No. _____

In The
Supreme Court of the United States

HECTOR ROLANDO MEDINA,

Petitioner,

v.

TEXAS,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF *CERTIORARI*

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CAPITAL CASE
QUESTIONS PRESENTED

Mr. Medina's trial was fundamentally unfair. Born and raised in El Salvador but legally resided in the United States, Mr. Medina primarily speaks Spanish. His capital defense team was accordingly highly specialized to take into account issues both of language and culture. Lead counsel, his mitigation specialist, and his primary mental health expert all were bilingual. His mitigation specialist and primary mental health expert likewise had extensive professional expertise working with El Salvadoran nationals. Conceding guilt, the defense team made Herculean efforts to be ready to present a persuasive case in mitigation to the jury involving multiple expert witnesses from around the nation as well as lay witnesses. Several witnesses were from rural El Salvador, whose presence in the country was laboriously arranged through the defense's mitigation specialist and his contacts in El Salvador. After the state rested its sentencing case in chief, and on the day Mr. Medina was set to begin presentation of his sentencing case, the trial court recessed the case indefinitely in order to accommodate the travel plans of a juror. The recess was granted over Mr. Medina's strenuous objection based on the fear he would be unable to reassemble his witnesses and replicate the mitigation case he was at that moment prepared to present.

A month later, trial was set for a date on which professional and legal conflicts existed for three-fifths of Mr. Medina's defense team—two co-counsel and his mitigation specialist—and on which Mr. Medina's critical sentencing expert was on a United States military base consulting on a capital military trial. A continuance request based on these factors was arbitrarily denied following the court's independent investigation that included ex parte contact with members of the defense team (other than counsel) and with witnesses outside defense counsel's presence. When trial resumed, lead defense counsel—the only counsel any longer still functionally representing Mr. Medina due to the scheduling conflicts of his two other appointed counsel—announced that the court's rulings had rendered it impossible to provide effective assistance of counsel, refused to call a witness or rest, and was held in contempt. After defense counsel was freed from confinement, the court rested on behalf of the defense. No defense evidence was presented, further objections made, or argument given. The jury returned a verdict requiring death within 45 minutes.

1. Whether the trial court's sua sponte and needless recess of trial over the defendant's objection to accommodate the personal travel plans of a juror; its refusal to substitute an alternate juror for an incapacitated juror; its denial of the defendant's motion for mistrial; its interference in and direct contact with members of the defendant's defense team and witnesses outside the presence of defense counsel; and its denial of defendant's motion for continuance deprived the defendant of his Fourteenth Amendment rights to due process, a meaningful opportunity to be heard, a fair opportunity to present a defense, and a fundamentally fair trial.

2. Whether the trial court's sua sponte and needless recess of trial over the defendant's objection to accommodate the personal travel plans of a juror; its refusal to substitute an alternate juror for an incapacitated juror; its denial of the defendant's motion for mistrial; its interference in and direct contact with members of the defendant's defense team and witnesses outside the presence of defense counsel; and its denial of defendant's motion for continuance deprived the defendant of his Sixth and Fourteenth Amendment rights to counsel.

3. Whether the trial court's sua sponte and needless recess of trial over the defendant's objection to accommodate the personal travel plans of a juror; its refusal to substitute an alternate juror for an incapacitated juror; its denial of the defendant's motion for mistrial; its interference in and direct contact with members of the defendant's defense team and witnesses outside the presence of defense counsel; and its denial of defendant's motion for continuance deprived the defendant of his Eighth and Fourteenth Amendment rights to a reliable and individualized capital sentencing proceeding.

PARTIES TO THE PROCEEDINGS BELOW

Mr. Medina is a defendant against the State of Texas whose capital trial resulted in a judgment of death.

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PETITION FOR WRIT OF *CERTIORARI*

Hector Medina respectfully petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas in this case.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas affirming Mr. Medina's criminal conviction and sentence is unpublished. App. 1. One judge dissented. App. 2.

JURISDICTION

This Court has jurisdiction to review these orders pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved have been reprinted at App. 3, *infra*.

STATEMENT OF THE CASE

> *"This case is not about whodunit. The entire responsibility of what happened that day lies with Hector Medina. ... We want to know why."* – Opening Statement of Defense Counsel Donna Winfield, S.F. Vol. 53: 54.

If any case were ever to merit a mistrial, it would be this capital one. In lieu of granting a mistrial when the defendant, through no fault of his own, found himself between Scylla and Charybdis—confronted with a choice between deprivation of the right to an impartial jury and the right to a meaningful opportunity to be heard—the court, in collaboration with an overzealous prosecution, embarked on a path that undermined Mr. Medina's exceptionally strong case for life, ultimately depriving him of due process, counsel, and a reliable, individualized capital sentencing.

Pretrial

Hector Medina, an El Salvadoran national who grew up in the midst of its civil war, shot himself in the neck and head in an attempted suicide after shooting his two young

children. Only through the timely intervention of paramedics did Mr. Medina survive his attempted suicide. S.F. Vol. 53: 83-89. Mr. Medina committed this unspeakable act during a psychotic break after learning that his wife and the mother of his children was having an affair in their home with a tenant who rented a room from them. Although Mr. Medina had no violent or criminal history at all, and was by all accounts a hardworking, law-abiding man until his break, the State of Texas, Dallas County, nevertheless sought the death penalty against Mr. Medina.

Mr. Medina, whose primary language is Spanish, was indicted on May 21, 2007. 1 C.R. 2. On November 29, 2007, the State decided to seek the death penalty. 1 C.R. 18. The State chose not to offer a plea bargain to Mr. Medina, although he was willing to accept a life sentence without the possibility of parole. S.F. Vol. 2: 5-7. The court appointed three lawyers to represent Mr. Medina, Donna Winfield, who was lead counsel, Lalon Peale, and John Tatum, who was appellate counsel appointed to assist with appellate issues at trial. Ms. Winfield spoke Spanish, but Mr. Peale and Mr. Tatum did not.

In January of 2008, counsel for Mr. Medina, upon consulting with and on referral by representatives of the El Salvadoran government, retained mitigation specialist Richard McGough to be part of the defense team. A mitigation specialist is "an indispensable member of the defense team throughout all capital proceedings." American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 959 (2003) (Commentary to ABA Guideline 4.1) [hereinafter "ABA Guidelines"]. The mitigation specialist possesses "clinical and information-gathering" skills that better equip them to elicit sensitive, embarrassing, and humiliating information from defendants and his or her family. *Id*. "Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall

preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict." *Id*.

> The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.
>
> The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending.

Id. at 959-60. See also *id*. at 952 (Guideline 4.1(A)) (defense team must contain mitigation specialist).

McGough "could not have been better suited for this case." C.R. Vol. 2: 346. Although based out of North Carolina, McGough spoke fluent Spanish, had traveled extensively to El Salvador, had contacts within the El Salvadoran government, and had worked on many cases involving El Salvadoran nationals. *Id*. See also Sharlette Holdman, *Cultural Competency in Capital Mitigation*, 36 Hofstra L. Rev. 883 (2008) ("[C]ultural competency is essential to the ability of capital defense teams to discover and reveal the humanity of the accused.").

In his role as mitigation specialist, McGough met with Mr. Medina in person at the Dallas County jail several times; traveled to El Salvador to discover, locate, and interview familial and other witnesses who knew Mr. Medina from his past; accompanied defense counsel to El Salvador where he arranged interviews with witnesses possessing information about Mr. Medina's life in El Salvador; and discovered, located, and interviewed witnesses in the United States who possessed favorable information about Mr. Medina's hard-working

character and his distraught mental state leading up to his suicidal break that would ultimately become the defense theory of the case. C.R. Vol. 2: 346.

Also by way of referral from El Salvadoran government representatives, Mr. Medina's counsel retained neuropsychologist Ricardo Weinstein to consult with the defense and testify at trial regarding Mr. Medina's mental health. Dr. Weinstein is one of the few bilingual forensic neuropsychologists in the country fluent in Spanish and possibly the only bilingual forensic neuropsychologist with extensive experience evaluating El Salvadoran nationals facing the death penalty. 2 C.R. 349. Dr. Weinstein had experience in numerous cases prior to Mr. Medina's involving people who suffered from post traumatic stress disorder as a result of the El Salvadoran civil war. S.F. Vol. 64: 16. Defense counsel's early retention of these professionals was in keeping with the American Bar Associations Guidelines for representing capitally charged clients. See ABA Guidelines at 925 (Commentary to Guideline 1.1) ("Counsel must promptly obtain the investigative resources necessary to prepare for both phases, including at minimum the assistance of a professional investigator and a mitigation specialist, as well as all professional expertise appropriate to the case.").

Dr. Weinstein met with and evaluated Mr. Medina on four occasions beginning in April of 2008. C.R. Vol. 2: 363. Extensive neuropsychological testing and a Quantitative Electroencephalogram (QEEG) were administered to determine Mr. Medina's cognitive functioning. *Id*. The results indicated the presence of "significant" brain dysfunction, including frontal lobe damage. *Id*. at 364; S.F. Vol. 64: 15. As part of his evaluation, Dr. Weinstein also reviewed records relating to Mr. Medina, interviewed ten witnesses in the United States and El Salvador who knew Mr. Medina, consulted with experts related to the civil war and the experiences of the people in El Salvador; and coordinated efforts with the mitigation specialist to obtain a cohesive life history based on the information obtained

from the investigation. *Id.* at 365-66; S.F. Vol. 64: 14. Information learned by Dr. Weinstein revealed, *inter alia*, the following circumstances of Mr. Medina's developmental period about which Dr. Weinstein was prepared to testify during sentencing:

- Mr. Medina was raised in abject poverty.
- Mr. Medina was exposed to terrifying experiences as a result of the civil war that occurred in El Salvador
- Mr. Medina's family was forced to provide the little food they had to the army and the guerillas.
- The family lived in a relatively remote area where the opposing bands would control at alternate times and the exchange of gunfire was ever present.
- When he was approximately 13 years old, Mr. Medina was confronted by a group of individuals whom he believed to be guerillas and was sexually assaulted by one of them, causing persisting feelings of impotence, anger and shame.
- Mr. Medina frequently had to miss school due to several different reasons, including the civil war, the great distance of the school from his home, the need to work with his father in subsistence agriculture, and his family's poverty which sometimes precluded him from obtaining clothes and necessary school supplies.

