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

GILMAR ALEXANDER GUEVARA Petitioner	§	
V.	§	Misc. Action
NATHANIEL QUARTERMAN, Texas Department of Criminal Justice Correctional Institutions Division Director,	§	No. H-06-441
Respondent	§	H-08 -1604

PETITION FOR WRIT OF HABEAS CORPUS
***28 U.S.C. § 2254* - DEATH PENALTY**

TO THE HONORABLE DISTRICT COURT:

COMES NOW, Petitioner Gilmar Alexander Guevara, by and through his attorney of record, Jani J. Maselli, and presents this Application for Writ of Habeas Corpus pursuant to *28 U.S.C. § 2254*. In support, petitioner shows the following:

I.

Mr. Guevara, the petitioner, was charged by indictment with the offense of capital murder, proscribed by *Texas Penal Code § 19.03*. The indictment alleged:

> In the name and by the authority of the State of Texas: The duly organized grand jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, Gilmar Alexander Guevara, hereafter styled the defendant, heretofore on or about June 2nd, 2000, did then and there unlawfully, during the same criminal transaction, intentionally and knowingly cause the death of Tae Youk by shooting Tae Youk with a deadly weapon, to-wit, a firearm, and intentionally and knowingly cause the death of Gerardo Yaxon by shooting Gerardo Yaxon with a deadly weapon, to-wit, a firearm.

> It is further presented that in Harris County, Texas, Gilmar Alexander Guevara, hereafter styled the defendant, heretofore on or about June 2nd, 2000, did then and there unlawfully while in the course of committing and attempting to commit the robbery of Tae Youk, intentionally cause the death of Tae Youk by shooting Tae Youk with a deadly weapon, to-wit, a firearm.
>
> It is further presented that in Harris County, Texas, Gilmar Alexander Guevara, hereafter styled the defendant, heretofore on or about June 2nd, 2000, did then and there unlawfully while in the course of committing and attempting to commit the robbery of Gerardo Yaxon, intentionally cause the death of Gerardo Yaxon by shooting Gerardo Yaxon with a deadly weapon, to-wit, a firearm.

(R.R. 14 - 9-10). A jury found petitioner guilty of capital murder and the special issues in a manner resulting in a punishment of death. (R.R. 16 - 31-32; R.R. 19 - 28-29).

The conviction and sentence were affirmed on direct appeal to the Texas Court of Criminal Appeals on May 23, 2000. *See Guevara v. State*, 97 S.W. 3d 579 (Tex. Crim. App. 2003). Robert Morrow represented petitioner at the state habeas level pursuant to *Texas Code Crim. Proc. art. 11.071.* In *Ex parte Guevara*, the Court of Criminal Appeals explained the procedural posture of the cases:

> Applicant filed an initial application for a writ of habeas corpus challenging the merits of his conviction and resulting sentence in the trial court on December 23, 2002, and the trial court forwarded that application to this Court on February 9, 2006. On January 12, 2006, applicant filed another application in the trial court and the trial court forwarded that application as a subsequent writ to this Court on January 17, 2006. Because the subsequent application was forwarded to this Court before the initial application, the subsequent application is numbered -01 and the initial application is numbered -02.

Ex parte Guevara, 2007 WL 1493152, 1 (Tex.Crim.App.2007). On May 23, 2007, the Texas Court of Criminal Appeals denied relief, holding:

> This Court has reviewed the record with respect to the allegations made by applicant. We decline to adopt findings Nos. 44 and 69 and conclusions Nos. 7, 13, and 27 because either they are not supported by the record or they are contrary to the law. We adopt the trial court's remaining findings of fact and conclusions of law. Based upon the trial court's findings and our own review, the relief sought is denied.
> This Court has also reviewed the record with respect to the application which was forwarded to this Court as a subsequent writ. On January 13, 2006, the trial court entered an order finding that said application was filed after the time period specified under Texas Code of Criminal Procedure, Article 11.071 § 4(a) or 4(b). We agree with the trial court's determination. Further, we find that the application fails to meet one of the exceptions provided for in Section 5 of Article 11.071 and, thus, dismiss this subsequent application as an abuse of the writ. See *Ex parte Blue,* S.W.3d, AP-75,254 (Tex.Crim.App. March 7, 2007).

Ex parte Guevara 2007 WL 1493152, at *1. Undersigned counsel was appointed to represent the petitioner in this federal proceeding.

II.
JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 2254.

III.
CUSTODY

Petitioner is a citizen of El Salvador and a resident of the State of Texas. He is presently in the respondent's custody at the Polunsky Unit in Livingston Texas pursuant to a judgment of conviction and sentence of death.

IV.
STANDARD OF REVIEW

Standard of Review: § 2254(e)(1) & § 2254(d)

AEDPA provides standards for the review of the merits of Mr. Guevara's claims

through the provisions of 28 U.S.C. §§ 2254(d) & 2254(e)(1):

> 28 U.S.C. § 2254(d) provides that:
> (d) An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
> (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law . . . ; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

It is important to note that § 2254(d) is a bar to the grant of habeas relief, rather than to the Court's review.

Therefore, for the Court to apply § 2254(d), it must first determine whether Mr. Guevara's claims merit relief when reviewed *de novo*. Only then does the Court examine whether relief is barred under § 2254(d). *See Ramdass v. Angelone*, 530 U.S. 156 (2000) and *Weeks v. Angelone*, 528 U.S. 225 (2000) (each thoroughly discussing the merits of the claims prior to discussing the applicability of § 2254(d)).

> 28 U.S.C. § 2254(e)(1) provides that:
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus . . . a determination of a factual issues made by a State court shall be presumed to be correct. That applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

The AEDPA's presumption of correctness is similar to that in previous law. Prior to the passage of the AEDPA, the law also provided that the federal courts were to presume state court fact findings correct, absent convincing evidence. *See Sumner v. Mata*, 440 U.S. 539, 550 (1981); *Bell v. Lynaugh*, 663 F.Supp. 405, 411 (E.D. Tex. 1987). The statute appears to be a codification of the Supreme Court's habeas jurisprudence in *Sumner*, and §

2254(e)(1) places no greater burden on a petitioner than existed prior to the enactment of the AEDPA.

Mr. Guevara

Every man has a story.

Gilmar Alexander Guevara's story is as worthy of consideration as any petitioner before this court. Mr. Guevara grew up in El Salvador, where he suffered a terrifying childhood. He was born in an impoverished environment in El Salvador. (Exhibit A - Llorente affidavit at 15-16). The childbirth was difficult, he was reportedly underweight and had difficulty feeding. *Id.* He was born with chicken pox and often sick with high fevers and received no medical attention. *Id.* In infancy he had constant diarrhea, and his skin was continually broken and bleeding from scabs. As a result, Mr. Guevara became very dependent on his mother. (Exhibit B, Affidavit of Investigator Gina Vitale, hereinafter "Vitale" at 2-3) He had no friends.

Mr. Guevara's father was a frightening presence in the household, frequently yelling at the children, throwing things, and having other angry outbursts. (Vitale affidavit, pages 3-4.) Life was very difficult economically. Mr. Guevara had to leave school after merely four years of education and go to work at the age of nine.(Vitale at 4; Llorente affidavit at 9). For his brief time in school, he was a good, quiet student, but slow to learn. "[H]e did not have intelligence." (Vitale at 4).

Most significantly, during the time young Mr. Guevara was growing up, constant war

presented dangers to everyone in El Salvador, including Alex and his family. Two of his siblings in the attached affidavit describe years of being exposed every day to violent death, mutilation, and the fear of being abducted into one army or another. The village in which the Guevara family lived was continually overrun by either the government troops or guerrilla fighters, so that everything was destroyed and life was extremely difficult. (Vitale at 4-7).

During that time in El Salvador, normal life was impossible. (Exhibit C, Affidavit of Dr. Richard Cervantes, hereinafter, "Cervantes.") Some 30,000 people were killed by the war between 1979 and 1986. (Cervantes at 30). The structure of society broke down. Unemployment rose to forty percent, and sixty percent of the population was illiterate. (Cervantes at 39).

Mr. Guevara was exposed to violent death almost every day of his life. His sister Sonia described daily life: "The most horrifying part for me was to go out to the street and see mountains of dead bodies. They would put them one on top of the other forming a mountain and then burn them right there, sometimes there were people we knew burning at the end, there would be left over members and the dogs would eat them." (Vitale at 5).

Mr. Guevara grew up in the midst of constant sudden death, and the fear of being taken away by either the military or the guerrillas. His brother Benjamin remembered: "As kids we were terrorized of being seen by either of the sides because they would take us away and if we resisted they would kill us. I have seen my friends dead in the streets and people burned alive. Alex and I have seen the parents and brothers of my best friend, who had the

shop where we went to learn mechanics, dead; killed in front of us." (Vitale at 5).

Guevara's younger brother Marvin described similar atrocities: "I remember once Alex and I visited an aunt, mother's sister, and from the window we watched the guerrilla making people dig holes in the ground, next donkeys would come loaded with bodies that they would throw in those holes. I was 14 and Alex was 17, we would see how guerrilla would fill up trucks with dead bodies and take them away. Everybody had fear." (Cervantes at 50).

Mr. Guevara himself said, "I could not open the door because the guerrilla was outside and they were going to kill us. Many times I really thought I was going insane. I would hear the airplanes come and I would see the bombs falling on top of our heads and exploding everywhere around us. I could not even eat due to the terror I felt. We would all hide under the beds in the floor and start crying. We all had sleep problems." (Cervantes at 41).

The fear was not only of being violently murdered, but of being conscripted into one of the warring armies. Alex Guevara's brother Marvin remembers both warring factions coming into houses looking for children to take, to join in the fighting. The Guevara children would hide inside their well to escape these armed men. (Cervantes at 51).

As a teenager, when danger to Guevara's life reached its peak, he became desperate to leave the country, as had so many other young men. According to Guevara's aunt, life had become impossible for children like him in El Salvador: "The children were very nervously affected, they would hear shootings right next to them and they would have nervous

breakdowns. We did not have a life. Children would cry a lot, they would throw bombs anywhere and they would fall next to you and that would be a total destruction." (Cervantes at 58).

So Mr. Guevara made the wrenching decision to leave his mother, on whom he was so dependent, and come to America, as his older brother Benjamin already had.

Even people who escaped the war, though, did not escape its traumatic effects. Survivors describe continuing to be frightened all the time, being startled by slight disturbances of modern life, or of having deadened feelings. (Vitale at 7).

Dr. Richard Cervantes is a clinical psychologist and director of Behavioral Assessment, Inc., in Los Angeles, as well as a Senior Research Fellow at California State University. His qualifications are set out in his attached affidavit. Dr. Cervantes was available to the defense as an expert witness.[1]

If Dr. Cervantes had been called, he would have testified that he had investigated Mr. Guevara's background by interviewing Guevara and two of his brothers, and by studying investigator reports which included interviews with other family members. (Cervantes at 10). He concluded that Guevara suffered from both Post-Traumatic Stress Disorder and from immigration-related stress.

---

[1] . He was not called as such a witness, of course, since the defense conducted only the most minimal investigation and so did not discover any expert witnesses (or any other witnesses) to present to the jury.

Mr. Guevara was only 14 when he came to America by himself. The boy who had been extremely attached to his mother had to leave her behind, along with most of his family, in order to save his life. He lived for a year with his older brother Benjamin and worked in his auto shop, but did not attend school. So he did not develop peer relationships or have parental guidance or any substitute for parents, such as teachers. According to Dr. Cervantes, this combination of circumstances severely undermined Guevara's adjustment to life in America. It also hindered his development to adulthood.

Furthermore, he lived in a part of Houston called Las Americas, an area heavily populated by other immigrants from Central America, and also a high-crime area. (Cervantes at 67; Vitale at 8-9). Guevara had moved from one war zone to another.

After a year, at the age of 15, Guevara moved out of his brother's home into an apartment with friends. He was working but still unschooled, and now had no supervision at all. Almost inevitably, he was taken up by what Dr. Cervantes calls "negative peers." (Cervantes at 72).

Guevara displayed a strong work ethic, first at his brother's shop and then as a bus boy at a restaurant. He was later promoted to cook. He was not known to drink or use drugs. (Cervantes at 73 and 74).

He did become peripherally associated with a gang, but did not seem to be a leader or hard-core member of the gang. (Cervantes at 71, Vitale at 9). His contacts were occasional, and in fact in 1994 he attempted to separate himself from gang activity by

moving to Texas City, a safer suburb of Houston. By this time, Mr. Guevara was married to his wife, Nancy. (Cervantes at 80).

Mr. Guevara's early life resulted in his suffering from Post Traumatic Stress Disorder as well as immigrant trauma. (Cervantes at 6-8). The symptoms of these traumas, particularly when a child has been exposed to war, include irrational thinking and violent outbursts.

Dr. Cervantes concludes that in his expert opinion, Guevara's early exposure to the trauma of war prevented his developing normal human relationships. (Cervantes at 83). Guevara's horrifying childhood was compounded by post-immigration trauma and the loss of any sort of parental supervision. (Cervantes at 84 and 89).

These factors led to the place where Mr. Guevara finds himself today - on death row, subsequent to a trial where this information was not investigated nor presented to the jury that decided he should die for his crimes.

The facts of the offense are secondary to the issues that Mr. Guevara presents today. This application for writ of habeas corpus rests upon who he is as a person and the deficits he suffers from and the representation that he did not receive at the trial or appellate court.[2]

---

[2] The CCA detailed the facts of the offense as follows:

Around 12:10 a.m. on June 2, 2000, officers responded to a reported burglary and shots fired at a convenience store on Ranchester Street in Houston. Upon arrival, they discovered the bodies of Tae Youk and Gerardo Yaxon lying inside the store. Both had been shot and were dead. On June 10, the police arrested appellant in Texas City pursuant to a warrant. Shortly thereafter, they obtained his consent to search his Texas City apartment and his vehicle. Officers also obtained appellant's wife's consent to search the apartment.

Issue Number One: Mr. Guevara is mentally retarded and his sentence must be commuted to life.

This issue was not properly considered by the Texas Court of Criminal Appeals, who rejected it as procedurally defaulted. *See Ex parte Guevara,* 2007 WL 1493152, at *1. However, there was not an independent and adequate state ground for this rejection, thus this federal court can consider the issue. In *Ex parte Guevara*, the CCA rejected the claim determining that Mr. Guevara had failed to make the appropriate standard for a "subsequent" writ. *Id.* The CCA based it decision on their previous opinion in *Ex parte Blue*, which held:

> We conclude that through Article 11.071, Section 5(a)(3), the Legislature has provided a mechanism whereby a subsequent habeas applicant may proceed with an *Atkins* claim if he is able to demonstrate to this Court that there is evidence that could reasonably show, to a level of confidence by clear and

---

During the search of appellant's car, officers recovered three pullover masks. FN2 From appellant's apartment, officers recovered a .40-caliber Smith & Wesson pistol, a .380-caliber Bersa pistol, a box of .40-caliber ammunition, and a box of .380-caliber ammunition. The firearms examiner testified that the Smith & Wesson pistol recovered at appellant's apartment fired the bullets recovered at the crime scene. The examiner also testified that the manufacturer who made the .40-caliber ammunition recovered from appellant's residence also made the bullets recovered at the crime scene. DNA samples recovered from one of the masks matched both appellant's and one of his co-defendant's DNA samples.

FN2. In an audiotaped statement to the police, appellant explained that he and two co-defendants were wearing masks at the time of the alleged offense.

Appellant subsequently gave an audiotaped statement to the authorities explaining the events on the evening of the murders. In his statement, appellant stated that he was riding around in his van with some friends that evening when someone said, "[L]et's go to the store there." Appellant and two others approached the store to "get the money." When appellant first entered the store, one of the store attendants hit him. At that time, one of his co-defendants told him to "shoot, shoot, shoot," and appellant shot at the attendant. Appellant claimed that he did not remember how many shots he fired but that he did not want to hurt anyone. Appellant and his accomplices left the store without taking anything.

Guevara v. State, 97 S.W.3d 579, 580 -581 (Tex.Crim. App.2003)

> convincing evidence, that no rational finder of fact would fail to find he is mentally retarded. However, because we find that the applicant in this case has failed to satisfy this heightened-threshold burden, we deny him leave to proceed.

Ex parte Blue, 230 S.W.3d 151, 154 (Tex.Crim.App. 2007). Even taking *Blue* as a correct interpretation of the Texas Legislature's intent on mandating procedures for subsequent writs, Mr. Guevara met the statutory requirements for a subsequent writ and the *Blue* standard, as well. The evidence of Mr. Guevara's mental retardation is so compelling and further, dovetails into the claims he raised on his initial application regarding the failure of his trial attorneys to properly investigate his mitigation case.

Mr. Guevara suffers from mental retardation. The Fifth Circuit has required:

> In *Atkins,* the Supreme Court held that the Constitution prohibits executing the mentally retarded. "The Court ... left 'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,' but cited with approval the American Association on Mental Retardation ('AAMR') definition of mental retardation."[FN9] The Texas courts have adopted a test for mental retardation that mirrors the AAMR definition, and thus require an applicant claiming mental retardation to demonstrate (1) significantly subaverage general intellectual functioning; (2) accompanied by related limitations in adaptive functioning; and (3) onset prior to the age of eighteen.[FN10] "To state a successful claim, an applicant must satisfy all three prongs of this test. (Footnotes omitted).

Moore v. Quarterman, 517 F.3d 781, 783 (5th Cir. 2008).

The Eighth and Fourteenth Amendment Imperative

In *Atkins v. Virginia*, 536 U.S. 304, 319, 122 S.Ct. 2242, 2251 (2002), the Supreme Court held that the execution of mentally retarded defendants violates the Eighth and Fourteenth Amendments to the United States Constitution. As a majority of the Court

reasonsed, "[t]he Eighth Amendment succinctly prohibits 'excessive' sanctions. It provides: 'Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted,' " citing *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544 (1910). *Atkins, at 310.* "'[I]t is a precept of justice that punishment for crimes should be graduated and proportional to the offense.'" *Weems, supra, at 367.*

Whether a punishment is excessive, in violation of the Eighth Amendment, is judged by the standards "that currently prevail." *Atkins, at 310.* The *Atkins* Court found that "the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. *Id. at 315.* The practice of executing the mentally retarded for the commission of state crimes "has become truly unusual, and it is fair to say that a national consensus has developed against it." *Id.* Moreover, the Federal Death Penalty Act, 1994, 18 U.S.C. § 3596(c), strictly prohibits any individual with mental retardation from being sentenced to death or executed.

Although mentally retarded persons may well know the "difference between right and wrong" and, in fact, be competent to stand trial, "they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id. at 316.* While finding "no evidence that they are more likely to

engage in criminal conduct than others," the Court found "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. *These deficiencies do not warrant any exemption from criminal sanctions, but they do diminish their personal culpability*." *Id.* (Emphasis added).

The "social purposes served by the death penalty" have been identified as "retribution and deterrence of capital crimes by prospective offenders,'" *id.*, quoting, *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909 (1976). With respect to *retribution – "the interest in seeing that the offender gets his 'just deserts' – the severity of the appropriate punishment necessarily depends on the culpability of the offender*." *Atkins, at 319*. Because imposition of the death penalty, consistent with the Eighth Amendment, is confined to or reserved for, "a narrow category of the most serious crimes," excluding the mentally retarded from the ultimate penalty is appropriate "to ensure that only the most deserving of executions are put to death ..." *Id.* As to *deterrence*, defined as "the interest in preventing capital crimes by prospective offenders," the death penalty "'can serve as a deterrent only when murder is the result of premeditation and deliberation.'" *Id.*, quoting *Enmund v. Florida*, 458 U.S. 782, 799, 102 S.Ct. 3368 (1982). As the *Atkins* Court reasoned:

> Exempting the mentally retarded from that punishment will not affect the 'cold calculus that precedes the decisions' of other potential murderers. (Citation omitted). Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable – for example, the diminished ability

> to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses – that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

536 U.S. at 319.

Finally, the reduced capacity of the mentally retarded provides an additional justification for a "categorical rule making such offenders ineligible for the death penalty." *Atkins* at 319. "[T]he possibility of false confessions, ... the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation," the fact that mentally retarded defendants "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes," present unacceptable "risks 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Id.*, quoting *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954 (1978). And, of course, because "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury," *see, Penry v. Lynaugh*, 492 U.S. 302, 323-325, 109 S.Ct. 2934 (1989), "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution." *Atkins* at 319.

The Court concluded that the Eighth Amendment "'places a substantive restriction on

the State's power to take the life' of a mentally retarded offender" and that such punishment is "excessive." *Id., quoting, Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595 (1986).

2. Mental Retardation Defined

The American Association of Mental Retardation (AAMR) defines mental retardation as follows:

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. *Mental retardation manifests before age 18.*

Mental Retardation: *Definition, Classification, and Systems of Supports*, p. 5 (9th ed. 1992). (Emphasis added).

The American Psychiatric Association's definition is similar:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). *The onset must occur before age 18 years* (Criterion C).
>
> Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders 41* (4th ed. 2000). (Emphasis added). "Mild" mental retardation is typically used to describe people with an IQ level of 50—55 to approximately 70. Id., at 42—43. *Atkins*, footnote 3.

Mild Mental Retardation is roughly equivalent to what used to be referred to as the educational category of "educable."

> This group constitutes the largest segment (about 85%) of those with the disorder. As a group, people with this level of Mental Retardation typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000), at 41.

The 2002 AAMR's definition of mental retardation is as follows:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills. This disability originates before age 18.

Definition, Classification, and Systems of Supports, p. 8 (10th ed. 2002). The 2002 definition "like AAMR definitions of mental retardation of the recent past, includes the three broad elements of significant limitations in intellectual functioning, concurrent with and related to significant limitations in adaptive behavior, and manifested in the developmental period." *Id.* at 9.

While the 1992 (9th) AAMR definition of mental retardation imposed an IQ "cut off" of an "IQ standard score of approximately 70 to 75 or below based on assessment that

includes one or more individually administered general intelligence scores," the 2002 (10th) "cutoff" is based on "[p]erformance that is at least two *SDs* (Standard Deviations)[3] below the *M* (mean) of an appropriate assessment instrument, considering the standard error of measurement for the specific assessment instruments used and the instrument's strengths and limitations." *Id.* at 22-23.

In the final analysis, however, "[t]he mental retardation construct is useful in that it allows mostly deserving individuals to get services and supports they often desperately need. *It is fiction in that there is no justification for the idea that there is a magical line (let alone*

3

> The assessment of intellectual functioning through the primary reliance on intelligence tests is fraught with the potential for misuse if consideration in not given to possible errors in measurement. An obtained IQ standard score must always be considered in terms of the accuracy of its measurement. Because all measurement, and particularly psychological measurement, has some potential for error, obtained scores may actually represent a range of several points. This variation around a hypothetical 'true score" may be hypothesized to be due to variations in test performance, examiner's behavior, or other undetermined factors. Variance in scores may or may not represent changes in the individual's actual or true level of functioning. Errors of measurement as well as true changes in performance outcome must be considered in the interpretations of test results. This process is facilitated by considering the concept of standard error of measurement (*SEM*), which has been estimated to be three to five points for well-standardized measures of general intellectual functioning. This means that if an individual is retested with the same instrument, the second obtained score would be within one *SEM* (i.e., ± 3 to 4 IQ points) of the first estimates about two-thirds of the time. Thus an IQ standard score is best seen as bounded by a range that would be approximately three to four points above and below the obtained score. This range can be considered as a 'zone of uncertainty' (Reschly, 1987). Therefore, an IQ of 70 is most accurately understood not as a precise score, but as a range of confidence with parameters of at least one *SEM* (i.e., scores to about 66 to 74; 66 % probability), or parameters of at least two *SEMs* (i.e. scores of 62 to 78; 95 % probability) (Grossman, 1983). This is a critical consideration that must be part of any decision concerning a diagnosis of mental retardation. *Id. at 57.*

one determinable by a test score) *dividing those who have or do not have the condition*." *Id.* at 35. (Emphasis added).

Simply put, "a fixed cutoff for diagnosing an individual having mental retardation was not intended (in the 2002 AAMR definition), and cannot be justified psychometrically ..." *Id.* at 58.

Mr. Guevara's evidence of mental retardation

In his supplemental writ to the Court of Criminal Appeals, there is numerous evidence presented regarding the mental retardation of Mr. Guevara.

Dr. Llorente's evaluation details his conclusions regarding Mr. Guevara. He personally interviewed Mr. Guevara and participated in other interviews, as well as working with the state habeas investigator and her colleagues. Dr. Llorente affirms that he believes, based upon his evaluation of the case and the AAMR definitions, that Mr. Guevara suffers from mental retardation. (Llorente at 10). Mr. Guevara relies fully on the attached affidavits, but would highlight these points to demonstrate to the court the evidence of mental retardation:

1. Deficient range of intellectual skills placing Mr. Guevara in the .4 percentile of people of similar age, meaning he is mentally deficient within the range of intellectual skills. (Llorene at 5,6)
2. Difficulties in performing complex tasks (Llorente at 4).
3. Reading and understanding at a fourth grade level. (Llorente at 6).

4. Because of his limited intellectual capabilities, Dr. Llorente could not use the typical MMPI-2 test, but instead gave Mr. Guevara the "Draw-A-{Person" test. Dr. Llorente concluded that the drawing was remarkable in that it revealed a great deal of cognitive immaturity. (Llorente at 9).

5. Overall, Mr. Guevara fell in the mentally deficient range, and these types of scores are often seen in people suffering from organic brain disorders including mental retardation. (Llorente at 9).

6. Mr. Guevara suffered from serious deficits in adaptive skills, as well. (Llorente at 15-16).

7. Ghe was unable to achieve academically in school. (Llorente at 15).

8. He dropped out of school in the fourth grade because he could not learn. (Llorente at 15).

9. He was "different" than his siblings and could not understand simple instructions or even remember the score of a game. (Llorente at 15).

10. He was unable to learn basic tasks as a teen-ager in order to hold down a job. (Llorente at 15).

11. Needed to depend on others in order to function in society. (Llorente at 15).

12. His impaired scores and performance on tests and inability to abstract at levels expected for adults demonstrate deficits in cognition consistent with mental deficiency. (Llorente at 10).

Dr. Llorente noted that:

> Mr. Guevara was born in an impoverished environment. He was delivered by a midwife. He did not receive any medical attention at birth despite the noted difficulties during his delivery. He may have suffered anoxia (lack of oxygen to the brain) at birth. His vital statistics at birth are unknown, but he was reportedly underweight. He did not breastfeed well. He suffered from malnutrition. He was born with chicken pox (his mother had chicken pox during pregnancy). He was often sick with high fevers and did not receive medical attention. He suffered brain insults before the age of 18 that compromised his nervous system. He received little sensory stimulation due to the abject poverty in which he was reared.

(Llorente at 15-16).

Dr. Llorente could not exclude mental retardation based upon his examination of Mr. Guevara. The evidence presented in his report along with Ms. Vitale's affidavit support more than the clear and convincing standard that Mr. Guevara suffers from mental retardation.

The Court of Criminal Appeals rejection of this claim is in defiance of the law and the its own standard. The Fifth Circuit considered a mental retardation claim from Texas, recently, and explained:

> In response, TCCA held that defendants and petitioners must establish their mental retardation, as defined by either the American Association of Mental Retardation (AAMR)FN2 or the Texas Health and Safety Code, by a preponderance of the evidence. *Ex Parte Briseno*, 135 S.W.3d 1, 7-8, 12 (Tex.Crim.App.2004).FN3 The AAMR definition referenced in *Atkins* and *Briseno* has three requirements:
>
> FN2. The Supreme Court cited this definition in *Atkins*, 536 U.S. at 309 n. 3, 122 S.Ct. 2242.
> FN3. To the extent that Woods argues this allocation of the

> burden of proof is inappropriate and that a jury should determine his mental retardation, we have previously rejected that argument. See In re Johnson, 334 F.3d 403, 405 (5th Cir.2003).

1) subaverage general intellectual functioning, generally defined as an IQ below 70;
2) accompanied by related limitations in adaptive functioning defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales; FN4 and

> FN4. The AAMR finds this prong satisfied when "limitations in two or more of the following applicable adaptive skill areas [are present]: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." Atkins, 536 U.S. at 309 n. 3, 122 S.Ct. 2242.

3) onset prior to the age of 18.

Moreno v. Dretke, 450 F.3d 158, 163 (5th Cir.2006) (internal quotation marks omitted) (referring to the definition in the ninth edition of the AAMR's Mental Retardation: Definition, Classification, and Systems of Support).

Alternatively, the Texas Health and Safety Code succinctly defines mental retardation as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." Tex. Health & Safety Code § 591.003(13).

The state habeas court held an evidentiary hearing on this issue and we will summarize the evidence presented by both parties. Woods relied primarily on the testimony and written report of Dr. Richard C. Schmitt, who interviewed Woods and Woods' grandmother and reviewed Woods' records before concluding that Woods was mildly mentally retarded.

Woods v. Quarterman, 493 F.3d 580, 585 (5th Cir. 2007). Mr. Guevara meets the standard -

the difference in this case is that in *Woods*, an actual hearing was held where the evidence could be vetted. In Harris County, no hearing was held. The CCA did not remand for a hearing - instead choosing procedural default to subvert the law of the United States Supreme Court that no mentally retarded individual should be executed for their offenses. Mr. Guevara would respectfully ask for a hearing from this court on this very issue.

Issue Number Two: Mr. Guevara's Death Sentence Violates the Sixth Amendment under *Atkins v. Virginia* and *Ring v. Arizona*, Because the Jury's Verdict Did Not Include a Determination of an Essential Element of Capital Murder – That Mr. Guevara Is Not Mentally Retarded.

Mr. Guevara understands this issue may have been foreclosed by prior precedent. *See Schriro v. Smith,* 126 S.Ct. 7, 8-9 (2005) (stating "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim" and reiterating the statement from *Atkins*, 536 U.S. at 317, 122 S.Ct. 2242, that the method for determining whether a defendant is mentally retarded is left to the States). However, he raises this claim, believing in the merit of it and were he not to raise it and waive the claim, the issue would forever be foreclosed.

