston, which was requiring "a great deal of her attention." The court granted the request, givi Taylor until April 21, 2005 in which to file the state application. (Ex. 39 [Reque Extension - Order '05].)

m. Milstein Loses Her Office Space (2005)

In February, 2005, Milstein stopped paying rent for the office space she shared on Norfolk. Milstein also did not pay her rent for March, 2005. On Mar 31, 2005, attorney Herb Ritchie, one of the owners of the Norfolk property, gav Milstein her lease termination notice. Richie told Milstein that the locks to the building had been changed and that she could only enter the house during norm business hours. (Ex. 83 [Eviction Letter].) When Milstein received notice of th lease termination, she told building management that Charlton and Bierbaum ha promised to pay her rent. (Ex. 84 [Relleboso Statement].) Milstein stated she would come in and remove her belongings. Milstein also stated that she was moving out of her apartment. (*Id.*)

Bierbaum knew that Milstein was removed from her office space for not paying her rent and telephone bill. (Ex. 43 at 10, 31 [Bierbaum Depo.].) According to Bierbaum, Milstein had complained about "neurological problems concerning "seizures and stuff" and that she was not going to work anymore. (I at 10, 20.) According to Bierbaum, Milstein stopped paying her rent because sh was not working on cases and thus, not receiving work assignments:

> we'd get a case -- get appointed to a case. And we'd go through the records and say go interview those people, and it just wouldn't happen. I mean, three months later it still wouldn't happen. And so at some point, you know, we decided enough was enough and we weren't going to work with her anymore. And in that process, she stopped paying rent as well . . . .

(Ex.43 at 10 [Bierbaum Depo.].) Bierbaum also knew that Milstein had a cocai problem. (Ex. 102 at ¶ 6 [Decl. of Calhoun].)

n. Rafael Holiday's Case (April 2005)

Attorney Calhoun, who shared office space with Taylor in Austin, was appointed to the state habeas case of Rafael Holiday. As they had done in the p

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Calhoun consulted with Bierbaum. In the Spring of 2005, Bierbaum told Calhoun that Milstein had a cocaine problem. (Ex. 102 at ¶ 5 [Decl. of Calhoun].) It was Calhoun's understanding that Milstein had been in a drug rehabilitation program and was getting back on her feet. (Ex. 102 at ¶ 6.) Calhoun assigned Milstein a few juror interviews to see if she was able to work on the case. Milstein never completed this task nor did she timely advise Calhoun of her inability to do the investigation and permit him to make alternative arrangements. (Exs. 102 at 7 [Decl. of Calhoun]; 43 at 19-20 [Bierbaum Depo.].) Calhoun confronted Milstein about this failure. Milstein became tearful and apologized. As a consequence of Milstein's failure, Calhoun did not want to use any affidavits Milstein had obtained in her other cases. Calhoun and Bierbaum stopped recommending Milstein as a habeas investigator by April, 2005. (Exs. 43 at 19-20 [Bierbaum Depo.]; 102 at ¶ 9 [Decl. of Calhoun].)

o. Mr. Young's Case

During this same time period (April of 2005), while Milstein was working on Mr. Young's state application, Francis and Milstein had frequent telephone conversations. On one occasion, Milstein asked Francis for money. Francis did not give her money directly for fear Milstein would use it to purchase drugs. Francis did put gasoline into Milstein's car before Milstein left for East Texas to interview Young witnesses. (Ex. 141 at ¶ 15 [2009 Decl. of Francis].)

In East Texas, Milstein interviewed, among others, Dano and Dino Young, Patricia McCoy, Christy Jetton, Crystal Deshotel, and Dylan Keen. Milstein collected affidavits from witnesses and notarized them during April, 2005.[34] (Exs

[34] Although funding for Milstein was requested by Taylor in April 2003, Milstein apparently did not do any substantial work on this case until April of 2005, days before the actual state application was filed.

45, 46, 48 [Affidavits of Young, Deshotel and McCoy])[35]

That month, while Milstein was in East Texas conducting witness interviews in Mr. Young's case, Milstein telephoned Nancy Piette, another investigator that Taylor was using on Young's case. Milstein told Piette that sh was lost and had forgotten all her psychiatric medication in Houston. Milstein sounded like she was "losing it." Piette called Gary Taylor and left him a voic mail message that Milstein was having a nervous breakdown. After the teleph message, Piette never talked to Taylor again, only Bierbaum. (Exs. 116, 145 a 10-13 [Decl. of Nancy Piette].)

p. The Practice Group Breaks Apart

In early 2002, Charlton left Houston and moved to New Mexico, but stil maintained his presence in the practice group. (Ex. 43 at 16 [Bierbaum Depo.] In July of 2005, Taylor quit his Texas practice and moved to Las Vegas, accep employment at the Federal Public Defender's Office. (Ex. 42 at 5, 16 [Taylor Depo.].) Bierbaum followed Taylor to Las Vegas in July, 2005. (Ex. 43 at 18, [Bierbaum Depo.].) Francis joined Taylor and Bierbaum in September, 2005. (Exs. 105, 141 at ¶ 16 [Decl. of Francis].) Charlton joined Taylor, Bierbaum, Francis in Las Vegas in July, 2006.

q. Milstein Enters Drug Rehab

Sometime after September 2005, Milstein entered a long-term drug treatment facility in Southern California, and was there for several months. (E 105, 141 at ¶ 16 [Decl. of Francis].) In June, 2006, Milstein checked herself in Awakenings, a substance abuse recovery facility for woman located in Boca Raton, Florida. She was a resident there from June 2006 to November 2006. November 4, 2006, Milstein was asked to leave the program for abusing her

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[35] In general, after Milstein drafted an affidavit, she electronically sent i Taylor. Taylor and Milstein rarely met in person. (Ex. 42 at 15-16 [Taylor Depo.].)

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medication. (Exs. 103 [Decl. of Christine De Camille]; 105, 141 at ¶ 17 [Decl. of Francis].)

r. Mr. Young's Hearing

The main issue raised by Taylor in Mr. Young's state application was the failure of defense counsel to investigate and present evidence that Mr. Young had been sexually abused by his father.[36] This was also the main issue to be litigated a Mr. Young's state hearing. The evidence to support this claim was collected solely by Milstein. When this evidence was presented at the hearing, it fell like a house of cards.

By the time the actual hearing started, Taylor had withdrawn from the case and Ori White, a former District Attorney of Upton and Reagan Counties, had taken over the representation of Mr. Young.[37]

The first indication of inaccuracies at the hearing came during the testimony of Amber Lynch Harrison, Mr. Young's former girlfriend. Harrison testified that she had talked with Taylor and Milstein. (2 RWR at 176-77.) At some point, "a lady" had faxed her a declaration to sign. Harrison could not read the fax but signed it and sent it back. (2 RWR at 177-80.)

When White began to go over the declaration with Harrison, it became obvious that some of the contents of the document were inaccurate. (2 RWR at 180-92.) In all, over half of the statements in the declaration were inaccurate, according to Harrison. While some of the inconsistencies were small (Harrison's father did not approve of her relationship with Young), others were more pronounced like whether Mr. Young would present a future danger to society,

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[36] Neither Taylor nor Milstein discussed the molestation claim with either of Mr. Young's trial counsel. (2 RWR at 201-02).

[37] While the District Attorney of Upton and Reagan Counties, White had personally opposed defense counsel's issuance of a subpoena seeking records regarding how the death penalty was charged in particular cases in surrounding Texas counties.

whether Young was always protective of Harrison, whether Harrison recalled hearing rumors that Douglas was a police informant, what type of clothing Mr. Young was wearing when she saw him in Midland, and whether the District Attorney was not interested in hearing anything good about Mr. Young. (2 RW at 182-93.)

The problems with Milstein's investigation became more pronounced during the testimony of Dano Young, Mr. Young's older brother. Dano's affidavit, notarized by Milstein, dated April, 2005, contained the following information pertinent to Mr. Young's molestation claim: when Dano and his siblings were younger, they all slept in the same room; Dano and Mr. Young's father, Bill Young, came into that room on many occasions and touched Dano's penis; this started happening when Dano was four years old; and when Dano cri his father made him "hush." (Ex. 45 [April 2005 Affidavit of Dano Young].)

However, at the state hearing, Dano vehemently disavowed the molestati allegation (3 RWR at 130, 149-50; 4 RWR at 115, 126) and testified, in pertine part, as follows: Dano drove around for two days smoking crack cocaine and drinking beer with Milstein; Dano was high when he signed the affidavit; he signed the affidavit so Milstein would continue to buy drugs for him; Milstein tried to get Dano to sleep with her at her hotel room; Milstein drove Dano to a crack house and purchased drugs for Dano's use; Dano smoked about $400 of crack with Milstein; Milstein told Dano not to tell anyone about the crack cocai because she could lose her investigator's license; and Dano lied in his affidavit about being molested by his father so that Dano would continue to get cocaine from Milstein. (3 RWR at 125-43, 148-53, 164; 5 RWR at 118-33.)

Dano also testified that Milstein started crying at some point during the interview saying that she felt Mr. Young had been molested but no one would t her who was the molester. Dano, at first, denied that their father was the moles Milstein then brought up the *idea* that Dano and/or his siblings were sexually

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abused by Bill Young. Dano eventually agreed to say that Dano himself was molested because Milstein had gotten him high and he wanted to continue to get more crack cocaine from Milstein. Milstein assured Dano that he would not get into trouble for saying he was molested by his father. (3 RWR 148-49, 153-55; 5 RWR at 125-26.) At one point, while Dano was smoking crack cocaine, Milstein put Dano on the telephone with someone Milstein said was a lawyer.[38] (3 RWR a 138.)

Dano also testified that the first time Milstein interviewed him, she picked him up at their home around midnight, and did not return him home until around a.m. Dano also described Milstein buying beer at a convenience store and then driving to Daingerfield, Texas to purchase crack cocaine. (5 RWR at 118-21.) Dano also described smoking crack cocaine with Milstein in her hotel room. (5 RWR at 132-33.)

Dano also testified about Milstein interviewing his four-year-old stepson, Dylan Keen. According to Dano, Milstein interviewed Dylan out of the presence of Dano and Crystal Deshotel, Dano's wife and Dylan's mother. Milstein got Dylan to say untrue things about being molested by Bill Young.[39] (3 RWR at 126 143, 159.) Based upon Milstein's interview with Dylan, Crystal and Dano took Dylan to the Child Advocacy Center in Winnsboro, Texas. Dylan was evaluated at the Center for about three hours. Following the evaluation, Dano and Crystal were told that it did not appear that anybody had molested their son. (3 RWR at

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[38] Dano testified at the state habeas hearing that he remembered speaking t someone on the telephone, but was so "high," he was not certain who it was, although it could have been Taylor. (3 RWR at 138; 5 RWR at 130-31.) At som point, Milstein put Dano on speaker phone with the person on the other end of th call. While on speaker phone, Milstein would ask Dano "yes" or "no" questions, and Dano would respond for the person on the other end of the call. During the phone call, Milstein did not ask Dano all the information which was the subject o his later affidavit. (5 RWR at 130-31.) Taylor testified that he was not certain h spoke to Dano Young on the telephone. (Ex. 42 at 17-20, 27-28 [Taylor Depo.].)

[39] The general import of Dylan's statement was that Bill Young anally abused him. (3 RWR at 159.)

126, 142-43, 164-65; 4 RWR at 137-38.) When Dano asked Dylan if he had bee molested by Bill Young, Dylan responded, "No." When Crystal asked Dylan wh he had said he was molested, Dylan replied, "That lady told me to." (3 RWR at 143.)[40]

Crystal Deshotel later confirmed Dano's testimony regarding Milstein. Before the hearing, Crystal had supplied an affidavit for Milstein, this one dated April 20, 2005. (*See* Ex. 46 [Affidavit of Deshotel].) The affidavit stated, in relevant part, the following: for a short time, Dano, Crystal, and Dylan lived wi Bill Young in Beaumont, Texas; while living there, Dylan came inside the hous after being outside with Bill Young, and stated that his "butt hole hurt;" Crystal checked her son but never found anything unusual; after Dano told Milstein that Bill Young had molested him as a child, Crystal gave Milstein permission to interview Dylan; on the recording, Dylan told Milstein that Bill undressed him, made him spread his butt cheeks and stuck a tree branch in his butt, and afterwards, Bill glued Dylan's butt back together. (Ex. 47 [Affidavit of Milstein

At the state hearing, Crystal denied the contents of the affidavit drafted by Milstein. To that end, Crystal denied that Dylan had ever told her his butt hurt after coming from being outside with Bill Young. Crystal also denied that she h ever checked Dylan for sexual abuse as she never had cause to believe he was th victim of sexual abuse.[41] (5 RWR at 89-90, 99-100.) Crystal also denied that

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[40] Dino Young was also visited by Milstein and questioned about being molested by Bill Young. Dino denied being molested by his father and never supplied a statement to Milstein. (3 RWR at 167-69, 175-76.) Dano went to se Dino a few weeks after Milstein's visit. Dano told Dino about riding around wi Milstein smoking crack cocaine. (3 RWR at 168, 177.) Christy Jetton, Mr. Young's older sister, was contacted by Milstein by telephone. Milstein set up a time to meet with Christy in Gilmore, Texas. Christy went to Gilmore with her children, but Milstein failed to show up and never rescheduled. (3 RWR at 227 28.) Christy was not molested by her father. (3 RWR at 226-27.)

[41] The affidavit that Crystal signed also alleged that Dano's sister, Renee told Crystal that Bill Young raped her. Crystal denied that Renee had ever told that, as Renee and Crystal did not get along. (5 RWR at 103.)

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Dylan had stated in a narrative form what Bill Young had done to him. Rather, or the tape, Dylan answered Milstein's questions with "yes" or "no" answers. (5 SRW at 79.)

Crystal also testified that Milstein interviewed Dylan for about three hours outside the family home. After the interview, Milstein let Crystal listen to a recording Milstein had done on her cellphone. The recording was not three hours long and only contained "snippets" of the interview.[42] Milstein then left the hous to get some money which had been wired to her. When Milstein returned, she ha a computer with her and took down Crystal's affidavit, which Crystal signed. At the time she signed the affidavit, Crystal was upset as she believed her son had been molested. Further, Crystal did not read the entire affidavit at the time she signed it. (5 RWR at 76-84, 93-94.) Before Milstein's visit, Crystal had no reaso to believe that her son had been molested. (5 RWR at 84.)

Patricia McCoy also testified at the state hearing.[43] McCoy was likewise interviewed by Milstein in preparation for Mr. Young's state application. McCo signed a two-page affidavit, which was notarized by Milstein. The second page contained only the signature block. However, what was introduced for purposes of the state application was a four-page declaration. McCoy did not recognize th second and third pages of the affidavit introduced into evidence. (Ex. 44 at 6-10, 29-30 [McCoy Depo.].)

While the third page of the affidavit stated that Mr. Young told McCoy tha he was sexually abused by his father (Ex. 48 Affidavit of P. McCoy), Mr. Young only told McCoy that he was physically abused by his father. (Ex. 44 at 18 [McCoy Depo.].) Many other portions of the affidavit were incorrect including:

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[42] Apparently when Milstein returned home, the cellphone had not saved the recording, and the phone company was not able to retrieve it. (5 RWR at 81.

[43] McCoy's testimony was admitted by way of a telephone deposition. (E 44 [Deposition of Patricia McCoy dated March 24, 2006].)

that Douglas was a pedophile; Mr. Young found a pair of young girls' panties i Douglas's car; when Douglas was on drugs, he tried to touch people in a sexual manner and that he was disgusting; Douglas let Mr. Young drive his car all the time; and, McCoy had never seen Mr. Young act in a violent manner. (Ex. 44 a 19-30 [McCoy Depo.].)

During the interview, Milstein was taking Xanax. At one point, Milstein asked McCoy if she knew where to purchase Xanax. Milstein also asked McC if she had any marijuana. (Ex. 44 at 11 [McCoy Depo.].) McCoy believed that Milstein was on some sort of drug, like "uppers." (*Id.* at 29.)

Taylor testified that he did not know that the affidavits filed by Milstein were false as Taylor never had any indication that Milstein would make false statements in any of her cases. (*Id.* at 17, 34, 40.)

On advice of counsel, Milstein made herself unavailable to testify at Mr. Young's state hearing.[44] (Ex. 42 at 23-25 [Taylor Depo.].)

By Taylor's own admission at the state habeas hearing, the investigation into the alleged molestation issue foreclosed the investigation and presentation other claims in Mr. Young's application due to time and resources. (Ex. 42 at 3 35-36 [Taylor Depo.].) Taylor's failure to adequately supervise Milstein, despi being on notice of her personal problems and inadequate performance at the tin he was appointed to represent Mr. Young, resulted in meritorious claims not be investigated and presented.

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[44] Federal habeas counsel attempted to interview Milstein in preparation Mr. Young's Petition. On the advice of her lawyer, Milstein would not talk wi counsel.

