No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCISCO SALAZAR
Petitioner

v.

THE STATE OF TEXAS
Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Mr. Salazar moves this Court to permit him to proceed *in forma pauperis* pursuant to SUPREME COURT RULE 39. In support of this motion, Mr. Brown would show the following:

1) Mr. Salazar was found to be indigent by the 9th Judicial District Court of Montgomery County, Texas and Stephen Simonsen was appointed to represent him in the trial court. Exhibit 1.[1]
2) Celeste Blackburn was appointed to represent Mr. Salazar to investigate a post-conviction writ of habeas corpus regarding his right to appeal. Exhibit 2.
3) The trial court ordered a Free Reporter's Record on Appeal. Exhibit 3.
4) The trial court ordered a Free Clerk's Record on Appeal. Exhibit 4.

[1] The court order is under a different cause number because the case was re-indicted. However, Mr. Simonsen represented Mr. Salazar under the new indictment as was well, even though a court order was not entered under the new case number.

5) Mr. Salazar's family retained his current attorney to represent him.. Mr. Salazar was unable to pay for attorney's fees.

6) Mr. Salazar has completed a Declaration in Support of Motion for Leave to Proceed *in Forma Pauperis*. Exhibit 5.

WHEREFORE, Mr. Salazar prays that this Court permit him to proceed *in forma pauperis*.

Respectfully submitted,

BRITTANY CARROLL LACAYO
LACAYO LAW FIRM, PLLC
TBN: 24067105
212 STRATFORD ST.
HOUSTON, TEXAS 77006
PHONE: (713) 504-0506
FAX: (832) 442-5033
BRITTANY@BCLLAWFIRM.COM

Exhibit 1

Trial Court Order for Appointed Counsel

CAUSE #: 10-02-0178[illegible]CR
10-02-01780-CR
10-02-01780-CR
10-02-01780-CR
FDA #: 40590

STATE OF TEXAS & IN THE 9th DISTRICT COURT
&
VS. & OF
&
& MONTGOMERY COUNTY, TEXAS

SALAZAR, FRANCISCO

PIN: 206935

Address: 29610 MIDLAND ST MAGNOLIA, TX 77354

Phone: 832-257-6097

Offense/Degree:	INDECENCY	W/CHILD	SEXUAL	F2
	INDECENCY	W/CHILD	SEXUAL	F2
	INDECENCY	W/CHILD	SEXUAL	F2
	SEXUAL ASSAULT CHILD	F2		

Court Setting: Contact District Attorney or Court Immediately.

ORDER APPOINTING/DENYING ATTORNEY

___X___ I hereby APPOINT SIMONSEN,STEPHEN to represent the defendant in the above numbered and entitled cause in all litigation in the trial court through and including a ruling on a Motion for New Trial, and filing a notice of appeal, if appropriate, unless released by written order of this Court at an earlier date or by the Court's appointment of appellate counsel.

_____ Attorney appointed out of rotation because he/she was previously appointed to represent the defendant.

_____ I hereby DENY appointment of counsel.

Signed this 3rd day of JUNE, 2010.

Lawrence V. Brisy

Judge, 9th DISTRICT COURT or Appointment Designee

CC: SIMONSEN,STEPHEN Phone 936/760-3299

Exhibit 2

Trial Court Order for Appointed Counsel

ORDER OF ATTORNEY APPOINTMENT

RECEIVED & FILED FOR RECORD
BARBARA GLADDEN ADAMICK DISTRICT
CLERK, MONTGOMERY COUNTY, TEXAS
2016 APR 13 PM 3:39
BY DEPUTY

Cause No	11-05-05000-CR	Sheriff No	208000
Complaint No	ARREAL	Defendant No	4462
		Appeal	

Offense/Degree :
7353-INDECENCY W/CHILD SEXUAL CONTACT/ F2-Second Degree Felony

STATE OF TEXAS VS FRANCISCO SALAZAR	& & &	9th District Court OF MONTGOMERY COUNTY, TEXAS

Defendant

Name	FRANCISCO SALAZAR
Date of Birth	05/27/1971
Phone	
Cell Phone	
Address	29810 MIDLAND ST
City, State, Zip	MAGNOLIA, TX 77354

Appointed Attorney

Name	CELESTE BLACKBURN
Phone	936-703-6000
Fax	877-800-2822
Address	393 NORTH RIVERSHIRE DRIVE, SUITE 285
City, State, Zip	Conroe, TX 77304

The above attorney is appointed to represent the defendant in the above numbered and entitled cause/complaint/case in all litigation in the trial court through and including a ruling on a Motion for New Trial, and filing a notice of appeal, if appropriate, unless released by written order of this Court at an earlier date or by the Court's appointment of appellate counsel.

☐	Attorney appointed from the County Approved Attorney Wheel and is the next attorney qualified to represent the defendant.
☐	Attorney appointed out of rotation because of written notification from Judge.
■	Attorney is currently representing the defendant in a related matter and is appointed under Montgomery County's Approved Policy.

Court Appointed Designee	Date	Time
BERENICE JUAN	04/12/2016	14:55:57

SCANNED

Exhibit 3

Trial Court Order for Free Reporter's Record on Appeal

RECEIVED AND FILED
FOR RECORD
AT 2:37 O'Clock P M.

JUL 29 2013

BARBARA GLADDEN ADAMICK
District Clerk
MONTGOMERY COUNTY, TEXAS
By [illegible] Deputy

NO. 11-05-05000

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	9TH JUDICIAL DISTRICT
	§	
FRANCISCO SALAZAR	§	MONTGOMERY COUNTY, TEXAS

ORDER

On 7/18, 2013, came on to be considered Francisco Salazar's Motion for Free Reporter's Record on Appeal, and said motion is hereby

(Granted) ~~(Denied)~~

JUDGE PRESIDING

Exhibit 4

Trial Court Order for Free Clerk's Record on Appeal

Received and E-Filed for Record
5/8/2017 4:16:43 PM
Barbara Gladden Adamick
District Clerk
Montgomery County, Texas

NO. 11-05-05000-CR
(Counts I, II, and III)

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
vs.	§	9TH JUDICIAL DISTRICT
	§	
FRANCISCO SALAZAR	§	MONTGOMERY COUNTY, TEXAS

ORDER

On this day came to be heard the Defendant's Motion for Court to Order a Free Clerk's Record for Appeal, and the same is hereby GRANTED ~~/ DENIED.~~

IT IS FURTHER ORDERED that the Montgomery County District Clerk's Office prepare the clerk's record at the expense of Montgomery County.

Signed: 5/9/2017 03:47 PM

SIGNED AND ENTERED this _____ day of _____, 2017.

JUDGE PRESIDING

Exhibit 5

Declaration in Support of Motion for Leave to Proceed *in Forma Pauperis*

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Francisco Salazar _____, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ None	$ N/A	$ None	$ N/A
Self-employment	$ None	$ N/A	$ None	$ N/A
Income from real property (such as rental income)	$ None	$ N/A	$ None	$ N/A
Interest and dividends	$ None	$ N/A	$ None	$ N/A
Gifts	$ None	$ N/A	$ None	$ N/A
Alimony	$ None	$ N/A	$ None	$ N/A
Child Support	$ None	$ N/A	$ None	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ None	$ N/A	$ None	$ N/A
Disability (such as social security, insurance payments)	$ None	$ N/A	$ None	$ N/A
Unemployment payments	$ None	$ N/A	$ None	$ N/A
Public-assistance (such as welfare)	$ None	$ N/A	$ None	$ N/A
Other (specify): _____	$ None	$ N/A	$ None	$ N/A
Total monthly income:	$ None	$ N/A	$ None	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A
N/A	N/A	N/A	$ N/A

4. How much cash do you and your spouse have? $ None
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
None	N/A	$ N/A	$ N/A
None	N/A	$ N/A	$ N/A
None	N/A	$ N/A	$ N/A

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model N/A
Value

☐ Motor Vehicle #2
Year, make & model N/A
Value N/A

☐ Other assets
Description N/A
Value N/A

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
None	$ None	$ None
None	$ None	$ None
None	$ None	$ None

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
None	N/A	N/A
None	N/A	N/A
None	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ None	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ None	$ N/A
Home maintenance (repairs and upkeep)	$ None	$ N/A
Food	$ None	$ N/A
Clothing	$ None	$ N/A
Laundry and dry-cleaning	$ None	$ N/A
Medical and dental expenses	$ None	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ None	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ None	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ None	$ N/A
Life	$ None	$ N/A
Health	$ None	$ N/A
Motor Vehicle	$ None	$ N/A
Other: _____	$ None	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ None	$ N/A
Installment payments		
Motor Vehicle	$ None	$ N/A
Credit card(s)	$ None	$ N/A
Department store(s)	$ None	$ N/A
Other: _____	$ None	$ N/A
Alimony, maintenance, and support paid to others	$ None	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ None	$ N/A
Other (specify): _____	$ None	$ N/A
Total monthly expenses:	$ None	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:
My family hired an attorney on my behalf. I did not pay my attorney.
Attorney's Information:
Brittany Carroll Lacayo
212 Stratford St., Houston, TX 77006
713-504-0506

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:
N/A

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am currently incarcerated in the Texas Department of Criminal Justice, Polunsky Unit TDCJ # 00852112.

I declare under penalty of perjury that the foregoing is true and

correct. Executed on: Oct 23, 2018

(Signature)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCISCO SALAZAR
Petitioner

v.

THE STATE OF TEXAS
Respondent

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

BRITTANY CARROLL LACAYO
LACAYO LAW FIRM, PLLC
TBN: 24067105
212 Stratford St.
Houston, Texas 77006
Phone: (713) 504-0506
Fax: (832) 442-5033
Brittany@bcllawfirm.com

ATTORNEY FOR PETITIONER,
FRANCISCO SALAZAR

QUESTIONS PRESENTED

Question One: Whether the Fifth Amendment to the United States Constitution's protections apply to someone who has been advised by his attorney to remain silent and invokes that right in a noncustodial interrogation.

Question Two: Whether the use of pretrial silence when questioned by law enforcement officials compels the defendant, in violation of the Fifth Amendment privilege, to give evidence that can be used against him – either his verbal responses to the statement or questions posed, or his non-responsive silence.

Question Three: Whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case-in-chief.

Question Four: Whether a defendant is unable to demonstrate prejudice in an ineffective assistance of counsel claim for being denied his constitutional right to testify that he is innocent because this is the same as his not-guilty plea.

Question Five: Whether a defendant's due process rights are violated when an expert provides an opinion that the complaint or class of persons to which the complainant belongs is truthful, or a statistical opinion on false allegations.

PARTIES TO THE PROCEEDINGS

PETITIONER:	FRANCISCO SALAZAR
ATTORNEY FOR PETITIONER:	BRITTANY CARROLL LACAYO Attorney at Law Lacayo Law Firm, PLLC 212 Stratford St. Houston, Texas 77006
RESPONDENTS:	MR. BRETT LIGON Montgomery County District Attorney 207 W. Phillips, 2nd Floor Conroe, Texas 77301
	MR. KEN PAXTON Texas State Attorney General P.O. Box 12548 Austin, Texas 78711

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Table of Authorities

Federal Cases

State Cases

Federal Constitutional Provisions

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS ENTERED IN PETITIONER'S CASE

1. Order Refusing Petition for Discretionary Review, *In re Salazar*, PD-0624-18, 2018 Tex. Crim. App. Unpub. LEXIS 982 (Tex. Crim. App. Sept. 26, 2018). Appendix A.
2. Opinion from the Texas Court of Appeals affirming the trial court's judgment, *Salazar v. State*, Nos. 09-17-00113-CR, 09-17-00114-CR, & 09-17-00115-CR, 2018 Tex. App. LEXIS 3639 (Tex. App.—Beaumont May 23, 2018, pet. ref'd) (mem. op., not designed for publication). Appendix B.
3. Opinion Granting Out-of-Time Appeal, *Ex parte Salazar*, No. WR-86,489-01, 2017 Tex. Crim. App. Unpub. LEXIS 209 (Tex. Crim. App. Mar. 22, 2017, orig. proceeding)(not designated for publication). Appendix C.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

On May 23, 2018, the Ninth District Court of Appeals in Beaumont, Texas issued an opinion affirming the judgment in Mr. Salazar's case. On August 2, 2018, Mr. Salazar filed a timely petition for discretionary review, after the Court's granting of extensions of time. On August 3, 2018, the Texas Court of Criminal Appeals denied Mr. Salazar's motion to exceed the word count limit and ordered that Mr. Salazar file an amended petition for discretionary review within ten days. On August 9, 2018, Mr. Salazar timely filed his Amended Petition for Discretionary

Review. On September 26, 2018, the Texas Court of Criminal Appeals refused Mr. Salazar's petition for discretionary review. This petition, filed within 90 days of the Texas Court of Criminal Appeals' refusal of the petition for discretionary review, is therefore timely. *See* SUP. CT. R. 13(1). This Court's jurisdiction is invoked through 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. V.

SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. AMEND. VI.

FOURTEENTH AMENDMENT

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

U.S. CONST. AMEND. XIV § 1.