Lest it be forgotten, [d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The Constitution itself requires careful review of Mr. Guevara's death sentence. The reality is the law is ever evolving. Indeed, "[t]he genius of the Constitution resides not in any static meaning that it had in a world that was dead and gone, but in its adaptability to interpretations of its greatest principles that cope with current problems and current needs." William J. Brennan, *Constitutional Adjudication*, 40 Notre Dame Law, 559, 568 (1965).

In *Atkins v. Virginia*, the Supreme Court considered the issue of whether executing

the mentally retarded violated the Eighth Amendment. Prior to their decision, the issue was foreclosed. In reversing precedent, the Court noted:

> A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. ... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Id., at 100-101, 78 S.Ct. 590.

Atkins, 122 S.Ct. at 2247. If Mr. Atkins had chosen to not present the argument, clearly foreclosed to him at the time he asserted it, he would most likely have been executed by now. The evolving standards that Mr. Chief Justice Warren wrote of in *Trop* in 1958 continue today:

> The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. (footnote omitted).

Trop v. Dulles, 356 U.S. 86, 99-101, 78 S.Ct. 590, 597-98 (1958). The evolving standards of decency mandate Mr. Guevara present this although it may be seemingly foreclosed.

An analysis of the current legal landscape, including another case decided by the Supreme Court this term, *Ring v. Arizona*, 122 S.C.t 2428 (2002), indicates that both judge and jury have a significant role to play in resolving a postconviction *Atkins* claim. *Ring*

involved a Sixth Amendment challenge to Arizona's judge-sentencing capital punishment scheme. Relying on the constitutional principles established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone), Ring argued that *Apprendi* was irreconcilable with the Court's prior decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which upheld Arizona's judge-sentencing procedure. The *Ring* Court agreed, overruled *Walton*, and held that the Sixth Amendment requires that any finding of fact that makes a defendant eligible for the death penalty must be unanimously made by the jury beyond a reasonable doubt. 122 S.Ct. At 2440.

While *Ring* dealt specifically with statutory aggravating circumstances, it included "factfinding[s] necessary to ... put [a defendant] to death." *Id.* At 2443. *Atkins* held that the Eighth Amendment prohibits a mentally retarded defendant from being sentenced to death. 122 S.Ct. at 2252. Because a mentally retarded defendant is no longer constitutionally eligible for the death penalty, mental retardation now becomes a factual issue "that ... must be found by a jury beyond a reasonable doubt." *Ring*, 122 S.Ct. At 2439. In effect, the absence of mental retardation is "the functional equivalent of an element of [capital murder]." *Apprendi*, 530 U.S. at 494.

The judge still plays a very important role in this determination. Much like the current Texas practice with regard to the admissibility of a defendant's statements, eyewitness

identification, and expert testimony, the constitutionally required procedure occurs in two steps. In the first step, the judge must make an independent judicial determination that the defendant does (or does not) have mental retardation, and whether the defendant is eligible for a death sentence under *Atkins*.

The reasons for the requirement of a distinct *judicial* determination of fact and law are discussed in *Jackson v. Denno*, 378 U.S. 368 (1964), and reiterated in *Crane v. Kentucky* 476 U.S. 683: the enforcement of a federal constitutional prohibition against exposing retarded persons to a death sentence at the jury's discretion can hardly be left solely to a procedure whereby the jury makes the ultimate factual determination of the existence of the facts on which the prohibition turns. In *Jackson*, for example, the Court stated "the *requirement* that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the statement's reliability during the course of the trial." 378 U.S. at 386. (Emphasis added). There is, in short, a due process mandate that the trial court make the initial determination whether the defendant's constitutional rights were violated. *Crane*, 476 U.S. at 687-688. This is especially important in the context of a jury determination regarding mental retardation. The Supreme Court created the constitutional prohibition in part as a result of recognition of the handicaps that retarded persons suffer in litigating issues in front of juries, which in turn exposes them to "a special risk of wrongful execution." 122 S.Ct. at 2252 (noting: (1) the difficulty of a mentally retarded person may have in testifying; (2) the possibility that a mentally retarded person's

"demeanor may create an unwarranted impression of lack of remorse; and (3) the possibility that evidence of mental retardation may enhance the likelihood that future dangerousness will be found by the jury).

In the second step of the process required for addressing and resolving an *Atkins* claim, the defendant who presents evidence of mental retardation has a right to insist that he not be sentenced to death unless the jury finds unanimously, beyond a reasonable doubt, that he is *not* mentally retarded. *Ring* and *Atkins*, read together, say that very clearly. *Ring* is explicit that the procedural rights guaranteed by *Apprendi* attach to elements that are added by Supreme Court interpret[ations] of the Constitution to require the addition of an ... element to the definition of a criminal offense in order to narrow its scope." *Ring*, 122 S.Ct. at 2442. It is equally clear that *Atkins* adds such an element. The *Atkins* Court stated: "Thus, *pursuant to our narrowing jurisprudence*, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." 122 S.Ct. at 2251.

Issue Number Three: Mr. Guevara was denied ineffective assistance of counsel when his trial attorneys failed to discover his mental retardation, and thus failed to present it to the court at an appropriate time.

Issue Number Four: Mr. Guevara Was Denied the Effective Assistance of Counsel During the Punishment Phase of His Capital Murder Trial When His Court-appointed Attorneys Did No Investigation to Prepare for That Phase. As a Result, Crucial Mitigating Evidence Was Not Presented to the Jury, and Mr. Guevara's Only Defense to the Death Penalty Was Lost.

Issue Number Five: Mr. Guevara Was Denied the Effective Assistance of Counsel When His Attorneys Failed to Object to Improper Victim Impact Testimony.

Issue Number Six: Mr. Guevara Was Denied the Effective Assistance of Counsel in Argument of the Punishment Phase of Trial When His Attorney Failed to Offer the Jury Any Reason to Answer the Special Issues in Such a Way as to Spare Mr. Guevara's Life.

In a case such as this - where Mr. Guevara confessed to the offense and there was little doubt regarding whether the State could achieve a guilty verdict the case rested entirely on the punishment phase of the trial. Rodriguez, the trial attorney prepared two affidavits in this case. (See Exhibits E and I). The two appear to contradict each other regarding the information received from the family of Mr. Guevara. In his four paragraph affidavit prepared for the defense, he asserts that Mr. Guevara's brother told him that he could testfiy as to some violene and atrocities perpetuated by the El Salvadoran government while Mr. Guevara was growing up. (Exhibit E). In Mr. Rodriguez's nine *page* affidavit, sworn to by a Harris County Investigator, he asserted that the brother told him that Mr. Guevara had never witnessed any violence or atrocities. (Exhibit I at page 5).

What the competing affidavits demonstrate is that Mr. Rodriguez had no idea what Mr,. Guevara suffered from. He had no idea who Mr. Guevara even was as a person. Frankly, the affidavits undermine any reliance upon eithe ro fthem because of their competing stories. And Mr. Guerinot's affidavit to the defense counsel that he pretty much agreed with everything Mr. Rodriguez asserted in his affidavit is an affront to the system. (See Exhibit F).

The evidence discovered by state habeas counsel is overwhelming in humanizing Mr. Guevara. The compelling nature of his story as he witnessed the most horrible of atrocities and sought to travel to *el norte* to seek out a better life, would have given a picture to the jury of who he was - not just the sum total of his bad acts. By not presenting anything, and trying to explain it by saying that it would have demeaned the victim, is more of an offense. (See Exhibit E). As worthy an individual as the victims were and however horribly they may have suffered at the hands of the perpetrator - just as compelling is the story of Mr. Guevara. This case was a punishment case - through and through.

Guevara's counsel failed to investigate adequately before trial, so they were unprepared to put on evidence at the punishment phase. A great deal of evidence was available, both mitigating evidence and evidence that Guevara would not be a danger to society in the future. The jury heard none of this evidence. The defense rested in the next sentence after the State did so.

Additionally, Mr. Guevara's counsel presented a final argument at punishment that

was so outrageously poor, that it actually could have been the State's argument. Individually and cumulatively, these errors were so devastating to the jury that Guevara was effectively deprived of any counsel.

These points will be argued together, because they are connected in fact and law.

Factual Background

In this case in which Mr. Guevara was sentenced to death, the defense presented no evidence during the punishment phase of trial. Substantial mitigating evidence was available, including proof of Guevara's horrifying childhood, his difficulty adjusting to life in America, his suffering from both Post Traumatic Stress Disorder and immigrant trauma, and his redeemable good qualities, as well as expert opinion that he would pose no danger to others if he lived in a structured environment. Guevara's defense attorneys did not investigate to discover any of this evidence, and so did nothing to try to save their client's life.

During the punishment phase of Mr. Guevara's trial for capital murder, the prosecution presented proof of Guevara's prior convictions, which was admitted. (R.R.17 - 11, 12) The State then presented evidence of Guevara's involvement in other crimes. In one, the State offered testimony that Guevara had participated in a robbery in which a victim was pistol-whipped. (R.R.17 - 77) Guevara was linked to another aggravated robbery through a showing that the bullets fired in that robbery had been fired from the same gun later recovered from Guevara's home. (R.R.17 - 77). Finally, the State offered evidence, including

a statement from Guevara, that he had been involved in the murder of a security guard at an apartment complex. (R.R.18 - 75, 76)

The State also offered substantial victim impact testimony.

Immediately after the State rested on punishment, the defense rested as well, having called no witnesses and offered no evidence. (R.R.18 - 116). The jury had absolutely no choice but to return answers to the special issues that resulted in a sentence of death for Guevara.

There was, however, significant mitigating evidence available for Guevara's defense. If Guevara's trial lawyers had conducted a proper investigation, they would have discovered the same. As presented under Mr. Guevara's story - he truly had the most horrific of upbringings. He was born with chicken pox and his family could not even nourish him properly. He was sick and had a father who was frighteningly violent. (Vitale at 2-3) he had no friends.

And what can not be underestimated is the extreme violene he suffered at the hands of the warring factions in El Salvador. Dr. Cervante's affidavit describing the war zone is compelling and makes someone wonder how anyone, let alone a poor, mentally retarded boy, could not grow up to participate in bad activities. Even people who escaped the war, though, did not escape its traumatic effects. Survivors describe continuing to be frightened all the time, being startled by slight disturbances of modern life, or of having deadened feelings. (Vitale at 7).

Dr. Cervantes *was available to the defense as an expert witness*. He was not called as such a witness, of course, since the defense conducted only the most minimal investigation and so did not discover any expert witnesses (or any other witnesses) to present to the jury.

If Dr. Cervantes had been called, he would have testified to all that was recounted above. To all the pain and turmoil that the people of El Salvador suffered. Dr. Cervantes concluded Mr. Guevara's horrifying childhood was compounded by post-immigration trauma and the loss of any sort of parental supervision. (Cervantes at 84 and 89). This led to his association with people who put him at great risk for criminal behavior.

However, in the expert's opinion, based on extensive interviews, including with Mr. Guevara himself, in a structured, institutional setting, Mr. Guevara would pose very little risk for any future violence. (Cervantes at 93).

Argument and Authorities

Factors that mitigate an individual defendant's moral culpability "ste[m] from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)(plurality opinion of Stewart, Powell, and Stevens, JJ.). As the Supreme Court reasoned:

> "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed. 43 (1937). Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. *See Williams v. New York*, 337 U.S., at 247-249, 69 S.Ct., at 1083-1084; *Furman*

> *v. Georgia*, 408 U.S., at 402-403, 92 S.Ct., at 2810-2811 (Burger, C. J., dissenting).

Woodson, 428 U.S. at 304, 96 S.Ct. at 2991.

In the instant case, no evidence of mitigation, whatsoever, was presented by defense counsel for the jury's consideration in explaining who Mr. Guevara was and why he should ne be sentenced to death. None of this was lost on the prosecution when it acknowledged this shortcoming in its final argument at the sentencing phase of the trial:

> ... there isn't any sufficient mitigating evidence to warrant a life sentence versus a death penalty.

(Vol. 19 - 27).

In the case at bar, "...it is undisputed that [petitioner]... had a right--indeed, a constitutionally protected right--to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams v. Taylor*, 529 U.S. 362, 393, 120 S.Ct. 1495, 1513, 146 L. Ed. 2d 389 (2000). Additionally, evidence about the defendant's background is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. *Penry v. Lynaugh* , 492 U.S. 302, 322-327, 109 S.Ct. 2934, 2948-52, 106 L.Ed.2d 256 (1989).

In *Austin v. Bell*, 126 F.3d 843, 848-849 (6th Cir. 1997), the Court held

> that the failure of trial counsel "to investigate and present any mitigating evidence during the sentencing phase so undermined the adversarial process

> that [defendant's] death sentence was not reliable.... [G]iven that several of [defendant's] relatives, friends, death penalty experts, and a minister were available and willing to testify on his behalf, failure to present any mitigating evidence does not reflect a strategic decision, but rather an abdication of advocacy.

Case law is replete with instances where the failure to investigate and present mitigation evidence at sentencing can render counsel's performance deficient. In *Kubat v. Thieret*, 867 F.2d 351, 367 (7th Cir. 1989), defense counsel's failure to call available witnesses at sentencing deprived the defendant of effective assistance of counsel:

> At the post-conviction hearing, fifteen character witnesses testified on Kubat's behalf. None of the witnesses were members of Kubat's family; most were neighbors and coworkers; all were well-respected citizens in their community; one was a deputy sheriff; and all stated that they would have testified on Kubat's behalf at the sentencing hearing if they had been asked. Despite the availability of this impressive array of character witnesses, Kubat's counsel contacted only two of the fifteen before trial and called none of the fifteen to testify at the sentencing hearing.

Kubat, 867 F.2d at 366-67.

As the instant case demonstrates, Mr. Guevara had a story to tell - a story compellingly presented in his affidavits from Dr. Llorente and Dr. Cervantes, and Master Social Worker Gina Vitale. *None* of this information was presented to the jury. As the Fifth Circuit reasoned:

> The sentencing stage of any case, regardless of the potential punishment, is 'the time at which for many defendants the most important services of the entire proceeding can be performed.' " *Stanley v. Zant*, 697 F.2d 955, 963 (11th Cir.1983) (citations omitted). Where the potential punishment is 99 years imprisonment, the sentencing proceeding takes on added importance. While the legal standard of effective representation does not change from case to case, this does not mean that the severity of the sentence faced by a criminal

> defendant should not be considered in determining whether counsel's performance meets this standard. *Watkins*, 655 F.2d at 1356. "[T]he number, nature, and seriousness of the charges against the defendant are all part of the 'totality of the circumstances in the entire record' that must be considered in the effective assistance calculus." Id. See Stanley, 697 F.2d at 962-63. Here, Vela was charged with perhaps the most serious of offenses; murder. "Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." *Cuyler*, 100 S.Ct. at 1715.

Vela v. Estelle, 708 F.2d 954, 964, 65 (5th Cir.1983), *cert. denied*, 464 U.S. 1053, 104 S.Ct. 736, 79 L.Ed.2d 195 (1984).

"Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980). The Supreme Court has held that the right to counsel guaranteed by the Constitution is a right to the "effective assistance of counsel." *See United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984). Absent competent counsel, ready and able to subject the prosecution's case to the "crucible of meaningful adversarial testing," there can be no guarantee that the adversarial system will function properly to produce just and reliable results. *Cronic*, at 656, 104 S.Ct., at 2045. *See Strickland v. Washington*, 466 U.S. 668, 684-687, 104 S.Ct. 2052, 2062-2064, 80 L.Ed.2d 674 (1984). In *Strickland*, the U.S. Supreme Court established a two prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial.

First, an error must be so egregious that it indicates "deficient performance" by

counsel, falling outside the "wide range of reasonable professional assistance." *Id.*, at 687, 689, 104 S.Ct., at 2064, 2065. Second, the error must be so severe that it gives rise to prejudice, defined quite clearly in *Strickland* as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694, 104 S.Ct., at 2068. Many significant errors will not meet this "highly demanding" standard. *Kimmelman v. Morrison*, 477 U.S. 365, 381-382, 106 S.Ct. 2574, 2586, 91 L.Ed.2d 305 (1986). But those errors, such as in Petitioner's case, that do require reversal, may not be because he was insularly deprived of some discrete and independent trial right, but because, as *Strickland* demands, they reflect performance by counsel that has "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S., at 686, 104 S.Ct., at 2064.

The *Strickland* standard is **clearly less than a preponderance of evidence**. As the Fifth Circuit has stated:

> "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070. We ask if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068. ***Strickland*** **explained that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.**" *Id.* (emphasis supplied).

Belyeu v. Scott, 67 F.3d 535, 540 (5th Cir. 1995). The ubiquitous "result of the outcome would not have been different" holding in probably thousands of cases relying on *Strickland*

completely fails to acknowledge that the standard is less than a preponderance. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S., at 76, 62 S.Ct., at 467.

The constitutional right to counsel does not guarantee errorless counsel, therefore, the effectiveness of counsel must be determined by the entire representation.[4] However, the "severity of the sentence" should "be considered in determining whether counsel's performance meets this standard." *Vela v. Estelle*, 708 F.2d 954, 965 (5th Cir. 1983).

In *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999), the Fifth Circuit explained that even a deferential review is subject to limitations:

> The Court is, therefore, **not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all**. Compare *Mann v. Scott*, 41 F.3d 968, 983-84 (5th Cir.1994) (citing record evidence for the proposition that counsel made a strategic decision not to offer mitigating evidence during the punishment phase of a capital trial), with *Whitley*, 977 F.2d at 157-58, (concluding from the record that counsel's failure to offer mitigating evidence during the punishment phase of habeas petitioner's capital trial was not the result of a considered strategic decision, and therefore not entitled to deference), and *Wilson*, 813 F.2d at 672, (concluding that the existing record was inadequate for purposes of determining whether counsel made a strategic decision not to offer mitigating evidence during the punishment phase of a capital trial or whether that decision was professionally reasonable); *see also*

---

[4] Although the entire representation must be reviewed, "the right to effective assistance of counsel ... may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 2649-2650, 91 L. Ed. 2d 397 (1986)." *Citing*, *United States v. Cronic*, 466 U.S. 648, 657, n.20, 104 S. Ct. 2039, 2046, n.20, 80 L. Ed. 2d 657 (1984).

> *Whitley*, 977 F.2d at 158 ("The crucial distinction between strategic judgment calls and plain omissions has echoed in the judgments of this court."); *Profitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir.1987) (Strickland 's measure of deference "must not be watered down into a disguised form of acquiescence."); id. at 1249 (refusing to indulge presumption of reasonableness as to "tactical" decision that afforded no advantage to the defense). Rather, the fundamental legal question is whether, viewed with the proper amount of deference, counsel's performance was professionally reasonable in light of all the circumstances. *Strickland*, 104 S.Ct. at 2066.

The question becomes did Mr. Guevara receive a fair sentence resulting in a punishment verdict worthy of confidence. *cf. Kyles v. Whitley*, 514 U.S. 419 (1995).

While the Courts will not use hindsight in gauging counsel's effectiveness, the decisions made by counsel will be evaluated based upon the investigation utilized to determine the best possible strategy. "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Crane v. Johnson*, 178 F.3d 309, 314 (5th Cir. 1999)(*citing Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)(on rehearing)).

In *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002), the Court partially granted habeas relief when a defense attorney failed to investigate his client's background, but was informed by the *client* not to proceed. *Silva*, 279 F.3d at 837-38. The Court of Appeals determined this performance deficient even given "an additional measure of deference" due to the client's wishes. *Id.* Amazingly, in this case, the record contains letters from Mr. Guevara imploring his attorneys to investigate his case. *See discussion infra*. The Court reiterated the

ABA standard that:

> ABA Standards for Criminal Justice 4-4.1 (2d ed.1980) reads as follows:
>
> > Duty to investigate
> >
> > It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Silva, 279 F.3d 825 at 840, n. 11.

In *Wiggins v. Smith*, 123 S.Ct. 2527, 2541-42 (2003), the Supreme Court reversed a capital case based on a less than thorough investigation regarding mitigation; explaining:

> In finding that Schlaich and Nethercott's investigation did not meet Strickland's performance standards, we emphasize that Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "**constitutionally protected independence of counsel**" at the heart of Strickland, 466 U.S., at 689, 104 S.Ct. 2052. We base our conclusion on the much more limited principle that *"strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation."* *Id.*, at 690-691, 104 S.Ct. 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691, 104 S.Ct. 2052.
>
> Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records--evidence that would have led a reasonably

> competent attorney to investigate further. Counsel's pursuit of bifurcation until the eve of sentencing and their partial presentation of a mitigation case suggest that *their incomplete investigation was the result of inattention, not reasoned strategic judgment*. In deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied Strickland. Furthermore, the court partially relied on an erroneous factual assumption. The requirements for habeas relief established by 28 U.S.C. § 2254(d) are thus satisfied. (emphasis supplied).

The duty to investigate is sacrosanct for any criminal defense attorney. In *Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987), the Fifth Circuit declared that failing to pursue what would obviously be an advantageous strategy, such as having the Petitioner testify on his own behalf would not be considered effective assistance of counsel. The Court explained:

> Appellees respond in their brief that defense counsel made an informed and conscious decision on trial tactics in deciding not to pursue the insanity defense at trial. In this case, however, we cannot baptize the decision to forego the insanity defense with the rejuvenating labels of "tactical" or "strategic" choice. **Judges wisely defer to true tactical choices--that is to say, to choices between alternatives that each have the potential for both benefit and loss.** We are in a poor position to judge, on the cold record, the quality of such a choice, made as it is in the fine-grained texture and nuance of the particular proceeding. **In this case, however, we simply can see no advantage in the decision** to bypass the insanity defense. **Therefore our usual deference to tactical decisions is not relevant. Moreover, Profitt's counsel made their "tactical" decision based on faulty information, information that was faulty because of their ineffective investigatory steps, as we have seen.** Finally, counsel admitted at the federal magistrate's evidentiary hearing that they did not know that the burden of proof would have shifted had they submitted evidence of Profitt's prior adjudication of insanity. **Such a lack of knowledge regarding the law undercuts any claim that the decision to forego the insanity defense was "informed."** (emphasis supplied).

The failure to prepare or investigate in the instant case resulted in a verdict unworthy

of confidence. The prejudice prong of *Strickland* has been met – Mr. Guevara is not required to show the result would have been different; he must establish by less than a preponderance of evidence that the verdict was unreliable. *See Belyeu v. Scott*, 67 F.3d 535, 540 (5th Cir. 1995).

A verdict *cannot* be reliable when the jury heard absolutely nothing about Mr. Guevara. In *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the facts are strikingly similar to those before the Court in this case. Williams confessed to the murder of an elderly man and was tried for capital murder in Virginia. During the punishment phase, the prosecution introduced evidence that Williams had prior convictions for armed robbery and grand larceny, and that he had committed other robberies of elderly victims after the offense for which he was on trial. In one of those robberies, the elderly woman victim was left in a "vegetative state" and not expected to recover.

The defense presented testimony from Williams' mother and two neighbors, one of whom the defense attorney plucked out of the audience immediately before his testimony. These witnesses testified that Williams was a "nice boy" whom they did not know to be violent. The defense also presented a taped statement from a psychiatrist, which said primarily that during another robbery Williams had removed the bullets from his gun so as not to hurt anybody. Here, of course, *absolutely nothing* was presented on behalf of mr. Guevara.

The jury concluded that Williams was a future danger, and he was sentenced to death.

However, in both state and federal habeas corpus proceedings, substantial mitigating evidence was introduced that had not been proven to Williams' jury. The federal trial judge identified five areas of mitigating evidence that the jury had not heard:

> (I) Counsel did not introduce evidence of the Petitioner's background...(ii) Counsel did not introduce evidence that Petitioner was abused by his father. (iii) Counsel did not introduce testimony from correctional officers who were willing to testify that defendant would not pose a danger while incarcerated. Nor did counsel offer prison commendations awarded to Williams for his help in breaking up a prison drug ring and for returning a guard's wallet. (iv) Several character witnesses were not called to testify....
> [T]he testimony of Elliott, a respected CPA in the community, could have been quite important to the jury... . (v) Finally, counsel did not introduce evidence that Petitioner was borderline mentally retarded, though he was found competent to stand trial.

Williams, 120 S.Ct. at 1501, at n. 5.

The state habeas judge found that the failure to discover and *present* this mitigating evidence was "below the range expected of reasonable, professional competent assistance of counsel," and therefore did not meet the *Strickland* standard for effective assistance of counsel. *Williams*, 120 S.Ct. at 1501. The federal habeas judge agreed, also finding that the failure to conduct an adequate investigation had not been a strategic decision, based on defense counsel's idea to rely almost entirely on the fact that Williams had confessed to his crime. 120 S.Ct. at 1502.

The Supreme Court agreed. The record showed that Williams' trial counsel did not begin to prepare for the sentencing hearing until a week before trial. *Williams*, 120 S.Ct. at 1514. As a result, they failed to uncover evidence of "Williams' nightmarish childhood," in

which he had been abused and neglected by his parents. They also failed to discover other mitigating evidence. These omissions "clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Williams*, 120 S.Ct. at 1514-15.

Similarly in Mr. Guevara's case, his trial lawyers failed to investigate and discover significant mitigating evidence. Williams' attorneys were ineffective partly because they did not begin to prepare for the sentencing hearing until a week before trial. Mr. Guevara's attorneys apparently did not prepare for the punishment phase at all; to the extent they did, it was two days before their turn would come in the punishment phase, when Rodriguez met with Mr. Guevara's brother Benjamin. (Exhibit D, Affidavit of Benjamin Guevara, hereinafter "Benjamin Guevara). Williams's attorneys presented weak mitigating evidence. Guevara's presented none. They gave the jury no reason at all to spare Guevara's life - where plenty of reasons existed.

The mitigating evidence Guevara's attorneys failed to present fell roughly into the same categories as the undiscovered evidence in Williams' case: (1) Both suffered nightmarish childhoods, one because of abusive parents, the other because of a hostile, horrifying, unlivable environment. Guevara was also forced to live on his own at a very early age, with no parental supervision or any substitute for such supervision. (2) Williams' attorneys could have introduced witnesses to say he would not be a future danger in prison. Guevara had available expert testimony to the same effect, that was not introduced. (3)

Williams had character witnesses available. Guevara could have offered many witnesses who would have testified that he was a loving son, husband, and father, that he was a hard worker, and that he did not use drugs or alcohol. (4) Finally, there was evidence that Williams was borderline mentally retarded. Guevara has not been shown to be mentally retarded, but he suffers from both Post Traumatic Stress Disorder and immigrant trauma, both of which hindered his development to normal adulthood with an understanding of the consequences for his actions.

The Fifth Circuit Court of Appeals' opinion in *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000), is also instructive. Lockett was convicted and sentenced to death in Mississippi for the vicious, calculated murders of a husband and wife. 230 F.3d at 698. Again, the defense counsel barely presented any mitigating evidence in the sentencing phase, *Id.* at 711-12, and Lockett was sentenced to death. However, significant evidence of Lockett's psychological problems and organic brain damage was available, and could have been used as mitigating evidence to show that Lockett may not have been responsible for his actions. Id. at 713. The Court found that Lockett's attorney's failure to discover and present this evidence amounted to ineffective assistance of counsel. Id. at 714. Nor was this a strategic decision on counsel's part.

A strategic decision can only be made after counsel has investigated thoroughly enough to inform himself of the facts of his client's case. Lockett's attorney did not make that investigation. Neither did counsel for Mr. Guevara in this case. Therefore they provided

ineffective assistance of counsel.

Mr. Guevara's counsel had an explanation for why he failed to put on any defense at the punishment phase of trial. According to the first affidavit of Ricardo Rodriguez. he had a witness, Mr. Guevara's brother Benjamin, ready to testify about Mr. Guevara's childhood. "Essentially, the brother would testify that Mr. Guevara witnessed some violence and atrocities perpetuated (sic) by the El Salvador Government soldiers. In short, that they were constantly harassed by the soldiers, as well as the right-wing militia."

However, the defense abandoned this plan when the State at punishment called "the mother of the youngest victim who was also from El Salvador." This witness also testified that her son had escaped the violence in El Salvador, and traveled to America to work hard for a better life.

Having heard this testimony, the two defense attorneys "decided that the best course of action was to rest after the State's [sic] case and not put the brother on the witness stand. Essentially, we felt that the brother's testimony would demean the victim and that the jury would not give his testimony any mitigation value." (Exhibit E, Affidavit of Mr. Ricardo Rodriguez, one of Mr. Guevara's appointed trial counsel, hereinafter "Rodriguez")

First, this explanation is not accurate. Mr. Guevara's attorneys were not prepared to present any meaningful evidence at punishment. An investigator hired by the attorneys, John Castillo, made some minimal attempts to contact Mr. Guevara's family. (Exhibit F, Affidavit of John Castillo, trial investigator, hereinafter "Castillo") He did not investigate Mr.

Guevara's background or life in El Salvador, because no one asked him to do so.

Castillo did manage to contact Benjamin, the brother whom Rodriguez mentions as a witness they had ready to call. Benjamin tried several times to get in contact with his brother's attorneys, but could never get a call returned. "It was like they just didn't care." (Vitale at 13). Benjamin did finally meet with Rodriguez just before the start of trial. However, the attorney asked no questions about Mr. Guevara's past, so he could not have been prepared to present this witness. (Benjamin Guevara at 1) As late as the day before Rodriguez might have called this witness, he told the court he was still undecided as to whether to do so. (R.R.17 - 220).

Rodriguez's explanation also significantly overstates the importance of El Salvador in the witness' testimony. Maria Flores, the witness in question, testified very minimally about conditions in that country. Her *entire* testimony on the subject follows:

> Q. Was Freddy born in this country?
>
> A. No, he was born in El Salvador.
>
> Q. Why did you and your family come to the United States?
>
> A. I wanted to - my children to prosper and to have a better life, a better future for them to be someone in life and for them to able [sic] to raise them with pride.
>
> Q. Was something going on in El Salvador at the time you left with your family?
>
> A. There was a war.
>
> Q. Was that a civil war?

A. Yes.

Q. Was it a dangerous place?

A. Twenty-four hours a day.

Q. How old was Freddy when he came to the United States?

A. He was between five and six years old....

(R.R.18 - 111-112).