C.R. Vol. 2: 366. Dr. Weinstein also formed conclusions about the circumstances of the offense, including Mr. Medina's mental state at the time of his suicidal break when he killed his children, about which he was prepared to testify at sentencing.

Trial

Trial on the merits was slated to begin Monday, September 8, 2008. Individual voir dire began on June 9, 2008 and lasted through August 27, 2008. Twelve jurors and one alternate juror were selected. On the date trial was to start, the trial judge informed the parties that one of the jurors had plans to go fishing in Galveston, Texas beginning Wednesday, September 10, 2008, and that he intended to accommodate the juror by recessing the case.[1] C.R. Vol. 2: 348, 355. During opening argument, defense counsel made only a brief statement, telling the jury that this case "is not about who done it[.] The entire responsibility of what happened that day lies on Hector Medina." Instead, defense counsel

[1] The trip never came to fruition, because Hurricane Ike was by Wednesday increasingly threatening to strike the Texas coast, making a fishing trip to Galveston inadvisable; however, the trial's recess for Thursday and Friday was left in place and no jury proceedings occurred.

explained, "[W]hat we anticipate is important, and what we anticipate that you're going to hear, is we want to know why [it happened]." S.F. Vol. 53: 54.

Evidence presented at the culpability stage reflected that Mr. Medina and his wife, Elia Martinez, lived together with their two children in a house owned by Mr. Medina. Mr. Medina and Martinez met and had been together since 2001. S.F. Vol. 54: 15. Although Mr. Medina lived and worked legally in the United States, Elia Martinez was not residing in the country legally. *Id*. at 102. Consequently, Mr. Medina worked long hours loading windows into trailers to financially support his wife and family. *Id*. at 86-87; S.F. Vol. 55: 42. Mr. Medina, at the encouragement of his wife, converted the garage into living quarters and rented out living space to help pay for the house's mortgage. Filemon Hernandez, also a non-legal resident of the country, first moved into the converted garage in November of 2006. S.F. Vol. 54: 25. In December of that same year, Hernandez and Elia Martinez began having a sexual affair behind Mr. Medina's back. *Id*. In January of 2007, Mr. Medina, unaware of the affair, agreed to rent a room inside the house next to the master bedroom to Hernandez. *Id*.

After Martinez began her affair with Hernandez, she began trying to leave Mr. Medina, leading to verbal domestic disputes between the couple. Mr. Medina finally discovered the affair when, on March 2, 2007, he caught Elia Martinez and Filemon Hernandez in Hernandez's car at a rendezvous spot at 5:50 in the morning. S.F. Vol. 54: 97-103. Martinez refused to come home with Mr. Medina, who asked Hernandez why he had stolen his wife from him. *Id*. at 45, 96. Two days later, Mr. Medina had a psychotic break and killed his two children with a firearm just before shooting himself in the head and neck. S.F. Vol. 55: 11. Due to timely intervention from paramedics, Mr. Medina survived. S.F. Vol. 53: 88. The State rested its case in guilt at the end of the day on Wednesday,

September 10, 2008. S.F. Vol. 55: 83. No jury proceedings occurred on Thursday or Friday due to the court's prior accommodation of the juror's request to go fishing.

Having conceded Mr. Medina's legal guilt, the defense prepared to present its punishment case to the jury the following week. Richard McGough, the mitigation specialist, was the defense point man for securing the attendance of the lay witnesses at Mr. Medina's sentencing phase, and his assistance was instrumental in formulating the case to be presented along with defense counsel. To help prepare the defense case for life, McGough committed to being in Dallas for the entire two-week period during which trial proceedings were expected to occur, allowing him ample time to assist the defense in preparing its sentencing case. C.R. Vol. 2: 346-47.

This preparation required Herculean efforts and a tremendous amount of coordination. Schedules for four expert witnesses from four different states (California, New Mexico, Louisiana, and Texas) had to be harmonized and travel accommodations for each made. The defense also decided that three witnesses from El Salvador—Mr. Medina's mother, brother, and an elementary school teacher—should be presented in mitigation, requiring the laborious task of making international travel arrangements for them as well.[2]

Richard McGough was the member of the defense team with primary responsibility for forging beneficial relationships and communicating with all of the scheduled defense witnesses. C.R. Vol. 2: 347. Critically, McGough, because of his experience and contacts, was responsible for arranging the presence of lay witnesses traveling from El Salvador. *Id*. Securing the attendance of witnesses from El Salvador required obtaining visas for their international travel. *Id*. McGough also had to present formal documentation for the employer of a specific witness in El Salvador (teacher). *Id*. This involved the assembling of

[2] Three other fact witnesses were also to be called, although those three resided in Dallas County.

the original court order and visa information for the teacher whom the defense planned to have testify about, *inter alia*, Mr. Medina's positive and socially adapted upbringing. *Id.*

Completing the paperwork for and obtaining the visas was only a fraction of the battle, for the paperwork needed to get into the hands of the proper authorities within El Salvador. *Id*. The paperwork also had to find its way into the hands of the witnesses, all of whom lived in remote areas of the country. *Id*. McGough utilized his extensive contacts within El Salvador to accomplish these ends, including sending travel documents to the proper authorities in San Salvador; traveling to remote areas of El Salvador to locate the witnesses and transport them to the embassy in San Salvador to collect their travel documents; and, after collecting the travel documents, transporting the witnesses to the airport. C.R. Vol. 2: 348. Once in the United States, compliance with visa restrictions required the defense to arrange law enforcement supervision over the witnesses at all times. *Id*. at 347.

Arrangements were originally made to have Mr. Medina's mother and sister arrive in the United States on Tuesday, September 9, 2007, and for his younger brother and school teacher to arrive Saturday, September 13, 2007. *Id*. The witnesses' travel visas expired September 20, 2008, and arrangements were made for return flights for each witness on that date. *Id*.

It took great effort, in particular, to obtain the presence at trial of Mr. Medina's mother, who lived in remote El Salvador and lacked transportation. Ms. Medina is also illiterate and was therefore unable to travel alone, as she would not have been able to read nor understand signage in airports regardless of the printed language. C.R. Vol. 2: 347. McGough therefore had arranged for Mr. Medina's younger sister to accompany her mother and assist her travel. *Id*. At the last minute, however, Mr. Medina's sister was unable to travel, and it was left to McGough to work out arrangements allowing Mr. Medina's

younger brother to arrive earlier than originally planned so that he could accompany his mother in travel. *Id*. This imposed a great hardship on Mr. Medina's family in El Salvador, because Mr. Medina's brother shares an employment position with another brother as a security guard for a private company in El Salvador. *Id*. His leaving for the United States necessitated the brother who remained in El Salvador to work 24-hour shifts in order to cover for and to protect his brother's job (a scarce resource), which is why Mr. Medina's brother originally was slated to arrive in the United States later and closer in time to when his testimony was expected to be given. *Id*.

McGough's responsibilities as defense mitigation specialist extended to coordinating with the Dallas area sentencing lay witnesses. Those witnesses also spoke primarily Spanish, so McGough had responsibility for communicating with them, primarily via cell phone. C.R. Vol. 2: 347. He also acted as translator when Mr. Peale, Mr. Medina's second chair attorney who did not speak Spanish, sought to communicate with the witnesses. *Id*. It is not a coincidence that defense counsel Winfield used the precise adjective to describe the services McGough performed for the defense team in Mr. Medina's case as the ABA Guidelines use to describe the importance of a mitigation specialist to a capital defense team: "indispensable." S.F. Vol. 65: 21. McGough was a critical component of Mr. Medina's defense team.

On Saturday, September 13, 2008, the defense team met in anticipation of beginning their sentencing presentation and plotted out a chart of their sentencing case in chief. S.F. Vol. 65: 101, 116. Dr. Ricardo Weinstein, the neuropsychologist from California, was to be the first witness presented, and his testimony was to lay the framework for all the testimony the defense would present after his. *Id*. at 102. He was considered by the defense its most important sentencing witness. C.R. Vol. 1: 269-70 ("Being required to start a

presentation of any mental state without Dr. Weinstein would render counsel ineffective."); S.F. Vol. 64: 15.

