No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2018

Fidencio Valdez
Petitioner

v.

The State of Texas
Respondent

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

Appendix

Exhibit	**ITEM**

A. The unpublished Order of the Court of Criminal Appeals dated October 3, 2018.

B. Initial *habeas corpus* application, filed July 28, 2017.

C. Subsequent *habeas corpus* application filed July 6, 2018.

D. Trial counsel's affidavit dated January 19, 2018.

Exhibit "A"

Unpublished Order of the Court of Criminal Appeals
Dated October 3, 2018.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

WR-85,941-02

EX PARTE FIDENCIO VALDEZ

ON APPLICATION FOR WRIT OF HABEAS CORPUS CAUSE NO. 20120d00749 IN THE 384TH DISTRICT COURT EL PASO COUNTY

***Per curiam*.**

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

On May 30, 2014, Applicant was convicted of the offense of capital murder. *See* TEX. PENAL CODE ANN. § 19.03. The jury answered the special issues submitted under Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Valdez v. State*, No. AP-77,042 (Tex. Crim. App. June 20, 2018) (not designated for publication).

His initial post-conviction application for a writ of habeas corpus was filed in the trial court on July 28, 2017, and is currently pending there. *See* TEX. CODE CRIM. PROC. ANN. Art. 11.071. This Court received Applicant's instant, subsequent post-conviction application for writ of habeas corpus on July 23, 2018.

Applicant presents three allegations in the instant subsequent application. First, Applicant asserts that he is entitled to a new trial under *McCoy v. Louisiana*, 138 S. Ct. 1500 (May 14, 2018), "because [his] trial counsel admitted Applicant's guilt, despite knowing that Applicant denied involvement in the murder and had provided evidence of an alibi, and that Applicant objected to the admission of guilt" (Claim I). Second, Applicant alleges that "trial counsel failed to subject the prosecution's case to meaningful adversarial testing" because counsel "admitt[ed] Applicant's guilt, despite knowing that Applicant denied involvement in the murder and had provided evidence of an alibi" (Claim II). Third, Applicant contends he "was denied the effective assistance of counsel when trial counsel admitted Applicant's guilt, despite knowing that Applicant denied involvement in the murder and had provided evidence of an alibi" (Claim III).

We have reviewed the subsequent application and find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the subsequent application as an abuse of the writ without considering the merits of the claims.

IT IS SO ORDERED THIS THE 3RD DAY OF OCTOBER, 2018.

Do Not Publish

Exhibit “B”

Initial *habeas corpus* application, filed July 28, 2017.

Filed 7/28/2017 9:11 PM
NORMA FAVELA BARCELEAU
District Clerk
El Paso County
20120D00749

No. 20120D00749
CCA No. WR-85,941-01

Ex parte Fidencio Valdez

In the 384th District Court

El Paso County, Texas

Original Application for Post-Conviction Writ of *Habeas Corpus* Pursuant to Article 11.071, C.Cr.P.

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Issues Presented

1. **Applicant Was Denied the Effective Assistance of Counsel by His Attorneys' Failure to Put the Testimony of Israel Gonzalez Before the Jury to Testify That the Passenger Had Exited the Vehicle and Fired at Least One Shot at the Car Behind**.

2. **The State Violated *Brady v. Maryland* When it Failed to Provide the Defense with Evidence Within its Possession Showing That Veronica Cera Was a Long-Time Participant in the Gang Activities of the Barrio Azteca Gang Even to the Point of Handling the Finances for the Gang**.

3. **The State Denied Applicant Due Process by Presenting the Jury with False and Incomplete Testimony Regarding the Role of its Star Witness, Veronica Cera, in the Criminal Gang to Which Applicant Belonged When the State Was Aware of Evidence Which Showed Cera to be a High Placed Officer or Member, and Failed to Disclose Those Facts to the Jury.**

4. **The State Denied Applicant Due Process by Presenting False and Incomplete Testimony Regarding the Commission of the Offense When the State Was Aware of Contradictory Evidence It Failed to Disclose to the Jury.**

Issues Presented
(CONT)

5. **Applicant Was Denied the Effective Assistance of Counsel by Trial Counsel's Failure to Properly Cross Examine Samuel Herrera Regarding Any Agreement He Made with the State.**

6. **Applicant Was Denied Effective Assistance of Counsel by His Attorneys' Failure to Request an Accomplice Witness Instruction Regarding Veronica Cera Based On Samuel Herrera's Testimony.**

7. **Applicant Was Denied the Effective Assistance of Counsel by His Trial Attorneys' Failure to Investigate and Discover Evidence in Mitigation of the Death Penalty**.

No. 20120D00749
CCA No. WR-85,941-01

EX PARTE	§	IN THE DISTRICT COURT
	§	384th JUDICIAL DISTRICT
FIDENCIO VALDEZ	§	EL PASO COUNTY, TEXAS

Original Application for Post-Conviction Writ of *Habeas Corpus* Pursuant to Article 11.071, C.Cr.P.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Fidencio Valdez, Applicant in the above styled and numbered cause, by and through his undersigned attorneys, Angela J. Moore, John G. Jasuta, and David A. Schulman, pursuant to Article 11.071, C.Cr.P., and files this application for writ of *habeas corpus* in the above styled and numbered cause, and in support of such would respectfully show the Court as follows:

Illegal Confinement and Restraint

Applicant is presently confined and restrained of his liberty by the State of Texas, pursuant to a judgment and

sentence in the instant cause. Copies of the indictment, judgment and sentence are not attached hereto, but are available as records of the Court. See Article 11.14, C.Cr.P.

Procedural History

On February 8, 2012, Applicant was charged by indictment with the December 10, 2010, murder of Julio Barrios, while "committing and attempting to commit the offense of robbery" (CR P. 6). On May 30, 2014, he was convicted of capital murder (RR Vol. 52, PP. 77-78). At the punishment phase of trial, the jury answered the first special issue "yes" and the second special issue "no" (RR Vol. 56, P. 156). On June 5, 2014, the trial court assessed a sentence imposing the death penalty on Count 1 based on the jury verdict (RR Vol. 57, PP. 5-6). Notice of appeal was given on July 3, 2014 (CR Vol. 7, 2617). On July 7, 2014, Appellant filed a motion for new trial (CR 2620), which was overruled by operation of law. Appeal in Court of Criminal Appeals case number AP-77,042 remains pending.

Ground for *Habeas Corpus* Relief Number One Restated

Applicant Was Denied the Effective Assistance of Counsel by His Attorneys' Failure to Put the Testimony of Israel Gonzalez Before the Jury to Testify That the Passenger Had Exited the Vehicle and Fired at Least One Shot at the Car Behind.

Facts Relevant to Ground Number One

Israel Gonzalez was an eyewitness to the offense committed by Applicant and Cera. He gave a statement to the police in which he stated that the passenger of the front automobile got out of the car and fired a pistol at the car in the rear (see Exhibit "A" attached hereto). Cera stated that she was the passenger in that car but denied leaving the vehicle or firing a shot as Gonzalez saw.