STATEMENT OF THE CASE

Petitioner was convicted by a jury of one count of continuous sexual abuse of a child, one count of indecency with a child by sexual contact, and one count of sexual assault of a child. *Salazar v. State*, Nos. 09-17-00113-CR, 09-17-00114-CR, & 09-17-00115-CR, 2018 Tex. App. LEXIS 3639 (Tex. App.—Beaumont May 23, 2018, pet. ref'd) (mem. op., not designed for publication). Appendix B. The jury assessed punishment at forty years for continuous sexual abuse of a child, ten years for indecency with a child by sexual contact, and twenty years for sexual abuse of a child, to be served concurrently. *Id.*

On August 2, 2011, Petitioner's trial counsel filed a motion for new trial and a motion to withdraw. *Id.* at *3. On October 12, 2012, the trial court granted the motion to withdraw. *Id.* On July 29, 2013, Petitioner filed notices of appeal, which were dismissed as untimely. *Id.* "On May 25, 2016, Mr. Salazar filed an application for a writ of habeas corpus in which he argued he had been denied the effective assistance of counsel because his trial counsel had not filed a proper motion for new trial or appeal." *Id.* "On February 15, 2017, the trial court issued findings of fact and conclusions of law, recommending that Salazar be permitted an out-of-time appeal but recommending that relief be denied as to filing an out-of-time motion for new trial." *Id.* at *3-4. "In the habeas proceeding, the Court of Criminal Appeals

found that Salazar was entitled to an out-of-time appeal and ordered that '[a]ll time limits shall be calculated as if the sentence had been imposed on the date on which the mandate of this Court issues.'" *Id.* at *4 (quoting *Ex parte Salazar*, No. WR-86,489-01, 2017 Tex. Crim. App. Unpub. LEXIS 209, at *2 (Tex. Crim. App. Mar. 22, 2017, orig. proceeding)(not designated for publication)). "On March 28, 2017, Salazar filed notices of appeal." *Id.*

On May 16, 2017, Petitioner filed another motion for new trial, which requested an evidentiary hearing, complained of ineffective assistance of counsel, the improper admission of certain evidence during the punishment phase, and sought a new trial "in the interest of justice." *Id.* On May 25, 2017, the trial court entered an Order finding that the motion for new trial was "'timely presented[]'" to the trial court, and also entered an Order denying the motion for new trial. *Id.* On May 26, 2017, Petitioner filed a "'Motion for Court to Clarify Basis for Denial of Motion for New Trial.'" *Id.* at *4-5. In this motion, Petitioner explained that on May 25, 2017, the trial court explained in court that it was denying the motion for new trial not on its merits, but because it found Petitioner did not have the right to file a motion for new trial. *Id.* at *5. The trial judge informed counsel that he might also deny it on the merits, and that the court would review the motion and enter a ruling by the end of the day. *Id.* The trial court never ruled on the motion to clarify. *See id.* at *5, n. 3.

In his motion for new trial, and on appeal, Petitioner argued that his trial counsel's performance was deficient in that he failed to object when Detective

Gannuci testified that Salazar would not provide a statement. *Salazar*, 2018 Tex. App. LEXIS 3639, at *16-18. Appendix B. During the jury trial, the State asked the detective during its case-in-chief if he spoke with Petitioner and the detective stated that he did. (3 R.R. at 125). The State asked the detective, if he was able to get any kind of statement and the detective said, "[n]o." (3 R.R. at 125). In Detective Gannucci's supplement to the Montgomery County Sheriff's Office's offense report, he stated,

> On 1/13/10, I talked with the suspect via phone and asked if he would come to the Magnolia Detective's Office to give a statement. The suspect said he hired an attorney and was told not to talk with me. The suspect's attorney is David Preston (713-224-4040).

(C.R. [count 1] at 263-64).

The court of appeals cited to *Salinas v. State*, 369 S.W.3d 176, 179 (Tex. Crim. App. 2012) stating, "the Fifth Amendment right against compulsory self-incrimination is 'simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak.'" *Salazar*, 2018 Tex. App. LEXIS 3639, at *18. Appendix B. The court found that since there was no evidence that Salazar was subject to custodial interrogation at the time he declined to give a statement, "no Fifth Amendment protections would have applied." *Id.* Therefore, the court found that "the trial court would not have erred in overruling a Fifth Amendment objection to Gannucci's testimony if such objection had been made." *Id.*

Furthermore, in his motion for new trial and on appeal, Petitioner argued that trial counsel denied Mr. Salazar his constitutional right to testify. *Salazar*,

2018 Tex. App. LEXIS 3639, at *33-35. Appendix B. Mr. Salazar told his attorney that he wanted to testify. Trial counsel told him that he was not going to put him on the stand. Mr. Salazar was unaware that he had the final authority to make the decision on whether to testify and his attorney failed to so inform him. Had he known that he could testify against counsel's wishes, he would have done so. (C.R. [count 1] at 278).

Mr. Salazar would have testified that he never intentionally touched the complainant inappropriately. He would have testified that the complainant did not like when he was strict with the rules and would not let her talk to the boys late at night on the phone and do everything that she wanted to do. She would become upset with him. (C.R. [count 1] at 278).

The court of appeals found that "[a]ppellant's assertion that he would have benefitted from his own testimony is mere speculation" and testimony by Petitioner that he "'never intentionally touched [E.G.] inappropriately'" would be "redundant of his not-guilty plea." *Salazar*, 2018 Tex. App. LEXIS 3639, at *34. Appendix B.

Moreover, in both his motion for new trial and on appeal, Petitioner argued that counsel was ineffective for failing to object to Dr. Lawrence Thompson's bolstering of the complaining witness's testimony. *Salazar*, 2018 Tex. App. LEXIS 3639, at *13-16. Appendix B. Dr. Lawrence Thompson was the State's first witness. (3 R.R. at 12-13). Dr. Thompson is the director of therapy and psychological services at the Harris County Children's Assessment Center. (3 R.R. at 13). During, redirect examination, the following exchange occurred:

[PROSECUTOR:] All right. And do you find in your practice that children that are – false allegations are more common or less common?

[DR. THOMPSON:] Less common. False allegations of child sexual abuse are rare.
[PROSECUTOR: Did you say "rare"?

[DR. THOMPSON:] Yes, I did.

[PROSECUTOR:] Do you have any study or anything that supports that?

[DR. THOMPSON:] Yes. In my clinical experience I can safely say that, you know, in terms of false allegations, I have observed, you know, less than 2 percent of cases that I have either worked on or supervised. The literature related to false allegation is a bit higher – there are some studies that are around that 2-percent range, but there are some reputable studies that do go to at least 5 percent. That's five out of every hundred, but that's 94 or so that in most studies it looks like it was a credible allegation of abuse. So possible, but pretty rare comparably speaking.

(3 R.R. at 51-52).

Not only did defense counsel fail to object, defense counsel went over the testimony again during recross-examination.

[DEFENSE COUNSEL:] Now, you indicated that the literature that you have reviewed is – say that in somewhere between 2 and 5 percent of the cases there are false allegations?

[DR. THOMPSON:] Yes.

[DEFENSE COUNSEL:] You would agree with me those are the ones most likely to end up in court?

[DR. THOMPSON:] Repeat the question.

[DEFENSE COUNSEL:] You would agree with me that those are the ones that would most likely end up in court in this situation.

[PROSECUTOR:] Objection; calls for speculation.

THE COURT: Overruled.

[DR. THOMPSON:] Repeat the question one more time, and let me think about

it.
[DEFENSE COUNSEL:] You indicated – you testified earlier that between 2 and 5 percent of child abuse allegations are false.

[DR. THOMPSON:] Yes.

[DEFENSE COUNSEL:] And my question to you is: Those type of cases are the most likely ones to end up in court if the false allegation is not – does not become obvious until you are in trial?

[DR. THOMPSON:] All kinds of cases involving disclosure of child abuse end up in court. So regardless, the literature that I referenced about the false allegation ones – it's really – I can't – I can't make that statement about the false allegation literature. What I can say is that when there's a disclosure of child sexual abuse and there is an alleged perpetrator abuse that says, "I didn't abuse this child," that those cases end up often times in court, but I can't make any statements specific to the literature and how many of those cases end up in court. I don't know.

[DEFENSE COUNSEL:] I'm not asking you that. What I'm asking you is: The cases with false allegations are most likely to end up in court?

[DR. THOMPSON:] No, no. I wouldn't say that those cases with false allegations could be ones that the prosecutor doesn't bring to court because they have a sense that there is a false allegation in the case.

[DEFENSE COUNSEL:] I'm not asking you that. What I'm asking you is: The cases with false allegations are most likely to end up in court?

[DR. THOMPSON:] No, no. I wouldn't say that those cases with false allegations could be ones that the prosecutor doesn't bring to court because they have a sense that there is a false allegation in the case.

(3 R.R. at 56-58)(emphasis added).

Additionally, the prosecutor argued Dr. Thompson's statistics during his closing argument,

[PROSECUTOR:] . . . In his experience 2 percent of the allegations of sexual abuse, what did he say? "Children don't lie about sexual abuse." 2 percent about the allegations regarding sexual abuse are false. Studies and literature

> say up to 5 percent. Okay. All the way up to 5 which means 95 to 98 percent of sexual abuse allegations are not false because the kids can't sustain that level of consistency . . .

(5 R.R. at 76).

The Court of Appeals stated,

> Based on our review of the record, we cannot say that the sole purpose of Dr. Thompson's testimony was to convince the jury of E.G.'s credibility. Dr. Thompson did not express an opinion as to whether E.G.'s allegations had merit, whether she was a trustworthy witness, or whether children as a class are truthful. On the record before us, Salazar has not met his burden to show that the trial court would have committed error in overruling such an objection had it been made. The trial court's decision to admit the complained-of evidence was within the zone of reasonable disagreement and did not constitute an abuse of discretion. Therefore, we cannot say that the trial court would have committed error in overruling a bolstering objection to Dr. Thompson's testimony if such objection had been made. Because appellant has not shown deficient performance we need not consider whether prejudice resulted.

Salazar, 2018 Tex. App. LEXIS 3639, at *14. Appendix B.

REASONS FOR GRANTING THE PETITION

Question One: Whether the Fifth Amendment to the United States Constitution's protections apply to someone who has been advised by his attorney to remain silent and invokes that right in a noncustodial interrogation.

Question Two: Whether the use of pretrial silence when questioned by law enforcement officials compels the defendant, in violation of the Fifth Amendment privilege, to give evidence that can be used against him – either his verbal responses to the statement or questions posed, or his non-responsive silence.

Question Three: Whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case-in-chief.

The Texas Court of Appeals has decided important questions of federal law that has not been, but should be settled by this Court. The court of appeals cited to *Salinas v. State*, 369 S.W.3d 176, 179 (Tex. Crim. App. 2012) stating, "the Fifth Amendment right against compulsory self-incrimination is 'simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak.'" *Salazar*, 2018 Tex. App. LEXIS 3639, at *18. Appendix B. The court found that since there was no evidence that Salazar was subject to custodial interrogation at the time he declined to give a statement, "no Fifth Amendment protections would have applied." *Id.*

In *Adair v. State*, the stated,

> As a general rule, a defendant's invocation of his right to remain silent, after he has been arrested and received his *Miranda* warnings, may not be used against him at trial. *See Doyle v. Ohio*, 426 U.S. 610, 619 [] (1976); *Dinkins v. State*, 894 S.W.2d 330, 356 (Tex. Crim. App. 1995); *Hampton v. State*, 121 S.W.3d 778, 782-83 (Tex. App. – Austin 2003, pet. ref'd). However, if a defendant invokes his right to remain silent during a police interview prior to his arrest, and prior to being read his *Miranda* warnings, then his silence is admissible in trial as substantive evidence of his guilt, at least in Texas. *See Salinas v. State*, 369 S.W.3d 176, 179 (Tex. Crim. App. 2012), *aff'd on other grounds*, 133 S. Ct. 2174 [(2013)]; *Steadman v. State*, 328 S.W.3d 566, 569-70 (Tex. App. – Eastland), *rev'd on other grounds*, 360 S.W.3d 499 (Tex. Crim. App. 2012). This case presents a different situation than either of the above scenarios. Here, it is undisputed that Adair gave his statement in a non-custodial setting prior to his arrest but after being read his *Miranda* warnings. The admissibility of a defendant's invocation of his right to remain silent in such a situation—during a non-custodial interview prior to arrest (when his invocation of his right to remain silent would normally be admissible), but after being read *Miranda* warnings (when his invocation of the right to remain silent would normally be inadmissible) – has not been squarely addressed by either the United States Supreme Court or any Texas court of which we are aware. However, we need not resolve this issue today . . .

Adair v. State, 2013 Tex. App. LEXIS 14923, at *30-31 (Tex. App. – Austin, 2013, no pet.)(mem. op., not designed for publication).

Additionally, the court noted,

> In his brief, Adair cites to several cases from federal courts of appeals holding that the invocation of the right to remain silent, prior to arrest, is generally inadmissible. *See, e.g., Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987). The cases to which Adair cites do not announce any specific rule distinguishing between the admissibility of pre-arrest silence absent *Miranda* warnings and pre-arrest silence following the receipt of *Miranda* warnings. We have found only one federal court of appeals that has held specifically that it is the receipt of *Miranda* warnings that prohibits the government from using a suspect's invocation of his right to remain silent against him. *See Kappos v. Hanks*, 54 F.3d 365, 368-69 (7th Cir. 1995) (citing *Fencl v. Abrahamson*, 841 F.2d 760, 764-65 (7th Cir. 1988)).

Id. at *31 n. 5.

"The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement – the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1 (1964).

"Introduction of a defendant's express invocation of his right to remain silent is prejudicial to a defendant because the introduction of such evidence invites the jury to draw an adverse inference of guilty from the exercise of a constitutional right. *See Hardie v. State*, 807 S.W.2d 319, 322 (Tex. Crim. App. 1991); *Ex parte Skelton*, 434 S.W.3d 709, 719 (Tex. App.—San Antonio 2014, pet. ref'd). In other words, the probable collateral implication of a defendant's invocation of his right to remain silent is that he is guilty. *See Skelton*, 434 S.W.3d at 719." *Friend v. State*, 473 S.W.3d 470, 478 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd).

In *United States v. Okatan*, the defendant was being questioned and invoked his privilege by requesting counsel. 728 F.3d 111 (2nd Cir. 2013). The Second Circuit explained that the plurality opinion in *Salinas* left open the question of whether "the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case-in-chief." *Id.* at 118. The court explained that in *Griffin*, the Court stated that allowing the prosecutor to comment on the defendant's exercise of his right not to testify was characterized as "a penalty imposed . . . for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 119 (citing *Griffin v. California*, 380 U.S. 609 (1965)). "What the jury may infer, given no help from the court is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is another." *Griffin*, 380 U.S. at 614. The *Okatan* court, quoted *Coppla v. Powell*, stating, "Allowing a jury to infer guilt from pre-arrest invocation of the privilege 'ignores the teaching that the protection of the Fifth Amendment is not limited to those in custody or charged with a crime.'" *Id.* at 119 (quoting *Coppola v. Powell*, 878 F.2d 1562 (1st Cir. 1989)). The state has the responsibility to investigate and prove its case with evidence independent of the accused's silence. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964).