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4. By Appointing Incompetent Counsel and Not Adopting Proper Standards to Evaluate Counsel's Competency, the Court of Criminal Appeals Denied Mr. Young of His Opportunity to Properly Challenge His Conviction and Sentence of Death at the State Level, in Violation of Mr. Young's Procedural Due Process Rights under the Fourteenth Amendment and Comparable State Law

Taylor's failure to properly direct and supervise his primary investigator in prior cases and in this case, made him not competent to be appointed as counsel for a state habeas petition. Although Article 11.071 states that "on appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing o an application for a writ of habeas corpus," Taylor relied on an investigator who used drugs, was emotionally unstable, and who obtained false declarations (declarants later renounced statements in their declarations in court). This pattern and practice also continued after Taylor's appointment in Mr. Young's case. (Exs 99, 122, 120, 121, 106, 102, 105, 98, 118, 113, 124, 108, 44, 141 [Decls. of Bacci at ¶¶ 5-10; Vaughn Ross at ¶ 5; Michelle Ross at ¶¶ 4, 7; Tiffany Ross at ¶ 5; Green at ¶¶ 3-12; Calhoun at ¶ 6; Francis at ¶¶ 12-17; Anton at ¶¶ 5-8; Rodriguez at ¶¶ 3-6; Martin at ¶¶ 3-9; Trenticosta at ¶¶ 4-10; Herrero at ¶¶ 5-8; McCoy Dep at 6-11, 29-30; 3 RWR at 180-93 [Amber Lynch Harrison]; 3 RWR at 130, 142-43, 149-50, 4 RWR at 115, 126 [Dano Young]; 5 RWR at 89-90, 99-100 [Crystal Deshotel]; 3 RWR at 125-43, 148-53, 164, 5 RWR at 118, 133 [Dano Young].)

As early as 1997, Taylor should have, at a minimum, been independently directing and supervising Milstein's work and in particular, with respect to allegations related to sexual abuse.

With regard to the Dominque Green case, Taylor was informed that Milste

was having personal problems, had little working knowledge of the death penal and was so easily upset that any attempts to focus her work would bring her to tears. (Ex. 99 [Decl. of Bacci].)

According to Michael Rodriguez, even though Taylor presented a claim t Rodriguez was molested by a priest, Taylor never talked to Rodriguez about the claim before it was presented at trial. If he had spoken to Rodriguez prior to tri adequately supervised Milstein, and/or performed his own independent evaluati of Rodriguez's case in mitigation, it would have become apparent to Taylor tha the molestation charge, based upon the facts as represented by Milstein, would renounced by the client. (Ex. 118 at ¶¶ 4-6 [Decl. of Rodriguez]; *see* Guideline 10.4 (lead counsel bears overall responsibility for performance of defense team and should direct and supervise its work).)

Moreover, had Taylor adequately directed and supervised Milstein, he would have known, starting in 2001, that the affidavits collected and notarized Milstein with respect to the Carpenter case were inaccurate and, in at least one case, possibly forged. Had Taylor, like his later federal habeas counter-part, Br Anton, adequately supervised and directed the performance of his defense team would not have presented false affidavits obtained by Milstein. (Ex. 98 [Decl. Anton].)

Had he adequately directed and supervised Milstein in 2003, Taylor wou have learned that affidavits that were submitted on behalf of Vaughn Ross were like those in Carpenter, misleading and full of factual errors. (Exs. 122, 121, 12 106, 113 [Decls. of Vaughn Ross, Tiffany Ross, Michelle Ross, Marcia Green, Valeria Martin].)

Had Taylor followed the guidelines as set forth by the ABA, he would ha been aware that his primary investigator (the same person whose work he used Rodriguez, Carpenter, Ross, and Mr. Young's case, not to mention numerous ot death cases), was suffering from substance abuse issues and mental health-relat

problems. (Exs. 99, 105, 141, 102 [Decls. of Bacci, Francis, Calhoun].) However, Taylor testified at the state habeas hearing that he made a point of keeping himself at arm's length from Milstein (Ex. 42 at 11, 13-14 [Taylor Depo.]), and thus, apparently, missed the signs that were obvious to others. Both Bierbaum and Calhoun, members of Taylor's practice group, were themselves aware of Milstein's drug problems. (Ex. 102 at ¶ 6 [Decl. of Calhoun.].) Even Susan Herrero, a mitigation specialist who had far less contact with Milstein than Taylor, was aware of Milstein's mental health and drug-related problems. (Ex. 108 at ¶ 7 [Decl. of Herrero].)

Taylor stated in his deposition that he had no reason himself to suspect Milstein was involved in drugs (Ex. 42 at 21-22 [Taylor Depo.]), but his client, Vaughn Ross, informed him of his suspicions about Milstein in October of 2004. (Ex. 78 at 876-77 [Ross to Taylor Letter 10-26-04].) Taylor took this statement seriously enough to seek permission from the state court to hire another investigator. (Ex. 80 [Letter - Order re Milstein].)

Taylor acknowledged at the state habeas hearing that he was aware of Milstein's health problems. (Ex. 42 at 8-9, 11 [Taylor Depo.].) If he had been more involved in supervising his defense team, he would have made the connection that Milstein was not able to conduct investigatory-related work, as di practice group members Calhoun, Bierbaum, and Francis, due to her drug use. (Exs. 102 at ¶ 9 [Decl. of Calhoun]; 105, 141 at ¶¶ 12-17 [Decl. of Francis]; 43 a 19-20 [Bierbaum Depo.].)

After Taylor stopped giving work to Milstein in 2004 (Ex. 42 at 9-10 [Taylor Depo.]), and informed the state court that he needed another investigator due to Milstein's personal problems (Ex. 80 [Letter - Order re Milstein]), he still permitted Milstein to conduct the most sensitive and important investigation of th Young case, that of interviewing family members. Fellow investigator Nancy Piette knew that something was wrong with Milstein during the Young

investigation (Ex. 116 at ¶¶ 10-12 [2009 Decl. of Nancy Piette]), and relayed he concern to Taylor (*id.*). Taylor nevertheless continued to allow Milstein to conduct, without supervision, an investigation that resulted in presenting an unmeritorious claim in lieu of the claims identified *ante* and *post* that could and should have been presented in the state habeas application.

The claim of parental sexual abuse had no merit and took valuable time away from other claims worthy of investigation and presentation.[45] Furthermore not only was the claim doomed to failure, Mr. Young's case was prejudiced by evidence that was brought forth at the state hearing -- evidence involving Milstein's use of drugs and sex in exchange for affidavits filled with inaccuraci and half-truths.

Rather than investigate and raise meritorious claims, such as the claims th were found to be procedurally barred by the CCA, counsel instead presented a house of cards (the molestation allegation) that collapsed when light was shed upon it. Counsel failed to present an adequate state application, as mandated by Article 11.071 and the applicable ABA Guidelines.

By failing to adopt proper rules and standards to evaluate counsel's competency at the time of appointment and failing to monitor counsel's performance before and after appointment, the CCA denied Mr. Young his 'one bite at the apple' to proper state habeas review.[46]

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[45] Had Taylor not concentrated on the claim of sexual abuse, he would ha been able to investigate and present the claims as will be discussed below.

[46] Representative Gallego, the sponsor of the abuse of the writ statute passed by the Legislature in 1995, codified in Art. 11.701, described the state's habeas procedure as a petitioner's "one bite of the apple":

> And we tell individuals that everything you can possibly raise the first time, we expect you to raise it initially, one bite of the apple, one shot . . . . What we're attempting to do here is to say "raise everything at one time." You get one bite of the apple. If you have to stick the kitchen sink in there, put it all in there, and we will go through those claims one at a time and make a decision. But none of this "every

Had the CCA acknowledged its duty to provide proper guidelines for the appointment and monitoring of state post-conviction counsel, as the State's own bar recognized (*see* Texas Guidelines), counsel's defects would have come to ligh before Taylor was appointed to Mr. Young's case. At the minimum, counsel would have known that the CCA expected him to perform a proper mitigation investigation. Most likely, however, if the CCA had provided proper guidelines for the appointment and monitoring of state post-conviction counsel when it was required to, it is unlikely Taylor would have even been appointed to Mr. Young's case.

Based upon the above, this Court should permit Mr. Young to litigate the following claims in this Application because the State of Texas interfered with Mr. Young's constitutional rights by appointing incompetent state habeas counsel.[47]

B. Judicial Bias

1. Introduction

As discussed above (*see* Claim Three, *ante*), three days after the conclusion

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> week you file a new petition" which is currently basically what happens . . . . **The idea is this: you're going to be able to fund counsel in these instances and we are going to give you one very well-represented run at a habeas corpus proceeding.** And unless you meet a very fine-tuned exception, you're not going to be able to come back time after time after time.

Ex parte Kerr, 64 S.W.3d 414, 418-19 (Tex. Crim. App. 2002) *citing* S.B. 440, Acts 1005, 74th Leg., codified at Tex. Code Crim. Proc. Art. 11.071 (Presentation by Representative Pete Gallego at second reading of S.B. 440 on the floor of the House of Representatives, May 18, 1995) (emphasis added).

[47] For that matter, Mr. Young's second state habeas counsel, Ori White, was not qualified for appointment when he was first selected to replace Taylor. On August 8, 2005, Judge Hyde appointed Ori White to Mr. Young's case. (Ex. 27.) On October 3, 2005, the CCA informed Judge Hyde that White was not on the approved list of attorneys to be appointed to such cases. A month later White was approved after applying for appointment. (Ex. 56 [CCA Letters re Ori White].) In addition, when it came to light that the molestation issue was invented by Milstein, White did little to repair the damage done, thus continuing a pattern of ineffective and incompetent counsel.

of Mr. Young's trial, Judge Hyde sent a letter to each of the jurors. In that lett Judge Hyde told the jurors that they had made the correct decision and he informed them of his own pre-disposed belief that Mr. Young was a dangerous man who was capable of harming someone else:

> After spending several weeks with the Defendant in jury selection before the trial began, I gained some insight into his personality and I got to hear and see much more than the jury heard. In my view, he is a dangerous man who is fully capable of harming someone else. Your jury made the correct decision.

(Ex. 93 [Hyde Letter].) The judge's opinion was based upon evidence the jury not hear and his own personal opinion. (*Id.*)

Judge Hyde then presided over, and denied, Mr. Young's motion for nev trial. (CR at 922-23; 39 RR at 100-05.) Later, Judge Hyde presided over, mad factual findings against, and denied Mr. Young's state habeas application. (Ex [Hyde Denial of Writ].)

2. Relevant Law

A defendant has an unqualified right to an impartial judge. *Gray*, 481 U at 668; *accord Bracy*, 520 U.S. at 904-05; *Gomez*, 490 U.S. at 858; *Tumey*, 273 U.S. at 535; *Richardson*, 537 F.3d at 474; *Bigby*, 402 F.3d at 558.

A defendant may establish the denial of this right by demonstrating actu bias. *Taylor*, 418 U.S. at 501-04; *Withrow*, 421 U.S. at 47; *Richardson*, 537 F.3 at 474-75; *Buntion*, 524 F.3d at 672.

Structural error occurs when a trial judge is biased. *Richardson*, 537 F.3 473, *citing Neder*, 527 U.S. 1. "A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence aga him." *Edwards v. Balisok*, 520 U.S. at 647; *Buntion*, 524 F.3d at 672.

3. Judge Hyde's Bias Excuses Mr. Young's Procedural Default

By his letter to the jurors, it is clear that Judge Hyde believed Mr. Young was guilty of the crimes against Douglas and Petrey, and should be put to death as he was a dangerous man who was fully capable of harming someone else in the event he was ever released from prison.

This same judge then presided over Mr. Young's state habeas proceeding. In presiding over the case, Judge Hyde sat now as both judge and jury over Mr. Young's fate. Judge Hyde decided which claims would be the subject of a state hearing. Judge Hyde decided what evidence was admissible at that hearing. And Judge Hyde eventually decided whether Mr. Young was to seek any type of post-conviction relief based upon the allegations raised in the state application.

Judge Hyde, however, should never have been permitted to preside over Mr Young's state proceeding as his letter to the jurors showed a clear bias against the very person whose fate he was deciding.

Based upon the above, this Court should not be precluded from reaching the merits of the claims mentioned above because Mr. Young's state proceeding was presided over by a biased jurist.[48]

Mr. Young was appointed incompetent counsel for purposes of state post-conviction litigation. That counsel failed to adequately supervise and direct the actions of his primary investigator, Lisa Milstein, despite the evidence as far back as 1996 that Milstein had emotional, psychological and drug addiction problems. The result of counsel's incompetence was an investigation centered around a factually unsupportable charge of parental sexual abuse, which was presented to the exclusion of other factually supportable, meritorious claims.

Further, once Taylor filed Mr. Young's defective state writ application, the judge who presided over the post-conviction proceeding was biased against Mr.

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[48] Should this Court remand the case to the convicting court, another judge should preside over the proceedings.

Young. Therefore, the following claims, which were not presented in the prior state application, should be litigated now.

C. Mr. Young Was Denied the Right to Effective Assistance of Counsel the Guilt and Punishment Phases of His Capital Trial

Mr. Young's convictions, confinement, and sentence violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, a comparable state law, because his attorneys failed to provide reasonably competent assistance at the guilt and punishment phases of trial. But for couns unprofessional actions and omissions, the result of the proceeding would have been different. *Wiggins v. Smith,* 539 U.S. 510, 521, 534 (2003); *Strickland*, 4 U.S. at 694; *Thompson*, 9 S.W.3d at 812.

1. Legal Standard

An ineffective assistance of counsel claim has two components: Mr. Yo must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *Wiggins*, 539 U.S. at 521; *State v. Morales*, 253 S.W.3 686, 696 (Tex. Crim. App. 2008). "To establish deficient performance, [Mr. Young] must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Id.* (*quoting Strickland*, 466 U.S. at 688); *Reis v. Quarterman*, 522 F.3d 522, 526-27 (5th Cir. 2008); *Soffar v. Dretke*, 368 F.3d 441, 472 (5th Cir. 2004); *Thompson*, 9 S.W.3d at 812. To establish prejudice, Young "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Wiggins*, 539 U.S. at 534 (*quoting Strickland*, 466 U.S. at 694); *accord Reis*, 522 F.3d at 527; *Thompson*, 9 S.W.3d at 812.

A "conscious and informed decision on trial tactics and strategy cannot b the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Johnson v.*

Dretke, 394 F.3d 332, 337 (5th Cir. 2004) (internal quotations omitted); *Gamble* *State*, 916 S.W.2d 92, 93 (Tex. App. - Houston 1996); *see Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987) (*Strickland* does not require deference to decision which do not yield any conceivable benefit to the defense).

Reasonableness of counsel's performance is assessed by looking to "[p]revailing norms of practice as reflected in [the] American Bar Association standards." *Strickland*, 466 U.S. at 688; *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) ("[W]e have long referred [to the ABA Standards for Criminal Justice] as guides to determining what is reasonable") (*citing Wiggins*, 539 U.S. at 524); *Florida v. Nixon*, 543 U.S. 175, 191 (2004); *Wiggins*, 539 U.S. at 524; *see Ex Parte Martinez*, 195 S.W.3d 713, 727-38 (Tex. Crim. App. 2006). Because adequacy is based upon "counsel's perspective at the time," (*Strickland*, 466 U.S. at 589), courts must look to the guidelines then in effect. *Smith v. Dretke*, 422 F.3d 269, 279 (5th Cir. 2005) (applying ABA Standards for Criminal Justice (2d Ed. 1980) which were in effect at time of trial); *see also Sonnier v. Quarterman,* 476 F.3d 349, 358 n.3 (5th Cir. 2007).

At the time of Mr. Young's trial, his attorneys' obligations were governed by the ABA Guidelines for the Appointment and Performance of Counsel in Dea Penalty Cases 2003 (the "Guidelines") and the ABA Standards for Criminal Justice (3d Ed. 1993) (the "Standards"). "Those Guidelines applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases and imposed . . . similarly forceful directive[s]." *Rompilla*, 545 U.S. at 387 n.7 (referring to 1989 Standards). Pursuant to the Guidelines, counsel has an obligation to conduct at every stage a "thorough and independent investigation (relating to the issues of both guilt and penalty." Guidelines 10.7(A).[49] Similarly,

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[49] Because the investigation leading up to Mr. Young's trial occurred prio to the February, 2003 enactment of the 2003 Guidelines, it could be argued that the 1989 ABA Guidelines for the Appointment and Performance of Counsel

the Standards imposed an affirmative obligation "to conduct a prompt investigation of the circumstances of the case and to explore *all* avenues leadin to facts relevant to the merits of the case." Standards 4-4.1 (emphasis added). Most significantly, "[t]he duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty." *Id.*

Once capital trial counsel completes the necessary pretrial investigation, must then formulate a defense theory "that will be effective in connection with both guilt and penalty . . . . Guideline 10.10.1 (2003); *accord* Guideline 11.7.1 (1989). Clearly established Federal law dictates that defense counsel must conduct a *reasonable investigation* or, at a minimum, to make a reasonable decision that makes specific investigation unnecessary. *Strickland*, 466 U.S. at 691; *accord Sonnier*, 476 F.3d at 358. Trial counsel may not limit the scope of their investigation unless it determined that further investigation would be "counterproductive or fruitless." *Lewis v. Dretke*, 355 F.3d 364, 367, (5th Cir. 2003); *accord Smith v. Dretke*, 422 F.3d 269, 280 (5th Cir. 2005).

2. Counsel's Failure to Object to the TYC Records

Where the prosecution seeks to introduce facts about a prior offense in aggravation, counsel has a "duty to make all reasonable efforts to learn what th [can] about the offense." *Rompilla*, 545 U.S. at 385; *Moore v. Johnson*, 194 F. 586, 608 (5th Cir. 1999) (articulating trial counsel's "affirmative duty to identi the state's witnesses to extraneous conduct and to interview those witnesses if possible"); *Valdez v. Johnson*, 93 F. Supp. 2d 769, 780 (S.D. Tex. 1999), rev'd other grounds, 274 F.3d 941 (5th Cir. 2001) ("counsel has a duty to investigate nature of defendant's prior criminal history, especially when evidence of these

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in Death Penalty Cases was controlling here. Even if that is so, there appears t no material difference between the two. (*See* ABA Guideline 11.4.1 (1989) (counsel required to conduct "independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial").

previous crimes is likely to be raised by the prosecution at trial.").