Based upon his clinical interview and testing of Mr. Medina as well as interviews with Mr. Medina's family and friends, the defense anticipated Dr. Weinstein would testify, in addition to the mitigating evidence about Mr. Medina's life history discussed, *supra*, to his neuropsychological opinions that Mr. Medina had suffered an emotional breakdown about which he no longer had a memory of the details and which culminated in the tragic death of his children and his suicide attempt; that, as a result of his wife's betrayal and his perception of having lost everything that he ever dreamed and worked for, Mr. Medina suffered unbearable emotional pain; that, although he had been searching for solutions to his problem after his wife left, he was unable to see alternatives to his suicide; that Mr. Medina could not bear the thought of his children being left behind and, in a moment of extreme despondency, he killed his children and shot himself in the neck and head; that Mr. Medina could not live with the trauma that his wife's betrayal caused him; that his early upbringing and life experiences—including his exposure to a brutal civil war and abject poverty—combined with the physical and emotional abandonment he experienced as a child had prevented Mr. Medina from developing a healthy sense of self and adequate self-esteem; that he was physically and emotionally unable to cope with his circumstances at that time; that the toll that his deprivation during his developmental period had taken on his brain development left Mr. Medina without the necessary cognitive capacity to overcome his dire circumstances; that at the time he attempted to kill himself and in the process killed his children, Mr. Medina's state of mind was such that he could not think clearly, form a rational intent, or conform his thoughts and actions to legal and moral standards; that a review of Mr. Medina's history indicated that he is a pro-social individual without any criminal history; and that, based on biographical data, statistical information

and actuarial data, Mr. Medina would not represent any future dangerousness if he were to be incarcerated. C.R. Vol. 2: 368. Dr. Weinstein believed that Mr. Medina viewed his children as an extension of himself, and that when he shot them, Mr. Medina considered it as inseparable from the act of killing himself. S.F. Vol. 57: 36.

Dr. Weinstein had also prepared a detailed PowerPoint presentation to go along with his testimony that would graphically show the jury how Mr. Medina's brain was physically different from normal brains as a result of the deprivation in which he was raised. S.F. Vol. 64: 15. The defense also intended to have Dr. Weinstein listen to all the other testimony and consult with them throughout the sentencing proceedings.[3] *Id*. at 16-17. The defense accordingly estimated it needed a four-day window of Dr. Weinstein's time. S.F. Vol. 59: 18.

The defense decided to call Dr. Andrea Kim after Dr Weinstein. S.F. Vol. 65: 116. Dr. Kim was the treating psychiatrist for Mr. Medina at Parkland Hospital where he was recovering from the gunshot wounds he inflicted upon himself during his attempted suicide. S.F. Vol. 64: 29. The defense team anticipated that she would have testified in accordance with a medical report she generated at the time, which reflected that Mr. Medina was experiencing auditory hallucinations and that she diagnosed him as having psychosis shortly after the attempted suicide. *Id*. at 30, 68.

Xochitl Paredes, from El Salvador, was Mr. Medina's teacher whom the defense originally planned to call after Dr. Kim. She would have testified that she knew Mr. Medina throughout his sporadic schooling in El Salvador. S.F. Vol. 64: 80. She believed Mr. Medina was a decent student who played soccer and was integrated into society as well as could be

[3] The State had retained a psychologist whom it did not present in its case in chief but could have presented in rebuttal. S.F. Vol. 64: 64. Thus, Dr. Weinstein's presence in the courtroom to hear all the testimony, consult with the defense, and possibly provide surrebuttal testimony was critical.

expected for someone in his situation growing up in poverty during a civil war. *Id*. It was also anticipated she would testify about how the school Mr. Medina attended was situated on a geographical landmark that was used as a meeting place for both the El Salvadoran army and the guerillas, depending upon who controlled the territory at any given time. *Id*. at 80-81. Ms. Paredes was also expected to testify about El Salvadoran socioeconomics and how, as a teacher, she lived in relative luxury compared with her students from rural areas for whom geography alone presented great obstacles to their school attendance. *Id*. at 81.

Hurricane Ike thwarted Paredes's scheduled arrival in Dallas on Saturday, September 13, as her airline canceled her flight. C.R. Vol. 2: 348. The El Salvadoran witnesses had to undergo clearance through the United States Department of Homeland Security, for which mitigation specialist Richard McGough was responsible. *Id*. Paredes had been cleared for her arrival, but there was a two-tiered hurdle to clear in EI Salvador. *Id*. When the defense team's local El Salvadoran contact took each potential witness from his or her home in a remote area of El Salvador, the contact would have to drive them to the capital city of San Salvador to the Embassy to get the necessary clearance and travel visas from that end. *Id*. The travel visas were valid only for a limited time. Because of the flight cancellation, Paredes's visa had expired. *Id*. The following Monday, September 15, 2008 was an El Salvadoran holiday for which the embassy was closed. *Id*. The earliest Paredes was able to receive clearance was Tuesday, September 16, 2008, and the next flight that had a port of entry in Dallas (to comply with visa restrictions) was Wednesday, September 17, 2008. C.R. *Id*. McGough therefore began to make the necessary arrangements, and defense counsel prepared to present Ms. Paredes's testimony out of turn from when they originally had planned. S.F. Vol. 65: 117.

Mark Vigen, Ph.D., a psychologist from Louisiana, was to be presented as an expert witness next. It was anticipated he would testify to his opinions relating to Mr. Medina's lack of future dangerousness as expressed in his Rule 705 hearing, i.e., that the likelihood that Mr. Medina would commit violent acts in prison is very low. S.F. Vol. 56: 43-59.

The defense next planned to call Deputy Dallas County Sheriff Valdez, who the defense anticipated would testify that, unlike other inmates accused of capital murder and confined pre-trial by the Dallas County Sheriff's Department, Mr. Medina was not required to be shackled or to wear a stun belt because he was not considered a danger to prison or court personnel. C.R. Vol. 2: 354; S.F. Vol. 64: 28; S.F. Vol. 65: 181.

The defense also decided to call Maydeli Lopez and Jose Zelaya, friends of Mr. Medina and Elia Martinez in Texas. They spent substantial time with Mr. Medina after he learned about his wife's affair with their tenant, and it was anticipated they would testify about Mr. Medina's depressed and severely distraught state of mind just before his suicide attempt.

Lopez was also expected to testify about how Mr. Medina's wife spoke derisively of Mr. Medina. S.F. Vol. 64: 72. She told Lopez that Mr. Medina was a fool and made fun of him for buying her expensive things. *Id*. The day Mr. Medina discovered his wife's affair, Lopez could see that Mr. Medina was upset. *Id*. at 73. Believing Martinez had abandoned him and their children, Mr. Medina sought out an attorney for legal advice, but could not afford to retain one. *Id*. at 74. The next day, Saturday, Lopez accompanied Mr. Medina to the grocery store, where he purchased a week's worth of diapers. *Id*. Mr. Medina seemed better, and they discussed taking his daughter to the doctor because she was sick. *Id*.

Lopez and her husband brought breakfast over to Mr. Medina's house on Sunday morning, the day before Mr. Medina's attempted suicide. When they arrived, they saw Mr. Medina crying while hugging his children to his chest. *Id*. at 75. She and Zelaya spent most

of that day with Mr. Medina. Sunday evening Mr. Medina and his children ate supper at Lopez's and Zelaya's apartment. *Id*. at 77. While there, Mr. Medina spent some time alone crying in their bathroom. *Id*. at 77-78. Over dinner, Mr. Medina, Lopez, and Zelaya made plans for the future and discussed how Mr. Medina would move on with his life. They discussed putting Mr. Medina's house in all three of their names and splitting the mortgage and bills to allow Lopez to care for Mr. Medina's children during the day while he worked. *Id*. at 78. Zelaya drove Mr. Medina home that night. *Id*. When they arrived at Mr. Medina's the next day, they observed that the house was surrounded with crime scene tape. *Id*.

The defense anticipated that Zelaya would confirm Lopez's narrative of events and would also testify that over the course of the weekend before Mr. Medina's children were killed, Mr. Medina was severely distraught and told Zelaya several times that he wanted to kill himself. S.F. Vol. 64: 79. Zelaya tried to counsel Mr. Medina against it, telling him that he could not kill himself because he could not leave his children alone like that. *Id*. at 79.

The defense next planned to call Mr. Medina's mother, Rosa Medina, and brother, Jose Medina, who were expected to testify about the impoverished and traumatic conditions in which Mr. Medina spent his developmental years in El Salvador. Mr. Medina was one of eight children. S.F. Vol. 64: 25. When he was born in 1979, his family lived on a "mianpa," which is a small plot of land from which they subsisted. S.F. Vol. 64: 23. When Mr. Medina was seven or eight years old, the family moved to an even more rural locale near the town of Chapaquite. *Id*. It was here that Mr. Medina came into daily contact with the country's civil war. *Id*. at 23-24. Mr. Medina's family home had no running water, no electricity, a mud floor, and was built with sticks, hay, and mud. *Id*. at 19. Even this meager dwelling, however, was not theirs. The family was permitted to live in the home in exchange for Mr. Medina's father's tending the landowner's cattle. *Id*. The family bathed and obtained

potable water by making trips to the river. *Id*. The home was situated between two mountain ranges, which often placed the Medina family in the crosshairs between government and guerilla armies during the civil war. *Id*.

The war greatly impeded Mr. Medina's efforts to obtain an education, as the necessary travel subjected children to the risk of being kidnapped and conscripted into the army or guerilla forces. S.F. Vol. 64: 19-20. The sheer difficulty of travelling the long distances necessary to reach the school—including frequent floods that made the lanes impassable—also contributed to interruptions in schooling. *Id*. at 20. Although Mr. Medina finished the first grade at the age of seven, he did not finish second grade until he was eleven years old. *Id*. at 24. Continuing his education sporadically, he was nineteen years old when he completed the ninth grade, his final grade, in 1998. He did not attend the El Salvadoran equivalent of high school for financial reasons. *Id*. Instead, Mr. Medina left Chapaquite to seek work in San Salvador. *Id*. Later that year, he moved to the United States, where he became a legal resident. *Id*.

