APPENDIX INDEX

APPENDIX A

January 12, 2009 Judgment in the District Court of Cameron County Texas 107th Judicial District a January 8, 2009 sentence of life punishment hearing

CAUSE NO. 07-CR-798-A

TEXAS § IN THE DISTRICT COURT OF

VS § CAMERON COUNTY, TEXAS

JAVIER CHAVEZ § 107TH JUDICIAL DISTRICT

JUDGMENT OF JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT-NO
PROBATION GRANTED;
SENTENCE TO INSTITUTIONAL DIVISION

Judge Presiding: Benjamin Euresti, Jr.
Date of Judgment; 1-12—2009
State' Attorney: Oscar Guzman
Defendant's attorney: Moises Salas
Offense Convicted: First Degree Felony
Date Offense Committed: 1-21-07
Charging Instrument: Indictment
Plea: Not Guilty
Jury Verdict: Found Defendant Guilty of Murder
Plea to Enhancement: True
Findings on Enhancement: True
Findings on Use of Deadly Weapon: n/a
Punishment assessed by: Court
Date sentence imposed: 1-8-09
Costs: See Bill of Costs (Exhibit B)
Punishment and Place of Confinement: LIFE-

TDCJ/ID
Time Credited: 449 Days
Total Amount of Restitution/Repair" n/a
This sentence is to be served concurrent with any other sentence unless otherwise specified.

BE IT REMEMBERED that on the 7th day of November, 2008, this cause was called to trial and the State appeared by the attorney stated above, and the defendant's

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JUDGMENT OF JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT-NO
PROBATION GRANTED;
SENTENCE TO INSTITUTIONAL DIVISION
Cause No. 07-cr-798-A' State v. Javier Chavez
ACS
SCANNED DATE 1-26-09

attorney were also present, and the Defendant, having been duly arraigned, pleaded Not Guilty and both parties announced ready for trial; thereupon a jury of twelve good and lawful persons, to wit; Oscar Medrano and eleven others, was duly selected, impaneled and sworn according to the law and charged by the Court on separation; and whereupon said cause recessed until November 18, 2008.

THEREAFTER, on November 18,2008 the indictment was read to the jury and the Defendant entered his plea of Not Guilty thereto whereupon the State introduced evidence and whereupon said cause recessed until November 19, 2008.

THEREAFTER, on November 19, 2008, the state continued with their evidence an testimony and rested. Defendant presented testimony and rested.

State presents rebuttal evidence. All parties closed, whereupon the charge was prepared and submitted to all counsel on said cause the Court charged the jury as to the law applicable to said cause and argument of counsel for the State and the Defendant was duly hear and concluded, and the jury retired in charge of the proper officer to consider their verdict, said cause was recessed until November 20, 2008;

THEREAFTER, on November 20, 2008 the jury was brought into open court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the Minutes of the Court, to wit:

> "We, the Jury, find the defendant, JAVIER CHAVEZ, "Guilty" of Murder as charged in the indictment."

s/ Oscar Mederano
Presiding Juror

JUDGMENT OF JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT-NO PROBATION GRANTED;
SENTENCE TO INSTITUTIONAL DIVISION
Cause No. 07-cr-798-A' State v. Javier Chavez

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, by the Court that the Defendant is guilty of the offense of Murder as found by the jury, and that said offense was committed on January 21, 2007.

THEREUPON, the Defendant, having previously elected in writing to have his punishment assessed by the Court, said jury was discharged and the cause

recessed until January 8, 2009 and a pre-sentence investigation report was ordered.

THEREAFTER, on January 8, 2009, all parties announced ready for hearing, the cause proceeded on the punishment phase an evidence for the State and for the Defendant was duly presented court having and arguments of counsel was heard and the and the Court having adjudged the /defendant guilty of the offense of Murder as found by the jury.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the Defendant is guilty of the offense Murder, as found by the jury, and, the court having reviewed the pre-sentence investigation report, the punishment is assessed by the Court at LIFE at the Texas Department of Criminal Justice, Institutional Division, and the State of Texas do have and recover of said Defendant all court costs in this prosecution expended for which execution will issue.

And thereupon the Court asked the Defendant whether the Defendant had anything to say why said sentence should not be pronounced upon said Defendant had anything to say why said sentence should not be pronounced upon said Defendant, and the Defendant answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant and the Defendant's attorney, to pronounce sentence upon said Defendant as follows:

JUDGMENT OF JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT-NO
PROBATION GRANTED;
SENTENCE TO INSTITUTIONAL DIVISION
Cause No. 07-cr-798-A' State v. Javier Chavez

IT IS ORDERED, by the Court that the Defendant, who has been adjudged guu8lty of the offense of Murder, as found by the jury, be and is hereby sentenced to LIFE, in Texas Department of Criminal Justice, Institutional Division. The Defendant shall be taken by the authorized agent of the state of Texas or by the Sheriff of Cameron County, Texas, and by him safely conveyed and delivered to the Director of the institutional division of the Texas Department of Criminal Justice, there to be imprisoned in the manner and for the period aforesaid. The Defendant is hereby remanded to the custody of the sheriff, until such time as the Sheriff can obey the directions of this sentence.

IT IS FURHER ORDERED by the Court that Defendant's left or right thumb be fingerprinted, and that said thumbprint be marked as Exhibit "A" and is made part hereof for all purposes.

Said defendant is given credit on this sentence for 449 days on account of the time spent in jail.

SIGNED FOR ENTRY: January 12, 2009

s/
Benjamin Euresti, Jr.
Judge Presiding

Filed 10:00 O'clock AM
AURORA DE LA CRUZ, CLERK
JAN 14 2009
DITRICT COURT OF CAMERON COUNTY, TEXAS
Carolina Ostas Deputy.

JUDGMENT OF JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT-NO
PROBATION GRANTED;
SENTENCE TO INSTITUTIONAL DIVISION

Cause No. 07-cr-798-A' State v. Javier Chavez
END OF JUDGMENT DOCUMENT

PUNISHMENT HEARING PAGE 1 OF 1

Case No. 07-CR-798-A DATE: 1-8-09
STATE OF TEXAS VS. JAVIER CHAVEZ
ATTORNEY MOISES SALAS D.A. O. GUZMAN

_X__ Punishment assessed at confinement at _x_TDC/ __SJF/ __CCJ for LIFE months/years:

_____Sentence suspended and probated for _____ months/years, under usual terms and conditions of community supervision:

_____Pay court costs within 90 days;
_____Pay supervision fees at the rate of $60.00 per month;
_____Pay restitution in the amount of $ within _____ days/months;
_____Pay attorney's fees in the amount of $ __ within _____days/months;
_____Pay a fine in the amount of $ __ within ___ days/months;
_____Pay PSI fee m the amount of $400.00 within __ days/months;
_____Pay a one time CRIME STOPPER'S fee of $50.00 within ___ days/months;
_____Submit to drug abuse /alcohol abuse counseling and classes; random urine analysis;
_____Provide community service hours of 125/15; 250/15 or 300/15 weekly; Complete the G.E.D Program and obtain certificate;
_____Submit to the B.I.P.P. (Batters intervention Prevention Program) as directed by the Community Supervision Department;

_____Submit to the Anger Management Program, as directed by the Cameron County Community Supervision and Correction Department;

_____DWI SUSPENSIONS: 180 days to 24 months; jail time : ___ (ALL DWI CASES NEED TO BE SUSPENDED)

_____Install Ignition Guardian Interlock Device for ___ months/years ___ for felony DWI drivers. Defendant should be responsible for all costs associated with the program.