Additionally, allowing the prosecutor to introduce evidence of a person's pretrial silence would permit police officers to manufacture evidence of guilt by asking people sensitive or uncomfortable questions. Additionally, the police might

choose to delay arresting suspects and giving *Miranda* warnings so that they might use the defendant's pre-arrest silence to urge the jury to infer guilt. Conviction of an accused when based in part on inadmissible evidence of his pretrial silence rather than the state's independent evidence of guilt is fundamentally unfair.

Although Petitioner did not clearly state that he was "invoking his *Miranda* rights," it is clear when Mr. Salazar informed Detective Gannucci that he would not provide a statement he was aware of his right to refuse to make a statement, and his attorney told him to invoke his right, which he did. In *Salinas v. State*, the Court stated, "Although 'no ritualistic formula is necessary in order to invoke the privilege,' *Quinn v. United* States, 349 U.S. 155 [](1955), a witness does not do so by simply standing mute." 570 U.S. 178 (2013). The Petitioner in this case did not stand mute. Additionally, the Ninth Circuit in *United States v. Velarde-Gomez*, cited both *Doyle* and *Griffin*, and stated that the *Miranda* warnings are a prophylactic means of protecting a defendant's Fifth Amendment rights, but they are "not the genesis of those rights." 269 F.3d 1023, 1029 (9th Cir. 2001). "[B]ecause the right to remain silent derives from the Constitution and not from the *Miranda* warnings themselves, regardless of whether the warnings are given, absent waiver, comment on the defendant's exercise of his right to silence violates the Fifth Amendment." *Id.*

The Fifth Amendment's privilege provides the accused the right to remain silent. This privilege applies to all persons, even those not yet arrested or indicted, if the answer might subject him to criminal penalties. The majority in *Salinas*, did not reach the issue of whether the use of pretrial silence when questioned by law

enforcement officials compels the defendant, in violation of the Fifth Amendment privilege, to give evidence that can be used against him – either his verbal responses to the statement or questions posed, or his non-responsive silence. *See Salinas v. Texas*, 570 U.S. 178 (2013).

Question Four: Whether a defendant is unable to demonstrate prejudice in an ineffective assistance of counsel claim for being denied his constitutional right to testify and say he is innocent because this is the same as his not-guilty plea.

The Texas Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court. The court of appeals found that "[a]ppellant's assertion that he would have benefitted from his own testimony is mere speculation" and testimony by Petitioner that he "'never intentionally touched [E.G.] inappropriately'" would be "redundant of his not-guilty plea." *Salazar*, 2018 Tex. App. LEXIS 3639, at *34. Appendix B. However, a plea of not guilty, simply puts the burden on the State to prove his guilt beyond a reasonable doubt. *See Hankins v. State*, 646 S.W.2d 191, 199 (Tex. Crim. App. 1983). A plea of not guilty is not the same as testifying in front of a jury and opening yourself up to direct examination and cross-examination, and allowing a jury to hear from the defendant, as a witness, and determine his credibility. "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Harris v. New York*, 401 U.S. 222, 225 (1971). "'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses

against him, to offer testimony, *and to be represented by counsel.*" *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972)(emphasis added)(quoting *In re Oliver*, 333 U.S. 257, 273 (1948)). Petitioner was denied an opportunity to defend himself by testifying on his own behalf.

"[D]efense counsel shoulders the primary responsibility to inform the defendant of his right to testify, including the fact that the ultimate decision belongs to the defendant." *Johnson v. State*, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005). "Because imparting that information is defense counsel's responsibility, *Strickland* provides the appropriate framework for addressing an allegation that the defendant's right to testify was denied by defense counsel." *Id.*

The right to testify is a "fundamental" constitutional right. *Johnson*, 169 S.W.3d at 236 (quoting *Rock v. Arkansas*, 483 U.S. 44 (1987)). In *Rock v. Arkansas*, "the Supreme Court found that the right flowed from several provisions in the United States Constitution: the Due Process Clause of the Fourteenth Amendment ('right to be heard'), the Compulsory Process Clause of the Sixth Amendment, the 'structure' of the Sixth Amendment (right to personally make a defense), and the Fifth Amendment's guarantee against compelled testimony." *Id.* at 236.

To say a defendant cannot show prejudice for being denied his constitutional right to testify and say he is innocent because that is the same as his not-guilty plea significantly infringes on a defendant's fundament right to testify in his own defense.

Question Five: Whether a defendant's due process rights are violated when an expert provides an opinion that the complaint or class of persons to which the complainant belongs is truthful, or a statistical opinion on false allegations.

The opinion encourages the State of Texas to tilt the scales of justice against a defendant and decided an important question of federal law that has not been, but should be settled by this Court. A defendant has a due process right to receive a fair trial. *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979). "'Bolstering' is 'any evidence the *sole* purpose of which is to convince the factfinder that a particular witness or source of evidence is worthy of credit, without substantively contributing 'to make the existence of [a] fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" *Flores v. State*, 2016 Tex. App. LEXIS 12593 (Tex. App.—Houston [14th Dist.] 2016, no pet.). "[E]xpert testimony that assists the jury in determining an ultimate fact is admissible, but expert testimony that decides an issue of ultimate fact for the jury, such as a direct opinion of the truthfulness of a child, is not admissible." *Id.* (citing TEX. R. EVID. 702; *Yount v. State*, 872 S.W.2d 706, 708 (Tex. Crim. App. 1993)). "Testimony from an expert who testifies that a class of persons to which the victim belongs is truthful is inadmissible because 'it essentially tell[s] the jury that they can believe the victim in the instant case as well.'" *Id.* (citing *Yount*, 872 S.W.2d at 711). "Accordingly an expert witness may not give an opinion that the complainant or class of persons to which the complainant belongs is truthful." *Id.* (citing *Yount*, 872 S.W.2d at 712).

As stated in *Flores v. State*,

> An expert is not permitted to opine that the complainant or class of persons to which the complainant belongs is truthful. *Yount*, 872 S.W.2d at 712. In *Yount*, the Court of Criminal Appeals affirmed the court of appeals's decision that bolstering testimony was inadmissible where a doctor testified that she had "seen very few cases where the child was actually not telling the truth." *Id.* at 707-08. Other courts of appeals, including this court, have found similar testimony to be inadmissible. *See*, e.g., *Wiseman v. State*, 394 S.W.3d 582, 587 (Tex. App. – Dallas 2012, pet. ref'd)(trial court erred when it allowed doctor to testify that approximately two percent of children who report sexual abuse are making false allegations); *Lopez v. State*, 288 S.W.3d 148, 158-59 (Tex. App. – Corpus Christi 2009, pet. ref'd)(where doctor was asked whether teenage boys are truthful when they make a sexual abuse outcry, doctor's response that "[g]enerally, they tell the truth" was inadmissible); *Lane v. State*, 257 S.W.3d 22, 27 (Tex. App. – Houston [14th Dist.] 2008, pet. ref'd)("Dr. Thompson's testimony that false accusations of childhood assaults are very rare had the effect of telling the jury they could believe E.A.'s testimony, which is expressly forbidden."); *Aguilera v. State*, 75 S.W.3d 60, 64-66 (Tex. App. – San Antonio 2002, pet. ref'd)(psychologist's testimony that only 10 percent of children lie about sexual abuse was inadmissible).

See Flores, 2016 Tex. App. LEXIS 12503 at * 48.

In *Lane v. State*, appellant was found guilty by a jury of aggravated sexual assault of a child under the age of fourteen. *See Lane v. State*, 257 S.W.3d 22 (Tex. App. – Houston [14th Dist.] 2008, pet ref'd). During appellant's trial the State called "Dr. Lawrence Thompson, Jr., the director of therapy and psychological services for the Children's Assessment Center in Houston, to testify as an expert in the field of child abuse and post-traumatic stress disorder." *Id.* at 24 (emphasis added). This is the same expert who testified regarding the same matters in Petitioner's trial. In *Lane*, Dr. Thompson testified in part that false allegations "are extremely rare," and that coaching "is a rare occurrence . . ." *Id.* at 24-25. In *Lane*, Dr. Thompson cited to percentages of children who lie about being sexually abused like he did during Francisco Salazar's trial. In *Lane*, while appellant's trial counsel lodged an

objection to Dr. Thompson's testimony, he did not request an instruction to the jury to disregard or move for a mistrial. *Id.* at 25. The court of appeals held, "[e]ven though there is nothing in the record on appeal explaining appellant's trial counsel's subjective trial strategy for allowing this testimony into evidence, there can be no conceivable strategy or tactic that would justify allowing this inadmissible testimony in front of the jury." *Id.* at 27 (emphasis added). Therefore, the court of appeals found that appellant's trial counsel was deficient. *Id.* Although the court of appeals informed the State of Texas that this testimony by Dr. Brown is inadmissible in 2008 in *Lane v. State*, the State of Texas still presented Dr. Thompson's inadmissible testimony in 2011 during Petitioner's trial.

As in the cases cited above, Dr. Thompson's testimony here was inadmissible because it offered an opinion that the class of persons to which the complainant belongs – children – are typically, truthful. *See id.* Accordingly, defense counsel was ineffective by not objecting to his testimony, not objecting to the prosecutor's argument at closing, and by reintroducing this line of testimony to the jury.

A strong factor in determining the prejudicial effect on the jury is whether the testimony was specific and carried an air of legitimacy such as citing to percentages of children who lie about being sexually abused. *See Flores*, 2016 Tex. App. LEXIS 12503 at * 50. This is exactly what happened here, and shows the prejudicial effect this testimony had during Petitioner's trial. Another factor the courts consider is whether the State referred to the psychologist's testimony that children do not typically lie in its closing argument. *See id.* (*see also Wilson v. State*,

90 S.W.3d 391, 394 (Tex. App. – Dallas 2002, no pet.)). This is also exactly what happened here when the prosecutor discussed Dr. Thompson's testimony that statistically children do not lie during the State's closing argument. (5 R.R. at 76).

In *Wiseman v.* State, the State's expert witness testified, "The research says that approximately 2 percent of individuals make false allegations. Out of those 2 percent, approximately 77 percent of those individuals are involved in a custody or divorce-related issue." *Wiseman v. State*, 394 S.W.3d 582, 586 (Tex. App. – Dallas, 2012, pet. ref'd). In *Wiseman*, the court of appeals held that he trial court erred when it allowed the expert to testify to the percentage of children who lie about being sexually abused. *Id.* at 587. The court of appeals stated,

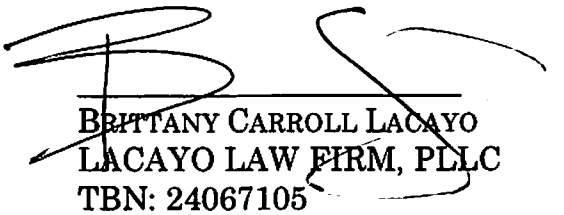
> We have concluded that admitting the statistical opinion on false allegations was error. We also conclude the admission of the opinion likely affected appellant's substantial rights. *See Wilson*, 90 S.W.3d at 393 (error is non-constitutional); *see* also TEX. R. APP. P. 44.2(b). In this case, the State offered no independent evidence of the offense; its case turned solely on the credibility of the complainant and those to whom she outcried. *Cf. Wilson*, 90 S.W.3d at 394 (medical records of complainant's pregnancy and defendant's flight provided independent support for complainant's testimony). Moreover, the State emphasized the impact of the testimony when it argued at closing: Dr. Lind told you that only two percent of those cases are false and frankly, they're kids who are in custody battles. This child wasn't in a custody battle.
>
> Our review of the record establishes that the State offered and emphasized expert testimony that the complainant was telling the truth and – by necessary implication – that appellant and I.R. were not telling the truth. We conclude the error likely affected appellant's substantial rights.

Id. at 588-89.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,



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ATTORNEY FOR PETITIONER,
FRANCISCO SALAZAR

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCISCO SALAZAR
Petitioner

v.

THE STATE OF TEXAS
Respondent

APPENDIX

APPENDICES – TABLE OF CONTENTS

Appendix A

Order Refusing Petition for Discretionary Review

In re Salazar

Court of Criminal Appeals of Texas

September 26, 2018, Decided

PD-0624-18

Reporter
2018 Tex. Crim. App. LEXIS 982 *

FRANCISCO SALAZAR

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] FROM MONTGOMERY COUNTY - 09-17-00113-CR.

Salazar v. State, 2018 Tex. App. LEXIS 3639 (Tex. App. Beaumont, May 23, 2018)

Opinion

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW REFUSED.

End of Document

Appendix B

Opinion from the Texas Court of Appeals affirming the trial court's judgment

Salazar v. State

Court of Appeals of Texas, Ninth District, Beaumont

February 21, 2018, Submitted; May 23, 2018, Opinion Delivered

NO. 09-17-00113-CR, NO. 09-17-00114-CR, NO. 09-17-00115-CR

Reporter
2018 Tex. App. LEXIS 3639 *; 2018 WL 2324393

, Appellant v. THE STATE OF TEXAS, Appellee

Notice: PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Petition for discretionary review refused by *In re Salazar, 2018 Tex. Crim. App. LEXIS 982 (Tex. Crim. App., Sept. 26, 2018)*

Prior History: **[*1]** On Appeal from the 9th District Court. Montgomery County, Texas. Trial Cause No. 11-05-05000-CR (Counts 1, 2 & 3).

Salazar v. State, 2013 Tex. App. LEXIS 12003 (Tex. App. Beaumont, Sept. 25, 2013)

Disposition: AFFIRMED.