It is clearly established federal law that counsel's failure to make an obviou and meritorious objection to illegally obtained evidence forming the basis of the state's case amounts to ineffective assistance of counsel, where such failure was not due to trial strategy considerations, but because defense counsel was unaware of the illegality of the evidence due to a failure to conduct pretrial discovery. *Kimmelman v. Morrison*, 477 U.S. 365, 383-85 (1986); *accord Moreno v. Dretke*, 450 F.3d 158, 167-68 (5th Cir. 2006). Thus, counsel's failure to object to the TY records, which violated Mr. Young's Fourth Amendment rights, as will be discussed below, is cognizable here. *Kimmelman*, 477 U.S. at 383-85.

In this case, trial counsel failed to investigate how the State obtained the TYC records pertinent to Mr. Young's detention before any charges against Mr. Young were filed. Had counsel investigated how those records were obtained, they would have discovered the records were not only illegally obtained by the State, but also that, more likely than not, the records were used by the State in deciding to charge Mr. Young with the death penalty. Counsel's failure to investigate how the State obtained those records, and whether the State improper used those records in charging Mr. Young with a capital crime, was ineffective. Because counsel failed to conduct a thorough investigation before deciding whether or not to object to the admissibility of the records, counsel's choice coul not have been strategic.

a. Pre-trial Investigation and Indictment

On November 29, 2001 – three days after Mr. Young had been detained by Midland authorities for the murder of Petrey, Rick Berry, then the District Attorney for Harrison County, sought a court order from Marion County to obtai

Mr. Young's juvenile records from the TYC.[50] (Ex. 70). The letter is all of bu two sentences long, stating: "My office request [sic] a copy of the TYC record Clint Young, DOB 7-19-83. Thank you for your cooperation in this matter." (The request was approved on the same day.[51]

On December 10, 2001, TYC produced 1,209 pages of records pertinent Mr. Young's detention in TYC, including information concerning Mr. Young's diagnosis and treatment while at TYC; information concerning his involuntary commitment to TYC; incidents preceding his commitment to TYC; alcohol and drug abuse information; and Mr. Young's mental health issues.

Amid the information revealed by the records, the TYC records revealed that Mr. Young:

> Has had problems since a young age. He is aggressive, had difficulty accepting responsibility for his actions, no remorse for negative behavior, argumentative and has a short attention span. Clint's father - abuses drugs & alcohol & has nothing to do with his child. - The last time Clint saw his father, his father assaulted him. . . . Father is suspected abuser of drugs & alcohol - Grandfather died from psorosis [sic] of the liver.

(Ex. 21 at 213-14 [State Trial Exhibit 147, at 285, 287].)

The records obtained by the State also indicated that Mr. Young suffered from ADHD (*id.* at 293); that Mr. Young had "mental health needs requiring treatment" for which he was prescribed "psychotropic medications"(*id.* at 300); and that Mr. Young presented evidence of emotional pain (*id.* at 362):

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[50] As alleged in other parts of this Application, prosecutorial misconduc was not limited to this incident. *See Brady* and *Napue* Claims One and Two, a

[51] As the signature on the letter is illegible, it is unclear who approved t request, and whether whoever approved the request had the authority to approv the release of those records.

> This client is likely to be experiencing considerable emotional pain, which . . . [is] part of a broad array of factors such as low self-esteem, suicidal . . ., history of trauma, and other symptoms suggestive of mood problems . . . .

(*Id.* at 363.) TYC records also disclosed the extensiveness of Mr. Young's alcoho problems. (*Id.* at 367-69.)

On December 20, 2001, a grand jury indictment was filed charging Mr. Young with the capital murder of Samuel Petrey. (CR at 3.)

On February 7, 2002, Mr. Young was re-indicted. In the first count of the re-indictment, it was alleged that Mr. Young murdered both Samuel Petrey and Doyle Douglas pursuant to the same scheme and course of conduct, within the meaning of Texas Penal Code section 19.03(a)(7). In the second paragraph of the re-indictment, it was alleged that Mr. Young intentionally murdered Mr. Petrey during the commission of robbery and kidnapping, within the meaning of Texas Penal Code section 19.03(a)(2). (CR at 4-5.)

On February 12, 2002, Mr. Young was arraigned on charges of the offense of capital murder. (2 RR at 4.) The arraignment was based on the February 7, 2002 indictment. (*Id.* at 5-6.) Mr. Young was then advised the State would be seeking the death penalty. (*Id.* at 6.)

On May 23, 2002, the trial court granted Mr. Young's motion to compel disclosure of evidence to be offered in support of the Texas special issues on punishment and information relating to mitigating circumstances. (CR at 217.) The trial court ordered the prosecution to disclose all such evidence no later that August 16, 2002. (*Id.*)

On an unspecified date, but before trial, the State served on trial counsel a

copy of the TYC records.[52] (2 RWR at 211.)

On June 7, 2002, almost seven months after the State had obtained the TYC records, the State filed a "Notice of Filing of Business Records & Request for Sealing of Records," notifying the court that "the State [had] filed with the Clerk of this Court" Mr. Young's TYC records. (CR at 224.) The notice indicated that copy of those records "were delivered to defendant's attorneys in open court" dat prior to June 7, 2002. (*Id.*) The TYC records were accompanied by a Certificate of Custodian to Copy of Official Records, under Texas Rules of Evidence, Rule 902 (4). (Ex. 21 at 215 [State Trial Ex. 147 at 1].)

Also on June 7, 2002, the State filed its "Notice of Extraneous Offenses," notifying defense counsel that the State proposed to use the TYC records during the punishment phase of Mr. Young's trial. (CR at 222). In describing the relevancy of such records, the State referred to the TYC records as: "Assaults and other acts of misconduct, including prior drug use, as set out in the records of the Texas Youth Commission which have been previously filed in this cause with the District Clerk." (*Id.*)

On July 12, 2002, DA Schorre testified at a pre-trial hearing that Midland County had a written policy concerning who should be charged with the death penalty. (5 RR at 96.) The policy stated:

In a capital case, the decision to seek the death penalty will only be authorized by the District Attorney.

> In considering the decision, the District Attorney will review factors including, but not limited to, the

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[52] Evidence was taken on this claim during the hearing on Mr. Young's state application. On direct examination, defense counsel Ian Cantacuzene, who handled the punishment phase of Mr. Young's trial, testified, in pertinent part:

> I can't remember the day it happened, but it was during a pretrial hearing, and they were allegedly brought in and dumped on a table in this courtroo and we had them -- I don't want to guess, I think eight, 10 months before trial.

(3 RWR at 22.)

following:

A) aggravated and mitigating facts of the offense;

B) the age, criminal history, intellectual capabilities, and the mental/physical status of the offender; to determine the likelihood that a jury would render an affirmative finding of "future dangerousness."

(5 RR at 155.)

Acknowledging that Midland County had not obtained the death penalty any of the four prior cases where Midland had sought the death penalty, DA Schorre testified that in comparison, at the time of Mr. Young's case, he "look more at the Defendant's background." (*Id.* at 102.)

> I think from actually in my standpoint when I look at the case, besides the facts of the case and how horrific the case may be, I look for things that we can show the jury that it's going to be a track record of prior antisocial conduct, prior criminal offenses that will help them in that determination on future dangerousness.

(5 RR at 102.)

On cross-examination, via a narrative, Schorre testified as follows:

> In the assessment in this case on whether or not to seek the death penalty, I've followed the same criteria. I looked at the nature of the offense, two people were killed, when I went and looked at the background of the Defendant, I found an extensive criminal history, both as a juvenile, as an adult, there is -- was a real long adjudication that eventually sent him to TYC, multiple offenses listed in there, multiple felonies listed in there. I went through around a thousand pages of the TYC

> records with multiple offenses, assaults against staff as well as other juvenile inmates . . . so when I look at not only the facts of this homicide, but the Defendant's background, I'm left with a person that I can reasonably make the assessment based upon several year track record that a jury could agree with me that he is going to be dangerous in the future and would therefore fall into the death penalty worthy group, which is the same assessment I made every time we've had to decide to seek the death penalty.

(5 RR at 120-21.)

At the punishment phase of Mr. Young's trial, the court admitted the TYC records into evidence without any objections from the defense. (30 RR at 194.)

b. State Hearing

Evidence was taken on this claim during the hearing on Mr. Young's state application. On direct examination, defense counsel testified that it had been a strategic decision to not object to the records. (3 RWR at 27.)

Trial counsel testified that there was nothing wrong with the TYC records because they were filed timely (3 RWR at 26), and that the information protected by "HIPAA had been redacted." (2 RWR at 181). Counsel also testified that although at first he had found the documents overwhelming, he and co-counsel had "poured over" the documents, and had decided that the TYC records supported Mr. Young's case in mitigation by showing that when properly medicated for his ADHD, his behavior would improve and thus, show that he would not be a future danger in a prison setting. (2 RWR at 212.) While recognizing the harmful potential of the records, trial counsel testified that they were more helpful than harmful to Mr. Young's case in punishment. (*Id.* at 212-14.)

c. Relevant Legal Authority (Fourth Amendment Right to Privacy)

The acquisition of Mr. Young's TYC records violated his Fourth Amendment right to privacy, which provides "[t]he right of the people to be sec in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." The attainment of Mr. Young's TYC records ir which Mr. Young had a vested proprietary interest was an illegal and unconstitutional procurement in violation of the Fourth Amendment of the Unit States Constitution and Article I, section 9 of the Texas Constitution.

Texas Constitution article I, section 9, protecting against unreasonable searches and seizures, has been held to be at least as extensive as the U.S. Constitutional Amendment IV. *State v. Comeaux*, 818 S.W.2d 46, 49 (Tex. Cri App. 1991). As with the Fourth Amendment, the purpose of article I, section 9 to safeguard an individual's legitimate expectation of privacy from unreasonabl governmental intrusions. *Green v. State*, 566 S.W.2d 578, 582 (Tex. Crim. App 1978); *Richardson v. State*, 865 S.W.2d 944, 948 (Tex. Crim. App. 1993). The Fourth Amendment and article I, section 9, protect "people not places." *Green*, 566 S.W.2d at 582; *Richardson*, 865 S.W.2d at 948.

A privilege stands as an absolute bar to the disclosure of evidence (absen an exception) while the Fourth Amendment merely imposes certain reasonable requirements as a condition for obtaining the evidence. That TYC records have not been given the absolute protection of a privilege does not mean they might possess the qualified protections embodied by the Fourth Amendment. *State v. Hardy,* 963 S.W.2d 516, 524 (Tex. Crim. App. 1997).

In order to present a federal or state constitutional claim based on a searc and seizure, Mr. Young must be within the purview of constitutional protection He must establish that he had an actual (subjective) legitimate expectation of privacy in the invaded place or property and that the expectation of privacy is c

that society is prepared to accept as objectively reasonable. *Katz v. United States*, 389 U.S. 347 (1967); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Comeaux*, 818 S.W.2d at 51.

d. Mr. Young had a Legitimate Subjective Expectation of Privacy in his TYC Records

Mr. Young's records were not "seized" or "searched" under the Fourth Amendment, unless Mr. Young had a legitimate expectation of privacy in them. *Hardy*, 963 S.W.2d 516. To determine if the accused has made a showing of a legitimate right of privacy, courts may look to the totality of the circumstances. However, legitimization of expectations of privacy by law must have a source outside of the Fourth Amendment either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. *Comeaux*, 818 S.W.2d at 51.

There is a general understanding that there is an expectation of privacy in physician-patient communications. As such Mr. Young had a reasonable expectation that his TYC records, particularly those relating to highly confidential personal information such as Mr. Young's mental health, drug and alcohol abuse, family dysfunction and the reasons for his involuntary commitment to TYC, would remain private. Furthermore at no stage did Mr. Young have reason to contemplate that his confidential TYC records would be disclosed to others at all, least of all without notice or the intervention of a court with proper jurisdiction. The physician-patient relationship provides an environment which ensures that a patient confides in his doctor any and all details which facilitate the provision of quality medical treatment in the best interests of the patient. Anything less jeopardizes the health of the patient, in particular, that of a juvenile.

e. Society Has an Objective Expectation of Privacy in Relat to Medical Records in General, Including Those Concerning a Juvenile

To fairly evaluate society's expectations, a state should step beyond its boundaries and take a nationwide perspective. *Hardy*, 963 S.W.2d at 524. Thu had the issue been raised by trial counsel at the time of trial, the issue to be resolved in the case of Mr. Young's case was whether society has a general expectation of privacy in medical records held by a third party, namely the Texa Youth Commission of Travis County, State of Texas.

As the relevant Fourth Amendment expectations are those of American society, a court cannot unilaterally make a policy choice on the matter. Moreover, the absence or inapplicability of a privilege does not foreclose the existence of an expectation of privacy recognized by society. *Hardy*, 963 S.W.2 at 524. Further it has been recognized that:

> [t]here are some subjective expectations of privacy, however, that society does sanction as legitimate in spite of limited, confidential disclosure. We would not want to say, for example, that society does not recognize the confidentiality of information imparted to a physician behind the closed doors of an examination room. That certain facts may be revealed in the necessarily candid process of diagnosis and treatment does not mean we no longer have a collective interest in insulating them from public scrutiny.
>
> On the contrary, society accepts -- indeed, positively insists -- that such information, although of necessity partly exposed, should nevertheless retain its essentially private character.

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Comeaux, 818 S.W.2d at 52-53; *see also Richardson*, 865 S.W.2d at 952.

The Supreme Court has on one occasion addressed society's expectations with regard to records held by a third party. In *United States v. Miller*, 425 U.S. 435 (1976), the Court held that a depositor possessed no reasonable expectation o privacy in bank records relating to his account. *Id.* at 440-43. In support of its holding, the Supreme Court explained that a depositor voluntarily exposes his financial information to the banking institution and assumes the risk that those records will be conveyed to the government. *Id.* at 442-43.

Like the bank, TYC is a third party entrusted with personal information. However, release of medical information to hospitals within juvenile detention facilities to which one has been involuntarily committed is less optional than the release of financial information to banks. A person can choose not to maintain a bank account, but it hardly seems reasonable to expect someone to forego medica attention, especially when such medical attention has been mandated through a court order involuntarily committing a juvenile to such facility. *See Hardy*, 963 S.W.2d at 524. As a consequence, not only did Mr. Young possess a subjective expectation of a right to privacy in his medical records and information contained in his TYC records, but this was an expectation that he shared with society in general.

The Supreme Court has held that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell. The Court added that it believed that it is accepted by our society tha loss of freedom of choice and privacy are inherent incidents of confinement. *Stat v Schieneman*, 77 S.W.3d 810, 812 (Tex. Crim. App. 2002) (quoting *Hudson v. Palmer*, 468 U.S. 517, 525-26, (1984)).

However, prisoners, including juveniles, must be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration. *Hudson*, 468 U.S. at 523 . At the time the records

were obtained by the State, Mr. Young's reasonable expectation of privacy in h medical records, particularly those relating to his mental health, drug and alcoh abuse, family dysfunction and the reasons for his involuntary commitment to T was not inconsistent with the objectives of incarceration which justify seizure (institutional security and internal order) in *Oliver v. Scott*, 276 F.3d 736, 744 (Cir. 2002).

Furthermore the nature of the seizure of Mr. Young's medical records fr a custodial institution does not conform with any of the accepted circumstance which seizure has been sanctioned by the courts. The seizure of the medical records was not necessary to ensure the safety of the prison staff, the administrative personnel, inmates or visitors. *Hudson*, 468 U.S. at 527. In addition, the seizure of Mr. Young's medical records did not extend to prevent the flow of illicit weapons into the prison; or attempts to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize. *Id.* Society may well not be prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell; and, therefo the proscription against unreasonable searches does not apply in the confines o the prison cell. *Id.* at 526. However, when Mr. Young's TYC records were sei by the State, Mr. Young stood detained, not yet charged of the crimes of capita murder. The case law provides no suggestion for supporting the argument that Mr. Young's confidential medical records could be unreasonably seized from a custodial institution where the State had yet to carry its burden of proof to show Mr. Young was guilty of the crimes for which he remained detained.

In determining in this case whether an expectation of privacy is legitima or reasonable involves a balancing of two interests. Namely the interest of Mr. Young in the inherent privacy of his medical records and the interest of the dis attorney's office in seizing the medical records before Mr. Young was charged with the crimes in question, let alone found guilty of those crimes.

Because the TYC records were obtained prior to Mr. Young's indictment on this case, while Mr. Young was on probation, at the time the State seized Mr. Young's TYC records, the State's interests in institutional security and internal order were not at stake. Agreeing, without conceding, that TYC records could have become relevant if and when Mr. Young was found guilty of capital murder, Mr. Young's expectation of privacy in those records was more substantial before he was even charged with capital murder.

Barely four days after the incidents in question took place, and before much investigation had already taken place, the State of Texas, in this case, cannot assert that its interest in determining Mr. Young's so called propensity to future dangerousness outweighed Mr. Young's expectation of privacy in his TYC records. It justly follows that an individual's interest in the privacy of his medical records, a right which is understood throughout the community as applying to all citizens, should overcome the interest of a district attorney's office in illegally obtaining records which are of dubious relevance to the case at that time, especially when the U.S. Constitution mandates that the presumption of innocence still applied.