_____Participate in the Electronic Monitoring Program for ____ months/years

_____Participate in the Intensive Supervision Program for _____ months/years

_____Participate in the Surveillance Program for ___ months/years;

_____Placed al the Restitution Center for __ months/years; Defendant to remain in custody ___ or Defendant to remain on bond

_____SUBSTANCE ABUSE PROGRAM (SAFPF} AT TDC (AS CONDITION OF PROB.) Defendant to remain in custody ___or Defendant to remain on bond ___

_____LOCAL BOOT CAMP (EDINBURG} (AS CONDITIONOF PROB.) Defendant to remain in custody ___ or Defendant to remain on bond

_____SEXUAL OFFENSES: As a condition of probation Defendant ordered to register with Sex Offender Registration Act; and Comply with any and all regulations of the Sex Offender Program;

_____Defendant shall serve _____days in the Cameron County Jail with credit for time served as a condition of community supervision, and, thereafter completion of confinement, Defendant shall be placed on community supervision as directed by

the Community Supervision department;
____Defendant to be deported into MEXICO/
___ by INS and ordered not to return to United States illegally . If Defendant should return legally, Defendant shall then report to the probation office within 24 hours and abide by aforementioned conditions of probation;
____Other additional conditions: _

APPENDIX B

THE STATE OF TEXAS
seal

NUMBER 13-09-00068-CR

COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI – EDINBURG

JAVIER CHAVEZ, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 107th District Court
of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Benavides, and Vela
Memorandum Opinion by Justice Benavides

Appellant, Javier Chavez, appeals from his conviction of murder. See TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 2003). By two issues, Chavez argues that the evidence is legally and factually insufficient to support his conviction. We affirm.

I. BACKGROUND[1]

[1] Because this is a memorandum opinion and the parties are familiar with the facts, we will only discuss the facts as necessary for the resolution of the appeal. See TEX. R. APP. P.

Luis de Leon ("Commander de Leon"), an investigator with the Cameron County District Attorney's office, testified that on January 19, 2007, he met with Steven Rodriguez concerning a pending case in which Rodriguez was a victim. Commander de Leon stated that Rodriguez was to return on January 22, 2007, to provide some information "on an auto theft ring." Rodriguez never returned to provide that information.

On January 20, 2007, Rodriguez and Trinidad Sanchez were drinking and doing drugs at Sanchez's house at 1200 Milpe Verde, in Brownsville, Texas, where Sanchez lived with his mother and grandmother. At some point that evening, a black Chevrolet Blazer arrived at the house, and Lucio Figueroa and Benjamin Pena exited the Blazer and entered Sanchez's house.[2] Shortly thereafter, Chavez also entered the house. All five men exited the house and proceeded to the front yard.

Sanchez testified that once the men were outside, an unidentified person arrived in a Chevrolet Silverado pickup truck. That person approached Rodriguez and called him a snitch. Figueroa and Pena also called Rodriguez a snitch. Figueroa, Pena, and Chavez then began fighting with Rodriguez. They were hitting him with their fists. Sanchez began arguing with Figueroa, and the man from the Silverado got in his truck and drove off. Sanchez

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47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").

[2] Lisbeth Garcia testified that she was the owner of the black Chevrolet Blazer, which she bought from her brother, Lucio Figueroa. She stated that during January 2007, Figueroa lived with her and often drove the vehicle.

stated that at some point during the fight, Rodriguez ran into the house. However, Sanchez told Chris Ortiz, an officer with the Brownsville Police Department and

the lead investigator in the case, that Rodriguez was taken into the house by Enrique Garcia, Sanchez's uncle.

Sanchez further testified that when Rodriguez entered the house, Chavez and Pena ran around the side of the house to the backyard. Sanchez admitted that he did not see what occurred in the backyard and that he was arguing with Figueroa at the time Chavez and Pena ran to the backyard. Sanchez stated that two to three minutes later, Chavez and Pena came running back to the front yard and that one of them said to Sanchez, "You're next." Chavez and Pena then got into the Blazer with Figueroa and left. Sanchez told Officer Ortiz that Chavez was wearing surgical gloves and had bloody hands when he came running from the backyard.3 Chavez testified that he went into the backyard to "take a leak," and Sanchez admitted that he did not see Chavez with Rodriguez in the backyard.[3] Sanchez also stated that he did not see Rodriguez again after Rodriguez went into the house.

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[3] This testimony was admitted over a running hearsay objection, and on appeal, Chavez does not challenge the trial court's decision to admit this testimony. See TEX. R. APP. P. 38.1(f); *Jaynes v. State*, 216 S.W .3d 839, 845 (Tex. App.–Corpus Christi 2006, no pet.) (stating that an appellate court considers all evidence, both admissible and inadmissible, when reviewing the legal and factual sufficiency of the evidence); *Arzaga v. State*, 86 S.W.3d 767, 778 (Tex. App.–El Paso 2002, no pet.) (same).

Denise Rodriguez, a dispatcher with the Brownsville Police Department, testified that she was on duty the night of January 20, 2007, and that at about 1:30 a.m. in the morning of January 21, 2007, she received a 911 call from a male who identified himself as Steven Rodriguez. She noted that the caller repeatedly stated that he had been stabbed but did not identify his assailant. She dispatched paramedics to the location Rodriguez gave her.

Julio Briones, an officer with the Brownsville Police Department, testified that he was assigned to investigate a homicide at 1200 Milpe Verde in Brownsville, Texas. He went

to the scene, and several other officers were already there. When he arrived, he was directed to a ditch approximately sixty yards behind the house and saw Rodriguez lying in the ditch. Rodriguez had been stabbed multiple times. Officer Briones collected blood samples from the area surrounding the ditch and from the Blazer. Officer Briones was also present during the autopsy of Rodriguez's body and took as evidence some fingernail clippings from Rodriguez's body. On cross-examination, Officer Briones testified that he photographed Chavez at the jail and did not see any signs of Chavez having been in a fight. Officer Briones also stated that he did not find any evidence at Chavez's house connecting Chavez to Rodriguez's murder. Norma Jean Farley, the chief forensic pathologist at Valley Forensics, testified that she performed the autopsy on Rodriguez and that he died in a homicide from the stab wounds.

Dora Lee Palomino testified that she was "seeing" Chavez during January 2007, including on January 20, 2007. On January 21, 2007, between midnight

and 1:00 a.m., Palomino received a phone call from Chavez. Chavez was high on drugs, and she spoke with him for five to ten minutes. He asked for money. Later that morning, Palomino met Chavez at a park in Brownsville, Texas. Chavez arrived in the back seat of the Blazer and got into Palomino's car. Chavez told her that he had hurt someone and that he had stabbed someone. He again asked for money and said that he needed money to leave. Chavez told her that he stabbed someone because that person "was messing with his friends." Chavez then exited Palomino's car and left in the Blazer. On January 22, 2007, Palomino picked up Chavez and his brother Ruben Chavez ("Ruben") at Chavez's house. Shortly thereafter, she was pulled over by a Brownsville police officer. On crossexamination, Palomino admitted that she often gave Chavez money for drugs. She also

stated that at the time they were seeing each other, Chavez was also seeing another woman.