Core Terms

trial court, motion for a new trial, trial counsel, sexual, touching, argues, witnesses, hearsay, images, issues, outcry, impeach, phone, interview, new trial, deficient, pet, punishment phase, fail to object, stepfather, talk, Grandmother, forensic, allegations, credibility, cumulative, overruling, prior inconsistent statement, deficient performance, cell phone

Case Summary

Overview

HOLDINGS: [1]-The trial court did not abuse its discretion by admitting the statements of the victim's sister and friend, and therefore trial counsel was not ineffective for failing to object, because neither the sister nor the friend were adults, neither could be an outcry witness under *Tex. Code Crim. Proc. Ann. art. 38.072, § 2(a)(3) (Supp. 2017)*, the trial court could have reasonably concluded that the friend's testimony was not hearsay, as it was offered to show only that the victim had talked to the friend and the victim was scared and upset, and the sister's testimony was cumulative of admissible evidence; [2]-The trial court did not abuse its discretion by denying defendant's motion for a new trial or in failing to hold a hearing because defendant failed to present facts that showed he could establish a basis for an ineffective assistance of counsel claim.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN1 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

To establish that he received ineffective assistance of counsel, an appellant must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's error(s), the result of the proceeding would have been different. The party alleging ineffective assistance has the burden to develop facts and details necessary to support the claim. A party asserting an ineffective-assistance claim must overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. An appellant's failure to make either of the required showings of deficient performance or sufficient prejudice defeats the claim of ineffective

assistance.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN2[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

The right to effective assistance of counsel ensures the right to reasonably effective assistance, and it does not require that counsel must be perfect or that the representation must be errorless. The appropriate context is the totality of the representation; counsel is not to be judged on isolated portions of his representation. Isolated failures to object to improper evidence or argument ordinarily do not constitute ineffective assistance of counsel. In order to meet his burden regarding his claim that his counsel was ineffective for failing to object to evidence, an appellant must also establish that the trial court would have committed error in overruling such objection had an objection been made.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Reviewability

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN3[] Effective Assistance of Counsel, Reviewability

Ordinarily, on direct appeal, the record will not have been sufficiently developed during the trial regarding trial counsel's alleged errors to demonstrate in the appeal that trial counsel provided ineffective assistance under the Strickland standards.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN4[] Abuse of Discretion, Evidence

An appellate court reviews the trial court's decision on the admission of evidence for abuse of discretion. A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. The appellate court may not substitute its own decision for that of the trial court.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

HN5[] Effective Assistance of Counsel, Trials

To show ineffective assistance of counsel for the failure to object during trial, the applicant must show that the trial judge would have committed error in overruling the objection.

Evidence > ... > Testimony > Credibility of Witnesses > Rehabilitation

HN6[] Credibility of Witnesses, Rehabilitation

"Bolstering" occurs when evidence is offered by a party to add credence or weight to some earlier unimpeached piece of evidence offered by the same party. Stated another way, bolstering is any evidence the sole purpose of which is to convince the factfinder that a particular witness or source of evidence is worthy of credit, without substantively contributing to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Tex. R. Evid. 401*. A witness generally may not testify directly as to the victim's truthfulness, as it does not concern a subject matter on which the testimony of an expert witness could assist the trier of fact and invades the province of the jury to determine witness credibility. An expert who testifies that a class of persons to which the victim belongs is truthful is essentially telling the jury that they can believe the victim in the instant case.

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

HN7[] Miranda Rights, Self-Incrimination Privilege

In pre-arrest, pre-Miranda circumstances, a suspect's interaction with police officers is not compelled. Thus, the Fifth Amendment right against compulsory self-

incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak.

Criminal Law & Procedure > Trials > Witnesses > Presentation

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN8[] Witnesses, Presentation

Weighing the advantages and disadvantages of calling a particular witness to testify is a matter usually left within the province of trial counsel's discretion. When unadmitted mitigating evidence is similar to admitted evidence, an appellant is unlikely to be able to show that the unadmitted evidence would have "tipped the scale" in his favor.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

Evidence > ... > Impeachment > Bad Character for Truthfulness > Opinion & Reputation

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Inconsistent Statements

HN9[] Effective Assistance of Counsel, Trials

Generally, a party may impeach a witness with evidence of a prior inconsistent statement. Tex. R. Evid. 613(a). And, a witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness or by testimony in the form of an opinion about that character. Tex. R. Evid. 608(a). Nevertheless, cross-examination is inherently risky, and a decision not to cross-examine a witness is often the result of wisdom acquired by experience in the combat of trial. A decision to limit cross-examination or even not to cross-examine a witness can frequently be considered sound trial strategy. As a general rule, a party is not entitled to impeach a witness on a collateral or immaterial matter. A collateral matter is one that seeks only to test a witness's general credibility or relates to facts irrelevant to issues at trial. The decision whether to call a witness is within the province of trial counsel's discretion. Trial counsel's failure to call witnesses is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony.

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Inconsistent Statements

HN10[] Impeachment, Prior Inconsistent Statements

A witness's prior inconsistent statement may be admissible as non-hearsay if it was made under penalty of perjury at a trial, hearing, or other proceeding or in a deposition. Tex. R. Evid. 801(e)(1)(A)(ii).

Evidence > ... > Testimony > Credibility of Witnesses > Impeachment

HN11[] Credibility of Witnesses, Impeachment

A party is generally not entitled to impeach a witness on a collateral or immaterial matter.

Evidence > ... > Hearsay > Exceptions > Statements of Child Abuse

HN12[] Exceptions, Statements of Child Abuse

Tex. Code Crim. Proc. Ann. art. 38.072 (Supp. 2017) provides a statutory exception to the rule against hearsay, and section 38.072 allows the first person to whom the child described the offense in some discernible manner to testify about the statements the child made. Article 38.072 provides that in sexual offense cases committed against a child fourteen years of age or younger, statements by the child about the alleged offense to the first person eighteen years of age or older, other than the defendant, about the offense will not be inadmissible because of the hearsay rule. Tex. Code Crim. Proc. Ann. art. 38.072. The trial court has broad discretion to determine whether the child's statement falls within this hearsay exception. Outcry testimony is admissible from more than one witness if the witnesses testify about different events, but there may be only one outcry witness per event. Though the terms do not appear in the statute, the victim's out-of-court statement is commonly known as an "outcry," and an adult who testifies about the outcry is commonly

known as an 'outcry witness.'"

Evidence > ... > Hearsay > Rule Components > Truth of Matter Asserted

HN13[] Rule Components, Truth of Matter Asserted

A statement not offered to prove the truth of the matter asserted is not hearsay.

Criminal Law & Procedure > Appeals > Standards of Review

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN14[] Appeals, Standards of Review

An appellate court upholds a trial court's evidentiary ruling if it is correct on any theory of law applicable to that ruling.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Testify

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN15[] Defendant's Rights, Right to Testify

While the right to testify is fundamental, an appellant alleging ineffective assistance of counsel because he was deprived of this right to testify must still show prejudice under Strickland.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN16[] Abuse of Discretion, Evidence

An appellate court reviews a trial court's decision to admit punishment evidence under an abuse-of-discretion standard. The appellate court may not disturb a trial court's evidentiary ruling absent an abuse of discretion. The trial court abuses its discretion only when its decision lies outside the zone of reasonable disagreement. If the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, the appellate court will uphold that decision.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

HN17[] Imposition of Sentence, Evidence

The erroneous admission of evidence is non-constitutional error that is subject to a harm analysis under *Tex. R. App. P. 44.2(b)*. An appellate court must disregard non-constitutional error unless it affects the substantial rights of the defendant. *Tex. R. App. P. 44.2(b)*. During the punishment phase of a non-capital criminal trial, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing. *Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) (Supp. 2017)*. Admissibility of evidence at the punishment phase of a trial of a non-capital felony offense is a function of policy rather than relevancy, and the definition of "relevant" in *Tex. R. Evid. 401* is of little avail because the factfinder's role during the guilt phase is different from its role during the punishment phase. Evidence is relevant if it helps the factfinder decide what sentence is appropriate for a particular defendant given the facts of the case.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > New Trial

HN18[] Postconviction Proceedings, Motions for New Trial

An appellate court reviews a trial court's grant or denial of a motion for new trial for an abuse of discretion. The appellate court also reviews a trial court's denial of a defendant's request for a hearing on a motion for new trial using an abuse-of-discretion standard. A trial court abuses its discretion only if its ruling is clearly erroneous and arbitrary and is not supported by any reasonable view of the record. When deciding whether a trial court erred in ruling on a motion for new trial, the appellate court views the evidence in the light most favorable to

the court's ruling and give almost total deference to the court's findings of historical fact. In order for a defendant to be entitled to a new trial on the basis of newly discovered evidence, the defendant must meet a four-pronged test, which includes in part establishing that the evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

HN19 **Postconviction Proceedings, Motions for New Trial**

A defendant does not have an absolute right to a hearing on a motion for new trial. The purposes of a hearing on a motion for new trial are to decide whether the case should be retried and to prepare a record for presenting issues on appeal in the event the motion is denied. A hearing is only required when the motion raises matters which cannot be determined from the record. And, even when a defendant raises matters not determinable from the record, he is not entitled to a hearing on his motion for new trial unless he also establishes the existence of reasonable grounds showing that the defendant could be entitled to relief. Therefore, the motion for new trial must be supported by an affidavit from the defendant or another person specifically setting out the factual basis for the claim to be entitled to a hearing. The affidavit need not establish a prima facie case, or even reflect every component legally required to establish relief. An affidavit is sufficient if a fair reading of it gives rise to reasonable grounds in support of the claim. An affidavit that is conclusory or that is unsupported by facts, or that fails to explain how the counsel's alleged deficiency would have changed the verdict is not sufficient and does not warrant a hearing on the motion for new trial.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Evidence > Types of Evidence > Documentary Evidence > Affidavits

HN20 **Postconviction Proceedings, Motions for New Trial**

Tex. R. App. P. 21.7 provides that the court may receive evidence by affidavit or otherwise at the hearing. Tex. R. App. P. 21.7. Accordingly, a trial court does not have to receive live testimony at the hearing.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Evidence > Types of Evidence > Documentary Evidence > Affidavits

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN21 **Postconviction Proceedings, Motions for New Trial**

It is clear that when a motion for new trial relies on a claim of ineffective assistance of counsel, the defendant's motion must allege sufficient facts from which a trial court could reasonably conclude both that counsel failed to act as a reasonably competent attorney and that, but for counsel's failure, there is a reasonable likelihood that the outcome of his trial would have been different. The motion must be supported by affidavit(s), specifically showing the truth of the grounds of attack. However, if the affidavits do not supply reasonable grounds that would entitle the accused to the relief sought, the trial court does not abuse its discretion in refusing to hold a hearing. While the affidavits are not required to reflect every argument legally required to establish relief, the motion or affidavits must reflect that reasonable grounds exist for holding that such relief could be granted.

Judges: Before Kreger, Horton, and Johnson, JJ.

Opinion by: LEANNE JOHNSON

Opinion

MEMORANDUM OPINION

Appellant Francisco Salazar appeals his convictions for one count of continuous sexual abuse of a child, one count of indecency with a child by sexual contact, and one count of sexual assault of a child. *See* Tex. Penal Code Ann. §§ 21.02(b), 21.11(a)(1), 22.011(a)(2)(B) (West Supp. 2017).[1] A jury found Salazar guilty on all

[1] We cite to the current version of statutes, as subsequent

three counts and assessed punishment at forty years for continuous sexual abuse of a child, ten years for indecency with a child by sexual contact, and twenty years for sexual assault of a child, to be served concurrently. Salazar raises four issues on appeal. We affirm.

Procedural Background

A grand jury originally indicted Salazar on February 23, 2010, and re-indicted him on July 29, 2010. He was then indicted again on May 5, 2011. Salazar was tried under the May 5th indictment for one count of continuous sexual abuse of a child, one count of indecency with a child by sexual contact, and one count of sexual assault of a child. The May 5th indictment[2] alleged, in relevant part, the following:

> Francisco Salazar, hereinafter styled Defendant, **[*2]** . . . during a period that was 30 or more days in duration, to-wit: from on or about November 14, 2007 through November 29, 2008, when the defendant was 17 years of age or older, commit two or more acts of sexual abuse against [E.G.], a child younger than 14 years of age, namely, Indecency with a Child, by having [E.G.] touch the sexual organ of the defendant[,] and Sexual Assault of a Child, by the defendant's sexual organ to contact or penetrate the mouth of [E.G.].
> . . . on or about July 1, 2007 in Montgomery County, Texas, Francisco Salazar, hereinafter styled Defendant, did then and there, with intent to arouse and gratify the sexual desire of the Defendant, engage in sexual contact by touching the breast of [E.G.], a child younger than 17 years of age and not the spouse of the defendant,
> . . . on or about December 13, 2009 in Montgomery County, Texas, Francisco Salazar, hereinafter styled Defendant, did then and there intentionally or knowingly cause the penetration of the mouth of [E.G.], a child, by the defendant's sexual organ, or intentionally or knowingly cause the defendant[']s sexual organ to contact or penetrate the mouth of [E.G.], a child[.]

Salazar pleaded not guilty **[*3]** to all counts. The case was tried to a jury in July of 2011. The jury found Salazar guilty on all three counts.

On August 2, 2011, Salazar's trial counsel filed a motion for new trial and motion in arrest of judgment, a motion for a free reporter's record on appeal, and a motion to withdraw. In the motion for new trial, Salazar argued the verdict "was contrary to the law and evidence[,]" and that he was entitled to a new trial "in the interest of justice." On October 12, 2012, the trial court granted the motion to withdraw. On July 29, 2013, Salazar filed notices of appeal, which this Court dismissed as untimely. *See* Salazar v. State, Nos. 09-13-00341-CR, 09-13-00342-CR, & 09-13-00343-CR, 2013 Tex. App. LEXIS 12003 (Tex. App.—Beaumont Sept. 25, 2013, no pet.) (mem. op., not designated for publication).