Trial counsel had the Gonzalez statement. Cera's testimony put Applicant as the sole actor in the commission of both the robbery and the murder, but Israel Gonzalez stated that he saw the passenger get out of the car and fire at the car behind. This would have established Cera's

participation in the crimes to the extent that some form of accomplice witness testimony would have been required.

Had Gonzalez' testimony been presented to the jury, that evidence would have required corroboration of Cera's testimony, and there was no such corroboration possible as to the robbery for sure, and thus the capital nature of the murder, given that only Applicant and Cera were in the car with Barrios. The failure to put on the Gonzalez evidence was disastrous. The outcome of the trial would, of necessity, have been altered had Cera been exposed as the accomplice she was.

Argument & Authorities - Ground Number One

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland v. Washington, 466 U.S. 668, 686 (1984).

The Sixth Amendment to the United States Constitution and Article I, Section 10, of the Texas Constitution require that a criminal defendant be afforded effective assistance of

counsel. The proper standard for reviewing the adequacy of representation is articulated in ***Strickland***, and adopted by the Court of Criminal Appeals in ***Hernandez v. State***, 726 S.W.2d 53, 57 (Tex.Cr.App. 1986). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

Strickland requires a two-step analysis. *First*, the reviewing court must decide whether trial counsel's performance failed to constitute reasonably effective assistance. Put another way, the question is whether the attorney's representation fell below an objective standard of reasonableness under prevailing professional norms. ***Strickland***, 466 U.S. at 686, ***Hernandez***, 726 S.W.2d at 57. *Second*, if the attorney's performance did fall below the accepted standard, it must then be decided whether there is a reasonable probability that the result of the trial would have

been different, but for counsel's deficient performance. ***Strickland*** defines a reasonable probability as a probability sufficient to undermine the confidence in the outcome. ***Strickland***, 466 U.S., at 694; ***Ex parte Overton***, 444 S.W.3d 632, 640 (Tex.Cr.App. 2014); ***Ex parte Amezquita***, 223 S.W.3d 363, 366 (Tex.Cr.App. 2006); ***Ex parte Gonzales***, 204 S.W.3d 391, 393 (Tex.Cr.App. 2006).

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. ***Ex parte Welborn***, 785 S.W.2d 391, 393 (Tex.Cr.App. 1990); ***Ex parte Duffy***, 607 S.W.2d 507, 526 (Tex.Cr.App. 1980). Counsel has a duty to bring to bear such skill and knowledge as will render the trial a "reliable adversarial testing process." ***Strickland***, 466 U.S. at 688. The presumption of reasonable trial strategy does not attach unless and until counsel has conducted the necessary factual

and legal investigation. ***Ex parte Brewer***, 50 S.W.3d 492, 493 (Tex.Cr.App. 2001).

Counsel's function is to make the adversarial testing process work in the particular case. To do so, counsel must necessarily conduct an independent legal and factual investigation sufficient to enable him or her to have a firm command of the case and the relationship between the facts and each element of the offense, and the law applying to those relationships, to permit him or her to discharge his or her duty to provide competent counsel. ***Strickland***, 466 U.S. at 690; ***Ex parte Briggs***, 187 S.W.3d 458, 467 (Tex.Cr.App. 2005).

Under ***Strickland*** and its progeny, a criminal defense lawyer must have a firm command of the facts of the case as well as governing law before he can render reasonably effective assistance of counsel. ***Brewer***, 50 S.W.3d at 493; ***Jackson v. State***, 766 S.W.2d 504, 509 (Tex.Cr.App. 1985); ***Ex parte Ybarra***, 629 S.W.2d 943, 946 (Tex.Cr.App. 1982);

Duffy, 607 S.W.2d 507 at 516. A natural consequence of this notion is that counsel has the responsibility to seek out and interview potential witnesses. ***McFarland v. State***, 928 S.W.2d 482, 501 (Tex.Cr.App. 1996); ***Duffy***, 607 S.W.2d at 517.

In ***Brown v. Sternes***, 304 F.3d 677, 693-698 (7th Cir. 2002), the Circuit Court held that "attorneys have an obligation to explore all readily available sources of evidence that might benefit their client . . .." The Court concluded that counsel who had access to defendant's medical records "had a professional obligation to do an in-depth investigation into their client's deep-seated psychiatric problems . . .," and that the failure to do so was ineffective assistance of counsel. See also ***Bouchillon v. Collins***, 907 F.2d 589, 595-597 (5th Cir. 1990), in which the Fifth Circuit held that a trial attorney who failed to do any investigation into client's medical and mental history after he had been informed of prior hospitalizations and who may have persuaded client to plead guilty and

accept plea offer was constitutionally ineffective for failing to make adequate investigation when it did not appear that defendant had any other available defense.

Applicant acknowledges that the decision whether to present witnesses is largely a matter of trial strategy, and that an attorney's decision not to present particular witnesses at the trial may be a strategically sound decision if the attorney bases it on a determination that the testimony of the witnesses may be harmful, rather than helpful, to the defendant. Applicant asserts, however, that a failure to uncover and present particular evidence cannot be justified as a tactical decision when defense counsel has not conducted a thorough investigation of the facts pertaining to that particular issue. See, e.g., ***Wiggins v. Smith***, 539 U.S. 510, 521 (2003).

Deficient Performance

In the case at bar counsel was in possession of a police report showing Israel Gonzalez' statement to them and its

contents. Those contents revealed that Gonzalez saw the passenger in the automobile get out of the car and fire a shot at the Chrysler Sebring in which the victim had arrived. While the State did not call Gonzalez to testify, violating his rights to due process and a fair trial as explained elsewhere herein, trial counsel should have. The failure to do so deprived him of the support to ask for an accomplice witness charge as to the murder because, if the jury were to believe Gonzalez' statement that Cera did get out of the car and fire a weapon in support of Applicant's actions, it would have necessarily believed that she was a party to the murder and/or the robbery of Barrios.

That trial counsel failed in this regard is indisputable. The police report of Gonzalez' statement exists and existed long before trial. Incredibly neither defense counsel nor their representative spoke with Gonzalez (see Exhibit "B" hereto). Had they done so they would have seen, as explained by Gonzalez in his affidavit, that he would have testified

consistent with his statement to the police. He would have testified before the jury that the passenger, admitted by Veronica Cera to be herself, left the car and fired at the trailing car, an action which could only be seen as taken in furtherance of the criminal acts.

Trial counsel should have been aware of the law of accomplice witnesses. Even if schooled in the law of accomplice witnesses, however, their lack of action demonstrates a deficiency of conduct informed by their lack of awareness through investigation. What they were unaware of, apparently, was that Israel Gonzalez' statement was clear and convincing evidence from an eyewitness that Cera had acted in support of criminal actions for which Applicant was on trial.