Ruben testified that he was not with Chavez on the night in question. The State played for the jury a recording of a statement Ruben gave to the police, but that recording is not in the record before us. Ruben testified that the State and the police coerced him into giving the statement. The State then questioned Ruben about some of the statements he made on the recording. Chavez told Ruben that there had been a fight but Chavez did not say he was involved in the fight. Ruben also stated that he had mentioned to the investigators that Chavez had some scratches on him but that Chavez goes fishing and works in construction, implying that those scratches could have been caused by those activities and not from the fight.

Jesse Pinales, an officer with the Brownsville Police Department, testified that on January 22, 2007, he went to Chavez's residence to arrest Chavez pursuant to an arrest warrant. Officer Pinales parked his unmarked vehicle near the residence and observed a vehicle approach the house. Officer Pinales saw a female and two males exit the house, enter the vehicle, and drive off. He observed that the car had a broken taillight and requested a patrol unit stop the vehicle. After the traffic stop occurred, Officer Pinales approached the vehicle and noticed Chavez sitting in the front passenger seat. Officer Pinales then arrested Chavez and took him into custody. Officer Pinales identified Palomino as the driver and Ruben as the back-seat passenger.

On January 22, 2007, Dalberto Luis de Leon, an officer with the Brownsville Police Department, went to Chavez's house. At the house, he met Juan Chavez ("Juan"), Chavez's father. Juan consented to a search of the house, and Officer de Leon searched

the house. He found a suitcase in Chavez's bedroom that had some dress shirts, still on hangers, folded up in the suitcase. Juan told him that the suitcase found in Chavez's room actually belonged to Juan who was packing it in preparation to take Chavez's mom out-of-town for medical treatment. Officer de Leon spoke with Ruben who informed him that the packed suitcase belonged to Chavez who was going out of town to look for work. On cross-examination, Officer de Leon stated that he did not find any evidence relating to the murder, such as bloody clothes or a knife, at the house.

Chavez testified that he was at the house on Milpe Verde the night Rodriguez was murdered but that no fight occurred. He stated that he went behind the

house to "take a leak" and that he did not see Rodriguez behind the house. Chavez said that he did not tell Palomino that he stabbed anyone. He claimed that the suitcase found in his room belonged to him and that he was living with his dad because he had recently moved out of his own residence due to a fight with his common-law wife. He claimed that Ruben was lying about Chavez's plans to leave town to look for work and that Ruben was lying about Chavez saying that he was in a fight. Chavez stated that he was a member of the "Vallucos," a protection gang that operates only in prison. He was "one hundred percent" Valluco. Chavez showed the jury a tattoo on his back which read "Valluco" and also discussed a tattoo of palm trees on his hand, stating that they stood for the "Valley." He said that outside of prison, he is a "family man" and that the Vallucos do not have a "code of silence."

Chavez declared that Sanchez was lying about there having been a fight and about Chavez showing up after Figueroa and Pena. He never said that anyone was "next." He further stated that he did not stab Rodriguez and that Palomino was lying when she said

that he told her he had been in a fight.

On rebuttal, Dionicio Cortez, a lieutenant with the Cameron County Sheriff's Office in the jail division, testified that he is a classification officer responsible for classifying gang members that come into the jail. Lieutenant Cortez was an expert in gang identification. He stated that while the Vallucos were initially organized as a protection gang and operated only to protect its members while they were in prison, the Vallucos now operate on the "outside" and are engaged in drug smuggling and dealing,

burglaries, robberies, and car theft. Lieutenant Cortez testified that the Vallucos do have a "code of silence," which means that the Vallucos threaten snitches with bodily injury and assault and even execute them. Lieutenant Cortez noted that a Valluco is a "fifty percenter" when he enters jail but becomes a "one hundred-percenter" when he enters federal or state prison. A "one hundred percenter" has tattoos of palm trees that form a "V." Lieutenant Cortez testified that the palm trees tattooed on Chavez's hand refer to Chavez's being a "one hundred percenter" and stated that Chavez has "RGV" tattooed on his leg, which stands for "Rio Grande Valley or Rio Grande Valluco." Lieutenant Cortez also discussed a different tattoo on Chavez's leg, which he described as the tattoo of the Valluco "code of silence." Lieutenant Cortez further testified that the Vallucos have formed a car theft ring to provide cars to the Zetas, a powerful, northern Mexico drug gang. Lieutenant Cortez testified that if the Zetas were not happy with someone on the United States side of the border, they would ask the Vallucos to do a hit.

The jury found Chavez guilty of murder, and the trial court sentenced him to life in prison. This appeal ensued.

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II. STANDARD OF REVIEW

When reviewing the legal sufficiency of the evidence, we must determine whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'—not whether '[we believe] that the evidence at the trial established guilt beyond a reasonable doubt.'" *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19

(1979)). "[W]e assess all of the evidence "'in the light most favorable to the prosecution.'" Id. (quoting *Jackson*, 443 U.S. at 319.) "After giving proper deference to the factfinder's role, we will uphold the verdict unless a rational factfinder must have had reasonable doubt as to any essential element." Id. at 518 (citing *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992)).

"Evidence that is legally sufficient, however, can be deemed factually insufficient in two ways: (1) the evidence supporting the conviction is 'too weak' to support the factfinder's verdict, or (2) considering conflicting evidence, the factfinder's verdict is 'against the great weight and preponderance of the evidence.'" Id. (quoting *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006)). In conducting a factual sufficiency review, we defer to the jury's findings. Id. We consider all of the evidence in a neutral light and will "find the evidence factually insufficient when necessary to 'prevent manifest injustice.'" Id. (quoting *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997)).

We measure the legal and factual sufficiency of the evidence based on a hypothetically correct jury charge. *Grotti v. State*, 273 S.W.3d 273, 280-81 (Tex. Crim. App. 2008). A hypothetically correct jury charge "accurately promulgates the law, is authorized by the indictment, does not unnecessarily increase the state's burden of proof or restrict the state's theories of liability, and adequately describes the particular offense

for which the defendant was tried." Id. In a hypothetically correct jury charge, the elements of murder under section 19.02(b)(1) of the penal code are: (1) intentionally or knowingly, (2) causing the death, (3)

of an individual. See TEX. PENAL CODE ANN. § 19.02(b)(1); see also *Vasquez v. State*, No. 13-05-531-CR, 2008 WL 1822519, at *13 (Tex. App.—Corpus Christi Apr. 24, 2008, pet. ref'd) (memo. op., not designated for publication). Additionally, "[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

III. DISCUSSION

On appeal, Chavez argues that the evidence is legally and factually insufficient to support his conviction. Specifically, he argues that "[n]o physical evidence was introduced at trial which established that . . . Chavez committed the murder of Steven Rodriguez, and only the uncorroborated testimony of an ex-lover and a 'witness' who admitted he was '[h]igh' at the time was introduced in an attempt to implicate [Chavez] in the crime." Therefore, "the evidence is legally [and factually] insufficient to support the jury's verdict." While it is true that "no physical evidence" links Chavez to Rodriguez's murder, we disagree that the evidence is legally and factually insufficient.

The record reveals that Palomino was "seeing" Chavez at the time of the murder. Chavez told her that he had been in a fight and had stabbed someone. On crossexamination, when asked whether she found out that Chavez was "seeing" another woman the entire time he was "seeing" Palomino, Palomino said that she had. Chavez's counsel then inquired whether that fact made Palomino "happy or unhappy." She answered, "It

doesn't matter."