That was the end of the subject of El Salvador. There was not the dramatic testimony Rodriguez describes in his affidavit. Certainly there was no description of the horrible conditions in El Salvador, to which Mr. Guevara had been subjected as a child, such as the defense could have put before the jury if they had been prepared. See the affidavit of Gina Vitale for summary. No reasonably competent attorney could made a sound decision completely to forgo a defense for his client based on the testimony of Maria Flores.

Most importantly, even if Rodriguez's explanation were accurate, the "strategic" decision he describes was itself based on ineffective assistance of counsel. The State's witness in question should never have been allowed to give her victim impact testimony to the jury, because her son was not a "victim" named in the indictment. Maria Flores testified about her son Freddy Marroquin. (R.R.18 - 110) He was not a complainant of the capital murder for which Mr. Guevara was on trial (C.R. 11), but of an extraneous offense.

This witness should not have been allowed to testify under Texas law. *Cantu v. State*, 939 S.W.2d 627, 637 (Tex.Crim.App. 1997). Four years before Mr. Guevara's trial, this

Court had held that "victim impact testimony" means only testimony related to the victim of the primary offense. Testimony related to other victims is irrelevant to the special issues before the jury at the punishment phase. *Id.* The trial court's finding on this issue supports Mr. Guevara's argument, when the court holds that this evidence "comprised only five out approximately 350 pages of punishment testimony." (Finding 45).

Mr. Guevara's attorneys were obviously unaware of this law that related directly to their client's case, because they made no objection to the testimony in question. (R.R.18 - 109, 110, et seq) In fact, they had Mr. Guevara stipulate to an identification of the victim in question, so that "this woman who's just testified before the break who got so upset" wouldn't have to be recalled. (R.R.18 - 114)

So Mr. Guevara's attorneys' strategic decision was based on ignorance of the law, which itself amounted to ineffective assistant of counsel. Counsel has an obligation to know the law that applies to his case. As the Fifth Circuit explained:

> There is no question that Bruder's decision constitutes grievous legal error that seriously disadvantaged his client. Bruder argued at trial that Smith was innocent because he acted in self-defense; yet, as an attorney, Bruder failed to achieve a *rudimentary understanding of the well-settled law* of self-defense in Texas. By doing so, he neglected the central issue in his client's case. Failing to introduce evidence because of a misapprehension of the law is a classic example of deficiency of counsel. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (noting, when finding deficiency of counsel, that petitioner's lawyers "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records"). Compare *Martinez v. Dretke*, 404 F.3d 878, 887-90 (5th Cir.2005). This misunderstanding could have been corrected with minimal legal research.

(Footnotes omitted; emphasis supplied).

Smith v. Dretke, 417 F.3d 438, 442 -443 (5th Cir. 2005). Mr. Guevara's counsel failed in this duty. As in *Williams, supra*, the mistake was based on a misunderstanding of the law. 120 S.Ct. at 1502 and 1514. This in itself was an unprofessional error that fell below an objective standard of reasonableness. Sound trial strategy could not be based on such an error.

In fact, Mr. Guevara also urges this Court to find ineffective assistance of counsel based on this error. If Mr. Guevara's attorneys had made a proper objection, this witness would not have been allowed to testify, or the trial court would have committed reversible error by allowing her testimony.

This witness's testimony was very emotional and ended with her crying and leaving the stand. (R.R.18 - 114) Her testimony was apparently so powerful to defense counsel, that Mr. Guevara's attorneys entered into a stipulation of evidence rather than have her recalled. (R.R.18 - 114-15) This powerfully emotional testimony made the jury more likely to answer the punishment questions in such a way as to return a death sentence. Without the unprofessional errors of Mr. Guevara's trial counsel, the jury would never have heard from this witness. There is a reasonable probability that the outcome of the punishment phase would have been different if Mr. Guevara's attorneys had done their job properly.

See the following ground for relief for additional arguments relating to this ground, which Mr. Guevara incorporates herein as if fully set out.

Mr. Guevara also received ineffective assistance of counsel during final argument, a rare occasion in which the defense sealed the State's case. Mr. Guevara's attorneys found absolutely none of the great quantity of available mitigating evidence. Therefore, of course, they did not present any such evidence to the jury at the punishment phase. As soon as the State rested, so did the defense. (R.R.18 - 116, lines 22 and 25) They presented absolutely no evidence. So they had no reason to ask the jury to spare Mr. Guevara's life.

The only defense argument presented in the punishment phase covers barely three pages of the reporter's record. The entire "argument" for a life sentence of Mr. Guevara was exactly three pages. Three pages and the judge gave each side thirty minutes. The clerk's record shows that defense counsel "argued" for *five* minutes. (C.R. 191). The prosecution utilized 29 of their 30 minutes. (C.R. 191). The most significant excerpts follow:

> Let me first thank you for your service, thank you from the bottom of my heart for something that is an extremely difficult thing to sit through. **The carnage in this case is great. The misery inflicted on these people out here is terrible on us, not only as a jury but as lawyers and part of this community. It is great.**
> And, yet, I am going to ask you to sentence this man to life in prison. **The easy route is to kill him, to put him out of his misery and to put him out of our misery**. And at some point we all die. He will live in a cage. He will have his own room, color TV, food, and then they will put him to sleep. Is that real punishment? I would submit to you that it is not...
> **You know I almost liken this to a war zone. May be the closest to what goes on in the Middle East in Israel with the Arabs and the Jews**.
> **First thing we say is how do we stop the killing?** Somebody has got to stop the killing. And we ask each side for restraint to not exact revenge, to not take another life because one was taken. And, yet, we have trials like this where we bring 12 citizens in and say, We will only ask you to answer these questions. But you know in your heart if the answer is yes and no once again we have taken a life for lives that were taken.

> **How do we stop the killing? I don't know the answer to that. I don't think you folks do.** ***Obviously one answer is that we know if we kill Alexander Guevara it stops for him forever. And maybe that is the answer.*** **I don't know.**
> I don't know because I am not over where you are. I know that Thursday was gut wrenching. Friday was even worse. I can't lie to you. I can't sit here and tell you that for God's sake put all of that out of your mind, don't look at this mother and tell her that, you know, this is worth life. I don't know what the answer is. I really don't.
> I think it is amazing that people can do the things that they do. And in 29 years I have seen few cases to match this. Very few. It is a hard decision....
> **You can view it as, Mr. Guevara sentenced these three people to death within an hour and five minutes and never gave them a trial. That's obvious. That's an easy answer.**
> **How do we stop the killing?** I don't know. A great Roman general said once, What we do in life echoes for eternity. His legacy is damnation. What will yours be? Can you come out and say I attempted to stop the killing by not killing another human being? I would ask you to answer these questions in such a way that that is where you end up. I tried to stop the killing by not killing him.
> Thank you.

(R.R.19 - 5-8)(Emphasis added)

This is the plea for life. These are the last words the jury heard before deciding whether Mr. Guevara should live or die. On many levels, it sounds exactly like a prosecution argument. The argument asks the jurors how they could possibly face a victim's grieving mother and tell her this case was worth a life sentence instead of death. (This was apparently a reference to the same woman who should never have been allowed to present testimony, if the defense attorneys had properly objected.) It told the jury that this capital murder case was one of the worst that this experienced lawyer had seen in 29 years of practice. What could possibly have been the strategic decision behind this argument? It amounts to additional testimony

in favor of the prosecution.

Finally, the defense attorney made a general plea to "stop the killing." Not for any particular reason, just answer the questions in such a way as to give a life sentence: this to a jury composed of twelve people who had already sworn that they could give a death sentence in a proper case, and that they would base their answers to the punishment questions on the evidence.

And the only evidence they had before them in the punishment phase was that Guevara would be a danger in the future and that there was nothing in his entire life that would suggest a reason to spare him. As far as the jury knew, Guevara had no redeeming qualities and nothing in his life that would explain his actions and make a life sentence appropriate.

The fact that Mr. Guevara was represented at trial made him worse off than if he had had no counsel at all. Counsel by their presence suggested to the jurors that those experienced attorneys had investigated as well as they could and found no facts and no arguments to present as to why their client's life should be spared. The jurors must inevitably have thought, What a horrible person this defendant must be if his own attorneys can't find anything to say on his behalf!

The Sixth Circuit Court of Appeals made a similar observation in *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), *cert. granted, rev'd on other grounds*, 543 U.S. 447 (2005):

> We can only imagine the effect on the jurors when Cone's defense counsel refused even to ask them to spare his client's life. They could only have

> inferred that Cone's counsel was, by his silence, acquiescing to the prosecutor's plea that Cone be sentenced to death. Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of the trial. If that had occurred, the jurors could not have inferred, as indeed they must have, that counsel's knowing and purposeful silence was an implicit agreement that justice required that Cone be put to death.

243 F.3d at 979 (citation omitted).

Mr. Guevara's case was far worse. His attorney did not just sit silent. He put into words his agreement that this was a terrible capital murder case and the simple answer for the jury would be to put his client to death.

If this Court finds that the assistance of counsel afforded Mr. Guevara in this case was adequate, then future capital murder defendants should be given the option of going unrepresented at trial.

Everything that happened or didn't happen at trial flowed from the lack of pre-trial investigation. An investigator was appointed and made some minimal efforts to contact Mr. Guevara's family. (See Exhibit G, Affidavit of Investigator Castillo). He was not asked to investigate Mr. Guevara's life or background in El Salvador any more, and no one else did so. It is the attorney who has the duty to investigate, and that duty may not be sloughed off to an investigator. The defense attorneys failed to seek expert witnesses or any of the many available fact witnesses themselves. Strategic decisions may be justified only after an attorney has made the proper investigation. *See Moore*, *supra.* In this case Mr. Guevara's attorneys failed in the very first step.

Guevara has clearly met the first prong of the *Strickland* standard. He did not have

competent counsel functioning effectively. His attorneys did no investigation and consequently did not present any mitigating evidence to the jury, even though such evidence was available. This performance fell below an objective standard of reasonableness. There can be no strategic reason for a decision to present no evidence to the jury during the punishment phase of a capital murder trial, when there was such evidence to present.

Next comes the question of harm. However, the United States Supreme Court has held that in certain extreme cases an attorney's representation may be so inadequate that it amounts to no assistance of counsel at all. In such rare cases, the defendant does not have to show that he was prejudiced by his counsel's failures.

The question could also be phrased: Would the defendant have been better off with no counsel at all than with the counsel he had? This was the rare case in which the answer is yes.

No showing of prejudice required: Cronic

If the assistance of counsel provided to a defendant is so inadequate that it amounts to no assistance at all, the defendant need not show that he was prejudiced by his attorney's ineffectiveness:

> The Sixth Amendment, however, guarantees more than the appointment of competent counsel. By its terms, one has a right to 'Assistance of Counsel' [for] his defence.' Assistance begins with the appointment of counsel, it does not end there. In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to 'have Assistance of Counsel' is denied.

United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), at n.11,

quoting United States v. Decoster, 199 U.S.App.D.C. 359, 382, 624 F.2d 196, 219, cert. denied, 100 S.Ct. 302 (1979).

This is such a case, in which the assistance of counsel was denied, where counsel presented no mitigating evidence even though a great deal of such evidence was available, allowed damaging inadmissible evidence before the jury, and made no argument to persuade the jury to return a finding on the special issues that would spare their client's life.

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing... But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. *Cronic* at 656, 104 S.Ct. 2039

For example: "[I]f the accused is denied counsel at a critical stage of his trial [or] ... if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of the Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Id. at 659, 104 S.Ct. 2039 (emphasis added) (footnote omitted). In such a case, it is not necessary to demonstrate actual prejudice. *Cone, supra*, 243 F.3d at 977.

In Mr. Guevara's case, his attorneys did not have plenty of mitigating evidence available to them, because they had not done the work to find such evidence. Their "strategic" decision not to present the scant evidence they had was unjustifiable and was based on their own ineffectiveness in not making a proper objection to State's evidence.

Mr. Guevara's attorneys did not fulfill their obligation to conduct a thorough investigation of their client's background. *See Wiggins v. Smith and Williams v. Taylor*, supra, 120 S.Ct. at 1514-1515. They did not subject the State's case to meaningful adversarial testing by presenting any alternative to a death sentence. They did not prevent very damaging, inadmissible testimony from reaching the jury. Finally, they did not present any argument for sparing Mr. Guevara's life. The process indeed "[lost] its character as a confrontation between adversaries" *Strickland, supra*, 104 S.Ct. at 2039.

In short, they did not provide any "assistance of counsel" for Mr. Guevara's defense. Since Mr. Guevara's attorneys did nothing that reasonably competent counsel should do, Mr. Guevara's situation was as if he had no counsel at all. In fact, as pointed out above, his attorneys' very presence at trial, while doing nothing, made Mr. Guevara's case worse than if he'd had no attorneys at all. The *Cronic* standard applies. Mr. Guevara does not have to demonstrate specific prejudice to his case because his attorneys' lack of representation permeated the entire trial, making the whole proceeding unreliable.

As the Fifth Circuit explained, when there is no basis for assuming that trial counsel exercised judgment on behalf of his client during critical stages of trial, there is insufficient basis for trusting the fairness of that trial and consequently the Court must presume prejudice. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

The Fifth Circuit Court of Appeals went on to conclude, "[W]hen a defendant does not have counsel at every critical stage of a criminal proceeding, the court must presume that

such egregious deficiency prejudiced the fairness of the trial." *Id.* In Mr. Guevara's case, he had no counsel assisting in his defense during the pre-trial investigation period, during the punishment phase, and during final argument.

> Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceeding fall within this category.

Satterwhite v. Texas, 486 U.S. 249, 256, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988). This was such a case. The failure of Mr. Guevara's attorneys to investigate and to familiarize themselves with the law that applied to the case distorted this entire capital murder punishment hearing, as if Mr. Guevara had had no counsel at all. Harm must be presumed.

If this Court determines, alternatively, that the harm standard of *Strickland v. Washington,* must be met, Mr. Guevara can do so. The second prong of the *Strickland* standard asks whether the defense was prejudiced by the attorneys' failure. In this case Guevara's defense was prejudiced because he had no defense as a result. His only viable defense against a death penalty was lost because his attorneys didn't know such a defense. Guevara's defense was not presented to the jury, leaving that jury with no choice but to answer the special issues in such a way that the death penalty would be assessed.

Furthermore, there is a reasonable probability that if the jury had been presented with Guevara's mitigating evidence, the outcome of the proceeding would have been different.

Mr. Guevara is making two different claims in this regard. The first is that his defense was prejudiced because his counsel presented no defense at all. A conviction and sentence

should be reversed for ineffective assistance of counsel where the result of counsel's failure to investigate is that the defendant's only viable defense is not advanced. *See Wiggins, supra.*

Under this standard, the defendant must show that the failure to investigate meant that significant evidence would have been discovered by such an investigation. In other words, the defendant must point to specific, significant evidence that was not presented to the jury because his counsel failed to find that evidence.

Mr. Guevara has done so in this case. As pointed out above, there was evidence of Mr. Guevara's horrifying childhood, his suffering from Post Traumatic Stress Disorder and immigrant trauma, and his being left on his own and unsupervised from an early age. There is also evidence of Mr. Guevara's good qualities, and that he would not present a future danger to society if he were living in a structured environment such as prison.

Certainly aggravating evidence was presented to the jury, that Mr. Guevara was responsible for more than one murder and involved in more than one robbery. However, the Court in *Lockett* was "also cognizant of the inherent unforgivable viciousness of this murder, the nature of which may well have inflamed the jury and led them to reject this evidence as rendering him less culpable." 230 F.3d at 716. But the defendant was prejudiced by his complete inability to present a defense, thanks to his attorney's lack of preparation for trial:

Furthermore, if the mitigating evidence Guevara's counsel failed to discover had been presented to the jury, there is a reasonable probability that the outcome of the proceeding

would have been different.

For a death penalty to be assessed, the jury's findings on the special issues must be unanimous. Art. 37.07, Sec. 2(d)(2), V.A.C.C.P. Therefore if the Court can conclude that only one objectively reasonable juror could have heard this evidence and determined as a result that death was not the appropriate penalty for Guevara, prejudice is established. Id., 230 F.3d at 716.

It is reasonable to make such a conclusion. Guevara grew up in conditions where death was a constant presence, where he feared for his life every day. Soldiers who have spent a year or two in war have been found to suffer from Post Traumatic Stress Disorder so that they are less culpable for their actions. Mr. Guevara grew up in a war zone. He was a child, not a trained soldier, but a child hunted by soldiers. There is no way with his limited mental abilities and the horrors he witnessed that he could *not* be traumatized.

Dr. Cervantes details the answers in his affidavit. (Cervantes at 6-8). People who suffer from post-traumatic stress disorder, particularly children who have been exposed to war, exhibit symptoms including aggressive behavior. This information should have been provided to the jury. Mr. Guevara was shaped by his background. His crimes were serious, but so was the background that produced his behavior. This is significant mitigating evidence. If Mr. Guevara's conduct was a product of his frightening childhood and adolescence, his moral culpability for his crime is reduced.

There was a great deal of such evidence available. A sickly child, Mr. Guevara

became very dependent on his mother, but had to leave her, along with almost all the rest of his family, at much too early an age. In Houston he found himself in another high-crime area. Furthermore, living in an area heavily populated by other immigrants from Latin America, he never adjusted to life in America. For him, the war continued. While suffering these twin traumas, from the age of 14 on he had no parental or school supervision. In spite of these lacks, he made a life for himself, working hard and raising a family. But his horrifying past continued to haunt him and eventually reclaimed him.

However, he could have functioned safely, no danger to anyone, in a structured environment such as prison. This evidence, unheard by the jury, would have contradicted the State's evidence on the issue of future dangerousness.

If a jury had heard all the available evidence, it is reasonable to conclude that at least one juror would have thought death was not the appropriate punishment. *One* juror could reasonably have concluded that the mitigating evidence made a death sentence inappropriate.

As the Fifth Circuit concluded,

> ...We just cannot say with any degree of confidence that an objectively reasonable juror, confronted with this mitigating evidence, might not have reached the conclusion that Lockett lacked the requisite level of culpability to be punished with death.

230 F.3d at 716. In other words, the court's confidence in the outcome of the proceeding was undermined, meeting the standard for showing that ineffective assistance has prejudiced the defense.

Or, as the Supreme Court has declared, "Mitigating evidence unrelated to

dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams v. Taylor, supra*, 120 S.Ct. at 1516.

The ineffectiveness of Guevara's counsel resulted in his presenting to the jury no defense at all to a death sentence. This alone amounted to prejudice to the defense. Furthermore, the evidence Mr. Guevara has pointed out in this writ was so substantially mitigating that there is a reasonable probability that, if such evidence had been presented, at least one juror would have found that a death sentence was not appropriate.

This is a case in which Mr. Guevara was worse off for having counsel than if he had had none at all. If Mr. Guevara had sat at the defense table alone and unassisted in facing the prosecutors, he might at least have evoked some sympathy. Instead, with two attorneys representing him who did nothing, the jury must have been left with the impression that these experienced lawyers had looked for every reason they could find to tell the jury to spare their client's life, and found nothing. Their very presence at the defense table during the punishment phase made Mr. Guevara's situation worse than if he had had no lawyer at all.

Mr. Guevara's attorneys made no investigation, allowed devastating inadmissible evidence before the jury, put on no evidence of their own, and then argued in such a way as to give the jury extra fuel for putting their client to death. Their ineffectiveness in investigating and presenting the case left them unable to tell the jury any reason to spare their client's life. Defense counsel's short argument did not even address the punishment questions. Most likely because they had given themselves nothing to argue on punishment

due to their lack of investigation. He gave the jury no evidentiary reason to answer those questions any way other than as they did.

Mr. Guevara's attorneys completely failed to subject the State's case to the "meaningful adversarial testing" required by *Strickland*. In effect, instead, they went over to the other side. Their ineffectiveness pervaded the punishment phase of trial and guaranteed its result. They denied their client the only viable defense he had. There was a great quantity of mitigating evidence, but the jury did not get to hear any of it. This ineffectiveness is enough to undermine confidence in the outcome of the proceeding; that is, the sentence of death.

Mr. Guevara Alex Guevara came to this country to escape death in El Salvador. It would be the grimmest of ironies if this country put him to death without a jury's having heard anything about the forces and pressures that shaped him. It is without question that Guevara received ineffective assistance when his attorneys failed to investigate, and therefore presented no evidence at all to the jury during punishment. For this reason alone, Mr. Guevara's defense was prejudiced by the ineffective assistance, because he was left with no defense at all to the death penalty. Furthermore, substantial mitigating evidence was available, and if it had been presented to the jury there is a reasonable probability that there would have been a different outcome to the trial.

In a case in which the ultimate penalty was assessed, and Mr. Guevara was given no chance to avoid that penalty, the sentence must be set aside so that he can present his defense

to a jury. In *Roberts v. Dretke*, the Fifth Circuit considered an ineffective claim base don failure to present mitigation evidence:

> The Supreme Court has emphasized that defendant's troubled history is relevant to declaring his moral culpability, and that a defendant's "life history is a part of the process of inflicting the penalty of death." *Wiggins*, 123 S.Ct. at 2543 (quoting Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)); see Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse."). **Considering Pickell presented no evidence of Roberts's life history**, and there is evidence that he suffered from head injuries and mental disease, **the reliability of the jury's determination as to Roberts's culpability is, at best, questionable, and thus a reasonable jurist could debate whether Roberts has demonstrated prejudice.**

Roberts v. Dretke 356 F.3d 632, 641 (5th Cir. 2004).

The ABA Standards for representation in capital cases is *very* specific over what type of mitigation preparation is to be completed:

> Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of the client.

ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* 81 (Rev. Ed. Feb. 2003, non-final draft).

The ABA guidelines direct trial counsel to thoroughly investigate *every* aspect of the client's background, stating that "an understanding of the client's extended, multigenerational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the

client's complete social history from before conception to the present." *Id* at 112.

In the instant case, *none* of the that was done. There can be no *strategy* in not thoroughly preparing for the sentencing of a capital case.

The trial court's finding that counsel explored possible mitigating evidence is absolutely incredible in light of the competing affidavits of Mr. Rodriguez and the absolutely compelling story of Mr. Guevara which was never presented. The state court findings are unreasonable in light of the facts and the law in this case. *See 28 U.S.C. § 2254(d).*

Issue Number Seven: Mr. Guevara Received Ineffective Assistance of Counsel on Appeal When His Appellate Attorney Failed to Raise Ineffective Assistance of Trial Counsel for Failure to Object to the Inadmissible Testimony of Maria Flores, an Improper "Victim Impact" Witness.

Issue Number Eight: Mr. Guevara Received Ineffective Assistance of Counsel on Appeal When His Appellate Attorney Failed to Claim as Error the Trial Court's Failure to Inquire into the Obvious Conflict Between Mr. Guevara and His Attorney.

Improper Victim Impact Testimony

Mr. Guevara's attorney raised only three points of error on appeal, with arguments comprising only eight pages of the brief. The second point of error claimed that "[T]he trial court reversibly erred in overruling Appellant's objection to improper victim impact testimony at the punishment phase of trial."

In this point appellate counsel claimed constitutional error in the trial court's overruling an objection to improper victim impact testimony. According to the brief, the witness in question was not testifying about a victim named in the indictment, and so under *Cantu v. State*, 939 S.W.2d 627, 637 (Tex.Crim.App. 1997), the testimony should not have been allowed.

The point of error, less than two pages long, contains no citations to the record. The point itself claims the trial court overruled an objection to permit this testimony, but appellate counsel does not quote the objection or the trial court's ruling. The testimony itself is not quoted or cited. The only clue to the factual context of this appellate claim is the last

sentence of the point, which refers to "the unfortunate Mr. Zubair." Appellant's brief at 28.

The State replied to this point (probably correctly) as if it referred to the testimony of Ahmed Musutag Fraz. (R.R.17 - 60, et seq) Fraz testified at punishment about an extraneous aggravated robbery in which he and his friend Mohammed Zubair were robbed, and Zubair was pistol-whipped severely. (R.R.17 - 63, 75-76, 82) Defense counsel did make two objections during this testimony, but those were to the form of a question and to the witness's lack of medical qualifications, not that this represented improper victim impact testimony. (R.R.17 - 81, 82) The State argues that this was not victim impact testimony, but offered instead to show the severity of the beating. If Fraz's testimony was victim impact testimony, objection to it has not been preserved for appeal. State's Reply Brief at 21.2

However, in making this claim, appellate counsel completely overlooked the actual victim impact testimony of Maria Flores, who testified concerning the killing of her son Freddy Marroquin. This was victim impact testimony concerning the victim of an extraneous offense, and so should have been inadmissible under Cantu, supra. There was no objection to this testimony by trial counsel, so appellate counsel should have raised this claim as ineffective assistance of counsel, for failure to make a proper objection.

As set out above, the basis for this unmade objection was well-established caselaw. Trial counsel had a duty to know the law as it applied to his case. They obviously did not. This should have been raised on appeal as a claim of ineffective assistance of counsel. Trial counsel's performance fell below an objective standard of reasonableness because they did

not know the applicable law and therefore allowed devastating testimony before the jury.

Attorney-Client Conflict

Mr. Guevara's appellate attorney also failed to raise the trial court's error in failing to inquire into the conflict between Mr. Guevara and his trial attorneys. That conflict was apparent from the record, because Mr. Guevara's letters to the trial court are in the clerk's record. (C.R. 145, 146, 148, 150, 151) See, Ground for Relief Nine, relating to the conflict, incorporated herein as if fully set out.

Mr. Guevara has addressed this issue more fully in the referenced ground, but in short, Mr. Guevara called to the trial court's attention his conflict with his attorneys. The trial court had a duty to inquire into this conflict, but did not do so. As the Fifth Circuit explained, in *United States v. Litchfield*, 959 F.2d 1514, 1518 (10th Cir. 1992), the Court examined a conflict of interest case:

> A defendant can pursue an ineffective assistance of counsel claim by showing that counsel had an actual conflict of interest. *E.g., Osborn v. Shillinger,* 861 F.2d 612, 626 (10th Cir.1988). Ordinarily, a defendant claiming ineffective assistance of counsel must show prejudice to the defendant, *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); **however, if defendant shows that trial counsel actually represented conflicting interests, prejudice is presumed**. *Id.* at 692, 104 S.Ct. at 2067; *Nix v. Whiteside,* 475 U.S. 157, 176, 106 S.Ct. 988, 999, 89 L.Ed.2d 123 (1986); *Osborn,* 861 F.2d at 626. "In order to establish an actual conflict, [defendant] must demonstrate 'as a threshold matter ... that the defense attorney was required to make a choice advancing his own interests to the detriment of his client's interests.' " *United States v. Acevedo,* 891 F.2d 607, 610 (7th Cir.1989) (quoting *United States v. Horton,* 845 F.2d 1414, 1419 (7th Cir.1988)) (ellipsis in original).
>
> Defendant alleges a conflict of interest between counsel's duty of loyalty to defendant and counsel's desire to protect his own reputation before

the district court.

Although *Litchfield* dealt with whether the client was going to present perjured testimony, the parallel in the instant case is apparent. Mr. Guevara's reasons for dissatisfaction with his counsel were well-founded, as demonstrated in the grounds dealing with ineffective assistance of counsel at trial.

Strickland Standard Met

As to whether this ineffective assistance on appeal presents reversible error, the second prong of Strickland applies. If these claims had been raised, would they have changed the outcome of the appeal? Yes. The trial court's failure to inquire into the attorney-client conflict was reversible error. If it had been raised on appeal, reversal would have resulted. Therefore Mr. Guevara has been prejudiced by his appellate attorney's failure to raise this issue.

The same is true of the other point not raised by appellate counsel. Because of the ineffectiveness in failing to object to the inadmissible "victim impact" testimony, a valuable defense was lost to Mr. Guevara. The failure to prevent this emotional testimony from reaching the jury undermines confidence in the outcome of the proceeding.

In short, these were the best claims of reversible error on appeal, and appellate counsel failed to make them. There could be no strategic decision for this failure. As a result, valuable defenses on appeal were lost to Mr. Guevara. At least one of them would have resulted in reversal on direct appeal. This Court should reverse for this ineffective assistance

of counsel on appeal that was prejudicial to the defense.

The finding by the trial court that this was not ineffective is contrary to the facts and the law.

Issue Number Nine: the Trial Court Erred by Failing to Inquire into an Obvious Conflict Between Mr. Guevara Appellant and His Appointed Attorney.

On March 9 and 10, 2001, shortly before trial was to begin, Mr. Guevara wrote several letters to the trial court, including a copy of a letter to one of his attorneys. These letters detailed deep conflicts between Mr. Guevara and his attorneys, both on a personal level and over preparation of trial (or rather, lack of preparation.)

In the first letter, Mr. Guevara told the court that the day before, he had inquired of his attorney Ricardo Rodriguez about the possibility of a plea bargain: "But he said no plea is await for me. So he told me to stop asking, and said to me how many time [sic] are you going to ask the same, stupid ass questions you damn moron, Please, Judge Stricklin, I know I was wrong for what I done, and for justice to be done. I have my life in your hands but with this attorney..., I feel that his help is not worthy for action in court. So if you would, Ms. Stricklin, if its [sic] not to [sic] much could you appoint me another attorney." (C.R. 145)

On the same day, Mr. Guevara sent the court a copy of a letter he'd written to his other attorney, Jerry Guerinot, asking for information about his case, "[s]o I am able to make better informed decisions." (C.R. 146)

Two days later, Mr. Guevara sent the court another letter, saying again that he had tried to get information from his attorneys and they had not given him any. "I have done everything that I could possible done (being incarcerated) to get into court so that I can be exonerated in this matter. So I'm writing to ask you to please help me in the interest of

justice." (C.R. 148)

In his final letter to the court, May 16, 2001, Mr. Guevara again told the court that his attorneys were not assisting him at all, and asked the court to "look into this matter." (C.R. 150) He asked the court to speak to his attorney Guerinot: "He's not helping me at all." (C.R.151)

In trial, Mr. Guevara's fears proved well-grounded. His attorneys presented no evidence at punishment and virtually no argument why his life should be spared. (See Previous Grounds for Relief).