"The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *United States v. Jacobsen*, 466 U.S. 109, 117 (1984); *Hardy*, 963 S.W.2d at 525. There is no suggestion that Mr. Young or the medical personnel had, prior to the seizure by the district attorney, frustrated the expectation of privacy in Mr. Young's health records by disclosure of some degree.

f. Mr. Young's Expectation of Privacy Before He Was Charged with the Underlying Convictions

Not only did Mr. Young have a "subjective" expectation of privacy in his TYC records, Mr. Young also had an objective expectation of privacy in those records because he was yet to be charged with any crimes, let alone capital

murders, at the time Mr. Young's records were seized by the State.

Under Texas Occupations Code, Mr. Young's TYC records are confiden and thus generally protected from disclosure.

Texas Occupations Code section 159.002 states, in pertinent part:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> © A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Tex. Occ. Code, § 159.002.

The term "physician" under this code has been interpreted broadly by th CCA to encompass other persons providing health care. *In re Dolezal*, 970 S.W.2d 650, 652 (Tex. Crim. App. 1998) ("protecting communications with a chiropractor even though a chiropractor is "not, technically, a physician.").

Texas Occupations Code section 159.003 states, in pertinent part,

> (a) An exception to the privilege of confidentiality in a

court or administrative proceeding exists:

(10) in a criminal prosecution in which the patient is a victim, witness, or defendant;

(b) This section does not authorize the release of confidential information to investigate or substantiate criminal charges against a patient.

© Records or communications are not discoverable under Subsection (a)(10) until the court in which the prosecution is pending makes an in camera determination as to the relevancy of the records or communications or any portion of the records or communications. That determination does not constitute a determination as to the admissibility of the information.

Tex. Occ. Code, § 159.003 (emphasis added).

In Mr. Young's case, the State of Texas subverted all of the protections created by the State itself to protect Mr. Young's expectation of privacy in those documents. Here, by its own admission, the State used the TYC records in deciding to charge Mr. Young with a capital crime and in deciding to seek the death penalty against Mr. Young, and not any of his cohorts.

> In the assessment in this case on whether or not to seek the death penalty . . . when I went and looked at the background of the Defendant, . . . there is -- was a real long adjudication that eventually sent him to TYC, multiple offenses listed in there, multiple felonies listed in there. I went through around a thousand pages of the TYC records with multiple offenses, assaults against staff as well as other juvenile inmates . . . so when I look

> at not only the facts of this homicide, but the Defendant's background, I'm left with a person that I can reasonably make the assessment based upon several year track record that a jury could agree with me that he is going to be dangerous in the future.

(5 RR at 120-21.)

At the time the TYC records were seized, the Texas Family Code allowed disclosure of information to "a government agency if the disclosure is required authorized by law," or "with leave of the juvenile court, . . . [to a] person, agen or institution having a legitimate interest in the proceeding or in the work of the court." Act of 1995, Ch. 262, § 53, 1995 Tex. Sess. Law Serv. 327 (codified as Tex. Code Fam. § 58.005 (a) (4) and (7)).

Here, the record is clear that the State accessed Mr. Young's confidential TYC records precisely for the illicit purpose that the laws of the State of Texas precluded.

Although at the time Mr. Young's records were seized, Section 58.007 of the Texas Family Code provided that "a prosecuting attorney may obtain the record of a defendant's adjudication," such access was premised on those recor being accessed "[f]or the purpose of offering a record as evidence in the punishment phase of the criminal proceeding." Act of 2001, Ch 1297, Tex. Se Law Serv. Ch. 1297 (H.B. 1118) (codified as Tex. Fam. Code, § 58.007).

Similarly, under the Human Resources Code, access to those records by a prosecuting attorney without a court order were available to a prosecutor only "[f]or the purpose of offering a record as evidence in the punishment phase of a criminal proceeding." Tex. Hum. Res. § 61.095.

Thus, because the State cannot argue that it intended to introduced those records at the punishment phase of a trial yet to occur when an indictment had even been filed, the State cannot argue that Mr. Young's TYC records, which

included confidential medical information, could be accessed at the time they were seized by the State. Furthermore, because by its own admission, the State used the TYC records to "investigate or substantiate criminal charges against" Mr. Young, the State used the TYC records for a purpose clearly prohibited by Texas law.

Here, the violation is so egregious precisely because those records were used to investigate or substantiate criminal charges against Mr. Young and to seek the death penalty against him. In addition, the records were obtained with total disregard for the protective measures created by the state to minimize the risk of misuse of such records, mainly the requirement of "an in camera determination as to the relevancy of the records or communications or any portion of the records or communications." Simply, the records were released because the State asked a juvenile court to release those records without the juvenile court requiring any further showing from the State. The DA asked, and a court complied.

g. Exclusion of Evidence

Texas Code of Criminal Procedure, section 38.23(a), provides that no evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

Thus, the medical records illegally obtained by the district attorney's office were not admissible at the punishment phase of Mr. Young's trial. Had trial counsel made a motion to suppress such documents, the trial court would have excluded from evidence at trial the TYC records obtained in violation of the Fourth Amendment to the United States Constitution and Article 1, Section 9 of the Texas Constitution.

h. The Decision Was Not Strategic

Contrary to trial counsel's assertions, their refusal to object to the TYC records does not qualify as a strategic decision. Trial counsel claimed that it was

better to let the TYC records come in and embrace them. (3 RWR at 181-83.) Even accepting this contention as reasonable, this purported excuse went only t the effectiveness of their tactics at trial, not whether trial counsel were reasonab in failing to investigate the matter entirely. Clearly, trial counsel saw the dange allowing the jury to learn about Mr. Young's so called "propensity" for future dangerousness by the fact trial counsel objected to the State's experts' ability to predict future dangerousness. (32 RR at 60-61.) The lack of investigation was less reasonable precisely because the State admitted the TYC records were used for an illicit purpose: to seek the death penalty against Mr. Young. Whether tri counsel would have decided to "embrace" Mr. Young's TYC records is irreleva Quite simply, trial counsel "could not make a valid strategic choice because he made no investigation." *Knighton v. Maggio*, 740 F.2d 1344, 1350 (5th Cir. 1984).

I. Prejudice from Failing to Investigate and Challenge the State's Seizure of Mr. Young's TYC Records

The prejudice to Mr. Young does not dissipate even if Respondent were argue that all the State had to do was follow proper procedure to obtain Mr. Young's records for those records to be admissible at trial. As DA Schorre himself testified, those records had been used in his decision to charge Mr. Young's with capital murder and seek the death penalty against him. Although Schorre testified he based his assessment on the alleged participation of Mr. Young in two other incidents, the burglary of a gun shop and the home invasio an alleged drug dealer, Schorre emphasized what he described as Mr. Young's "several year track records that a jury could agree with me that he is going to b dangerous in the future and would therefore fall into the death penalty worthy group." (5 RR at 121.) Thus, the prejudice to Mr. Young was, at a minimum, the State using those records to determine Mr. Young should be charged with a capital murder for which the State would seek the death penalty.

3. Counsel's Failure to Utilize Available Ballistics Evidence That Would Have Shown that Someone Other than Mr. Young Shot Doyle Douglas

At the time of trial, defense counsel had a ballistics report from the State's witness, Tim Counce, that cast doubt on whether the firearm in Mr. Young's possession could have been the gun that was used to shoot Doyle Douglas. However, counsel unreasonably failed to utilize this report in cross-examination o lay and expert witnesses who testified to the shooting, and failed to retain and present their own expert witness who could have testified consistently to Counce' opinion in the report and during his testimony. *Strickland*, 466 U.S. at 688.

At trial, both Mark Ray and David Page testified that Mr. Young shot Doyl Douglas twice in the head while sitting to Douglas's left in the passenger-side front seat using State's Exhibit 3, the Colt Huntsman .22 caliber weapon. Both also testified that Ray shot Douglas for the third time in the back of the head. In fact, according to the ballistics, the gun that the accomplice witnesses testified M Young possessed on the night of the shooting was ruled out as the gun that shot the bullet into the right side of Doyle Douglas's head. According to this report, Ray was in possession of the gun that caused the injury to the right side of Douglas's head.

a. Relevant Trial Testimony

Prosecution expert Tim Counce, a forensic firearms and toolmark examine for the Texas Department of Public Safety, prepared a favorable report and testified at trial to the inconclusive nature of the ballistics evidence, but was able to rule out certain theories of the evidence that were useful to Mr. Young's case. Trial counsel failed to ask that his report be admitted into evidence, which defens counsel (Paul Williams) realized only during his closing argument. (29 RR at 47 48.) Once he realized his mistake, he asked the jury to request a read-back of Mr Counce's testimony in order to put the pieces of evidence together. (29 RR at 48

The prosecutor took advantage of this mistake by arguing that the jury should n ask for a read-back and that the defense lawyer just got it wrong:

> Now, I take issue, you'll have to rely on your notes, I think defense counsel, Mr. Cantacuzene tried to straighten out Mr. Williams, but I think Mr. Williams has the testimony on the spent bullets, the projectiles and where they were recovered and what they match up to entirely wrong. I think it's good faith mistake and Mr. Cantacuzene tried to correct him, but he's got that part wrong. You go back and you look from your notes what Mr. Counce said.

(29 RR at 67.) Counce's ballistics report was admitted into evidence at the sta writ hearing as Defense Exhibit W-5. (3 RWR at 50; Ex. 88.)

McCoy testified that Mr. Young shot Douglas in the car with a .22 calib firearm with a long barrel and a clip. (21 RR at 113.) Ray testified that the handgun Mr. Young used to shoot Douglas in the car was a semi-automatic handgun like an old styled German Ruger with a barrel four to six inches long the metallic nickel finish and clip, which he identified as State's Exhibit 3, the Colt Huntsman. (22 RR at 96, 249-50.) Page testified that the handgun Mr. Young used to shoot Douglas was a .22 caliber semi-automatic handgun. (26 I at 157-65.)

Ray testified that State's Exhibit 5, a .22 caliber revolver/pistol with a broken handle, was the weapon he used to shoot Douglas in the head at the cre (22 at RR 250.) State's Exhibit 5 was described by Mr. Counce as an R-G dou action .22 caliber long rifle/revolver, commonly known as a Saturday Night Special. (25 RR at 150-51.)

At the time of Mr. Young's arrest after his vehicle was stopped by offic in Midland County, Mr. Young possessed a Colt Huntsman .22 caliber semi-

automatic handgun. (24 RR at 170-71.) This weapon was introduced and referre to as State's Trial Exhibit 3. State's Exhibit 3 was identified as one of the firearm taken in the burglary of an East Texas business located in Diana, Texas. (30 RR a 30-38.)

Prosecution expert Jill Urban testified that she performed the autopsy of Doyle Douglas and concluded that Douglas was shot in the head three times by a small caliber weapon. (22 RR at 263-68.) Shell casings (.22 caliber) were recovered from Douglas's car when it was discovered abandoned near Eastland, Texas. (23 RR at 43-46.) The casings found in Douglas's vehicle were connecte with the .22 Colt Huntsman handgun seized from Mr. Young at the time of his arrest. (25 RR at 158-59.)

Counce testified that State's Exhibit 9, which was a bullet taken from the left side of Douglas's head, was not fired from State's Exhibit 5, a .22 caliber revolver, but that he could not identify or eliminate State's Exhibit 9 as having been fired from State's Exhibit 3, which was the .22 caliber semi-automatic handgun seized from the Mr. Young. (25 RR at 161-62.) Counce also testified that he was unable to identify or eliminate State's Exhibit 10, the bullet recovered from the back of Douglas's head, as having been fired from State's Exhibit 3, which was the .22 caliber semi-automatic handgun seized from the Mr. Young. (*Id.*) In his report, Counce concludes that "[i]t is our opinion that the above mentioned projectiles [9 and 10] were not fired from the R-G revolver" (State's Exhibit 5). (Ex. 88 at 967 [Counce Report].)

Counce's testimony and the ballistics report by Counce stated that he was unable to identify or eliminate State's Exhibit 11, the bullet taken from the right side of Douglas's head, as having been fired from State's Exhibit 5. Counce was able to say that the bullet, State's Exhibit 11, was not fired from State's Exhibit 3, the .22 caliber semi-automatic handgun seized from Mr. Young at time of his arrest. (Id .) In his report he stated, "[i]t is our opinion that the mentioned

projectile was not fired from the submitted Colt pistol." (*Id.*)

b. Relevant State Writ Testimony

At the state writ hearing, both trial lawyers, Ian Cantacuzene and Paul Williams, testified that Williams had argued the ballistics evidence in an incorre manner during the closing argument, and that Nancy Piette (the trial paralegal) Cantacuzene had to interrupt Williams's closing. (2 RWR at 236-37.) Accordi to Williams, the defense team did not hire their own ballistics expert because th felt that they did not need one. (3 RWR at 102-03.) Instead, they relied upon th State's experts. (*Id.*) Williams testified that he did not cross-examine Counce with respect to their defense theory of what the ballistics showed in their favor because he did not know what the answer to the question would be. (3 RWR at 104, 107.)

This line of reasoning was clearly flawed; an expert hired by the defense team would have been able to preview his testimony with the team to ensure tha favorable testimony would have been elicited. Further, there was no evidence a trial that Mr. Counce would not speak to the defense team prior to his testimony so that they could have previewed their questions. The favorable ballistics evidence should have been presented through the live testimony of a qualified expert.

c. Trial Counsel Should Have Argued and Presented Ballis Evidence at Trial

All of the ballistics information detailed in Section 1 was available to tria counsel at the time of trial. Counsel failed to ask that Counce's report be admit into evidence and failed to present independent, corroborating ballistics eviden through their own expert. Had they done so, the expert could have testified tha

> Mark Ray testified that he fired a single shot into the back of the head of Doyle Douglas. The assertion is not supported by the physical evidence. The physical

> evidence is consistent with showing that Mark Ray, who admitted to using the R-G .22 LR Revolver, firing the shot into the right side of the victim's head. The shot to the back of the head of Doyle Douglas is listed as Gunshot Wound # 1 in the autopsy report. (22 RR at 268). The shot to the left side of the head is listed as Gunshot Wound # 2 in the autopsy report. (22 RR at 264). Both of these shots were revealed by the autopsy report and later by laboratory examinations at the TDPS Laboratory to be consistent with being fired by the Colt Huntsman .22LR pistol, or the State's Exhibit 3.

(Ex. 95 at ¶ 7 [Decl. of Richard Ernest].)

Richard Ernest, a forensic ballistics consultant, or any such consultant, could have testified at trial that State's Exhibits 9 and 10 would not have been consistent with the testimony that Mr. Young fired these two shots first using the Colt Huntsman .22LR pistol before Mark Ray later fired the shot into the back of the head of the victim. Ernest could have further testified that:

> Because of the physical dimensions and limitations involved in an automobile, it is the opinion of this examiner that it is unlikely that these two shots (State's Exhibits 9 and 10) were fired inside the automobile by the front seat passenger, Clinton Young, into the left side of the head and back of the head of the victim, Doyle Douglas, while he (the victim) was in the driver's position in the automobile. Given this evidence, it is more likely that Douglas was shot by someone who was firing from the victim's left side (the driver's side of the car).

(Ex. 95 at ¶ 8 [Decl. of Ernest].)

The testimony at trial was that Doyle Douglas was shot in the head three times with a small caliber weapon. The prosecution's ballistics expert's uncertainty as to which weapon fired the bullets that killed Douglas was helpful the defense. The evidence that Mr. Young shot Douglas two times in the head with a Colt Huntsman .22 caliber semi-automatic handgun in his possession at t time of arrest (State's Exhibit 3), was inconclusive, and trial counsel should hav argued that this ballistics evidence showed that Ray, McCoy, and Page were no telling the truth and the State had not proven its case beyond a reasonable doub *See Draughon v. Dretke*, 427 F.3d 286, 296-97 (5th Cir. 2005) (counsel ineffec for failing to obtain forensic examination of the path of the fatal bullet and the absence of forensic evidence facilitated the state's portrait of defendant as a violent young man; without forensic testimony only defendant could counter state's theory that there had been a short distance between defendant and the victim).

The trial lawyers should have developed and presented the evidence to sh that Page and Ray shot Douglas. Mr. Young was seated in the passenger side the car, close to Douglas and to his right. Mr. Young could not have shot Doug in the left side of the head because of where he was sitting. All of this information, if presented properly and with the reports of Tim Counce and Jill Urban, would have shown that Mr. Young could not have shot Douglas and tha the shots to the left and back of the head are consistent with being fired by Pag who was standing to the left of Douglas outside the car on the driver's side wit the door open. An expert could have testified that the wound to the right side Douglas's head, along with the reports and Ray's admission of guilt, shows tha Ray was responsible for that wound. Page and Ray were equally culpable as n of the three bullet wounds were found to be post-mortem. If this evidence had been presented to the jury and argued in this manner, it is reasonably probable

the jury would not have voted guilty as to the homicide of Douglas. *Strickland*, 466 U.S. at 693.

d. Conclusion

The omitted evidence is so compelling that there was a reasonable probability that at least one juror would have changed his or her mind about convicting Mr. Young of capital murder had the evidence been presented. *Williams*, 529 U.S. at 394; *Strickland*, 466 U.S. at 693; *Neal v. Puckett*, 286 F.3d 230, 241 (5th Cir. 2002) (en banc). Additionally, there is a reasonably probability that the ballistics evidence would have caused the jury to vote "no" on Special Issue No. 2, whether the "defendant actually caused the death of the deceased individuals," (CR at 861), which would have resulted in a life sentence.