On May 25, 2016, Salazar filed an application for a writ of habeas corpus in which he argued he had been denied the effective assistance of counsel because his trial counsel had not filed a proper motion for new trial or appeal. On February 15, 2017, the trial court issued findings of fact and conclusions of law, recommending that Salazar be permitted an out-of-time appeal but recommending that the relief be denied as to filing an out-of-time motion for new **[*4]** trial. In the habeas proceeding, the Court of Criminal Appeals found that Salazar was entitled to an out-of-time appeal and ordered that "[a]ll time limits shall be calculated as if the sentence had been imposed on the date on which the mandate of this Court issues." Ex parte Salazar, No. WR-86,489-01, 2017 Tex. Crim. App. Unpub. LEXIS 209, at *2 (Tex. Crim. App. Mar. 22, 2017, orig. proceeding) (not designated for publication). On March 28, 2017, Salazar filed notices of appeal.

On May 16, 2017, Salazar filed another motion for new trial and therein he requested an evidentiary hearing, complained of ineffective assistance of counsel, the improper admission of certain evidence during the punishment phase, and he sought a new trial "in the interest of justice." On May 25, 2017, the trial court entered an Order finding that the motion for new trial was "timely presented[]" to the trial court. On that same date, the trial court also entered an Order denying the motion for new trial, stating as follows:

> On the 25th day of May, 2017, came on to be considered the Defendant's Motion for New Trial. Having considered the motions, exhibits, evidence and/or arguments of counsel, the court is of the opinion that the motion should be: Denied.

The record reflects that on May 26, 2017, Salazar **[*5]**

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amendments do not affect the disposition of this appeal.

[2]We use initials herein to refer to the alleged victim and relational nouns to refer to family members and juveniles. *See* Tex. Const. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

filed a "Motion for Court to Clarify Basis for Denial of Motion for New Trial." In the motion, Salazar alleged that, at a hearing on May 25, 2017, the trial court explained it was denying the motion for new trial not on its merits, but because Salazar did not have the right to file a motion for new trial.[3] In the motion, Salazar also indicated that the trial judge informed counsel that he might also deny it on the merits, and further that the court would review the motion and enter a ruling by the end of the day.

Evidence at Trial

Testimony of E.G.'s Sister, Mother, Aunt, and Grandmother

K.S., E.G.'s sister ("Sister" or "E.G.'s Sister") testified that, in July of 2007, she told her mother ("Mother" or "E.G.'s Mother") that Salazar was touching E.G. because E.G. had told the Sister it happened. E.G.'s Sister also testified that she did not remember Salazar touching E.G. and that she did not believe Salazar did anything wrong.

E.G.'s Mother testified that in July of 2007, when E.G. was twelve years old, E.G. and K.S. approached the Mother one afternoon before Salazar got home. According to the Mother, K.S. was worried and nervous, and E.G. was scared and upset. The Mother explained that E.G. **[*6]** told her that Salazar had touched her breasts. And, she testified that, when Salazar got home, she confronted him about what E.G. had reported, and Salazar said "it was a mistake[,]" that he was sorry, and that it would never happen again.

According to E.G.'s Mother, she learned of another outcry from the Mother's sister, E.G.'s "Aunt." The Aunt told E.G.'s Mother that E.G. made an outcry to the Aunt on January 3, 2010, when E.G. was fifteen years old. The Aunt also testified at the trial.

According to the Aunt, when she learned from E.G. what had happened to E.G., E.G.'s grandmother ("Grandmother") and Aunt decided to go to Houston to get E.G. The Grandmother and Aunt testified that, upon arriving in Houston, they informed E.G.'s Mother about what E.G. had told the Aunt, they picked up the children, and called the police. After talking with police, they went to the house to get clothes, and then drove back to Victoria, where the Aunt and Grandmother lived.

E.G.'s Mother also testified that, as they were leaving the family home, she saw that E.G. had Salazar's phone, and the Mother took the phone and kept it because she knew they needed the phone. E.G.'s Sister also testified that she **[*7]** recalled finding a phone lying on top of a car, and that she and E.G. tried to find a video that may have been on the phone.

E.G.'s Testimony

E.G. testified that Salazar is her stepfather and that she was sixteen years of age at the time of trial. E.G. explained that in July of 2007, she told her Sister that Salazar had touched her inappropriately on the chest. According to E.G., at that time, the touching had been going on for "a couple of months." E.G. testified that Salazar touched her inappropriately "[m]ore than 20[]" times before she told anyone about it. E.G. recalled that when she told her Sister and Mother about the touching, they were angry with Salazar, and Salazar put his hands over his face and cried.

According to E.G., a few months later, Salazar asked E.G. to masturbate him while he was driving her home from a birthday party. E.G. explained that she knew that Salazar had ejaculated because he had worn a condom, and when he took it off, "there was stuff in the condom." E.G. testified that Salazar asked her to masturbate him another time when they were in his bedroom watching television. E.G. recalled this incident occurred before her youngest sister was born in March of **[*8]** 2008.

E.G. also testified about two occurrences when Salazar asked E.G. to give him oral sex. E.G. explained that on one such occasion, E.G. believed that Salazar was recording her with his phone because he was holding his phone out during the incident. According to E.G., she masturbated Salazar "[f]our to five times[]" and she performed oral sex on him "[t]hree to four[]" times. E.G. explained that she had told her Sister and a teenaged male friend ("Friend") about the first incident of oral sex, and her Sister and her Friend encouraged her to tell an adult. E.G. testified that she made her second outcry to her Grandmother.

According to E.G., when Salazar and her Mother fought, Salazar "would get real angry and he would start throwing stuff." E.G. explained that she felt that she had torn her family apart and she was sad because her relationship with her Sister was not good. E.G. also

[3] There is no reporter's record for the hearing that Appellant contends occurred on May 25, 2017. We did not find anything in the record regarding whether the trial court ever ruled upon the motion to clarify.

testified that she does not like living in Victoria because her friends are not there.

Other testimony

Detective Tom Gannucci with the Montgomery County Sheriff's Office testified that he arranged for E.G. to be interviewed at Safe Harbor. According to Gannucci, following E.G.'s interview, he drove to Victoria **[*9]** to retrieve a cell phone from the Mother, from which he was eventually able to recover some images. Gannucci testified that he had spoken with Salazar during his investigation, but he did not get a statement.

Special Agent Stephen Santini with the Department of Homeland Security testified that he became involved in the case pursuant to a request to analyze a cell phone. Santini explained that he is assigned to a division of Homeland Security that is involved with computer forensics in child exploitation cases. Santini also explained that when an image has been deleted from a cell phone, it is not recoverable if the first part of the image's file has been overwritten.

Dr. Lawrence Thompson, the director of therapy and psychological services at the Harris County Children's Assessment Center, testified that some children delay making an outcry due to fear, embarrassment, shame, or mixed feelings about the perpetrator. Dr. Thompson agreed that false allegations of sexual abuse of a child do occur. But, he further testified that false allegations of child sexual abuse are rare. Kari Prihoda, a forensic interviewer with Children's Safe Harbor testified that during her interview with E.G., **[*10]** E.G. appeared sad. Prihoda also testified that E.G. gave "lots of detail[]" especially as to sensory details during her interview.

Two of E.G.'s teenaged male friends also testified that E.G. had told them about her concerns about Salazar's conduct toward her.

Issues on Appeal

Appellant raises four issues on appeal. Appellant's first issue argues that the trial court abused its discretion in denying his motion for new trial. In his second issue, he argues he was prejudiced by his trial counsel's ineffective assistance. In his third issue, Appellant argues the trial court erred in admitting certain photographs or images during the punishment phase of trial. And in his fourth issue, Appellant argues that the trial court abused its discretion in refusing to grant his request for an evidentiary hearing on the issues raised in the motion for new trial.

Ineffective Assistance of Counsel Claim

Appellant's second issue argues that he was prejudiced by the ineffective assistance of his trial counsel. Specifically, Appellant alleges the following:

1. "Trial counsel failed to object to the State's bolstering of the complaining witness's testimony."

2. "Trial counsel failed to object to the detective **[*11]** testifying about the Appellant's express invocation of his right to remain silent."
3. "Trial counsel failed to introduce the fact that [the Appellant] did provide an exculpatory statement to Investigator C.D. Holditch, Jr. after the State put forth evidence that the [sic] he did not provide a statement to the detective."
4. "Trial counsel failed to investigate and present testimony from [Appellant's stepfather] to contradict the testimony of the complainant."
5. "Trial counsel failed to impeach the complainant with her prior inconsistent statement about the amount of times she was forced to give a 'hand job.'"
6. "Trial counsel failed to impeach the complainant with her prior inconsistent statement about the amount of times she was forced to give him a 'blow job.'"
7. "Trial counsel failed to question the complainant about her letter to [Appellant] on June 21, 2009."
8. "Trial counsel failed to object to the testimony of more than one outcry witness as hearsay."
9. "Trial counsel denied [Appellant] his constitutional right to testify."

10. "Trial counsel failed to prepare for the punishment phase of the trial and failed to subpoena material character witnesses to testify on Appellant's behalf." **[*12]**

HN1[↑] To establish that he received ineffective assistance of counsel, Salazar must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's error(s), the result of the proceeding would have been different. *See* Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The party alleging ineffective assistance has the burden to develop facts and details necessary to support the claim. *See* Jackson v. State, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). A party asserting an ineffective-

assistance claim must overcome the "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *See* Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing Strickland, 466 U.S. at 689). An appellant's failure to make either of the required showings of deficient performance or sufficient prejudice defeats the claim of ineffective assistance. Rylander v. State, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003); *see also* Williams v. State, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong.").

HN2[↑] The right to effective assistance of counsel ensures the right to "reasonably effective assistance[,]" and it does not require that counsel must be perfect or that the representation must be errorless. *See* Ingham v. State, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). The appropriate context is the totality of the representation; counsel is **[*13]** not to be judged on isolated portions of his representation. *See* Thompson, 9 S.W.3d at 813; Solis v. State, 792 S.W.2d 95, 98 (Tex. Crim. App. 1990). Isolated failures to object to improper evidence or argument ordinarily do not constitute ineffective assistance of counsel. *See id.*; Ewing v. State, 549 S.W.2d 392, 395 (Tex. Crim. App. 1977). In order to meet his burden regarding his claim that his counsel was ineffective for failing to object to evidence, Appellant must also establish that the trial court would have committed error in overruling such objection had an objection been made. *See* Vaughn v. State, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996).

HN3[↑] Ordinarily, on direct appeal, the record will not have been sufficiently developed during the trial regarding trial counsel's alleged errors to demonstrate in the appeal that trial counsel provided ineffective assistance under the *Strickland* standards. Menefield v. State, 363 S.W.3d 591, 592-93 (Tex. Crim. App. 2012).

1. "Trial counsel failed to object to the State's bolstering of the complaining witness's testimony."

Appellant complains that his trial counsel failed to object to certain testimony by Dr. Lawrence Thompson on the basis that it impermissibly bolstered the testimony of E.G. Appellant specifically notes the testimony of Dr. Thompson wherein he testified that, based on his own experience as well as scientific literature, between two and five percent of allegations of child sexual abuse **[*14]** are false and that "those cases with false allegations could be ones that the prosecutor doesn't bring to court because they have a sense that there is a false allegation in the case." According to Appellant, Dr. Thompson's testimony was inadmissible because it offered an opinion that the class of persons to which the complainant belongs, namely children, are typically truthful.

HN4[↑] We review the trial court's decision on the admission of evidence for abuse of discretion. Martinez v. State, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Id.* We may not substitute our own decision for that of the trial court. Moses v. State, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). HN5[↑] "To show ineffective assistance of counsel for the failure to object during trial, the applicant must show that the trial judge would have committed error in overruling the objection." Ex parte White, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004) (citing Vaughn v. State, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996)).

HN6[↑] "Bolstering" occurs when evidence is offered by a party to add credence or weight to some earlier unimpeached piece of evidence offered by the same party. Cohn v. State, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993). Stated another way, bolstering is

> any evidence the *sole* purpose of which is to convince the factfinder that a particular witness or source of evidence is worthy of credit, without substantively contributing **[*15]** "to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

Id. at 819-20 (emphasis in original) (quoting Tex. R. Evid. 401). A witness generally may not testify directly as to the victim's truthfulness, as it does not concern a subject matter on which the testimony of an expert witness could assist the trier of fact and invades the province of the jury to determine witness credibility. Wesbrook v. State, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000) ("The jury is the exclusive judge of the credibility of witnesses and of the weight to be given testimony[.]"); Schutz v. State, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997) ("Expert testimony does not assist the jury if it constitutes 'a direct opinion on the truthfulness' of a child complainant's allegations."); Yount v. State, 872 S.W.2d 706, 709 (Tex. Crim. App. 1993) (citing Duckett v. State, 797 S.W.2d 906, 914-15 (Tex. Crim. App. 1990)). "An expert who testifies that a class of persons to which the victim belongs is truthful is

essentially telling the jury that they can believe the victim in the instant case[.]" *Yount, 872 S.W.2d at 711*.

Dr. Thompson testified that he does clinical, and not forensic, interviews. According to Dr. Thompson, a clinical interview is not a "truth-finding mission[,]" and the goal of a clinical interview is to understand a person's issues in order to provide psychological treatment. Based on our review of the **[*16]** record, we cannot say that the sole purpose of Dr. Thompson's testimony was to convince the jury of E.G.'s credibility. *See Cohn, 849 S.W.2d at 819-20*. Dr. Thompson did not express an opinion as to whether E.G.'s allegations had merit, whether she was a trustworthy witness, or whether children as a class are truthful. On the record before us, Salazar has not met his burden to show that the trial court would have committed error in overruling such an objection had it been made. *See Vaughn, 931 S.W.2d at 566*. The trial court's decision to admit the complained-of evidence was within the zone of reasonable disagreement and did not constitute an abuse of discretion. *See Martinez, 327 S.W.3d at 736*; *see also Robles v. State, No. 10-12-00398-CR, 2013 Tex. App. LEXIS 13790, at **6-7* (Tex. App.—Waco Nov. 7, 2013, pet. ref'd) (mem. op., not designated for publication). Therefore, we cannot say the trial court would have committed error in overruling a bolstering objection to Dr. Thompson's testimony if such objection had been made. *See Ex parte White, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004)*. Because Appellant has not shown deficient performance, we need not consider whether prejudice resulted. *See Williams, 301 S.W.3d at 687*; *Rylander, 101 S.W.3d at 110*.