Mr. Medina's mother was expected to testify, *inter alia*, about life in El Salvador during the civil war, what Mr. Medina was like in his formative years and his difficulty sleeping as a child. *Id*. at 25-26. Mr. Medina's brother was expected to testify, *inter alia*, about life in El Salvador during the civil war, including having to hide under furniture when gunshots rang out and the constant fear under which they lived. *Id*. at 27. Both witnesses were expected to authenticate pictures showing the impoverished conditions in which they lived, which was expected to provide the jury a deeper understanding about Mr. Medina's origins. *Id*. at 26.

Last, the defense decided to call Selena Sermeno, Ph.D., a professor at Antioch University from New Mexico, as a cultural and historical expert. She was born and raised

in El Salvador and was expected to testify about the historical and cultural conditions in El Salvador during the period in which Mr. Medina lived there. S.F. Vol. 65: 116.

Trial resumed on Monday, September 15. That afternoon, the defense put on the record that it had been made aware just that morning that the court, without consulting the parties, intended to recess the case again after Tuesday in order to allow a juror to travel to Lubbock, Texas to attend the induced birth of his grandchild. S.F. Vol. 57: 54. Counsel for Mr. Medina objected to the proposed week-long continuance on the ground that it would "severely impact [Mr. Medina's] ability to present a defense" due to scheduling difficulties with his team and witnesses. *Id*. Counsel argued that the juror was not incapacitated, that there was an alternate juror who could be substituted if he were, and that the defense team and defense witnesses had all coordinated and arranged schedules to be available for Mr. Medina's trial dates which had been set well in advance. *Id*. The State responded that it believed a decision premature at the time because there was at least one more day before a decision had to be made. *Id*. at 55. The court agreed. *Id*. Thereafter, the defense rested without presenting any guilt phase evidence, and both sides closed. *Id*. at 57. Following closing argument, in which the defense merely assured the jury that it would hear more about what happened in the sentencing phase, the jury returned a guilty verdict. *Id*. at 66, 71.

The sentencing phase began immediately that same afternoon. Besides additional testimony from Mr. Medina's wife,[4] the State's sentencing evidence consisted of three witnesses: a woman who testified that Mr. Medina once made a pass at her several years

[4] Martinez's testimony provided a fuller accounting of her and Mr. Medina's relationship from her perspective, including that Mr. Medina allegedly demanded anal intercourse and became upset with her when she refused. S.F. Vol. 66: 107-08. Anticipated defense testimony would have reflected that Mr. Medina denied this and in fact maintained that just the opposite was the case, that it was Martinez who demanded anal intercourse and he who refused because he found it unpleasant. S.F. Vol. C.R. Vol. 2: 367.

before and allegedly verbally threatened her if she refused, S.F. Vol. 57: 161; her husband whose testimony served to corroborate the story that Mr. Medina once made a pass at her, *id*. at 171; and a jail official who testified that Mr. Medina had once refused to return his food tray but otherwise cooperated with his orders. *Id*. at 131. The state rested its sentencing case for death at the end of the day. *Id*. at 180.

The next morning, September 16, the defense learned through the court and State that a juror had fallen down and injured herself while leaving the courthouse the prior evening. S.F. Vol. 58: 4. The juror was taken by ambulance to a hospital where she learned that her arm was broken. *Id*. at 5-6. She was not at the courthouse at that time and had an appointment scheduled with an orthopedic surgeon that afternoon. *Id*. at 6. The court then observed how this "problem" was "compounded" by the juror "who indicated that he would not be available after today due to the birth of his grandchild." *Id*. The judge continued:

> The risk of simply declaring the injured juror to be disabled and substituting the alternate for her leaves us in the predicament of having a juror who clearly does not want to be here, and has made – made that fact very well-known to all of the lawyers.
>
> ... I asked each side if there was any objection to me asking this juror about his plans. Neither side objected, and I had a very brief discussion with him concerning the – the birth, and he was very insistent and very clear that he would not be able to – made it very clear he was going.
>
> The Court obviously could simply order him to stay. My concern is that if the Court does require him to stay, that he is going to be unfair to one side or both. He is going to be very angry at this, and angry jurors are not fair jurors. ...
>
> I am worried that he is just going to sit back there, go with the rest of whatever everybody else says, and just go along just for the sake of going along, instead of participating in the deliberations, and to use his – use unclouded judgment in making a decision.
>
> That would leave us with eleven jurors, which is not permissible.

Id. at 6-7. The Court proposed continuing the case for a week, finding that the "least drastic measure" was not to excuse any juror and to hope the injured juror would be able to resume the trial the next week. *Id*. at 8-9.

The defense objected.

MS. WINFIELD: Your Honor, I just want to make this clear to the Court of Criminal Appeals that the State, first of all, has rested in their case in chief in punishment in this death penalty case.

Number two, the Defense, we are ready to proceed with all of our witnesses. As of right now, all of our witnesses are – except for one teacher, who we anticipate arriving from El Salvador tomorrow. We are ready to proceed with our case. We can present a cohesive case, an emotionally effective case to the jury today, tomorrow, Thursday morning.

We have been advised that a juror fell in the parking lot and seriously broke her arm. She's at an orthopedic surgeon today. Her husband called and told the judge to inform him the juror would not be here today, nor is she. ...

Number four, the Court has advised us that the Court intends to continue trial until next Tuesday.

Number five, we have qualified one alternate juror for this purpose. He is available. He is here today. There are 12 jurors back in the jury room right now. Prior to today we were advised that one juror indicated to the Court that his daughter-in-law is going to be induced on Wednesday morning for the birth of his grandchild.

First of all, Judge Biard, during the course of voir dire, never allowed us to inquire into any juror as to any kind of conflicts of time that they would have past the week of the 15th. I had at one point tried t[o] inquire into a juror who might not be available the week or two after that, and Judge Biard said, "No, we are going to try this case in two weeks. We are not allowed to ask the jurors about their time constraints for the following weeks.["]

The – the next point I want to make clear to the Court of Criminal Appeals is that we believe that at some point, obviously this juror had been led to believe that he would be allowed to go to Lubbock as of Tuesday afternoon at 3:00 o'clock and potentially not return until Tuesday, September 23rd. We absolutely cannot replicate our defense that we have ready today. It is an impossibility.

First of all, we have a teacher who is flying into – was supposed to have flown in Saturday afternoon on Taca Airlines. That flight was cancelled. They rescheduled her for Sunday. That flight was also cancelled.

THE COURT:And that was because of the hurricane?

MS. WINFIELD: Correct.

The – the state of El – the country of El Salvador recognizes a national holiday on Monday, September the 15th, so because this witness's visa or the – she actually has a seven day travel permit that the embassy allows, and that had expired as of that Sunday. So we could not get it renewed yesterday. We have a – an investigator helping us down in El Salvador today who is trying to get the visa extended so that she can travel up here tomorrow, which we changed her flight from a direct flight to a flight with two different stops in two different countries so that her point of entry into the United States would be in compliance with her visa, and enter here at DFW Airport.

We had to go through serious diplomatic hoops in order to allow this witness to be released from her job. She actually has been having to stay in the city of San Salvador in order for her to be available for both the visa application and the flight. So she has already taken off work. The – having her stay beyond that for work purposes is untenable in our situation, and we believe she would lose her job if she were forced to come back or stay past what we anticipate of her leaving, which would have been Saturday.

Additionally, Jose Reynaldo Medina, Jr., who is Defendant Hector Medina's younger brother, who is here right now in the building. He has – had to travel with his mother because his mother, Rosa Medina, does not read or write Spanish or English. So he had to travel with his mother in order to assist her in making the proper – getting through the proper channels in order to travel.

He has a brother who is maintaining his shift at his job. His brother has been working 24-hour shifts for the last eight days as of today. And as far as his employment with that company and both with the situation with his brother, we believe that's an untenable situation t[o] put Jose Reynaldo Medina in. And to do anything other than present him to a jury as a live witness where he can go through the photographs that we took on our trip to El Salvador and indicate where the defendant grew up, and the circumstances under which their family found themselves as far as the war, and that's – that is an absolutely emotionally riveting testimony that cannot be replaced through either the use of a deposition or through even a videotaped question and answer presentation. That needs to be seen through the witness.

The – the mother, Rosa Medina, has been here eight days as well. She is the – she is caretaker of the family's land, as well as the other brother, and their situation is – is – is tenuous at best as far as being able to maintain their household while they're here in the United States.

Dr. [Selena Sermeno], who we anticipated testifying as a culture and historical expert regarding El Salvador is here today. She's also a professor at Antioch College. She is not – she has had to – to get special permission from her college in order to miss her teaching responsibilities. She is not going to be available next Tuesday because of the fact that she's here now. She had to barter with them in order to get up here this week.

Additionally, Dr. Weinstein, who's our neuropsychologist, who we anticipate calling as well, he potentially can be here next Tuesday, although, he was already scheduled to be in – in Houston on a death row case. But he, on Wednesday, which we anticipate our case taking more than one day, he has a very complicated family situation which includes the flying of his son in from Mexico City; is that correct, Dr. Weinstein?

DR. WEINSTEIN: Yes, Your Honor, my – my mother's 87 years old and she's in pretty bad shape. I'm brought – I'm bringing my son from Mexico to stay with our son with Down's Syndrome. I'm bringing my son – my son that lives in China is flying so we can all go visit my mother in Baltimore, for where this trial would be – our family reunion would be. And I have made all the travel arrangements.