4. Allegations Regarding Cumulative Error On Ineffective Assistance of Counsel Claims

Although the following claims have been alleged in prior state court petitions, taken together with the other ineffective assistance of counsel claims raised previously to this Court and those alleged herein, relief should be granted.[53] The cumulative effect of these errors may require reversal, even though a single one of those errors, standing alone, would not require such a result. *See United States v. Canales*, 744 F.2d 413, 430 (5th Cir. 1984).

a. Counsel Failed to Locate, Investigate, and Test Items That Would Have Provided Exculpatory Evidence

The homicides of Doyle Douglas and Sam Petrey took place roughly thirty plus hours and 525 miles apart. To make the offense eligible for capital murder, the prosecution had to charge Mr. Young with the murder of Petrey. Without a

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[53] The subclaim below at section (iv) regarding testing of David Page's gloves was previously raised in as claim 21 of the Supplemental Application Both the subclaim at section (iii) regarding the Petrey homicide investigation and at section (I) regarding the testing of Douglas's car were brought up in pro per letter filed in the trial court by Mr. Young. These claims were denied by this Court without a full and fair hearing in the trial court.

finding that Mr. Young shot Petrey, capital murder could not be found, and the death penalty would not have been an option for the jury.[54]

I. Counsel Was Ineffective for Failing to Have Tests Conducted on the Car of Victim Doyle Douglas Which Would Have Provided Exculpatory Eviden

Trial counsel inexplicably failed to test Mr. Douglas's vehicle so that the defense could explain why two .22 caliber shell casings were found in the passenger side of the vehicle. (23 RR at 43-46.) In his closing argument, the prosecutor argued that the shell casings found in Douglas's vehicle, one in the and one on the floorboard, were fired from Mr. Young's gun, the Colt Huntsma .22 caliber (29 RR at 19-20, 67), and thus the shooter was inside the car at the of the shooting. The shell casings matched the Colt Huntsman, which, by proc of elimination, were responsible for two of the gunshot wounds to Douglas. (RR at 158-59.)

Ann Hinkle, who was the FBI agent who performed a forensics inspecti of Douglas's vehicle, testified that the car had been shot at and that there was a defect on the dashboard, but she did not know whether it was from a bullet. (2 RR at 74-76.) There were no tests conducted on the dash; Hinkle collected the evidence only. (23 RR at 73.) She also admitted that she refused to speak to t

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[54] There was plenty of evidence to show that Mr. Young did not shoot Petrey, some of which trial counsel did not present to the jury. As is addressed Claim Eight, the trial court would not allow Irma Rodriguez to testify about th polygraph test that she administered to David Page. At a hearing outside the presence of the jury, she testified that Page's answers were deceptive. (27 RR 240-41.) When informed that he failed he stated "I know what it is." (27 RR 242; Ex. 62 at 718 [Report].) Further, Christopher MCelwee, a cell mate of D Page's, testified that Page had confessed the second murder to him, and that h also confessed to a "Spanish guy" that he killed Samuel Petrey. (27 RR at 272 75.) The "Spanish guy" who Page confessed to was Raynaldo Ray Villa. He would have also testified that he overheard Page tell another inmate that he "h shot a man named Petrey." Villa would have also testified that Page told him directly that "he, and not Clinton Young, had shot Petrey outside of Petrey's truck." (Exs.125 at ¶¶ 2-4, 6 [Decl. of Villa]; 95 at ¶¶ 3-4 [Decl. of Richard Ernest].)

defense prior to the trial. (23 RR at 67-69.)

Mr. Young informed his trial lawyers that the dash and steering wheel had been shot at inside the car, which is where the shell casings came from. (Ex. 52 at 625 [Letter to Gary Taylor].) Mr. Young asked his lawyers to conduct tests on the car months prior to the trial. (*Id.*) Such discovery was never conducted and no ballistics expert was ever requested.

If tested, the defense would have shown that the defects that Hinkle described were in fact bullet holes, which would show an alternative explanation of how the shell casings were found in the vehicle. This evidence, along with Tim Counce's ballistics report that the trial lawyers failed to get admitted into evidence, would have cast reasonable doubt on whether the shooter was actually in the car where Douglas was shot.

ii. The State's Bungled Crime-Scene Processing Regarding Petrey

The State conducted sloppy police work at the Petrey murder scene. Paul Hallmark was the only Crime Scene Investigator at Midland County Sheriff's Office. (24 RR at 305; 25 RR at 31.) He failed to secure and analyze the Petrey murder scene and overlooked evidence in plain view at the pump jack site. Hallmark saw Petrey's body and found a red cotton rag on top. (24 RR at 311, 321.) He noticed tire tread marks, but admitted that he was "just a layman as far a tire prints go" and not a scientist. (24 RR at 313; 25 RR at 18.) He made no casts of tires and did not collect rubber.

Hallmark also recovered two shell casings and a cigarette butt near the body. (24 RR at 316-20.) Paul Hallmark did not find any gloves during his search of the crime scene despite walking the entire caliche pad. (24 RR at 321; 25 RR at 45, 56.) Officer Spencer found Page's gloves on a subsequent search right on the caliche pad of the pump jack site. (24 RR at 322-23; 25 RR at 56.) Hallmark also missed the tire iron tool that was later found at the crime scene. (25 RR at 57.)

Additionally, Hallmark did not notice that there was a bullet in one of the fingers of one of the gloves, and admitted that he made a mistake. (25 RR at 63-64.) Much of the evidence collected in the Petrey case, ended up stacked on a desk in the Sheriff's Office with other items with no guarantee of cross-contamination, which, according to Hallmark, was a mistake. (25 RR at 65-68.) Further, Hallmark did not use the camcorder that he brought with him to the Pet crime scene and opted to use a camera instead. (25 RR at 66.) Even though the FBI uses photo logs, Hallmark did not make a photo log of everything that he collected in the case because he thought it was passe. (25 RR at 72.)

Trial counsel was on notice of the problems with the Petrey investigation and should have hired their own expert to testify for the defense.

iii. Ballistics Evidence Regarding the Gun Shots To M Petrey

Trial counsel failed to present a ballistics expert to show that Mr. Young not shoot Mr. Petrey. David Page, in all his statements after he was first arreste stated that he, Petrey and Young were standing around Petrey's truck at the pur jack site. Page stated that he was to the left of Petrey and that Mr. Young was t the right of Petrey. (27 RR at 208-09.) Page testified that Mr. Young was from six to ten feet away from Petrey. (27 RR at 42.) In Page's first statements, he s that Mr. Young was to the right of Petrey and Petrey was facing away from the back of the truck. (27 RR at 42-44, 92.) This is also what Page said in his vide statement that was played during trial. (27 RR at 208-09.) Page also said that Young came up to Petrey and shot him in the right side of the head. (27 RR at

Because Petrey was standing at the back of the truck facing away from th truck, and was shot in the left side of the head, Mr. Young could not have shot from where he was standing on the right. At trial, Page changed his story to sh that Petrey was facing toward the back of the truck looking toward Page and w shot in the left side of the head. (27 RR at 46, 209.)

David Page admitted that he changed his story about the way that the victim was facing after speaking to the prosecutor's investigator. (27 RR at 43-44, 46-47, 147.) Page was informed that his version of the events did not support the physical evidence, and then he changed his story so that it did fit the physical evidence. (*Id.*)

Trial counsel should have called a ballistics expert to explain why the shooting of Petrey could not have occurred the way Page said that it did. During cross examination David Page stated that Mr. Young was standing from six to ten away from Petrey when he was shot. (27 RR at 42.) An expert such as Richard Ernest could have testified to the following:

> In reference to the victim, Sam Petrey, it is noted in the cross examination testimony of David Lee Page (27 RR at 42) that he states that the victim was shot by Clinton Young at a distance of 6 to 10 feet away. In opposition to this statement, the autopsy report reveals that the victim, Sam Petrey, was shot at close range. In opposition to this statement, the autopsy report reveals that Petrey was shot at close range. Gunshot Wound #1, as enumerated by the autopsy report, is described as exhibiting both gunpowder stippling and faint soot. These are the characteristics of close range gunshot wounds. (26 RR at 28.)
>
> Because these shots were fired in rapid manner, it is also likely that Gunshot Wound #2, as characterized by the autopsy report, was fired at close range. The reason gunshot residues and gunpowder stippling is not seen in this gunshot wound is most likely caused by the well known sifting effect of hair upon gunshot residues.

(Ex. 95 at ¶¶ 10-11[Decl. of Ernest].)

Further, the weapon used was a small caliber weapon, which adds to the conclusion that it was a close range shot. As Ernest would have testified:

> Given the fact that the gunshots to the victim in this case were reportedly produced by a Colt brand .22 LR pistol, it is even more likely that this gunshot wound was produced by a muzzle to skin distance of approximately less than two feet. This is because the Colt weapon used was a small caliber weapon which is capable of producing gunpowder tattooing (stippling) only at very short distances from the muzzle of approximately two feet or less. Again, for those unfamiliar with gunshot residue issues involving a .22 LR caliber cartridge, the cartridge itself has a very small gunpowder charge in the unfired cartridge. Upon firing the remaining unburned gunpowder particles, partially burned gunpowder particles and carbonaceous residues will only travel a very short distance from the muzzle of the firearm barrel with sufficient velocity to cause gunpowder stippling and powder burns. This distance is approximately two feet or less.

(Ex. 95 at ¶ 12 [Decl. of Ernest].)

Even the coroner, Dr. Townsend-Parchman, testified that Petrey was sh a range of about six inches to a foot away because of the presence of soot. (26 at 28.) Dr. Ernest would have elaborated further that:

> Mr. Page originally told police officers that Samuel Petrey was standing with his back to the end of the truck looking away from the truck and Young came up to

Petrey on his right and shot him in the right side of the head. (27 RR at 46, 209). He also testified that Page was standing on the right, passenger side of the truck and that Mr. Young was standing on the left driver's side of the truck. (27 RR at 40, 59). The two shell casings were found to the left of Mr. Petrey's body at a distance of 2', 11" and 5' 11" from the midline of his body. I agree with Tim Counce's testimony that this particular Colt brand .22LR pistol ejects the fired shell casings to the back and right of the shooter. (25 RR at 149). This, taken together with the gun shot location to the left side of the head and the residue and stippling of gunshot wound #1, the shooter had to be standing relatively close to the left side of Mr. Petrey holding the muzzle end of the pistol at a close range. I agree with the coroner, Dr. Janice Townsend-Parchman, that the distance was approximately six inches to two feet away from the victim's head. (26 RR 28). ¶ Therefore, the statement by David Lee Page, that the victim was shot by Mr. Young at a distance of 6 to 10 feet is not consistent with the physical evidence, and the manner of this shooting simply cannot be as described by David Lee Page.

(Ex. 95 at ¶¶ 13-14 [Decl. of Ernest].)

Trial counsel was ineffective for failing to present expert testimony at trial. *See Draughon v. Dretke*, 427 F.3d 286, 296-97 (5th Cir. 2005) (counsel ineffectiv for failing to obtain forensic examination of the path of the fatal bullet and the absence of forensic evidence facilitated the states portrait of defendant as a violen

young man; without forensic testimony only defendant could counter state's theory that there had been a short distance between defendant and the victim).

Further, Mr. Young told trial counsel that there were no bullets left for th Colt Huntsman gun because they were left behind in Doyle Douglas's car. Tri counsel failed to cross-examine Mr. Page on the fact that Mr. Young had no bullets for the gun at the time they picked up Mr. Petrey, and that Page was the one who either stole or purchased the bullets for the gun. This would have undermined Page's credibility and strengthened the theory that Page was the triggerman who premeditated the necessity to get bullets in order to shot Petrey

iv. Page's Gloves and Trace Metal Testing

Trial counsel failed to obtain trace metal testing on the gloves belonging Page. This omission constituted ineffective assistance of counsel.

Besides the testimony of David Page, the only other evidence the prosecution presented implicating Mr. Young in the shooting of Petrey was a presumptive trace metal test conducted by a police officer. (25 RR at 94.) Pol officer Paul Hallmark sprayed Mr. Young's hand with a chemical and compare to pictures in a book. He thought the glow from Mr. Young's hand was simila that of an automatic weapon. (25 RR at 94-95.) Page's hands also glowed but the officer's opinion, the glow was not similar to any of the pictures in his boo (25 RR at 101-02.) In Hallmark's opinion it appeared to be a round object but appeared to be most similar to a picture of a drill chuck. (*Id.*) However, the accuracy of the photographs taken were in question because Hallmark also did use the ultraviolet filter for the camera to take pictures of Mr. Young's and Mr Page's hand because the department did not have one. (25 RR at 41.) The ultraviolet filter was available for purchase locally for $10.72. (*Id.*) Hallmark not use an inexpensive SEM kit because he did not have one, but testified that would the next time. (25 RR at 25-26, 88.)

Although the evidence was clear that gloves were found at the murder scene, Hallmark did not test the gloves for trace metal or gunshot residue, which can be tested for on gloves. (25 RR at 37, 44, 46, 51, 97.) The evidence provided by Page and trace metal testing comes into question by the testimony of Christopher McElwee who was in jail with Page. McElwee testified that Page admitted killing Mr. Petrey and that he wore gloves at the time he shot him. (27 RR at 271-75.) Page's DNA was discovered in the inside of the palm area of the gloves. (27 RR at 245-54.)

Page's claim that he was wearing work gloves that he had brought from home (26 RR at 137, 241) could have easily been refuted by testing the gloves for age, wear, and dirt. Mr. Young informed his attorneys that Page bought the glove the during their journey. The trial attorneys failed to follow-up and hire an expert to test these gloves for trace metal and for condition, age, and wear to further undermine Page's credibility. As Mr. Ernest would have testified:

> These gloves could have been tested for traces of gunshot residues using the Sodium Rhodizonate and the Modified Griess tests. The gloves could have also been examined for condition, age and wear using conventional microscopy tests.

(Ex. 95 at ¶15 [Decl. of Ernest].) Trial counsel failed to investigate and hire an expert to test the gloves and testify to the findings.

b. The Failure to Present a Ballistics Expert and Argue Against the State's Evidence Was Prejudicial to Mr. Young

The failure of trial counsel to put on their own ballistics expert in the guilt phase was prejudicial to Mr. Young's case. The jury never heard from an expert that:

> the physical evidence associated with this shooting incident and the sworn testimony at trial by . . . David

> Lee Page should cast doubt on the truthfulness of the account(s) rendered by Mark Ray and David Lee Page in the matter of this case.

(Ex. 95 at ¶ 16 [Decl. of Ernest].)

The jurors would have listened to the expert as Juror James Bobo has stat "If the defense had presented its own ballistics expert to convincingly challenge the State's evidence and the testimony of government witness David Page, it certainly would have raised questions for me about Mr. Page's credibility and h own involvement in the shooting of Mr. Petrey." (Ex. 100 at ¶ 3 [Decl. of Jame Bobo].) Another juror, Michael Byrne similarly said: "If the defense had convincingly countered the State's ballistics evidence with regard to the Petrey murder, I would have been less likely to convict Young of killing Petrey." (Ex. 101 at ¶ 4 [Decl. of Michael Byrne].)

The omitted evidence was so compelling that there was a reasonable probability that at least one juror would have changed his or her mind about convicting Mr. Young of capital murder. *Williams*, 529 U.S. at 394; *Strickland* 466 U.S. at 693; *Neal*, 286 F.3d at 241. Additionally, there is a reasonably probability that the ballistics evidence would have caused the jury to vote "no" special issue number 2, whether the "defendant actually caused the death of the deceased individuals," (CR at 861), which would have resulted in a life sentenc

D. The State Interfered with the Defense's Investigation and Presentati of its Mitigation Case

Mr. Young's convictions, confinement, and sentence are illegal and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and comparable state law, because the State interfered with the defense's selection of Gerald Byington as the mitigation specialist/bio-psychosocial historian expert in Young's case.

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1. Relevant Law

Unlike the lawyer who is bound only by the rules of the State Bar, it has long been recognized that a prosecutor has an even greater duty to conduct himsel with propriety. *See* A.B.A. Standards, The Prosecution Function, Section 3-1.1(d Although prosecutorial discretion is broad, it is not unlimited. *United States v. Batchelder*, 442 U.S. 114, 125 (1979). Rather, "prosecutorial discretion is subjec to constitutional constraints." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal quotations omitted).

In all cases, but most particularly during a capital trial, a prosecutor must not simply pursue a conviction, but rather, must seek to ensure that justice is done *Kyles*, 514 U.S. at 439 (*citing Berger*, 295 U.S. at 88).

A criminal defendant's due process rights are violated if prosecutorial misconduct renders a trial fundamentally unfair. *Darden v. Wainwright*, 477 U.S. 168 (1986); *see Greer v. Miller*, 483 U.S. 756, 765 (1987) (conduct so infected th trial with unfairness as to make the resulting conviction a denial of due process); *Riddle v. Cockrell*, 288 F.3d 713, 720 (5th Cir. 2002); *United States v. Burke*, 496 F.2d 373, 377 (5th Cir. 1974) . "[T]he touchstone of due process analysis in case of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). The federal habeas court must distinguish between "ordinary trial error of a prosecutor and that sort of egregious misconduct . . . amount[ing] to a denial of constitutional du process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647-48 (1974); *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000).