Sanchez admitted that he was using drugs and alcohol the night that Rodriguez was murdered. He saw Chavez fighting with Rodriguez and observed Chavez and Pena running to the backyard after Rodriguez went inside the house; however, he did not see what transpired behind the house. Sanchez agreed that he was intoxicated that night and that sometimes when he is intoxicated, he might see and hear things incorrectly. However, on re-direct examination, Sanchez stated that he was able to remember what happened that night and that he was telling the truth.

Chavez contends that the following evidence contradicts Palomino's and Sanchez's testimony: on the 9-1-1 call, Rodriguez did not identify Chavez as his assailant; Dr. Farley did not find any evidence that Rodriguez had been in a fight, even though "[s]ometimes [medical examiners] don't always see contusions if the person dies fairly quickly"; Officer Briones, in his examination of Chavez, did not uncover any evidence that Chavez had been in a fight with anyone; no murder weapon was found tying Chavez to the murder; and none of the blood samples taken from the scene or from the Blazer indicated that Chavez had been fighting with Rodriguez or was otherwise responsible for Rodriguez's murder. Additionally, Chavez stated at trial that he owned the partially packed suitcase and had recently moved out of his own residence. He asserted that, contrary to Ruben's testimony, he was not going out of town.

Despite Chavez's challenges to the above evidence, the record contains other evidence from which the jury could have concluded that Chavez committed the murder. The record contained evidence that Figueroa, Pena, and the man from the Silverado

pickup truck called Rodriguez a snitch. Rodriguez was to provide information to Officer de Leon regarding an auto theft ring. Chavez was a member of the Vallucos, a gang that was involved in stealing cars. The Vallucos maintain a "code of silence," which means that snitches are threatened with bodily injury and are sometimes executed. Chavez had a tattoo representing this "code of silence." And, Sanchez told Officer Ortiz that Chavez was wearing surgical gloves and had bloody hands when he came running from the backyard.

All of this evidence and testimony was before the jury, and it is the jury's duty to weigh the evidence and to evaluate the credibility of the witnesses. See TEX. CODE CRIM. PROC. ANN. arts. 36.13 (Vernon 2007), 38.04 (Vernon 1979); *Lancon v. State,* 253 S.W.3d 699, 707 (Tex. Crim. App. 2008). "'Appellate courts should afford almost complete deference to a jury's decision when that decision is based upon an evaluation of credibility.'" *Garza v. State*, 290 S.W.3d 489, 496 (Tex. App.–Corpus Christi 2009, pet. ref'd) (quoting Lancon, 253 S.W.3d at 705). Because we rely on the cold record and the jury is present to hear the testimony, the jury is in the best position to judge a witness's credibility. Id. "The jury may choose to believe some testimony and disbelieve other testimony." Id.

While there is no physical evidence linking Chavez to Rodriguez's murder, there was substantial circumstantial evidence for the jury to consider. See *Clayton*, 235 S.W.3d at 778 (noting that "circumstantial evidence alone can be sufficient to establish guilt"). As we must, we defer to the jury's resolution of the conflicts in the evidence, and we conclude that the evidence is legally and factually

sufficient to support the jury's verdict. We overrule Chavez's appellate issues.

IV. CONCLUSION

Having overruled Chavez's appellate issues, we affirm the judgment of the trial court.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
15th day of July, 2010.

APPENDIX C

FILE COPY

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

8/5/2015

CHAVEZ, JAVIER Tr. Ct. No. 07-CR-00000798-A
WR-83,558-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

Abel Acosta, Clerk

DISTRICT CLERK CAMERON COUNTY
AURORA DE LA GARZA
974 E. HARRISON
BROWNSVILLE, TX 78520
* DELIVERED VIA E-MAIL

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FILE COPY

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

8/5/2015

CHAVEZ, JAVIER Tr. Ct. No. 07-CR-00000798-A
WR-83,558-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

Abel Acosta, Clerk

DISTRICT CLERK CAMERON COUNTY
ARMANDO R. VILLALOBOS
964 E HARRISON ST.
ADMINISTRATION BLDG., 4TH FL.
BROWNSVILLE, TX 78520
* DELIVERED VIA E-MAIL *

PAGE 3

FILE COPY

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

8/5/2015

CHAVEZ, JAVIER Tr. Ct. No. 07-CR-00000798-A
WR-83,558-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

Abel Acosta, Clerk

JAVIER CHAVEZ
MCCONNELL UNIT - TDC # 1551347
3001 S. EMILY DR.
BEEVILLE, TX 78102*

APPENDIX D

Case 1:16-cv-00283 Document 13 Filed in TXSD on 08/17/17 Page 1 of 17

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

JAVIER CHAVEZ, Petitioner,	§	
V.	§	
LORIE DAVIS, Respondent.	§	Civil Action No. 1:16-283

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

On November 1, 2016, Petitioner Javier Chavez ("Chavez") filed a Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to 28 U.S.C. § 2254. Dkt. No. 1. On March 9, 2017, Respondent Lorie Davis, in her official capacity as Director of Texas Department of Criminal Justice – Correctional Institutions Division (hereinafter "Texas" or "State") timely filed a motion for summary judgment. Dkt. No. 11.

After reviewing the record and the relevant case law, the Court recommends that the State's motion for summary judgment be granted. Chavez's claims are untimely filed and substantively meritless.

I. Background

A. Factual Background

On direct appeal, the 13th Court of Appeals of Texas made a number of specific factual findings. *Chavez v. State*, No. 13-09-00068-CR, 2010 WL 2783869 at *1-5 (Tex. App. July 15, 2010) (unpubl.). As provided by law, the court sets forth and adopts those findings.[1]

Thus, all of the facts, as set forth below, are quoted from the State Court of Appeal decision, changing only the formatting.

Page 2 of 17

1. Investigation & Trial

Luis de Leon ("Commander de Leon"), an investigator with the Cameron County District Attorney's office, testified that on January 19, 2007, he met with Steven Rodriguez concerning a pending case in which Rodriguez was a victim. Commander de Leon stated that Rodriguez was to return on January 22, 2007, to provide some information "on an auto theft ring." Rodriguez never returned to provide that information.

On January 20, 2007, Rodriguez and Trinidad Sanchez were drinking and doing drugs at Sanchez's house [on Milpe Verde], in Brownsville, Texas, where Sanchez lived with his mother and grandmother. At some point that evening, a black Chevrolet Blazer

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[1] 1 The Court notes that any factual findings made by the state court are "presumed to be correct," unless the petitioner can show "by clear and convincing evidence" that they were incorrect. *Norris v. Davis*, 826 F.3d 821, 827 (5th Cir. 2016), cert. denied, 137 S. Ct. 1203, 197 L. Ed. 2d 250 (2017) (citing 28 U.S.C. § 2254(e)(1)). Chavez has raised no such challenge. Indeed, Chavez has not challenged any specific factual findings as found by the state court. Accordingly, the Court adopts the factual findings of the state court.

arrived at the house, and Lucio Figueroa and Benjamin Pena exited the Blazer and entered Sanchez's house. Shortly thereafter, Chavez also entered the house. All five men exited the house and proceeded to the front yard.

Sanchez testified that once the men were outside, an unidentified person arrived in a Chevrolet Silverado pickup truck. That person approached Rodriguez and called him a snitch. Figueroa and Pena also called Rodriguez a snitch. Figueroa, Pena, and Chavez then began fighting with Rodriguez. They were hitting him with their fists. Sanchez began arguing with Figueroa, and the man from the Silverado got in his truck and drove off. Sanchez stated that at some point during the fight, Rodriguez ran into the house. However, Sanchez told Chris Ortiz, an officer with the Brownsville Police Department and the lead investigator in the case, that Rodriguez was taken into the house by Enrique Garcia, Sanchez's uncle.