Mr. Guevara had only a limited grasp of English (as his letters indicate), and no understanding of court procedure. He did everything he could to make the court aware of his dissatisfaction with both his appointed attorneys. There is no record, however, that the trial court ever inquired into this obvious conflict. It is likely that based upon the hand writing of those letters, that Mr. Guevara did not even write them himself, especially when comparing the penmanship with the signature on the letters.

B. Argument and Authorities

Indigent defendants do not have the right to counsel of their choice. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989); *Morris v. Slappy*, 461 U.S. 1, 14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). However, as the Sixth Circuit explained:

> Iles also argues that the district court deprived him of his Sixth Amendment rights by not inquiring into his dissatisfaction with counsel. Iles focuses upon

cases which require a personal colloquy with the defendant when the issue of substitution of counsel arises. It is hornbook law that **"[w]hen an indigent defendant makes a timely and good faith motion requesting that appointed counsel be discharged and new counsel appointed, the trial court clearly has a responsibility to determine the reasons for defendant's dissatisfaction with his current counsel.**" LaFave and Israel, *Criminal Procedure*, § 11.4 at 36 (1984) (footnote omitted); *see also McMahon v. Fulcomer*, 821 F.2d 934, 942 (3rd Cir.1987); *Thomas v. Wainwright*, 767 F.2d 738, 741 (11th Cir.1985); *United States v. Welty*, 674 F.2d 185, 187 (3rd Cir.1982); *McKee v. Harris*, 649 F.2d 927, 933-34 (2nd Cir.1981); *United States v. Williams*, 594 F.2d 1258, 1260-61 (9th Cir.1979) (per curiam); *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir.1970). The right to counsel of choice, unlike the right to counsel, however, is not absolute. An indigent defendant has no right to have a particular attorney represent him and therefore must demonstrate "good cause" to warrant substitution of counsel. FN8 *See, e.g., United States v. Gallop*, 838 F.2d 105, 108 (4th Cir.1988); *United States v. Allen*, 789 F.2d 90, 92 (1st Cir.1986); *United States v. Young*, 482 F.2d 993, 995 (5th Cir.1973); *see also Nerison v. Solem*, 715 F.2d 415, 418 (8th Cir.1983) (a defendant must show "justifiable dissatisfaction" with his appointed counsel to warrant substitution of counsel).

> FN8. In reviewing whether a district court abused its discretion in denying a defendant's motion to substitute counsel, appellate courts generally consider the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense. *See, e.g., United States v. Gallop*, 838 F.2d 105, 108 (4th Cir.1988); *United States v. Allen*, 789 F.2d at 92; *United States v. Whaley*, 788 F.2d 581, 583 (9th Cir.1986); *United States v. Rogers*, 769 F.2d 1418, 1423 (9th Cir.1985); *cf. Wilson v. Mintzes*, 761 F.2d 275, 280 (6th Cir.1985). Further, "[c]onsideration of such motions requires a balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice." *Wilson v. Mintzes*, 761 F.2d at 280 (footnote and citations omitted). Judicial review obviously necessitates that such an inquiry be based upon a motion, or something that approximates such a motion. As discussed below, not only did the defendant never make such a motion, personally or through counsel, but Iles never tried to "fire" his appointed counsel, never moved for a

> continuance to seek new counsel, and never sought to represent himself. (Emphasis supplied).

United States v. Iles, 906 F.2d 1122, 1130 -1131 (6th Cir. 1990). Mr. Guevara's request for different attorneys was not made for the purpose of delay. Mr. Guevara was in jail awaiting trial, and so had no incentive to delay his court date. Mr. Guevara never had an opportunity to voice his complaints about his attorneys, because those very attorneys spoke for him to the court. Finally, with trial looming, Mr. Guevara realized that his attorneys had done nothing to prepare, and nothing to inform him. That is when he was forced to contact the court directly, the only thing he could have done to bring the problem to the trial court's attention. A defendant has an obligation to call his dissatisfaction to the trial court's attention. Mr. Guevara did so, as well as he could, given the facts of his incarceration and his extremely limited power to communicate. The trial court was alerted in at least three different instances of Mr. Guevara's dissatisfaction with his appointed counsel. The letters also alerted the trial court to the fact that Mr. Guevara's ability to communicate in English was extremely limited.

Given this notice, the trial court should have made at least some inquiry into the situation. So at least the defendant had an opportunity to address the court concerning the problem. In Mr. Guevara's case, he was given no such opportunity. The trial court erred in failing to inquire into Mr. Guevara's complaints regarding his attorneys.

This was constitutional error, violating Mr. Guevara's Sixth Amendment right to choose his own attorney. No inquiry was made. Nothing was established by the Court to determine whether a conflict existed, at all.

Because of the trial court's failure to hold even a minimal inquiry into Mr. Guevara's substantial complaints about his attorneys, any findings by the trial court otherwise are unreasonable in light of the undisputed facts and the law.

Issue Number Ten: Considering That the Law Would Require Mr. Guevara, on a Life Sentence, to Serve 40 Calendar Years in Prison Before Parole Eligibility, the State Failed to Prove Beyond a Reasonable Doubt the Probability That He Would Constitute a Continuing Threat to Prison Society for 40 Years And/or That after That Time, in Free Society.

At the time of Mr. Guevara's trial, Texas did not have a life without parole option. However, based upon the law at the time, there was a de facto life with out parole - no parole consideration at all for forty calendar years. However, there is a de facto life without parole, for any convicted capital murderer like Mr. Guevara, is widely recognized among the members of the legal community and the prison system. There is no record citation for this proposition, but Mr. Guevara submits that the record of his case does support the conclusion, based on common knowledge and common sense, that no jury could rationally find beyond a reasonable doubt there was a probability he would ever be released into free society again, at whatever advanced age, unless he had proven himself to be rehabilitated and not a threat to free society.

The burden of proof makes all the difference to the resolution of this issue. It is clear by now (despite all the struggle it has taken to reach this point) that jurors are informed, even if indirectly, that "society" in the future dangerousness special issue means prison society and free society. They take an oath to render a "true verdict," and at the punishment phase of a capital case the jurors do so by making a prediction about a capital defendant's being a continuing threat to two societies: the prison society which is a certainty and will commence immediately, and the free society which is a possibility, but will not commence, if it ever

does commence, until 40 calendar years from the date of the defendant's incarceration.

The State's burden of proof extends to all parts of the special issue. First, the prosecution must prove the virtual certainty of a probability in a certain society for a certain time: the burden of proving beyond a reasonable doubt there is a probability the defendant (if allowed to live) would commit criminal acts of violence that would constitute a continuing threat to (prison) society during the next 40 years. Then, because of the 40-years-without-parole rule on which the jury is instructed, the prosecution must prove the virtual certainty of a probability in a possible (free) society after a certain period of time: the burden of proving beyond a reasonable doubt there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to (free) society, after 40 years of imprisonment. If the jury concludes that the defendant would be a continuing threat to free society, if he were paroled after 40 years, they would rationally conclude that such a defendant would never be paroled. He will always remain in prison society, where he would not be a threat.

This second burden of proof carries an implicit, necessary burden of proving the likelihood - to whatever degree the evidence supports it - that the particular defendant would be in free society, i.e., would be paroled. In assessing the degree of threat the defendant will pose to prison society the jury considers all sorts of risks and possibilities about how he will behave in the particular environment of prison society. They need not speculate about the prison society factor or the time factor; they are given that information and they apply

whatever evidence they have heard in answering the threat-to-prison-society-for-40-years question.

Then, however, the jury must make another quite different prediction. What if, they must answer, the defendant is paroled into free society at some time after 40 years (which they know is the first time he will become eligible)? If the clear answer, based on the evidence and their common sense, to the "what if?" question is that the defendant would be quite dangerous if he were released back into free society (even after 40 years) then the answer to the special issue might seem to be clear as well: whether or not the defendant could be controlled in prison or for any reason would be non-dangerous in prison, the jury should answer yes if they found he would be dangerous in free society. However, as stated above, the rational conclusion is that a convicted capital murderer who continues in prison to prove himself dangerous would never be released into free society again. The burden of proof must be taken into account in reviewing the sufficiency of evidence. The possibility that Mr. Guevara might be paroled into free society in 40 years, as a man in his sixties, shrinks to an impossibility if he were behaving in a way that was a threat to society. The State simply could not satisfy its burden to prove beyond a reasonable doubt Mr. Guevara would be released, so that he could pose a threat to free society. Moreover, the State offered no proof whatever that Mr. Guevara had been a threat while in jail awaiting trial or in any kind of structured, controlled society like the prison society where he would be confined for 40 years if the jury gave him a life sentence.

The principle of *Simmons v. South Carolina,* must now be employed in Texas cases like this one. The prosecutors who have become used to a particular view of their "burden" of proving continuing threat must finally acknowledge that circumstances have changed. The legislature has stepped in--to raise the minimum mandatory imprisonment to 40 years, keeping capital convicts in prison society for that length of time, and to direct that juries making the dangerousness decision know that fact. No longer may a prosecutor argue, to an enlightened jury, "He will always be a threat no matter where he is," unless he can back up (prove) that assertion beyond a reasonable doubt. No longer may a prosecutor say, to an informed jury, "The only question is whether he's a danger as he sits here today." Most important, no longer should a Court say, in reviewing the sufficiency of evidence to prove future dangerousness, "The facts of the case alone may be sufficient to support a yes answer to the future dangerousness special issue," unless the Court goes on to discuss the application of those facts, and any other evidence, to the likelihood of the particular defendant's being a threat in prison society and/or free society, within the 40-year framework.

Mr. Guevara incorporates by reference the statement of facts of the other grounds for relief. The jury must have drawn the conclusion that Mr. Guevara presented a danger, a threat to free society. Mr. Guevara's commission of offenses was certainly evidence relevant to their decision about his being a continuing threat to society. However, once he was convicted, all the conditions about which the jurors had heard would change, and jurors heard nothing about how Mr. Guevara would likely behave under those new conditions.

Argument and Authorities.

Was there sufficient evidence for the State to prove, first, that Mr. Guevara would be a continuing threat to prison society for the next 40 years? No. Did the State, then, prove that if he were released in the year 2040 or afterward, he would be a threat to free society? They did not. Their evidence was simply proof of the fact that there was little chance Mr. Guevara would ever be in the free world again. That is the way a rational juror abiding by his oath would assess the evidence and return an answer based on reason, rather than a natural desire to see Mr. Guevara punished for the severity of his crimes.

Free Society After 40 Years

At the very least, Mr. Guevara could not be released into free society until he had been in prison society for 40 calendar years. The jury knew this. It makes no difference that the special issue number one did not ask as a separate question whether he would be a danger in 40 years. That is clearly a matter the jurors were required to address, because they knew Mr. Guevara would at least be eligible for parole release after 40 years. The special issue does ask the jury to assess the defendant's future dangerousness "as he sits here today" but only in the sense that the prediction must be made upon the evidence available to the jury today as to whether the defendant will be a threat immediately as he goes into prison society today or whether he will be a threat as he sits in prison 40 years from today, asking to be released into free society. The jurors would be contradicting the law they received in the jury charge if they were to judge Mr. Guevara's dangerousness to free society "as he sits here

today." The reality is that Mr. Guevara, like any other capital defendant does not just "sit there." He goes somewhere. Where does he go? Prison. How long does he stay there? For 40 years. Where does he go then? Perhaps into free society?

The promise of the 40-year rule is to protect free society. Special issue number one protects society as a whole, whether it is prison society or free society. If the State proves the defendant is a continuing threat to either society they are entitled to a yes answer for the protection of that society. But what the State cannot do, given our law of mandatory incarceration for 40 years, is to obtain a verdict based upon insufficient proof. It is indeed a lie to ask a jury to make a prediction that Mr. Guevara will be a threat now to free society when they are told he is not going to be in that society for at least 40 years.

The reason the Supreme Court reversed the death sentence in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) was that the prosecutor asked the jury to sentence the defendant to death based upon a danger that did not exist, under South Carolina law. He suggested to them that the defendant would be a danger to free society when in fact the life without parole law meant the defendant would never be in free society. In Texas the parole law means the same thing for a defendant like Mr. Guevara: he will never be paroled into free society, no matter how "eligible" he may be. The prosecutors may not be forbidden to make a future dangerousness argument, because the possibility of parole into free society does exist, if only as a tiny light flickering at the end of a 40-year tunnel. However, for a certain kind of defendant - including one convicted of multiple

murders, such as Mr. Guevara -- that light is extinguished by the powerful onrush of the evidence that precedes him into that tunnel. He will never be a continuing threat to free society.

With that said, Mr. Guevara is fully cognizant of the negative view the Fifth Circuit has taken regarding these claims. *See Wheat v. Johnson*, 238 F.3d 357, 362 (5th Cir. 2001); and *Hughes v. Johnson*, 191 F.3d 607, 617 (5th Cir.1999), *cert. denied*, 528 U.S. 1145 (2000). Mr. Guevara is aware of the numerous holdings in this Circuit regarding *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), and *Brown v. Texas*, 522 U.S. 940, 118 S.Ct. 355 (1997)(dissenting mem. op.). But the reasoning and rationale of the Court of Appeals, in the *Simmons'* area, is, with all respect, singularly myopic. In rejecting the challenges of a condemned man regarding abject failure of the jury to have any knowledge whatsoever of what a "life" sentence means in Texas, there is no reasoned decision on whether the appropriate sentence is life or death. In *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J. concurring), various death penalty schemes in the United States were determined to be unconstitutional because, in part, the statutes were resulting in "wantonly and freakishly" imposed sentences. A jury with no information or a misunderstanding of the process cannot impose a sentence of death without a wanton or freakish outcome. It is not possible.

He would not have even been eligible for parole until he was almost 60 years old. The prospect of him actually being paroled, was literally next to nil. *Brown v. Texas* presents the

most compelling argument for the reversal of petitioner's case. As this court is well aware, *Brown* was an opinion issued respecting the denial of the petition for writ of certiorari but bringing into question the sentencing scheme in Texas. Four current Supreme Court justices agreed that there is a tension between Texas' sentencing statute and the decision of the Court in *Simmons*. *Brown*, 522 U.S. at 940, 118 S.Ct. at 355. The crux of their argument was the fact that truthful information was being kept from the jury. *Id.* Although parole decisions are uniquely an executive branch function, if an inmate is ineligible for a certain period of time – the jury should have that information. Without it, "[t]he situation in Texas is especially troubling." *Brown*, 522 U.S. at 940, 118 S.Ct. at 356. The four Justices further noted the perversity of Texas law which mandates the instruction in *noncapital cases* but precludes it when death is sought. "The Texas rule unquestionable tips the scales in favor of a death sentence that a fully informed jury might not impose." *Id.*

Issue Number Eleven: The Continuing Threat Special Issue Was Unconstitutional, as Applied to Obtain the Death Penalty, Because That Issue Was Not Susceptible to Proof Beyond a Reasonable Doubt and the Jury Could Not Apply the Rule for Decision (Beyond a Reasonable Doubt) Fairly in the Context of the Punishment Question.

When a system, like the criminal justice system, is based upon the need to make decisions, to render judgments, it is inevitable that some of the decisions will be wrong; errors will be made. There is a necessity, then, to establish in advance a rule for decision, a framework that will designate what type of error is more to be avoided. The criminal justice system is based on the judgment that it is better to err on the side of freeing the guilty than convicting the innocent, so that the rule for decision favors the accused; the burden of proof is on the State and it is weighted toward the defense with the degree of proof: beyond a reasonable doubt. As one commentator noted:

> This "special issue" was subsequently adopted as a capital sentencing aggravating factor by many jurisdictions throughout the United States. It is **understandable from a strategic as well as specific deterrent perspective that this issue would get broad traction at capital sentencing** and more specifically in federal capital sentencing. **Concerns with the future violence of a capital defendant may have significant or even primary influence on a capital jury's sentencing verdict** (Blume and Garvey 2001; Geimer and Amsterdam 1988; Sandys 1991; Costanzo and Costanzo 1992, 1994). (emphasis supplied).

Mark D. Cunningham, Thomas J. Reidy, Jon R. Sorensen, *Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, 32 Law & Hum. Behav. 46, 46 -47 (Feb. 2008).

In the Texas death penalty scheme, specifically the continuing threat special issue, the

rule for decision: proof beyond a reasonable doubt, cannot be fairly applied, and was not fairly applied in the circumstances of Mr. Guevara's case.

The rule for decision embodied in the standard of proof beyond a reasonable doubt is that the factfinder is supposed to favor an "erroneous acquittal" over an erroneous conviction: "When in doubt, acquit." Instead, in the circumstances of this case, at the punishment phase of the Texas trial, the jury will not tolerate any doubt, much less a "reasonable doubt" defined as "the kind of doubt that would cause them to hesitate to act in the most important of their own affairs" of the defendant's being one day paroled into free society.

The circumstances of the increased period of mandatory imprisonment have affected the validity of the operation of the continuing threat special. The State is able to take advantage of what is (Mr. Guevara submits) an entirely illusory possibility of parole to suggest to the jury that if the Defendant were ever released on parole he would be a danger to free society. That mere possibility has the inevitable effect of reducing the prosecution's burden of proof to virtually zero. The burden of proof, the rule for decision, means that the jurors are supposed to answer "no" to the special issue if they believe the Defendant would not be a threat to free society (which conclusion they could reach based upon a belief he would never be released into free society) or if they have a reasonable doubt about that prediction. Instead, they are likely to answer "yes" based on the mere possibility of parole release, without holding the State to their burden of proof beyond a reasonable doubt. They

will interpret a reasonable doubt to mean any tiny degree of doubt, because they are not willing to tolerate any risk, at whatever time, of the defendant's release.

Mr. Guevara incorporates by reference the discussion of the testimony already set out in this writ. Suffice it to say here that the jury knew that Mr. Guevara would not be eligible for parole until he was over 60 years old. They also knew from the charge that they could not predict whether he would be released on parole then.

The jurors were charged at punishment in terms of Art. 37.071, Sec. 2, V.A.C.C.P. They were told:

> The State must prove Special Issue No. 1 submitted to you beyond reasonable doubt, and you shall return a Special Verdict of "YES" or "NO" on Special Issue No. 1.
>
> * * *
>
> It is not required that the State prove Special Issue No. 1 beyond all possible doubt; it is required that the State's proof excludes all "reasonable doubt" concerning the defendant.

Argument and Authorities.

The United States Constitution requires the State to prove a statutory aggravating factor beyond a reasonable doubt in a death penalty case. *Walton v. Arizona*, 497 U.S. 639 (1990). When the State has life without parole, the prosecutor cannot argue that the defendant is a continuing threat or a future danger to society without also telling the jury that the defendant can never be released into free society. That truth-in-sentencing rule tells the prosecutors they cannot mislead the jury with the possibility of the defendant's danger to free society unless he might be in free society. They must have information to arrive at a rational

answer to the discrete questions of danger in prison society and/or danger in free society after 40 years. If the defendant can be shown to be a danger in prison society, the State may obtain a yes answer based on that evidence, but according to the rule in Simmons, the State may not mislead the jurors by raising a danger that does not exist. As a necessary corollary to that restriction, the State may not exaggerate the danger that does exist, under the existing law. *See, Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994); *Shafer v. South Carolina*, 121 S.Ct. 1263 (2001). The jury faces a decision-making problem. Just as in many fields, decision makers in the legal field are often faced with uncertainty in the course of their duties, yet some norm of decision-making has to be established so that uncertainty will not paralyze the system, which must proceed. These norms are (must be) based on the assumption that some types of error are more to be avoided than others. The assumption becomes so basic that it is usually taken for granted and seldom discussed; it is slow to change or won't be changed. The standard itself has never been changed in American criminal jurisprudence but the Texas courts briefly adopted, then discarded, the definition of the standard.

In England and the United States, in criminal trials, there is and has been an explicit rule for arriving at a decision in the face of uncertainty: "A person is innocent until proven guilty." "Proven" is clarified by the requirement that the evidence of guilt (or continuing threat) must be compelling beyond a reasonable doubt. The command of the rule of decision is, "When in doubt, acquit." The jury must not be equally wary of an erroneous conviction

and an erroneous acquittal: the error that is to be avoided, according to the rule of decision, is the erroneous conviction (here, the erroneous prediction that the defendant will be a continuing threat, which is the death decision). The command of the rule is, "When in doubt: answer no to continuing threat." The concept is often expressed by a familiar maxim. "Better a hundred guilty men go free, than one innocent man be convicted." Translated into context of punishment in Texas death penalty cases, in which the only aggravating factor concerns the protection of society, rather than retribution, the rule dictates, "Better a hundred dangerous men be confined for life than one non-dangerous man be executed."

The consequences of the rule, for society, are far less serious in the death penalty punishment context than in the guilt phase, in that the man wrongly "acquitted" of future dangerousness does not go free, but is imprisoned for life. So, if we as a society continue to maintain the rule at the trial itself, how much more easily should it be accommodated as the rule for determining whether a convicted capital murderer is executed or is given a sentence of life in prison? It is assumed that in most cases a conviction, if erroneous, will do irreversible harm to the individual, who is seen as weak and defenseless in relation to the community and deserving of the protection of being presumed innocent. An erroneous acquittal, on the other hand, damages society because the person who actually committed a crime goes unpunished and may commit additional crimes. The deterrent effect of punishment for the rest of society is reduced, also, if it becomes known that a guilty person went free. To this point, the American system has judged that society is able to sustain these

damages without serious consequences, or at least without consequences that outweigh those of erroneous conviction of an innocent individual.

The average person's reaction to the fact that the probability of a dangerous inmate's being released into free society, where he would be a threat, is about one in a million, is usually that this is a real risk, which he will not accept. Yet this is roughly the risk of death he unthinkingly accepts in taking a cross-country trip in an airplane or automobile. A juror is reluctant to take risks in this area of the same degree as risks routinely encountered and accepted in "the most important of their own affairs."

The jurors are not likely to accept any risk, however small, that Mr. Guevara may be released into free society, even 40 years in the future.

The rule of decision: proof beyond a reasonable doubt, requires the jurors to favor a life answer (an "acquittal") if they face the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs. The risk the Texas jury is assessing is not the immediate risk of the defendant's being a threat to free society; it is the risk that he will be released into free society in 40 years, where the evidence tells them he will probably still be a threat. The question for the jury then becomes not so much a question of predictive fact as a moral question, and the jurors are not likely to tolerate any risk at all in the circumstances.

Mr. Guevara has argued that the more dangerous the convicted capital murderer, the less likely it is that any authority would ever release him into free society. The logical,

rational answer to the continuing threat special issue in such a case is "no." Yet, the concept of reasonable doubt in this case instead makes a "yes" answer inevitable. Mr. Guevara's argument in this point of error is a corollary to his argument that the evidence was insufficient to support the jury's answer to the continuing threat special issue. The burden of proof was not, could not have been, applied fairly in this case. Instead, the process resulted in a death sentence that was arbitrary and capricious, rather than a sentence that was based on the finding of proof beyond a reasonable doubt. Such a sentence violates the Eighth Amendment protections against the imposition of an arbitrary death sentence, and mandates reversal of Mr. Guevara's punishment verdict.

Issue Number Twelve: the Dual-track Habeas Application System Violates Due Process of Law, as Guaranteed by U.S. Const. Amend. XIV.

Again, Mr. Guevara is well aware of the rejection of this issue. As Judge Hughes recently explained in an unpublished opinion:

> Wilson fails to raise a cognizable habeas corpus claim. Habeas relief under 28 U.S.C. § 2254 is only available if a petitioner shows that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). No Supreme Court authority has held that state habeas proceedings must run consecutive to and independent from a capital inmate's direct appeal. In fact, States have no obligation to provide habeas relief at all. *See Murray v. Giarratano*, 492 U.S. 1, 10, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings[.]"); *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) ("States have no obligation to provide [a habeas] avenue of relief."). Importantly, Wilson's challenge to Texas's method of permitting habeas review does not call into question the constitutionality of his conviction and sentence. See Nichols v. Scott, 69 F.3d 1255, 1275 (5th Cir.1995) ("An attack on a state habeas proceeding does not entitle the petitioner to habeas relief in respect to his conviction, as it 'is an attack on a proceeding collateral to the detention and not the detention itself.' "), *cert. denied*, 518 U.S. 1022, 116 S.Ct. 2559, 135 L.Ed.2d 1076 (1996). Because post-conviction proceedings are, by definition, collateral to an inmate's conviction and sentence, "infirmities in state habeas proceedings do not constitute grounds for federal habeas relief." *Duff-Smith v. Collins*, 973 F.2d 1175, 1182 (5th Cir.1992); *see also Rudd v. Johnson*, 256 F.3d 317, 320 (5th Cir.) ("[A]n attack on the state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself."), *cert. denied*, 534 U.S. 101 (2001).

Wilson v. Dretke, 2006 WL 213989, 9(S.D.Tex. 2006). However, it must be fairly presented before this court for consideration. Mr. Guevara contends that Art. 11.071, V.A.C.C.P. is unconstitutional, on its face and as applied, because it distorts the historic purpose of a postconviction application for writ of habeas corpus. Not merely the form of

the writ of habeas corpus, but its efficacy as well, is guaranteed by the Texas Constitution. Furthermore, the role of the writ of habeas corpus is so well established in American law that it should be regarded as part of the due process of law guaranteed by U.S. CONST. amend. XIV. The problem begins with the statute itself, as enacted in 1995. Prior to that time there was no fixed statutory timetable for filing a postconviction habeas application. As of the effective date of September 1, 1995, a habeas application must be filed within the time period specified by section 4 of Article

Two alternative provisions apply. An application must be filed 180 days after appointment of counsel, or 45 days after the filing of the State's brief on direct appeal, whichever is later. Only one 90-day extension is permitted. Because this makes the direct appeal and habeas application time periods overlap, rather than having the direct appeal process precede the habeas process, Mr. Guevara will refer to the amended system as the "dual-track" system.

Under the statute, Mr. Guevara's first application for writ of habeas corpus was due no later than December 26, 2002 and is being filed by that date, even though the direct appeal process in Mr. Guevara's underlying case was not complete. Indeed, the direct appeal in this case had not yet been decided when the state writ was filed. This did not even take into account the additional period of time for filing a petition for writ of certiorari on direct appeal, a step which has become indispensable for effective representation because of harsh constraints placed on federal habeas review by 28 U.S.C. §2254(d)(1).

(B) The importance of a postconviction habeas process. At least in the United States, the writ of habeas corpus commonly has been used for postconviction relief. In this context "postconviction" does not merely mean relief sought after the entry in the trial court of a judgment of conviction, but rather means relief sought after the direct appellate process has become final. There are two primary reasons for this.

In theory the dual-track system allows for development of an adequate record just as the old system did, but in practice something of great value is lost. A Court sometimes finds an appellate record inadequate in ways that defense counsel on direct appeal might not foresee and which the State might not raise in response It is much easier for habeas counsel to make sure an adequate record is presented once he has the benefit of the Court's assessment, on direct appeal, of the adequacy of the direct appeal record.

Second, a mechanism which operates after the direct appeal process is necessary because issues of ineffectiveness of counsel, either at trial or on direct appeal, probably cannot be developed adequately while the direct appeal is still in progress, and even if they can, the conflict generated is inherently damaging. There are several specific problems of this type, six of which are noted here. Whether or not trial counsel was effective in preserving error, and whether or not that mattered, might not be clear until after a direct appeal opinion is issued. Additionally, in many instances the attorney on direct appeal may have been trial counsel. This is a factor which should be considered in examining the whole picture. Either due to pride, or simply due to having been too close to a case for a long time,

counsel functioning in the double role of both trial counsel and appellate counsel may fail to notice shortcomings in his own performance, such as failure to preserve error, with the result that an issue is shot down on direct appeal due to something for which counsel, rather than an appellant, should take the blame. It is true that nothing inherently prevents habeas counsel in a dual-track system from pointing out this flaw, but the result may be a destructive contradiction in the positions taken by direct appeal counsel and habeas counsel - the former insisting that error is preserved (or that non-preservation is excusable), the latter insisting that error is not preserved due to inexcusable neglect by the trial/direct appeal attorney. This would be unseemly even in a non-capital case, but with a life at stake the creation of this dilemma borders on cruelty. This dilemma also cannot improve the image of the judicial system's treatment of the death penalty in Texas, which already has suffered precisely because of criticism of counsel.

Also, even if direct appeal counsel is not the same attorney who tried the case, the same type of conflict as discussed above can exist. That is, even with no personal stake in what may be said about trial counsel, the attorney on direct appeal naturally must argue either that error was preserved or that non-preservation is excusable, while habeas counsel must argue the opposite view in pursuing an ineffectiveness claim. This leads to the further question whether habeas counsel, disagreeing with direct appeal counsel, must argue that direct appeal counsel is ineffective, in the sense of impeding habeas counsel's function, when he tries to avoid a finding of procedural default. Again, the likely finger-pointing cannot be

good for justice or the image of justice.

What if direct appeal counsel simply misses an issue? Habeas counsel cannot raise it on its merits if it was available to direct appeal counsel, under the principle that habeas review is not a substitute for direct appeal. Therefore habeas counsel who must file an application while a direct appeal is pending is compelled to argue that direct appeal counsel is ineffective, in the hope of forcing a new direct appeal which includes the missed issue. Mr. Guevara has included such a claim in this application. How does that make direct appeal counsel look at a time when his persuasiveness on direct appeal and the Court of Criminal Appeals' confidence in his arguments could make a critical difference? How does that make the system look?

Mr. Guevara also contends that a postconviction habeas application, rather than a dual-track system, is a component of due process of law. It is true that not every procedural safeguard is automatically incorporated in due process, but some mechanisms are so well entrenched in the Anglo-American tradition of criminal procedure that they are incorporated in due process. The Interpretive Commentary to VERNON'S CONSTITUTION OF THE STATE OF TEXAS, ANNOTATED, at 403 observed that the writ of habeas corpus is "regarded as a fundamental part of the English common law." It was incorporated in an English statute as early as 1697. The United States Constitution provided for it even before the Bill of Rights was adopted. U.S. CONST. Art. I, §9. Habeas has often been called the "Great Writ." While the writ of habeas corpus may be used in several contexts, all of them

share one characteristic: the routine processes of the law are inadequate to provide redress. Nowhere is that more true than in the use of postconviction habeas applications.