2. The Prosecutor Interfered with the Investigation and Presentation of Mitigating Evidence

After improperly receiving the sealed billing records of the defense's mitigation specialist/social historian, Gerald Byington, the State reported Byingto to the Texas Commission on Private Security, alleging Byington was conducting

investigatory work illegally. (Ex. 49 [Judge Hyde Letter dated October 29, 200 8 RR at 6-7.) The result of the prosecutor's actions was to foreclose the defens from properly investigating and presenting a bio-psychosocial history of Mr. Young, which should have been presented at trial. The prosecutor's actions constituted misconduct and violated Mr. Young's constitutional rights to due process, a fair trial, and the effective assistance of counsel.

a. Relevant Facts

In late summer 2001, the defense contacted Gerald Byington to work as their mitigation specialist. Byington was to assist the defense in investigating a presenting mitigation evidence at trial. Byington's duties included preparing a bio-psychosocial history of Mr. Young. (Ex. 94 at ¶ 3 [Decl. of Gerald Byington].)

Byington, who was a Licensed Clinical Social Worker and a certified ex in social history, had participated in the development of mitigation witnesses, experts, and strategies in more than 200 felony criminal trials in Texas. Of tho cases, at least half of them involved death penalty defendants. (*Id.* at ¶¶ 1-2.)

In preparation for his appointment by the court to Mr. Young's case, Byington prepared a detailed ex-parte affidavit outlining his anticipated investigation of Mr. Young's history and the amount of funding that would be required to complete the task. Byington anticipated requiring 139 hours of tim prepare Mr. Young's bio-psychosocial history, at a cost of $10,843.20. (*Id.* at Ex. 76 [August 2002 Affidavit of Byington].)

In a sealed order by the Court in early 2002, Byington was appointed to Young's case, and was granted initial funding in the amount of $5,000. (Ex. 3 [April 02 Appointment of Byington]; 94 at ¶ 5 [Decl. of Byington].)

Based upon his past experiences as a social historian, Byington formulat precise and detailed vision of how Mr. Young's bio-spychosocial history shou be investigated and presented. This included investigating and presenting

evidence related to the client's family history, medical history -- including mental and physical health, educational history, employment history, and history as it related to incarceration. To accomplish this task, Byington would gather and review records as well as conduct interviews with family members, friends, teachers, and others who knew Mr. Young. (Ex. 94 at ¶ 6 [Decl. of Byington].)

Byington submitted his first bill in late April, 2002. That bill, which included work from February 11 to April 16, 2002, was in the amount of $5,033.91. (Exs. 94 at ¶ 7 [Decl. of Byington]; 64 [Byington's first billing statement].) The Court paid the bill in late June 2002. (Ex. 94 at ¶ 8 [Decl. of Byington].)

In a letter to defense counsel dated June 26, 2002, Byington requested additional funds for further specified mitigation services including, but not limite to, the collection of additional family history documents in order to develop a genogram for display at trial, and further neuropsychological, EEG and SPECT scan testing. (Exs. 94 at ¶ 8 [Decl. of Byington]; 64 [June 26 Letter].) The fundi request was submitted to the court.

Byington informed defense counsel that no further services would be provided by him until such time as additional funding by the court was authorize Byington agreed to continue to consult with the attorneys regarding information that had already been obtained however, Byington stated he would not gather an additional information. (Ex. 94 at ¶ 9 [Decl. of Byington].)

On September 9, 2002, Byington received a letter from the Texas Commission on Private Security. The letter explained that someone had filed an anonymous complaint against Byington alleging that he had been doing the work of a private investigator, and that he was not licensed to do such work in the stat of Texas. (Ex. 94 at ¶ 10 [Decl. of Byington].)

A court hearing on this matter, presided over by Judge Hyde, was held on September 19, 2002. When Byington arrived at the hearing, he was surprised to

find that besides the defense attorneys who had hired him, also present was Midland County District Attorney Al Schorre, who was prosecuting Mr. Young Byington felt the presence of the prosecutor was highly unusual because, in his experience, the prosecution was never involved in the preparation of the defens mitigation case. (Ex. 94 at ¶ 11 [Decl. of Byington].)

Byington also noticed that DA Schorre had a copy of Byington's initial e parte request for funding, the court order granting the funding, a copy of Byington's billing records, as well as a copy of the "anonymous" complaint tha had been filed against Byington. (Ex. 94 at ¶ 12 [Decl. of Byington].)

At the hearing, DA Schorre told the court that he objected to the request Byington's additional funding. According to DA Schorre, the court had not funded investigation into mitigation, but rather, had approved funds for someon who would investigate the facts of the case, and that Byington was not licensed do this type of investigation. (8 RR at 5-7.)

Defense counsel argued that while Jeff Marugg was the defense investig for guilt, Byington was hired as a mitigation specialist, and was trained to cond the type of investigation he was undertaking. Defense counsel also argued that Byington was not only funded for the mitigation investigation, but also to assis counsel in the presentation of a "knowledgeable and informative" mitigation ca to the jury including explaining to the jury and helping them understand the iss surrounding Special Issue No. 3 under Texas Criminal Procedure Code section 37.07(1). (8 RR at 8-11.) Counsel also argued that Byington was a critical member of the defense team. (8 RR at 12.)

At the hearing, Byington testified about the significance of a mitigation specialist, and explained the work he had performed to date in Mr. Young's ca Byington also testified that the type of services he provided as a mitigation specialist were clearly covered by his licensure as a Clinical Social Worker. Byington provided the court with a copy of those rules. (8 RR at 14-24; Exs. 9

¶ 15 [Decl. of Byington]; Ex. 50 [Texas Adminisrative Code, Title 22].) Rusty Wall, Mr. Young's appellate counsel, also testified at the hearing regarding the importance of the defense hiring and working with a mitigation specialist in a cas such as Mr. Young's. (8 RR at 24-28.)

Following the testimony of Byington and Wall, defense counsel alerted the court that it had previously, as had another local court, appointed a mitigation specialist that was not a private investigator and that no one had lodged a complaint. (8 RR at 37-38.) At the conclusion of the hearing, Judge Hyde stated he would render a decision regarding Byington's work after contacting the Commission on Private Security. (8 RR at 38-39.)

A second hearing was held on this matter in November 2002. At that hearing, the court heard evidence from Cliff Grumbles of the Private Securities Board and Andrew Marks, the Executive Director of the Texas State Board of Social Worker Examiners. (10 RR at 7-8, 12.)

Marks testified that the work conducted by Byington was within the norma duties of social workers, and "absolutely" within the duties of a LMSW. (10 RR at 8-11.) Grumbles, on the other hand, testified that Byington's work, as far as conducting interviews, was outside the bounds of a private investigator. (10 RR 13-17.)

Judge Hyde took the matter under submission and did not issue an order fo additional funding for mitigation services. (10 RR at 29-30; Ex. 94 at ¶ 17 [Decl of Byington].) With no authority to interview witnesses, Byington's work as a mitigation specialist was severely curtailed. (Ex. 94 at ¶ 19 [Decl. of Byington].) At the time Byington stopped receiving court funding, he had completed no more than half the research he would have considered mandatory for a proper mitigatio defense of Mr. Young. (*Id.* at ¶ 22.)

Judge Hyde never rendered a decision regarding Byington's ability to wor on Mr. Young's case. In June 2003, *after* the completion of the trial, the court

approved some of Byington's previously incurred expenses. (Ex. 65 [Final funding approval for Byington].)

b. Argument

Prosecutor's and law enforcement are prohibited from invading the defendant's Sixth Amendment zone of privacy. *See Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995); *see also United States v. Levy*, 577 F.2d 200, 210 (3rd Cir. 1978); *United States v. Kelly*, 790 F.2d 130, 138 (D.C. Cir. 1980). Here, the prosecution deliberately interfered with Mr. Young's investigation an presentation of mitigation evidence.

At the time of Mr. Young's trial in 2003, counsel's duty to investigate an present mitigating evidence was well established. *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). Mr. Young's attorneys' obligations were governed by the 2003 ABA Guidelines.

The ABA Guidelines require defense counsel to retain a mitigation specialist as part of the capital defense team. Guideline § 4.1. The Commentar to the Guidelines discusses the role of the mitigation specialist with regard to th social history document: "The mitigation specialist compiles a comprehensive well-documented psycho-social history of the client based on an exhaustive investigation." The Commentary to § 4.1 also explains that the mitigation specialist is an "indispensable member of the defense team as they have "the ti and ability to elicit sensitive, embarrassing and often humiliating evidence . . . the defendant may have never disclosed."

Based upon the Commentary to Guideline 10.7 [Investigation], defense counsel had an obligation at the punishment phase to conduct an extensive and unparalleled investigation into Mr. Young's personal and family history includ mental history, family and social history, educational history, military service, employment and training history, and prior juvenile and adult correctional experience. The Commentary also states that it is necessary to locate and

interview the client's family members, and virtually anyone else who knew the client and his family including, but not limited to teachers, neighbors, clergy, case workers, doctors, correctional, probation or parole officers.

A sampling of contemporary Texas cases demonstrates the prevalence of mitigation specialists. *Scheanette v. Quarterman*, 482 F.3d 815 (5th Cir. 2007) (mitigation specialist retained for 1996 trial); *United States v. Hall*, 455 F.3d 508, 517 (5th Cir. 2006) (mitigation specialist retained in 1995); *United States v. Webster*, 392 F.3d 787, 795 (5th Cir. 2004) (mitigation specialist retained for 199 trial); *Rosales v. Cockrell*, 220 F. Supp. 2d 593, 611 (N. D. Tex. 2001); *Shields v. Dretke*, 122 Fed. Appx. 133, 136 (5th Cir. 2005) (use of a mitigation specialist in 1995 trial); *see also Watts v. Quarterman*, 448 F. Supp. 2d 786, 796 (W.D. Tex. 2006) (defense introduced testimony of mitigation specialist in 2003 trial); *Roberts v. State*, 220 S.W. 3d 521 (Tex. Crim. App. 2007).

In this case, however, the prosecution prohibited counsel from fulfilling their defense obligations when it interfered with counsel's ability to investigate and present a mitigation case through the use of their chosen mitigation specialist

As discussed above, the prosecution improperly received the sealed billing records of Byington, and then contacted the Texas Commission on Private Security, alleging that the work Byington was conducting was illegal. This interference caused the court to question its continued funding of Byington, and the defense was left without a mitigation specialist to assist them in investigating and presenting a comprehensive mitigation case.

To that end, at the time Byington's services were brought into question by the State, Byington had only completed half the research into Mr. Young's histor that Byington would have considered mandatory for a proper mitigation presentation. (Ex. 94 at ¶ 22 [Decl. of Byington].) Further, while Byington continued to discuss the case from time to time with Mr. Young's defense team, the discussions were all based on the incomplete information that Byington had

obtained prior to June 2002, almost a full year before Mr. Young's trial began. (*Id.* at ¶ 23.)

Without Byington's services, there were a number of important areas that were left unexamined by Mr. Young's defense counsel. To that end, Byington would have presented far more information culled from Mr. Young's family, ke teachers, treatment providers and others to help differentiate between Clinton Young as a person and the problems he manifested, from his infancy on. (Ex. 9 at ¶ 24 [Decl. of Byington].) Further, Byington would have identified and interviewed additional lay witnesses who could have presented testimony abou Mr. Young's attempts at being a "normal" child and teenager. (*Id.* at ¶ 25.)

Byington would have developed a family genogram for both the materna and paternal families, which could have been presented at trial. Byington also would have provided evidence that Mr. Young's behavior was sometimes intentional, while at other times it was the result of his mental disorders. With assistance, Byington could have collected such evidence and prepared expert testimony which would have provided the jury with specific, clear examples Young's intentional behavior in contrast with behavior that was an expression his disability. (Ex. 94 at ¶¶ 26-27 [Decl. of Byington].)

However, without Byington's authority to perform his task as a mitigati specialist/bio-psychosocial historian, the defense was left rudderless with rega the investigation and presentation of a mitigation case. More important, the ju was left without a clear idea who Mr. Young was, and how his problems affec his life.

For example, the jury was confused as to why Mr. Young, who suffered from ADHD, could sit quietly throughout his trial without medication. (37 RT 5.) If the defense had been permitted to use a mitigation specialist, like Bying this type of potential problem could have been addressed either before or at tri (Ex. 97 at ¶¶ 5, 10-12 [Decl. of Dr. Milam].) A mitigation specialist like Byin

could also have foreseen the jurors struggle regarding Mr. Young's purported "choice" to return to drugs after his release from TYC. (*Id.* at ¶¶ 13-19; Ex. 96 at ¶¶ 111-19 [Decl. of Toni Knox].)

If the defense had been permitted to use their mitigation specialist, instead of losing him through prosecutorial interference, the defense could have presented a more accurate portrait of their client through the presentation of both lay and expert witnesses, and by Byington's own testimony. Such a portrait, like that presented by Toni Knox, the mitigation specialist/social historian retained by current federal habeas counsel, would have shown the jury that:

> In addition to Clint being genetically loaded toward mental illness and chemical dependency, there were numerous social and family problems which contributed to Clint's development. These factors affected his social functioning, impulse control and lack of appropriate coping skills from a young age.

(Ex. 96 at ¶ 8 [Decl. of Toni Knox].)

Had the defense been permitted to investigate and present the mitigation case they wanted, the jury would have learned that Mr. Young was harmed in utero by his father's assaults upon his mother during her pregnancy. (*Id.* at ¶ 167

The jury would have heard about the interplay between Mr. Young's chemical dependency and mental illness; the systemic failure of the institutions which were supposed to help Mr. Young with his drug and alcohol dependence; the family dysfunction which invaded all aspects of Mr. Young's life; and the psychological barriers which delayed Mr. Young's mental and emotional development. (*Id.*)

The jury would have heard testimony about Mr. Young's maternal family history including information about Carla Sexton's adoption and her own distant relationship with her adopted mother. This information would have given the

jurors context to why Carla had such trouble parenting her own child, especiall one that required so much attention as Mr. Young did due to his ADHD. The ju also would have understood the unstable environment Mr. Young was born int (*Id.* at ¶¶ 9-12, 168.) The jury also would have heard evidence about Mr. Youn being genetically predisposed to addiction and mental illness based upon his maternal family background. (*Id.* at ¶ 13.)

Had the prosecution not interfered with Mr. Young's mitigation presentation, the jury also would have heard information about Mr. Young's paternal family history. This information would have given context to the abus suffered by Mr. Young by his father Billy when viewed in light of the rampant abuse which permeated Billy's own family history. Mr. Young's paternal fami history also would have added to the evidence of Mr. Young's own genetic predisposition to addiction. (*See id.* at ¶¶ 14-23.)

Had the prosecution not interfered with Mr. Young's case, the jury woul have learned that Carla Young was ill-equipped to raise Mr. Young at the age eighteen, and especially ill-equipped to raise five children, four of whom belon to a new husband who was abusing her. (*Id.* at ¶¶ 25-26.) The jury would hav heard of the neonatal abuse suffered by Carla at the hands of Billy, abuse whic caused the premature birth of Mr. Young. (*Id.* at ¶¶ 27, 168.)

The jury would have heard evidence about the familiar interplay betwee Mr. Young's half-brothers and -sisters, and how those relationships colored M Young's own upbringing and development. (*Id.* at ¶¶ 28-50.) The jury would have learned of the chaos the surrounded Mr. Young's early years including M Young being passed back and forth between his mother and father. The jury a would have received evidence regarding Carla's courtship and marriage to Quentin Sexton, how Quentin could not accept or love Mr. Young as his own biological child, and how Mr. Young was very aware that Quentin did not lov him and often rebelled against Quentin's rigid rules and abusive treatment. Th

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jury also would have learned that Mr. Young constantly felt like an "outsider," as he was shuttled between the families, and how Mr. Young was made to feel like h was a "problem child." (*Id.* at ¶¶ 51-60, 63, 169-70, 173.)

Had Byington been permitted to complete his work as a mitigation specialist, the jury would have learned that not only did Mr. Young not fit in with both his maternal and paternal families, he also did not fit in at school because of his hyperactivity, which often led to behavioral problems. The jury would have had enough information to understand how Mr. Young's hyperactivity led to his feelings of frustration. (*Id.* at ¶ 172.)

The jury would have been informed about the acrimony between Carla and Billy and how that affected Mr. Young emotionally and physically. The jury would have had explained how the increasing level of chaos in Mr. Young's family, coupled with Mr. Young's ADHD, led to problematic behavior that Carla did not know how to control. The jury would have been better able to understand how the institutions, which were meant to assist Mr. Young with his behavioral problems, did nothing more than house Mr. Young until the institution grew tired of Mr. Young and kicked him out. (*Id.* at ¶¶ 60-81.)

The jury would have been given a roadmap regarding Mr. Young's rapid mental and emotional decline that occurred without the treatment that he so badly required. The jury would have had a better understanding of why the treatments that were prescribed to Mr. Young failed. The jury also would have learned that while successful treatment required Mr. Young's family to be involved so that unhealthy familiar interactions could change, this type of treatment never took place. (*Id.* at ¶¶ 82-100, 173.)

And had a mitigation specialist been permitted to do the job he was appointed to do, the jury would have learned that Mr. Young was discharged from TYC without any provisions for chemical dependency or psychiatric treatment. The jury also would have learned that Mr. Young returned to the same "unhealthy

environment that had exacerbated his previous problems. (*Id.* at ¶ 175; Ex. 97 a ¶¶ 15-17 [Decl. of Milam].)

Had a mitigation specialist like Byington been permitted to conduct the investigation he was hired to do, the jury would have been given a comprehensi overview of Mr. Young's chemical dependency and its genetic component (Ex. at ¶¶ 121-27); psychiatric treatment history and including medications (*id.* at ¶ 128-36); educational history (*id.* at ¶¶ 148-52); physical and emotional abuse since childhood (*id.* at ¶¶ 153-58), and possible bi-polar disorder.