Sanchez further testified that when Rodriguez entered the house, Chavez and Pena ran around the side of the house to the backyard. Sanchez admitted that he did not see what occurred in the backyard and that he was arguing with Figueroa at the time Chavez and Pena ran to the backyard. Sanchez stated that two to three minutes later, Chavez and Pena came running back to the front yard and that one of them said to Sanchez, "You're next." Chavez and Pena then got into the Blazer with Figueroa and left. Sanchez told Officer Ortiz that Chavez was wearing surgical gloves and had bloody hands when he came running from the backyard.

Chavez testified that he went into the backyard to "take a leak," and Sanchez admitted that he did not see Chavez with Rodriguez in the backyard. Sanchez also stated that he did not see Rodriguez again after Rodriguez went into the house.

Denise Rodriguez, a dispatcher with the Brownsville Police Department, testified that she was on duty the night of January 20, 2007, and that at about 1:30 a.m. in the morning of January 21, 2007, she received a 911 call from a male who identified himself as Steven Rodriguez. She noted that the caller repeatedly stated that he had been stabbed but did not identify his assailant. She dispatched paramedics to the location Rodriguez gave her.

Julio Briones, an officer with the Brownsville Police Department, testified that he was assigned to investigate a homicide [on Milpe Verde] in Brownsville, Texas. He went to the scene, and several other officers were already there. When he arrived, he was directed to a ditch approximately sixty yards behind the house and saw Rodriguez lying in the ditch. Rodriguez had been stabbed multiple times. Officer Briones collected blood samples from the area surrounding the ditch and from the Blazer. Officer Briones was also present during the autopsy of Rodriguez's body and took as evidence some fingernail clippings from Rodriguez's body. On cross-examination, Officer Briones testified that he photographed Chavez at the jail and did not see any signs of Chavez having been in a fight. Officer Briones also stated that he did not find any evidence at Chavez's house connecting Chavez to Rodriguez's murder. Norma Jean Farley, the chief forensic pathologist at Valley Forensics, testified that she performed the

autopsy on Rodriguez and that he died in a homicide from the stab wounds.

Dora Lee Palomino testified that she was "seeing" Chavez during January 2007, including on January 20, 2007. On January 21, 2007, between midnight and 1:00 a.m., Palomino received a phone call from Chavez. Chavez was high on drugs, and she spoke with him for five to ten minutes. He asked for money. Later that morning, Palomino met Chavez at a park in Brownsville, Texas. Chavez arrived in the back seat of the Blazer and got into Palomino's car. Chavez told her that he had hurt someone and that he had stabbed someone.

He again asked for money and said that he needed money to leave. Chavez told her that he stabbed someone because that person "was messing with his friends." Chavez then exited Palomino's car and left in the Blazer. On January 22, 2007, Palomino picked up Chavez and his brother Ruben Chavez ("Ruben") at Chavez's house. Shortly thereafter, she was pulled over by a Brownsville police officer. On cross-examination, Palomino admitted that she often gave Chavez money for drugs. She also stated that at the time they were seeing each other, Chavez was also seeing another woman.

Ruben testified that he was not with Chavez on the night in question. The State played for the jury a recording of a statement Ruben gave to the police, but that recording is not in the record before us. Ruben testified that the State and the police coerced him into giving the statement. The State then questioned Ruben about some of the statements he made on the recording. Chavez told Ruben that there had been a fight but Chavez did not say he was involved in the fight. Ruben also stated that he had mentioned

to the investigators that Chavez had some scratches on him but that Chavez goes fishing and works in construction, implying that those scratches could have been caused by those activities and not from the fight.

Jesse Pinales, an officer with the Brownsville Police Department, testified that on January 22, 2007, he went to Chavez's residence to arrest Chavez pursuant to an arrest warrant. Officer Pinales parked his unmarked vehicle near the residence and observed a vehicle approach the house. Officer Pinales saw a female and two males exit the house, enter the vehicle, and drive off. He observed that the car had a broken taillight and requested a patrol unit stop the vehicle. After the traffic stop occurred, Officer Pinales approached the vehicle and noticed Chavez sitting in the front passenger seat. Officer Pinales then arrested Chavez and took him into custody. Officer Pinales identified Palomino as the driver and Ruben as the back-seat passenger.

On January 22, 2007, Dalberto Luis de Leon, an officer with the Brownsville Police Department, went to Chavez's house. At the house, he met Juan Chavez ("Juan"), Chavez's

father. Juan consented to a search of the house, and Officer de Leon searched the house. He found a suitcase in Chavez's bedroom that had some dress shirts, still on hangers, folded up in the suitcase. Juan told him that the suitcase found in Chavez's room actually belonged to Juan who was packing it in preparation to take Chavez's mom out-of-town for medical treatment. Officer de Leon spoke with Ruben who informed him that the packed suitcase belonged to Chavez who was going out of town to look for work. On cross-examination, Officer de Leon stated that he

did not find any evidence relating to the murder, such as bloody clothes or a knife, at the house.

Chavez testified that he was at the house on Milpe Verde the night Rodriguez was murdered but that no fight occurred. He stated that he went behind the house to "take a leak" and that he did not see Rodriguez behind the house. Chavez said that he did not tell Palomino that he stabbed anyone. He claimed that the suitcase found in his room belonged to him and that he was living with his dad because he had recently moved out of his own residence due to a fight with his common-law wife. He claimed that Ruben was lying about Chavez's plans to leave town to look for work and that Ruben was lying about Chavez saying that he was in a fight. Chavez stated that he was a member of the "Vallucos," a protection gang that operates only in prison. He was "one hundred percent" Valluco. Chavez showed the jury a tattoo on his back which read "Valluco" and also discussed a tattoo of palm trees on his hand, stating that they stood for the "Valley." He said that outside of prison, he is a "family man" and that the Vallucos do not have a "code of silence."

Chavez declared that Sanchez was lying about there having been a fight and about Chavez showing up after Figueroa and Pena. He never said that anyone was "next." He further stated that he did not stab Rodriguez and that Palomino was lying when she said that he told her he had been in a fight.

On rebuttal, Dionicio Cortez, a lieutenant with the Cameron County Sheriff's Office in the jail division, testified that he is a classification officer responsible for classifying gang members that come into the jail. Lieutenant Cortez was an expert in gang identifycation. He

stated that while the Vallucos were initially organized as a protection gang and operated only to protect its members while they were in prison, the Vallucos now operate on the "outside" and are engaged in drug smuggling and dealing, burglaries, robberies, and car theft. Lieutenant Cortez testified that the Vallucos do have a "code of silence," which means that the Vallucos threaten snitches with bodily injury and assault and even execute them. Lieutenant Cortez noted that a Valluco is a "fifty percenter" when he enters jail but becomes a "one hundred-percenter" when he enters federal or state prison. A "one hundred percenter" has tattoos of palm trees that form a "V." Lieutenant Cortez testified that the palm trees tattooed on Chavez's hand refer to Chavez's being a "one hundred percenter" and stated that Chavez has "RGV" tattooed on his leg, which stands for "Rio Grande Valley or Rio Grande Valluco." Lieutenant Cortez also discussed a different tattoo on Chavez's leg, which he described as the tattoo of the Valluco "code of silence." Lieutenant Cortez further testified that the Vallucos have formed a car theft ring to provide cars to the Zetas, a powerful, northern Mexico drug gang. Lieutenant Cortez testified that if the Zetas were not happy with someone on the United States side of the border, they would ask the Vallucos to do a hit. The jury found Chavez guilty of murder, and the trial court sentenced him to life in prison.[2]

2. Direct Appeal

On direct appeal, Chavez – via appointed counsel – raised two interrelated issues, claiming that the

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[2] The direct quotation of facts, taken from the 13th Court of Appeals, ends here.

evidence was legally and factually insufficient to support his conviction. *Chavez v. State*, No. 13-09-00068-CR, 2010 WL 2783869, at *4 (Tex. App. July 15, 2010).