> MS. WINFIELD: And those are arrangements that have been made for a long time based on the – on the dates that we were told that this trial is going to take place. That – that family situation puts Dr. Weinstein in an untenable situation as well because he has to make a choice between a professional obligation and his dying 87 year-old mother and his Down Syndrome child.
>
> Additionally, our mitigation expert, Richard McGough, who is here, has two other cases that he has to work on next week, one in North Carolina, another one in Arkansas. His relationship with our witnesses is vital to our ability to present a cohesive case to a jury.

Id. at 9-15.

Counsel for Mr. Medina thereafter moved for a mistrial based on the court's denial of due process, deprivation of Mr. Medina's right to effective assistance of counsel, and for having led a juror to believe he would be able to leave for his daughter-in-law's induced delivery, rendering him no longer impartial. *Id*. at 15. The court found the defense's points "well-taken" but denied a mistrial. *Id*. at 16. Defense counsel thereafter conveyed to the court that it would not oppose a continuance that the court wanted "if we can have sufficient time to – to prepare all of our witnesses. If we have to continue it to January, we're fine with that." *Id*. at 18. The court inquired as to whether a two-week continuance would be sufficient, and Ms. Winfield replied that it would not, and that if it was going to be reset, she believed it would have to be in January. *Id*. at 19. Defense counsel Peale informed the court that he had another death penalty trial set to begin in two weeks. *Id*. at 19-20.

> THE COURT: Well, I'm just not – not prepared to – to declare [the injured juror] to be disabled at this point. She's not permanently disabled. She just couldn't be here today and can be back on – on Tuesday.
>
> We've got another juror who I think simply is not going to pay this case the – the attention that it deserves, and I don't believe he can fulfill his duties of the job this week. He can next week.
>
> MS. WINFIELD: So the Court recognizes the fact that we're in an untenable situation. We have a juror who's not here. Even if she got back there, she'd be on pain medication. And then another juror who's currently here would end up being unfairly prejudicial to our client. So, therefore, if we have to have a continuance, at least give us time to render our team back

> together where it's not going to give us an undue hardship ... [W]e can all come back in December or January, or after Mr. Peale finishes his trial.

Id. at 21-22.

The trial judge requested that the defense team "get [him] the phone numbers ... of the people that I need to call" in order to try to make arrangements for the entire defense team and all defense witnesses with scheduling conflicts in the near future. *Id*. at 22. Ms. Winfield expressed incredulity that the judge was going to try to rearrange the schedules of over a dozen people and multiple capital murder cases in different states, all to allow a single juror to travel to Lubbock, Texas to see his daughter-in-law's induced delivery. Winfield again noted the fact that there were currently 12 jurors, counting the alternate, in the courthouse. *Id*. at 22-23. The Court thereafter released the jury over the defense's objection. *Id*. at 24. Defense counsel Winfield and Peale immediately moved to withdraw based on their inability to provide effective representation, which was denied. *Id*.

Three days later, on September 19, the court determined not to resume the trial on September 23, and, instead of declaring a mistrial, ordered the parties to confer and determine a mutually agreeable date for the continuation of the trial. C.R. Vol. 2: 329. The parties tentatively identified October 20, 2008; however, on September 22, the court coordinator emailed the parties to convey that a juror had vacation plans from October 18 through October 26. C.R. Vol. 2: 496. The Court then ordered Mr. Medina to contact his witnesses and determine their availability. C.R. Vol. 2: 329.

On September 23, Winfield sent emails to her mitigation specialist Richard McGough, her primary mental health expert Ricardo Weinstein, and her historical and cultural expert Selena Sermeno asking whether October 27, 2008 worked as a trial date for them and what specific dates they would not be available for trial. C.R. Vol. 2: 491. That night, Winfield received a response from Dr. Sermeno listing October 1st-7th, 20th-23rd,

and 27th-30th as dates she was not available to be in Texas.[5] *Id*. at 492. The next day, McGough replied,

> I am required in court in Arkansas starting Sunday Oct 12 through Thursday October 16. The hearing involves other witnesses flying up from El Salvador and can't be changed. I have another case set for trial October 27th. This is with a Mexican national and also involves complicated visa issues. This trial has been continued several times and won't be continued again. We have a suppression hearing in that case set for this Thursday and that may put the case off forever but as of now we have to act like it's going to trial. That means that I will be involved in trial prep just following my trip to Arkansas.
>
> I'm in El Salvador starting November 2 through November 9th. This trip can't be changed as it involves another case set for trial first of the year in Virginia.

Id. at 493. Winfield forwarded the responses via email to Assistant District Attorney (ADA) Patrick Kirlin, lead counsel for the State on the case, and the trial judge. *Id*. at 492-93. During this period, and despite the prosecution's lack of objection to the continuance entered by the court on September 16, the prosecution pushed aggressively to resume the trial as soon as possible, including on dates for which it knew the defense had clearly asserted it could not be ready.[6] C.R. Vol. 2: 357.

On September 29, the court coordinator sent an email to Winfield, Peale, and two assistant district attorneys on the case, Felicia Oliphant and Josh Healy, that she had scheduled all the jurors to be at the court on October 27, 2008, at which time the Medina trial would resume. C.R. Vol. 2: 495. On October 8, ADA Healy spoke with defense counsel Peale in which Peale told Healy that conflicts existed in regard to the defense team and

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[5] A subsequent email clarified that she could be available on the 27th but only in the morning, because she had to be in Seattle that evening for a speaking engagement the next day. C.R. Vol. 2: 491.

[6] Without any apparent appreciation for the irony, ADA Kirlin testified in a hearing on a motion for new trial that the State's insistence about going forward soon—despite not having objected to the recess in the first place—was borne of concern about the "nightmare" of coordinating the schedules of the twelve jurors. S.F. Vol. 66: 159. Kirlin also testified that it was due to his motivation to "make sure that I could get my witnesses here," even though the State had already rested its sentencing case. *Id*. at 153.

defense expert witnesses with respect to the October 27th date. C.R. Vol. 2: 357. Peale informed Healy that the defense would not be ready on the trial date, and had never agreed to the date that had been set. *Id*. On October 9, ADA Kirlin sent defense counsel Winfield an email saying that he had not heard anything to the contrary and was bringing the victim's family in court for October 27. C.R. Vol. 2: 494. Winfield replied stating that there must have been some miscommunication regarding the viability of the October 27th date; that she had just learned that Dr. Weinstein was involved in a capital military trial in Fort Bragg that would be occurring during that time; and that defense counsel Peale and Tatum were both in trial on different capital murder cases on that date. *Id*.

On October 20, the defense filed a sworn motion for continuance based on the unavailability of its defense team and witnesses for October 27, 2008. The motion related,

> 2. DEFENDANT had previously in Court and ready for presentation witnesses from five states and El Salvador. This included several experts who bad arranged their schedules to accommodate the original trial date of September 8, 2008.
>
> 3. Primarily, DEFENDANT'S mitigation expert Richard McGough has been subpoenaed to appear in a trial in North Carolina. A copy of that subpoena is attached to this motion. This expert is pivotal in the presentation of DEFENDANT'S life history, as he has kept in contact with DEFENDANT'S family members and has been instrumental in securing their presence in the United States. Mr. McGough preceded DEFENDANT'S counsel to El Salvador to assist in the journey throughout the country of El Salvador, and took several photographs to indicate the poverty and struggle that DEFENDANT encountered in his formative years. Being required to start back to trial without this expert would severely hamper DEFENDANT'S ability to present a cohesive mitigation case to the jury.
>
> 4. Just as important to DEFENDANT'S case is the bi-lingual neuropsychologist Dr. Ricardo Weinstein who is also unavailable the week of October 27th. Dr. Weinstein has conducted numerous tests on DEFENDANT and can fully explain DEFENDANT'S mental state to the jury. Due to the limited number of bi-lingual neuropsychologists in this country, Dr. Weinstein's schedule is always full. He will be available to testify January 19th-23rd, 2009. Being required to start a presentation of any mental state without Dr. Weinstein would render counsel ineffective. A military case for which Dr. Weinstein is expected to testify has already commenced, and an assistant to the officer in charge has left a message with the court indicating that conflict.

> 5. Both experts will be available January 19th-23rd, 2009.
>
> 6. Both experts were present in court for the trial prior to its being continued.
>
> 7. Co-counsel Lalon Peale is currently in voir dire on a different death penalty case in Dallas County. That case is anticipated being completed prior to the new year. This would be significant to DEFENDANT as Mr. Peale's attention can be completely devoted to the presentation of witnesses needed to properly defend the life of the DEFENDANT.
>
> 8. Appellate counsel John Tatum has commenced a capital murder trial as lead counsel in Collin County and would not be available to support the defense team in the appellate issues which arise during trial. He will also be available January 19th-23rd.
>
> 9. This continuance is not sought solely for delay but that justice may be done. DEFENDANT is literally on trial for his life. He is entitled to the same witnesses he had ready to present to the jury in September. He had no control over the Court's decision to allow a juror to leave or the fact that a different juror fell and broke her arm during trial, and that the alternate was not seated.

C.R. Vol. 1: 269-70. Attached to the motion was a North Carolina subpoena requiring McGough's presence as a witness in a North Carolina court on October 27th. *Id*. at 273.

ADA Healy, upon receiving the continuance motion, aggressively began making direct contact with members of the defense team out of the presence of defense counsel. S.F. Vol. 59: 4-5. Defense mitigation specialist McGough was one such defense team member contacted by ADA Healy. C.R. Vol. 2: 505. Healy attempted to interrogate McGough about the North Carolina case for which he had been subpoenaed. McGough told ADA Healy that he did not think it was appropriate for Healy to call him directly and that he did not want to speak to him. *Id*. McGough was contacted *ex parte* by the judge on the same day, who also questioned him about the North Carolina case. *Id*. at 506. McGough felt intimidated and was left with the impression that the prosecution and judge were working together. *Id*.

