No. 18-7203

In the
Supreme Court of the United States of America

FRANCISCO SALAZAR,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

**On Petition for Writ of Certiorari to
the Texas Court of Criminal Appeals**

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

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Appendix A

Salazar's Motion for New Trial

CAUSE NO. 11-05-05000-CR

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

DEFENDANT'S MOTION FOR NEW TRIAL AND REQUEST FOR EVIDENTIARY HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, FRANCISCO SALAZAR, Defendant in the above entitled and numbered causes, by and through his attorney, BRITTANY CARROLL LACAYO, and files this Motion for New Trial pursuant to Rule 21 of the Texas Rules of Appellate Procedure, and in support thereof would show this court the following:

I. Statement of The Case

On February 23, 2010, Applicant was charged by Indictment with three counts of indecency with a child –sexual contact and one charge of sexual assault of a child in case no. 10-02-01780-CR in the 9th Judicial District Court of Montgomery County, Texas. (See Exhibit 1). On June 3, 2010, Stephen Simonsen ("Simonsen") was appointed to represent Applicant.[1] (See Exhibit 2). On July 29, 2010, Applicant was re-indicted on the same charges under the same case number. (See Exhibit 3). On May 5, 2011, Applicant was re-indicted again under case no. 11-05-05000 in the 9th Judicial District Court of Montgomery County and charged with Count 1: Continuous Sexual Abuse of a Child, Count 2: Indecency with a Child Sexual Contact, and Count 3: Sexual Assault of a Child. (See Exhibit 4). On July 25, 2011, a jury trial was held. Applicant was convicted on all three counts and three judgments were entered on July 29, 2011.

[1] Stephen Simonson was appointed under case no. 10-02-1780-CR. There does not appear to be a new order appointing him to represent Applicant after his case was re-filed under Case No. 11-05-05000.

(See Exhibit 5). On July 29, 2011, the jury assessed punishment at 40 years confinement in the Texas Department of Criminal Justice, Institutional Division for Count 1, 10 years in the Texas Department of Criminal Justice, Institutional Division for Count 2, and 20 years in the Texas Department of Criminal Justice, Institutional Division for Count 3. (See Exhibit 5).

Applicant filed an Application for a Writ of Habeas Corpus pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure contending that his counsel rendered ineffective assistance because he failed to timely file a notice of appeal. The trial court 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 found that Mr. Salazar desired to appeal, but was denied the right to do so through no fault of his own. On March 22, 2017, the Texas Court of Criminal Appeals found that Applicant is entitled the opportunity to file an out-of-time appeal from his convictions. The Texas Court of Criminal Appeals held, "[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." (See Exhibit 6). The Court's mandate was issued on April 17, 2017. (See Exhibit 7). Therefore, this Motion, filed within the thirty-day timetable, is therefore timely. See Tex. R. App. P. 21.4(a).

II. Necessity For An Evidentiary Hearing

Because this motion raises matters outside the trial record, is supported by affidavit and properly verified, timely filed and presented to this Court, Mr. Salazar is entitled to an evidentiary hearing and this Court would abuse its discretion by denying him such a hearing. See *Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1992).

III. Grounds For New Trial

1. Mr. Salazar was denied effective assistance of counsel.

2. Trial Court Erred in Allowing Adult Pornographic Images, and a Picture of Human Feces in a Toilet Into Evidence During the Punishment Phase

3. A new trial is warranted in the interest of justice.

IV. Ineffective Assistance of Counsel

At the initial stage before entering a plea of guilty, Defendant was denied effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Texas Constitution. *Powell v. Alabama*, 287 U.S. 45 (1932).

A. The Standard of Review for Ineffective Assistance Claims

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in a state criminal proceeding. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). Under the standard set out by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 698 (1984), a defendant seeking relief as a result of trial counsel's performance must first show that: 1) Counsel's performance was deficient and 2) The deficient performance prejudiced the defense.

The Court of Criminal Appeals has held that the *Strickland* test is applicable to ineffective assistance claims at the guilt-innocence stage of both capital and non-capital trials. *Craig v. State*, 825 S.W.2d 128, 129 (Tex. Crim. App. 1992). To rise to the level of ineffective assistance of counsel, a reasonable lack of confidence in the outcome of the trial must exist; that is, but for trial counsel's unprofessional errors, the outcome of the proceeding would have been different. *Ex Parte Zepeda*, 819 S.W.2d 874, 876 (Tex. Crim. App. 1991). The standard does not require

innocence or that the defendant would have received a lesser punishment absent counsel's errors. *See Everage v. State,* 893 S.W.2d 219, 222 (Tex. App. – Houston [1st Dist.] 1995, pet. ref'd). Rather, the issue is whether the defendant received a fair trial resulting in a verdict worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419 (1995).

In determining whether the accused has met his burden under *Strickland,* a court must consider the totality of counsel's representation. *Strickland v. Washington,* 466 U.S. at 670; *Ex Parte Welborn,* 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). The defendant must prove ineffective assistance of counsel by a preponderance of the evidence. *McFarland v. State,* 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). A single error can meet the standard. As the Fifth Circuit Court of Appeals has noted, "[S]ometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard." *Nero v. Blackburn,* 597 F.2d 991, 994 (5th Cir. 1979). *See also Cooper v. State,* 769 S.W.2d 301, 305 (Tex. App. – Houston [1st Dist.] 1989, pet. ref'd); *see also Ex Parte Felton,* 815 S.W.2d 733, 736 (Tex. Crim. App. 1991)(single error was of sufficient magnitude to render trial counsel's performance ineffective).

Effective assistance of counsel requires the trial attorney to engage in a reasonable investigation of the law and the facts impacting his client's case and to "present all available evidence and arguments to support the defense of his client." *Johnson v. State,* 857 S.W.2d 678, 683 (Tex. App. – Houston [14th Dist.] 1993, no pet.). Counsel has a duty to bring such skill and knowledge as will render the proceeding a "reliable adversarial testing process." *Strickland v. Washington,* 466 U.S. at 788. Where counsel's performance "falls below an objective standard of reasonableness under prevailing professional norms," this conduct is deficient within the meaning of the first prong of *Strickland. Vasquez v. State,* 830 S.W.2d 948, 949 (Tex. Crim. App. 1992). A professed trial strategy that is premised upon a patently incorrect understanding of controlling

case law cannot be an objectively reasonable trial strategy. *See Ex Parte Welborn*, 785 S.W.2d 391, 395 (Tex. Crim. App. 1990).

B. Deficient Acts of Trial Counsel

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

Counsel failed to object to Dr. Lawrence Thompson's bolstering of the complaining witness's testimony. Dr. Lawrence Thompson was the State's first witness. (See Exhibit 8, 3 R.R. at 12-13). Dr. Thompson is the director of therapy and psychological services at the Harris County Children's Assessment Center. (See Exhibit 8, 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.

(See Exhibit 8, 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.

(See Exhibit 8, 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 . . .

(See Exhibit 8, 5 R.R. at 76).

"'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 given 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 Francisco Salazar'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 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. 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 Francisco Salazar's trial.

As in the cases cited above, Dr. Thompson's testimony here is inadmissible because it offered an opinion that the class of persons to which 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 Appellant'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. (See Exhibit 8, 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). 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. Therefore, the court of appeals reversed the judgment. *Id.* at 589.

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

The State asked the detective if he spoke with the suspect and the detective stated that he did. (Exhibit 8, 3 R.R. at 125). The State asked the detective, if he made any kind of statement and the detective said, "[n]o." (Exhibit 8, 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).

(See Exhibit 9).

"Use of a defendant's silence for either substantive or impeachment value is constitutionally prohibited; it is fundamentally unfair to simultaneously afford a suspect a constitutional right to silence following his receipt of his *Miranda* warnings and then allow the implications of that silence to be used against him." *Friend v. Texas*, 473 S.W.3d 470, 478-79 (Tex. App. – Houston [1st Dist.] 2015, pet. ref'd)(citing *Doyle v. Ohio*, 426 U.S. 610, 619 (1976)). "Silence 'does not mean only muteness; it includes the statement of a desire to remain silent.'" *Id.* at 479 (citing *Wainwright v. Greenfield*, 474 U.S. 284, 295 n. 13 (1986)).

"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. In other words, the

probable collateral implication of a defendant's invocation of his right to remain silent is that he is guilty." *Id.* 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. Trial counsel provided ineffective assistance by failing to object to this testimony.

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

The State asked the detective if he spoke with the suspect and the detective stated that he did. (Exhibit 8, 3 R.R. at 125). The State asked the detective, if he made any kind of statement and the detective said, "[n]o." (Exhibit 8, 3 R.R. at 125). Not only did he fail to object to this line of questioning as indicated above, this left the jury with the impression that the Mr. Salazar never provided a statement, which is not true. The Defendant did provide a statement to Investigator C.D. Holditch, Jr. on June 14, 2010. 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 and he stopped touching her at all. (See Exhibit 10). The Defendant failed to question the detective regarding the Defendant's statement to Investigator C.D. Holditch, Jr. to clarify the misleading testimony offered by the detective, or call Investigator Holditch to testify once the State opened the door.

4. Trial counsel failed to investigate and present testimony from William Brasfield to contradict the testimony of the complainant.

A criminal defense lawyer must have a firm command of the facts of the case and the governing law before he can render effective assistance of counsel. *Ex Parte Welborn*, 785 S.W.2d 391, 393-395 (Tex. Crim. App. 1990)(en banc). Consequently, trial counsel has the responsibility to seek out and interview potential witnesses. *Id.* Trial counsel must conduct an investigation,

and the burden to do so may not be "sloughed" off to an investigator or associate. *See Haynes v. State*, 790 S.W.2d 824, 827 (Tex. App. – Austin 1990, no pet.). Reliance upon information received from a prosecutor, *i.e.* an open file, is no substitute for an independent investigation, particularly when there is no effort to examine physical evidence or talk to the state's witnesses. *Id.*

Furthermore, counsel cannot defend a choice as trial strategy before completing an independent investigation: "It may not be argued that a given course of conduct was within the realm of trial strategy *unless and until the trial attorney has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision.*" *See Ex Parte Welborn*, 785 S.W.2d at 393-395 (emphasis added); *see also Moore v. Johnson*, 194 F.3d 586, 615 (5th Cir. 1999)("*Strickland* does not require deference to those decisions of counsel that, viewed in light of the facts known at the time of the purported decision, do not serve any conceivable strategic purpose."). As the United States Fifth Circuit Court of Appeals has recognized, defense counsel must "at a minimum...interview potential witnesses and make an independent investigation of the facts and circumstances of the case." *Nealy v. Cabana*, 764 F.2d 1173, 1175 (5th Cir. 1985).

The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty. *Richards v. Quarterman*, 566 F.3d 553, 571 (5th Cir. 2009), citing ABA Criminal Justice Standard 4-4.1(a). A defendant is entitled to rely on his counsel '"to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea, should be entered' based upon an informed investigation ..." *Ex Parte Briggs*, 187 S.W.3d 458, 469 (Tex. Crim. App. 2005)(quoting *Von Moltke v. Gillies*, 332 U.S.708 (1948)).

The United States Supreme Court has explained "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and

strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003)(quoting *Strickland*, 466 U.S. at 690-91, 104 S. Ct. 2066). In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.* In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id.* at 521-22.

Texas Rule of Evidence 613 (a) permits a party to impeach a witness with a prior inconsistent statement, provided that the proper predicate is laid. TEX. R. EVID. 613(a).