On July 15, 2010, the 13th Court of Appeals issued an opinion, affirming Chavez's conviction. Id. The appellate court found that "[w]hile there is no physical evidence linking Chavez to Rodriguez's murder, there was substantial circumstantial evidence for the jury to consider." Id, at *6.

There is no evidence in the record that Chavez filed a petition for discretionary review

with the Texas Court of Criminal Appeals.

3. State Habeas Proceedings

On May 27, 2015, Chavez filed a state habeas petition in the 107th District Court in Cameron County. Dkt. No. 12-1, p. 4. In that petition, Chavez raised nine claims, which the Court restates as four claims: (1) the admission of evidence of Chavez's gang affiliation deprived him of a fair trial;(2) Chavez is actually innocent of the offense;(3) the policy of Texas appellate courts to dismiss state habeas petitions that are filed more than four years after the conviction becomes final – based on a finding of laches – violates the Texas constitution; (4) the policy of Texas appellate courts to dismiss state habeas petitions that are filed more than four years after the conviction becomes final violates federal due process rights. Id, pp. 4-23.

On June 30, 2015, the 107th District Court in Cameron County filed findings of fact and a recommendation to the Court of Criminal Appeals. Dkt. No.12-1, pp. 101-03. The 107th District Court

found that (1) Chavez should have raised the claim regarding the gang affiliation evidence on direct appeal; (2) Chavez had not shown that he was actually innocent of the offense; (3) Chavez had failed to pursue his claims with "reasonable diligence," and that the State was entitled to a defense of laches. Id.

On August 5, 2015, the Court of Criminal Appeals "denied" Chavez's petition "without [a] written order on findings of trial court without hearing." Dkt. No. 12-2, p. 139. The denial signified that the Appeals Court had considered the merits of Chavez's petition and found that relief was not warranted. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (en banc).

B. Procedural History

On November 1, 2016, Chavez filed his habeas petition, pursuant to 28 U.S.C. § 2254, in this Court. Dkt. No. 1.

In that petition, Chavez raised five claims, which the Court restates and re-numbers as four claims: (1) the Texas courts deprived him of federal due process in resolving his state

habeas petition because it "follows a policy of rejecting all applications for post-conviction habeas corpus [relief] which are filed more than four years after the finality of judgment;" (2) the Texas courts deprived him of his due process rights protected by the Texas constitution when it applied the doctrine of laches to his state habeas petition; (3) the application of the laches doctrine to the state habeas petition rendered his state habeas rights "inadequate or ineffective," and, thus, unexhausted; and, (4) the

admission of evidence of Chavez's gang affiliation deprived him of a fair trial. Dkt. No. 1.

On March 9, 2017, the State of Texas filed a motion for summary judgment. Dkt. No. 11. The State of Texas argues that Chavez's petition is untimely filed and cannot be saved by equitable tolling. The State further asserts that Chavez's first claim is meritless because "infirmities in state habeas proceedings are not grounds for federal habeas relief." Id., p. 15. As to Chavez's second claim, the State argues that claims regarding a violation of the Texas constitution are not cognizable in a federal habeas proceeding. Id. As to the third issue, the State argues that Chavez's petition was resolved on the merits and is not unexhausted. Id. As to the fourth issue, the State argues that the issue was defaulted; is purely an issue of state law; and is substantively meritless. Id.

Chavez did not respond to the motion for summary judgment.

II. Applicable Law

A. Summary Judgment

Summary judgment pursuant to Rule 56(c) is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as

> to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The

> moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). All inferences are made and doubts are resolved in favor of the nonmoving party. *Dean v. City of Shreveport,* 438 F.3d 448, 454 (5th Cir. 2006). Hearsay is not competent summary judgment evidence. *Martin v. John W. Stone Oil Distributor, Inc.*, 819 F.2d 547, 549 (5th Cir. 1987).

A court may determine that no genuine issue of material fact exists, if it determines that no reasonable juror could find in favor of the nonmovant. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1089 (5th Cir. 1995). The moving party, however, is not required to provide evidence negating the nonmovant's claims. *Celotex Corp.*, 477 U.S. at 323. "[R]egardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for entry of summary judgement, as set forth in Rule 56(c), is satisfied." Id. Summary judgment is an appropriate vehicle through which to resolve a habeas petition, where the

facts otherwise support such resolution. *Goodrum v. Quarterman*, 547 F.3d 249, 255 (5th Cir. 2008).

B. Section 2254

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a prisoner convicted in a state court may challenge his conviction to the extent it violates "the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Accordingly, only violations of the United States Constitution or federal law are subject to review by this Court under § 2254.

In conducting such a review, a federal district court:

> may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the claim by the state court "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the
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> United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding."

Riddle v. Cockrell, 288 F.3d 713, 716 (5th Cir. 2002) (quoting 28 U.S.C. § 2254(d)(1)-(2)). "A decision is contrary to clearly established federal law under § 2254(d)(1) if the state court (1) 'arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law'; or (2) 'confronts facts that are materially indistinguishable from a relevant Su-

preme Court precedent' and reaches an opposite result.'" *Simmons v. Epps,* 654 F.3d 526, 534 (5th Cir. 2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)).

"The state court makes an unreasonable application of clearly established federal law if the state court (1) 'identifies the correct governing legal rule from [the Supreme] Court's cases but unreason-ably applies it to the facts'; or (2) 'either unreason-ably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" *Simmons*, at 534 (quoting *Williams*, at 407).

Additionally, the AEDPA requires that federal law be "clearly established" "as articulated by the Supreme Court." *Woodfox v. Cain*, 609 F.3d 774, 800 n. 14 (5th Cir. 2010). "[A] decision by . . . [the Fifth Circuit] . . . or one of our sister circuits, even if compelling and well-reasoned, cannot satisfy the clearly established federal law requirement under § 2254(d)(1)." *Salazar v. Dretke,* 419 F.3d 384, 399 (5th Cir. 2005).

Furthermore, a federal court may not review a state court's determination of state law issues. *Thompson v. Thaler*, 432 F. App'x 376, 379 (5th Cir. 2011); *McCarthy v. Thaler*, 482 F. App'x 898, 903 (5th Cir. 2012). "Under § 2254, federal habeas courts sit to review state court misapplications of federal law. A federal court lacks authority to rule that a state court incorrectly interpreted its own law." *Charles v. Thaler*, 629 F.3d 494, 500–01 (5th Cir. 2011) (emphasis original). "It is not our function as a federal appellate court in a habeas proceeding to review a state's interpretation of its own law, and we defer to the state courts

interpretation of the *Texas* ... statute." *Schaetzle v. Cockrell,* 343 F.3d 440, 449 (5th Cir. 2003) (quoting Weeks v. Scott, 55 F.3d 1059, 1063 (5th Cir. 1995)).