An accomplice participates before, during, or after the commission of the offense and acts with the culpable mental state required for the offense. ***Paredes v. State***, 129 S.W.3d 530, 536 (Tex.Cr.App. 2004). An accomplice must commit an

affirmative act that promotes commission of the offense. ***Paredes***, 129 S.W.3d at 536. As a matter of law, an accomplice is one who is susceptible to prosecution for the same offense as the defendant or for a lesser-included offense. ***Paredes***, 129 S.W.3d at 536.

The State tried to show that Cera was merely present during the commission of the offenses, having loaned her car to her boyfriend without any inkling of what was to occur. Of course, mere presence during commission of the offense does not make one an accomplice. ***Solomon v. State***, 49 S.W.3d 356, 361 (Tex.Cr.App. 2001). The evidence was clear that Cera took steps to conceal the killing by cleaning her car but failure to disclose or even active concealment of a known offense also does not make one an accomplice. ***Medina v. State***, 7 S.W.3d 633, 641 (Tex.Cr.App. 1999); ***Blake v. State***, 971 S.W.2d 451, 454 (Tex.Cr.App. 1998). Clearly, Cera was never charged with an offense, despite her testimony in this case as well as her incriminating statements in the Cornejo

case. The question for a court, however, is not whether the alleged accomplice has been charged, but whether there is sufficient evidence in the record to support a charge. ***Blake***, 971 S.W.2d at 455.

Where the evidence clearly shows that a witness is an accomplice as a matter of law, the trial court has a duty to instruct the jury to consider the witness an accomplice. ***Paredes***, 129 S.W.3d at 536; ***Blake***, 971 S.W.2d at 455. If the evidence is unclear, the trial court must provide a definition of "accomplice" and instruct the jury to consider the witness an accomplice if it finds the witness meets the definition provided. ***Paredes***, 129 S.W.3d at 536.

Had the evidence of Israel Gonzalez been presented to the jury, that jury would have had to have been charged on the law of accomplice witnesses. His statements clearly put the passenger, who Cera claimed to be, out of the car and firing a weapon at the car behind hers while Applicant dragged Barrios out of the car. Plainly there was no reason for the

passenger to be firing a weapon at the car behind except to support the on-going criminal activity. At the very least the trial court would have been required to define the terms for the jury and instruct them to consider whether Cera met that definition. ***Paredes***, 129 S.W.3d at 536. The failure to put Israel Gonzalez' evidence before the jury was plainly deficient conduct.

Confidence in the Outcome is Undermined

Strickland also requires a showing that the deficient performance prejudiced the defense. ***Strickland***, 466 U.S. at 687; ***Jackson v. State***, 973 S.W.2d 954, 956 (Tex.Cr.App. 1999). When addressing the second prong of ***Strickland***, a court must examine counsel's errors not as isolated incidents, but in the context of the overall record. ***Ex parte Menchaca***, 854 S.W.2d 128, 133 (Tex.Cr.App. 1993). A harm analysis regarding an ineffective assistance of counsel claim, of course, involves error of constitutional dimension. ***Bone v. State***, 77 S.W.3d 828, 833 (Tex.Cr.App. 2002); see also Tex.R.App.Pro.

44.2(a). An applicant for *habeas* relief must, therefore, show that this deficient performance prejudiced his defense. ***Strickland***, 466 U.S. at 687. As the Court of Criminal Appeals explained in ***Mitchell v. State***, 68 S.W.3d 640, 642 (Tex.Cr.App. 2002), "[t]his means that the appellant must show a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different." See also ***Bone***, 77 S.W.3d at 833. A "reasonable probability" is one sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 687. An appellate court's examination considers "everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case." ***Motilla v. State***, 78 S.W.3d 352, 355 (Tex.Cr.App. 2002) (quoting ***Morales v. State***, 32 S.W.3d 862, 867 (Tex.Cr.App. 2000)).

When these tests are applied to counsel's performance and the case at bar harm is evident. The only evidence of Cera's participation, or lack thereof, in the crime came from her. To say that her portrayal was self-serving is an understatement, especially when it is understood that her true identity as revealed in the Cornejo trial was not revealed to this jury.

Cera was portrayed as the girlfriend who loaned her car to her ne'er do well boyfriend and who happened to go along for the ride, never suspecting that crime was afoot. In reality, she was the Barrio Azteca bookkeeper, paymaster and a trusted drug and money courier. To show from a disinterested witness that she got out of the vehicle and fired a weapon at the Chrysler Sebring would have shown the truth about the State's star witness, a truth the State went to lengths to conceal.

The harm in counsels' failure to recognize the evidence they had in their possession and use it to impeach the only

witness to the capital murder is palpable. There is nothing within the entirety of the record which could have supported Cera's testimony as to what happened in that car thus demonstrating the harm beyond doubt.

Conclusion - Ground Number One

Applicant was denied the effective assistance of counsel by his attorneys' failure to recognize and utilize crucial evidence within their possession which would have pierced the veil of disguise used by the State to cloak their witness from the bright light of truth and reality. This failure allowed the State to portray the only witness to the capital murder as a girlfriend without any interest in or knowledge of the crimes committed when, as they would show less than a year later in another trial of a Barrio Azteca gang member, she was, in reality, the paymaster and an important person in or to the gang. With Israel Gonzalez' evidence she would have been completely exposed to this jury as an active shooter and an

accomplice as a matter of fact. Ineffective assistance of counsel, in both prongs, is evident.

Ground for *Habeas Corpus* Relief Number Two Restated

The State Violated *Brady v. Maryland* When it Failed to Provide the Defense with Evidence Within its Possession Showing That Veronica Cera Was a Long-Time Participant in the Gang Activities of the Barrio Azteca Gang Even to the Point of Handling the Finances for the Gang.

Facts Relevant to Ground Number Two

Applicant adopts the facts as set out generally herein and as set out in Ground for *Habeas Corpus* Relief Number Two. Additional facts will be stated as needed.

Argument & Authorities - Ground Number Two

It is entirely clear that at the trial in this cause, held beginning on May 28, 2014, the State presented evidence of Veronica Cera's knowledge of Applicant and characterized that knowledge as arising from their dating relationship (RR Vol. 50, PP. 78-80). The witness Cera stated that she was working in a bar at the time (RR Vol. 50, P. 81). No mention was made of any affiliation of the witness with the criminal

gang, the Barrio Azteca gang, to which Applicant belonged, at the time she dated Applicant or at any other time.

However, in the trial of another Bario Azteca member, Juan Cornejo,[1] held on January 7, 2015, Cera testified differently, portraying herself in an entirely different manner (see Excerpt of Volume 9 of the trial of Juan Cornejo, attached as Exhibit "C" hereto). No longer was she the girlfriend who was simply along for the ride but, rather, a major figure within the criminal gang's leadership.

Cera's testimony at Cornejo's trial described her activities within the gang as a bit more than as a casual observer:

> Q. (BY MS. TARANGO) Okay. And was there a time when you were aware of and in charge of, I guess, the -- I guess the books for that box?
>
> A. Yes. I would make the -- I would do all the math and write down all the names and the money that was being sent upstate and to the other gang members that were out here. I would write down the receipts.
>
> Q. Okay. So you would do the receipts?
>
> A. Yes, ma'am.