The dual track system provided an inadequate state review for Mr. Guevara's claims.

Issue Number Thirteen: this Court must Follow the Decision of the International Court of Justice and Provide Relief on the Basis of Texas' Violation of Mr. Guevara's Rights under Article 36 of the Vienna Convention on Consular Relations.

The United States Supreme Court recently considered the following issues in *Medellin v. Texas*:

> First, is the ICJ's judgment in Avena directly enforceable as domestic law in a state court in the United States? Second, does the President's Memorandum independently require the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in Avena without regard to state procedural default rules? We conclude that neither Avena nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.

Medellin v. Texas, 128 S.Ct. 1346, 1353 (2008). In determining that Mr. Medellin was not subject to relief, the Court held:

> None of this is to say, however, that the combination of a non-self-executing treaty and the lack of implementing legislation precludes the President from acting to comply with an international treaty obligation. It is only to say that the Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect. That is, the non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts. The President may comply with the treaty's obligations by some other means, so long as they are consistent with the Constitution. But he may not rely upon a non-self-executing treaty to "establish binding rules of decision that preempt contrary state law."

Medellin, 128 S.Ct. At 1371. Additionally, the Court explained that this issue should have been raised at the trial court or on direct review:

> Medellín first raised his Vienna Convention claim in his first application for state postconviction relief. The state trial court held that the claim was procedurally defaulted because Medellín had failed to raise it at trial or on

> direct review. The trial court also rejected the Vienna Convention claim on the merits, finding that Medellín had "fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment." *Id.*, at 62.FN1 The Texas Court of Criminal Appeals affirmed. Id., at 64-65.

Medellin, 128 S.Ct. at 1354 -1355. That holding can be considered specific for Mr. Medellin based upon the facts of his case.

There is a paper in the State's answer which stated that Mr. Guevara requested the consulate be notified. (Exhibit J). But there is no showing this was *ever* done. This, in and of itself, differentiates Mr. Guevara's claim from Mr. Medellin's claim.

A. Article 36 of the Vienna Convention on Consular Relations Provides Foreign Nationals Who are Detained by State or Federal Authorities the Rights to Consular Notification and Assistance.

Both the United States and El Salvador are parties to the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention"). Article 36 of the Vienna Convention requires that nationals of one country who are arrested in another country must be advised "without delay" that they have the right to communicate with a consular officer of their government. Upon the request of an arrested national, the arresting authorities must, also without delay, notify the consular officers of the foreign national's home country and permit them full access to the prisoner.

The right of consular access is so rooted in the universally recognized proposition that a national of one country who is arrested or detained in another country faces special

difficulties not confronted by nationals of the arresting state that the U.S. Department of State has recognized it as part of customary international law that must be followed even in the absence of a treaty. U.S. Department of State, Assistance to U.S. Citizens Arrested Abroad, at http://travel.state.gov/arrest.html (last visited Aug. 16, 2001). While language is a tremendous barrier, cf., *e.g., Chacon v. Wood*, 36 F.3d 1459, 1464-65 (9th Cir. 1994), even if the foreign national can speak the language of the arresting state, he may know little if anything about the laws on which his arrest is based, the procedures followed by the arresting state, his rights under the arresting state's legal system, the choices available to him in dealing with the local laws and authorities, or the risks attendant on these various choices. Luke T. Lee, Consular Law and Practice (2d ed. 1991) ("Lee") at 145 (quoting United States Dept. of State Telegram 40298 to United States Embassy in Damascus 21 Feb. 1975).

The difficulties of confronting arrest and trial under an unfamiliar legal system may be exacerbated by local variations in law and procedure within the arresting country. While nationals of the arresting state can be expected to be aware that such variations exist, foreign nationals may have no reason to know of them. At the most basic level, a foreign national will often be unfamiliar with local police customs and policies regarding interrogation and investigation of crimes. See Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 Hous. J. Int'l L. 375, 376-77 (1997) ("Uribe"); S. Adele Shank & John Quigley, *Foreigners on Texas' Death Row and the Right of Access to a Consul*, 26 St. Mary's L.J. 719, 720 (1995). A

foreign national may also be unaware of the circumstances under which he is entitled to legal counsel in the country of his arrest and is unlikely to know a skilled lawyer or even how to find one.

In cases where the foreign national is charged with a crime "particularly a serious crime carrying a severe penalty" consular assistance is an indispensable complement to the usual trial rights and protections afforded by U.S. courts to "level the playing field" for defendants who suffer the disadvantages of dealing with a strange legal system, in a strange language, in a strange country. "The consul is in a unique position to offer information to the detainee about the legal system in which he is detained in comparison to his home legal system." Linda Jane Springrose, Note, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 Geo. Immigr. L.J. 185, 195 (1999) ("Springrose"). The State Department "has described the right of access as a 'cultural bridge' which '[n]o one needs . . . more than the individual . . . who has been arrested in a foreign country.'" Id. (citation omitted). Indeed, "[c]onsular officials can eliminate false understandings and prevent actions which may result in prejudice to the defendant." Ledezma v. Iowa, 626 N.W. 2d 134, 152 (Iowa 2001) (citing Springrose, 14 Geo. Immigr. L.J. at 195).

As the Chief Judge of the First Circuit recently observed, "[a] consular official offers two things of utmost importance to detained nationals: (1) the familiar background, language, and culture of the alien's homeland, and (2) a familiarity with the criminal system threatening

to take away the alien's liberty." He concluded that, "[w]ithout these aids . . . we presume too much to think that an alien can present his defense with even a minimum of effectiveness. The result is injury not only to the individual alien, but also to the equity and efficacy of our criminal justice system." United States v. Li, 206 F.3d 56, 78 (1st Cir. 2000) (Torruella, C.J., concurring and dissenting). Because of these benefits, "consular notification and access are absolutely essential to the fair administration of our criminal justice system" since "diplomatic officials are often the only familiar face for detained nationals, and the best stewards to help them through the ordeal of criminal prosecution." Id.

The concern about equal footing applies not just to foreign nationals in the United States, but also to Americans traveling, working and living abroad in any country that also is party to the Vienna Convention. Accordingly, the United States has long insisted that other States Parties promptly comply with the Convention's notification requirement, terming it an obligation "of the highest order." Lee at 143 (quoting United States Department of State File L/M/SCA; United States Department of State, Digest, 1973, p. 161). See also Li, 206 F.3d 56 at 74 75, 78 (State Department insistence that "[i]n all cases, the foreign national must be told of the right of consular access.") (Torruella, C.J., concurring and dissenting).

Prejudice at the Guilt and at the Penalty Phase

Had the consulate been properly notified, the Salvadoran authorities would have been able to provide the same effective assistance to Mr. Guevara and his trial counsel that they have provided to habeas counsel. The matters set out in the first three claims of this application

would have been available to assist Mr. Guevara from the earliest stages of the case. Consular officials would have advised Mr. Guevara in no uncertain terms that he should not speak to any law enforcement officer without first speaking with an American attorney. In a case such as this, the timely intervention of consular authorities may have a significant impact on the exercise of prosecutorial discretion. Salvadoran consular officials would have assisted in the development of mitigating evidence at the earliest possible moment, as relevant information to be presented by them to the prosecutor as grounds for seeking a life sentence. That comprehensive development of mitigation would have revealed the factors (set out in the first three claims) compelling evidence of reduced culpability. Such evidence was precisely what was required to persuade the prosecutor that Mr. Guevara, despite evidence of his guilt, did not meet the narrow criteria for a death sentence under Texas law. There is nothing speculative about the assertion that foreign consular assistance can and does avert disproportionate or unfair death sentences. As a starting point, one need only look to the evidence recently gathered by lawyers, investigators, and mental health experts. See discussion of facts, supra, and affidavits of Ms. Vitale and Dr.Cervantes. Habeas counsel has expended funds and developed additional facts relevant to Mr. Guevara's defense at punishment. El Salvadoran consular officials could have provided those funds at a time when the investigation would have been far more meaningful. Before trial, the consulate could have assisted in arranging for a bilingual investigator to travel to El Salvador to investigate the circumstances of Mr. Guevara's life in that country. Based on the significant

family and personal history information these experts have discovered, we now know that trial counsel failed to unearth a wealth of mitigating evidence that would, in all likelihood, have resulted in a life sentence if presented at trial. Nothing could be more prejudicial than the absence of this evidence from the trial, and nothing could be clearer than that the denial of El Salvador's consular aid is the cause of this prejudice.

Given trial counsel's lack of preparation, the willingness and ability of the El Salvadoran Consulate to find other counsel would also have been a turning point for Mr. Guevara. If the Consulate had been involved, Mr. Guevara would have had a different defense team comprising experienced counsel, either working with appointed counsel or retained by El Salvador in their place, who would have investigated and prepared a meaningful mitigation case. With El Salvador's assistance, counsel could have conducted extensive interviews with Mr. Guevara's Spanish-speaking family. Consular officials would have assisted them in compiling a detailed and complete life history of their client.

Because the rules of the Vienna Convention were violated and Mr. Guevara was harmed thereby, he respectfully asks this Court to grant relief in the form of a new trial.

Issue Number Fourteen: the Prosecution's Introduction of Unadjudicated Offenses to Secure a Death Sentence Violated Mr. Guevara's Rights under the Principles of Ring v. Arizona and International Law.

The Prosecution Relied on Testimony Regarding Unadjudicated Offenses to Secure a Death Sentence Against Mr. Guevara

The prosecution persuaded the jury to sentence Mr. Guevara to death by introducing evidence of crimes for which he had not been convicted. The jury was free to rely on these other offenses, and indeed the prosecutor asked them to consider the unadjudicated offenses in finding Mr. Guevara was a continuing threat. (e.g., R.R. 19-8)

Although the evidence of the case-in-chief was available for the jury's consideration on future dangerousness, the prosecution felt it necessary to rely on unadjudicated offenses to secure this death sentence.

Mr. Guevara's Death Sentence Violates the Rule Announced in *Ring* and *Apprendi* That Every Fact That Increases Punishment Must Be Contained in the Indictment and Proven Beyond a Reasonable Doubt to a Unanimous Jury.

Mr. Guevara's death sentence must be reversed and vacated because his indictment failed to state the aggravating factors, ie., the "facts" that increased his sentence from "life in prison" to "death." Additionally, the death sentence is unconstitutional because the State was not required to prove, nor was the jury required to find the facts justifying a death sentence beyond a reasonable doubt. Instead, the jury was only required to find that there was a "probability" that Mr. Guevara would be a future danger. Further, there was no evidentiary threshold of proof, nor a requirement of jury unanimity regarding the unadjudicated crimes relied upon by the State to prove dangerousness.

The United States Supreme Court's recent decisions in Apprendi and Ring clearly require that every fact that increases punishment must be contained in the indictment and proven to a unanimous jury beyond a reasonable doubt. Because Mr. Guevara's death sentence was imposed in clear violation of that constitutional rule of law, this Court should vacate his death sentence.

Mr. Guevara's Death Sentence Is Invalid Because the Elements of the Offense Necessary to Establish Capital Murder Were Not Charged in the Indictment.

Mr. Guevara was charged by indictment with capital murder. That document alleged that he committed the crime of murder in the course of committing or attempting to commit a robbery. Under Texas law, the "maximum penalty" for that crime was imprisonment for life unless the jury made an additional finding: (1) that there was a probability that Mr. Guevara posed a continuing threat to society. Art. 37.071, Sec. 2(e)(1), Vernon's Ann. C.C.P. If the jury failed to find sufficient facts to support future dangerousness, the maximum sentence was life in prison. Thus, the aggravating factor increased the maximum penalty from life in prison to a death sentence.

Despite the fact that future dangerousness were necessary prerequisite to increase the penalty from life in prison to a death sentence, that accusation was not contained in Mr. Guevara's indictment. The failure to include that necessary element in the indictment renders his death sentence unconstitutional.

Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact

(other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones, at 243, n.6. *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. In *Ring v. Arizona*122 S.Ct. 2428 (2002) the United States Supreme Court held that the rule of *Jones* and *Apprendi* applies with equal force to capital cases. Aggravating factors operate as the functional equivalent of an element or a greater offense. *Ring,* 122 S.Ct. at 2443. "The relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494.

The CCA has repeatedly held that aggravating circumstances in a capital murder case are not "elements" of the crime. *See, Moore v. State*, 969 S.W.2d 4, 13 (Tex. Crim. App. 1998); *Callins v. State*, 780 S.W.2d 176, 186-87 (Tex. Crim. App. 1989). However, as stated above, the critical inquiry is not the label, but whether the facts increase the maximum penalty otherwise available. Indeed, as Justice Scalia noted in his concurring opinion in Ring, the state could call the facts "elements of the crime," "sentencing factors," or "Mary Jane," and the analysis would be identical: failure to state those facts in the charging document renders the sentence unconstitutional. 122 S.Ct. at 2444.

Indeed, on June 28, 2002, after the Court's decision in *Ring*, the death sentence imposed in *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), was overturned when the Supreme Court granted the writ of certiorari, vacated the judgment of the United States Court of Appeals for the Eighth Circuit upholding the death sentence, and remanded the case for

reconsideration in light of *Ring*'s holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. *Allen v. United States*, No. 01-7310, 2002 U.S. LEXIS 4893 (June 28, 2002). Allen had his death sentence vacated, and the Eighth Circuit explained:

> In other words, the same facts that the Sixth Amendment requires to be proven to the petit jury beyond a reasonable doubt in state and federal prosecutions must also be found by the grand jury and charged in the indictment in federal prosecutions. We therefore conclude that the Fifth Amendment requires at least one statutory aggravating factor and the mens rea requirement to be found by the grand jury and charged in the indictment. *See United States v. Robinson*, 367 F.3d 278, 284 (5th Cir.), *cert. denied*, 543 U.S. 1005, 125 S.Ct. 623, 160 L.Ed.2d 466 (2004); *United States v. Higgs*, 353 F.3d 281, 299 (4th Cir.2003), *cert. denied*, 543 U.S. 999, 125 S.Ct. 627, 160 L.Ed.2d 456 (2004); *United States v. Quinones*, 313 F.3d 49, 53 n. 1 (2d Cir.2002), *cert. denied*, 540 U.S. 1051, 124 S.Ct. 807, 157 L.Ed.2d 702 (2003). The indictment must include at least one statutory aggravating factor to satisfy the Fifth Amendment because that is what is required to elevate the available statutory maximum sentence from life imprisonment to death. In turn, at least one of the statutory aggravating factors found by the petit jury in imposing the death sentence must have been one of the statutory aggravating factors charged by the grand jury in the indictment. *See Higgs*, 353 F.3d at 299 n. 7. The same is true of the mens rea requirement.

United States v. Allen, 406 F.3d 940, 943 (8th Cir. 2005).

The State may argue that Allen can be distinguished because it involves the Fifth Amendment's grand jury requirement, a federal constitutional clause that is not applicable to the states. This distinction makes no difference for two reasons. First, the notice requirements of the Sixth and Fourteenth Amendments, which are applicable to the states, likewise require the inclusion of every element of the crime in the charging document. See, *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *United States v. Gaytan*, 74 F.3d 545 (5th Cir.

1996)("the Sixth Amendment requires that an indictment 'enumerate each prima facie element of the charged offense.'") The failure of the indictment to include the necessary elements that elevated Mr. Guevara's maximum sentence to death requires relief. *Ball v. United States*, 140 U.S. 118, 136 (1891); *United States v. DuBo*, 186 F.3d 1177 (9th Cir. 1999).

Relief is also required because only Mr. Guevara's grand jury could have decided whether the indictment should include all the elements of capital murder. Like the Fifth Amendment to the United States Constitution, the Texas State Constitution guarantees that "no one shall be held to answer for a criminal offense, unless on an indictment of a grand jury" Tex. Const. Art. I Sec. 20. See also, Tex. Const. Art. V Sec.12 (b); Art 1.141 V.A.C.C.P.(prohibiting waiver of right to be accused by indictment of a capital offense). The most "celebrated purpose" of the grand jury "is to stand between the government and the citizen" and protect individuals from the abuse of arbitrary prosecution. *United States v. Dionisio*, 410 U.S. 19, 33 (1973). The shielding function of the grand jury is uniquely important in capital cases. It is impossible to know whether the grand jury in this case would have returned an indictment alleging the presence of the aggravating factors of deliberateness and dangerousness. The State's authority to decide whether to seek the execution of an individual charged with a crime hardly overrides "in fact is an archetypical reason for" the constitutional requirement of neutral review of prosecutorial intentions.

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall

be informed of the nature and cause of the accusation". A conviction on a charge not made by the indictment is a denial of due process. *Thornhill v. Alabama*, 310 U.S. 88 (1940). Because the State did not submit to the grand jury, and the indictment did not state, all the elements of the crime necessary to return a death sentence, Mr. Guevara's constitutional rights under both the Texas and United States Constitutions were violated.

In making the "continuing threat" or dangerousness finding the jury was instructed that they had to find that there was a "probability" that Mr. Guevara would commit criminal acts of violence. See Art. 37.071, Sec. 2(c), V.A.C.C.P. This burden of proof was constitutionally deficient.

The rule in *Apprendi* and *Ring* is clear: any fact that increases punishment must be proven beyond a reasonable doubt. 122 S.Ct. at 2349. Facts that expose a defendant to a punishment greater than that otherwise legally prescribed are elements of the offense and must be proven beyond a reasonable doubt. The "facts" relied upon by the State to prove future dangerousness in this case were the facts of the unadjudicated extraneous offenses. However, the jury was not required to find "beyond a reasonable doubt" that Mr. Guevara committed those crimes, nor were they required to unanimously agree that it had been proven. Instead, some jurors could have found that these facts had been proven beyond a reasonable doubt and justified a finding of dangerousness, while others could have found that there were only proven by a preponderance of the evidence, while other jurors rejected the extraneous offenses entirely. Allowing individual jurors to decide for themselves whether

an unadjudicated crime has been satisfactorily proved runs afoul of the principles set forth in Apprendi and Ring. As Justice Scalia wrote in his concurrence in *Apprendi*:

> "[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury."

530 U.S. at 483. Those facts must be found beyond a reasonable doubt. No such requirement existed in this case.

"The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applied to both." *Ring*, 122 S.Ct. at 2443. Thus, Mr. Guevara's death sentence should be vacated and reversed.

After thoroughly reviewing circumstances similar to those detailed in the present case, the Inter-American Commission on Human Rights determined that "the State's conduct in introducing evidence of unadjudicated foreign crimes during [a] capital sentencing hearing was antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes." Accordingly, the Commission found that the introduction of unadjudicated offenses violated the defendant's right to a fair under Article XVIII of the American Declaration, as well as his right to due process of law under Article XXVI of the Declaration. Report No. 52/01, Case 12.243, Juan Raul Garza, para 110.

Based on that determination, there is little need to elaborate on the clear violation of

Mr. Guevara's selfsame rights to due process and a fair trial. However, Mr. Guevara submits that the circumstances in his case are even more egregious. In Garza, the Commission determined that "during the sentencing hearing, the jury concluded beyond a reasonable doubt that Mr. Garza committed the four killings in Mexico, and considered his responsibility for these crimes in determining whether he should be sentenced to death." *Id.*, para 86. Unlike the standard applied in the Garza case, capital juries in Texas are not required to find, "beyond a reasonable doubt," that the defendant committed the unadjudicated offense.

As has been cogently put, the use of evidence of unadjudicated crimes becomes a ploy that "allows the state to secure a conviction on a strong murder case, then seek the death penalty by providing a weak case before a jury which is undeniably prejudiced. This opens the door to death penalty recommendations upon a level of proof lower than proof beyond a reasonable doubt." *State v. McCormick*, 397 N.E.2d 276, 280 (1979). Because Mr. Guevara's jury based his death sentence on factors the State and not have to prove beyond a reasonable doubt, this Court should vacate his death sentence and remand for re-sentencing.

PRAYER FOR RELIEF

WHEREFORE. PREMISES CONSIDERED, it is respectfully requested that this Honorable Court

1. Vacate the petitioner's conviction.

2. Vacate the petitioner's sentence.

3. Issue a writ of habeas corpus so that the petitioner may be relieved of his illegal restraint of liberty, such restraint being founded upon an unlawful and unconstitutional conviction and sentence based upon ineffective assistance of counsel.

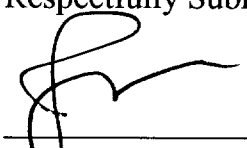
4. Permit discovery, pursuant to Rule 6, Rules - Section 2254 cases.

5. Allow the petitioner a period of time within which to file such amendments to this application as might be necessary to bring all proper matters before this Court.

6. Permit the filing of a traverse or reply to the state's answer.

7. Finally, to grant such other and further relief as this court may deem appropriate.

Respectfully Submitted,



JANI J. MASELLI
State Bar of Texas Number 00791195
808 Travis Street, 24th Floor
Houston, Texas 77002
(713) 757-0684

Attorney for Petitioner,
Gilmar Alexander Guevara

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2008, a true and correct copy of the foregoing pleading was served upon opposing counsel by depositing the same in United States Mail, first class, postage prepaid, addressed to:

Assistant Attorney General
Katherine Hayes
Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

JANIS J. MASELLI

VERIFICATION AS TO PETITIONER'S KNOWLEDGE

Jani Maselli, counsel in this case has met with Mr. Guevara, and has corresponded with Mr. Guevara, who is located at the Polunsky Unit in Livingston, Texas. Through meetings, correspondence, and discussions with his immediate family, we have explained all the claims raised in this federal application.

Accordingly, Petitioner Guevara has been fully informed of, and has consented to, claims raised in this petition. *See 28 U.S.C. § 2242*, and Advisory Committee Note on Rule 2(c); *Lucky v. Calderon*, 86 F.3d 923 (9th Cir. 1996).

I swear that the foregoing averments as to petitioner's acknowledgment and consent to issues raised are true and correct.

I swear that the alleged facts in this petition are true and correct to the best of my knowledge.

JANI J. MASELLI

Sworn and subscribed before me on May 21, 2008.

NOTARY PUBLIC - STATE OF TEXAS

DIANNA GREER
MY COMMISSION EXPIRES
January 12, 2010

Cause No. 847121-A

EX PARTE	§	IN THE DISTRICT COURT OF
	§	
	§	HARRIS COUNTY, TEXAS
	§	
GILMAR GUEVARA	§	183rd JUDICIAL DISTRICT

AFFIDAVIT

STATE OF TEXAS	§
	§
COUNTY OF HARRIS	§

BEFORE ME, the undersigned authority, on this day personally appeared Dr. Antolin M. Llorente who, after being by me duly sworn upon his oath, did say:

My name is Dr. Antolin M. Llorente, and Mr. Guevara was referred to me by Mr. Robert A. Morrow, Esq. for neuropsychological evaluation in an attempt to assess his present level of neuropsychological functioning and rule out mental retardation. The results of the evaluation are presented below.

REPORT OF NEUROPSYCHOLOGICAL EVALUATION
(Confidential)

Patient's Name:	GUEVARA, Gilmar
Date of Birth:	10-05-1969
Date of Evaluation:	08-25-2003
Chronological Age:	33 years, 10 months
Date of Report:	01-25-05; Rev. 03-05-05 (History)

Reason for Referral

Gilmar Guevara was referred by Robert A. Morrow, Esq. for neuropsychological evaluation in an attempt to assess his present level of neuropsychological functioning and cognitive functioning. Mr. Morrow referred Mr. Guevara in an attempt to rule-out mental retardation. Mr. Guevara was convicted of a capital crime in 2001, and he is presently on death row in Livingston, Texas (Polunsky Unit). He is presently receiving a medication (non-psychotropic) for migraine headaches administered by TDCJ.

Review of Records and Relevant History/Background Information

Mr. Guevara reportedly participated in a convenience store robbery in Houston, Texas. His arrest eventually led to his prosecution and conviction for capital murder. Although Mr. Guevara admitted being part of the robbery, he denied "shooting" the convenience store clerk, and he indicated that the weapon used in the robbery found in his possession had been "planted" by the individual who actually shot the store clerk. When asked, he indicated behaving appropriately while on death row, information confirmed by TDCJ officials.

Mr. Guevara reportedly was born in Santa Rosa de Lima, El Salvador. He has two brothers and two sisters. He was born at home, delivered by midwife substituting his scheduled midwife, and he reportedly experienced severe complications during his birth including an unduly extended labor and asphyxia. According to multiple sources (mother, employer, etc.), he grew up in an impoverished, deprived and unsanitary environment while in El Salvador.
He reportedly immigrated to the United States (U.S.) in 1985. Although he attended school for approximately four years in El Salvador, he did not receive any formal education in the U.S., and he went to work immediately upon arrival to this country.

Review of medical records indicated the absence of birth records. Review of other records provided by defense counsel indicated the presence of a complicated pregnancy (e.g., chicken pox in the mother), consistent with maternal report. Mr. Guevara reportedly also suffered from significant childhood illnesses including hepatitis (unknown type). In addition, Mr. Guevara was reportedly exposed to neglect (malnutrition) in his home, as well as exposure to significant violence during the war in El Salvador to the extent that he appears to have suffered from PTSD. Familial medical history is unknown to the patient.

An interview with his biological mother (via telephone) revealed a more extensive history of problems during the delivery. According to his mother, "Gilmar" was scheduled to be delivered by the midwife that had been following her pregnancy with Mr. Guevara. However, she was not available at the time of his delivery, and a substitute midwife had to deliver Mr. Guevara. This issue further complicated his remarkable delivery in which Mr. Guevara reportedly suffered from problems with oxygenation to the extent that the midwife believed that he was not viable product. The mother also confirmed that she suffered from the chicken pox while pregnant with Mr. Guevara, and she noted that he also was born with the chicken pox. Because of the rural environment in which Mr. Guevara was delivered, he was not taken to the hospital shortly after his complicated delivery despite the aforementioned difficulties. The mother was also questioned about Mr. Guevara's developmental milestones, general development, and academic history. According to the mother, all milestones were delayed and he exhibited difficulties learning. The mother stated that he did not learn to walk

until he was approximately two years- old, and he did not learn to talk until he was approximately four years-old. As a young child, he reportedly did not play with other children, nor did he play alone. She stated that she was concerned about her son and consulted a health professional at a local clinic when Mr. Guevara was six or seven years-old. The health professional was not positive about Mr. Guevara's prognosis and he reportedly advised her to "buy her son a ball to play with." She stated that at age seven, Mr. Guevara began school. In this setting, he reportedly did very poorly. She states that he had to repeat third grade, among other problems. Adapative delays also were noted including the fact that he was not able to tie his shoes at the age of seven years. Mr. Guevara's mother reports that he had difficulty following simple directions, in a way that was very different from her other children. For example, when his mother would send him to the store for a grocery item, he would return with the wrong item. She states that her husband, Mr. Guevara's father, tried to teach him simple tasks such as drying and grinding corn but he could not learn how to do so. The father then approached some friends and neighbors who might be able to hire Mr. Guevara as an apprentice so that he could learn a trade.

Because Mr. Guevara did not attend school in the U.S., American academic records are not available for review. Although Mr. Guevara's school records from El Salvador are not available, he reportedly attended a rural school until the equivalent of a fourth grade education where he got "good grades but was slow." An affidavit indicated that he was slow because he did not have the "intelligence" to succeed in school. When asked during the clinical interview what subject he liked most while in school, Mr. Guevara replied "recreo" ("recess").

In an attempt to obtain further information related to adaptive skills during the developmental period, two individuals from El Salvador familiar with Mr. Guevara were interviewed (via telephone) from the U.S. One individual was a former garage owner and mechanic (Mr. Rafael Antonio Ventura) who unsuccessfully attempted to train Mr. Guevara as a mechanic, and the other individual was the wife (Ms. Vina Asencio) of a deceased mechanic and proprietor of a garage where Mr. Guevara was an apprentice. In both cases, Mr. Guevara's biological father had asked them to help his son (Mr. Guevara) learn this trade while he was a teenager before the age of 18 years. When asked, Ms. Asencio noted that her husband used to have significant difficulties training Mr. Guevara. She noted these problems as she worked in the garage with her husband, where Mr. Guevara exhibited problems understanding the work he was being asked to do, including simple tasks. She noted that Mr. Guevara was forgetful, oftentimes appeared confused, could not take responsibility and "was not normal." As an apprentice, he was often asked to assist finding specific tools "but Gilmar repeatedly would bring the wrong tool." She noted that her

husband felt that he was not capable of training Mr. Guevara. She also stated that her husband paid Mr. Guevara about $1.15 per week. A similar picture was provided by Mr.Ventura. He also experienced difficulties attempting to train "Gilmar." He emphatically indicated that Mr. Guevara's chief problem was that he was incapable of "understanding" what he was being asked to do. When Mr. Guevara would perform a simple task incorrectly, Mr. Ventura would have Mr. Guevara do the task again after explaining again what needed to be done, but Mr. Guevara would often fail again. When asked, he also noted that other apprentices, younger than Mr. Guevara, would be more advanced and could do far many more and advanced tasks than Mr. Guevara. No behavioral or conduct problems were reported by these individuals when addressing Mr. Guevara's conduct in these settings, a demeanor that essentially confused people because it led to expectations that usually surpassed Mr. Guevara's actual abilities. Mr. Ventura stated that Mr. Guevara did not receive a salary and worked for tips from the customers.

The interview with Mr. Guevara revealed a longstanding history of employment starting at an early age (before the legal age of employment in most U.S. jurisdictions). While in the U.S., he was employed in many menial and unskilled jobs including dishwasher, cook, and mechanic's aid. Mr. Guevara denied the abuse of alcohol or controlled substances. When asked, Mr. Guevara indicated that he never married. He has had long-term relationships and he has children from these relationships. The impoverished and neglectful environment described by Mr. Guevara was confirmed by information provided by defense counsel and interview with other parties.

Behavioral Observations

Mr. Guevara was evaluated within the confines of a special cell within the Polunsky Unit in Livingston, Texas. He was evaluated without upper extremity restraints. The entire examination was conducted in Spanish (after a test of language proficiency revealed this to be his language of greatest dominance) in an attempt to obtain his best performance.