C. Timeliness

A petitioner has a one year "period of limitation" in which to file a § 2254 petition. 28 U.S.C. § 2244(d)(1). That period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D). This one year period is tolled during the time in which "a properly filed application for State post-conviction or other collat-

eral review" is pending in the state courts. 28 U.S.C. § 2244(d)(2).

Further, the limitations period is not jurisdictional and may be equitably tolled. *Holland v. Florida*, 560 U.S. 631, 645 (2010). For equitable tolling to excuse the late filing of a petition, the petitioner must show that he has been "pursuing his rights diligently" and that "some extraordinary circumstance" prevented timely filing. Id. at 649.

The filing of a state petition does not serve to "revive an expired limitation period." *Villegas v. Johnson*, 184 F.3d 467, 472-73 (5th Cir. 1999).

III. Analysis

As observed earlier, Chavez has raised four claims: (1) he was deprived of federal due process in when laches was applied to his state habeas petition; (2) he was deprived of state- protected due process in when laches was applied to his state habeas petition; (3) the

application of the laches doctrine to the state habeas petition rendered his state habeas petition unexhausted; and, (4) the admission of evidence of his gang affiliation deprived him of a fair trial. Dkt. No. 1. The Court will first address the timeliness of the petition and then address each of Chavez's claims in turn.

A. Timeliness

As previously noted, Chavez had one year in which to file his § 2254 petition in this Court. As relevant here, Chavez had one year from "the date on which the judgment became final by the conclusion of direct

review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

Chavez's conviction became final on August 16, 2010, when his period to file a petition for discretionary review with the Texas Court of Criminal Appeals expired. Tex. R. App. Proc. 68.2; *Scott v. Johnson*, 227 F.3d 260, 262 (5th Cir. 2000). By the plain language of § 2244(d)(1)(A), Chavez had until August 16, 2011, to file a habeas petition in federal court. Chavez did not file his petition until November 1, 2016, more than five years after the deadline passed. Dkt. No. 1.

The one-year period is tolled during the time in which "a properly filed application for State post-conviction or other collateral review" is pending in the state courts. 28 U.S.C. § 2244(d)(2). As recounted in the factual background, Chavez's first petition was filed on May 27, 2015. Dkt. No. 12-1, p. 4. This petition did not toll the limitation period "because it was not filed until after the period of limitation had expired." *Scott*, 227 F.3d at 263 (emphasis original). Given that Chavez's state petition did not toll the statute of limitations period, his petition is untimely filed.

B. Equitable Tolling

Even if Chavez's limitations period was not statutorily tolled, it may be equitably tolled. *Holland*, 530 U.S. at 645. To avail himself of such relief from the limitations period, Chavez must establish "extraordinary circumstances" that warrant the tolling of the

limitations period. Id at 649. Chavez bears the burden of establishing that equitable tolling is appropriate. *Phillips v. Donnelly*, 216 F.3d 508, 511

(5th Cir. 2000). Chavez has failed to meet this burden.

Chavez has stated that the reason that he did not timely file his habeas petition was that his lawyer on direct appeal, Moises Salas, did "not timely advise him of the results of the [direct] appeal," and that Salas passed away and the remaining lawyer in Salas's office could not locate the file. Dkt. No. 1, p. 19. The Court notes that the direct appeal was denied on July 15, 2010. *Chavez*, 2010 WL 2783869. Salas passed away on June 23, 2012. Dkt. No. 12-1, p. 85. Equitable tolling is reserved for litigants who have been diligently pursuing their rights. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Chavez does not explain how he diligently pursued his rights from July 2010 until June 2012; he does not explain if he ever attempted to contact Salas or the state appellate court concerning the status of his direct appeal. See *O'Veal v. Davis*, 664 F. App'x 355, 357 (5th Cir. 2016) (unpubl.) (noting that there is no case law "suggesting that an attorney's failure to notify a defendant of the status of his case rises to the level of an extraordinary circumstance that prevents the defendant from timely filing a federal habeas petition"); *Lewis v. Cockrell*, 33 Fed.Appx. 704 (5th Cir. 2002) (unpubl.) (equitable tolling was not appropriate because the petitioner could have contacted his attorney to inquire about the status of his appeal).

As a result, Chavez has not met his burden and equitable tolling is inappropriate. Even if equitable tolling was appropriate, Chavez is not entitled to the relief he seeks. As discussed below, his claims are meritless.

C. Federal Due Process Rights

Chavez asserts that he was deprived of federal due process in when laches was applied to his state habeas petition. This claim is meritless.

The Fifth Circuit has repeatedly held that "alleged infirmities in state habeas proceedings are not grounds for federal habeas relief." *Brown v. Dretke,* 419 F.3d 365, 378 (5th Cir. 2005) (collecting cases). Accordingly, Chavez's claim is foreclosed in this court.

Id. This claim should be denied.

D. State Due Process Rights

Chavez also asserts that his due process rights under the Texas Constitution were violated when laches was applied to his state habeas petition. This claim, similarly, lacks merit.

Any claims that Chavez's state law rights were violated are not cognizable on federal habeas review. *Sharp v. Johnson*, 107 F.3d 282, 290 (5th Cir. 1997) ("The procedural defect involved herein is a matter purely of state, not federal, law, and therefore is in and of itself not cognizable on federal habeas corpus review."). Again, this claim is foreclosed and should be denied.

E. Adjudication on the Merits

Chavez appears to assert that the application of the laches doctrine to the state habeas petition rendered his state habeas petition unexhausted because the courts never ruled on its substance. As with the others, this claim is also meritless.

As previously noted, the trial court issued findings of fact and conclusions of law regarding Chavez's state habeas petition. Dkt. No.12-1, pp. 101-03. One

of the reasons that the trial court cited for recommending denial of Chavez's petition was laches – that Chavez had waited so long to file his petition that the State of Texas was prejudiced in its ability to defend the conviction.[3]

On August 5, 2015, the Court of Criminal Appeals "denied" Chavez's petition "without [a] written order on findings of trial court without hearing." Dkt. No. 12-2, p. 139. The Texas Court of Criminal Appeals has previously held that a denial of a habeas petition is a ruling on the merits; conversely, a dismissal is not a ruling on the merits. *Ex Parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997). Thus, the Texas courts considered the merits

of Chavez's petition, despite any application of laches.

The Fifth Circuit has suggested in dictum that the term "on the merits" in § 2254(b)(2) includes "limitations or laches or procedural default." See *U.S. v. Clark*, 203 F.3d 358, 370 n. 13 (5th Cir.2000), vacated on other grounds, 532 U.S. 1005 (2001) (remanding case for further consideration in light of *Daniels v. U.S.*, 532 U.S. 374 (2001)) and opinion withdrawn on other grounds, 284 F.3d 563 (5th Cir.2002) (affirming district court opinion after considering Daniels). Thus, it is apparent that the Texas courts ruled on the merits of Chavez's claim. This claim should be denied as meritless.

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[3] The trial court specifically found that Salas's death prejudiced the State's ability to defend the conviction because Salas could not be called to testify in any post-conviction hearings

F. Gang Evidence

Chavez asserts that the admission of evidence of his gang affiliation deprived him of a fair trial. Dkt. No. 1. He argues that it violated Texas Penal Code § 7.02 because it allowed the jury to find him guilty by association. This claim is also meritless.