[1] ***State v. Juan Cornejo***, Cause No. 2010D05090, Court of Appeals No. 08-15-00039-CR, appeal still pending.

Q. So you had to account for this money; is that right?

A. Yes, ma'am.

Q. And when you say "upstate," what do you mean?

A. To other gang members in prison.

Q. So is money collected from drug deals in town by the Aztecas and then collected in the box?

A. Yes, ma'am.

Q. And then the money from the box goes --

* * * * *

Q. (BY MS. TARANGO) What happens to the money that is then collected and in the box?

A. It's given to the lieutenants and to the sergeants. And then some of the money is put away for lawyer fees for other gang members. And some of the money is given to other family members of the gang members.

Q. And you were in charge, for a while, of keeping the receipts?

* * * * *

Q. (BY MS. TARANGO) Okay. How long -- how long were you involved with the -- with keeping track of the money in and out of the box?

A. When we had the box till. It was given to Silent.

Q. And when did you have the box?

A. Around that time, back and forth.

Q. Back and forth?

A. Yes, ma'am.

(RR Vol. 9, PP. 78-80).

In short, in the Cornejo case, the State presented evidence to bolster the veracity of the evidence Cera was giving by showing that jury that they could believe her because she was high up in the leadership of the Barrio Azteca gang. None of this information was revealed to the defense in this case.

In ***Brady v. Maryland***, 373 U.S. 83 (1966), the Supreme Court of the United States concluded that the suppression by the prosecution of evidence favorable to a defendant violates due process if the evidence is material either to guilt or punishment, without regard to the good or bad faith of the prosecution. The prosecution violates a defendant's due process rights if it suppresses, either willfully or inadvertently, exculpatory or impeaching evidence that is material. ***Banks v. Dretke***, 540 U.S. 668, 691 (2004); ***Brady***,

373 U.S. at 87; ***Harm v. State***, 183 S.W.3d 403, 406 (Tex.Cr.App. 2006).

In ***United States v. Agurs***, 427 U.S. 97 (1976), the Supreme Court was called upon to determine whether the prosecutor has a duty, in the absence of a specific request, to disclose exculpatory evidence to the defense, and if so, what standard of materiality gives rise to that duty. ***Agurs***, 427 U.S. at 107. To resolve the issue the Court recognized three standards of materiality.

First, in the case of a prosecutor's knowing use of perjured testimony, the conviction will be reversed "if there is any reasonable likelihood that the false testimony could have affected the judgement of the jury." ***Agurs***, 427 U.S. at 103. Second, in the case of a specific request, the Court noted:

> Although there is, of course no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

Agurs, 427 U.S. at 106. It necessarily follows that if the omitted evidence "create[d] a reasonable doubt that did not otherwise exist, constitutional error has been committed." ***Agurs***, 427 U.S. at 113. A specific request for all exculpatory or impeaching evidence was made in the case at bar, but even the ***Agurs*** Court recognized that there were "situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." ***Agurs***, 427 U.S. at 110 (footnote omitted).

> "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, supra, at 87. See also Giglio v. United States, 405 U. S. 150, 153–154 (1972) (clarifying that the rule stated in Brady applies to evidence undermining witness credibility).

Wearry v. Cain, No. 14-10008; March 7, 2016)(slip op. at 7).

To establish a ***Brady*** violation, a defendant must show (1) that the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) that the evidence is favorable to him; and (3) that the evidence is material, that is,

there is a reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different. ***Pena v. State***, 353 S.W.3d 797, 809 (Tex.Cr.App. 2011); ***Hampton v. State***, 86 S.W.3d 603, 612 (Tex.Cr.App. 2002). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. ***United States v. Bagley***, 473 U.S. 667, 682 (1985). An applicant need not show that he would have been acquitted:

> To prevail on his Brady claim, Wearry need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. Smith v. Cain, 565 U. S. 73, ___–___ (2012) (slip op., at 2–3) (internal quotation marks and brackets omitted). He must show only that the new evidence is sufficient to "undermine confidence" in the verdict. Ibid.

Wearry, slip op. at 7. The Court explained that, "Given this legal standard, Wearry can prevail even if, as the dissent suggests, the undisclosed information may not have affected the jury's verdict." ***Wearry***, slip op. at 7 (FN 6).

Even if the prosecutor in the case was not aware of the evidence, which is certainly not the case, the State is not relieved of its duty to disclose because "the State" includes, in

addition to the prosecutor, other lawyers and employees and members of law enforcement connected to the investigation and prosecution of the case. ***Kyles v. Whitley***, 514 U.S. 419, 437 (1995); ***Ex parte Reed***, 271 S.W.3d 698, 726 (Tex.Cr.App. 2008). Clearly, the El Paso police had investigated the Barrio Azteca gang for some time prior to Applicant's trial and knew that Cera was a "player." The police were members of this prosecution team. In the case at bar, both the police and other members of the District Attorney's staff were aware of the history of Veronica Cera.

A ***Brady*** violation denies the defendant due process and is reversible error. ***Wearry***, slip op at 7; ***Harm***, 183 S.W.3d at 406; ***Hampton***, 86 S.W.3d at 612. Thus, it is clear that the State has the affirmative duty to disclose evidence that is favorable to a defendant, and this duty extends to all evidence which tends to discredit the State's theory of the case or a State's witness. See ***Brady***, 373 U.S. at 87; ***Harm***, 183 S.W.3d at 406; ***Bagley***, 473 U.S. at 676. An applicant need

not show "bad faith" on the part of the State, only that the evidence was not revealed. ***Pena***, 353 S.W.3d at 809; ***Hampton***, 86 S.W.3d at 612.

The evidence that Cera was, while perhaps, not an official "member" of Barrio Azteca gang due to her being female, a leading player in gang activities to the point of managing the finances for the gang, paying its members both in and out of prison, and delivering both money and drugs on the gang's behalf, in El Paso and Juarez, Mexico. This relevant and material evidence was not revealed to the defense team in the instant case, and was not discovered until the trial of Cornejo.

- This evidence would have been instrumental in impeaching Cera's self-serving testimony in which she portrayed herself, with the assistance of the State, as an unwitting girlfriend who was merely lending her car to her boyfriend and went along for the ride.

- The evidence showed that she knew full well what it meant to go to a drug deal without money but with firearms.

- The evidence showed that her familiarity with the drug trade included experience as a drug courier, as an international money smuggler and as the paymaster of the entire Barrio Azteca organization.

The State's failure to reveal this information allowed their witness to go unimpeached when they were certainly aware of the criminal history of Cera complete with individualization of that history to the gang with which Appellant was affiliated. In so failing to reveal exculpatory and beneficial evidence to the defense, the State violated Applicant's right to due process and a fair trial.

Conclusion - Ground Number Two

The State failed to reveal evidence within its possession which showed that it's star witness was much more involved in the criminal activities of the Barrio Azteca gang than had been shown to the defense. In failing to reveal the criminal history of its witness, specific to the criminal gang to which Applicant belonged, and which specifically contradicted the characterization by the State of the witness as simply the

girlfriend, the State violated ***Brady v. Maryland*** and deprived Applicant of a fair trial.