Mr. Guevara initially presented as an apprehensive man that appeared his stated age. During the initial interview and the evaluation, his speech was slow in pace but easy to understand in Spanish. The content of his speech was primitive for a man his age. He was well oriented to person, time, and place. Although he initially appeared to be somewhat apprehensive as noted above, he quickly acclimated to the situation, but exhibited difficulties understanding and following instructions on occasions, particularly when asked to perform complex tasks. He appeared to put forth appropriate effort on all tasks. Unfortunately, it became clear during the examination that his level of functioning was lower that one would expect given his chronological age (adult).

Mood and affect appeared to be within normal limits. It should be noted that the testing environment was quiet during the day of examination reducing threats to the validity of the evaluation.

Mr. Guevara's demeanor was observed outside of the one-on-one testing situation as he left the assessment cell for his lunch break. During this observation, he was at all times appropriate from a behavioral standpoint consistent with his TDJC records of unremarkable behavior while incarcerated. During this observation, his coordination also was observed to be within normal limits.

Procedures and Tests Administered

Batería Woodcock-Muñoz Pruebas de Aprovechamiento-Revisada (Reading Understanding in Spanish only)
Batería Woodcock-Muñoz-Pruebas de Habilidad Cognitiva-Revisada (WMPHC-R)
Beck Anxiety Inventory (Spanish Version)
Beck Depression Inventory (Spanish Version)
Clinical Interview with the Patient (Spanish)
Color Trails Test 1 & 2 (Spanish Instructions and American Norms)
Dot Counting Test (Spanish Instructions)
Draw-A-Person Test (Spanish Instructions)
Grooved Pegboard Test (Spanish Instructions and American Norms)
Judgement of Line Orientation, Form H (Spanish Instructions and North American Norms)
Ponton-Satz Boston Naming Test (Spanish Instructions and Hispanic Norms) (BNT)
Reitan-Klove Sensory Perceptual Examination - Except Tactile Form Recognition
Rey 15-Item Memory Test (Spanish Instructions)
Rey-Osterrieth Complex Figure Test (Copy and 30' Delayed Recall) (Spanish Instructions and Hispanic Norms)
Stroop Interference Test (Spanish Version, American Norms)
Symptom Validity Test (Spanish Instructions)
Test of Nonverbal Intelligence-Second Edition (TONI-2) (Spanish Instructions)
Wechsler Memory Scale-Third Edition (WAIS-III)-Logical Memory and Digit Span only (American Norms)
WHO-UCLA Auditory Verbal Learning Test (WHO-UCLA-AVLT) (Spanish Version)
Wisconsin Card Sorting Test (Spanish Instructions and American Norms) (WCST)
Woodcock-Muñoz Language Survey-Spanish Form (WMLS)-Select Subtests as noted

Assessment Results

Assessment Validity

Due to the legal nature of this case, coupled with the fact that Mr. Guevara may have been

motivated to present himself in a good light as a result of his capital punishment sentence, several procedures believed to be sensitive to the presence of feigned symptom exaggeration and/or response bias were administered. The results of these procedures revealed that Mr. Guevara was being straightforward in his responses to test items. He performed within the range of expectation on the Rey 15-Item Memory Test (Score=11/15). Similarly, his scores on the Dot Counting Test fell within normal limits. On a more complex probabilistic procedure, involving forced-choice responding (The Symptom Validity Test [SVT]; Color Pens), his performance fell within expectation on three sets of trials involving 5-, 15-, and 30-second delays (Score=60/60). The level of rapport established with this individual also was appropriate.

Academic Functioning (Reading Levels)

Because of his lackluster academic history, in conjunction with his history of learning problems without formal academic assessment, and the fact that this evaluation requires the patient to read during select portions of the assessment, he was administered picture vocabulary, reading, and reading understanding subtests in Spanish. On these measures, his performance fell in the 4.4. 7.8, and 4.6 grade-equivalent range (WMLS and WMPA). Although he can sight and read words at a 7th-grade level, his reading understanding and picture vocabulary are those of a fourth grader.

Intellectual Functioning (Estimates)

Mr. Guevara was administered the Woodcock-Muñoz Pruebas de Habilidad Cognitiva-Revisada (WMPHC-R), a test of intellectual ability. On this instrument, he obtained a Broad Cognitive Ability score of 60±5 (.4th %ile) when compared to other individuals his same age. This score placed his performance within the very poor or mentally deficient range of intellectual skills. His performance on the WMPHC-R was marked by significant variability. His scores on the subtests comprising his overall score ranged from the impaired range to the low end of the average range. Although he obtained score in the low end of the average and low average range on measures requiring memory for phrases and synthesis-analytic processing, all other subtests scores fell in the impaired range. He obtained the following Standard Scores (SS) (mean=100; standard deviation = 15):

Subtest	**SS**	**%ile**
Memory for Names	60	.4th
Memory for Sentences	91	28th
Visual Matching	67	1st
Incomplete Words	70	2nd
Visual Closure	67	1st
Picture Vocabulary	70	2nd
Analysis-Synthesis	83	12th

Mr. Guevara was subsequently administered a test of non-verbal reasoning (TONI-2) in an attempt to estimate his intellectual ability using an instrument less reliant on language. On this instrument, he obtained a score in the Borderline range (77 [75-79]; 95% confidence interval; 6th %ile). This score is consistent with his score on the WMPHC-R, the former (TONI-2) a less stringent test of non-verbal intellect.

Attention and Concentration (Screening)

Mr. Guevara's performance on measures assessing his ability to attend and concentrate fell below normal limits (14th and 12th %ile) on tasks requiring alternating attention, psychomotor speed, and sequencing (Color Trails 1 & 2, respectively) when compared to individuals 30-44 years of age with less than or equal to 8 years of education. His performance fell within the low end of the average (25th %ile) on a measure of auditory attention (WMS-III, Digit Span) when compared to his same age peers.

Language/Auditory Processing (Screening)

Although he has a limited command of Spanish consistent with his limited educational level, Mr. Guevara spoke fluently in his native tongue. His speech, although normal in prosody was mildly dysarthric and the content of his speech was immature for an adult but not surprising given his level of formal education. His scores on a task requiring confrontational naming (BNT) in Spanish fell in the impaired range (1st %ile) when compared to his same age peers and individuals with his level of education. Neither functional nor phonemic cues aided his performance on this test, and his limited exposure to test items most likely affected his performance.

Visual Spatial Skills and Perceptual Organization

On a complex visuo-motor procedure (Copy, Rey-Osterreith Complex Figure), the patient obtained a score of 21/36 placing his performance within the Impaired and low average range when compared to his same age peers (1st %ile) and educational level (12th %ile), respectively. On this task, he exhibited significant organizational difficulties. Due to his lackluster performance on this measure when compared to his same age peers, the patient was administered another visuo-perceptual (motor-free) measure assessing his ability to determine angular distances (JLO). On this measure, his score (21/30) fell in the borderline range (7th %ile) when compared to other adults his age.

Learning and Memory Functions

Verbal Memory: Mr. Guevara's verbal memory was assessed using contextual and rote verbal memory procedures. He was administered a test of contextual verbal memory (Ponton-Satz Logical Memory). On this measure his score fell in the within the impaired range (1st %ile) when compared to his same age peers (American Norms, only norms available). On the delayed portion of the same test, he obtained a score within the low

average range (18th %ile). Mr. Guevara exhibited difficulties on a rote learning and memory measure in Spanish (WHO-UCLA AVLT). His recall on trial V (7/15 words) fell within the Impaired range (1st %ile) when compared to individuals with his level of education or chronological age. Mr. Guevara's scores on the short delay recall (short-term memory, AVLT) of the original list fell within the Low Average and Borderline ranges when compared to his level of education and chronological age (24th and 8th %iles). His scores on the long delay recall (long-term memory, AVLT) of the original list fell within the Borderline and Impaired ranges when compared to his level of education and chronological age (9th and 1st %iles).

Visual Memory: The patient's performance (7/36) on a visual learning and memory (Rey Osterrieth Complex Figure, 30-minute Delayed Recall) task fell within the impaired range when compared to his same age peers (20-29 year-olds). In contrast, when his performance was compared to norms from individuals with 0-6 years of education, he scored in the borderline range (4th %ile).

Motor/Sensory Skills

Informal lateral preference assessment (use of hand to write, throw, use spoon, etc.) suggests that Mr. Guevara is right-hand dominant. Using this information, his motor/sensory functioning was assessed. On the Grooved Pegboard Test, a test which requires fine motor coordination and dexterity, his score fell within the average range with his right (dominant hand) and left (non-dominant) hands (preferred hand=64 sec., 42nd %ile; non-dominant hand=76 sec., 34th %ile) when compared to 20-39 year-olds. There was a non-significant raw score lateralizing discrepancy of 11% favoring his preferred hand as expected. Grip strength was assessed informally and found to be within normal limits. His performance on the Sensory Perceptual Exam revealed no errors.

Executive (Frontal Systems) Skills Functioning

On Color Trails 2, a test requiring shifting of set and alternating attention, his score fell within the low average range (12th %ile). On this measure, he did not sequence or color errors, which is within normal limits. He additionally displayed significant difficulty in organization and planning while performing the copy portion of the Rey-Osterrieth Complex Figure. He scored in the Impaired range (1st %ile) when compared to same age peers (American Norms, only norms available) on the three components of another procedure assessing the ability to inhibit a common response for a more complex response (Stroop Interference Test). Finally, he was asked to complete the WCST, a test requiring problem solving and other executive skills. On this measure his scores fell in the impaired range consistent with results from other tests assessing executive functions and frontal skills (Categories Achieved = 1 in 64 Trials; Trials to Complete First Category = 12; Learning to Learn = –36).

Behavioral/Emotional/Personality Functioning

Mr. Guevara was not asked to complete the MMPI-2. His low reading understanding level and cognitive level supports such a course of action. During this assessment, Mr. Guevara was asked to complete the Draw-A-Person Test. His drawing of a person was remarkable from a developmental standpoint in that it revealed a great deal of cognitive immaturity. Finally, Mr. Guevara completed the Beck Depression and Anxiety Inventories in Spanish. On these measures he obtained scores of 9 and 9 suggesting that he is free of depressive and anxious symptomatology.

Summary and Clinical Impressions:

Gilmar Guevara is a 33-year, 10-month-old, right-handed, single, Latino (National of El Salvador) male. Although he attended school for approximately four years in El Salvador, he did not receive any formal education in the U.S., and he went to work immediately upon arrival to this country. He was referred for neuropsychological evaluation in an attempt to assess his present level of neuropsychological and cognitive functioning. In ADDition, a rule-out of mental retardation was requested by the referral source. Mr. Guevara was convicted of a capital crime, and he is presently on death row in Livingston, Texas (Polunsky Unit). He is presently receiving a medication (non-psychotropic) for migraine headaches.

His overall performance on an intellectual measure fell in the mentally deficient range but his performance was marked by significant variability. Although he obtained scores in the low end of the average and low average range on measures requiring memory for phrases and synthesis-analytic processing, respectively, all other subtests scores fell in the impaired range. It should be noted that his profile is sometimes seen in individuals suffering from organic brain disorders including mental retardation. This finding is important as it suggests that Mr. Guevara suffers from reasoning deficits capable of infringing upon his ability to process information as well as encroach upon other aspects of functioning subserved by these skills including judgement and planning. Although he was administered a test of non-verbal intellect (TONI-2) in which his overall score fell in the borderline range (77± 2), his score on this test, a less stringent, non-verbal test of intellect, actually support his score on WMPHC-R.

Because it is difficult to retrospectively assess adaptive skills, collateral sources of information, such as from family members and previous employers, are regularly used by mental health professionals in assessing those skills. Therefore, many independent sources of information coincide to support Mr. Guevara's deficiencies in adaptive skills. Family affidavits from individuals in El Salvador indicate that he suffered from academic and developmental delays. Mr. Guevara's vocational history is marked by poor performance and involvement in unskilled occupations, prior to the incident responsible for his current incarceration (and the age of 18 years). It should be noted that consistent information in this regard was obtained from several sources. His level of academic attainment also points to congenital deficits, which in conjunction with his present intellectual performance is

consistent with mental retardation. His impaired valid scores and performance on several tests and procedures, but particularly his inability to abstract at levels expected for adults also demonstrate deficits in cognition consistent with mental deficiency. It is also important to note that despite the fact that several sources of information in the past may have indicated that Mr. Guevara was either a good student or worker, they were referring to his demeanor and characteristics, a set of factors not to be confused with the quality of his work from a products standpoint. For example, when Mr. Rafael Ventura refers to Mr. Guevara as a good worker he stated that this means he trusted Mr. Guevara and allowed him to go into his home unsupervised. In fact, it is not unusual to get this contradictory information in these cases where the person with impaired intellect is behaviorally appropriate, yet impaired, leading to academic and occupational problems well documented in their academic record and work history.

With regard to the requested rule-out of mental retardation by the referral source, Mr. Guevara's impaired intellect, in conjunction with his history of adapative delays, and the fact that his impairments had an early onset (before the age of 18 years), does not permit a rule-out of mental retardation. In fact, it is my opinion, with a reasonable degree of psychological certainty, that Mr. Guevara suffers from mental retardation and this impression is based on established definitions of mental retardation set forth by the AAMR and the APA (DSM-IV-TR).

The patient's neuropsychological performance fell within the range of expectation on tasks assessing motor and sensory-perceptual skills. In contrast, the results of this examination revealed deficits (when his performance was compared to same-age peers) or below average performance (when compared to his level of education) in most neuropsychological domains including attention, expressive language, verbal and visual memory, complex visual processing and perceptual organization, etc. Pronounced impairments were observed in circumscribed visual memory indices and higher-order executive domains facilitated by frontal systems. The pattern of neuropsychological performance observed is for the most part consistent with the present intellectual assessment revealing cognitive impediments. It is also consistent with profiles commonly seen in individuals suffering from neurological abnormalities. In addition, his difficulties in executive skills coupled with his relative verbal reasoning weaknesses are capable of compromising other aspects of functioning including practical reasoning, planning, and inhibition/disinhibition of certain responses. From a developmental perspective, it is also critical to note that Mr. Guevara may have experienced neglect including malnutrition. Aside from other factors including his reported illnesses as a child and complicated delivery, such a history of malnutrition at a critical stage of development is consistent with his present neuropsychological profile. Similarly, if he indeed sustained asphyxia at birth as reported, such an event also may have affected his present level of functioning, and could partially account for his present neuropsychological profile and impaired cognition.

Behavioral and emotional indicators obtained during this examination did not reveal the presence of psychological distress. His profile is commonly seen in impulsive, immature,

and socially inept individuals. Individuals with his psychological profile also have been found to have encountered significant familial difficulties similar to those experienced by this individual in the past. This assessment additionally revealed consistent themes associated with a need to feel accepted by paternal (or societal) figures and inappropriate attention-seeking behaviors (deficits in executive skills).

In sum, the results of this examination revealed a pattern of performance consistent with poor judgement, impulsivity, and a course of action marked by an inability to inhibit inappropriate responses. These findings point to frontal lobe systems dysfunction in an individual with impaired intellect exacerbated by malnutrition, lack of medical care, and exposure to severe violence caused by the civil war. Moreover, Mr. Guevara also suffers from Post-Traumatic Stress Disorder; this is the result of his exposure to the severe violence of the civil war, including seeing dead bodies, and being under the constant threat of death or physical harm.

Recommendations

1. Mr. Guevara suffers from cognitive impairments. Given his cognitive level, he should be carefully monitored since he may be at risk to undue influences (e.g., victimization) even within the confines of a penal institution.

With regard to the specific legal opinion requested, the following are put forth for consideration:

Mental Retardation

Several sources were considered for the purpose of adopting a definition and criteria for diagnosing mental retardation on which to base the rationale for the conclusions in this report. For example, for diagnostic puroposes, the Diagnostic and Statistical Manual Of Mental Disorders, Fourth Edition, Text Revised (DSM-IV-TR), the tests manuals, existing research, and the manual from the American Association on Mental Retardation (AAMR) were consulted.

The DSM-IV-TR contains the following criteria for diagnosis of mental retardation:

A. Significant subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test.

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before age 18 years.

The AAMR defines metal retardation as:

"Mental retardation is a disability characterized by significant limitations both in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." (AAMR, 2002)

In addition the AAMR's definition includes the following assumptions essential to the application of the definition.

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.

2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.

3. Within an individual, limitations often coexist with strengths.

4. An important purpose of describing limitations is to develop a profile of needed supports.

5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

AAMR defines a disability as:

> A disability refers to personal limitations that represent a substantial disadvantage when attempting to function in society. A disability should be considered within the context of the environment, personal factors, and the need for individualized supports.

AAMR defines intelligence as:

> Intelligence refers to a general mental capability. It involves the ability to reason, plan, solve problems, think abstractly, comprehend complex ideas, learn quickly, and learn from experience. Although not perfect, intelligence is represented by Intelligent Quotient (IQ) scores obtained from standardized tests given by a trained professional. In regard to the intellectual criterion for the diagnosis of mental retardation, mental retardation is generally thought to be present if an individual has an IQ test score of approximately 70 of below. An obtained IQ score must always be considered in light of its standard error of measurement, appropriateness, and consistency with administration guidelines. Since the standard error of measurement for most IQ tests is approximately 5, the ceiling may go up to 75. This

> represents a score approximately 2 standard deviations below the mean, considering a test's standard error of measurement. It is important to remember, however, that an IQ score is only one aspect in determining if a person has mental retardation. Significant limitations in adaptive behavior skills and evidence that the disability was present before age 18 are two additional elements that are critical in determining if a person has mental retardation.

Based on the results of this evaluation in which a comprehensive measure of intellectual ability was administered, his scores meet criteria consistent with that provided by the AAMR indicative of mental retardation. His history also supports such a diagnostic impression including probable causes (see below) capable of accounting for his present level of impaired cognition.

AAMR defines adaptive behavior as:

> Adaptive behavior is the collection of conceptual, social, and practical skills that people have learned so they can function in their everyday lives. Significant limitations in adaptive behavior impact a person's daily life and affect the ability to respond to a particular situation or to the environment.
>
> Limitations in adaptive behavior can be determined by using standardized tests that are normed on the general population including people with disabilities and people without disabilities. On these standardized measures, significant limitations in adaptive behavior are operationally defined as performance that is at least 2 standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills.

Specific examples of adaptive behavior skills according to AAMR include:

Conceptual Skills-

- Receptive and expressive language
- Reading and writing
- Money concepts
- Self-directions

Social Skills-

- Interpersonal
- Responsibility
- Self-esteem
- Gullibility (likelihood of being tricked or manipulated)
- Naiveté
- Follows Rules
- Obeys laws

Avoids victimizations

Practical Skills-

Personal activities of daily living such as eating, dressing, mobility and toileting.
Instrumental activities of daily living such as preparing meals, taking medication, using the telephone, managing money, using transportation and doing housekeeping activities.
Occupational skills
Maintaining a safe environment

Causes of Mental Retardation:

The etiology of mental retardation is variable and complex. In fact, there are hundreds of disorders and conditions, both genetic and acquired that can lead to mental retardation at different developmental stages.

A. Prenatal Etiology

One of the most common causes of mental retardation are genetic factors. In addition during the pregnancy numerous events can contribute to mental retardation: "Numerous agents can have significant deleterious effects on the fragile central nervous system of a child *in utero*. Such teratogens are nongenetic, nonchromosomal agents that are major causes of mental subnormality. These include poor nutrition, toxic substances, maternal disease or infection, blood incompatibility, drugs and alcohol exposure, and cigarettes."

B. Perinatal Etiology

The perinatal stage is the time period surrounding the birth (e.g. +/- 7 days). During this time, several obstetric complications may arise that place a child at increased risk of having mental retardation. Included in these are prematurity and low birth weight. Prematurity may be the result of many other risk factors that contribute to the manifestation of mental retardation. Further, a premature infant is born with more biological and environmental risk factors and will likely have additional risks throughout their lifetime.

C. Postnatal Etiology

"[M]any conditions in these early years can lead to mental retardation. In fact, it has been estimated that between 5 and 20%

> of cases of mental retardation are a result of trauma or neglect." Causes of postnatal mental retardation include traumatic brain injury, cerebral infections (e.g., meningitis and encephalitis), child abuse (e.g., shaken baby syndrome), lead poisoning, and nutritional deficiencies.

Adaptive behaviors

Based on the materials reviewed, interviews conducted with his mother and third parties, and the declarations of relevant witnesses, as well as the history obtained from Mr. Guevara, a clear pattern of poor adaptive behaviors emerged. Mr. Guevara achieved developmental milestones in a delayed manner. In this regard, there are indications that his speech was delayed until age four, he did not start walking until age two, and he could not put tie his shoes at the age seven years.

Mr. Guevara was unable to achieve academically in school. He was retained in third grade. He dropped out of school because he could not learn. He only achieved a fourth grade education at best, within an overall setting in provided by the educational system in El Salvador in which almost all students in the "first cycle" of school (K-3) are automatically promoted, commonly referred to as a "social promotion." After grade 3, students are promoted if they receive acceptable grades.

Mr. Guevara was described by his mother and previous employers as being different from his siblings or other children his age. He exhibited problems understanding simple instructions, he did exhibit poor play skills, he forgot simple things like what he was supposed to bring from the store even if there were one or two items to recall.

Mr. Guevara's employers while he was a teenager stated that although Mr. Guevara was trustworthy, he was unable to learn simple mechanic tasks, could not follow basic instructions, seemed confused and was forgetful. Both employers took Mr. Guevara under their guidance as a favor to his family in an unsuccessful attempt to teach him a trade. Both state that he was unable to master simple mechanic skills.

Mr. Guevara has always been dependent of other individuals in order to function in society. He has exhibited extremely poor judgment, impulsive behaviors, disregulation of emotional behavior and inability to solve his problems in a rational and logical way.

Risk Factors Supporting the Diagnosis of Mental Retardation:

Mr. Guevara was born in an unpoverished environment. He was delivered by a midwife. He did not receive any medical attention at birth despite the noted difficulties during his delivery. He may have suffered anoxia (lack of oxygen to the brain) at birth. His vital statistics at birth are unknown, but he was reportedly underweight. He did not breastfeed well. He suffered from malnutrition. He was born with chicken pox (his mother had

chicken pox during pregnancy.) He was often sick with high fevers and did not receive medical attention. He suffered several brain insults before the age of 18 that compromised his nervous system. He received little sensory stimulation due to the abject poverty in which he was reared.

Further affiant sayeth not.

Antolin M. Llorente, Ph.D.
Licensed Psychologist (MD: 3839; TX: 25,470)
Clinical Neuropsychologist
1708 West Rogers Avenue
Baltimore, MD 21209

SUBSCRIBED AND SWORN TO ME BEFORE ME on this the 21st day of July, 2005.

NOTARY PUBLIC

(notary seal)

Exhibit B
Gina Vitale Affidavit

Declaration of Gina T. Vitale, LMSW, CCFC

I, Gina T. Vitale, LMSW, CCFC hereby state as follows:

1. I have been appointed by the court as a mitigation expert for the defense in State of Texas V. Guevara. I am a master level social worker duly licensed to practice in the state of Texas since 1997. I am a member of the National Association of Social Workers, the National Association of Sentencing Advocates and the National Association of Forensic Social Workers.
2. I currently provide mitigation investigations throughout East Texas, where I have been an independent contractor since 1999. I have attended and served as a faculty member in numerous CLE-approved training seminars sponsored by the Texas Defender Service and the Texas state bar association. From 1989 to 1993 I supervised behavior management programs and assisted with psychological testing at the New Orleans Children and Adolescent Psychiatric Hospital. I was employed by Depelchin Children's Center from 1994 until 1997 where I worked with victims of abuse and neglect as well as children and families involved in the juvenile justice and protective services systems. Additionally, I have provided crisis intervention and counseling to victims of violent crime, domestic abuse and traumatic injury at Memorial Hermann Hospital since 1997 where I am also responsible for conducting assessments and determining appropriate placement for patients seeking emergency treatment for mental illness.
3. I have been asked by the attorneys for Gilmar Alexander Guevara to conduct an investigation of potential mitigating factors, which might have been relevant to the penalty phase of Mr. Guevara's trial. In my investigation of Mr. Guevara's social history and other mitigating factors, I have followed the standard of care required by mental health and medical professionals who may rely upon the investigation to reach their expert opinions. As part of my responsibilities, I have completed the following tasks.
    a) Conducted interviews with Mr. Guevara to develop an outline of his social history, including medical history, educational and employment history and history of childhood trauma.
    b) Interviewed family members and friends living in the United States who immigrated due to the horrors of war in El Salvador.
    c) Conducted independent research on the *Las Americas* neighborhood of Houston, Texas, where Mr. Guevara lived upon his arrival to the United States.
    d) Reviewed videotape footage of Mr. Guevara's family home and village in El Salvador.

e) Reviewed transcripts of interviews, conducted in Spanish and translated into English, by Edurne Imana, with family, former employers and neighbors in El Salvador regarding Mr. Guevara's childhood health and life experiences in his home country.
f) Interviewed Mr. Guevara's wife and children as well as co-workers regarding his work ethic and functioning as a productive member of society.
g) Attempted to locate medical and school records from Mr. Guevara's childhood. These records are unavailable for review due to destruction of schools and hospitals during El Salvador's Civil War.

4. My investigation has uncovered a significant amount of compelling evidence of mitigation including
   a) Lack of appropriate prenatal care and severe illness in infancy and early childhood, which prevented development of appropriate peer relationships and separation from mother.
   b) Extensive psychological trauma suffered as a child due to his father's violent temper and the violence and destruction caused by Civil War.
   c) Grinding poverty of Mr. Guevara's family and village accompanied by destruction of village resources leaving Mr. Guevara and his siblings without adequate medical care, nutrition and education; forcing him to begin working at age 9 to help support his family financially.
   d) A lack of guidance and support from positive role models while adjusting to life in the United States.
   e) Mr. Guevara's strong work ethic and love of his family.

Family History & Early Childhood

Gilmar Alexander Guevara, known as 'Alex' to his friends and family, was born to Maria and Guadalupe Guevara in Santa Rosa, El Salvador on October 5, 1969. Mr. Guevara is the third of the couple's five children. Mr. Guevara also has an older half-brother from a previous relationship of his father's. Mr. Guevara's parents were born and raised in El Salvador, both raised in impoverished conditions and without formal education. Mr. Guevara's cousin recalls that "Alex loved his parents and they did everything they could for him but they didn't have very much." (Interview with Juana Guevara) Like his siblings, Mr. Guevara was delivered in the family's home. "In those times you would have the midwife and the husband to help during delivery." (Interview with Rosa Candida Berrios). Mr. Guevara's mother did not receive traditional prenatal care; "nothing was available." (Interview with Maria Del Carmen Berrios). Mrs. Guevara spoke about her pregnancy, explaining:

> " I had lots of stress because El Salvador was in war with Honduras and there were bombings in this area. Around the seventh month I contracted Chicken Pox and I started to have a natural tendency to loose the child and abort. I got very swollen and inflamed and had extremely high fevers up until the eighth month and I was still

> having abortion symptoms. There wasn't a hospital then, but there was a small clinic here in Santa Rosa De Lima. The doctor that attended me there said that the problem was that the baby had also been affected and he put me under treatment. I remember getting several shots and pills"(interview with Maria Santos Guevara).

Though Mrs. Guevara considers Alex's delivery to have been normal, he was extremely ill throughout his childhood. Mr. Guevara's aunt recalls, "he was born with a skin condition due to my sister's illness and I remember he would cry a lot." (Interview with Rosa Candida Berrios) Mr. Guevara's mother elaborated, "He had lots of diarrhea and the skin in his body was full of scabs, broken and bleeding. I could not lay him down in bed or elsewhere, his skin would stick to everything and peel off so I would lay him over big leaves, this lasted for at least three months." (Interview with Maria Santos Guevara and Guadalupe Guevara). Benjamin Guevara remembers his brother's illness and describes his skin as "peeling like a reptile and it would become raw…my mother couldn't lay him down in bed or else the skin would stick and come off...Dr. Cabeza that attended Alex said he would die." (Interview with Jose Benjamin Guevara 12/21/01)

> "When (Alex) was 3 or 4 years old, he went through a state of depression, he had no desire of playing at all. I (mother) finally took him to the doctor who medicated him with pills and some type of liquid…he told me Alex had a problem but back then they would not explain things to you. When he was five years old, Alex had hepatitis. I became very worried I started noticing that he was very yellow, he would not eat at all, he would be very depressed and would not play, he would cry a lot because he was in pain and could not stand still, he would always be bending down, he started having high fevers and then I realized he had a very serious condition and decided to take him to the doctor. He said that he was badly ill and had an advanced liver infection." (Interview with Maria Santos Guevara and Guadalupe Guevara).

As a result of Mr. Guevara's childhood illness and frailty, Mr. Guevara did not have the opportunity to develop appropriate peer relations and became overly bonded with his mother who gave him special treatment. Mrs. Guevara recalls "Alex was extremely introverted…he always wanted to be around me, he would sit in the kitchen with his face between his hands and watch me doing things." (Interview with Maria Santos Guevara and Guadalupe Guevara) Benjamin Guevara also discussed the relationship between his mother and brother; "my mother gave him extra special attention because he was so sick…Alex was extremely reserved and timid, he was not communicative at all and did not want to play. My mom bought him a special ball and wooden car so that he would play. The other kids played with marbles and seeds." (Interview with Jose Benjamin Guevara 12/21/01)

During Mr. Guevara's childhood, the family lived in a small home made of stones and wood. Mr. Guevara and his siblings slept either on the dirt floor or in a hammock. Family describes their bathroom facilities as "a hole in the ground with a cover on it." (Interview with Jose Benjamin Guevara 12/21/01). The home had no running water and the family carried water from a well, which they shared with other families. Mr. Guevara's parents describe their living conditions as "very poor", "we lived in a very poor little house with one room and one kitchen."(Interview with Maria Santos Guevara and Guadalupe Guevara). Mr. Guevara's siblings remember, "We always had food at home even though sometimes it was very little." (Interview with Jose Benjamin Guevara 12/21/01 and Interview with Sonia Sorto).