2. "Trial counsel failed to object to the detective testifying about the Appellant's express invocation of his right to remain silent."

Appellant argues that his trial counsel's performance was deficient **[*17]** in that he failed to object when Detective Gannucci testified that Salazar had not made any kind of statement to him. The following exchange occurred when the State's counsel examined the Detective:

> [State's counsel]: Did you attempt to make contact with the suspect?
> [Gannucci]: Yes.
> [State's counsel]: And did you get any kind of statement?
> [Gannucci]: No.
> [State's counsel]: And did you actually speak with the suspect?
> [Gannucci]: Yes.

Attached to Salazar's motion for new trial was a document Salazar characterized as an excerpt from Detective Gannucci's supplement to the offense report. The excerpt includes the following: "On 01/13/10, I talked with the suspect via phone and asked if [he] would come to the Magnolia Detective's Office to give a statement. The suspect said he hired an attorney and was told not to talk with me."

Nothing on the face of this document expressly connects it to Detective Gannucci. But even assuming the document could be authenticated and admitted, we cannot say that it supports a conclusion that Salazar's trial counsel's performance was deficient. Salazar does not argue that he was detained, in custody, or arrested at the time he declined to give the statement to **[*18]** the Detective. *See Miranda v. Arizona, 384 U.S. 436, 444-445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)* (explaining that *Miranda* rights apply to statements made or silence invoked during custodial interrogation). As the Court of Criminal Appeals has explained, ***HN7***[ ] "[i]n pre-arrest, pre-*Miranda* circumstances, a suspect's interaction with police officers is not compelled. Thus, the *Fifth Amendment* right against compulsory self-incrimination is 'simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak.'" *Salinas v. State, 369 S.W.3d 176, 179 (Tex. Crim. App. 2012)* (quoting *Jenkins v. Anderson, 447 U.S. 231, 241, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980)* (Stevens, J., concurring). On the record before us, we find no evidence that Salazar was subject to custodial interrogation at the time he declined to give a statement to Detective Gannucci, and no *Fifth Amendment* protections would have applied. *See Salinas, 369 S.W.3d at 179*. Therefore, the trial court would not have erred in overruling a *Fifth Amendment* objection to Gannucci's testimony if such objection had been made, and we cannot conclude that Salazar's trial counsel failed to perform deficiently by failing to lodge such objection.

3. "Trial counsel failed to introduce the fact that Mr. Salazar did provide an exculpatory statement to Investigator C.D. Holditch, Jr. after the State put forth evidence that he did not provide a statement to the detective."

10. "Trial counsel failed **[*19]** to prepare for the punishment phase of the trial and failed to subpoena material character witnesses to testify on Appellant's

behalf."

We address these two complaints together as they both pertain to trial counsel's alleged failure to introduce certain evidence at trial. Appellant argues that his trial counsel performed deficiently by failing to introduce evidence of an "exculpatory" statement Salazar made to Investigator C.D. Holditch Jr. Attached to Salazar's motion for new trial is a document that includes a document labeled as "Contact Narrative" by Investigator Holditch. The document's footer reflects that it was printed on July 18, 2011, at the Texas Department of Family and Protective Services. The document also includes the following: "He denied any inappropriate touching. He said years ago he and his children would wrestle on the floor but once he noticed she was developing [] he stopped touching her at all." Appellant also argues that his trial counsel was deficient for failing to subpoena certain persons who would have testified "to issues including, but not limited to, [] Salazar's care and love for his family and friends, his hard working character, and their opinion that **[*20]** he is a good person." Attached to his motion for new trial are unsworn declarations by four persons, in which they state they would have been available to testify at Salazar's trial and would have testified that he was a good person and it would have been out of character for Salazar to have committed the crimes for which he was charged.

As to the Holditch document, we note that Salazar has not shown that the document could have been properly authenticated and admitted. *See* DeLeon v. State, 322 S.W.3d 375, 382 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) ("Appellant offers no argument as to whether this evidence would have been properly admitted. . . . Accordingly, he has not met his burden to show that counsel's performance was deficient under the first prong of *Strickland*."). Furthermore, E.G.'s Sister testified that after Salazar had touched E.G. accidentally when they were wrestling, he apologized to E.G., and E.G. testified that, when she described to her Sister that Salazar was touching E.G., E.G. was not talking about anything that occurred while wrestling. Additionally, the trial court could have reasonably concluded that any denial Salazar made to Investigator Holditch as noted in the report would have been cumulative of his not-guilty plea. *See* King v. State, 9 Tex. Ct. App. 515, 544 (1880) (a plea **[*21]** of "not guilty" is the same as if the defendant had denied every element of the crime charged).

As to the additional witnesses Salazar claims would have testified to Salazar's good character, such testimony would have been merely cumulative of the testimony of others who did testify on behalf of Salazar. E.G.'s Sister, who was Salazar's biological daughter, testified during the guilt phase that she did not believe Salazar committed the crimes charged because "he's just too much of a good person to do something like that." During the punishment phase, Salazar's mother testified that Salazar is a "great dad[,]" has good relationships with his children, and "[t]he kids all love him. He's a good provider and good, hard worker."

HN8[↑] "Weighing the advantages and disadvantages of calling a particular witness to testify is a matter usually left within the province of trial counsel's discretion." *Ex parte* Ruiz, Nos. WR-27,328-03 & WR-27,328-04, 543 S.W.3d 805, 2016 Tex. Crim. App. LEXIS 1341, at *43 (Tex. Crim. App. Nov. 9, 2016) (citing Ruiz v. Thaler, 783 F.Supp.2d 905, 949 (W.D. Tex. 2011)). When unadmitted mitigating evidence is similar to admitted evidence, an appellant is unlikely to be able to show that the unadmitted evidence would have "tipped the scale" in his favor. *See* Ex parte Martinez, 195 S.W.3d 713, 731 (Tex. Crim. App. 2006). We cannot conclude that trial counsel's failure to introduce **[*22]** additional mitigation evidence that would have been cumulative of other mitigation evidence that was admitted at trial constitutes proof of deficient performance or prejudice under *Strickland*. *See* Wong v. Belmontes, 558 U.S. 15, 22-23, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009) (failure to introduce additional mitigating evidence that would have been cumulative did not establish *Strickland* prejudice); Sincere v. State, No. 11-11-00056-CR, 2013 Tex. App. LEXIS 2341, at *8 (Tex. App.—Eastland, no pet.) (mem. op., not designated for publication) (appellant did not establish that trial counsel was deficient for failing to present cumulative alibi testimony). Accordingly, Appellant has failed to show either deficient performance or prejudice as to these two alleged failures by his trial counsel.

4. "Trial counsel failed to investigate and present testimony from [Appellant's stepfather] to contradict the testimony of the complainant."

5. "Trial counsel failed to impeach the complainant with her prior inconsistent statement about the amount of times she was forced to give a 'hand job.'"

6. "Trial counsel failed to impeach the complainant with

her prior inconsistent statement about the amount of times she was forced to give him a 'blow job.'"

7. "Trial counsel failed to question the complainant about her letter to [Appellant] on June 21, 2009."

We consider these issues together **[*23]** as they all pertain to impeachment of E.G.'s testimony. *HN9*[↑] Generally, a party may impeach a witness with evidence of a prior inconsistent statement. *Tex. R. Evid. 613(a)*; *Lopez v. State, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002)*. And, a witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness or by testimony in the form of an opinion about that character. *Tex. R. Evid. 608(a)*. Nevertheless, "[c]ross-examination is inherently risky, and a decision not to cross-examine a witness is often the result of wisdom acquired by experience in the combat of trial." *Ex parte McFarland, 163 S.W.3d 743, 756 (Tex. Crim. App. 2005)*. A decision to limit cross-examination or even not to cross-examine a witness can frequently be considered sound trial strategy. *See Miniel v. State, 831 S.W.2d 310, 324 (Tex. Crim. App. 1992)* (quoting *Coble v. State, 501 S.W.2d 344, 346 (Tex. Crim. App. 1973)*); *see also McFarland, 163 S.W.3d at 756* ("It is frequently a sound trial strategy not to attack a sympathetic eyewitness without very strong impeachment."); *Dannhaus v. State, 928 S.W.2d 81, 88 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd)* (explaining that cross-examining a sympathetic witness can offend jurors). As a general rule, a party is not entitled to impeach a witness on a collateral or immaterial matter. *Ramirez v. State, 802 S.W.2d 674, 675 (Tex. Crim. App. 1990)*. A collateral matter is one that seeks only to test a witness's general credibility or relates to facts irrelevant to issues at trial. *Keller v. State, 662 S.W.2d 362, 365 (Tex. Crim. App. 1984)*. As we have previously explained, the decision whether to **[*24]** call a witness is within the province of trial counsel's discretion. *Ruiz, 543 S.W.3d 805, 2016 Tex. Crim. App. LEXIS 1341, at *43*. Trial counsel's failure to call witnesses is "irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony." *King v. State, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983)*.

Appellant complains that his trial counsel failed to present the testimony of his stepfather. Appellant argues that his stepfather's testimony would have contradicted certain testimony by E.G., specifically, her testimony that when Salazar was working on an electrical outlet in her room with his stepfather, she heard Salazar say "[y]ou need to find my bag of nuts, but when you find them be gentle with them[.]" Salazar attached an affidavit of his stepfather to his motion for new trial, in which his stepfather attested that he remembered working with Salazar on an electrical issue in E.G.'s room, but he did not recall hearing this statement "or any wording similar to that." The trial court could have reasonably concluded from the affidavit that the stepfather's testimony pertained to a collateral matter that pertained to a witness's general credibility or relates to facts that were not relevant to the crimes charged. *See Keller, 662 S.W.2d at 365*. Therefore, the trial court could **[*25]** have concluded that Salazar had no right to impeach E.G. concerning her testimony regarding the "bag of nuts" statement. *See Ramirez, 802 S.W.2d at 675*. As a consequence, the trial court could have reasonably concluded that Salazar's trial counsel's performance would not have been deficient for failing to elicit testimony by Salazar's stepfather. *See Rylander, 101 S.W.3d at 110* (an appellant's failure to show deficient performance defeats a claim of ineffective assistance). In addition, on appeal, Appellant fails to explain how his defense was prejudiced as a result, or how the result of his trial would have been different had his stepfather testified that he did not remember hearing this comment. *See Strickland, 466 U.S. at 687-88, 694*; *Delamora v. State, 128 S.W.3d 344, 363, 367* (Tex. App.—Austin 2004, pet. ref'd) (no error to deny admission of evidence that was of "minimal relevance" and merely collateral or impeaching, and any error from its exclusion was harmless).

Next, Appellant complains that his trial counsel failed to impeach E.G. regarding the number of times she was forced to masturbate Salazar and to give him oral sex. At trial, E.G. testified that Salazar forced her to masturbate him "[f]our to five times[]" and he forced her to give him oral sex "[t]hree to four[]" times. With his motion for new **[*26]** trial, Salazar submitted documents he characterized as "supplemental reports" of the Montgomery County Sheriff's Office. The documents Salazar provided stated that, in her forensic interview, E.G. had reported she masturbated Salazar twice and gave him oral sex "4 or 5 times." According to Salazar, impeaching E.G. regarding these inconsistencies "was important to counter the State's argument that she was being consistent."

According to Appellant, the "supplemental report[s]" purport to convey the substance of E.G.'s forensic interview with Kari Prihoda. We note that during Prihoda's testimony at trial, both parties acknowledged

that Prihoda could not testify as to what E.G. had told her. Appellant also offered no argument as to whether this evidence could be properly authenticated and admitted. We conclude that Appellant failed to meet his burden to show that counsel's performance was deficient under the first prong of *Strickland*. *See DeLeon, 322 S.W.3d at 382*.

HN10[↑] A witness's prior inconsistent statement may be admissible as non-hearsay if it was made "under penalty of perjury at a trial, hearing, or other proceeding . . . or in a deposition[.]" *Tex. R. Evid. 801(e)(1)(A)(ii)*. The appellate record does not reflect that the statements E.G. allegedly **[*27]** made in her forensic interview were made under oath in a qualifying proceeding, nor does Salazar argue that the statements qualify as prior inconsistent statements under *Rule 801*. In addition, to the extent that E.G. reported a different number of instances of criminal conduct by Salazar in her forensic interview, the trial court could have concluded that any inconsistency between E.G.'s trial testimony and her forensic interview would not be exculpatory, and would only relate to her credibility. *See Ramirez, 802 S.W.2d at 675* (*HN11*[↑] a party is generally not entitled to impeach a witness on a collateral or immaterial matter). We note that at trial, E.G.'s Mother testified that E.G. was not always truthful, and the Sister testified that E.G. was known in the family for making up lies and telling stories. Considering the record as a whole, we further conclude that Salazar has failed to show a reasonable probability that the result of the proceeding would have been different had the forensic interview evidence been admitted to impeach E.G. *See Strickland, 466 U.S. at 694*; *Holland v. State, 761 S.W.2d 307, 319 (Tex. Crim. App. 1988)* ("Absent a showing by appellant that he would have benefitted from the testimony, the decision not to call witnesses at either stage of trial does not raise the spectre of ineffective **[*28]** assistance.") (citing *King, 649 S.W.2d 42*).