In this case, the complainant testified that Mr. Salazar was in Magnolia working on an outlet plug in her room, and he said, "You need to find my bag of nuts, but when you find them be gentle with them" and his step dad, William was with him and he was laughing about that. They were both laughing and I was like, 'Grow up. That's immature.'" (Exhibit 8, 4 R.R. at 91). This allegation was in the Texas Department of Family and Protective Services records, where she stated, "Wires outlet plugs are messed up. He was fixing them with his step-dad. He was like you need to find my nuts. They were laughing. No[sic] funny. Frank called me. Said I needed to find his bag of nuts, the bolts. Gross. Be careful when you find them, be gentle." Defense counsel never contacted Mr. Salazar's stepdad. If he had, his stepdad would have told him that he remembers working on an electrical issue with Francisco Salazar in the complainant's room. However, he never heard Francisco Salazar say that to the complainant. (See Exhibit 11).

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."

During the trial, the complainant testified that she "masturbate[d] him" "four to five times." (See Exhibit 8, 4 R.R. at 110). However, according to the Montgomery County Sheriff's

Office's supplemental report, the complainant stated that she only gave the defendant a "'hand job' twice," and stated the first time was after her friend Allison's birthday party, and the second time was sometime in February 2008 when she was sitting on the computer chair watching the Disney Channel. (See Exhibit 12). Defense counsel failed to impeach the complainant regarding this inconsistency. This was important to counter the State's argument that she was being consistent. (See Exhibit 8, 5 R.R. at 75).

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."

During the trial, the complainant testified that she gave him a "blow job" "three to four" times. (See Exhibit 8, 4 R.R. at 110). However, according to the Montgomery County Sheriff's Office's supplemental report, the complainant stated that she placed his "penis in her mouth 4 or 5 times." (See Exhibit 13). Defense counsel failed to impeach the complainant regarding this inconsistency. This was important to counter the State's argument that she was being consistent. (See Exhibit 8, 5 R.R. at 75).

7. Trial counsel failed to question the complainant about her letter to Francisco Salazar on June 21, 2009.

The complainant wrote a letter to Francisco Salazar on June 21, 2009, talking about how Francisco Salazar treats her like his own child, and how she was thankful that god gave her Francisco Salazar as a stepdad and that she loves him. (See Exhibit 14). According to the timeline presented by the complainant, she would have written this letter after she alleges the Defendant made her give him a hand job twice, and she was scared of him. Trial counsel failed to question the complainant regarding this letter.

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

Texas Code of Criminal Procedure 38.072 provides an "outcry" exception to the general rule that hearsay statements are inadmissible. The outcry provision seeks both the fair

> prosecution of child abuse cases and the protection of children in the courtroom, but "carefully limited" to ensure the reliability of the testimony. The statute applies only to statements made (1) by the child against whom the offense was allegedly committed, and (2) to the first person, eighteen years of age or older, to whom the child made a statement about the offense. The outcry witness is the first adult to whom the child relates the how, when, and where of the assault. However, the statement must describe the alleged offense in some discernible way and amount to 'more than words which give a general allusion that something in the area of child abuse was going on.'

Mireles v. State, 413 S.W.3d 98, 103 (Tex. App. – San Antonio, 2013, pet. ref'd)(internal citations omitted). "There may be more than one outcry witness provided the witnesses testify about different events. 'Because of the way in which [article 38.072] is written, an outcry witness is not person-specific, but event-specific. Therefore, 'the outcry must be about different events, and not simply a repetition of the same event related by the victim to different individuals.'" *Id.* at 104 (internal citations omitted).

During the trial, defense counsel and the State, agreed Tesha Salazar, the complainant's mother was the outcry witness to the first outcry when the complainant alleged Mr. Salazar touched her breasts in July 2007. (Exhibit 8, 3 R.R. at 160-61). The State further agreed that any statements she made after her second outcry, regarding the incident that allegedly occurred when she was already 14, were inadmissible. (Exhibit 8, 3 R.R. at 169). However, Kayla Salazar, the complainant's sister, testified regarding what the complainant told her about the alleged acts of Mr. Salazar touching the complainant's breasts in 2007. (See Exhibit 8, 4 R.R. at 11). The State also introduced Kayla's testimony that her sister told her something happened a second time around January 2nd or 3rd of 2010, that they were sitting on the floor playing a game, the complainant called her to the bed, told her Kayla's father was doing things to her and still touching her, and was doing disgusting things to her, and being gross. (Exhibit 8, 4 R.R. at 16-17). Defense counsel failed to object to this testimony as hearsay.

Justin Volle was also allowed to testify that the complainant "cried out" to him, "really stressed out and scared" and told him everything, which involved her stepdad. (Exhibit 8, 4 R.R. at 134). Defense counsel failed to object to this testimony as hearsay. Trial counsel also failed to object to the trial court's failure to hold a hearing outside the presence of the jury regarding the outcry testimony that was offered pursuant to the Texas Code Criminal Procedure 38.072(2)(b)(2).

9. Trial counsel denied Francisco Salazar his constitutional right to testify.

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. (See Exhibit 15).

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. (See Exhibit 15).

"[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. The court in *Johnson v. State* held that that usual *Strickland* prejudice analysis applies and the "defendant must show a reasonable probability that the outcome of the proceeding would have been different had his attorney not precluded him from testifying." *Id.* at 239.

These acts and omissions of defense counsel contributed to the conviction of Mr. Salazar. But for counsel's errors, there is a reasonable probability the outcome would have been different. If Mr. Salazar had known that he could testify against counsel's wishes, he would have done so. If he had testified, 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.

10. Trial counsel failed to prepare for the punishment phase of the trial and failed to subpoena material character witnesses to testify on Defendant's behalf.

It is fundamental that a criminal defense attorney must have a firm command of the facts of the case before the attorney can render reasonably affective assistance of counsel. *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990); *Melton v. State*, 987 S.W.2d 72 (Tex. App.—Dallas 1998, no pet.). A natural consequence of this notion is that counsel has the responsibility to seek out and interview potential witnesses. *Ex parte Welborn*, 785 S.W.2d at 393; *Ex parte Duffy*, 607 S.W.2d 507, 516-17 (Tex. Crim. App. 1980).

Counsel has a responsibility to seek out and interview potential witnesses, and failure to do so is ineffective where the result is that any viable defense available to the accused is not advanced. *Doherty v. State*, 781 S.W.2d 439 (Tex. App.—Houston [1st Dist.] 1989, no pet.)(retained counsel was ineffective when he did not consult with appellant's first trial counsel, did not consult with appellant's investigator, did not talk to any of the State's witnesses prior to trial, did not subpoena any witnesses, and failed to investigate another possible suspect, and fact witnesses). Furthermore,

trial counsel cannot rely on the fact that his/her client did not give him any names of witnesses, especially if they were never requested. In fact, counsel may be required to investigate potential mitigating facts even if the defendant is "uninterested in helping". *Ex Parte Gonzales*, 204 S.W.3d 391, 400 (Tex. Crim. App. 2006) (Conchran, J., concurring).

Trial counsel is ineffective when he fails to investigate and present available mitigating evidence at punishment. *Moore v. State*, 983 S.W.2d 15, 23 (Tex. App. – Houston [14th Dist. 1998, no pet.). Prejudice can be demonstrated by showing counsel's failure to offer mitigating evidence at the punishment phase of the defendant's trial, even if it amounts to sheer speculation that the mitigating evidence would have influenced the jury's assessment of punishment. *See Milburn v. State*, 15 S.W.3d 267, 271 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd.).

Defendant could have provided witnesses to assist the jury in better evaluating his character. Trial counsel never asked the defendant to provide a list of people who would be willing to testify on his behalf at punishment. (See Exhibit 15). If he had done so, Mr. Salazar would have provided him the names and contact information for the following people: Marcia Salazar-Thompson, Daniel Roesner, William Brasfield, Lori Salazar, Mario Kallergis, and Laura Ynfante (See Exhibit 11, 15, 16, 17). Since he failed to request a list of people who would testify for Francisco Salazar, the only person that testified on his behalf was his mother, Rose Mary Brasfield. As stated in the attached affidavits, these witnesses would have made themselves available to testify as character witnesses during sentencing. They would have testified to issues including, but not limited to, Francisco Salazar's care and love for his family and friends, his hard working character, and their opinion that he is a good person. (See Exhibits 11, 16, 17). Mr. Simonsen's failure to place a simple phone call to his family seeking character witnesses and to ask Francisco Salazar for a list of people willing to testify at the hearing is wholly unacceptable and clearly prejudiced Mr. Salazar.

C. Prejudice

To establish prejudice, applicant must show that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would be different. *Ex Parte Chandler*, 182 S.W.3d 350, 354 (Tex. Crim. App. 2005) (quoting *Strickland*, 466 U.S. 668, 694 (1984)). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Cox v. State*, S.W.3d 817, 819 (Tex. Crim. App. 2012). In determining whether an appellant has been prejudiced by counsel's deficient performance, the court considers the totality of the evidence before the judge or jury. *Strickland v. Washington*, 466 U.S. 668, 695 (1984). The court is to examine counsels' errors not as isolated incidents, but in the context of the overall record. *Fuller*, 224 S.W.3d at 836. "These were not isolated incidents; counsel's errors pervaded and prejudiced the entire defense." *Id.* In this case, there is a reasonable probability that but for trial counsel's ten acts of ineffective assistance the result of the proceeding would have been different.

V. Trial Court Erred in Allowing Adult Pornographic Images, and a Picture of Human Feces in a Toilet Into Evidence During the Punishment Phase

During the punishment phase of the trial, the State introduced pictures and images recovered from the defendant's cell phone. (Exhibit 8, 6 R.R. at 5). Defense counsel objected that you cannot tell how they got on the cell phone because it was clear from the testimony during the guilt/innocence phase that there was a period of time when his client did not have the cell phone in his possession, and also objected that they are far more prejudicial than probative in this type of case because he was convicted of sexual abuse of a child, and none of the pictures or images involve children. (Exhibit 8, 6 R.R. at 5). The State argued that, that there would be testimony that the pictures were recovered from the defendant's phone, and that the issue of when the pictures were put there "and so forth" goes to the weight of the evidence rather than the

admissibility of the evidence. (Exhibit 8, 6 R.R. at 5-6). The State further argued, "[t]he images for the very nature of this offense, I think it's important for the jury to consider the type of images that were on the Defendant's phone. Also, there's going to be testimony that this Defendant from time to time would show F[redacted] little cartoon pictures from his phone relating to doing sexual acts." (Exhibit 8, 6 R.R. at 6). The trial court overruled the objections and admitted exhibits 18-23 into evidence. (Exhibit 8, 6 R.R. at 5, 7 R.R. at 19-24).

State's witness, Special Agent Stephen Santini, testified that just because the items have been deleted he has no way of knowing whether the defendant deleted those items. (Exhibit 8, 6 R.R. at 16). He also testified that he has no way of knowing how the images got on the phone. (Exhibit 8, 6 R.R. at 16). He was not able to tell whether the images recovered were taken or downloaded by the defendant or whether they were received by someone else. (Exhibit 8, 6 R.R. at 17). Defense counsel raised the same objections when the State sought to publish the exhibits to the jury, and the trial court overruled his objection. (Exhibit 8, 6 R.R. at 17).

State's exhibit 18, was a male penis between the breast of a woman. (Exhibit 8, 6 R.R. at 17). State's exhibit 19, appeared to be "a person tied up in the back and someone suspended from a bar or some type – it looks like they are naked." (Exhibit 8, 6 R.R. at 18). State's exhibit 20, was a "male penis in a hotdog bun" with "ketchup and mustard" on it. (Exhibit 8, 6 R.R. at 18). State's exhibit 21, was "human feces in a toilet bowl." (Exhibit 8, 6 R.R. at 18). State's exhibit 22, was "a male penis put into a woman's shoe" with "the testicles of the male penis" in the heel part of the shoe. (Exhibit 8, 6 R.R. at 18). State's exhibit 23, was a cartoon of a "snowman and snow woman in various sexual positions." (Exhibit 8, 6 R.R. at 19).