Ground for *Habeas Corpus* Relief Number Three Restated

> **The State Denied Applicant Due Process by Presenting the Jury with False and Incomplete Testimony Regarding the Role of its Star Witness, Veronica Cera, in the Criminal Gang to Which Applicant Belonged When the State Was Aware of Evidence Which Showed Cera to be a High Placed Officer or Member, and Failed to Disclose Those Facts to the Jury.**

Facts Relevant to Ground Number Three

At trial held beginning on May 28, 2014, the State presented evidence of Veronica Cera's knowledge of Applicant as arising from their dating relationship (RR Vol. 50, PP. 78-80). The witness Cera stated that she was working in a bar at the time (RR Vol. 50, P. 81). No mention was made of any affiliation of the witness with the criminal gang, the Barrio Aztecas, to which Applicant belonged, at the time she dated Applicant or at any other time.

However, in the trial of another Bario Azteca member, Juan Cornejo,[2] held on January 7, 2015, Cera testified:

> Q. Were you ever involved with Tony in any Barrio Azteca business?
>
> A. Yes, ma'am.
>
> Q. What kinds of things would he do, or what kinds of things would you do to help him?
>
> A. Drug deals, money, picking up money, and going to Juarez for him.
>
> Q. Okay. And why would you go to Juarez?
>
> A. To take money.
>
> Q. Who would you take money to?
>
> A. To a guy named Nano.

(RR Vol. 9, P. 72). She also stated:

> Q. (BY MS. TARANGO) Well, since this is becoming an issue, how do you know how the gang works? How do you know about the Barrio Azteca?
>
> A. I have hanged around them for a long time. I dated several members. And I did a lot of work for them as well.
>
> Q. You did a lot of work for them yourself as well?
>
> A. Yes, ma'am.
>
> Q. And you talked a little bit about the kinds of things you did for them. What kinds of things would you do for Tony?

[2] See Footnote 1, *supra*.

A. I would go to Juarez and bring back drugs and also take money. Sometimes I would drive him around to do the drug ex- -- exchanges. I'm sorry.

(RR Vol. 9, PP. 74-75.) At this point, it should be noted that the State's lead prosecutor in the Cornejo case, Rebecca Tarango was also the lead prosecutor in the instant case. It was she who orchestrated Cera's testimony in Applicant's case.

Cera's testimony at Cornejo's trial described her activities within the gang as a bit more than as a casual observer:

Q. (BY MS. TARANGO) To both of them. Okay. And as a sergeant, what were -- what was -- what was Tony's job? What were his duties as a sergeant?

A. To pick up money that was being collected by other drug dealers.

Q. And who was in charge of the money that he collected? What did he have to do with it?

A. Give it to Silent because Silent was in charge of the box.

Q. Did he get to keep some of the money from the box? Did Tony get to keep some of the money?

A. They would get money. The sergeants would get 150 weekly.

Q. Okay. And was there a time when you were aware of and in charge of, I guess, the -- I guess the books for that box?

A. Yes. I would make the -- I would do all the math and write down all the names and the money that was being sent upstate and to the other gang members that were out here. I would write down the receipts.

Q. Okay. So you would do the receipts?

A. Yes, ma'am.

Q. So you had to account for this money; is that right?

A. Yes, ma'am.

Q. And when you say "upstate," what do you mean?

A. To other gang members in prison.

Q. So is money collected from drug deals in town by the Aztecas and then collected in the box?

A. Yes, ma'am.

Q. And then the money from the box goes --

MR. SOLIS: Object to leading, suggesting the answer to the witness, Your Honor.

THE COURT: All right. Sustained.

Q. (BY MS. TARANGO) What happens to the money that is then collected and in the box?

A. It's given to the lieutenants and to the sergeants. And then some of the money is put away for lawyer fees for other gang members. And some of the money is given to other family members of the gang members.

Q. And you were in charge, for a while, of keeping the receipts?

MR. SOLIS: Again, object to the leading nature of the question, Your Honor.

THE COURT: Yes. It sounded like it might have been leading. Go ahead.

Q. (BY MS. TARANGO) Okay. How long -- how long were you involved with the -- with keeping track of the money in and out of the box?

A. When we had the box till. It was given to Silent.

Q. And when did you have the box?

A. Around that time, back and forth.

Q. Back and forth?

A. Yes, ma'am.

Q. And you are talking about 2012?

A. Yes, ma'am. And a little bit before that.

(RR Vol. 9, PP. 78-80).

Argument & Authorities - Ground Number Three

As can readily be seen, Cera was in the business of the gang much more deeply than she let on at Applicant's trial. In fact, the prosecutor at Cornejo's trial, the same person who led the prosecution of Applicant less than a year earlier, stated, "She cannot be classified as a Barrio Azteca because she was a woman so she wasn't a member. But she was there and she was participating in all of these activities" (RR Vol. 9, PP. 104-105). This statement, or anything like it, was not

said at Applicant's trial. Instead, at Applicant's trial, the State presented Cera as the innocent girlfriend of Applicant.

As stated elsewhere herein, due process rights are violated when a witness gives the jury (or fact-finder judge) a "false impression" that misleads the jury (and judge) into thinking one thing when the truth is something different. ***Alcorta v. Texas***, 355 U.S. 28, 31 (1957); ***Burkhalter v. State***, 493 S.W.2d 214, 218 (Tex.Cr.App. 1973). Due process rights under the Fifth and Fourteenth Amendments are violated, even if the State unknowingly presents false impression testimony. See ***Ex parte Chabot***, 300 S.W.3d 768 (Tex.Cr.App. 2009). The State's use of material false testimony violates a defendant's due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. ***Ex parte Fierro***, 934 S.W.2d 370, 372 (Tex.Cr.App. 1996); ***Chabot***, 300 S.W.3d at 770-771. See also ***Giglio v. United States***, 405 U.S. 150, 153-154 (1972). The only question is

materiality. Given the "star witness" status of Cera at Applicant's trial, materiality is a given.

Again, as stated above, the Court of Criminal Appeals has explained materiality:

> To constitute a due-process violation, the record must show that the testimony was material, namely, that there is "a reasonable likelihood" that the false testimony affected the judgment of the jury. See Ghahremani, 332 S.W.3d at 478. In Ghahremani, the State introduced misleading testimony from the victims' father that "amplified the impact that the applicant's actions had on" the victims. Id. at 480. Observing that the applicant's sentences were at the high end of the applicable punishment range, we held that there was "a reasonable likelihood that the false testimony resulted in a harsher punishment" in that case. Id. In Chabot, we found that the false accomplice-witness testimony was also material because it provided the only direct evidence supporting the conviction. See Chabot, 300 S.W.3d at 772.