As an initial matter, the Texas courts found that this claim should have been raised on direct appeal. Dkt. No.12-1, pp. 101-03. Under Texas law, the "writ of habeas corpus ordinarily may not be used to litigate matters that could have been raised at trial and on direct appeal." *Ex parte Jennings*, No. 14-09-00817-CR, 2010 WL 2968043, at *3 (Tex. App. July 29, 2010) (citing Tex.Code Crim. Proc. Ann. art. 11.072, § 3). The Fifth Circuit has concluded that when a state court dismisses a habeas claim on the grounds that it should have been raised on direct appeal, a federal court has "no power" to review that decision. *Moses v. Davis*, 673 F. App'x 364, 367 (5th Cir. 2016) (unpubl.) (citing *Scheanette v. Quarterman,* 482 F.3d 815, 827 (5th Cir. 2007)).

Furthermore, Chavez's claim rests on state law grounds, namely that the court violated Texas Penal Code § 7.02. As noted earlier, this Court lacks the authority to review any violations of state law made in a federal habeas petition. *Sharp*, 107 F.3d at 290. Moreover, this claim is substantively meritless. The trial court instructed the jury that it could find Chavez guilty if Chavez actually committed the murder or if he was "criminally responsible" for the actions of the murderer. Dkt. No. 12-12, p. 921. The jury was also

instructed that Chavez would be "criminally responsible" if he "solicits, encourages, directs, aids

or attempts to aid the other person to commit the offense." *Id.*

Under the facts as found by the state appellate court, there were sufficient facts in the record to show that Chavez actually committed the murder. The victim was stabbed to death. Chavez was seen fighting with the victim and was also seen wearing bloody gloves after the murder. The jury heard evidence that the murder was gang-related. *Bailey v. State,* No. 01 15 00215 CR, 2016 WL 921747, at *16 (Tex. App. Mar. 10, 2016) ("Evidence of gang affiliation may be relevant to show that the defendant had a motive to commit a gang- related crime.").

Thus, this claim is meritless and should be denied.

IV. Recommendation

It is recommended that the motion for summary judgment filed by Respondent Lorie Davis be granted. Dkt. No. 11. It is further recommended that Javier Chavez's petition for writ of habeas corpus by a person in state custody pursuant to 28 U.S.C. § 2254 be dismissed as untimely filed, or alternatively, denied as meritless.

A. Certificate of Appealability

Unless a circuit justice or judge issues a Certificate of Appealability ("COA"), a petitioner may not appeal the denial of a § 2254 motion to the Court of Appeals. 28 U.S.C. § 2253(c)(1)(A). A petitioner may receive a COA only if he makes a "substantial showing of the denial of a constitutional right." § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To satisfy this standard, a petitioner must demonstrate that jurists of reason could disagree with the court's resolution of his constitutional claims or that jurists could conclude that the issues

presented are adequate to deserve encouragement to proceed further. Id. at 327; *Moreno v. Dretke*, 450 F.3d 158, 163 (5th Cir. 2006). "Importantly, in determining this issue, we view the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Druery v. Thaler,* 647 F.3d 535, 538 (5th Cir. 2011) (internal quotations omitted) (citing *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir.2000)). The district court must rule upon a certificate of appealability when it "enters a final order adverse

to the applicant." Rule 11, Rules Governing § 2254 Petitions.

After reviewing Chavez's § 2254 motion and the applicable Fifth Circuit precedent, the Court is confident that no outstanding issue would be debatable among jurists of reason. Although Chavez's § 2254 motion raises issues that the Court has carefully considered, he fails to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Accordingly, it is **RECOMMENDED** that a COA should be denied.

B. Notice to Parties

The parties have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Andrew S. Hanen, United States District Judge. 28 U.S.C. § 636(b)(1) (eff. Dec. 1, 2009). Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the

District Court except upon grounds of plain error or manifest injustice. See § 636(b)(1); *Thomas v Arn,* 474 U.S. 140, 149 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996), superseded by statute on other grounds, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

DONE at Brownsville, Texas, on August 17, 2017.

_____

Ronald G. Morgan
United States Magistrate Judge

APPENDIX E

Case 1:16-cv-00283 Document 22 Filed in TXSD on 01/29/18 Page 1 of 1

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

JAVIER CHAVEZ, Petitioner,	§	
V.	§	
	§	Civil Action No. 1:16-283
LORIE DAVIS, Respondent.	§	

ORDER

On August 17, 2017, the Magistrate Judge issued a report and recommendation in this case. Dkt. No. 13. On January 9, 2018, the Court adopted the report and recommendation in full and denied the issuance of a certificate of appealability. Dkt. No. 17.

On January 22, 2018, Petitioner Javier Chavez filed a notice of appeal. Dkt. No. 18. On January 23, 2018, Chavez filed a motion for leave to file a motion for a certificate of appealability and a motion for certificate of appealability. Dkt. No. 29, 21. Both of thee motions had the cs caption for this court, but appear to be seeking relief from the Fifth Cicuit.

To the extent that the motions seek relief from this Court, they are DENIED. To the extent that the motions ask this court to reconsider its denial of the certificate of appealability, they are DENIED.

If Chavez is seeking to have the fifth Circuit review the denial of the certificate of appealability,

he shall file those motions with the Fifth Circuit and not in this Court.

DONE at Brownsville, Texas, on July 27, 2008.

s
Andrew S. Hansen
United States District
Judge

APPENDIX F

Case 1:16-cv-00283 Document 23 Filed in TXSD on 11/12/18 Page 1 of 3

Court Seal
UNITED STATES COURT OF APPEAL
FIFTH JUDICIAL DISTRIT

Stamped
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Nov 12 2018
Donald J. Bradley, Clerk of Court
FILED

UNITED SATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A True Copy
Certified order issued Nov 12, 2018

No. 18-40063

Hand written B-16-CV-286

JAVIER CHAVEZ,
Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee

Appeal from the United States District Court

for the Southern District of Texas

ORDER

Javier Chavez, Texas prisoner # 01551347, moves for a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 application challenging his 2009 murder conviction. The district court dismissed his § 2254 application as utimely or, alternatively, denied it on the merits. He also moves to "abate" his appeal while he seeks to exhaust state court remedies.

In support of his COA request, Chavez argues that he was entitled to equitable tolling because his appellate attorney passed away before filing his state habeas application and because, after learning of appellate counsel's death, his subsequent attorney was unable to successfully find the case file. Chavez also challenges the district court's alternative denials on the merits of

His claims regarding the state habeas court's refusal to consider state habeas applications filed more than four years after a conviction becomes final

To obtain a COA, Chavez must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see *Miller-El v. Cockrell*, 577 U.S. 322, 336 (2003). An application satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resoliution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El* 537 U.S. at 327; see *Slack v. McDaniel*, 529 U.S. 473, 484. Chavez has not met this standard.

Accordingly, his motion for a COA is DENIED. His motion to abate his appeal is also DENIED.

s/
DON R. WILLETT
UNITED STATES CIRCUIT JUDGE

APPENDIX G

Case 18-40063 Document 00514774585 Page 1 Date Filed 12/26/18

UNITED STATES COURT OF APPEAL
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESRI PLACE
NEW ORLEANS, LA 70130

DECEMBER 27, 2018

Mr. Larry Logan Warner Sr.
Law Office of Larry Warner
3109 Banyan Circle
Harlingen, TX 78550

No. 18-40063 Javier Chavez v. Lorie Davis,
Director USDC No. 1:16-CV-283

Dear Mr. Warner,

We will take no action on your petition for rehearing. The time for filing a petition for rehearing under FED. R. APP. P. 40 has expired.

Sincerely

LYLE W. CAYCE, Clerk

By: ___s/_____
Casey A. Sullivan, Deputy Clerk