Healy also made direct contact with Dr. Weinstein. Dr. Weinstein had previously informed Healy that he would not speak to him outside the presence of defense counsel. S.F. Vol. 66: 13. Despite that, ADA Healy called Dr. Weinstein directly on his cell phone on October 20 and threatened Dr. Weinstein that he would face serious consequences if he was

not in the courtroom on October 27, 2008. He warned him the judge was going to "yank" him from the military trial in which he was retained—although under what authority Mr. Healy believed the State of Texas would have to act on a United States military base in North Carolina was never disclosed.[7] S.F. Vol. 66: 13, 29. Dr. Weinstein described the phone call as "disturbing." S.F. Vol. 66: 13.

ADA Healy also contacted lawyers involved in the cases for which defense team members had conflicts. Joanna Shober represented the defendant in the North Carolina case for which McGough had been subpoenaed. She was called at her office by Healy. C.R. Vol. 2: 489. Shober told Healy that she did not expect their hearing to last more than two days and suggested that the Medina matter be postponed until at least the afternoon of October 28.[8] *Id*. Healy then asked if Shober would be willing to speak to the judge on the Medina case on Healy's cell phone, which Shober believed to be an unusual request indicating improper *ex parte* communication between Healy and the judge. *Id*. The judge, however, was busy at that time, so Shober gave Healy her cell phone number. *Id*. Healy never asked Shober if she would have released McGough from his subpoena, but, if he had, she would have refused. *Id*. at 490.

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[7] See ABA Model Rules of Professional Conduct, Rule 4.3 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer ... shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-378 (1993) (an attorney who engages in ex parte contacts with an opposing party's expert witness may violate the duty to obey the obligations of the tribunal); Or.St.Bar Ass'n, Formal Op. 1992-132 (1992) (ruling that an attorney is ethically prohibited from initiating ex parte contact with an expert witness retained by opposing counsel); *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996) (attributing the "scarcity of case law on the issue of *ex parte* contact with expert witnesses" to the likelihood that "the violation seldom happens").

[8] Shober's suggestion did not take into account the considerable work that McGough had to perform *in advance* of the resumption of trial to have Mr. Medina's El Salvadoran witnesses present in Dallas, Texas and to otherwise help prepare the defense presentation of its sentencing case, about which she would have had no knowledge.

Two hours later, and without the knowledge of defense counsel, the trial judge contacted Shober on her cell phone, confirming *ex parte* communication and coordination between ADA Healy and the trial judge in Medina's case.[9] *Id*. at 489. The judge also contacted Clay Stiffler and Captain Brad Cowen, defense counsel in the capital military trial in which Dr. Weinstein had been retained as a consulting expert, as well as various judges and clerks in North Carolina, all outside the presence of the defense.[10] S.F. Vol. 59: 7-8, 13; S.F. Vol. 66: 14, 22, 33.

The next morning, October 21, the court heard the defense motion for continuance. Ms. Winfield was the only defense lawyer present, because Mr. Medina's two other appointed counsel were in other capital trials.[11] Based upon the independent investigation it had conducted, the court denied the motion. S.F. Vol. 59: 12. Despite the investigation confirming that Dr. Weinstein was indeed retained as an expert in a military trial that was occurring the week of October 27th and expected to last through December, the court found that Dr. Weinstein was nevertheless "available" to the defense.[12] S.F. Vol. 59: 13; S.F. Vol.

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[9] See also S.F. Vol. 59: 11 (conversation between Winfield and Healy revealed that there were "quite a few" conversations that occurred between Healy and the judge outside the presence of the defense).

[10] The judge's actions amounted to an independent investigation of the defense's continuance motion, which should have resulted in recusal. See *Hamm v. Groose*, 15 F.3d 110, 113 (8th Cir. 1994) (magistrate judge's use of independent investigation to decide temporary restraining order request will not be tolerated); *Callahan v. State*, 557 So. 2d 1292, 1309 (Ala. Crim. App. 1989) (a judge's independent investigation "necessitate[s] a recusal"); *State v. Stewart*, 573 P.2d 1138, 1148 (Mont. 1977) ("We must not forget that the presence of a judge in a role as a private investigator, can be intimidating, if not coercive."). A recusal motion was subsequently filed but denied.

[11] During the hearing, ADA Healy, based upon misrepresentations of his own conversations with defense witnesses and others, accused the defense of being untruthful about the unavailability of Dr. Weinstein. S.F. Vol. 59: 5. The next day, October 22, Winfield filed a motion to withdraw based on a conflict of interest caused by the threat of prosecution for perjury by the Dallas County District Attorney's Office. C.R. Vol. 1: 274. The judge denied the motion. S.F. Vol. 60: 13. After the ruling, ADA Felicia Oliphant told the judge that ADA Healy took the actions he did "not because ... anything filed in defendant's Motion for Continuance was doubted by the State," but merely in an effort to see if he could "gain compliance" from a person "who had told the Defense they were not available," acts that "should be commended." *Id*. at 14.

[12] The defense contended it needed a four-day window of Dr. Weinstein's time in which to present his testimony and receive his consulting services during the proceeding. S.F. Vol. 59: 18. At

66: 14 (judge had contacted defense lawyers who conveyed to judge their unwillingness to release Weinstein). With regard to mitigation specialist McGough, and despite the judge's acknowledgement based upon his independent investigation that McGough was under a subpoena that required him to be in a North Carolina court on October 27, the court insisted that he was also "available" to the defense.[13] Finally, that Mr. Medina was deprived of two of his three appointed lawyers who were then in other capital murder trials was deemed unproblematic because Peale's capital case was "just" in voir dire. *Id*. at 14. "It's not so time and – and thought intensive that [Peale] can't do this case [at the same time]."[14] *Id*.

On the morning of October 24, the State filed a "Motion for Issuance of Contempt Order." Confirming again the State's *ex parte* contact with the judge as well as the judge's *ex parte* contact with witnesses while conducting an independent investigation of the continuance motion, the State wrote, "The Court has spoken to Dr. Weinstein, has found he has no conflict that prevents him from appearing in Court on October 27, 2008, and has

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the same time the State was actively opposing the defense's attempt to secure the services of its mental health expert during sentencing proceedings, the State intended to have the consulting services of its own mental health expert present in the courtroom throughout all testimony. Indeed, the State's consulting mental health expert was even present in the courtroom for the State's benefit during non-jury proceedings. S.F. Vol. 63: 64; S.F. Vol. 65: 140.

[13] The judge announced a litany of reasons for his conclusion, all of which were either false or arbitrary. The judge insisted, variously, that McGough was available because (1) McGough was already sworn in (he was not because he was a member of the defense team), S.F. Vol. 59: 7, 12, 15; (2) Mr. Medina's case took priority over all others (the judge had tried, but failed, to make contact with the North Carolina judge presiding over the case in which McGough had been subpoenaed), *id*. at 7; (3) the clerk of the superior court division of North Carolina whom the judge had contacted during his investigation could not tell the judge that there was going to be a trial scheduled for October 27 (information that the defense could not rebut because it was learned *ex parte*), *id*. at 8; and (4) it was incumbent upon both parties to file a motion to quash McGough's subpoena (although the parties lacked standing to do so and there was no indication that either defense counsel or the prosecution were licensed to practice law in North Carolina where such a motion would be filed), *id*.

[14] Notwithstanding the frivolity with which the judge expected defense lawyers to undertake *voir dire* in capital cases, he never explained what powers he believed defense attorneys possess which allows them physically to be present in two different courtrooms at the same time.

personally ordered him to appear on that date."[15] The government sought (1) a conditional order of contempt against Dr. Weinstein, and (2) alternatively, an order requiring Dr. Weinstein to appear and show cause why he should not be held in criminal contempt, along with a writ of attachment to secure his attendance.[16]

The same day, without any prior notice to the defense, the court heard the motion. Defense counsel Winfield again was the only member of the defense team present. At the hearing, ADA Lisa Smith told the court that if Dr. Weinstein were not in the courtroom on October 27, the State would ask the court to issue a certificate under the Uniform Act to Secure Attendance of Witnesses from Without State that Dr. Weinstein is a material witness in a pending prosecution, notwithstanding that such a certificate would have no force on a federal military base where Dr. Weinstein was to be on October 27. At the hearing, the State asked the Court to again make *ex parte* contact with Dr. Weinstein to notify him of issuance of an order and "to obtain an answer from the witness as to whether or not he intends to appear." S.F. Vol. 61: 4-5. Defense counsel Winfield objected that the trial judge was a witness based on his *ex parte* contact with witnesses relevant to the continuance motion.[17] *Id*. at 9. The judge nevertheless denied the motion, finding it premature. *Id*.at 10.

On the morning of October 27, neither mitigation specialist McGough nor the El Salvadoran witnesses were present. Nor was defense expert Dr. Weinstein present. Mr. Medina's second chair counsel, Lalon Peale, was conducting *voir dire* in his other capital murder trial that morning. S.F. Vol. 62: 28. He subsequently came to the Medina courtroom

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[15] The Court admitted its *ex parte* contact with Dr. Weinstein on the record. S.F. Vol. 61: 6.

[16] The prosecution did not appear to perceive any limitations to the State of Texas's jurisdiction or the reach of its compulsory process.