Ex parte Chavez, 371 S.W.3d 200, 206-207 (Tex.Cr.App. 2012). See also ***Wearry***, slip op. at 7, and its definition of materiality ("the new evidence is sufficient to 'undermine confidence' in the verdict"). Using this standard, it is clear that the false testimony presented in this case was material.

The failure to reveal material evidence to the jury is, by definition, harmful. In this case the evidence demonstrated that Cera, while technically, perhaps, not an official "member"

of the Barrio Aztecas gang, was a leading player in gang activities to the point of managing the finances for the gang, paying its members both in freedom and incarceration, and delivering both money and drugs on the gang's behalf, in El Paso and Juarez, Mexico. This relevant and material evidence was not revealed to the defense team in the instant case, and was not discovered until the trial of Cornejo.

Cera had worked for the gang and knew various members through that working relationship. She was responsible for paying the members, including, it is suggested, Applicant. This participation in gang activities was not limited by the witness in such a manner as to show she was not working for the gang at the time she participated with Applicant in the commission of the offense for which he was tried.

Had Cera been correctly portrayed by the State, and particularly by Ms. Tarango as she was less than a year after Applicant's trial at his trial, Cera would have been seen for

what she was - very connected to the Barrio Aztecas gang. Her testimony, including that in which she denied knowing what Applicant was planning to do, would have been seen in an entirely different light, had only this information been provided to Applicant's lawyers. Cera would have been seen by the jury as one who had participated in drug transactions as a courier for the gang. This would have resulted in her protestations of lack of understanding regarding Applicant's plans when going to a drug transaction as an armed buyer with no money as pathetically weak and entirely self-serving.

She stated, "I have hanged around them for a long time. I dated several members. And I did a lot of work for them as well." While Cera never explained what "a long time" was, this jury should have heard that she had worked for the gang for a very long period of time. Cera told the Cornejo jury that, "I would go to Juarez and bring back drugs and also take money. Sometimes I would drive him around to do the drug ex- -- exchanges." Applicant's jury, however, did not hear

about Cera's experience in the gang's numerous drug deals. This allowed her testimony about a lack of knowledge of what was going on when she and Applicant went to meet a drug supplier, while armed but without money, to go unrefuted -- despite the State's knowledge of its falsity. Plainly, the State utterly failed in its duty to present the complete picture of its witness to the jury and, in that failure, violated Applicant's right to Due Process of Law and a fair trial.

Cera's involvement in the gang was yet even deeper. The prosecutor in the Cornejo prosecution had her explain that she was, essentially, the bookkeeper and paymaster for the Barrio Azteca gang:

> Q. (BY MS. TARANGO) Okay. And was there a time when you were aware of and in charge of, I guess, the -- I guess the books for that box?
>
> A. Yes. I would make the -- I would do all the math and write down all the names and the money that was being sent upstate and to the other gang members that were out here. I would write down the receipts.
>
> Q. Okay. So you would do the receipts?
>
> A. Yes, ma'am.
>
> Q. So you had to account for this money; is that right?

A. Yes, ma'am.

Q. And when you say "upstate," what do you mean?

A. To other gang members in prison.

Q. So is money collected from drug deals in town by the Aztecas and then collected in the box?

A. Yes, ma'am.

Q. And then the money from the box goes --

MR. SOLIS: Object to leading, suggesting the answer to the witness, Your Honor.

THE COURT: All right. Sustained.

Q. (BY MS. TARANGO) What happens to the money that is then collected and in the box?

A. It's given to the lieutenants and to the sergeants. And then some of the money is put away for lawyer fees for other gang members. And some of the money is given to other family members of the gang members.

Q. And you were in charge, for a while, of keeping the receipts?

MR. SOLIS: Again, object to the leading nature of the question, Your Honor.

THE COURT: Yes. It sounded like it might have been leading. Go ahead.

Q. (BY MS. TARANGO) Okay. How long -- how long were you involved with the -- with keeping track of the money in and out of the box?

A. When we had the box till. It was given to Silent.

Q. And when did you have the box?

A. Around that time, back and forth.

Q. Back and forth?

A. Yes, ma'am.

Q. And you are talking about 2012?

A. Yes, ma'am. And a little bit before that.

(RR Vol. 9, PP. 79-80).

In the Cornejo trial, the State acknowledged that Cera held a position in the gang of great trust and personally disbursed the proceeds of the Barrio Azteca gang's various illegal activities to the members, both incarcerated and free. The State did not reveal this knowledge to the jury in Applicant's case. Instead, the State, through Ms. Tarrango, presented Cera as Applicant's girlfriend and general hanger on. It was in this context that the Applicant's jury was asked to evaluate her statements that she wasn't involved and had no way of knowing what was going to happen when the two of them went to meet the soon to be victim, Barrios. Thus, the State presented a false picture of its "star" witness when it had information it chose not to reveal to the jury which would have completely destroyed that false image. In failing

to present a complete picture, the State violated Applicant's due process rights.

Even if it could be argued that the prosecutor in the case was not aware of the evidence which went unpresented to the jury, the State is not relieved of its duty because "the State" includes, in addition to the prosecutor, other lawyers and employees and members of law enforcement connected to the investigation and prosecution of the case. ***Kyles***, 514 U.S. At 437; ***Reed***, 271 S.W.3d at 726. Clearly, the El Paso police had investigated the Barrio Aztecas for some time prior to Cornejo's, and Applicant's, trials and knew that Cera was a "player." The police were members of this prosecution team. The prosecutor in both cases revealed a detailed understanding of Cera's history with the Barrio Aztecas, but only to the jury in Cornejo's trial, not the case at bar.

In this case, both the police and other members of the District Attorney's staff were aware of the history of Veronica Cera but failed to reveal it to the jury, or to the defense

lawyers. They left the jury believing that Cera, their star witness and the only person who could testify that Applicant shot Barrios while in the car, was merely the girlfriend. The State created a false impression, was under a duty to correct that impression and failed to do so.

Conclusion - Ground Number Three

In its failure to complete the picture of its star witness to the jury, the State constructed a false impression based on unrevealed material facts regarding its witness and the role she played within the criminal gang, the Barrio Aztecas. In this failure, the State violated Applicant's rights to Due Process of Law and a fair trial. Applicant is entitled to relief in the form of a new trial in which the truth can be presented to the jury regarding the State's star witness.

Ground for *Habeas Corpus* Relief Number Four Restated

The State Denied Applicant Due Process by Presenting False and Incomplete Testimony Regarding the Commission of the Offense When the State Was Aware of Contradictory Evidence It Failed to Disclose to the Jury.

Facts Relevant to Ground Number Four

At the time of the commission of the offense there were several eye witnesses to the crime. There was, however, only one witness who testified that Applicant shot Barrios while he was in the car, after Applicant had refused to pay for the drugs that Barrios had delivered or to return the drugs - Veronica Cera ("Cera"). She denied leaving the car or participating in the several offenses committed in any manner.

The State was aware that Israel Gonzalez had viewed the commission of the offense and had given a statement to the El Paso Police which directly contradicted Cera, the State's star witness, on a major factual point, i.e., whether she had participated in the killing by firing at the Chrysler Sebring

and, by doing so, made herself an accomplice to both the robbery and the murder.