Mr. Guevara's father was employed at a corn flour mill and was always "gone, working all day" (interview with Jose Benjamin Guevara 12/21/01). Mrs. Guevara points out that while home, "he would sometimes scare the children talking loud and throwing things…he has an impulsive character…moody. He is bad tempered and rough and has been like that his whole life. I would have to tell him not to be rough with the kids. An example is when I would cook and he did not like it he would throw the plate away." (Interview with Maria Santos Guevara) When asked about his father, Jose Benjamin Guevara states, "we were brought up in a very strict way and with strong discipline." (Interview with Jose Benjamin Guevara 12/21/01)

Family and neighbors describe Alex Guevara as an "obedient…very loving child" (interview with Moises Berrios Benitez) who "got along with everybody…Alex was very respectful and loving with his family, he was an extremely good child. Even with animals, any little animal he would find, he would take care of it, feed it and treat it with so much love. He was always so thoughtful with everybody. The family always admired how loving he was to all." (Interview with Maria Del Carmen Berrios) Alex's aunt, Rosa, also remembers his kindness, "when they would go to school their dad would give them money and he would buy sweets and he would not eat them he would come home and give his mother and father some. He would always be sharing." (Interview with Rosa Candida Berrios)

Mr. Guevara and his siblings attended grade school at *La Escuela Del Llano* in Santa Rosa, El Salvador. Mr. Guevara's teacher remembers, "he was a very gentle boy, reserved, somewhat shy; his behavior was good and humble but academically he wasn't so good, he did not like to study much. (Interview with Ana Fermina Orion Sorto) Family believed; "he could not learn" (interview with Moises Berrios Benitez) "he had good grades but he was a little slow… it was hard for him…he did not have intelligence." (Interview with Maria Santos Guevara and Guadalupe Guevara) Unfortunately, Mr. Guevara's parents were unable to help him with his academics, his mother states "I helped with what I could. I don't know how to read but I know some letters and numbers, his father didn't help him because he is worse than me." (Interview with Maria Santos Guevara and Guadalupe Guevara)"He did not want to go to school, what he wanted is to learn a trade." (Interview with Maria Del Carmen Berrios) His mother was sorry that he could not complete his education, but at the age of nine he was forced to leave school and begin working to help support the family.

Civil War

Civil War in El Salvador began in 1979 and lasted through 1986. During these times, unemployment rose to forty-percent and illiteracy was sixty percent (Declaration of R.Cervantes). Guerillas attacked villages destroying everything in their path and government forces attacked anyone suspected of collaborating with guerilla forces. Mr. Guevara's brother, Benjamin, describes his experiences during the war and feelings of being trapped between the two sides:

> "It was a state of constant fear of being killed or taken away. The guerilla would come in the middle of the night and with megaphones would announce that the village was taken over, that anybody who would look out would get killed. There were no medicines, the guerilla would come and steal whatever medication they

would find in the hospital and then burn it down, people would die massively, guerillas would steal money from the bank and burn it down they would burn the gas stations, they would burn everything. We had nothing…it was a constant situation of terror for all of us; we could not go anywhere we were confined at home or wherever we were hiding. On one side when the militaries would come to get you to fight for them if you resisted they would kill you because they would say you were an ally of the Guerilla and if you would go with them, you knew you would get killed anyway since you did not have any training and did not even know how to hold a gun. On the other side when the guerilla would come to get you to fight with them, if you did not want to go, they would kill you right there, because they would say that you were on the military's side. As kids we were terrorized of being seen by either of the sides because they would take us away and if we resisted they would kill us. I have seen my friends dead in the streets and people burned alive. Alex and I have seen the parents and brothers of my best friend, who had the shop where we went to learn mechanics, dead; killed in front of us." (Interview with Jose Benjamin Guevara 12/21/01).

Mr. Guevara's youngest brother, Marvin, has similar memories of his time in El Salvador:

"I would see mountains of dead people without heads, hands and other body parts laying in the streets in my neighborhood. I have seen bodies burning. I remember once when Alex and I visited an aunt, from the window we were watching how the guerillas had the people making holes in the ground and the next thing was donkeys would come loaded with bodies that they would throw in those holes. I was so terrified I did not want to be taken away, the militaries and the guerillas would come into houses looking for children to take away to combat for them, and we would hide inside the well. As children we could not go out we were panicked, I remember I would cry and hang to my mother's skirt because I did not want the militaries or the guerilla to take me away. They would bomb everything, exploding bridges, power plants…the guerilla would burn schools, hospitals, banks, gas stations and the city hall. Everything was destroyed." (Interview with Marvin Guevara)

Sonia Sorto, Mr. Guevara's older sister, escaped to the United States, but not until after she required treatment for a nervous breakdown. She describes feeling

"terrible because of the war. We could not open the door because the guerilla was outside and they were going to kill us. Many times I really thought I was going insane. I would hear airplanes come and I would see the bombs falling on top of our head and exploding everywhere around us. I could not even eat due to the terror I felt. We would all hide under the beds in the floor and start crying. We all had sleep problems and bedwetting up to about seven or eight years of age. I used to rub my belly button raw, until it started bleeding. I don't know why I did that, nerves probably… The most horrifying part for me was to go out to the street and see mountains of dead bodies. They would put one on top of the other forming a mountain and then burn it right there, sometimes there were people you knew burning. At the end there would be left over members and the dogs would eat them. I think lots of the children had mental problems and turned somewhat crazy in their heads. It was a state of panic and terror. " (Interview with Sonia Sorto)

No one was safe anywhere; "it was a total state of fear that you would get from each side and you were in between. It was horrible." (Interview with Moises Berrios Benitez) Mr. Guevara's mother becomes extremely emotional when describing her family's experiences during the war:

> "We went through great tribulations; right here across from the house they bombed and burnt the hill. I did not know what to do; my children were small. We were told to throw the mattresses on the floor and cover with them. We had to turn off anything with alcohol and could not sleep at night. The soldiers would come drink from the well behind the house and they would sleep there at night. Then in the day the guerillas would come down and drink from the well. I saw lots of dead bodies. They would turn purple and then they would pick them up and burn them where the clinic used to be." (Interview with Maria Santos Guevara and Guadalupe Guevara)

Children were forced to remain indoors or be subjected to the death and destruction of war. Mr. Guevara's aunt, Carmen, remembers:

> "The little ones did not understand, but they would feel the fear anyway, the would hear the bullets, tanks and bombings. The children could not go out and play; they were so scared. Something I noticed in the children is tremendous fear, they were scared of anybody they didn't know and they feared that everyone belonged to the guerillas and they would hide. (Interview with Maria Del Carmen Berrios)

Another aunt, Rosa, believes "all the children had nervous conditions." (Interview with Rosa Candida Berrios) Villagers were not safe in the streets but had to face the guerillas in order to provide for their families. Mr. Guevara's uncle describes a:

> "terrible fear of leaving the house and going out. Everyone had that fear. One day on my way to work, I got stopped and pointed at with shotguns by people that belonged to the guerilla, they told me to go back home and not to get our because I was risking my life by being out, but in order to eat I had to make it to work." (Interview with Moises Berrios Benitez)

Parents lived in constant fear of losing their children and children witnessed friends and neighbors slaughtered and burned. Young men believed their only option to remain alive was to abandon their families and country.

Mr. Guevara's aunt, Maria Del Carmen Berrios recalls the horrors of war:

> "Alex's mother told me once they could no longer go out in the village. She said she did not sleep anymore because she had to be hiding the children. She would hide them under the bed because both sides were persecuting all the young people, that's when Alex left to the U.S. Lots of young boys left for the same reason…they would get so scared and did not know what to do with themselves, where to hide. They would hear bullets everywhere, helicopters and bombs falling. All the kids his age left; deserted." (Interview with Maria Del Carmen Berrios)

Mrs. Berrios had difficulty discussing her own family's experiences. She states:

> "We could hear the tanks all night, they would come in the middle of the night to some neighbor's house and take their children away, we could hear the screaming, crying, and the lamentations of the mothers whose children they were taking away. We were all so worried, we could not sleep and we all got so skinny. One of my neighbors had her children taken away and two days later they found them dead and mutilated, their pieces were floating in the river, one of them did not have the head

on. Another neighbor, whose sons they took away also, were age 12 and 9. She had her husband begging them to take him, but not the children. The next day the three of them were found mutilated in the streets. Another time I remember my youngest son was telling me that they announced that there was not going to be anymore school. I was fixing him something to eat and I had the mixer in my hand…suddenly a bullet came through the window, hit the mixer breaking it into pieces, then the bullet crossed through the door into the next house where a child was playing and hit him in the head. I saw how the boy died. I assure you those times were very hard." (Interview with Maria Del Carmen Berrios)

Many individuals who desperately wanted to flee their villages felt trapped, with nowhere to go or money to get there. Mr. Guevara's mother remembers her oldest daughter, Sonia "crying and begging me to take her away but I had nowhere to take her, I would hide her under the bed that's all I could do. I had to take her to the doctor. He said she had a nervous condition and medicated her with sedatives." (Interview with Maria Santos Guevara and Guadalupe Guevara)

The never-ending fear experienced by Mr. Guevara and his countrymen left emotional scars that, despite efforts to put the war behind them, continue to haunt El Salvadorans today. "Some people still today carry the trauma of the war in their mind and are affected in their daily lives…in my case I think that I don't feel anything anymore."(Interview with Moises Berrios Benitez) Mr. Guevara's brother states:

"Even today in my daily life I jump with any noise that surprises me. The other day I was walking in the street, when a gardener started blowing air with his machine and surprised me. I jumped and started shaking…it's hard to say about the others because we have buried the war inside of us and we never talk about it. It's too difficult" (Interview with Jose Benjamin Guevara12/21/01)

Mr. Guevara's sister also described her ongoing emotional difficulties:

"When I heard what happened to the towers in New York I started shaking. It was like I was back in El Salvador. I have dreams too still of dead bodies falling on top of me. It's because anywhere we would see people dead hanging out of the windows and all kinds of terrible things."(Interview with Sonia Sorto)

Immigration & Life in the United States

Life in El Salvador and its hardships forced many young men to make the difficult decision to leave their families and homeland. Felipe Guevara recalls coming to the United States:

"…to escape the war in El Salvador. Life there was terrible and awful it is not anything someone from this country can understand. We couldn't sleep at night because we would hear machine guns, helicopters and bombs going constantly. We used to wake up very early to take the bus into town and there would be dead bodies scattered on the streets. They hadn't had time to clean them up and we would see the results of the fighting the night before. We used to see guerillas on the roadside with machine guns. They would wait behind buses for the soldiers to pass, and then come to our villages to recruit young men. It was a bad situation because if you went with them to fight you knew you would be killed by the government, but if you refused

> they would kill you right there. They said you had a choice, but there really was no choice. That is why I had to leave, to escape the horror." (Interview with Felipe Guevara)

Alex Guevara's childhood friend told interviewers "It's hard for me to talk about what it was like there. No one should have to see those things; it affects me still. I moved here to get away from those memories; they are just too hard." (Interview with Rene Rubio)

Like his brothers, Alex Guevara agonized over his decision to leave El Salvador. Mr. Guevara's Uncle remembers "Alex consulted me before going to the U.S. we discussed the situation here with the war and the tremendous state of insecurity." (Interview with Moises Berrios Benitez) Mr. Guevara's parents believed that, "he had to leave because the militaries and the guerilla were taking the boys of his age away. The decision was not easy. We both made the decision because he was very depressed." (Interview with Maria Santos Guevara and Guadalupe Guevara). Mr. Guevara's aunt recalls, "He was so scared to be taken away and disappear like other boys he knew." (Interview with Maria Del Carmen Berrios)

Mr. Guevara, like many others, depended on *'Coyotes'* for his immigration to the United States. Mr. Guevara is reluctant to discuss his experiences while traveling to America. However, his brother Benjamin describes his immigration in detail. During his travel to the U. S., Benjamin was forced to spend days traveling by bus, swimming across borders and walking for hours without food and water. Benjamin's immigration was an experience filled with appalling living conditions, abuse, incarceration, and exploitation.

Upon his arrival in the United States Alex Guevara set up residence in the part of Houston that most reminded him of home, an area described as a "lively neighborhood, full of the sights and sounds *a sabor Latino*." (Hoover Digest 1999, volume 1 "the welcome effects of Latino Immigration" by Michael Barone) However, it is likely that the poverty and violence redolent in this area also brought back thoughts of home for Mr. Guevara. Jose Manuel Aventura states:

> "I have known Alex since 1985 when we had both just arrived in the United States and we became best friends…Alex and I lived in Southwest Houston. It wasn't really the greatest neighborhood, but they called it *'Las Americas'* because of all the Hispanics. I think Alex liked it because it reminded him of his family back home." (Interview with Manuel Aventura)

The area known as *Las Americas* consisted of fifty thousand apartments, built in the 1970's with an expected population of young middle class families. However, after the Savings and Loan scandals and oil bust of the 1980's many apartment owners could not pay their debts. Services in the buildings began to deteriorate and soon razor-wire fences were erected and windows were boarded. As people moved out the complexes shut down altogether. New landlords soon purchased these buildings at bargain rates and did almost no repairs. Advertising was done in the Spanish media only, targeting the many Central American and Mexican immigrants. Almost overnight, the apartments were filled with immigrants and the neighborhood came to be known to Houstonians as the "Gulfton Ghetto." Local residents nicknamed it *Las Americas* for the large number of immigrants from Central and South America who lived there.

By the mid 1980's, the area had become "acres of broken glass, barbed wire, backed up sewage and overflowing dumpsters...authorities blamed the masses who lived in Gulfton for causing the situation which in fact victimized them."(Revolutionary Worker, November 1998).

By the late 1980's, the "Gulfton Ghetto" was the headquarters for notorious street gang, The Southwest Cholos, who controlled most of Southwest Houston. Mr. Guevara admits to associating with Los Cholos gang members from 1991 to 1993. Mr. Guevara states that friends of his were in the gang and encouraged him to join. Alex laughs as he looks back on that time because he states, "I never really fit in with the other gang members because I would never drink or do drugs. I never would get a tattoo either. I didn't believe in doing that to my body. They all used to tease me." (Interview with Gilmar Alexander Guevara) Mr. Guevara's best friend agrees; "We would go to some parties but even then he never drank anything except sodas." (Interview with Jose Manuel Aventura 12/22/01) A co-worker reports, "I never saw him drinking even when we went to parties. I remember people would make fun of him because he would drink only sodas." (Interview with Ramon Last Name Unknown) Cousins who spent time with Alex at family reunions remember, "there was always beer around, but I never saw him take a drink. I never knew him to go to clubs or party. When Alex had free time he spent it with his family." (Interview with Juana Guevara) and "I never saw him or his brothers drink alcohol, even though there was plenty there. Alex loved to dance, but he never drank or used drugs and I never knew him to be involved in any gangs." (Interview with Iris Guevara)

Like war torn El Salvador, violence in *Las Americas* was rampant. The apartments were characterized by extremely serious opportunistic crime problems; repeated violent attacks on tenants, including the 1993 rape and murder of a Honduran woman, in front of her 2 month old son, by criminals who walked into the complex unchallenged through a broken security gate. Despite repeated incidents and complaints, landlords did nothing to increase tenant safety. Mari Castillo, a 14-year-old Gulfton resident laments, "Gulfton is not safe. You can't go out after seven. There are people out who can harm you."(Marino, 2001). City officials did not support resident requests for improvements, instead proposing that barricades be erected on eighteen streets surrounding the apartments and businesses to protect neighboring communities. Local Latino organizations fought against the "ghetto-izing of their community and won the battle.

Mr. Guevara's wife spoke with this writer about her experiences with Alex in *Las Americas* and his decision to move away from the neighborhood:

"When I first met Alex we were living in Southwest Houston where there were lots of gangs. Alex know lots of bad people, but I never knew him to be involved in any robberies, assaults or killings. Alex would hang around the gangs, like he wanted to belong, but he never got involved in any bad stuff even though there were plenty of people around us who were. He just wasn't like that. In 1994 Alex moved me and the kids to Texas City to get away from the violence in Southwest Houston. He did not think it was a good environment for us." (Interview with Nancy Gonzales Guevara)

Alex's brother, Benjamin, also discussed Alex's life in Gulfton and move to Texas City;

"Alex used to live in Houston, but the gangs were too bad and he finally moved to Texas City to get away from the violence. I don't think he was ever really in a gang.

He had a friend, Alfredo, who was and I think he hung around him to feel macho. Alex was more of a follower, doing things to fit in." (Interview with Jose Benjamin Guevara 11/10/01)

Police efforts to clean up the "Gulfton Ghetto" did not begin until the early 90's and primarily included arresting and deporting many of the young immigrants in the area. "People in Gulfton- many of whom fled U.S. sponsored death squads in El Salvador and Guatemala- commonly call the police in the U.S. *Soldanos* (soldiers), because they are so much like the soldiers who rampaged throughout the countryside of their homelands." (Revolutionary Worker, 1998). Community activists point out that the neighborhood contained no schools, parks or libraries; "police repression is the only 'service' the city offers the people of Gulfton." (Revolutionary Worker, October 1998) Oscar Gonzales, a Gulfton Elementary School Athletic Director and counselor told Jennifer Rose Marino of the Savannah Morning News that Gulfton boasts the city's highest juvenile crime rate; 90% of the student population eats breakfast and lunch at school provided by the state. "Most parents in the area work two to three jobs to get by, in our community where ambulance and police sirens wail constantly and it is normal for six families to live in a one-bedroom apartment…Gulfton is an area with a long history of violence, gangs and drugs- massive hotbeds for all kind of trouble. You have 100,000 people living in a quarter of a mile. It creates all kinds of social issues. It leads to very tough situations." (Marino, 2001)

In addition to the police presence, residents of Las Americas were at risk due to their extremely poor living conditions and fire hazards. In 1992, a two-year-old boy was critically injured after he escaped his home, which had no lock or doorknob, and fell 30 feet through banister railings twice the width allowed, by city code. Newspaper reporters visiting the area documented broken windows, exposed wiring, apartments plagued by rats and roaches, wobbly stairways, collapsed carports, mounds of garbage and many other hazards in apartments costing up to four hundred dollars per month in rent. City fire chief, Ernest Brinkman admitted that his inspectors reached only 20% of the areas apartments in any given year, and Bea Link, Houston's Assistant Public Works Director for Neighborhood Protection, described the atrocious condition of Gulfton's complexes noting that she had seen, among other things, children with gaping sores on their legs from contact with raw sewage. (Morris, 1995)

By the late 90's, the Gulfton community was identified as one of eleven neighborhoods in the state of Texas with the most referrals of delinquent youth to the Juvenile Justice System. The area had the highest population density of any in the Houston area and the most serious crime problems were identified as drug trafficking, criminal street gang activity and juvenile delinquency. (Interview with Bea Marquez)

Family Relationships

One of the most difficult obstacles for immigrants is the separation from family. Mr. Guevara was not only close with his mother, but enjoyed strong bonds to all family in El Salvador. Mr. Guevara did his best to maintain these relationships from the U.S. despite

the distance and expense. "Alex hated to be away from his family and missed his mother and father very much. Alex nicknamed his mother *maito* and his father *papito*. He always told me how he missed talking to his *maito*." (Interview with Juana Guevara) Mr. Guevara's wife remembers, "Alex missed his family in El Salvador very much. Alex even talked about us moving there, but he didn't want his kids to grow up seeing the things he had. It was hard for Alex to talk about the things he saw in El Salvador. He always just said that there was too much fighting and bad stuff." (Interview with Nancy Gonzales Guevara) While living with his brother Felipe in Los Angeles, Alex "would become very sad when people mentioned his family because he missed them so much. He was a very sensitive person." (Interview with Felipe Guevara) Mr. Guevara's younger sister, Ingris, described her feelings about her brother; "We always got along so great, even when he already was in the U.S. he would call me and treat me with such love." (Interview with Gloria Ingris Guevara Berrios) Mr. Guevara even sought to develop a relationship with the family's newest member, an infant adopted by his parents after Mr. Guevara had already come to the states. Despite never meeting his new sister, Mr. Guevara fondly recalls speaking to her on the telephone, sending notes and pictures back and forth and he proudly describes how pleased she was with a gift of roller skates he sent to her for her tenth birthday. (Interview with Gilmar Alexander Guevara)

Maintaining contact with family is extremely important to Mr. Guevara; he worries about his parents' health in their old age. It has been extremely important for Alex to keep his mother informed about his life in America and his accomplishments. Alex often spoke to his parents about where he was living and working and encouraged his wife to develop a relationship with his mother also. Mr. Guevara's wife and parents continue to talk often. (Interview with Nancy Gonzales Guevara) Mr. Guevara's mother fondly recalls a certificate that Alex sent her from a bible course he completed in June of 2001. Mr. Guevara's family consider themselves good Christians and felt it was important to raise their children with these beliefs. Mr. Guevara's mother is proud that Alex continued his church attendance in the United States and became extremely emotional while showing the interviewer a bible that Alex sent her. Inside the bible is written "to my Mammy with lots of love from her son who loves her and misses her a lot." (Interview with Maria Santos Guevara and Guadalupe Guevara) Mr. Guevara's wife reports that church was an important part of their life. Many of the church members were immigrants from El Salvador and knew Alex and his family from home. The Guevaras attended Oasis De Esperanza Church every week and had many friends there; "the people at the church pray for him every day. They can tell you what a good man he is." (Interview with Nancy Gonzales Guevara). Interviews with church members support Nancy's claims. Sonia Castro met Alex at church and describes him as:

> A "good Christian. He was a friendly person who was always with his wife and children. I never knew Alex to drink, smoke or use drugs. I never even heard of him doing anything like that and my husband knows him from their childhood in El Salvador. My husband does not wish to be interviewed. He is a hard worker and it is too difficult for him to remember the things he saw there. He does not want to be upset." (Interview with Sonia Castro)

Maria De La Cruz Escobar knew Alex from her hometown of Santa Rosa, El Salvador and also attended church with him at Oasis De Esperanza in Houston:

> "Alex always went to mass with my family on Wednesdays and Sundays. Alex didn't get into any trouble. He would work, go home and then go to church. He even lived with my family for a short time. I didn't ever mind having them. They were good people. I remember too many things from my childhood during the war…we all try not to talk about those times (in El Salvador)… No one likes to remember… As time goes on it is easier for me to forget." (Interview with Maria De La Cruz Escobar)

Without question, Mr. Guevara states that the birth of his children was the happiest moment in his life. Mr. Guevara met his wife Nancy while living in *Las Americas.* Nancy was 13 when she met Mr. Guevara and admits to struggling with family problems, truancy, gang involvement and addiction at that time. However, Nancy points out that Mr. Guevara encouraged her to improve her life; "when I met Alex I was drinking an smoking every day, but Alex never drank or anything he always said it wasn't good and helped me to quit." (Interview with Nancy Gonzales Guevara)
Nancy points out that she did not work during her marriage to Alex:

> "Alex always worked hard to take care of us, sometimes two or three jobs…he really cared about his family and loved us very much…even one time my sister got mad because she was jealous of how good he treated me and the kids…After we moved to Texas City, we almost never went out at night. Alex didn't like to leave the children with a baby sitter and always said he would rather stay home with his family. Alex had another child too, a daughter from before we were married. Alex was very devoted to her and saw her every weekend until he was arrested. When he was off work he never missed a visit with his daughter." (Interview with Nancy Gonzales Guevara)

Friends and neighbors agree that Mr. Guevara was a family man who cared deeply for his wife and children. Mr. Guevara's best friend, Manuel, remembers; "Alex was devoted to his girlfriend and his daughter. He was a happy guy who was never in any trouble." (Interview with Jose Manuel Aventura11/25/01) "The last time I saw Alex was 1995. He came to my house with his one and one-half year old daughter and was so loving to her, I have never seen a bad reaction out of him towards anything." (Interview with Jose Manuel Aventura 12/22/01) Another friend, and co-worker at his brother's auto shop, remembers him as "very, very loving with his wife, daughters and his son. He would come to the shop three or four times a month with his three children. He loved all children, but he was so proud of his own. I would even get jealous of seeing the way he was." (Interview with Ramon, Last Name Unknown)

Rene Rubio who also grew up in El Salvador fondly remembers the time he spent with Alex in America:

> "Alex was a calm man who worked hard to succeed in life. He and his family lived with us in a small one-bedroom apartment. It was crowded, but we were glad to help. Alex was a good man who was devoted to his wife and his child. I never knew Alex to drink or use drugs, his only hobby was for us to go fishing." (Interview with Rene Rubio)

Mr. Guevara's oldest sister currently lives in Texas City. Mr. Guevara spent a significant amount of time at her home in the years prior to his arrest. Mrs. Sorto states:

> "He is a good brother; he has always helped me with money for our rent, with advice and support. He loved his children, all children really…I remember once he got upset because my daughter broke her hand due to the fact that she fell and I did not watch her close enough, he then told me that it could have been avoided if I would have been more cautious with her. He really cared." (Interview with Sonia Sorto)

Employment History

Mr. Guevara showed a strong work ethic throughout his life, beginning at age nine when he left school to learn a trade. Mr. Guevara states that he learned to fix cars from his older brother who worked at a shop in their village. Benjamin Guevara recalls, "We had to start working very early to help support our family." (Interview with Jose Benjamin Guevara11/25/01)"We would get up at 4 am and pull water out from the well and carry it to the mill then in the morning we would work at the brick factory and in the afternoon we would go to a friend's shop to learn mechanics." (Interview with Jose Benjamin Guevara 12/21/01) Mr. Guevara remembers that while working on cars he would watch the man who owned the welding shop across the street. Mr. Guevara was so curious that he approached the man and asked him to teach him the trade. Alex became very adept at welding and was hired to work on the village's buses, which were damaged in the war. (Interview with Gilmar Alexander Guevara) Mr. Guevara's former employer, Rafael Antonio Ventura remembers:

> "We trusted him with everything in the shop and the house and we never had a problem. I only employ people that I know the family, have references of, that I can trust and know of them as being honest and respectable. He had access to my shop and also to my house and he can come into my house to drink something, etc…Alex was always on time, was a good worker and through time he won everyone's trust." (Interview with Rafael Antonio Ventura)

Miguel Angel Fernandez grew up in El Salvador. Alex worked for Mr. Fernandez' father for five years. Miguel remembers Alex as:

> "…a very serious worker, very dedicated. We never had any problems of any kind with him. When my father was alive he always had good memories of Alex. When he would tell him to do something he would never complain, he was an excellent worker."(Interview with Miguel Angel Fernandez)

Upon his arrival to the United States, Mr. Guevara began working for his brother Benjamin Guevara at his auto body shop. He was employed there, successfully, for two years at which time he moved to Los Angeles. Alex and his, then pregnant, girlfriend moved to Los Angeles to live with his half brother, Felipe Guevara. Felipe recommended Alex to a local mechanic who was very pleased by Alex's hard work:

> "Alex's employer, Mr. Garcia always said he was terrific. I called to check on his work almost every week since I had referred him. He was a hard worker and was very good at what he did. Mr. Garcia used to joke that I should bring more of my brothers to work for him since Alex was so good. Alex was never in any trouble while he was

here. He worked and spent time with the family; that was it. He used to come home from work and play with my kids in the evenings. They loved him." (Interview with Felipe Guevara)

Mr. Guevara remembers Los Angeles fondly and states that he enjoyed his work and spending time with family there. "Alex loved Los Angeles, but his girlfriend was pregnant and home sick for Houston. Alex agreed to move back because he wanted to do what was right for the baby and her mother, not what was right for him." (Interview with Felipe Guevara).

Upon his return to Houston, Mr. Guevara began working as a bus boy for a local restaurant chain. After a few years, Mr. Guevara asked a manager if he could learn how to cook. Because of Mr. Guevara's history as a dependable and responsible employee, the restaurant agreed to train him and promoted him to line chef. Mr. Guevara enjoyed this work for several years until a raid by immigration scared the restaurant into firing all foreign-born employees. Mr. Guevara immediately secured employment at another local eatery, where he worked until Hurricane Alicia destroyed the restaurant. (Interview with Gilmar Alexander Guevara)

Mr. Guevara describes being distraught after the hurricane, wondering how he would support his family. He recalls sitting outside his apartment when he was approached by the complex's owner (he had traveled from Canada to survey the damage). After talking with Mr. Guevara and learning of his recent unemployment he offered Alex the job of helping repair hurricane damage at the apartments. The owner was so pleased with Mr. Guevara's work that upon his return to Canada he hired Mr. Guevara as a full time maintenance man. While working at the apartment complex, Mr. Guevara became close friends with Mr. Jo Chau, head maintenance man, and his wife Ophelia. Jo took Mr. Guevara under his wing and taught him many new skills, including air conditioner repair. Mrs. Chau recalls "Alex was a hard worker and spent time with his family. Alex really loved his children. He was always playing and taking care of them." (Interview with Jo and Ophelia Chau) When Mr. Chau heard that a friend at nearby Bellamy Apartments was looking for a new maintenance man he recommended Mr. Guevara for the job based on his skills and reliability. Mr. Chau remembers, "Alex was such a good worker…he worked all the time, day or night. If someone in the complex had a problem, he would fix it. When Alex wasn't working he was spending time with his family. He was always with his kids. He was a good parent." (Interview with Jo and Ophelia Chau) Mr. Guevara worked at Bellamy Apartments until the time of his arrest.