Special Agent Santini testified that he did not know if these images were shown to the complainant in this case. (Exhibit 8, 6 R.R. at 20). Special Agent Santini also testified that the sexual animation images are usually sent from adult to adult. (Exhibit 8, 6 R.R. at 22). During

the punishment phase, the complainant testified that Francisco Salazar never showed her any kind of pornographic images. (Exhibit 8, 6 R.R. at 35). She testified that she saw State's exhibit 23 when she was going through his phone and being "nosey", he never showed it to her. (Exhibit 8, 6 R.R. at 35).

Article 37.07, section 3(a)(1) of the code of criminal procedure governs the admissibility of evidence during the punishment stage of a non-capital criminal trial. *McGee v. State*, 233 S.W.3d 315, 318 (Tex. Crim. App. 2007). That statute provides that "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). Evidence is relevant to sentencing within the meaning of the statute if the evidence is "helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case." *Rodriguez v. State*, 203 S.W.3d 837, 842 (Tex. Crim. App. 2006). As stated in *Akin v. State*, some nexis must exist to make evidence of the defendant's use of *adult* pornography relevant in cases involving sexual offenses against children. 2015 Tex. App. LEXIS 9687 (Tex. App. – Texarkana, 2015, pet. ref'd). When evidence does not show this nexus, evidence of adult pornography has been held irrelevant. *See Cox v. State*, 2001 WL 34392825 at *1 (Tex. App. – Corpus Christi Aug. 9, 2001, no pet.).

In this case, the evidence of adult pornographic images or cartoons and images of human feces in a toilet was irrelevant to the task before the jury, determining Mr. Salazar's punishment for continuous sexual assault of a child, indecency with a child, and sexual assault of a child. Not only were these pictures irrelevant, they were highly prejudicial in nature. In this case the defendant's substantial rights were affected and the error had a substantial and injurious effect or influence in determining the jury's verdict.

VI. A New Trial Should be Granted In the Interest of Justice

For the past 125 years, Texas trial judges have had the discretion to grant new trials in the interest of justice. *State v. Gonzalez*, 855 S.W.2d 692, 694 (Tex. Crim. App. 1993). As the Texas Supreme Court, which at the time had criminal jurisdiction, noted some 130 years ago, "The discretion of the [trial] Court, in granting new trials, is almost the only protection to the citizen against the illegal or oppressive verdicts of prejudiced, careless, or ignorant juries, and we think the [trial] Court should never hesitate to use that discretion whenever the ends of justice have not been attained by those verdicts." *Mullins v. State*, 37 Tex. 337, 339-340 (1872-1873). *See also State v. Gill*, 967 S.W.2d 540, 543 (Tex. App. – Austin, 1998)("only the trial court can consider how [trial counsel's] deficiencies affected the outcome of case and whether 'justice' requires a new trial:); *State v. Dixon*, 893 S.W.2d 286, 288 (Tex. App. -- Texarkana, 1995)(trial court did not abuse its discretion in granting new trial in the interest of justice); *State v. Lyons*, 820 S.W.2d 46, 48 (Tex. App. -- Fort Worth, 1991)(trial court retains discretion to grant new trial on any ground interest of justice requires).

For all of those reasons set forth above, the interest of justice requires that this motion for new trial be granted.

VII. Evidentiary Support

In support of this motion for new trial and request for evidentiary hearing, Defendant incorporates the attached exhibits:

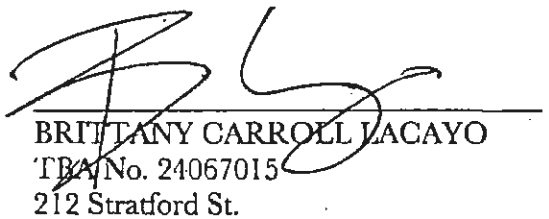
1. Indictment in Case No. 10-02-01780-CR
2. Order Appointing Stephen Simonsen
3. Re-Indictment in Case No. 10-02-01780-CR
4. Re-Indictment in Case No. 11-05-05000-CR
5. Judgments

6. Texas Court of Criminal Appeals Opinion on Writ of Habeas Corpus
7. Mandate
8. Reporter's Record
9. Excerpt from Detective Gannucci's Supplement to the Offense Report Regarding Defendant's Invocation of his Right to Remain Silent
10. Documentation from Investigator C.D. Holditch, Jr. Regarding Defendant's Statement
11. Unsworn Declaration of William Brasfield
12. Montgomery County Sheriff's Office's supplemental report – Prior Inconsistent Statement of How Many Times She Gave a "Hand Job"
13. Montgomery County Sheriff's Office's supplemental report – Prior Inconsistent Statement of How Many Times She Gave a "Blow Job"
14. The Complainant's Letter to Francisco Salazar
15. Unsworn Declaration of Francisco Salazar
16. Unsworn Declaration of Marcia Salazar-Thompson
17. Unsworn Declaration of Daniel Roesner

VIII. Conclusion

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court hold a hearing incident to this Motion, and, after hearing evidence incident thereto, grant the Defendant a new trial.

Respectfully submitted,



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Appendix B

Salazar's Brief in the Beaumont Court of Appeals

CASE NOS. 09-17-00113-CR, 09-17-00114-CR, 09-17-00115-CR

IN THE COURT OF APPEALS
NINTH SUPREME JUDICIAL DISTRICT
BEAUMONT, TEXAS

FRANCISCO SALAZAR,
Appellant

V.

THE STATE OF TEXAS,
Appellee

On Appeal from the 9th District Court of Montgomery County, Texas
Cause No. 11-05-05000-CR (Counts 1, 2, and 3)

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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PRESIDING JUDGE FOR MOTION FOR NEW TRIAL:	Hon. Phil Grant 9th District Court Montgomery County, Texas 207 West Phillips, Suite 306 Conroe, Texas 77301
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STATEMENT OF THE CASE

On February 23, 2010, Applicant was charged by Indictment with three counts of indecency with a child –sexual contact and one charge of sexual assault of a child in case no. 10-02-01780-CR in the 9th Judicial District Court of Montgomery County, Texas. (Supp. C.R. [count 1] 11-12). On June 3, 2010, Stephen Simonsen ("Simonsen") was appointed to represent Applicant.[1] (Supp. C.R. [count 1] 33). On July 29, 2010, Applicant was re-indicted on the same charges under the same case number. (Supp. C.R. [count 1] at 35). On May 5, 2011, Applicant was re-indicted again under case no. 11-05-05000 in the 9th Judicial District Court of Montgomery County and charged with Count 1: Continuous Sexual Abuse of a Child, Count 2: Indecency with a Child Sexual Contact, and Count 3: Sexual Assault of a Child. (C.R. [count 1] 11-12).

On July 25, 2011, a jury trial was held. (1 R.R. at 1). Applicant was convicted on all three counts and three judgments were entered on July 29, 2011. (C.R. [count 1] at 110, C.R. [count 2] at 111, C.R. [count 3] at 111). On July 29, 2011, the jury assessed punishment at 40 years confinement in the Texas Department of Criminal Justice, Institutional Division for Count 1, 10 years in the Texas Department of Criminal Justice, Institutional Division for Count 2, and 20

[1] Stephen Simonson was appointed under case no. 10-02-1780-CR. There does not appear to be a new order appointing him to represent Applicant after his case was re-filed under Case No. 11-05-05000.

years in the Texas Department of Criminal Justice, Institutional Division for Count 3. (C.R. [count 1] at 110, C.R. [count 2] at 111, C.R. [count 3] at 111).

Applicant filed an Application for a Writ of Habeas Corpus pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure contending that his counsel rendered ineffective assistance because he failed to timely file a notice of appeal. (C.R. [count 1] at 191). The trial court 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. (C.R. [count 1] at 191). The trial court found that Mr. Salazar desired to appeal, but was denied the right to do so through no fault of his own. (C.R. [count 1] at 192).

On March 22, 2017, the Texas Court of Criminal Appeals found that Applicant is entitled the opportunity to file an out-of-time appeal from his convictions. (C.R. [count 1] at 192). The Texas Court of Criminal Appeals held, "[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." (C.R. [count 1] at 192). The Court's mandate was issued on April 17, 2017. (C.R. [count 1] at 198).

Appellant filed a Motion for New Trial on and Request for Evidentiary Hearing on May 16, 2017. (C.R. [count 1] at 210). Since his Motion for New Trial was filed within the thirty-day timetable of the date the sentence was imposed (the

date the Court of Criminal's Appeal's Mandate issued), his motion was timely. See Tex. R. App. P. 21.4(a).

On May 25, 2017, counsel for Appellant, and counsel for the State, Jason Larman, approached the trial court regarding the Motion for New Trial and counsel for Appellant had the trial court sign the order presenting the Motion for New Trial. (C.R. [count 1] at 285, 292). At the bench, the State argued for the trial court to deny the motion for new trial arguing that the Texas Court of Criminal Appeals did not allow Appellant to file a motion for new trial. (C.R. [count 1] at 292). Counsel for Appellant disagreed, asserting that the Texas Court of Criminal Appeals held, "[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." (C.R. [count 1] at 292-93). The Court's mandate was issued on April 17, 2017; therefore, Appellant's motion, filed within the thirty-day timetable, was therefore timely. (C.R. [count 1] at 293).

The trial court stated that it agreed with the State and was denying the motion for new trial because Appellant does not have the right to file one. (C.R. [count 1] at 293). Counsel for Appellant requested that the trial court go on the record to state the basis for the denial of the motion for new trial is that the trial court is agreeing with the State and believes that Appellant does not have the right to file a motion for new trial and that the trial court is not denying the motion for

new trial on its merits. (C.R. [count 1] at 293). The trial court denied this request and stated that he might also deny it on the merits after having time to review its contents, and stated that he would review the motion for new trial and would issue a decision by the end of the day. (C.R. [count 1] at 293).

Later that day, on May 25, 2017, the trial court entered an order denying Appellant's Motion for New Trial and Request for Evidentiary Hearing without an evidentiary hearing, but did not state whether the trial court was denying the motion for new trial on its merits or if the trial court was denying the motion for new trial because he agrees with how the State interprets the Court of Criminal Appeals' order. (C.R. [count 1] at 285, 293). As a result, counsel for Appellant filed a Motion for Court to Clarify Basis for Denial of Motion for New Trial with a proposed order. (C.R. [count 1] at 291-95). The trial court never ruled on Appellant's Motion for Court to Clarify Basis for Denial of Motion for New Trial.

Appellant gave timely notice of appeal and the trial court's certification of defendant's right of appeal ensures Appellant has the legal right to appeal. (C.R. [count 1] at 113, 285, C.R. [count 2] at 114 193, C.R. [count 3] at 114, 193). TEX. R. APP. PROC. 25.2(a).

ISSUES PRESENTED

ISSUE ONE: The trial court abused its discretion by denying Appellant's Motion for New Trial.

ISSUE TWO: Appellant was prejudiced by trial counsel's ineffective assistance.

ISSUE THREE: Trial Court erred in allowing adult pornographic images, and a picture of human feces in a toilet into evidence during the punishment phase.

ISSUE FOUR: The trial judge abused its discretion in refusing to grant Appellant's request for an evidentiary hearing on the issues raised in the Motion or New Trial.