The State did not present Gonzalez as a witness. In the police report detailing their contact with Gonzalez it states that "Gonzalez lives at [redacted] and was inside the house when he heard gunshots. He ran outside and saw the driver and front passenger exit the suspect vehicle and shoot at Samuel Herrera's vehicle which was parked behind the white suspect SUV."

Although the State did not put Gonzalez on as a witness to the commission of the crime, it did have Cera testify that she and Applicant were alone in the car with Barrios, that Applicant shot Barrios, and that she had not left the car. The State made no attempt to correct the false impression left by Cera.

Argument & Authorities - Ground Number Four

Due process rights are violated when a witness gives the jury (or fact-finder judge) a "false impression" that misleads

the jury (and judge) into thinking one thing when the truth is something different. ***Alcorta***, 355 U.S. at 31; ***Burkhalter***, 493 S.W.2d at 218. Due process rights under the Fifth and Fourteenth Amendment are violated, even if the State unknowingly presents false impression testimony. See ***Chabot***, 300 S.W.3d at 772. The State's use of material false testimony violates a defendant's due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. ***Fierro***, 934 S.W.2d at 372; ***Chabot***, 300 S.W.3d at 770-771. See also ***Giglio***, 405 U.S. at 153-154.

In any *habeas* claim alleging the use of material false testimony it must be shown that the evidence was, in fact, false, and, if so, whether it was material. ***Fierro***, 934 S.W.2d at 372. Only the use of material false testimony amounts to a due-process violation. ***Ex parte Weinstein***, 421 S.W.3d 656, 665 (Tex.Cr.App. 2014). False testimony is material if there is a "reasonable likelihood" that it affected the judgment of the jury. ***Chavez***, 371 S.W.3d at 208.

An applicant who proves a due process violation stemming from a use of material false testimony necessarily proves harm because a false statement is material only if there is a reasonable likelihood the false testimony affected the judgment of the jury. ***Chavez***, 371 S.W.3d at 210.

> Testimony need not be perjured to constitute a due-process violation; rather, "it is sufficient that the testimony was `false.'" Id. [Ex parte Robbins, 360 S.W.3d 446, 459 (Tex.Cr.App.2011) (citing U.S. CONST. amend. XIV)] The question is whether the testimony, taken as a whole, gives the jury a false impression. See Ghahremani, 332 S.W.3d at 477; Alcorta v. Texas, 355 U.S. 28, 31, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957).

Chavez, 371 S.W.3d at 208.

False Evidence

Chavez makes it clear that the actual evidence complained of need not be, in and of itself, perjured testimony. "The question is whether the testimony, taken as a whole, gives the jury a false impression." ***Chavez***, 371 S.W.3d at 208. An examination of the facts of the case at bar makes clear the creation of a false impression and, thus, the State's use of false testimony.

As stated above, Cera testified that she was just along for the ride and that she did not leave the car or otherwise participate in either of the several offenses committed that evening. The statement of Israel Gonzalez shows, unequivocally, that there was a potential for Cera's testimony, self-serving at best, to be false.[3] It is clear that Cera's statements, alone without consideration of any other factors, created a false impression, leading her testimony to be "false" under ***Chavez***.

Despite being in possession of the knowledge of its legal falsity, the State never corrected, or attempted to correct, the impression made to the jury by Cera that Applicant had, spontaneously, committed the crime without her involvement in any manner, and that she did nothing to assist. The

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[3] Compare the description of Cera and her role given at this trial portraying her as the innocent girlfriend just along for the ride with the testimony she gave in the trial of Juan Cornejo, El Paso Cause Number 2010D05090, Court of Appeals No. 08-15-00039-CR, another Barrio Azteca member on trial, just six months later in which she described herself as an international courier for both drugs and money as well as the paymaster for the criminal gang, the Barrio Aztecas, of which Applicant was a member. See Ground for Habeas Corpus Relief Number XX, herein.

testimony, taken as a whole, gave the jury an absolutely false impression. By its creation of, and failure to correct, the false impression, the State presented perjured and false testimony. See ***Chavez***, 371 S.W.3d 208.

Materiality

There truly can be no question of materiality, as the Israel Gonzalez testimony contradicted the evidence given by the only witness to the offense of robbery as well as the initial gunshot and showed, despite her testimony of non-involvement, that she had participated. Evidence showing that the State's "star," and only, witness to the entirety of the events did participate in those offenses by firing a weapon goes directly to the heart of the State's case and thate witness' evidence. As such, there can be no question as to its materiality.

Cera was the key witness for the State, giving the jury her version of what occurred in her car. It should be noted, however, that:

- Only she said that Barrios was in the business of selling drugs;

- Only she said that Barrios brought drugs to the car;

- Only she said that Barrios delivered drugs to Applicant;

- Only she said that Applicant refused to pay for those drugs; and

- Only she told the jury Applicant was the one fired the first shot.

Only Cera's self-serving version of those events which supposedly occurred, while she, Barrios, and Applicant were concealed from all others in the car, was given to the jury. While there were other witnesses to Applicant firing the final shot, only Cera claimed that Applicant shot the first shot while Barrios was in the back seat of the car. She was portrayed by her own testimony as an innocent bystander when Gonzalez' evidence showed otherwise.

It is entirely possible that Barrios was not a drug dealer and brought no drugs to the car. Additionally, in light of Israel Gonzalez's statement to the police that the passenger

not only had a gun, but fired at the car from which the deceased came, it is also entirely possible that Cera was the one that fired the first shot. Common sense dictates that it would have been much easier for the passenger to have fired that shot than for the driver. Because there is evidence that Cera had and fired a gun that evening in the commission of these offenses, that the eye witnesses put Applicant outside the car firing additional shots into the Barrios' body does not prove that he also fired the first shot.

The Court of Criminal Appeals has explained materiality:

> To constitute a due-process violation, the record must show that the testimony was material, namely, that there is "a reasonable likelihood" that the false testimony affected the judgment of the jury. See Ghahremani, 332 S.W.3d at 478. In Ghahremani, the State introduced misleading testimony from the victims' father that "amplified the impact that the applicant's actions had on" the victims. Id. at 480. Observing that the applicant's sentences were at the high end of the applicable punishment range, we held that there was "a reasonable likelihood that the false testimony resulted in a harsher punishment" in that case. Id. In Chabot, we found that the false accomplice-witness testimony was also material because it provided the only direct evidence supporting the conviction. See Chabot, 300 S.W.3d at 772.

Chavez, 371 S.W.3d at 208. See also ***Wearry***, slip op. at 7, and its definition of materiality ("the new evidence is sufficient

to 'undermine confidence' in the verdict"). Using this standard, it is clear that the false testimony presented in this case was material. Harm is proven.