Appellant also argues that his trial counsel's performance was deficient because he failed to question E.G. concerning a June 21, 2009 letter to Salazar. Attached to his motion for new trial was a letter purportedly written by E.G. that expressed affection and appreciation and stated in part "I love you Daddy[.]" Appellant argues that, according to the chronology of events E.G. related at trial, the letter would have been written after Salazar had forced her to masturbate him and when she was scared of him.

Even assuming the document could be authenticated and admitted, Salazar did not meet his burden to show that counsel's failure to offer this letter into evidence constituted a deficient performance, nor did he show a reasonable probability that the result of the proceeding would have been different had the letter been offered into evidence. *See Strickland, 466 U.S. at 687-88, 694*. Accordingly, we conclude that the trial court could have reasonably concluded that Appellant failed to show that there is a reasonable probability that the result of the proceeding would have been different. *See id. at 694*.

8. "Trial counsel failed to object to the testimony of more than one outcry witness as hearsay."

According **[*29]** to Appellant, his trial counsel was deficient for failing to object to the testimony of E.G.'s Sister and Friend because their testimony was inadmissible hearsay. Appellant also argues that trial counsel failed to object to the trial court's failure to hold a hearing on the Sister's and the Friend's "outcry testimony" pursuant to *section 38.072 of the Texas Code of Criminal Procedure.*

HN12[↑] *Section 38.072 of the Texas Code of Criminal Procedure* provides a statutory exception to the rule against hearsay, and *section 38.072* allows the first person to whom the child described the offense in some discernible manner to testify about the statements the child made. *Tex. Code Crim. Proc. Ann. art. 38.072* (West Supp. 2017); *Garcia v. State, 792 S.W.2d 88, 90-91 (Tex. Crim. App. 1990)*. *Article 38.072* provides that in sexual offense cases committed against a child fourteen years of age or younger, statements by the child about the alleged offense to the first person eighteen years of age or older, other than the defendant, about the offense will not be inadmissible because of the hearsay rule. *Tex. Code Crim. Proc. Ann. art. 38.072*. The trial court has broad discretion to determine whether the child's statement falls within this hearsay exception. *See Garcia, 792 S.W.2d at 92*. Outcry testimony is admissible from more than one witness if the witnesses testify about different events, but there may be only one outcry witness per event. *Lopez v. State, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011)*.

"Though the terms do not appear in the statute, the victim's **[*30]** out-of-court statement is commonly known as an 'outcry,' and an adult who testifies about the outcry is commonly known as an 'outcry witness.'" *Sanchez v. State, 354 S.W.3d 476, 484 (Tex. Crim. App. 2011)*. In this case, E.G.'s Sister was thirteen years

of age at the time of trial, and the Friend was fifteen years of age. Because neither the Sister nor the Friend was an adult, neither could be an outcry witness under article 38.072. See Tex. Code Crim. Proc. Ann. art. 38.072, § 2(a)(3) (defining outcry witness as "the first person, 18 years of age or older, other than the defendant, to whom the child . . . made a statement about the offense[]").

Our inquiry does not end here. "The appropriate question to ask next, of course, is whether the substance of the out of court declaration—'what was said'—has any relevance at all *apart* from the truth of the matter asserted." See Dinkins v. State, 894 S.W.2d 330, 364 (Tex. Crim. App. 1995). **HN13**[↑] A statement not offered to prove the truth of the matter asserted is not hearsay. Id. at 347-48; see also Tex. R. Evid. 801(d) (limiting hearsay to evidence offered to prove the truth of the matter asserted). **HN14**[↑] We uphold a trial court's evidentiary ruling if it is correct on any theory of law applicable to that ruling. See De La Paz v. State, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

During the Friend's testimony, the following exchange occurred:

> [State's counsel]: Do you recall a time where she called and talked to you about something **[*31]** that was going on in Magnolia that was causing her concern?
> [Friend]: Yes. The night that she cried out to me we were just talking and she sounded really stressed out and scared. So I asked her what was wrong and she opened up and told me everything.
> [State's counsel]: And you can't talk about what she told you --
> [Friend]: Okay.
> [State's counsel]: -- but did it involve something to do with her step dad?
> [Friend]: Yes.
> . . . .
> [State's counsel]: What did you tell [E.G.]?
> [Friend]: I said if it's really going on, she should tell parents and if she didn't, I was going to have to tell my mom to talk to her grandmother.
> [State's counsel]. How did she sound?
> [Friend]: She was really scared and kept telling me not to and then she told me to hold on and she would call me back and she called me back and said she had told her grandmother.
> [Defense counsel]: Objection; hearsay.
> THE COURT: Don't repeat what she said, please. I heard you say she called you back. So anything after that I think would be hearsay and I sustain the objection.

According to Appellant, the Friend's testimony that E.G. "cried out" to him and told him everything constituted hearsay. We disagree. The trial court could have reasonably **[*32]** concluded that the Friend's testimony was not offered for the truth of any statement made by E.G. but for the fact that E.G. had talked to the Friend and that the Friend understood that E.G. was scared and upset. *See, e.g.*, Guidry v. State, 9 S.W.3d 133, 152 (Tex. Crim. App. 1999); Dinkins, 894 S.W.2d at 347; *see also* Tex. R. Evid. 803(3) (providing an exception to hearsay for a statement of the declarant's then-existing state of mind).

Appellant argues that certain portions of the Sister's testimony contained inadmissible hearsay, namely that E.G. told the Sister that Salazar was touching E.G. inappropriately. Appellant's brief acknowledges that E.G.'s Mother was the outcry witness as to E.G.'s first outcry that Salazar was touching E.G.'s breasts. We also note that E.G. testified at trial that Salazar had touched her breasts. Accordingly, the complained-of portion of the Sister's testimony would have been cumulative of admissible evidence and, as such, we are unable to conclude that, had trial counsel objected, the outcome of the trial would have been different. *See* Anderson v. State, 717 S.W.2d 622, 627 (Tex. Crim. App. 1986) ("If the fact to which the hearsay relates is sufficiently proved by other competent and unobjected to evidence, . . . the admission of the hearsay is properly deemed harmless and does not constitute reversible error."); **[*33]** In re AWT, 61 S.W.3d 87, 89 (Tex. App.—Amarillo 2001, no pet.). We cannot say the trial court abused its discretion in admitting the complained-of statements by the Sister and the Friend, and, therefore, trial counsel's performance would not have been deficient for a failure to make hearsay objections.

9. "Trial counsel denied [Appellant] his constitutional right to testify."

Appellant argues he told his attorney he wanted to testify and his attorney told him he was not going to put him on the stand. Salazar's unsworn declaration attached to his motion for new trial includes the following statement:

> I told my attorney that I wanted to testify. My attorney told me he was not going to put me on the

> stand. I was not aware that I had the final authority to make the decision on whether to testify and my attorney failed to inform me of this. If I had known that I could testify against my attorney's wishes, I would have done so. I would have testified that I never intentionally touched [E.G.] inappropriately. I would have testified that [E.G.] did not like when I was strict with the rules and I would not let her talk to boys late at night on the phone and do everything she wanted to do. She would become very upset with me about not letting her do what **[*34]** she wanted to do.

According to Salazar, if he had known he could testify and had done so, "the jury would have been able to evaluate his credibility and there is a reasonable probability that they would have decided to find him not guilty."

HN15[↑] While the right to testify is fundamental, an appellant alleging ineffective assistance of counsel because he was deprived of this right to testify must still show prejudice under *Strickland*. *See Johnson v. State, 169 S.W.3d 223, 228-39 (Tex. Crim. App. 2005)*. Appellant's assertion that he would have benefitted from his own testimony is mere speculation. To the extent Appellant has suggested he would have testified that he "never intentionally touched [E.G.] inappropriately[,]" such testimony would have been redundant of his not-guilty plea. *See King, 9 Tex. Ct. App. at 544*. The only additional evidence Appellant's proffered testimony would have contributed would have been that E.G. disliked Appellant's rules and parenting, possibly implying a motive for her to be untruthful. However, the Sister testified that E.G. would get sad or mad because her Mother and Salazar had taken away E.G.'s phone due to an issue with her grades. The Sister also testified that she thought E.G. liked living with the Grandmother in Victoria "[f]or freedom[,]" **[*35]** because she gets to bring friends to the house and would sometimes "sneak to a boy's house." Appellant's motion and supporting affidavits fail to establish that, had he testified in his own behalf, there is a reasonable probability that the results of the proceeding would be different. *See Strickland, 466 U.S. at 694*.

In sum, examining all the errors alleged by Appellant in light of counsel's representation as a whole, we cannot say that Appellant has satisfied his burden to show that, but for the alleged errors, the outcome of the proceeding would have been different. *See Thompson, 9 S.W.3d at 813*; *Ex parte Zepeda, 819 S.W.2d 874, 876 (Tex. Crim. App. 1991)*. On this record, Appellant has not made the required showings of deficient performance and prejudice as required by *Strickland*. *See Strickland, 466 U.S. at 687-88, 694*. We overrule Appellant's second issue.

Admission of Evidence

In his third issue, Salazar challenges the admission of certain evidence during the punishment phase of trial. Specifically, he argues that the admission of "adult pornographic images" and a photograph of human feces in a toilet was in error because such evidence was not relevant to sentencing and was highly prejudicial.

HN16[↑] We review a trial court's decision to admit punishment evidence under an abuse-of-discretion standard. *Davis v. State, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010)*; *Walters v. State, 247 S.W.3d 204, 217 (Tex. Crim. App. 2007)*. We may not disturb a trial **[*36]** court's evidentiary ruling absent an abuse of discretion. *McGee v. State, 233 S.W.3d 315, 318 (Tex. Crim. App. 2007)*. The trial court abuses its discretion only when its decision lies "outside the zone of reasonable disagreement." *Davis, 329 S.W.3d at 803*; *Walters, 247 S.W.3d at 217*. If the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, we will uphold that decision. *De La Paz, 279 S.W.3d at 344*.

HN17[↑] The erroneous admission of evidence is non-constitutional error that is subject to a harm analysis under *rule 44.2(b) of the Texas Rules of Appellate Procedure*. *See Tex. R. App. P. 44.2(b)*; *Duncan v. State, 95 S.W.3d 669, 672 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd)*. We must disregard non-constitutional error unless it affects the substantial rights of the defendant. *Tex. R. App. P. 44.2(b)*. During the punishment phase of a non-capital criminal trial, "evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing[.]" *See Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1)* (West Supp. 2017); *McGee, 233 S.W.3d at 318*. Admissibility of evidence at the punishment phase of a trial of a non-capital felony offense is a function of policy rather than relevancy, and the definition of "relevant" in *Texas Rule of Evidence 401* "is of little avail because the factfinder's role during the guilt phase is different from its role during the punishment phase." *Hayden v. State, 296 S.W.3d 549, 552 (Tex. Crim. App. 2009)*; *Come v. State, 82 S.W.3d 486, 491 (Tex. App.—Austin 2002, no pet.)*. Evidence is relevant if it helps the factfinder decide what sentence is appropriate for a particular defendant given the facts of the case. *Hayden, 296 S.W.3d at 552* (citing *Rogers v. State, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999)*);

Rodriguez v. State, 203 S.W.3d 837, 842 (Tex. Crim. App. 2006).

During the **[*37]** punishment phase of Salazar's trial, outside the presence of the jury, the State sought to pre-admit four photos and one image that were recovered from the Appellant's phone. Defense counsel objected that the pictures were more prejudicial than probative and that "none of those pictures are indicative of any children or anything like that." The State responded that the images were obtained from Salazar's phone, and that testimony would show that Defendant sometimes showed one of the images, "little cartoon pictures from his phone relating to doing sexual acts[,]" to E.G. The trial court admitted the images "for purposes of aiding the jury in perhaps deciding the state of mind of [Salazar]" and the images were published to the jury.

At trial, E.G.'s Sister testified that she found Salazar's cell phone and that she and E.G. had attempted to find a video on the cell phone. E.G. also testified that she believed that Salazar had used his phone to make a recording of her giving him oral sex. In addition, E.G. testified that Salazar had not shown her pornographic images, but that she had seen cartoons related to sexual acts on Salazar's phone.

Detective Gannucci testified that he had retrieved **[*38]** Salazar's cell phone from E.G.'s Mother after she and the children had gone to Victoria. Special Agent Santini, an analyst with the Department of Homeland Security assigned to computer crimes and child exploitation, explained that he recovered the images in State's Exhibits 18 through 23 from a cell phone a detective had given to him. Santini testified that "there were also pictures that were recovered from the deleted section which led me to believe that they had to do with some child exploitation pictures[.]" Santini described one of the images as a cartoon that depicted a "snowman and snow woman in various sexual positions." According to Santini, in child exploitation cases, he looks for cartoons depicting sexual acts that could be used to make a child feel at ease and more comfortable regarding sexual acts. He described the other images as depicting male genitalia, what "looks like human feces in a toilet bowl[,]", and an image that "looks like some type of person -- looks like a person tied up in the back and someone suspended from a bar or some type -- it looks like they are naked."

At trial, Appellant objected to the admission of these images as more prejudicial than probative. **[*39]** However on appeal, his appellate brief does not include an analysis of the *rule 403* balancing factors. *See Tex. R. App. P. 38.1(i); see also Hernandez v. State, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012)* (discussing *rule 403* balancing factors). Appellant argues that "some nex[u]s must exist to make evidence of the defendant's use of *adult* pornography relevant in cases involving sexual offenses against children." *See Akin v. State, No. 06-14-00178-CR, 2015 Tex. App. LEXIS 9687, at **15-16* (Tex. App.—Texarkana 2015, pet. ref'd) (mem. op., not designated for publication); *Cox v. State, Nos. 13-00-184-CR & 13-00-185-CR, 2001 Tex. App. LEXIS 5485, at *12-*13* (Tex. App.—Corpus Christi 2001, no pet.) (not designated for publication). *Akin* and *Cox*, to which Appellant cites, pertain to the admission of evidence during the guilt-innocence phase of trial and are distinguishable on that basis. Moreover, there was no testimony at Salazar's trial characterizing the images as "adult."