STATEMENT OF FACTS

The complainant is Appellant's stepdaughter. (3 R.R. at 63, 64, 100). On July 3, 2007, the complainant's sister told her mother that she needed to talk to her. (3 R.R. at 157-58, 188). The complainant said that it was true; Appellant touched her breasts. (3 R.R. at 161). The complainant's mother testified that she confronted Appellant, and he apologized and stated, "it was a mistake." (3 R.R. at 164). She testified that Appellant asked if she wanted him to leave, and she stated, "yes," and he left. (3 R.R. at 164). She testified that Appellant called that evening, apologized, and told her it would never happen again, so she let him move back in with the family. (3 R.R. at 164-65). The complainant's sister testified that Appellant grabbed the complainant's breasts on accident when they were wrestling, and it did not appear that Appellant did it on purpose. (4 R.R. at 31-32).

The complainant testified that after she told her family about Appellant touching her breasts in July of 2007, Appellant did not touch her for a couple months. (4 R.R. at 71). She testified that the next time Appellant touched her was on November 14, 2007, on the night of her friend, Allison's birthday party. (4 R.R. at 71). After the party ended, Appellant picked her up, drove her to a road, and took her hand to give him a "hand job." (4 R.R. at 75-77). She further testified that approximately in February or March of 2008, she was sitting on a computer chair and Appellant forced her to give him a "hand job." (4 R.R. at 82-86).

The complainant turned fourteen on November 30, 2008. (3 R.R. at 167). In November or December of 2009, the complainant asked her mother if she could move to Victoria, and her mother said no. (3 R.R. at 171-72). The complainant was not happy that her mother would not let her move to Victoria. (3 R.R. at 172). She repeatedly asked her mother to change her mind, and her mother continued to deny her requests. (3 R.R. at 172). The complainant has a friend, Justin Volle ("Volle") that lives in Victoria. (3 R.R. at 134, 195). According to the complainant's sister, Volle was the complainant's boyfriend at one time; however, the complainant denied that they were ever in a relationship. (4 R.R. at 28, 93, 118). Nevertheless, Volle testified that he would describe their relationship as being boyfriend and girlfriend at one point. (4 R.R. at 134).

The complainant testified that on December 14, 2009, when she was fifteen years old, she went with her friend to the Magnolia Christmas Parade. (4 R.R. at 73, 79, 101). She testified that Appellant gave her forty dollars for the parade and told her she would have to pay him back. (4 R.R. at 79). The next morning, Appellant picked her up from her friend's house. (4 R.R. at 103). She testified that Appellant had her phone and told her that if she wanted her phone back, she would have to give him a "blow job." (4 R.R. at 105). She testified that she did so, and he gave her phone back to her. (4 R.R. at 106).

On January 3, 2010, the complainant's mother received a call from her sister. (3 R.R. at 175). After speaking with her sister, she drove to her house, picked up her children, and called the police. (3 R.R. at 176-81).

The complainant's mother described the complainant as being a "drama queen," and stated that she never observed any inappropriate behavior between Appellant and any of her daughters. (3 R.R. at 202-03). The complainant's mother has had problems with the complainant lying. (3 R.R. at 210). The complainant's mother never noticed anything that concerned her. (3 R.R. at 165). The complainant's aunt also testified that she did not observe any inappropriate behavior by Appellant towards the complainant. (3 R.R. at 237). The complainant's sister testified that she does not believe the complainant and believes the complainant is making up these allegations. (4 R.R. at 5). The complainant's sister testified that she never observed the complainant go into the room alone with Appellant. (4 R.R. at 37). The complainant's sister testified that she told the interviewer what happened by saying what the complainant told her, not by what she actually observed. (4 R.R. at 36-37). The complainant's sister testified that the complainant is known in the family to make up lies, tell stories, and get in trouble a lot. (4 R.R. at 33). The complainant admitted that she never mentioned anything regarding Appellant touching her inappropriately in any of her diaries that were collected. (4 R.R. at 16).

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in denying Appellant's Motion for New Trial. Appellant was prejudiced by trial counsel's ineffective assistance. Trial counsel: (1) failed to object to the State's bolstering of the complaining witness's testimony, (2) failed to object to the detective testifying about the Appellant's express invocation of his right to remain silent, (3) 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 the he did not provide a statement to the detective, (4) failed to investigate and present testimony from William Brasfield to contradict the testimony of the complainant, (5) failed to impeach the complainant with her prior inconsistent statement about the amount of times she was forced to give a "hand job," (6) 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) failed to question the complainant about her letter to Appellant on June 21, 2009, (8) failed to object to the testimony of more than one outcry witness as hearsay, (9) denied Appellant his constitutional right to testify, and (10) failed to prepare for the punishment phase of the trial and failed to subpoena material character witnesses to testify on Appellant's behalf.

Additionally, the trial court erred in allowing adult pornographic images, and a picture of human feces in a toilet into evidence during the punishment phase.

Moreover, since there were issues not determinable from the record upon which Appellant could be entitled to relief, the trial court erred in denying Appellant's request for evidentiary hearing.

ARGUMENT

> ISSUE ONE RESTATED: The trial court abused its discretion by denying Appellant's Motion for New Trial.
>
> ISSUE TWO RESTATED: Appellant was prejudiced by trial counsel's ineffective assistance.
>
> ISSUE THREE RESTATED: Trial Court Erred in Allowing Adult Pornographic Images, and a Picture of Human Feces in a Toilet Into Evidence During the Punishment Phase.

I. Standard of Review

A trial court's ruling denying a defendant's motion for new trial is reviewed under an abuse of discretion standard. *Salazar v. State*, 38 S.W.3d 141, 148 (Tex. Crim. App. 2001). The reviewing court does not substitute its judgment for that of the trial court, but rather decides whether the trial court's decision is so arbitrary or unreasonable as to warrant reversal. *Id.* at 148.

In the event the this court decides Appellant did not have the right to file a Motion for New Trial, which counsel insists he did based on the order from the Texas Court of Criminal Appeals, as discussed *supra*, then counsel raises these issues on appeal avoiding the abuse of discretion standard. For these reasons, counsel has added issues two and three, which were discussed as part of the motion

for new trial, as separate issues to be considered in the event the court finds that the trial court did not abuse its discretion in denying the motion for new trial because Appellant did not have the right to file one. In that event, counsel requests this Court to issue an opinion on these matters as though they are being considered for the first time.

II. Appellant was prejudiced by trial counsel's ineffective assistance.

A. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in a state criminal proceeding. *McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970); *Garcia v. State,* 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). Under the standard set out by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 698 (1984), a defendant seeking relief as a result of trial counsel's performance must first show that: 1) Counsel's performance was deficient and 2) The deficient performance prejudiced the defense.

The Court of Criminal Appeals has held that the *Strickland* test is applicable to ineffective assistance claims at the guilt-innocence stage of both capital and non-capital trials. *Craig v. State,* 825 S.W.2d 128, 129 (Tex. Crim. App. 1992). To rise to the level of ineffective assistance of counsel, a reasonable lack of confidence in the outcome of the trial must exist; that is, but for trial counsel's unprofessional

errors, the outcome of the proceeding would have been different. *Ex Parte Zepeda,* 819 S.W.2d 874, 876 (Tex. Crim. App. 1991). The standard does not require innocence or that the defendant would have received a lesser punishment absent counsel's errors. *See Everage v. State,* 893 S.W.2d 219, 222 (Tex. App. – Houston [1st Dist.] 1995, pet. ref'd). Rather, the issue is whether the defendant received a fair trial resulting in a verdict worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419 (1995).

In determining whether the accused has met his burden under *Strickland,* a court must consider the totality of counsel's representation. *Strickland v. Washington,* 466 U.S. at 670; *Ex Parte Welborn,* 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). The defendant must prove ineffective assistance of counsel by a preponderance of the evidence. *McFarland v. State,* 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). A single error can meet the standard. As the Fifth Circuit Court of Appeals has noted, "[S]ometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard." *Nero v. Blackburn,* 597 F.2d 991, 994 (5th Cir. 1979)*; see also Cooper v. State,* 769 S.W.2d 301, 305 (Tex. App. – Houston [1st Dist.] 1989, pet. ref'd); *see also Ex Parte Felton,* 815 S.W.2d 733, 736 (Tex. Crim. App. 1991)(single error was of sufficient magnitude to render trial counsel's performance ineffective).

Effective assistance of counsel requires the trial attorney to engage in a reasonable investigation of the law and the facts impacting his client's case and to "present all available evidence and arguments to support the defense of his client." *Johnson v. State*, 857 S.W.2d 678, 683 (Tex. App. – Houston [14th Dist.] 1993, no pet.). Counsel has a duty to bring such skill and knowledge as will render the proceeding a "reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. at 788. Where counsel's performance "falls below an objective standard of reasonableness under prevailing professional norms," this conduct is deficient within the meaning of the first prong of *Strickland*. *Vasquez v. State*, 830 S.W.2d 948, 949 (Tex. Crim. App. 1992). A professed trial strategy that is premised upon a patently incorrect understanding of controlling case law cannot be an objectively reasonable trial strategy. *See Ex Parte Welborn*, 785 S.W.2d at 395.

B. Deficient Acts of Trial Counsel

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

Counsel failed to object to Dr. Lawrence Thompson's bolstering of the complaining witness's testimony. 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 <u>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.</u>

(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).

"'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 given 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 Francisco Salazar'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 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. 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 Francisco Salazar's trial.

As in the cases cited above, Dr. Thompson's testimony here is inadmissible because it offered an opinion that the class of persons to which 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 Appellant'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). 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. Therefore, the court of appeals reversed the judgment. *Id.* at 589.

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

The State asked the detective if he spoke with the suspect and the detective stated that he did. (3 R.R. at 125). The State asked the detective, if he made 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).

"Use of a defendant's silence for either substantive or impeachment value is constitutionally prohibited; it is fundamentally unfair to simultaneously afford a suspect a constitutional right to silence following his receipt of his *Miranda* warnings and then allow the implications of that silence to be used against him." *Friend v. Texas*, 473 S.W.3d 470, 478-79 (Tex. App. – Houston [1st Dist.] 2015, pet.

ref'd)(citing *Doyle v. Ohio*, 426 U.S. 610, 619 (1976)). "Silence 'does not mean only muteness; it includes the statement of a desire to remain silent.'" *Id.* at 479 (citing *Wainwright v. Greenfield*, 474 U.S. 284, 295 n. 13 (1986)).

"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. In other words, the probable collateral implication of a defendant's invocation of his right to remain silent is that he is guilty." *Id.* 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. Trial counsel provided ineffective assistance by failing to object to this testimony.

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 the he did not provide a statement to the detective.

The State asked the detective if he spoke with the suspect and the detective stated that he did. (3 R.R. at 125). The State asked the detective, if he made any kind of statement and the detective said, "[n]o." (3 R.R. at 125). Not only did he fail to object to this line of questioning as indicated above, this left the jury with the impression that Appellant never provided a statement, which is not true. Mr. Salazar did provide a statement to Investigator C.D. Holditch, Jr. on June 14,

2010. 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 and he stopped touching her at all. (C.R. [count 1] at 265-67). Trial counsel failed to question the detective regarding Appellant's statement to Investigator C.D. Holditch, Jr. to clarify the misleading testimony offered by the detective, or call Investigator Holditch to testify once the State opened the door.

4. Trial counsel failed to investigate and present testimony from William Brasfield to contradict the testimony of the complainant.