Previous Trial

Everyone interviewed agreed that they would have been willing to provide support, testimony or whatever was needed during Mr. Guevara's trial, but didn't know what to do. Alex's brother Benjamin states:

"It was so hard during the first trial. It was like nobody wanted to help. I talked once to an investigator, but he never came again. I tried to call the lawyers and even sent them a fax, but they never would get back to me. It was like they just didn't care." (Interview with Jose Benjamin Guevara 11/10/01)

One of Alex's life-long friends commented, "I would have been willing to testify on his behalf and so would my family, but no one asked us to. I wish I had known there was a way I could have helped." (Interview with Rene Rubio)

Neighbor, Ophelia Chau and her husband Jo believe:

> "Alex's lawyers just didn't care, not one of them came to talk to us. Everyone in the complex was upset and wondered what we could do to help but no one knew who to talk to. If we had known we would all have been there to help." (Interview with Jo and Ophelia Chau)

Maria De La Cruz Escobar experienced childhood in El Salvador, a difficult immigration to the U.S., supported Mr. Guevara in her home and also attended church with him. During Alex's trial she "was never asked anything about Alex. I would have been happy to tell people what I know about him and his life." (Interview with Maria De La Cruz Escobar)

Mr. Guevara has several cousins who now live in the United States. Juana Guevara states "I visited with Alex after the trial to show my support. I never talked to his attorneys and they never asked me for any information. I would have gladly testified or helped in any way." (Interview with Juana Guevara)

Cousin Iris Guevara was also not contacted, but states "I would have been willing to talk to them or do anything." (Interview with Iris Guevara)

Mr. Guevara's brother, Felipe commented:

> "I couldn't believe what I was told when I heard about Alex. The Alex I knew couldn't do anything like that. It sounded like the soldiers in my country not like the brother who shared my home. I wanted to make arrangements to travel to Houston for the trial, but it was so difficult to get information. It was like the lawyers were trying not to help him. I will do anything I can for my brother. Please let me know how to help."(Interview with Felipe Guevara)

Summary

There is a wealth of information available regarding Alex Guevara's life. Family members, friends and co-workers spoke with interviewers about the most difficult of their life experiences in order to help Mr. Guevara who they expressed great love for. All individuals expressed a willingness to testify on his behalf and lamented that they were not given the opportunity to help in his previous trial.

Interviews provided information on Mr. Guevara's extreme illness as a youth and the lack of adequate medical care. Mr. Guevara's condition necessitated constant care and supervision by his mother who he became dependant on. Mr. Guevara did not have the opportunity to develop peer relationships, resulting in inappropriate attachment to his mother. This relationship was further complicated by Mr. Guevara's childhood environment. Civil War in El Salvador prevented neighborhood children from playing together normally. Parents' fear of their children being abducted and/or killed necessitated constant vigilance and keep their children close.

Despite his parents' best efforts, Mr. Guevara and his siblings were exposed to unparalleled death and destruction. Interviewees describe watching local businesses

bombed and friends and family killed and burned. After Mr. Guevara made the difficult decision to leave his family he found himself in Houston living in one of America's war zones without his mother to look after him; a situation he was very much not used to.

Despite an environment of violence, poverty and gangs, Mr. Guevara showed great strength in avoiding drugs and alcohol, viewing his gang affiliation as a source of support and camaraderie rather than an opportunity for violence.

The strong work ethic that Mr. Guevara was forced to develop at a very early age prompted him to work several jobs at a time, supporting his family in Houston, saving to move his family to a better neighborhood, and sending what little was left home to El Salvador. Mr. Guevara speaks proudly of his employment history and has enjoyed multiple jobs in the United States. Mr. Guevara often went out of his way to request additional training seeking to improve his skills and position. Mr. Guevara was well liked by clients and co-workers and employers praised his devotion and responsibility.

Despite the wealth of mitigating evidence available, none was sought or presented during Mr. Guevara's previous trial. It is my opinion that this information would have been critical to the deliberations of a jury asked to assess the most severe punishment.

This declaration is respectfully submitted on the 12th day of December 2002

Gina T. Vitale, LMSW, CCFC

Appendix

The following Appendix is a list of documents used in developing the Declaration of Gina T. Vitale, LMSW, CCFC

1. Declaration of Claudia Maria Aventura (Church member), July 2, 2002: Declaration obtained and translated by Lizzette Tienda
2. Declaration of Moises Berrios Benitez (Uncle), February 10, 2002: Declaration obtained and translated by Edurne Imana
3. Declaration of Carmen Berrios (Aunt), February 7, 2002: Declaration obtained and translated by Edurne Imana
4. Declaration of Rosa Candida Berrios (Aunt), February 7, 2002: Declaration obtained and translated by Edurne Imana
5. Declaration of Gloria Ingris Guevara Berrios (Sister), February 9, 2002: Declaration obtained and translated by Edurne Imana
6. Declaration of Sonia Castro (married to Mr. Guevara's cousin), July 2, 2002: Declaration obtained and translated by Lizzette Tienda
7. Declaration of Richard C. Cervantes, PhD., June 2002
8. Declaration of Jo and Ophelia Chau (Neighbors and co-workers), January 16, 2002
9. Declaration of Maria De La Cruz Escobar (Friend and church member), July 2, 2002: Declaration obtained and translated by Lizzette Tienda
10. Declaration of Miguel Angel Fernandez (Employer), February 12, 2002: Declaration obtained and translated by Edurne Imana
11. Declaration of Felipe Guevara (Brother), December 18, 2001
12. Declaration of Felipe Guevara (Brother), December 23, 2001
13. Declaration of Iris Guevara (Cousin), April 4, 2002: Declaration obtained and translated by Lizzette Tienda
14. Declaration of Jose Benjamin Guevara and Jose Marvin Guevara (Brothers) November 11, 2001
15. Declaration of Jose Benjamin Guevara (Brother), November 25, 2001
16. Declaration of Jose Benjamin Guevara (Brother), December 21, 2001: Declaration obtained and translated by Edurne Imana
17. Declaration of Jose Marvin Guevara (Brother), December 22, 2001: Declaration obtained and translated by Edurne Imana
18. Declaration of Juana Guevara (Childhood friend and married to Mr. Guevara's cousin), April 4, 2002: Declaration obtained and translated by Lizzette Tienda
19. Declaration of Maria Santos Guevara and Guadalupe Guevara (Parents), February 9, 2002: Declaration obtained and translated by Edurne Imana
20. Declaration of Nancy Gonzales Guevara (Wife), December 24, 2001
21. Declaration of Ramon Last Name Unknown (Co-worker), December 23, 2001: Declaration obtained and translated by Edurne Imana

22. Declaration of Rene Rubio (Friend), July 2, 2002: Declaration obtained and translated by Lizzette Tienda
23. Declaration of Evangelina Sarabia (Childhood Friend), July 2, 2002: Declaration obtained and translated by Lizzette Tienda
24. Declaration of Ana Fermina Orion Sorto (Teacher), February 12, 2002: Declaration obtained and translated by Edurne Imana
25. Declaration of Sonia Sorto (Sister), December 21, 2001: Declaration obtained and translated by Edurne Imana
26. Declaration of Haydee Ventura (Cousin), April 4, 2002: Declaration obtained and translated by Lizzette Tienda
27. Declaration of Jose Manuel Ventura (Friend), April 4, 2002: Declaration obtained and translated by Lizzette Tienda
28. Declaration of Jose Manuel Ventura (Friend), December 22, 2002: Declaration obtained and translated by Edurne Imana
29. Declaration of Rafael Antonio Ventura (Employer), February 11, 2002: Declaration obtained and translated by Edurne Imana
30. Barone, M. (1999). The Welcome Effects of Latino Immigration. Hoover Digest, 1999 No.1.
31. Bernstein, A. (2001, February 2). Newcomer's Map Omits Poor Neighborhoods. The Houston Chronicle On-line Archives. Available: http://www.Houstonchronicle.com.
32. *La Resistencia* on-line. "A History of *La Resistencia*." Available: http://www.Laresistencia.org.
33. Marino, J.R. (2001, February 11). No Excuses. The Savannah Morning News On the Web. Available: http://www.savannahmorningnews.com.
34. Morris, J. (1995, March 26). Life on the Edge: The powerless often are force into apartments that defy city housing codes and, in some cases, belief. The Houston Chronicle On-line Archives. Available: http://www. Houstonchronicle.com
35. National Association of Hispanic Journalists. (2001). Latinos in the United States [Brochure]
36. Revolutionary Worker Online #979, October 25, 1998. "Houston: *Asesinos* in Gulfton." Available: http://www.mcs.net/~rwor.
37. Revolutionary Worker Online #980, November 1, 1998. "The Police Murder of Pedro Oregon and the Popular Resolution to Stop Police Brutality." Available: http://www.mcs.net/~rwor.
38. Sachs, K. (1995, November 6). '*La Gaceta*' Editor Welcomed in Houston. The Militant, 59 (41).
39. Tedford, B. (1998, February 17). No Vacancy for Drug Dealers. The Houston Chronicle On-line Archives. Available: http://www. Houstonchronicle.com

Exhibit C
Dr. Cervates Affidavit

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared RICHARD C. CERVANTES, PhD. who, after being by me duly sworn upon his oath, did say:

My name is Richard Cervantes. I am over the age of eighteen and competent to make this affidavit. I am currently Senior Research Associate and Director of Research at Behavioral Assessment, Inc. in Los Angeles, California. In addition, I am Senior Research Fellow at the California State University, in the Department of Psychology. Previously I was employed from 1990 to 1995 as an Assistant Professor in the Department of Psychiatry at the University of Southern California. I served as the Associate Director of Clinical Psychology Training at USC Medical Center. As part of my work, I conduct evaluations of psychologically impaired police officers for the Los Angeles County District Attorney's Office. Between 1984 to 1989 I was employed as Assistant Research Psychologist at UCLA's Spanish Speaking Mental Health research Center.

1. I received a bachelor's degree in business administration and psychology in 1978, master's degree in clinical psychology in 1982, and Ph.D in clinical psychology in 1984 from Oklahoma State University.

2. I currently am a member of the Hispanic High Risk Youth Cluster Steering Committee, United State Center for Substance Abuse Prevention, Alcohol Abuse and Mental Health Administration.

3. Following my educational training, I was employed as a Staff Psychologist at the Didi Hirsch Community mental Health Center in Culver City, California for five years. From 1984 through 1989, I was an Assistant Research Psychologist at the Spanish Speaking Mental Health Research Center at UCLA. From 1988 to 1990, I was an Assistant Professor and Coordinator of Community/Clinical Track at the California School of Professional Psychology.

5. My professional clinical experience also included serving as a psychologist for the Oklahoma Department of Corrections, a Pre-Doctoral Intern at the Didi Hirsch Community Mental Health Center in Culver City, California, and Diagnostic Technician for the Tulsa Headstart Program.

6. I am a member in good standing of the American Orthopsychiatric Association, and the American Association of Applied and Preventive Psychology, the American Psychological Society, and received an American Psychological Association award as "Promising Young Research Scientist" from Division 45.

7. My professional duties have included providing counseling to survivors of domestic abuse, counseling and referral for poly-substance abuse, and counseling for psychological trauma caused by exposure to violence and stressful situations. In addition, I have conducted over 200 of

psychological evaluations of patients suffering from severe emotional and psychological problems, learning disabilities, mental retardation, and other mental impairments. My evaluations have been relied upon by courts, social service agencies, and educational institutions to determine the social service needs of clients.

8. I have published over two-dozen scholarly articles in medical journals, a book and numerous chapters in professional books and have presented over three-dozen papers at local, national, and international conferences. My topics of research include addressing mental health issues in Hispanic populations, drug and alcohol abuse research and prevention, particularly, within the Hispanic community, Hispanic family dynamics and stress, and Hispanic gangs. I am one of the principal authors of the Hispanic Stress Inventory, a new psychological test for Hispanic adults.

9. Mr. Guevara's attorney has requested that I investigate and evaluate his cultural and social history and background, with particular attention to his family, educational, migration, and medical history. The purposes of this evaluation are to:

(1) Determine the extent of which constant exposure of war trauma in El Salvador affected his emotional and cognitive capacity, and how he had PTSD symptoms later in childhood and adulthood.
(2) Determine whether his social and behavioral functioning is related to severe psychological, intellectual and cognitive deficits.
(3) Determine whether his early exposure to war and violence further contributed to his diminished intellectual and cognitive abilities.
(4) Determine whether a lack of intervention by agencies, institutions, family, and community contributed to his social, psychological, and intellectual functioning from birth to adulthood; and
(5) Determine whether Defendant's childhood and adolescent history or social, psychological, and intellectual functioning affected his behavior at the time of the crime for which he was convicted.

10. In conducting this investigation, I have relied upon a variety of materials including school reports, investigator reports, court records, social and cultural history interview records, and information obtained through my personal interviews with Alex Guevara, Jose Benjamin Guevara, and Marvin Guevara.

Personal and Family history

11. According to investigator reports, Alex Guevara is one of four siblings of Maria and Guadalupe Guevara and was born in Santa Rosa, El Salvador on October 5, 1969.

12. Alex's mother, Maria was born in Canton Los Ranchos, El Salvador, and his father, Guadalupe, was born in San Miguel, El Salvador.

13. According to Alex Guevara's mother, her pregnancy with Alex was very complicated. During month seven of her pregnancy she contracted Chicken Pox.

14. Alex's mother described being under treatment for Chicken Pox during pregnancy, but described Alex as a normal delivery with no complication.

15. According to Alex's mother and father they resided in a very small house made of stones and pieces of wood during Alex's infancy in Santa Rosa De Lima, El Salvador.

16. According to Alex's mother, her husband, Guadalupe was impulsive and had a bad temper his whole life he would scare the children, sometimes talking loud and throwing things. For example throwing the plate when he didn't like the food that was cooked for him.

17. According to interviews with Alex's mother, brothers and sister, between the ages of zero to 2 Alex was very ill, and is reported to have contracted Chicken Pox during Maria's pregnancy. All informants indicate that Alex had constant diarrhea, his skin was always broken and bleeding with scabs and that this condition lasted for about four months during his infancy.

18. According to those family members interviewed, Alex was well behaved and was a quiet child. Alex got along well with his siblings and was the most humble and most lovable of all the children during his early childhood.

19. According to all family members, due to physical illness during infancy, Alex tended to be over protected and overly sheltered by his mother. He is reported to have developed an extremely strong attachment to his mother.

War Exposure Trauma and Post-Traumatic Disorder

20. The development of Post-Traumatic Stress Disorder (PTSD) follows an occurrence of extreme psychological stress, such as that encountered in war or resulting from violence, childhood abuse, sexual abuse, or serious accident. The Diagnosis of Post Traumatic Stress Disorder, as listed in the Diagnostic and Statistic Manual of Mental Disorders – IV Edition, is considered a major psychiatric/medical condition that often requires specialized treatment interventions (DSM-IV, 1994).

21. Victims of PTSD commonly experience periods of emotional numbness and denial that can last for months or years, accompanied by symptoms such as intrusive imagery, recurring nightmares, "flashbacks," short-term memory problems, cognitive disruption, delayed reaction, insomnia, hyper arousal or heightened sensitivity to sudden noises and difficulty in coping and solving problems. In some cases outbursts of violent behavior have been observed (Murray, 1992).

22. Current research on PTSD, suggests that individual risk factors such as environment, demographic, personality and psychiatric history, dissociation, cognitive and biological systems and familial or genetic risk factors interact together to determine who develops the disorder (Halligan, Yehuda, 1999).

23. In a study by Breslau et al. (1998), demographic factors such as economic status or lower levels of educations played a significant role in the development of PTSD as it allowed for a heightened risk of trauma exposure.

24. Environmental factors such as prior exposure to trauma or chronic stress was also highly associated with the development of PTSD, particularly when experienced at a young age (Davidson et al., 1991). In particular, the type of exposure such as assault, family instability or traumatic experiences such as the atrocities of war increased incidence and or the likelihood of PTSD (King et al., 1996).

25. Exposure to combat, the duration of exposure, being witness to the death of comrades, and participating in the violence of war have been found to be the most frequent factors associated with PTSD (Murray, 1992).

Children of War

26. The diverse psychological consequences of exposure to war and violence have also been well documented in urban youth (Cervantes, 1992; Barbarin, Richter; Dewet, 2001).

27. In children, psychological symptoms of war exposure include, loss of desire for amusement, daydreaming, poor attention, disrupted sleep, nightmares, intrusive and disturbing imagery, separation anxiety, and fear of death (Osofsky, Wewers, Hann, Fick, 1993).

28. Child victims of war exposure may cope with fear and loss by restricting their activities, pretending not to care about things, chronic worry about safety, anxious attachment to mother, imitative aggressive play, and counterfobic displays of aggression (Osofsky, Wewers, Hann, Fick, 1993).

29. Children may also display post-traumatic stress disorder Symptoms (PTSD) that commonly follows an occurrence of extreme psychological stress, such as that encountered in war or resulting from violence, childhood abuse, sexual abuse, or serious accident.

30. These symptoms include frequent fears, difficulty concentrating, reliving distressing incidents, heightened arousal, irritability, anger, fear of being alone, nightmares about separation, and general distress or social withdrawal (Pynoos, et al., 1987).

31. In another recent study of refugees from Central America, fifty-two percent of Central American immigrants who migrated as a result of war, or political unrest reported symptoms consistent with a diagnosis of PTSD. The authors call for more research to document the psychosocial aspects of war related migration, (Cervantes, Salgado de Snyder, Padilla, 1989).

32. According to Messer and Rasmussen (Messer, Rasmussen, 1986) the greater the refugee's premigration trauma, the more difficult the process of adaptation to the host country. Preoccupation with past traumatic events such as significant losses and exposure to extreme violence, as well as the migration experience itself, may impede the acculturation process. Clinicians' failure to recognize and adequately diagnose PTSD in political refugees and other

immigrants has important consequences, since PTSD differs from other disorders in its etiology, clinical course, and response to therapeutic interventions (Figley, 1978).

33. The vast influx of immigrants, from El Salvador, between 1980 to 1990 was documented to be the result of refuges fleeing turmoil and violence associated with the long civil war in El Salvador.

34. Large urban US areas including Los Angeles, San Francisco, Houston, Washington, DC reported large numbers of refugees from El Salvador between 1980 to 1990.

35. El Salvador is a country about the size of the state of Massachusetts and is one of the most densely populated and poorest countries in the Western Hemisphere and the one with the lowest per capita caloric intake. Less than one percent of the population owns forty percent of the land. In 1979 the average daily wage was $1.95 (Solberg 1982). In El Salvador, many women are not tied to men, because of the labor migration. Ten percent of all babies die before reaching the age of one and there are fewer than three doctors per 10,000 population. Such factors have certainly also prompted economic migrants to leave the country.

36. In El Salvador a military/civilian junta was installed after an October 1979 coup but only increased the repression and number of victims. According to Berryman (1983) the government of El Salvador and its supporters were determined to maintain the extreme disparities in land ownership, wealth and income that existed in the county, in 1984, during the Duarte administration.

37. Human rights and church organizations claim that eighty percent of the 30,000 people killed in El Salvador between October 1979, and 1986 had been victims of the government's military forces or of right-wing death squads (Berryman 1983). The government forces and death squads attack not just guerrillas, but any suspected collaborators and sympathizers. Thus refugees come form a broad spectrum of the population.

38. In El Salvador the guerrillas had concentrated on attacking electrical installations, bridges, crops, trucks and buses. This sabotage of the infrastructure and of the means of production had produced loss of jobs and more economic migrants. This type of destruction was common in the village where the defendant was raised.

39. In El Salvador during the early phases of the war unemployment rose to forty-percent and illiteracy was sixty percent. Scores of union leaders had been imprisoned, tortured and killed without any pretense of a trial. According to spokespersons for the teacher's union in Los Angeles three hundred and twenty five teachers, members of the Salvadorian teachers Union ANDES had been murdered. One thousand three hundred schools were closed in El Salvador, mostly in rural areas, where they had been bombed and destroyed (Peñalosa, 1986).

40. Based on interviews and personal accounts, Alex Guevara, his siblings, and other family members were exposed to prolonged war exposure and all experienced some form of psychological trauma.

41. According to Alex, all children felt terrible because of the war. He commented,

> "I could not open the door because the guerilla was outside and they were going to kill us. Many times I really thought I was going insane. I would hear the airplanes come and I would see the bombs falling on top of our heads and exploding everywhere around us. I could not even eat due to the terror I felt. We would all hide under the beds in the floor and start crying. We all had sleep problems."

42. According to Benjamin, Alex's older brother, their childhood was filled with fighting.

> "There was always fighting around our village and we could not go outside or anywhere. There were dead people everywhere and we were not free. That is why Alex had to come here, so that he wouldn't have to fight for our government or for anyone else, It was just to hard over there."

43. According to Sonia, she, Alex, Marvin and Ingri had bedwetting problems up to age 7 or 8. They all had problems sleeping.

44. According to Sonia, Alex's older sister,

> "The most horrifying part for me was to go out to the street and see mountains of dead bodies. They would put them one on top of the other forming a mountain and then burn them right there, sometimes there were people we knew burning at the end, there would be left over members and the dogs would eat them."

45. According to Sonia, who is now 34, she has been very affected by the war and felt terrorized. She would have tremendous migraines and had nervous problems,

> "I would cry and beg my parents to take me away, but they had nowhere to take me. The whole country was in war, they would hide her under the bed that's all they could do. They took me to the doctor and he said I had a nervous condition and he medicated me with sedatives."

46. According to Sonia, Alex's sister, the guerilla would come into the village and announce with speakers that the village was taken over and everybody would hide and start crying.

47. According to Sonia she would have nightmares of dead bodies falling on top of her. "I would see dead people hanging off the windows and all kinds of horrible things."

48. According to Sonia the guerilla and the military destroyed everything. There was nothing available.

49. According to Sonia, when she heard what happened to the towers in New York on September 11, 2001, she started shaking.

> "I could not help it, when I saw the towers fall I felt like I was going back in time. Sonia got very scared and felt horrible, she had a panic attack and started shaking. In general when I hear planes I get scared and feel nervous."

50. According to Marvin he would see mountains of dead people without heads, hands and other body parts, lying in the streets, in his neighborhood.

> "I remember once Alex and I visited an aunt, mothers sister, and from the window they watched the guerilla making people dig holes in the ground, next donkeys would come loaded with bodies that they would throw in those holes. I was 14 and Alex was 17, we would see how guerilla would fill up trucks with dead bodies and take them away. Everybody had fear."

51. According to Marvin he also lived in fear, he did not want to be taken away. The military and also the guerilla would come into the houses looking for children to take away to fight for them, the Guevara children would hide inside the well.

52. According to Marvin they would not go outside, they panicked, he remembers he would cry and hang on to his mother's skirt because he did not want the militaries or the guerilla to take him away.

53. According to Maria Guevara, Alex Guevara's mom, the family went through great tribulations, She indicated,

> "Right here across from the house they bombed and burnt the hill, there were confrontations between the military and the guerilla. I did not know what to do, my children where small. We were told to throw the mattresses on the floor and cover anything with alcohol. We could not sleep at night, the soldiers would come drink water from my well behind the house and they would sleep there. They would leave in the day then the guerilla would come down and drink water from my well as well. I saw lots of dead bodies they would turn purple. They would pick them up and burn them where the clinic used to be in the past."

54. According to Maria, Alex's mother, they were all terrified. "As soon as we would hear the planes we would start crying and we would look for the safest place to hide."

55. According to Alex's mother Maria, Alex was desperate to leave the country. She said,

> "There was no freedom for him here, boys his age were persecuted and recruited by the militaries as well as the guerilla, for the parents it was a constant state of anguish because we did not want to have our children taken away and killed."

56. According to Alex's mother Maria, who stated, "Alex would cry and would tell me 'mommy is it possible that you will not help me leave and my oldest brother Benjamin is gone, do you want to see me taken away?'"

57. According to Virgilia, Alex's aunt, the war was very hard on all of them, they were persecuted by both sides, young people were desperate they had no escape. All the young people had to leave the country.

58. According to Virgilia, who stated,

> "The children were very nervously affected, they would hear shootings right next to them and they would have nervous breakdowns. We did not have a life. Children would cry a lot, they would throw bombs anywhere and they would fall next to you and that would be a total destruction."

59. According to interviews and other information reviewed neither Alex or any of his siblings sought out or were identified as being in need of mental health treatment for war exposure and trauma.

Post-Migration Stress And Adjustment

60. According to all the information that I have obtained, Alex Guevrra has experienced a significant amount of immigration related stress that compounded pre-migration stress and war exposure. In my previous studies, post migration stress in Latino immigrants is related to problems in adapting to life in the US and is associated with psychological problems and symptoms (Cervantes, et al., 1999). It is my opinion that Alex Guevara experienced adaptation problems as a result of immigration stress.

61. According to Carola and Marcelo M. Suarez-Orozco 2001, immigration is a major life decision. It has important psychological and social implications for the individual and the family group. On the eve of departure, immigrants face an uncertain future with potential for both gains and losses. It is an enterprise that is often carefully planned and never taken lightly.

62. According to the Harvard immigration project (Suarez-Orozco, 2001), low-intensity warfare in Central America during the 1980s generated unprecedented population displacements. As a result, there are now well over a million Central Americans in the United States, most of whom sought asylum after 1980.

63. According to Zhou and Bankston (1998), research suggests a series of complex and sometimes contradictory social outcomes in the new country. Some children whom arrived with earlier waves of Southeast Asian refugees, as well as with more recent waves of Central American asylum seekers, tend to overachieve, going on to four-year colleges in disproportionately high numbers.

64. According to Carola and Marcelo M. Suárez-Orozco (2001), for many immigrant children today, family reunification is a long, painful, and disorienting ordeal. Only twenty percent of the children in their study came to the United States as a family unit. Most of the children were separated from one or both parents for a few months to a few years.

65. According to Carola and Marcelo M. Suárez-Orozco (2001), in interviews with immigrant children, it was reveal that many of them experience the crossing of the border as highly traumatic. Some were detained, deported, beaten, or humiliated. Others sensed potential danger.

66. According to Orfield (1998), immigrant families who survive the violence of their countries and the crossing ironically often find a new form of violence as they settle in their American

neighborhoods. New arrivals today, especially those from Latin America and the Caribbean, tend to settle in highly segregated neighborhoods where violence is an everyday occurrence.

67. Based on my interviews with Alex, Marvin, and Benjamin upon arriving to the US Alex moved with his brother in a very high crime area of Houston. This area, called "Las Americas," was where many recent immigrants from Latin America resided.

68. According to Berry (1998), and Flaskerud, and Uman (1996), acculturation is the process of learning new cultural rules and interpersonal expectations. Language is not the only form of communication that immigrants must learn. Social interactions are culturally structured.

69. According to Earls (1997), family cohesion and the maintenance of a well-functioning system of supervision, authority, and mutuality are perhaps the most powerful factors in shaping the well-being and the future outcomes of all children-immigrant and nonimmigrant alike.

70. Based on the information that I obtained, Alex was negatively affected by separation from his parents and country of origin. Alex migrated to the United States alone and indicated,

> " I missed my family a lot. I talked to them a lot, even the newest stepsister who I never met. I was working a lot with my brother and not going to school."

71. Based on information that I obtained there was a lack of parent supervision for Alex Guevara in the United States after his arrival. According to Benjamin, he served as surrogate father and indicated that Alex never complained of anything. Alex worked with his brother at the auto shop at that time.

72. According to Alex's brother Benjamin, Alex moved from his brothers' apartment after living with the brother for approximately one year he moved to live with friends in a separate apartment. According to Benjamin it was at that time that he began to have problems and begin to associate with negative peers. Ales was approximately 15 years old when leaving his brother Benjamin and moving in with friends. This resulted in even less adult supervision in a very high-risk neighborhood.

73. Also, it is important to note that despite the multiple stressors experienced by Alex, he reports no history of substance abuse – he denies any use of illicit-hard core drugs and denies the use of alcohol. All other siblings and acquaintances that were interviewed corroborate this information

Gang Affiliation

74. Alex Guevara, despite the lack of parental supervision displayed strong work habits as an adolescent and young man. Between the age of 14 and up to the age of about 20 Alex's reports having worked for his Brother Benjamin in the auto shop. At about the age of 20 Alex began working as a bus boy and later as a cook at the Papa Deaux in Houston. Alex spoke about his work history in a very positive fashion and indicates that he was a dedicated and hard working employee.

75. According to Covey, Menard, and Franzese (1997), gangs, like other groups in society, must perform certain functions in order to survive. They must recruit members, provide for the well-being of their members, make decisions about immediate (and perhaps long-term) goals and lines of action, and settle internal disputes. There is considerable variability in how different gangs approach these tasks. According to Stafford (1984), most researchers have found that gangs are loosely structured, not very cohesive, and without clearly defined leadership roles. Some gangs, however, are more highly structured, especially Hispanic and Asian American gangs in the United States (Chin 1990; Harris 1988; Moore 1978; Vigil 1988). It also appears that gangs that focus on profitable property crime, as opposed to drug use, violence, or other activities, tend to be more formally organized.

76. According to Covey, Menard, and Franzese (1997), gangs typically consist of a small core of five to twenty-five members who re most active in gang activities and from which the leadership of the gang is drawn, and a set of peripheral or marginal members, more of less strongly affiliated with the gang, more or less frequently involved in gang activities, and more or less committed to the gang (Hagedorn 1989; Hardman 1969; Harris 1988; Klein 1968a; Spergel 1990; Taylor 1990; Vigil 1988; Yablonsky and Haskell 1988). Counting only core members, most gangs are fairly small, typically twenty or fewer members (Davis 1978). Ice T (1994) suggests that there are three levels of membership, Hardcore (totally focused on gang violence), members (highly involved in the gang, willing to stand up for it, usually involved in running the gang, but there primarily for the friendship and companionship), and Affiliates (people who know the gang members, wear the colors, and abide by the rules, occasionally involved in running the gang; basically kids who go along to get along). If Peripheral members of affiliates are included, gangs may number in the hundreds, and coalitions of gangs may have thousands of members (Spergel 1990).

77. According to Yablonsky (1962) who suggested that leaders of violent gangs were the most sociopathic and socially inept members of the gang, the members with the most severe psychological problems. If the gang leader's status were threatened, the leader would respond with verbal threats or violence. Partially consistent with Yablonsky's position, other researchers have indicated that gang leaders may use violence and other delinquent activities to maintain status as the leader of the gang and to promote gang cohesiveness (Short and Strodtbeck 1965; Spergel 1990).

78. Consistent with the literature and research Alex Guevara would be considered only a peripheral member of a gang. Based on all interviews and other relevant information, he showed no other signs of being a hard-core, violent gang member.

79. Alex's gang affiliation was limited to brief encounters with other hard-core members as acquaintances and as a way to meet females.

80. Based on interviews with Alex and two brothers, Alex and his wife Nancy actively attempted to separate from any gang activity or affiliation in 1994 by moving to Texas City, a safer suburb of Houston.