The jury would have learned that had Mr. Young been given proper long term treatment, including family therapy and appropriate medications, he could have led a productive life. And although Mr. Young was assessed by a myriad professionals over the years, and recommendations were made regarding treatment, those recommendations were not carried out in any real or logical wa (*Id.* at ¶ 174.)

Had the defense been permitted to investigate and present the mitigation case they had desired, with the help of a mitigation specialist, the jury would ha learned that Mr. Young could not overcome the risk factors which stemmed fro family dysfunction. The jury would have heard evidence that Mr. Young was never able to develop the appropriate coping skills and, upon release from TYC attempted to use the survivor skills he had learned in the prison system. (*Id.* at 177.)

Without a mitigation specialist/bio-psychosocial historian, the jury did n hear that Mr. Young's bad behavior was often the result of his hyperactivity an impulsivity, which he struggled throughout his life to contain. From outward appearances, Mr. Young was a nice looking intelligent young man, which mad more difficult for a jury to understand his feelings of alienation. (*Id.* at ¶ 180.) mitigation specialist could also have helped the jury to understand that over th years, Mr. Young experienced numerous side effects and frequent disappointm

from the various medications he was prescribed, causing him to lose hope and thus, reinforcing his reluctance to take any medication. (Ex. 96 at ¶ 181 [Decl. of Knox].)

In sum, without a mitigation specialist/bio-psychosocial historian, the defense was unable to present to the jury a comprehensive, linear, and cohesive story about Mr. Young. This portrait would have shown what can and will go wrong when a young person is born into, and travels through a life filled with emotional and physical abuse, lack of stability and support, and a lack of positive role models. (*Id.* at ¶ 183.)

As social historian Toni Knox states in her declaration:

> It is my strong professional opinion that the findings contained in this declaration were absolutely necessary for the jury to hear through the testimony of an expert such as myself, in order for the jury members to get some idea of how Clinton Young became involved with the criminal element, and to give them a firm basis for finding the mitigating factors necessary to impose a judgment of life without parole instead of death. Various pieces of the information contained herein were presented through competent witnesses, but there was not an expert that was able to "tie" all of the pieces together to give the jury the full story of Clint's life. It is this "full story" that could have helped the jury understand everything that affected Clint throughout his life.
>
> Had I or some other competent expert been asked by counsel to present this story to the jury in the form of trial testimony at the penalty phase, and had the jury

> been presented with this evidence by competent counsel and a competent expert, there is a reasonable probability that the jury would have returned a verdict of life without parole instead of a death sentence.

(Ex. 96 at ¶¶ 185-86 [Decl. of Knox].)

Based upon the above, this error is structural, deserving of habeas relief without regard to harmless error. At a minimum, the prosecution's direct interference to the defense punishment case rendered Mr. Young's trial fundamentally unfair. *Wainwright*, 477 U.S. at 183. Had the defense been permitted to present Mr. Young's social history to the jury, one juror may have voted for life imprisonment. *Wiggins,* 539 U.S. at 537 (relief required when "th is a reasonable probability that at least one juror would have struck a different balance"); *Buckner v. Polk*, 453 F.3d 195, 203 (4th Cir. 2006) ("A reasonable probability that . . . one juror considering the original and newly raised evidenc together would have voted for life imprisonment satisfies this [prejudice] standard."); *Foster v. Johnson*, 293 F.3d 766, 784 (5th Cir. 2002) (discussing whether the defense mitigation evidence "would have altered at least one juror' balancing determination in favor of life").

Moreover, independent of the prosecutorial misconduct claim, the trial court's failure to rule on Byington's ability to conduct the investigation he was appointed to do was a violation of Mr. Young's due process rights. As stated above, the trial court only funded Byington for work completed from February through April of 2002. And while Byington submitted further billing requests, and the court held two hearings on Byington's ability to act as a mitigation specialist on this case, the court never made a ruling as to this issue. This, desp the fact the court acknowledged at the conclusion of the November 2002 heari that it would "report to you as quickly as I can. . . . I know it's of -- time is growing of [sic] essence in this matter. I'll try to get it resolved as quickly as I

for you." (10 RR at 29-30.) However, the court made no ruling, and only partially funded Byington's work *after* the conclusion of trial. (Ex. 65 [Final Payment].)

Finally, independent of the prosecutor's improper interference, and the trial court's failure to rule on the issue, Mr. Young's trial counsel was ineffective for failing to press the court for a ruling. At a minimum, counsel should have either: (1) hired a mitigation specialist who was a licensed private investigator or: (2) hired a private investigator to conduct the interviews and then have given that information to Byington so he could complete his bio-psychosocial history. *See Johnson v, Bagley*, 544 F.3d 592, 605-06 (6th Cir. 2008) (although there was some investigation done of the petitioner's childhood, it lacked structure, coherence and supervision and was not effectively put into a trial theme).

It was incumbent upon trial counsel "to locate and interview the client's family members, and virtually everyone else who knew the client and his family." Guideline § 10.7; *see Wiggins*, 539 U.S. at 516. But despite the fact that "in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a 'reasonably substantial, independent investigation' into potential mitigating circumstances," *Neal*, 286 F.3d at 236, the defense was without a mitigation expert/bio-psychosocial historian from June of 2002 until the conclusion of trial.

Because trial counsel failed to press the court for a ruling, or, at a minimum hire a licensed private investigator to complete that portion of Byington's work, counsel's performance was objectively unreasonable. *See Wiggins*, 539 U.S. at 527-28 ("counsel chose to abandon their investigation at an unreasonable juncture making a fully informed decision with respect to sentencing strategy impossible"); *Jells v. Mitchell*, 538 F.3d 478, 501 (6th Cir. 2008) (prejudicial failure to conduct timely and complete mitigation investigation); *Sonnier*, 476 F.3d at 358 (finding trial counsel provided deficient performance by conducting only cursory interviews of some family members because "the trial attorneys stopped short of

making a reasonable investigation for purposes of uncovering relevant mitigatin evidence").

E. Counsel's Failure to Present Key Evidence in Mitigation

Mr. Young's counsel failed to present two key pieces of mitigation evide at the punishment phase: (1) evidence explaining why Mr. Young would stop taking his ADHD medication upon his discharge from TYC; and (2) evidence explaining why Mr. Young, who was apparently unmedicated at the time of the trial, seemed to be able to sit still and converse with his trial counsel. Trial counsel presented several experts at the punishment phase, but they did not elic testimony to explain these two important concepts.

1. Relevant Law

The United States Supreme Court, in *Wiggins*, 539 U.S. 510, stated that, among the topics counsel should investigate are "medical history, educational history, employment and training history, *family and social history*, prior adult juvenile correctional experience, and religious and cultural influences. . . ." *Id* (emphasis in original); *see Sonnier*, 476 F.3d at 358; *Lewis*, 355 F.3d at 367. I this case, the limited evidence that trial counsel presented regarding Mr. Young ADHD was clearly not enough. But for counsel's failure to present further evidence, Mr. Young would not have been sentenced to death. *Strickland*, 466 U.S. at 694.

2. Facts and Analysis

The jury knew that, by the time Mr. Young was released from TYC, he v on a combination of Depakote (a mood stabilizer), Clonidine (a blood pressure medication with a sedative effect), and Ritalin (an amphetamine). (36 RR at 4 41.) The jury was clearly concerned about the issue of Mr. Young's ADHD an whether he was on the medication at the time of trial. During punishment deliberations, the jurors sent a note to the judge asking the following question: "We find no record of his current medication for ADHD during his stay in

Midland County. Is this in the record or are we just not finding it." (37 RR at 5.) The judge's response to the note did not answer the jury's question: "Members of the jury, the documents before you are the only documentary exhibits in evidence." (*Id.*)

Although Dr. Daneen Milam testified in the punishment phase, she was never asked: (1) why Mr. Young would stop taking his ADHD medication upon his discharge from TYC; and (2) why Mr. Young, who was apparently unmedicated at the time of the trial, seemed to be able to sit still and converse with his trial counsel.[55]

First, if asked, Dr. Milam could have explained that Mr. Young was dependent on drugs before he went to TYC. (Ex. 97 at ¶ 13 [Decl. of Milam].) Drugs were part of Mr. Young's life early on partially because of his father's own dependency issues. (Ex. 96 at ¶¶ 8, 137 [Decl. of Knox].) As trial counsel knew at the time of trial and explained at the state writ hearing, Mr. Young's father had introduced his child to crack cocaine. (33 RR at 245-46; 2 RWR at 208-09.) Further, Mr. Young never received any treatment for drug or alcohol abuse. (Ex. 96 at ¶ 175 [Decl. of Knox].) The chances were high that Mr. Young would abuse drugs as soon as he faced a trigger, i.e., outside of TYC and in a place where drug were prevalent. (Ex. 97 at ¶¶ 14, 17 [Decl. of Milam].) Taking street drugs outside of the TYC was not so much a decision to take drugs; it was behavior consistent with Mr. Young's dependency on drugs. (*Id.* at ¶ 16.)

Dr. Milam could have explained that Mr. Young was referred to the Mental Health Mental Retardation Centers, but had limited access and transportation. (Ex. 97 at ¶ 15 [Decl. of Milam].) She could have testified further that:

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[55] During the state habeas investigation, Nancy Piette interviewed some of Mr. Young's jurors. One juror noted that while the defense attorneys made a "big deal" of Mr. Young's ADHD, in court it was obvious Mr. Young could listen, pay attention, assist the attorneys, write notes, and behave, without medication. Another juror remarked that Mr. Young's decision to stop taking his medication upon his release from TYC, was voluntary.

> In itself, a question about Mr. Young's "decision" to not take his medicine upon his release indicates the jury was not presented with a fully detailed explanation of Young's problem. At trial the jury was told Mr. Young had been up for days using "meth" before and during the time of the crimes. But a clear progression was not drawn between the legal stimulants he used since childhood and methamphetamine, which he used for a couple of months at most. A fully informed jury would have readily understood why a subject such as Young, under these circumstances, *would be more likely to fail* to maintain his medication regime than not.
>
> Without a structured therapy or medication plan, Mr. Young's turning to self-medication via other stimulants was almost inevitable. When he was released from TYC with no external regulators to keep him on track, and instead surrounded by an abundance of street drugs, he transitioned to methamphetamine. Methamphetamine, also known as "speed" or "meth" or "crystal meth," albeit illegal, has properties similar to the FDA-approved medicine Young had been taking all his life. Despite its highly addictive nature and extremely dangerous side effects, it was a simple conversion for Young because of his long-term use of a chemically similar drug.

(Ex. 97 at ¶¶ 16-17 [Decl. of Milam].)

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Second, if asked, Dr. Milam could have explained why, even unmedicated, Mr. Young was able to sit still through his trial and converse with trial counsel. She would have testified that:

> While Clinton Young's long history of ADHD was presented to the jury, neither this expert, nor any other expert, explained the concept of hyperfocusing. Had the neurological basis for ADHD been adequately explained, including the concept of "hyperfocusing," the jury may have understood Mr. Young's ability to sit quietly throughout his trial. A more detailed explanation, including these disparate effects of being un-focused or overly-focused, would have not only allowed the jury to understand the peculiarities of Mr. Young's ADHD, they likely would have been able to observe it as such.

(Ex. 97 at ¶ 12 [Decl. of Milam].)

Finally, if asked, Dr. Milam could have pulled together all aspects of Mr. Young's drug dependency, ADHD and social history, which would have given th most persuasive and complete testimony in mitigation:

> Mr. Young's ADHD was and is a medical problem and was not the result of a lack of will power. ADHD is a biological and chemical malfunction in an immature brain. The effects of Mr. Young's genetically and biologically determined impulsive and distractible response style was aggravated, no doubt, by the chaotic, traumatic home environment in which he spent his formative years. Children who suffer from severe ADHD disorder require intensive limit setting and a stable environment. The impact of positive structure on

> Mr. Young is clearly demonstrated by his good behavior and good reviews by several of his teachers and counselors at TYC. It appears extremely unlikely that any adult in Mr. Young's home could have provided such a structure or stability.
>
> The fact that biological deficits would cause Mr. Young to behave even younger than his chronological age is corroborated by the comments of his teachers, counselors, and family members who consistently stated he was impulsive, and a follower. A review of the sequence of events of the crime is consistent with a poorly planned and executed event. Mr. Young is an individual who was incapable of assessing and responding to a rapidly changing situation. His poor ability to think and plan, lack of cognitive and practical skills sent him and his life spiraling out of his control.

(Ex. 97 at ¶¶ 24-25 [Decl. of Milam].) The jurors also could have been inform of Mr. Young's bi-polar disorder.

Counsel also failed to present evidence that some of the medications tha Mr. Young was prescribed were later found to have caused psychosis in patien

F. The State Lost or Destroyed Key Evidence

The State lost or destroyed evidence that was exculpatory in nature, including shell casings left in front of the house where Douglas was first shot; 7-Eleven video tape of Mr. Young shopping in the convenience store; and eyewitness evidence from persons at Brookshire's Grocery Store on the day th Mr. Petrey was kidnapped.

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1. Factual Background

As revealed during trial, Kent Spencer, Midland County Sheriff Investigator, testified that the district attorney's office lost the tape of Mr. Young in Midland at the Midkiff and Loop 250 7-Eleven on November 26, 2001. (24 RR at 232-33; *see also* Ex. 75 [Spencer 7-11 Report].) The tape that the jury never saw showed Mr. Young walking around the store for eleven minutes, without a weapon, while Page and Petrey stayed in the car. Thereafter, Mr. Young returned to the car and to the passenger side. (24 RR at 217-19; Ex. 75 at 847-48 [Spencer 7-11 Report].)

Further, the State lost or destroyed the shell casings that could have been found on the ground outside of the house where Douglas was first shot. This evidence was lost by the failure of the authorities to search the area where Douglas was first shot. They could have easily found the location because Page, in a statement to authorities, said that he knew the people who lived at the house in front of which Douglas was shot. Douglas was shot twice by Page who was standing to his left by the passenger side door. Therefore the shell casings would have been left at that scene on the ground. The State was in possession of such shell casings, but has since lost or destroyed this evidence.

Finally, the State failed to investigate the scene where Petrey was kidnapped. Had they done so, they could have interviewed eyewitnesses, including a woman in a white vehicle, who would have identified Page as the person who kidnapped Petrey.

2. Analysis

In *California v. Trombetta*, 467 U.S. 479 (1984), the Supreme Court applied a standard for determining the materiality of lost evidence: the High Court concluded that nonmalicious destruction of evidence does not involve a violation of the federal Constitution unless the evidence possessed "an exculpatory value" that was apparent before it was destroyed, and the evidence was of such a nature

that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Trombetta*, 467 U.S. at 488-89.

Under *Trombetta*, Mr. Young's constitutional rights were violated. The court looks at whether the lost evidence had "an exculpatory value" that was apparent before the evidence was destroyed, and whether the evidence was of a nature that the defendant could not obtain comparable evidence by other reasonable means. *Trombetta*, 467 U.S. at 489. Having "exculpatory value" do not mean that under *Trombetta* a defendant must establish that the lost evidence would have exonerated him. Were that the standard, proof that such evidence once existed would be tantamount to proof of innocence entitling a defendant t dismissal wholly apart from the fact that the evidence was destroyed or lost. Rather, the *Trombetta* standard should be met when it is apparent that: (1) the evidence was exculpatory to some degree, and (2) the defendant is prejudiced b its loss or destruction because he is left unable to establish the full extent of its exculpatory nature. *Id.* In other words, if the full extent of the exculpatory nat were apparent to the police prior to the loss or destruction of the evidence, proc of that fact at trial would in most cases be the equivalent of having the evidenc trial, and defendant would not be harmed by its loss.

Accordingly, the intentional destruction of the 7-Eleven videotape violat the federal Constitution because the videotape was prima facie exculpatory (in it showed that Page and Petrey were not being held against their will and were to go as Mr. Young walked around the 7-Eleven for eleven minutes without a weapon) and it was destroyed before the full extent of their exculpatory nature could be determined.

(Second, the State's loss or destruction of the shell casings located on the ground in front of the house where Douglas was first shot would have been material to establish that Mr. Young did not shoot Douglas, but that Mr. Page him while standing outside the car.)

And third, the failure to investigate the place where Petrey was kidnapped resulted in the failure to interview key eyewitnesses to the event - witnesses who would have identified the kidnapper as Page, not Mr. Young.

The second prong of the *Trombetta* requirements, that the evidence be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means, is clearly met in the case of the video tape because the video tape itself would have been the best evidence of how calm Mr. Young was, how long he was in the 7-Eleven, and that Mr. Page and Mr. Petrey were not kidnapped by Mr. Young. Sanctions should have been imposed for the destruction of the videotape. The instruction given by the court did not cure the prejudice to Mr. Young, and was no substitute for actually showing the jury the video tape.

With respect to the shell casings found at the house where Douglas was initially shot, aside from the ballistics evidence that showed that Douglas was sho from the left, there was no comparable evidence to show that Douglas was shot by Page from outside of the vehicle, which would have refuted the State's theory tha Mr. Young shot him inside the car from the passenger's seat.

And with respect to the eyewitnesses at the grocery store parking lot, there was no comparable evidence to show that Page, not Mr. Young, was the person who kidnapped Petrey.

The trial court should have imposed sanctions as a result of the State's loss/destruction of material evidence and habeas relief is required.[56] Assuming

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[56] The Supreme Court's decision in *Arizona v. Youngblood*, 488 U.S. 51, (1988), does not require a different result. *Youngblood* holds that under the due process clause, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, 488 U.S. at 58. As the *Youngblood* Court pointed out, however, the "presence or absence of bad faith by the police for purposes of the due process clause must necessarily turn on the police's knowled of the exculpatory value of the evidence at the time it was lost or destroyed." 48 U.S. at 56, n. 1. Intentional destruction of evidence by the individual having

arguendo, that the prosecution's intentional destruction of evidence did not rise the level of a violation of federal due process, an alternative sanction should ha been issued. Furthermore, trial counsel was ineffective for failing to move for sanctions.