A criminal defense lawyer must have a firm command of the facts of the case and the governing law before he can render effective assistance of counsel. *Ex Parte Welborn,* 785 S.W.2d at 393-95. Consequently, trial counsel has the responsibility to seek out and interview potential witnesses. *Id.* Trial counsel must conduct an investigation, and the burden to do so may not be "sloughed" off to an investigator or associate. *See Haynes v. State,* 790 S.W.2d 824, 827 (Tex. App. – Austin 1990, no pet.). Reliance upon information received from a prosecutor, *i.e.* an open file, is no substitute for an independent investigation, particularly when there is no effort to examine physical evidence or talk to the state's witnesses. *Id.*

Furthermore, counsel cannot defend a choice as trial strategy before completing an independent investigation: "It may not be argued that a given course of conduct was within the realm of trial strategy *unless and until the trial attorney*

has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision." See Ex Parte Welborn, 785 S.W.2d at 393-95 (emphasis added); *see also Moore v. Johnson,* 194 F.3d 586, 615 (5th Cir. 1999)("*Strickland* does not require deference to those decisions of counsel that, viewed in light of the facts known at the time of the purported decision, do not serve any conceivable strategic purpose."). As the United States Fifth Circuit Court of Appeals has recognized, defense counsel must "at a minimum…interview potential witnesses and make an independent investigation of the facts and circumstances of the case." *Nealy v. Cabana*, 764 F.2d 1173, 1175 (5th Cir. 1985).

The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty. *Richards v. Quarterman,* 566 F.3d 553, 571 (5th Cir. 2009), citing ABA Criminal Justice Standard 4-4.1(a). A defendant is entitled to rely on his counsel '"to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea, should be entered' based upon an informed investigation …" *Ex Parte Briggs,* 187 S.W.3d 458, 469 (Tex. Crim. App. 2005)(quoting *Von Moltke v. Gillies,* 332 U.S. 708 (1948)).

The United States Supreme Court has explained "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are

virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith,* 539 U.S. 510, 521-22 (2003)(quoting *Strickland,* 466 U.S. at 690-91). In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.* In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id.* at 521-22.

Texas Rule of Evidence 613 (a) permits a party to impeach a witness with a prior inconsistent statement, provided that the proper predicate is laid. TEX. R. EVID. 613(a).

In this case, the complainant testified that Mr. Salazar was in Magnolia working on an outlet plug in her room, and he said, "You need to find my bag of nuts, but when you find them be gentle with them" and his step dad, William was with him and he was laughing about that. They were both laughing and I was like, 'Grow up. That's immature.'" (4 R.R. at 91). This allegation was in the Texas Department of Family and Protective Services records, where she stated, "Wires outlet plugs are messed up. He was fixing them with his step-dad. He was like you need to find my nuts. They were laughing. No[sic] funny. Frank called me. Said I

needed to find his bag of nuts, the bolts. Gross. Be careful when you find them, be gentle." Defense counsel never contacted Mr. Salazar's stepdad. If he had, his stepdad would have told him that he remembers working on an electrical issue with Francisco Salazar in the complainant's room. However, he never heard Francisco Salazar say that to the complainant. (C.R. [count 1] at 268-69).

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."

During the trial, the complainant testified that she "masturbate[d] him" "four to five times." (4 R.R. at 110). However, according to the Montgomery County Sheriff's Office's supplemental report, the complainant stated that she only gave the defendant a "'hand job' twice," and stated the first time was after her friend Allison's birthday party, and the second time was sometime in February 2008 when she was sitting on the computer chair watching the Disney Channel. (C.R. [count 1] at 270-72). Defense counsel failed to impeach the complainant regarding this inconsistency. This was important to counter the State's argument that she was being consistent. (5 R.R. at 75).

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."

During the trial, the complainant testified that she gave him a "blow job" "three to four" times. (4 R.R. at 110). However, according to the Montgomery

County Sheriff's Office's supplemental report, the complainant stated she placed his "penis in her mouth 4 or 5 times." (C.R. [count 1] at 273-74). Defense counsel failed to impeach the complainant regarding this inconsistency. This was important to counter the State's argument that she was being consistent. (5 R.R. at 75).

7. Trial counsel failed to question the complainant about her letter to Francisco Salazar on June 21, 2009.

The complainant wrote a letter to Francisco Salazar on June 21, 2009, talking about how Francisco Salazar treats her like his own child, and how she was thankful that god gave her Francisco Salazar as a stepdad and that she loves him. (C.R. [count 1] at 275-76). According to the timeline presented by the complainant, she would have written this letter after she alleges Appellant made her give him a hand job twice, and she was scared of him. Trial counsel failed to question the complainant regarding this letter.

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

> Texas Code of Criminal Procedure 38.072 provides an "outcry" exception to the general rule that hearsay statements are inadmissible. The outcry provision seeks both the fair prosecution of child abuse cases and the protection of children in the courtroom, but "carefully limited" to ensure the reliability of the testimony. The statute applies only to statements made (1) by the child against whom the offense was allegedly committed, and (2) to the first person, eighteen years of age or older, to whom the child made a statement about the offense. The outcry witness is the first adult to whom the child relates the how, when, and where of the assault. However, the statement must describe the alleged offense in some discernible way and amount to 'more than words which give a general allusion that something in the area of child abuse was going on.'

Mireles v. State, 413 S.W.3d 98, 103 (Tex. App. – San Antonio, 2013, pet. ref'd)(internal citations omitted). "There may be more than one outcry witness provided the witnesses testify about different events. 'Because of the way in which [article 38.072] is written, an outcry witness is not person-specific, but event-specific. Therefore, 'the outcry must be about different events, and not simply a repetition of the same event related by the victim to different individuals.'" *Id.* at 104 (internal citations omitted).

During the trial, defense counsel and the State, agreed Tesha Salazar, the complainant's mother was the outcry witness to the first outcry when the complainant alleged Mr. Salazar touched her breasts in July 2007. (3 R.R. at 160-61). The State further agreed that any statements she made after her second outcry, regarding the incident that allegedly occurred when she was already 14, were inadmissible. (3 R.R. at 169). However, Kayla Salazar, the complainant's sister, testified regarding what the complainant told her about the alleged acts of Mr. Salazar touching the complainant's breasts in 2007. (4 R.R. at 11). The State also introduced Kayla Salazar's testimony that her sister told her something happened a second time around January 2nd or 3rd of 2010, that they were sitting on the floor playing a game, the complainant called her to the bed, told her Appellant was doing things to her and still touching her, and was doing disgusting

things to her, and being gross. (4 R.R. at 16-17). Appellant failed to object to this testimony as hearsay.

Justin Volle was also allowed to testify that the complainant "cried out" to him, "really stressed out and scared" and told him everything, which involved her stepdad. (4 R.R. at 134). Trial counsel failed to object to this testimony as hearsay. Trial counsel also failed to object to the trial court's failure to hold a hearing outside the presence of the jury regarding the outcry testimony that was offered pursuant to the TEXAS CODE CRIM. PROC. 38.072(2)(b)(2).

9. Trial counsel denied Francisco Salazar his constitutional right to testify.

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).

"[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. The court in *Johnson v. State* held that that usual *Strickland* prejudice analysis applies and the "defendant must show a reasonable probability that the outcome of the proceeding would have been different had his attorney not precluded him from testifying." *Id.* at 239.

These acts and omissions of defense counsel contributed to the conviction of Mr. Salazar. But for counsel's errors, there is a reasonable probability the outcome would have been different. If Mr. Salazar had known that he could testify against

counsel's wishes, he would have done so. (C.R. [count 1] at 278). If he had testified, 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.

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.

It is fundamental that a criminal defense attorney must have a firm command of the facts of the case before the attorney can render reasonably affective assistance of counsel. *Ex parte Welborn*, 785 S.W.2d at 393; *Melton v. State*, 987 S.W.2d 72 (Tex. App.—Dallas 1998, no pet.). A natural consequence of this notion is that counsel has the responsibility to seek out and interview potential witnesses. *Ex parte Welborn*, 785 S.W.2d at 393; *Ex parte Duffy*, 607 S.W.2d 507, 516-17 (Tex. Crim. App. 1980).

Counsel has a responsibility to seek out and interview potential witnesses, and failure to do so is ineffective where the result is that any viable defense available to the accused is not advanced. *Doherty v. State*, 781 S.W.2d 439 (Tex. App.—Houston [1st Dist.] 1989, no pet.)(retained counsel was ineffective when he did not consult with appellant's first trial counsel, did not consult with appellant's investigator, did not talk to any of the State's witnesses prior to trial, did not subpoena any witnesses, and failed to investigate another possible suspect, and fact witnesses). Furthermore, trial counsel cannot rely on the fact that his/her client did not give

him any names of witnesses, especially if they were never requested. In fact, counsel may be required to investigate potential mitigating facts even if the defendant is "uninterested in helping". *Ex Parte Gonzales*, 204 S.W.3d 391, 400 (Tex. Crim. App. 2006)(Conchran, J., concurring).

Trial counsel is ineffective when he fails to investigate and present available mitigating evidence at punishment. *Moore v. State*, 983 S.W.2d 15, 23 (Tex. App. – Houston [14th Dist.] 1998, no pet.). Prejudice can be demonstrated by showing counsel's failure to offer mitigating evidence at the punishment phase of the defendant's trial, even if it amounts to sheer speculation that the mitigating evidence would have influenced the jury's assessment of punishment. *See Milburn v. State*, 15 S.W.3d 267, 271 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd.).

Appellant could have provided witnesses to assist the jury in better evaluating his character. Trial counsel never asked Appellant to provide a list of people who would be willing to testify on his behalf at punishment. (C.R. [count 1] at 277-78). If he had done so, Mr. Salazar would have provided him the names and contact information for the following people: Marcia Salazar-Thompson, Daniel Roesner, William Brasfield, Lori Salazar, Mario Kallergis, and Laura Ynfante. (C.R. [count 1] at 269, 278, 280, 282). Since he failed to request a list of people who would testify for Appellant, the only person that testified on his behalf was his mother, Rose Mary Brasfield. As stated in the affidavits attached to the Motion for New

Trial and Request for Evidentiary Hearing, these witnesses would have made themselves available to testify as character witnesses during sentencing. They would have testified to issues including, but not limited to, Francisco Salazar's care and love for his family and friends, his hard working character, and their opinion that he is a good person. (C.R. [count 1] at 269, 280, 282). Mr. Simonsen's failure to place a simple phone call to his family seeking character witnesses and to ask Francisco Salazar for a list of people willing to testify at the hearing is wholly unacceptable and clearly prejudiced Mr. Salazar.

C. Prejudice

To establish prejudice, applicant must show that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would be different. *Ex Parte Chandler*, 182 S.W.3d 350, 354 (Tex. Crim. App. 2005) (quoting *Strickland*, 466 U.S. 668, 694 (1984)). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Cox v. State*, 389 S.W.3d 817, 819 (Tex. Crim. App. 2012). In determining whether an appellant has been prejudiced by counsel's deficient performance, the court considers the totality of the evidence before the judge or jury. *Strickland*, 466 U.S. at 695. The court is to examine counsel's errors not as isolated incidents, but in the context of the overall record. *Fuller*, 224 S.W.3d at 836. "These were not isolated incidents; counsel's errors pervaded and prejudiced the entire defense." *Id.* In this case, there is a

reasonable probability that but for trial counsel's ten acts of ineffective assistance the result of the proceeding would have been different.

III. Trial Court Erred in Allowing Adult Pornographic Images, and a Picture of Human Feces in a Toilet Into Evidence During the Punishment Phase.