[17] During a hearing on the motion for new trial, the trial judge stated his belief that all the lawyers involved in Mr. Medina's case—*even he*—wore "dual roles" as lawyers and witnesses during the case. S.F. Vol. 66: 17.

later in the morning, but was still in active conflict between his cases, as he had not been given permission to be released from either courtroom.[18] *Id*. at 29-30. Mr. Medina's appointed appellate counsel, John Tatum, was present in the courtroom in the morning, but was required to return back to his other capital murder case by noon. *Id*. at 26.

The defense filed a motion to recuse the trial judge for his *ex parte* contacts with the opposing party and witnesses regarding the continuance motion and for arbitrary and capricious rulings. C.R. Vol. 2: 290-97. A hearing was held on the motion and it was denied.[19] S.F. Vol. 63: 77. The defense thereafter filed another continuance motion based on the unavailability of its witnesses despite their or their representatives having been notified by the defense that their presence was required in court on October 27, which the State opposed. C.R. Vol. 2: 286-88. The court denied the re-urged continuance motion, explaining to defense counsel that it had "no evidence" that Dr. Weinstein was unavailable or was at a trial on a military base—other than "your word and your sworn motion." S.F. Vol. 62: 7.

Winfield requested that the court attach Dr. Weinstein and Mr. Medina's mother and brother, all of whom had previously been sworn in and were thus under the jurisdiction

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[18] When asked by the court about his status, Peale told the court,

> I actually informed the Court back in September when we were looking at continuing this case that I had a conflict. Numerous times the Court told me that that would not be a problem. DAs knew about it. DAs were informed one of the -- because the other capital murder case that I'm in the middle of jury selection on right now, the prosecutors wanted to finish by the end of the year. So there was a conflict. I constantly let the Court know what my ob1igations were. The Court assured me they talked to the judge in that Court. I don't know what these conversations are. I know that I was told to be down here today, so I was down here today, I was up there this morning at 9:00 picking a jury...

S.F. Vol. 62: 27-28. He told the court that he had been "forced to be in the untenable position to try and be in two places at once." *Id*. at 29. The judge in Peale's other capital murder trial had not released him to go to the Medina courtroom. *Id*. at 30. "He just told me to go down there and check back with him, so I've been constantly going back and forth between the courts updating them on what's going on down here." *Id*.

[19] Remarkably, the State moved to impose sanctions on defense counsel for seeking to recuse the trial judge. S.F. Vol. 63: 78.

of the court. The court asked where Dr. Weinstein could be located, and defense counsel replied, "[H]e's on a base at Fort Bragg." *Id*. at 12. The court then asked if defense counsel wanted the court to attach McGough, joking that North Carolina jails were going to be "cluttered with defense witnesses." *Id*. at 17. Defense counsel told the court that as a member of the defense team McGough was not a witness who had ever been sworn in or subpoenaed and that he had no choice but to obey the North Carolina subpoena in which he was a witness. *Id*. Finally, defense counsel asked for the court to attach Mr. Medina's family in El Salvador. *Id*. at 20. The court said it would take the requests "under advisement" but never ruled on the attachment requests or issued attachments for witnesses. *Id*. at 22.

Defense counsel thereafter explained to the court that, based on its rulings, it was unable to go forward due to an inability to render effective assistance of counsel. S.F. Vol. 62: 34-35. The judge asked Winfield again if she would either call a witness or rest in front of the jury, and Winfield again replied that she could not go forward based on the previous rulings of the court. *Id*. at 37. The trial court thereafter held Winfield in contempt of court and remanded her into custody. *Id*. After approximately three hours, the court released Winfield from custody, called the jury into the courtroom, informed them they had heard all the evidence they were going to hear in the case, and dismissed them until the next morning. S.F. Vol. 62: 41.

The next morning, the defense again moved for a mistrial. S.F. Vol. 64: 4. When it was denied, the defense again moved for a continuance, supplementing it with a letter from Captain Brad Cowan. *Id*. at 5. The letter, dated October 27, 2008, stated (1) that Dr. Weinstein was a court-appointed defense expert in the capital court-martial, *United States v. Alberto Martinez*, which was currently underway at Fort Bragg, North Carolina; (2) that

Dr. Weinstein had been assisting the defense since he was appointed in 2006; (3) that Dr. Weinstein had contractually committed to assist the defense at Fort Bragg during the duration of the trial which was estimated to last until December 24, 2008; (4) that the trial dates to which Dr. Weinstein had committed were known in July of that year; and (5) that "the defense cannot agree to excuse Dr. Weinstein for any part of the trial, including a four-day period that ... relates to a trial in another jurisdiction." C.R. Vol. 2: 301.

The motion was denied, and the jury was brought in. S.F. Vol. 64 at 9. The State made a closing argument without objection from the defense. The defense did not make a closing argument, nor did it make any objections to the charge. The court instructed the jury, which deliberated for 45 minutes before returning answers to the special issues requiring the court to sentence Mr. Medina to death. The jury never heard any mitigating evidence. During a hearing on a motion for new trial, the lead prosecutor in the case, Patrick Kirlin, refused to affirm a belief that Mr. Medina received a fair trial. S.F. Vol. 66: 185-86. "I cannot in good conscience answer these questions yes or no, and, therefore, I'm not going to do that." *Id*. at 186.

The CCA affirmed Mr. Medina's conviction and sentence in an unpublished opinion, holding that Mr. Medina was afforded due process. With respect to the trial court's *sua sponte* recessing the case on September 16, 2008 over the defense's objection to allow a juror to travel to Lubbock, Texas for personal reasons and to its failure to grant the defense's requested mistrial, the CCA merely observed that granting the recess to allow the juror to take his vacation was "a proper use of the trial court's inherent authority to control the trial." App. 1 at 33. As to the court's failure to grant a continuance in the face of Mr. Medina's lacking most of his defense team and most critical witnesses, the CCA held that Mr. Medina did not diligently attempt to secure the presence of his witnesses. *Id*. The CCA did not explicate further either on what Mr. Medina did not do or what Mr. Medina should

have done to secure the presence of his witnesses. The court also held that Mr. Medina was not deprived of the assistance of counsel because the prosecution's sentencing case was subjected to meaningful adversarial testing.[20] App. 1 at 27.

Judge Johnson dissented. App. 2. "This is a case in which the court encouraged jurors to set other matters above the duties of a juror," she wrote. *Id*. at 1. In her opinion, the "needless" recesses the court granted to accommodate even the most trivial of personal requests from the jury "severely prejudiced [Mr. Medina's] ability to present mitigating evidence." *Id*. at 2. Concluding that "[t]he injured juror should have been replaced at the time of her injury and the trial continued without regard to scheduled, induced births," Judge Johnson would have reversed the judgment and granted a new sentencing trial. *Id*.

Mr. Medina asks this Court to review the CCA's decision holding that he was not denied due process, the right to assistance of counsel, and the right to a reliable and individualized sentencing hearing during his trial.

[20] The court also held that Mr. Medina's counsel was not ineffective for failing to present mitigating evidence because there was no evidence that Dr. Weinstein was in fact available to testify for the defense. This somewhat misconstrued the nature of the ground raised on appeal, which was not limited to the defense's failure to present Dr. Weinstein's testimony but encompassed its entire failure to defend Mr. Medina at sentencing at all once its continuance was denied.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO CORRECT AN INJUSTICE IN A CAPITAL CASE AND TO DECIDE WHETHER MR. MEDINA WAS DENIED HIS CONSTITUTIONAL RIGHT TO A MEANINGFUL OPPORTUNITY TO BE HEARD IN DEFENSE OF HIS LIFE, HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO COUNSEL, AND HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE, INDIVIDUALIZED CAPITAL SENTENCING PROCEEDING.

A. The trial court's sua sponte and needless recess of trial over Mr. Medina's objection to accommodate the personal travel plans of a juror; its refusal to substitute an alternate juror; its denial of Mr. Medina's motion for mistrial; its interference in and direct contact with members of Mr. Medina's defense team and witnesses outside the presence of defense counsel; and its denial of Mr. Medina's motion for continuance deprived Mr. Medina of due process, a meaningful opportunity to be heard, a fair opportunity to present a defense, and a fundamentally fair trial.

"A fundamental requirement of due process is 'the opportunity to be heard.'" *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). It is an opportunity "which must be granted at a meaningful time and in a meaningful manner." *Id.* "Common justice requires that no man shall be condemned in his person or property without . . . an opportunity to make his defence." *Baldwin v. Hale*, 68 U.S. 223, 233 (1864). See also *In re Oliver*, 333 U.S. 257, 275 (1948) (defendant must be afforded "a reasonable opportunity to meet [the charges against him] by way of defense or explanation").

In criminal cases, the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* Capital defendants must be afforded a meaningful opportunity to defend against the State's penalty phase evidence. *Gray v. Netherland*, 518 U.S. 152, 181 (1996) (Ginsburg, J., dissenting). "A *pro forma* opportunity will not do." *Id.* at 182. Absent a

"full, fair, potentially effective opportunity" to defend against the State's charges, the right to a hearing would be 'but a barren one.'" *Id*. (quoting *Morgan v. United States*, 304 U.S. 1, 18 (1938)).

Additionally, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. *Id*. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Id*. See also *Manlove v. Tansy*, 981 F.2d 473 (10th Cir. 1992) (finding denial of continuance violated due process); *Bennett v. Scroggy*, 793 F.2d 772 (6th Cir. 1986); *Hicks v. Wainwright*, 633 F.2d 1146 (5th Cir. 1981).