On this record, we cannot say that the images were irrelevant in light of Special Agent Santini's testimony, and we cannot say the trial court abused its discretion in admitting the images. Considering all of the evidence discussed and the entire record, we have fair assurance that, even if the trial court erred in admitting these exhibits, the evidence did not influence the jury, or had but a very slight effect on the jury, in determining **[*40]** Appellant's punishment. *See Tex. R. App. P. 44.2(b); Johnson v. State, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).* We overrule Appellant's third issue.

Motion for New Trial

In his first issue, Salazar argues that the trial court erred in denying his motion for new trial. And in his fourth issue, Salazar argues that the trial court erred in refusing to grant Salazar's request for an evidentiary hearing on the issues raised in his motion for new trial. We will address these issues together as both issues pertain to the motion for new trial.

HN18[↑] We review a trial court's grant or denial of a motion for new trial for an abuse of discretion. *State v. Gutierrez, No. PD-0197-16, 541 S.W.3d 91, 2017 Tex. Crim. App. LEXIS 1003, at *10 (Tex. Crim. App. Oct. 18, 2017)* (citing *State v. Herndon, 215 S.W.3d 901, 906-07 (Tex. Crim. App. 2007)).* We also review a trial court's denial of a defendant's request for a hearing on a motion for new trial using an abuse-of-discretion standard. *Smith v. State, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009).* A trial court abuses its discretion only if its ruling is clearly erroneous and arbitrary and is not supported by any reasonable view of the record. *Id.;*

Riley v. State, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012). When deciding whether a trial court erred in ruling on a motion for new trial, we view the evidence in the light most favorable to the court's ruling and give almost total deference to the court's findings of historical fact. *See Riley, 378 S.W.3d at 457-58*. In order for a defendant to be entitled to a new trial on the basis **[*41]** of newly discovered evidence, the defendant must meet a four-pronged test, which includes in part establishing that the evidence is admissible and not "merely cumulative, corroborative, collateral, or impeaching[.]" *See Carsner v. State, 444 S.W.3d 1, 2 (Tex. Crim. App. 2014)* (citing *Wallace v. State, 106 S.W.3d 103, 108 (Tex. Crim. App. 2003)*; *Keeter v. State, 74 S.W.3d 31, 36-37 (Tex. Crim. App. 2002)*).

HN19 A defendant does not have an absolute right to a hearing on a motion for new trial. *Smith, 286 S.W.3d at 338*. The purposes of a hearing on a motion for new trial are to decide whether the case should be retried and to "prepare a record for presenting issues on appeal in the event the motion is denied." *Id.* A hearing is only required when the motion raises matters which cannot be determined from the record. *Id.* And, even when a defendant raises matters not determinable from the record, he is not entitled to a hearing on his motion for new trial unless he also "establishes the existence of 'reasonable grounds' showing that the defendant 'could be entitled to relief.'" *Id. at 339* (noting this requirement is imposed to avoid fishing expeditions at a motion for new trial hearing). Therefore, the motion for new trial must be supported by an affidavit from the defendant or another person specifically setting out the factual basis for the claim to be entitled to a hearing. *Id.* The affidavit need **[*42]** not establish a prima facie case, or even "'reflect every component legally required to establish' relief." *Id.* (quoting *Reyes v. State, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993)*). An affidavit is sufficient "if a fair reading of it gives rise to reasonable grounds in support of the claim." *Id.* An affidavit that is conclusory or that is unsupported by facts, or that fails to explain how the counsel's alleged deficiency would have changed the verdict is not sufficient and does not warrant a hearing on the motion for new trial. *Id.*[4]

HN20 *Texas Rule of Appellate Procedure 21.7* provides that the "court may receive evidence by affidavit or otherwise[]" at the hearing. *Tex. R. App. P. 21.7*. Accordingly, a trial court does not have to receive live testimony at the hearing. *Holden v. State, 201 S.W.3d 761, 763-64 (Tex. Crim. App. 2006)* (discussing *rule 21.7*).

Accordingly***HN21*** , it is clear that when a motion for new trial relies on a claim of ineffective assistance of

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[4] In *Smith*, the appellant was indicted for sexual assault, he later pleaded guilty pursuant to a plea agreement, and the trial court placed him on ten years' deferred adjudication community supervision. *Smith v. State, 286 S.W.3d 333, 335-36 (Tex. Crim. App. 2009)*. Eight years later the State filed a motion to adjudicate for violations of the community supervision. *Id. at 336*. A hearing was held on the motion to adjudicate and evidence was presented by the State. Smith did not testify at the hearing. *Id.* The trial court found one or more allegations true and adjudicated appellant guilty and sentenced him to twenty years in prison. *Id.*

Smith filed a motion for new trial and a request for a hearing, alleging his trial counsel was ineffective for failing to submit certain medical evidence and failing to inform Smith of his right to testify. *Id.* Smith further alleged in his supporting affidavit that he would have testified and rebutted certain statements from the victim and the probation officer, and that the medical records would have shown he did not abuse prescription medications and explained his surgery. *Id.* According to Smith, the information "may well have resulted in a different outcome." *Id.* The motion for new trial was denied without any hearing. *Id. at 336-37*.

The Court of Appeals reversed concluding that Smith was entitled to a hearing on the motion for new trial. *Id. at 337*. The Court of Criminal Appeals reversed and remanded the case back to the Court of Appeals, concluding as follows:

> The appellant's motion for new trial and supporting affidavit raised a matter not determinable from the record, namely, that trial counsel was ineffective for failing to inform him of his right to testify on his own behalf and to enter certain medical records into evidence. However, despite having raised a matter not determinable from the record, the appellant failed to establish reasonable grounds to believe that he could, under *Strickland*, prevail on his claim of ineffective assistance of counsel, entitling him to a new adjudication proceeding. Specifically, by failing to explain how counsel's allegedly unprofessional errors would have changed the trial court's finding of true on all three violations **[*43]** in the State's motion to adjudicate, the appellant failed to show that but for counsel's deficiency the result of the hearing to adjudicate guilt would have been different. Consequently, appellant did not present facts adequate to demonstrate reasonable grounds exist to believe he could prove ineffective assistance of counsel at an evidentiary hearing. Under these circumstances, the trial court did not abuse its discretion in failing to hold to a hearing on the appellant's motion for new trial.

Id. at 345.

counsel, as does Salazar's, the defendant's motion "must allege sufficient facts from which a trial court could reasonably conclude *both* that counsel failed to act as a reasonably competent attorney *and* that, but for counsel's failure, there is a reasonable likelihood that the outcome of his trial would have been different." *Smith, 286 S.W.3d at 341*; *see also Strickland, 466 U.S. at 694*.

The motion must be supported by affidavit(s), specifically showing the truth **[*44]** of the grounds of attack. *King, 29 S.W.3d at 569*; *Edwards v. State, 37 S.W.3d 511, 514 (Tex. App.—Texarkana 2001, pet. ref'd)*. However, if the affidavits do not supply reasonable grounds that would entitle the accused to the relief sought, the trial court does not abuse its discretion in refusing to hold a hearing. *King, 29 S.W.3d at 569*; *Jordan v. State, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994)*. While the affidavits are not required to reflect every argument legally required to establish relief, the motion or affidavits must reflect that reasonable grounds exist for holding that such relief could be granted. *Edwards, 37 S.W.3d at 514*.

We note that Appellant contends on appeal that the trial court failed to hold a hearing on the motion for new trial. However, according to the motion to clarify that was filed by the defense counsel after the trial court denied the motion for new trial, defense counsel attended a "hearing" on May 25, 2017, wherein the parties presented arguments to the trial court on the motion for new trial and the trial court made certain statements regarding the motion for new trial and took it under advisement. Therefore, it appears that the trial court may have actually held a "hearing" of some type, although a reporter's record does not appear in our appellate record. The rules of appellate procedure do not require a trial court to receive live testimony and **[*45]** it can consider evidence presented by affidavit. *Tex. R. App. P. 21.7*.

Nevertheless, assuming without deciding that there was no "hearing" held by the trial court on the motion for new trial, as noted above in our discussion of the other issues, Salazar failed to present facts that were adequate to demonstrate reasonable grounds existed to believe he could establish a basis for an ineffective assistance claim, or a basis for the admission of or materiality of the additional witnesses or evidence he references, or grounds for establishing improper admission of evidence during the punishment phase. Accordingly, we conclude that the trial court's ruling denying the motion for new trial and the decision to rule on the motion for new trial without holding a hearing to obtain further evidence was within the zone of reasonable disagreement. *See Smith, 286 S.W.3d at 339*; *King, 29 S.W.3d at 569*; *Jordan, 883 S.W.2d at 664*.

Nor can we conclude on the record before us that the trial court's denial of Salazar's motion for new trial was clearly erroneous and arbitrary or not supported by a reasonable view of the record. *See Gutierrez, 541 S.W.3d 91, 2017 Tex. Crim. App. LEXIS 1003 at *10*. The trial court could have reasonably concluded that the matters raised in the motion for new trial and the attached declarations were either inadmissible, cumulative, **[*46]** or did not establish, even if true, that the result of the trial would have been different. The trial court was aware of the evidence presented at trial both during the guilt and sentencing phases of trial, and the trial court was familiar with the overall performance of trial counsel, as well as the testimony of the witnesses. The trial court could have reasonably concluded that the strength of the State's case was such that the affidavits offered by Salazar, even if true, were not compelling enough to probably bring about a different result in a new trial and, therefore, that Appellant's motion and accompanying affidavits did not show that he was entitled to relief. *See Wallace, 106 S.W.3d at 108*. Appellant has not demonstrated that any of his counsel's complained-of errors affected his substantial rights. *See State v. Thomas, 426 S.W.3d 233, 239 (Tex. App.—Houston [1st Dist.] 2012), affirmed by 428 S.W.3d 99 (Tex. Crim. App. 2014)* (citing *Herndon, 215 S.W.3d at 908*). Therefore, we conclude that the trial court did not abuse its discretion in denying Salazar's motion for new trial or in failing to hold a hearing. *Id.; Keeter, 74 S.W.3d at 36-37*. We overrule Salazar's first and fourth issues.

Having overruled all of Appellant's issues, we affirm the judgments of conviction.

AFFIRMED.

LEANNE JOHNSON

Justice

Submitted on February 21, 2018

Opinion Delivered May 23, 2018

Do **[*47]** Not Publish

Before Kreger, Horton, and Johnson, JJ.

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Appendix C

Opinion Granting Out-of-Time Appeal

Ex parte Salazar

Court of Criminal Appeals of Texas

March 22, 2017, Delivered

NO. WR-86,489-01

Reporter
2017 Tex. Crim. App. Unpub. LEXIS 209 *; 2017 WL 1090027

EX PARTE FRANCISCO SALAZAR, Applicant

Notice: DO NOT PUBLISH.

PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] ON APPLICATION FOR A WRIT OF HABEAS CORPUS. CAUSE NO. 11-05-05000-CR(1) IN THE 9TH DISTRICT COURT FROM MONTGOMERY COUNTY.

Salazar v. State, 2013 Tex. App. LEXIS 12003 (Tex. App. Beaumont, Sept. 25, 2013)

Core Terms

trial court, imprisonment, written notice of appeal, notice of appeal, indigent, sentence, issues, sexual, days

Opinion

Per curiam.

OPINION

Pursuant to the provisions of *Article 11.07 of the Texas Code of Criminal Procedure,* the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967).* Applicant was convicted of one count of continuous sexual abuse of a child, one count of indecency with a child, and one count of sexual assault of a child and was sentenced to forty years' imprisonment, ten years' imprisonment, and twenty years' imprisonment, to run concurrently.

Applicant contends that his counsel rendered ineffective assistance because he failed to timely file a notice of appeal. The trial court has determined that trial counsel prepared a notice of appeal, but that the notice was lost somewhere between its execution and its inclusion in the records maintained by the district clerk's office. The trial court finds that Applicant desired to appeal, but that he was denied the right to do so through no fault of his own. We find that Applicant is entitled to the opportunity to file an out-of-time appeal of the judgment of conviction in Cause No. 11-05-05000-CR(1) from the 9th District Court of Montgomery [*2] County. Applicant is ordered returned to that time at which he may give a written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. Within ten days of the issuance of this opinion, the trial court shall determine whether Applicant is indigent. If Applicant is indigent and wishes to be represented by counsel, the trial court shall immediately appoint an attorney to represent Applicant on direct appeal. All time lim its shall be calculated as if the sentence had been imposed on the date on which the mandate of this Court issues. We hold that, should Applicant desire to prosecute an appeal, he must take affirmative steps to file a written notice of appeal in the trial court within 30 days after the mandate of this Court issues.

Copies of this opinion shall be sent to the Texas Department of Criminal Justice-Correctional Institutions Division and Pardons and Paroles Division.

Delivered: March 22, 2017

Do not publish

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCISCO SALAZAR
Petitioner

v.

THE STATE OF TEXAS
Respondent

PROOF OF SERVICE

I, BRITTANY CARROLL LACAYO, on December 26, 2018, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and the PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid.

The name and addresses of those served are as follows:

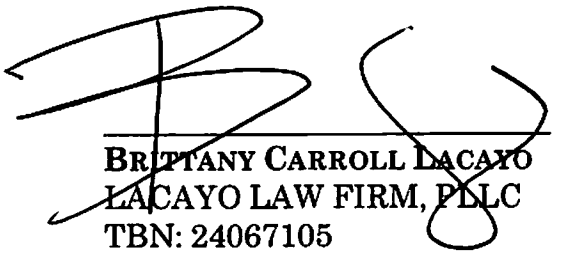
MR. BRETT LIGON
Montgomery County District Attorney
207 W. Phillips, 2nd Floor
Conroe, Texas 77301
Tel No. 936-539-7800

MR. KEN PAXTON,
Texas State Attorney General,
P.O. Box 12548, Austin,
Texas 78711-2548.
Tel. No. (512) 463-2100

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 26, 2018.

Respectfully submitted,



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