During the punishment phase of the trial, the State introduced pictures and images recovered from Appellant's cell phone. (6 R.R. at 5). Defense counsel objected that you cannot tell how they got on the cell phone because it was clear from the testimony during the guilt/innocence phase that there was a period of time when his client did not have the cell phone in his possession, and also objected that they are far more prejudicial than probative in this type of case because he was convicted of sexual abuse of a child, and none of the pictures or images involve children. (6 R.R. at 5). The State argued that, that there would be testimony that the pictures were recovered from Appellant's phone, and that the issue of when the pictures were put there "and so forth" goes to the weight of the evidence rather than the admissibility of the evidence. (6 R.R. at 5-6). The State further argued, "[t]he images for the very nature of this offense, I think it's important for the jury to consider the type of images that were on the Defendant's phone. Also, there's going to be testimony that this Defendant from time to time would show [the complaining witness] little cartoon pictures from his phone relating to doing sexual

acts." (6 R.R. at 6). The trial court overruled the objections and admitted exhibits 18-23 into evidence. (6 R.R. at 5, 7 R.R. at 19-24).

State's witness, Special Agent Stephen Santini, testified that just because the items have been deleted he has no way of knowing whether the Appellant deleted those items. (6 R.R. at 16). He also testified that he has no way of knowing how the images got on the phone. (6 R.R. at 16). He was not able to tell whether the images recovered were taken or downloaded by Appellant or whether someone else received them. (6 R.R. at 17). Defense counsel raised the same objections when the State sought to publish the exhibits to the jury, and the trial court overruled his objections. (6 R.R. at 17).

State's exhibit 18, was a male penis between the breast of a woman. (6 R.R. at 17). State's exhibit 19, appeared to be "a person tied up in the back and someone suspended from a bar or some type – it looks like they are naked." (6 R.R. at 18). State's exhibit 20, was a "male penis in a hotdog bun" with "ketchup and mustard" on it. (6 R.R. at 18). State's exhibit 21, was "human feces in a toilet bowl." (6 R.R. at 18). State's exhibit 22, was "a male penis put into a woman's shoe" with "the testicles of the male penis" in the heel part of the shoe. (6 R.R. at 18). State's exhibit 23, was a cartoon of a "snowman and snow woman in various sexual positions." (6 R.R. at 19).

Special Agent Santini testified that he did not know if these images were shown to the complainant in this case. (6 R.R. at 20). Special Agent Santini also testified that the sexual animation images are usually sent from adult to adult. (6 R.R. at 22). During the punishment phase, the complainant testified that Francisco Salazar never showed her any kind of pornographic images. (6 R.R. at 35). She testified that she saw State's exhibit 23 when she was going through his phone and being "nosey", he never showed it to her. (6 R.R. at 35).

Article 37.07, section 3(a)(1) of the code of criminal procedure governs the admissibility of evidence during the punishment stage of a non-capital criminal trial. *McGee v. State*, 233 S.W.3d 315, 318 (Tex. Crim. App. 2007). That statute provides that "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). Evidence is relevant to sentencing within the meaning of the statute if the evidence is "helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case." *Rodriguez v. State*, 203 S.W.3d 837, 842 (Tex. Crim. App. 2006). As stated in *Akin v. State*, some nexis must exist to make evidence of the defendant's use of *adult* pornography relevant in cases involving sexual offenses against children. 2015 Tex. App. LEXIS 9687 (Tex. App. – Texarkana, 2015, pet. ref'd). When evidence does not show this nexus, evidence

of adult pornography has been held irrelevant. *See Cox v. State*, 2001 WL 34392825 at *1 (Tex. App. – Corpus Christi Aug. 9, 2001, no pet.).

In this case, the evidence of adult pornographic images or cartoons and images of human feces in a toilet was irrelevant to the task before the jury, determining Mr. Salazar's punishment for continuous sexual assault of a child, indecency with a child, and sexual assault of a child. Not only were these pictures irrelevant, they were highly prejudicial in nature. In this case the Appellant's substantial rights were affected and the error had a substantial and injurious effect or influence in determining the jury's verdict.

> ISSUE FOUR RESTATED: The trial court abused its discretion in refusing to grant Appellant's request for an evidentiary hearing on the issues raised in the Motion or New Trial.

I. Standard of Review

A trial court's ruling on whether to grant a hearing on a motion for new trial is reviewed under an abuse of discretion standard. *Smith v. State*, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009). The trial judge's decision will only be reversed when it lies outside the zone of reasonable disagreement. *Id.* The trial court abuses its discretion in failing to hold an evidentiary hearing when an accused presents a motion for new trial raising matters not determinable from the record upon which the accused could be entitled to relief. *Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993).

II. There were matters not determinable from the record upon which Appellant could be entitled to relief

There were matters that were not determinable from the record upon which Appellant could be entitled to relief. The purpose of a hearing on a motion for new trial is for a defendant to develop the issues raised in the motion. *Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994). Trial counsel did not file an affidavit in response to the Motion for New Trial; therefore, the record is silent as to any explanation by trial counsel regarding his strategy, if any, and whether it was reasonable in response to the ten allegations of ineffective assistance discussed *supra*. This matter could have been developed by trial counsel's testimony at an evidentiary hearing.

Additionally, the motion for new trial was supported by affidavits showing the truth of the grounds alleged as a basis for a new trial. *See Reyes v. State*, 849 S.W.2d at 816. In this case, the complainant testified that Mr. Salazar was in Magnolia working on an outlet plug in her room, and he said, "You need to find my bag of nuts, but when you find them be gentle with them" and his step dad, William was with him and he was laughing about that. They were both laughing and I was like, 'Grow up. That's immature.'" (4 R.R. at 91). This allegation was in the Texas Department of Family and Protective Services records, where she stated, "Wires outlet plugs are messed up. He was fixing them with his step-dad. He was like you need to find my nuts. They were laughing. No[sic] funny. Frank called me.

Said I needed to find his bag of nuts, the bolts. Gross. Be careful when you find them, be gentle." Defense counsel never contacted Mr. Salazar's stepdad. If he had, his stepdad would have told him that he remembers working on an electrical issue with Francisco Salazar in the complainant's room. However, he never heard Francisco Salazar say that to the complainant. (C.R. [count 1] at 268-69). An affidavit by Mr. Salazar's stepdad was attached to the Motion for New Trial. (C.R. [count 1] at 268-69).

Furthermore, Appellant provided an affidavit, attached to his Motion for New Trial, revealing that he was denied his constitutional right to testify. 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). If Mr. Salazar had known that he could testify against counsel's wishes, he would have done so. (C.R. [count 1] at 278).

Moreover, counsel alleged that 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. Appellant provided an affidavit attached to his Motion for New Trial stating that he could have provided witnesses to assist the jury in better evaluating his character. (C.R. [count 1] at 277-78). Trial counsel never asked the Appellant to provide a list of people who would be willing to testify on his behalf at punishment. (C.R. [count 1] at 277-78). If he had done so, Mr. Salazar would have provided him the names and contact information for the following people: Marcia Salazar-Thompson, Daniel Roesner, William Brasfield, Lori Salazar, Mario Kallergis, and Laura Ynfante. (C.R. [count 1] at 269, 278, 280, 282). Since he failed to request a list of people who would testify for Francisco Salazar, the only person that testified on his behalf was his mother, Rose Mary Brasfield. As stated in the affidavits attached to the Motion for New Trial and the additional affidavits filed with the trial court, these witnesses would have made themselves available to testify as character witnesses during sentencing. They would have testified to issues including, but not limited to, Francisco Salazar's care and love for his family and friends, his hard working character, and their opinion that he is a good person. (C.R. [count 1] at 269, 280, 282, 289, 291). Mr. Simonsen's failure to place a simple phone call to his family seeking character witnesses and to

ask Francisco Salazar for a list of people willing to testify at the hearing is wholly unacceptable and clearly prejudiced Mr. Salazar.

Appellant incorporates by reference the arguments raised *supra* as to why Appellant is entitled to relief on the issues that were raised, which are outside of the record. Since there were issues not determinable from the record upon which Appellant could be entitled to relief, the trial court erred in denying Appellant's request for evidentiary hearing. *See Reyes v. State*, 849 S.W.2d at 816.

PRAYER

FOR THESE REASONS, Appellant respectfully prays that this Honorable Court reverse the trial court's judgment of conviction and remand the case for a new trial, remand to the trial court for an evidentiary hearing on the motion for new trial, and for any other appropriate remedy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because if contains 10,0005 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Brittany Carroll Lacayo
BRITTANY CARROLL LACAYO

CERTIFICATE OF SERVICE

I certify that a copy of this Brief for Appellant has been served upon the Assistant District Attorney, William J. Delmore III, Montgomery County District Attorney's Office, by electronic filing on October 16, 2017.

/s/ Brittany Carroll Lacayo
BRITTANY CARROLL LACAYO

Appendix C

Salazar's Reply to the State's Brief in the Beaumont Court of Appeals

ACCEPTED
09-17-00114-CR
NINTH COURT OF APPEALS
BEAUMONT, TEXAS
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CASE NOS. 09-07-00113-CR, 09-07-00114-CR, 09-07-00115-CR

IN THE COURT OF APPEALS
NINTH SUPREME JUDICIAL DISTRICT
BEAUMONT, TEXAS

FRANCISCO SALAZAR,
Appellant

V.

THE STATE OF TEXAS,
Appellee

On Appeal from the 9th District Court of Montgomery County, Texas
Cause No. 11-05-05000-CR (Counts 1, 2, and 3)

REPLY TO THE STATE'S APPELLATE BRIEF

I. Reply to the State's Statement of Facts.

The State points out that when Appellant was confronted, he stated, "'it was a mistake," and that Appellant left, but Tesha allowed him to return to the home after he promised "[i]t would never happen again'"(Appellee's Brief at 3-4)(quoting 3 R.R. at 164-65). However, the State misleadingly stops there and fails to reveal or acknowledge that the complainant's sister testified that Appellant grabbed the complainant's breasts on accident when they were wrestling, and it did not appear that Appellant did it on purpose. (4 R.R. at 31-32).

II. Reply to the State's argument that Appellant alleged no prejudice resulting from alleged deficiencies three through eight.

In response to Appellant's argument that he received ineffective assistance of counsel, the State did not claim that appellant received effective assistance of counsel; instead, the State argued that Appellant "alleged no prejudice resulting from alleged deficiencies three through eight." (Appellee's Brief at 9). Then the State contradicts itself by stating, appellant alleged "he was prejudiced based on the totality of the alleged deficiencies." (Appellee's Brief at 9).

In response to the third deficiency, that 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 the he did not provide a statement to the detective, Appellant argued that he was prejudiced because in his statement "he denied any inappropriate touching," and "[h]e 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." (Appellee's Brief at 22)(citing C.R. [count 1] at 265-67). Appellant explained that this was important and prejudiced Appellant because trial counsel did not "clarify the misleading testimony offered by the detective, or call Investigator Holdtich to testify once the State opened the door." (Appellee's Brief at 22). It was clearly prejudicial for the jury to be informed that Appellant did not make a statement, which is not true, and made it appear that

Appellant was hiding information or not cooperating, when in fact he *did* provide an *exculpatory* statement.

In response to the fourth deficiency, that trial counsel failed to investigate and present testimony from William Brasfield to contradict the testimony of the complainant, Appellant showed prejudice by trial counsel's failure to investigate, because if he had investigated and spoke to William Brasfield, whom he never attempted to speak with, he would have told him that he never heard the Appellant say to the complainant that she "'needed to find his bag of nuts, the bolts. Gross. Be careful when you find them, be gentle.'" (Appellant's Brief at 24).