The CCA's decision that Mr. Medina was afforded a meaningful opportunity to be heard in his defense against the death penalty ought to be reversed. At every opportunity, the trial court—often in collaboration with the prosecution—undermined Mr. Medina's ability to present a defense. Although the defense vigorously objected to the trial court's recessing the case to accommodate a juror's travel plans, the State did not. It had already presented its case in chief in sentencing, and, despite later purporting to have concerns about delay, did not join the defendant's objection to, but instead acquiesced in, this "needless" delay.

On September 16, 2011, the day the defense had long been scheduled to begin its sentencing case in chief, Mr. Medina had his full defense team—two trial counsel and appellate counsel, a mitigation specialist based in North Carolina, and a fact investigator—

in court and prepared to proceed.[21] The defense also had professional expert witnesses from three other states—Louisiana, California, and New Mexico—present in the courtroom and ready to testify. It had two lay witnesses from rural El Salvador whom the defense team's mitigation specialist, utilizing his personal extensive contacts, had spent considerable time and effort to bring to the United States. One of those witnesses was at risk of losing his gainful employment for having made the trip. Another witness from El Salvador, a teacher whose absence from work was also a hardship, was en route to the United States, having been delayed due to problems caused by Hurricane Ike. The defense was prepared to present other local witnesses as well.

Assembling this team and its witnesses was a formidable task, only made possible in view of the months-long notice afforded the team about the dates during which the trial would be occurring. The trial court's sua sponte decision to recess the case on this date for a week to accommodate a juror's personal travel plans was an arbitrary decision that wreaked havoc on the defense's ability to reassemble and present the case it had painstakingly readied to be presented on September 16, 2008.

The judge's belief that he had to permit the juror to travel in order for the juror to remain impartial does not justify the court's actions. First, the juror's belief in his entitlement to leave the trial had been fostered by the trial court's earlier sua sponte recess—granted without consultation with the parties—to allow a different juror to go to on a *fishing trip* to Galveston, Texas in the middle of guilt-innocence proceedings. Second, the judge's belief that the juror would be impartial if forced to proceed with trial, in conjunction

[21] See ABA Guidelines at 952 (ABA Guideline 4.1) ("The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.").

with the defense's objection to recessing the case due to the difficulty of replicating its defense, forced the defense into an untenable position, through no fault of its own.

Once a juror fell and broke her arm, the judge's handling of the trial placed Mr. Medina on the horns of a dilemma: he could choose either to be deprived of an impartial jury by insisting that the court order the juror with travel plans to stay or to be deprived of a meaningful opportunity to be heard by acceding to an indefinite continuance. As both constitute fundamental rights, neither option was acceptable, and a mistrial was required. See *Cherry v. Director, State Bd. of Corrections*, 635 F.2d 414, 419 (5th Cir. 1981) (describing granting of mistrial when a juror ceases to attend for good reason or is biased as "in accord with the common practice"). The failure to grant the defense's request for a mistrial under these circumstances violated due process.

Ultimately, when the court released the jury on the morning of the 16th, the court determined for Mr. Medina which right he would be deprived. The defense had placed the court and prosecution on notice about the difficulty it would have reassembling its defense team and witnesses any time in the near future in the event the trial court refused to go forward on September 16, and the defense's exception to allowing the jurors to leave was noted by the court. S.F. Vol. 58: 24.

When the trial was arbitrarily reset for October 27 in the face of serious conflicts by three important members of the defense team and the defense's most critical defense expert witness, what had throughout the trial been casual delay on the part of the court for the most frivolous of reasons (and at Mr. Medina's expense) suddenly became an "insistence upon expeditiousness" (still at Mr. Medina's expense). Until that point, the Court had bent over backwards to accommodate juror's personal lives, recessing the case once to accommodate a juror's fishing trip and another to accommodate a juror's vacation to Lubbock, Texas over the objection of the defense, which sought to proceed expeditiously.

The State had assented to the previous needless delays, including to allow the juror to travel to Lubbock, Texas, notwithstanding Mr. Medina's strenuous objection based on the difficulty in reassembling his defense team and witnesses in the near future.

The insistence on expeditiousness was "myopic" and without doubt made "in the face of a justifiable request for delay." *Ungar*, 376 U.S. at 589. The trial court set the October 27 hearing date knowing that two of Mr. Medina's counsel would be in other capital murder trials—one in a different county—and that Mr. Medina's mitigation specialist—one of the primary responsibilities of whom was to secure the attendance at trial of critical El Salvadoran witnesses—had a professional and legal conflict with the date. The date was chosen without any consideration of the defense's readiness. Although the court asked the defense, off the record, to contact their team members and expert witnesses and determine what dates they could not appear due to their schedules, the defense did not hear anything back from the court until it received an email—again off the record—from the court coordinator informing the parties that the trial had been scheduled to resume October 27, a date on which the defense had previously informed the court that its mitigation specialist, co-counsel, and its expert witness was unavailable.[22] The lack of consideration for the defense's ability to proceed is especially offensive in light of the fact that the State never opposed the initial recess, had already rested its case in chief, and therefore had little interest in the matter.

The CCA held that Mr. Medina's request for continuance was not "justifiable" because Mr. Medina's counsel were not "diligent" in trying to obtain Dr. Weinstein's presence (even though the court credited, in another part of the opinion, that "defense

[22] Worse, the judge had assured co-counsel Peale that he himself would take care of Peale's scheduling conflict by speaking to the judge of the court in which Peale's conflict existed. (The courts were in the same county and building.) The judge apparently never did so and Peale's conflict was left unresolved. S.F. Vol. 62: 27-30.

counsel consistently maintained that Dr. Weinstein was not available because he was assisting the defense at the North Carolina trial"). Notwithstanding the sheer unreasonableness of this finding in light of the record, the CCA made no effort at all to undertake a thoughtful analysis of all the circumstances in the case that culminated in the denial of a fundamentally fair trial to Mr. Medina. The totality of the circumstances show a diligent defense team whose prodigious effort to present their mitigation case to the jury was thwarted by a trial court that placed the personal interests of jurors above a capital defendant's fundamental right to a fair trial.

Accordingly, the Court should grant certiorari and reverse the Court of Criminal Appeals of Texas's decision that Mr. Medina was afforded due process.

B. The trial court's sua sponte and needless recess of trial over Mr. Medina's objection to accommodate the personal travel plans of a juror; its refusal to substitute an alternate juror; its denial of Mr. Medina's motion for mistrial; its interference in and direct contact with members of Mr. Medina's defense team and witnesses outside the presence of defense counsel; and its denial of Mr. Medina's motion for continuance deprived Mr. Medina of his Sixth Amendment right to counsel.

The right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *United States v. Cronic*, 466 U.S. 648, 658 (1984). Representation by counsel "is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Where circumstances of trial are such that the likelihood that counsel could perform as an effective adversary is so remote as to render the trial inherently unfair, the right to counsel and due process have been denied. See *Alabama v. Powell*, 287 U.S. 45, 58 (1932).

> The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

Id. at 59.

Under the circumstances of this case—in which the trial was recessed for a trivial reason over the strenuous objection of the defense, after the State rested, and just as the defense was prepared and poised to present its sentencing case to the jury; in which the court denied a mistrial when the defense was forced to make a choice between a denial of an impartial jury and a denial of due process; in which the court scheduled trial to resume on a day known to the court and the prosecution to be one in which three-fifths of the defense team, including the most important member for sentencing besides lead counsel (mitigation specialist), had scheduling conflicts with other capital cases; in which the case was scheduled to resume on a date when the defense's most important expert witness—whom the defense intended to testify and consult with throughout the sentencing proceedings—was unavailable due to his presence on a federal military base for a capital military trial; in which the court and prosecution made ex parte contact with defense team members other than counsel and with defense and other witnesses about the case outside the presence of defense counsel and in ways that intimidated the defense members and witnesses, rendering them hostile to Mr. Medina; and in which the court denied a sworn defense motion for continuance based on the unavailability of most of the defense team and expert witnesses—the likelihood that any lawyer could provide effective assistance is nil.[23] To decide otherwise would be to "ignore actualities." *Powell*, 287 U.S. at 58.

Consequently, this Court should grant certiorari to correct this grave injustice in a capital case and hold that Mr. Medina was deprived of his Sixth and Fourteenth Amendment rights to counsel and to due process during his capital sentencing.

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[23] Mr. Medina also believes that counsel's refusal to participate in the sentencing proceedings following the resumption of trial on October 27 "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" and deprived Mr. Medina of counsel. *Cronic*, 466 U.S. at 659. If prejudice must be considered, it is well established in this case.

C. The trial court's sua sponte and needless recess of trial over Mr. Medina's objection to accommodate the personal travel plans of a juror; its refusal to substitute an alternate juror; its denial of Mr. Medina's motion for mistrial; its interference in and direct contact with members of Mr. Medina's defense team and witnesses outside the presence of defense counsel; and its denial of Mr. Medina's motion for continuance deprived Mr. Medina of his Eighth and Fourteenth Amendment rights to a reliable and individualized capital sentencing proceeding.

"[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality); *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (Supreme Court "ha[s] emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination"). Whether attributable to the conduct of the court, the prosecution, defense counsel, or any combination of the three, the undeniable result of the confluence of events described above is that Mr. Medina was unfairly deprived of a reliable and individualized capital sentencing proceeding when a jury sentenced him to death without having heard any of the wealth of mitigating evidence—both relating to Mr. Medina's background and character as well as relating to the circumstances of the offense—that the defense was prepared to present on September 16, 2008.

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari*.

Respectfully submitted,

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May 31, 2011

Appendix 1

Appendix 2

Appendix 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[] by an impartial jury … and to have the Assistance of Counsel for his defence."

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."