G. Mr. Young Received Ineffective Assistance of Appellate Counsel

Mr. Young was also denied his right to effective appellate counsel. The *Strickland* standard also applies to claims of ineffective assistance of appellate counsel. *See Ries*, 522 F.3d at 531; *Amdor v. Quarterman*, 458 F.3d 397, 411 (Cir. 2006).

J. K. (Rusty) Wall was appointed as appellate counsel on Mr. Young's behalf on December 26, 2002. (CR at 691.) Mr. Wall failed to raise critical claims on Mr. Young's behalf, claims that were readily apparent from the recor

To the extent that this Court finds that the constitutional violations noted herein were not presented to the CCA on direct review and were apparent from trial record, then appellate counsel rendered constitutionally ineffective assista to Mr. Young, through their failure to adequately investigate and raise these issues. *See Evitts v. Lucey*, 469 U.S. 387 (1985).

The denial of his right to effective assistance of appellate counsel substantially prejudiced Mr. Young and had a substantial and injurious effect o the verdict. But for the denial of this right, it is reasonably probable that a mor favorable result would have been attained.

Under these circumstances, the adversarial system completely broke dov and Mr. Young was left without meaningful representation. Although many of counsel's errors were, by themselves, so egregious as to require reversal, the extraordinary accumulation of errors and omissions over the course of the trial created a total breakdown in the adversarial process, so that prejudice is

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knowledge of its exculpatory character must meet this standard, even if there is claim that the destruction was malicious.

conclusively presumed. Even assuming a showing of prejudice is required, Mr. Young has made that showing here.

H. The Cumulative Effect Renders All Phases of Mr. Young's Trial Fundamentally Unfair

Mr. Young's conviction and sentence of death were unlawfully and unconstitutionally imposed in violation of his rights to due process of law, equal protection, effective assistance of counsel, a fair trial, and an accurate and reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and comparable state law, because of the cumulative and inter-related errors that occurred at the guilt and penalty phases of trial.

The Supreme Court has established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973). For that matter, the cumulative effect of multiple errors violates due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. *Chambers*, 410 U.S. at 290 n.3; *see also Montana v. Egelhoff*, 518 U.S. 37, 53 (1996), *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15, (1978); *see Coble v. Quarterman*, 496 F.3d 430, 440 (5th Cir. 2007) (cumulative errors of a constitutional dimension).

Mr. Young refers to all of the allegations pled herein as well as claims set forth by Mr. Young in his direct appeal and state habeas application and, by this reference, incorporates them herein as though set forth in full.

Each of the errors at Mr. Young's guilt and punishment trials standing alone require that he be granted relief. Moreover, reversal of the death sentence and habeas relief is mandated, because the foregoing constitutional violations had a harmful effect on the punishment phase verdict. The effect of each and all of these guilt phase issues must be added to the subsequent punishment phase errors in the

evaluation of cumulative error in both guilt and punishment phases. However, because the issues resolved at the guilt phase are fundamentally different from question resolved at the punishment phase, the possibility exists that an error might be harmless as to the guilt determination, but still prejudicial to the punishment determination. *Smith v. Zant*, 855 F.2d 712, 721-22 (11th Cir. 199 (admission of confession harmless as to guilt but prejudicial as to sentence).

The failings of the state's case must be considered because "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 46 U.S. at 696; *see also Glasser v. United States*, 315 U.S. 60, 67 (1942) ("[Where the scales of justice may be delicately poised between guilt and innocence . . . error, which under some circumstances would not be ground for reversal, cann be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt.").

"Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." *Magill v. Dugger*, 824 F.2d 879, 888 (1 Cir. 1987). Further, Mr. Young's sentence of death was unlawfully and unconstitutionally imposed as alleged in Claims Two, Four, Five, and Thirteen through Twenty, and Twenty-Four and Twenty-Five. Such violations mandate habeas relief and ultimate reversal of the punishment phase verdict because the cumulative effect of the punishment phase errors requires reversal of Mr. Youn death sentence. *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Zant v. Stephens* 462 U.S. 862 (1983).

These errors variously deprived Mr. Young of his rights to liberty, fair t an unbiased jury, effective assistance of counsel, due process, to present a defe heightened capital case due process, a reliable and non-arbitrary determination penalty, and equal protection under the law. Taken together, these errors

undoubtedly produced a fundamentally unfair trial and a new trial is required, du to cumulative error. *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992); *cf. Taylo v. Kennedy*, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (several flaws in state court proceedings combine to create reversible federal constitutional error).

I. Mr. Young is Innocent of Capital Murder

Mr. Young's convictions, confinement, and sentence violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution because he is actually innocent of the capital murder of which he was convicted. *See Sawyer v. Whitley*, 505 U.S. 333, 336 (1992); *Thomas v. Calderon*, 151 F3d. 918, 924 (9th Cir. 1998); *see also Herrera v. Collins*, 506 U.S. 390 (1993).

Here, Mr. Young is actually innocent of capital murder for the multiple reasons discussed above. Had the constitutional errors described above not occurred, "it is more likely than not that "no reasonable juror' would have convicted" Mr. Young. *Schlup v. Delo*, 513 U.S. 289, 329 (1995).

IV.

MR. YOUNG'S CLAIMS SATISFY THE STATE STANDARDS FO FILING A SUBSEQUENT STATE HABEAS APPLICATION.

Texas Code of Criminal Procedure, article 11.071, section 5(a), prohibits consideration of a successive application unless the applicant can establish one the following showings:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application . . . 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 would 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 [at punishment] . . .

Id. Mr. Young's claims that have not been previously presented to the state co meet the standards set forth in article 11.071, section 5(a)(1) and (2).

A. *Brady* Claims Related to Plea Arrangements with Ray and Page

None of the *Brady* evidence related to the plea arrangements with Ray a Page presented in this Application was available to Mr. Young when he filed l prior habeas applications in April, 2005 and June, 2006. *See* Art. 11.071, § 5(a)(1).

With respect to Ray's plea deal, as explained in Claim One, *ante*, Ray testified at Mr. Young's trial that he did not have a deal with the State. (22 RI 147.) Furthermore, at a pre-trial hearing, prosecutors with the Harrison Count District Attorneys Office, along with Harrison County Investigator Hall Reavi testified there were no deals in place with the State with respect to Ray. (2 SF 109-13, 124, 127, 130-31.)

Tena Francis, an investigator for state habeas counsel Gary Taylor, interviewed Ray in March 2005 at the Cole State Jail in Bonham, Texas. At t interview, Ray denied having a deal with prosecutors before he testified again Mr. Young. (Exs. 141 at ¶¶ 18-20 [2009 Decl. of Tena Francis]; 146 at ¶ 6 [2 Decl. of Mark Ray].)

Mr. Young's federal habeas team interviewed Ray on July 8, 2008. Ra who at the time was approximately a month away from being released from pr informed federal counsel that indeed he had been offered a deal by the

prosecution. Ray explained that he was now willing to talk about the deal because: (1) he believed that he had lived up to his part of the bargain by never having talked publicly about the plea deal before then; and (2) he felt that he had done his time, was getting out of prison in a few weeks, and that telling the truth would not result in any retaliation against him. Ray was released from prison les than a month later, on August 5, 2008, (Exs. 146 at ¶¶ 8-9 [2009 Decl. of Ray]; 143 at ¶ 9 [2009 Decl. of Krikorian]; 144 at ¶ 2 [Decl. of Levenson].) Ray signe a declaration about his plea deals on July 11, 2008. (Ex. 117 [Decl. of Ray].)

With respect to Page's plea deal, as previously discussed, Page testified at Mr. Young's trial that he had no deals with the state. (RR at 26 RR at 257; 27 R at 127, 130-31.) Lisa Milstein, one of the state habeas investigators, interviewed Page in March 2005. Page never informed Milstein that he had engaged in plea discussion talks with the prosecution before or during Mr. Young's trial. (Ex. 14 at ¶ 5 [Decl. of Levenson].)

Mr. Young's federal habeas team interviewed Page on July 9, 2008. Page again denied entering into plea discussions with the prosecution prior to his testimony against Mr. Young. (Exs. 143 at ¶ 10 [2009 Decl. of Krikorian]; 144 a ¶ 3 [Decl. of Levenson].) However, due to Ray's recent admission that he had a deal with the State, and based upon Page's demeanor and answers to questions during the interview, the federal habeas team had reason to believe that Page was not telling the truth and interviewed Page's trial attorney, Woody Leverett, in September 2008. (Exs. 143 at ¶ 10 [Decl. of Krikorian]; 144 at ¶¶ 3-4 [Decl. of Levenson].) Armed with Ray's declaration, Mr. Leverett admitted to engaging i plea negotiations with the prosecution in exchange for Page's testimony against Young. Mr. Leverett also admitted that Page knew about these pleas negotiation (Ex. 111.)

In light of the government's active suppression of evidence, the soonest M Young could have learned of the deals made by the government with Ray and

Page was in July and September 2008, respectively. With the new evidence regarding Ray and Page in hand, federal habeas counsel filed a petition in fede court in October, 2008, and asked the federal court to grant a stay so that Mr. Young could return to state court to exhaust these claims. The federal court granted the stay in February, 2009, giving Mr. Young thirty days to return to th Court. (Ex. 148.)

None of the information discovered by Young could have been discover sooner, and Young's prior counsel acted with due diligence in their own investigation of this evidence. To that end, the United States Supreme Court h stated: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represe that all such material has been disclosed." *Banks v. Dretke*, 540 U.S. 668, 692 696, 696 (2004) (a defendant shows cause for his failure to develop the facts in state court where the prosecutor's suppression of *Brady* evidence was *the reas* for the defendant's failure to raise the claim); *see Starns v. Andrews*, 524 F.3d 618-21 (5th Cir. 2008); *see also Crivens v. Roth*, 172 F.3d 991, 997 (7th Cir. 1999) ("[w]e will not penalize [a defendant] for presenting an issue to us that h was unable to present to the state courts because of the state's misconduct"); *Wilson v. Beard*, 426 F.3d 653, 660 (3rd Cir. 2005) ("it is not enough to sugge that [Petitioner] could have learned about the [facts] by happenstance; rather, i must be shown that, had he exercised due diligence ..." he would have learned the relevant fact); *United States v. Kelly*, 35 F.3d 929, 933 and n.4 (4th Cir. 19 (defendant should not be penalized for serendipitous discovery of *Brady* evidence).

B. *Brady* Claims Related to A.P. Merillat Claim

None of the *Brady* evidence related to A.P. Merillat presented in this Application was available to Mr. Young when he filed his prior habeas applications in April, 2005 and June, 2006. *See* Art. 11.071, § 5(a)(1).

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As discussed previously, at Mr. Young's trial, over the objection of the defense, the state presented the testimony of A.P. Merillat, a Senior Criminal Investigator with the Special Prosecution's Unit, State of Texas. Mr. Merillat testified about issues regarding Mr. Young's future dangerousness in the Texas prison system if he was spared the death penalty. Unbeknownst to the defense, Mr. Merillat was conferring benefits to inmates in the Texas prison system, a direct contradiction to facts testified to by Merillat. (35 RR et. seq.)

This information only came to light in August and September, 2008 when the attorney for another inmate on Texas's death row, Anibal Canales, sent to Mr. Young's federal habeas attorneys a memorandum of points and authorities regarding another topic. One of Mr. Young's federal habeas attorneys, Pamela Gomez, noticed that one of Mr. Canales's *Brady* claims was based upon the role Mr. Merillat had played on Mr. Canales's case. (Ex. 142 at ¶ 4 [Decl. of Pamela Gomez].) That attorney later sent Ms. Gomez information on Mr. Merillat that th attorney was only able to uncover through his access to federal discovery procedures in Mr. Canales's case. (*Id.* at ¶¶ 4, 7.) Thus, the soonest counsel coul have learned of this evidence was in September, 2008. *See Boss v. Pierce*, 263 F.3d 734, 740, 743 (7th Cir. 2001) (prosecutor's untenable and expansive view o what evidence is available to the defense skews the balance between maintaining adversarial system of justice and enforcing prosecutor's obligation to seek justice before victory and would punish defense for not obtaining evidence it had no reason to believe existed).

C. Judicial Bias Claim

None of the evidence related to the judicial bias claim presented in this Application was available to Mr. Young when he filed his prior habeas applications in April, 2005 and June, 2006. *See* Art. 11.071, § 5(a)(1).

As previously discussed, Judge Hyde, who presided over Mr. Young's tria sent a letter to the jurors in April, 2003, after the jurors reached a verdict in the

guilt and punishment phase of Mr. Young's trial. That letter advised the jurors they had made the correct decision because Mr. Young was a dangerous man w was capable of harming someone else. Judge Hyde then presided over Mr. Young's motion for new trial and state post-conviction litigation.

All records pertaining to Mr. Young's trial were certified and transmitte the CCA in August 2003. The letter from Judge Hyde was not included in the clerk's record on appeal.

Per state habeas counsel's request, investigator Nancy Piette interviewe Mr. Young's jurors in January, 2005. None of the jurors who were willing to interviewed informed Ms. Piette of Judge Hyde's letter. (Exs. 116, 145 at ¶¶ 9 15-16 [Decl. of Nancy Piette].)

In May 2008, while reviewing documents at the Midland County Courthouse, John Beaver, a paralegal for current federal habeas counsel, was handed documents from Judge Hyde's chambers, including the letter in questi Mr. Beaver was told by clerk staff that the documents had never been include the public docket and had been kept stored in Judge Hyde's chambers since th conclusion of Young's trial. (Ex. 140 at ¶¶ 3-4 [Decl. of John Beaver].)

Under these circumstances, the soonest Mr. Young could have been awa of the claim raised here was in May 2008, when the files were turned over fro Judge Hyde. *See United States v. Payne*, 63 F.3d 1200, 1208-09 (2nd Cir. 199 (still *Brady* material when defense had no reason to know of evidence). And, previously stated, with the new evidence regarding judicial bias, federal habea counsel filed a petition in federal court in October, 2008, and asked the federa court to grant a stay so that Mr. Young could return to state court to exhaust th claims. The federal court granted the stay in February, 2009, giving Mr. Your thirty days to return to this Court. (Ex. 148.)

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D. Incompetence of Counsel Claims

None of the evidence presented within this section, Claim 4 supra, was available to Mr. Young when he filed his prior habeas applications in April, 2005 and June, 2006 due to state habeas counsel's incompetence at the time of his appointment. *See* Art. 11.071, § 5(a)(1), (2). For that matter, Mr. Young made known to Mr. Taylor his desire to file these claims in the first application, however, Mr. Taylor refused to include the claims in question. (*See* Exs. 51-52, 54.) Because the law of this State precludes hybrid representation, *Ex Parte Taylor*, 36 S.W.3d 883, 887 (Tex. Crim. App. 2001); *Sossamon v. State*, 110 S.W.3d 57, 61 (Tex.-App. Waco 2002), Mr. Young was precluded from filing these claims on his own behalf.

Mr. Young's evidence of ineffective assistance of counsel (*see* Claim Four *ante*) is not only important in evaluating the cumulative error of the *Brady* and *Strickland* violations, *see Gonzales v. McKune*, 247 F.3d 1066 (10th Cir. 2001) (recognizing "clear authority holding that courts should consider *Strickland* and *Brady* errors cumulatively to determine whether petitioner has demonstrated prejudice and materiality"); *Phillips v. Woodford*, 267 F.3d 966 (9th Cir. 2001) (remanding for cumulative prejudice analysis of *Brady* and *Strickland* error), but also demonstrates Mr. Young's probable innocence. As such, this evidence supports the conclusion that "by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror would have found the applicant guilty beyond a reasonable doubt." Art 11.071, § 5(a)(1), (2).

E. Conclusion

There is strong precedent that previously unpresented *Brady* claims will meet the requirements of section 5 and thus be considered on the merits in state court. *See Ex Parte Toney*, No. 76,056 (Tex. Crim. App. 2008) (authorizing successive application related to *Brady* claim, and ultimately granting relief); *Ex Parte Prystash*, No. 58,537-02 (Tex. Crim. App. 2008) (same); *Ex parte*

Washington, No. 35,410-02 (Tex. Crim. App. 2002) (authorizing successive proceedings on claim that the State withheld information regarding criminal records of punishment phase witnesses and presented false and misleading testimony); *Ex parte Murphy*, No. 30.035-02 (Tex. Crim. App. 2000) (authoriz successive proceedings on a claim that prosecutors relied on perjured testimon *Ex parte Faulder*; No. 10,395-03 (Tex. Crim. App. 1997) (authorizing succes proceedings on a claim that prosecutors allowed witnesses to testify falsely an withheld exculpatory evidence); *Ex parte Nichols*, No. 21,253-02 (Tex. Crim. App. 1997) (authorizing successive proceedings on a claim that prosecutors withheld the correct name address of a witness with exculpatory information).

Furthermore, because Mr. Young's claims of ineffective assistance of counsel, when viewed together with the suppressed exculpatory evidence, establish that no rational juror would have found him guilty beyond a reasonab doubt but for the constitutional error, *see* Tex. Code Crim. Proc. art. 11.071§5(a)(2), Mr. Young should be allowed to present his new claims to the state district court pursuant to Section 5.

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