In this case, the complainant testified that Mr. Salazar was in Magnolia working on an outlet plug in her room, and he said, "You need to find my bag of nuts, but when you find them be gentle with them" and his step dad, William was with him and he was laughing about that. They were both laughing and I was like, 'Grow up. That's immature.'" (4 R.R. at 91). This allegation was in the Texas Department of Family and Protective Services records, where she stated, "'Wires outlet plugs are messed up. He was fixing them with his step-dad. He was like you need to find my nuts. They were laughing. No[sic] funny. Frank called me. Said I needed to find his bag of nuts, the bolts. Gross. Be careful when you find them, be gentle.'" (C.R. [count 1] at 222). This information was admitted by the State

during the trial in an attempt to aid in the conviction of Appellant, otherwise, it would have been irrelevant.

Defense counsel never contacted Mr. Salazar's stepdad. If he had, his stepdad would have told him that he remembers working on an electrical issue with Francisco Salazar in the complainant's room. However, he never heard Francisco Salazar say that to the complainant. (Appellant's Brief at 24-25)(citing C.R. [count 1] at 268-69). Therefore, Appellant was prejudiced by the attorney's failure to investigate because, as explained in Appellant's brief, if he had he would have known that Appellant's stepdad could contradict the complainant's testimony, he could have used this information to impeach the complainant's testimony. (Appellant's Brief at 24-25).

In response to the fifth and sixth deficiency, that 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," and the amount of times she was forced to give him a "blow job," Appellant argued in his brief that he was prejudiced because it was important for Defense counsel to impeach the complainant regarding this inconsistency in order to counter the State's argument that she was being consistent. (Appellant's Brief at 25-26)(citing 5 R.R. at 75).

In response to the seventh deficiency, that trial counsel failed to question the complainant about her letter to Francisco Salazar on June 21, 2009, Appellant

argued in his brief that according to the timeline presented by the complainant, she would have written this letter after she alleges Appellant made her give him a hand job twice, and she was scared of him. (Appellant's Brief at 26). Appellant was prejudiced since this would have exhibited a negative light on the credibility of the complainant, her timeline, and the allegations themselves, and this information was never presented to the jury.

In response to the eighth deficiency, that trial counsel failed to object to the testimony of more than one witness as hearsay, appellant explained that he was prejudiced because Kayla Salazar, the complainant's sister, testified regarding what the complainant told her about the alleged acts of Mr. Salazar touching the complainant's breasts in 2007. (Appellant's Brief at 28)(citing 4 R.R. at 11). The State also introduced Kayla Salazar's testimony that her sister told her something happened a second time around January 2nd or 3rd of 2010, that they were sitting on the floor playing a game, the complainant called her to the bed, told her Appellant was doing things to her and still touching her, and was doing disgusting things to her, and being gross. (Appellant's testimony at 27)(citing 4 R.R. at 16-17). Trial counsel failed to object to this testimony as hearsay. (Appellant's Brief at 28).

Appellant also explained in his brief, that Appellant was prejudiced because Justin Volle was also allowed to testify that the complainant "cried out" to him, "really stressed out and scared" and told him everything, which involved her

stepdad. (Appellant's Brief at 28)(citing 4 R.R. at 134). Trial counsel failed to object to this testimony as hearsay. (Appellant's Brief at 28).

Additionally, after specifying ten specific acts showing that Appellant received ineffective assistance of counsel, and how Appellant was prejudiced by each individual act, counsel argued that "[i]n determining whether an appellant has been prejudiced by counsel's deficient performance, the court considers the totality of the evidence before the judge or jury. The court is to examine counsel's errors not as isolated incidents, but in the context of the overall record. 'These were not isolated incidents; counsel's errors pervaded and prejudiced the entire defense.' In this case, there is a reasonable probability that but for trial counsel's ten acts of ineffective assistance the result of the proceeding would have been different. (Appellee's Brief at 32-33)(internal citations omitted).

Therefore, this is not a case where the "defendant fail[ed] to make any effort to prove the prejudice prong of the *Strickland* test" as alleged by the State. (Appellee's Brief at 9)(citing *Ladd v. State*, 3 S.W.3d 547, 570 (Tex. Crim. App. 1999)). Furthermore, Appellant did not provide "non-specific conclusory allegations of prejudice" as alleged by the State. (Appellee's Brief at 9).

Additionally, the State cites to *Bone v. State*; however, the State's reliance on this case is misplaced. In *Bone*, the Court was deciding whether an appellate court may reverse a conviction on ineffective assistance of counsel when counsel's actions

or omissions may have been based upon tactical decisions, to which it answered "no." 77 S.W.3d 828, 830 (Tex. Crim. App. 2002). The State cites to *Bone*, stating "'[a] vague, inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally incompetent.'" (Appellee's Brief at 9)(citing *Id.* at 836). However, that is not the situation we have here. Appellant provided a list of specific instances of ineffective assistance and explained how this prejudiced Appellant. Additionally, there can be no valid strategical basis for trial counsel's actions or inactions in this case. *Cf. Bone*, 77 S.W.3d 832-37. To rise to the level of ineffective assistance of counsel, a reasonable lack of confidence in the outcome of the trial must exist; that is, but for trial counsel's unprofessional errors, the outcome of the proceeding would have been different. *Ex Parte Zepeda,* 819 S.W.2d 874, 876 (Tex. Crim. App. 1991). The standard does not require innocence or that the defendant would have received a lesser punishment absent counsel's errors. *See Everage v. State,* 893 S.W.2d 219, 222 (Tex. App. – Houston [1st Dist.] 1995, pet. ref'd). Rather, the issue is whether the defendant received a fair trial resulting in a verdict worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419 (1995). The defendant must only prove ineffective assistance of counsel by a preponderance of the evidence. *McFarland v. State,* 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). A single error can meet the standard. As the Fifth Circuit Court of Appeals has noted, "[S]ometimes a single error is so substantial that it alone

causes the attorney's assistance to fall below the Sixth Amendment standard." *Nero v. Blackburn,* 597 F.2d 991, 994 (5th Cir. 1979)*; see also Cooper v. State,* 769 S.W.2d 301, 305 (Tex. App. – Houston [1st Dist.] 1989, pet. ref'd); *see also Ex Parte Felton,* 815 S.W.2d 733, 736 (Tex. Crim. App. 1991)(single error was of sufficient magnitude to render trial counsel's performance ineffective). Where counsel's performance "falls below an objective standard of reasonableness under prevailing professional norms," this conduct is deficient within the meaning of the first prong of *Strickland. Vasquez v. State,* 830 S.W.2d 948, 949 (Tex. Crim. App. 1992).

In this case, but for counsel's failure to object to the State's bolstering of the complaining witnesses testimony, failure to object to the detective testifying about the Appellant's express invocation of this right to remain silent, failure to introduce the fact that appellant 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, failure to investigate and present testimony from William Brasfield to contradict the testimony of the complainant, failure to impeach the complainant with her prior inconsistent statement about the amount of times she was forced to give a "hand job," failure to question the complainant with her letter to Appellant on June 21, 2009, failure to object to the testimony of more than one outcry witness as hearsay, denying Appellant his constitutional right to testify, and failing to prepare for the punishment phase of the trial and failure to subpoena material

character witnesses to testify on Appellant's behalf, there is a reasonable probability that the result of the proceeding would be different, in that, there is a reasonable probability that a not guilty verdict would have resulted if the complainant's testimony was impeached, her credibility questioned, evidence introduced that Appellant *did* provide an exculpatory statement in contrast to the testimony provided by Investigator Holditch at Appellant's trial that Appellant did not provide a statement, Appellant's testimony that he did not commit these alleged offenses and the jury having the ability to judge his credibility based on his testimony, and the Jury would not have heard the testimony of multiple outcry witnesses.

Additionally, but for counsel's failure to prepare for the punishment phase of the trial and failure to subpoena material character witnesses to testify on Appellant's behalf there is a reasonable probability that the result of the proceeding would be different, in that, there is a reasonable probability that appellant would have received a lesser punishment if the jury would have heard Marcia Salazar-Thompson, Daniel Roesner, William Brasfield, Lori Salazar, Mario Kallergis, and Laura Ynfante testify to Francisco Salazar's care and love for his family and friends, his hard working character, and their opinion that he is a good person. (Appellant's Brief at 30-32)(C.R. [count 1] at 269, 280, 282). Prejudice can be demonstrated by showing counsel's failure to offer mitigating evidence at the

punishment phase of the defendant's trial, even if it amounts to sheer speculation that the mitigating evidence would have influenced the jury's assessment of punishment. *See Milburn v. State*, 15 S.W.3d 267, 271 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd.).

III. Reply to the State's argument that Appellant demonstrated no prejudice resulting from trial counsel denying Appellant his right to testify.

In its brief, the State argues, "appellant demonstrated no prejudice resulting from trial counsel allegedly denying appellant his right to testify." (Appellee's Brief at 10). In support of its argument, the State cites to *Smith v. State*, 286 S.W.3d 333 (Tex. Crim. App. 2009). In *Smith*, Appellant filed a motion for new trial, alleging that trial counsel rendered ineffective assistance, in part, by failing to inform appellant of his right to testify at the hearing on the State's motion to adjudicate. *Id.* at 336. In *Smith*, the trial court found that appellant committed three of the four violations alleged in the State's motion to adjudicate. *Id.* at 342. Since one sufficient ground for revocation would support the trial court's order revoking community supervision, appellant had to show reasonable grounds exist to overturn *each* of the trial court's three findings of true that led to his adjudication. *Id.* Appellant's motion and affidavit only rebutted his probation supervisor's statements concerning the first ground of revocation. *Id.* Therefore, the court found that even if taken as true, the proffered evidence might vitiate appellant's revocation based

on the first allegation, but the other two grounds remained sufficient to support the trial court's decision to proceed to an adjudication of appellant's guilt. *Id.* at 343.

Mr. Salazar's declaration pursuant to Civil Practice and Remedies Code Section 132.001, stated, in pertinent part,

> 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 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[redacted] inappropriately. I would have testified that E[redacted] 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 she wanted to do.

(C.R. [count 1] at 278).

The State argues, that that by denying that he ever intentionally touched Elisa inappropriately, he did not refute the charged conduct. (Appellee's Brief at 12 n.9). In Appellant's case, he was charged with Count 1: Continuous Sexual Abuse of a Child, Count 2: Indecency with a Child Sexual Contact, and Count 3: Sexual Assault of a Child. (C.R. [count 1] 11-12). By denying that he ever intentionally (which is what these offenses require) touched Elisa inappropriately, he clearly denied each of these accusations against him. All of the evidence was derived from testimony offered by the complainant, or statements regarding what the complainant told someone. The only evidence the State argues in support of appellant's convictions, other than the complainant's own accusations, is the State's

claim of "appellant's own incriminating actions and statements." (Appellee's Brief at 11). The State failed to provide any citations to the record, or any explanation of its reference to "appellant's own incriminating actions," and in support of its claim that Appellant made incriminating statements, the State claims that the "jury heard evidence of appellant's acknowledgement of guilt from two other witnesses other than the complainant." (Appellee's Brief at 11 n.8). In support of this, the State asserts,

> Tesha testified that she confronted the appellant in 2007 and asked him. "Did you touch her? Did you touch [E.G.]? to which the appellant replied, "I'm sorry" and "it was a mistake" (3 R.R. at 164). The appellant then asked Tesha if she wanted him to leave and, when she responded affirmatively, he left (3 R.R. at 164). Later, the appellant again told Tesha "[t]hat it was a mistake," "[i]t would never happen again," and that he "was really sorry" (3 C.R. 164). The appellant also declared to Tesha that "[i]t only happened once" (3 C.R. 208). Even the appellant's daughter, Kayla, who openly sided with the appellant during the trial, admitted that when Tesha confronted the appellant about molesting the complainant, the appellant tearfully said he was sorry and promised to never do it again." (4 R.R. at 14).

(Appellee's Brief at 11-12 n.8). However, the State misleadingly stops there and fails to reveal or acknowledge that the complainant's sister testified that when appellant was confronted, they were discussing Appellant touching the complainant's breasts, and that Appellant grabbed the complainant's breasts on accident when they were wrestling, and it did not appear that Appellant did it on purpose. (4 R.R. at 31-32). That is what Appellant was referring to when he was

apologizing to Tesha and said he made a "mistake." (4 R.R. at 32). That is why Appellant said he never intentionally touched Elisa inappropriately in his declaration attached to the Motion for New Trial. Moreover, in the investigator's report, he stated that when he interviewed Salazar, "[h]e denied any inappropriate touching. He said years ago he and his children would wrestle on the floor but once he noticed she was developing and [sic] he stopped touching her at all." (C.R. [count 1] 267). Additionally, as stated in *Smith*, cited by the State, an "affidavit need not establish a *prima facie* case, or even 'reflect every component legally required to establish relief.' '[I]t is sufficient if a fair reading of it gives rise to reasonable grounds in support of the claim.'" *Smith*, 286 S.W.3d at 339.

The State also argues, "appellant's proferred denial of guilt – stating that he "never intentionally touched [E.G.] inappropriately" (1 C.R. 278) – would have been redundant of his earlier plea of not guilty." (Appellee's Brief at 12). 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). This is not the same as Mr. Salazar placing himself on the stand, to have his credibility evaluated by the jury, and stating that he is innocent of these charges.

IV. Reply to the State's argument that trial counsel's failure to present relatively weak evidence in mitigation of punishment did not prejudice the appellant.

The State argued in its brief, that the testimony that should have been offered in Appellant's punishment phase, "would merely have been cumulative of the evidence the jury heard" and "[t]he fact that five more people could have testified to the appellant's good and fatherly nature is not significant enough to tip the scales in his favor when weighed against all the evidence against him that warranted a longer sentence." (Appellee's Brief at 15-16). However, trial counsel is ineffective when he fails to investigate and present available mitigating evidence at punishment. *Moore v. State*, 983 S.W.2d 15, 23 (Tex. App. – Houston [14th Dist.] 1998, no pet.). Prejudice can be demonstrated by showing counsel's failure to offer mitigating evidence at the punishment phase of the defendant's trial, even if it amounts to sheer speculation that the mitigating evidence would have influenced the jury's assessment of punishment. *See Milburn v. State*, 15 S.W.3d 267, 271 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd.).

V. Reply to the State's argument that trial counsel did not perform deficiently by failing to object to Dr. Thompson's testimony.

The State while appearing to concede that the testimony by Dr. Thompson was inadmissible, attempts to claim that Appellant opened the door to such testimony by cross-examining the State's witness. (Appellee's Brief at 18-21). The State, asserts "as in *Herrera*, appellant was the first to elicit testimony from Dr. Thompson regarding the occurrence of false allegations of sexual abuse, thereby opening the

door for the State to have Dr. Thompson clarify that that the incidence of such false allegations is relatively low." (Appellee's Brief at 19)(citing *Herrera v. State*, No. 01-08-00615-CR, 2009 WL 1813093, at *5 (Tex. App. – Houston [1st Dist.] June 25, 2009, no pet.)(mem. op., not designated for publication). However, this case is not the situation that was presented in *Herrera*, an unpublished case of no precedential value, which is the State's chief support for its argument. *See Herrera*, 2009 WL 1813093, at *5. In *Herrera*, Appellant's trial counsel "posited that a hypothetical child, with a description nearly identical to the complainant's, fabricated his report of sexual abuse." *Id.* at 13. Furthermore, as stated by the Texas Court of Criminal Appeals in *Schutz v. State*, "it is clear that 'general' testimony asserting manipulation or fantasy, which is admissible, does not open the door to inadmissible testimony that specific allegations are not the result of manipulation or fantasy." 957 S.W.2d 52 (Tex. Crim. App. 1997). Similarly, in this case, general testimony that there are false allegations of sexual abuse, does not open the door to inadmissible testimony that, as the prosecutor argued at closing,

> [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 State argued that its closing argument regarding this matter was "brief;" however, this is only an attempt to minimize the enormous prejudicial effect of this information not only coming from the State's expert witness, but then argued by the State at closing. (Appellee's Brief at 18).

VI. Reply to the State's argument that trial counsel did not perform deficiently by failing to object to Gannuci's testimony regarding Appellant's noncustodial silence.

The State argues, that his statement was made "pre-*Miranda*" and therefore, his silence was not protected by the Fifth Amendment and was admissible. (Appellee's Brief at 22). The State asked the detective if he spoke with the suspect and the detective stated that he did. (3 R.R. at 125). The State asked the detective, if he made 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). It is clear when Mr. Salazar informed Detective Gannucci that he would not provide a statement he was aware of his *Miranda* right

to refuse to make a statement. Therefore, this was post-*Miranda*[1], and his attorney told him to invoke his right, which he did.

"Use of a defendant's silence for either substantive or impeachment value is constitutionally prohibited; it is fundamentally unfair to simultaneously afford a suspect a constitutional right to silence following his receipt of his *Miranda* warnings and then allow the implications of that silence to be used against him." *Friend v. Texas*, 473 S.W.3d 470, 478-79 (Tex. App. – Houston [1st Dist.] 2015, pet. ref'd)(citing *Doyle v. Ohio*, 426 U.S. 610, 619 (1976)). "Silence 'does not mean only muteness; it includes the statement of a desire to remain silent.'" *Id*. at 479 (citing *Wainwright v. Greenfield*, 474 U.S. 284, 295 n. 13 (1986)).

"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. In other words, the probable collateral implication of a defendant's invocation of his right to remain silent is that he is guilty." *Id.* 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. Trial counsel provided ineffective assistance by failing to object to this testimony.

[1] It has never been held that *Miranda* rights have to be provided from a police officer to trigger an individual's rights under the Fifth Amendment.

VII. Reply to State's assertion that appellant was not entitled to an out-of-time motion for new trial.

The State concedes that the Court of Criminal Appeals has previously held that granting an out-of-time appeal also permitted an out-of-time motion for new trial." (Appellee's Brief at 23)(citing *Mestas v. State*, 214 S.W.3d 1, 4 (Tex. Crim. App. 2007). However, the State tries to distinguish this case from *Mestas* by arguing that unlike in *Mestas*, a motion for new trial was not an unforeseen situation that should have been covered by the granting of an out-of time appeal, arguing that the trial court recommending denying a motion for new trial. (Appellee's Brief at 24). However, in this case, the Texas Court of Criminal Appeals never denied Appellant the right to file a motion for new trial. (C.R. [count 1] at 191-92). Instead, the Court found that "Appellant is entitled to the opportunity file an out-of-time appeal of the judgment of conviction . . . 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." *Salazar v. State*, Nos. 09-13-00341, 09-13-00342-CR, 09-13-00343-CR, 2013 WL 5428282 (Tex. App. – Beaumont, Sept. 25, 2013, no pet.). The Court, which was aware that Appellant wished to file a motion for new trial stated, "[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.* (emphasis added). The Court's mandate was issued on April 17, 2017. (C.R. [count 1] at 198). Appellant filed a Motion for New Trial and Request for Evidentiary

Hearing on May 16, 2017. (C.R. [count 1] at 210). Since his Motion for New Trial was filed within the thirty-day timetable of the date the sentence was imposed (the date the Court of Criminal's Appeal's Mandate issued), his motion was timely. See Tex. R. App. P. 21.4(a).

VIII. Reply to the State's argument that any error in admitting a picture of a male penis between the breast of a woman, a picture of a naked person tied up in the back and a naked individual suspended from a bar, a picture of male penis in a hotdog bun with ketchup and mustard, a picture of human feces in a toilet bowl, a picture of a male penis put into a woman's shoe with the testicles of the male penis in the heel part of the shoe, and a cartoon of a snowman and snow woman in various sexual positions, was harmless.

The State cites to *Akin* and *Cox*, unpublished cases of no binding precedential value, for its assertion that "[o]ther appellate courts have held the erroneous admission of photography to be harmless error." (Appellee's Brief at 29)(citing *Akin v. State*, 06-14-00178-CR, 2015 WL 5439352, at *6-7 (Tex. App. – Texarkana Sept. 16, 2015, pet.ref'd)(mem. op., not designated for publication) and *Cox v. State*, Nos. 13-00-184-CR, 13-00-185-CR, 2001 WL 34392825, at *2-7 (Tex. App. – Corpus Christi, Aug. 9, 2001, no pet.)(not designated for publication)). However, these cases are distinguishable, in *Akins*, the Court held,

> The record in this case demonstrates that the error is harmless. First, the exhibits erroneously admitted consisted of two pages reflecting internet search history and photographs of two pornographic websites. Essentially the same facts were shown by the testimony of Akin's ex-wife, Misti. She testified that, in the last years of their marriage, Akin was watching aggressive and vulgar pornography, including wife-raping video recordings, forced sex, and simulated

> rape. Misti also testified that Akin viewed pornography many times every day. Barker testified that over 50,000 pornographic images, videos, and websites were recovered from Akin's laptop. None of this testimony is challenged on appeal.

Akins, 2015 WL 5439354, at *20. Similarly, in *Cox. v. State*, the Court found no harm from the erroneous admission of child and adult pornography since,

> Charlotte, the mother of one of the victims, testified she dated Cox until the accusations against him were made. She testified without objection that Cox had told her he was a member of a nudist colony. She said that he did not walk around the house nude in her presence, but that she and he had bathed in his hot tub without clothes. She also testified, without objection, that Cox had a screensaver on his computer consisting of naked boys running around with cows in a field. . . . Later, after the victims had testified, she testified again, indicating that her son had said that on several occasions he had seen Cox on the internet looking at child porn sites and adult porn sites.

Cox, 2001 WL 34392825, at *17-18.

In this case, the State argued in its brief, that "previously admitted, unobjected [sic] evidence showed that the appellant possessed images that had a similar or worse prejudicial effect than the admission of the images during the punishment phase." (Appellee's Brief at 6). Later on the State explained that the image they are referring to is the "one image of a nude adult on his phone," which was an image of his own wife, Tesha in the shower. (Appellee's Brief at 29-30). (6 R.R. at 28)(Tesha and Appellant were married). This would not have a similar or worse prejudicial effect than the admission of a picture of a male penis between the breast of a woman, a picture of a naked person tied up in the back and a naked individual

suspended from a bar, a picture of male penis in a hotdog bun with ketchup and mustard, a picture of human feces in a toilet bowl, a picture of a male penis put into a woman's shoe with the testicles of the male penis in the heel part of the shoe, and a cartoon of a snowman and snow woman in various sexual positions, as alleged by the State. (Appellee's Brief at 6)(6 R.R. at 17-19).

IX. Conclusion and Prayer

Appellant respectfully prays that this Honorable Court reverse the trial court's judgment of conviction and remand the case for a new trial, remand to the trial court for an evidentiary hearing on the motion for new trial, and for any other appropriate remedy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because if contains 5,390 words.

/s/ Brittany Carroll Lacayo
BRITTANY CARROLL LACAYO

CERTIFICATE OF SERVICE

I certify that a copy of this Brief for Appellant has been served upon the Montgomery County District Attorney's Office, by electronic filing on February 1, 2018.

/s/ Brittany Carroll Lacayo
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