Conclusion - Ground Number Four

Applicant was denied due process of law by the State's use of false and misleading evidence as to who participated in the offenses committed, without using evidence within its possession to correct the falsity. The false evidence it used was the only evidence painting Applicant as the sole actor and was presented by the State when it knew beyond all doubt that there was evidence in its possession which called its witness' recitation of the facts into dispute. The facts which the State failed to present would show their witness as a participant in the offense and a party thereto. As such the State's failure to correct the false impression it created violated Applicant's right to Due Process of Law. Applicant is entitled to relief in the form of a new trial.

Ground for *Habeas Corpus* Relief Number Five Restated

Applicant Was Denied the Effective Assistance of Counsel by Trial Counsel's Failure to Properly Cross Examine Samuel Herrera Regarding Any Agreement He Made with the State.

Facts Relevant to Ground Number Five

Samuel Herrera was one of the two witnesses who identified Applicant as the shooter and the driver of the SUV. Herrera could not identify the passenger at the time of trial, although having previously told the police that the passenger shot at him.

Herrera said he pulled right up next to the SUV, and saw the driver. No one else testified to that position of the vehicles. In the other testimony adduced by the State, the Chrysler Sebring Herrera was driving was either 15 feet or two streets away from the shooting.

Herrera testified that when he first stopped to let the deceased out, he was parked parallel to the driver of the white SUV (RR Vol. 49, P. 184). At some point, Herrera parked his vehicle close to the white SUV, the deceased walked over to

the white SUV, and entered the vehicle (RR Vol. 49, PP. 183-184).

Herrera stated he saw two individuals, one being male and the other "just a shadow, kind of blurred, but definitely a person." They were both in the front seat of the vehicle (RR Vol. 49, P. 185). Herrera watched the deceased get into the SUV, behind the driver's seat (RR Vol. 49, P. 185). Herrera next observed the white SUV drive off (RR Vol. 49, P. 185). Then, when he saw the white SUV stop on Tropicana, Herrera parked about 15 feet or so behind it. Herrera testified:

> Q. (MS. BUTTERWORTH): And what do you do?
>
> A. (MR. HERRERA): Well, I didn't know what was going on, so I instinctively followed him. And as I went around they stopped on Tropicana about -- I don't know -- I'd say 40 feet away from the street. I parked behind them about 15 feet or so. And when I'm reaching for my phone to text Julio or call him -- I don't recall exactly what I was going to do -- and ask him what was going on, I remember hearing a loud bang and flash. And at that moment I -- I got out of the vehicle and I was running towards my nephew when the driver pulls out Julio and shoots him again.

(RR Vol. 49, PP. 186). Subsequently the following occurred:

> Q. (MS. BUTTERWORTH): Do you remember exactly which shots you recall? Can you go through them?
>
> A. (MR. HERRERA): One of them was inside the vehicle when I initially heard the first bang. The second was as I was running towards him -- as I was, you know, going towards my nephew. A third one I recall it from the passenger side. I

remember seeing a flash. And then the fourth one again on the driver's side. And the fifth one I can't recall a flash, but I recall a bang. It could have been an echo. I don't know.

Q. Okay. So what do you do at this point when -- I guess it occurs to you that you're being shot at as well?

A. I duck.

(RR Vol. 49, P. 187). On redirect, the prosecutor also asked Herrera the identity of the shooter:

Q. (MS. BUTTERWORTH): Mr. Herrera, let me go back to -- you had commented earlier when we were referring to your photo lineup that you believe you see now -- in May of 2014, you believe you see that individual that you recognized or identified from the photo lineup back in December of 2010. Do you -- do you believe that you see that same individual in the courtroom today?

A. (MR. HERRERA): Definitely.

(RR Vol. 49, P. 202). Herrera identified Applicant sitting in the courtroom as the person that shot his nephew (RR Vol. 49, P. 202).

Defense counsel did question Herrera regarding inconsistent statements he gave to the police. Hererra testified that he did not recognize the passenger in the vehicle, whereas he told the police the passenger got out of the vehicle and shot at him. The following occurred during the defense's cross-examination:

Q. (MR. LOPEZ): Now, in your statement to El Paso police detectives you stated that -- did you state that you "saw the passenger get out of the SUV and shoot twice at "me" as I was standing by the passenger side of my car"?

A. (MR. HERRERA): I recall seeing a flash, and -- I mean, there was bangs. I couldn't tell you what direction -- left or right -- but I did recall a flash from the right side. From the passenger side.

(RR Vol. 49, PP. 217-218).

When questioningSamuel Herrera, defense counsel also twice caused him to give answers which emphasized that Applicant shot the decedent after pulling him from the car (RR Vol. 49, P. 215). Herrera did state he was focused on the driver and saw a flash from the passenger side and heard a bang (RR Vol. 49, P. 218).

Although the questioning was inartful, Herrera did admit that the deceased had discussed possessing the pills and how much each pill was worth. Herrera also admitted that he thought the deceased was going to buy pot, as evidenced by giving him the empty baggies (RR Vol. 49, PP. 207, 220).

Argument & Authorities - Ground Number Five

Applicant respectfully incorporates the discussion on ineffective assistance of counsel claims set out in connection with Ground for Relief Number One, above.

Deficient Performance

Based on the information elicited as trial, and the contradictory statements Herrera gave to the police, the convenient inability to recognize the passenger, and his inability to recall at trial that the passenger shot at him, it is readily apparent that Herrera has sculpted his testimony to fit the State's narrative of the case. It was plainly necessary to question Herrera regarding any bargains or discussions with the State as a precursor to any questioning of Herrera, and better still to question Herrera during and after his testimony regarding his new and improved version of the events.

It is obvious Herrera knew he was engaged in a drug deal from the inception of the events that evening of the shooting.

Although arguably the drug deal may have been about a different type of drug than marijuana, Herrera was still taking the deceased to a drug deal. His version also tends to relieve him of any guilt regarding driving the deceased to the scene of his death.

Confidence in the Outcome is Undermined

While counsel's decision not to cross-examine witnesses on irrelevant discrepancies was consistent with a plausible trial strategy, here, a failure to cross examine a key witness is no strategy at all. See ***Ex parte Ewing***, 570 S.W.2d 941, 945 (Tex.Cr.App. 1978). That is the case before the Court.

The record is clear that Herrera knowingly engaged in activity he believed was to assist in a drug deal. It is clear that his testimony, given without statutory or other warnings regarding his right to refrain from compelled self-incrimination, would subject him to criminal liability. Yet no mention was made of his avoidance of that liability. Thus, while it is true that absent any evidence in the record that

this was not counsel's trial strategy, the presumption that counsel's strategy constituted reasonably effective assistance cannot be overcome, the record in this case is quite clear. In the context of the instant case, there is no reasonable trial strategy NOT to impeach or at least ask Herrera regarding his discussions with the prosecution, or any tacit agreements with the State. ***Phetvongkham v. State***, 841 S.W.2d 928, 932 (Tex. App. - Corpus Christi 1992).

Conclusion - Ground Number Five

The record glaringly revealed Herrera's complicity in the deceased's criminal activity. The State did not explain Herrera's lack of prosecution to the jury. It was incumbent on Applicant's counsel to fill in this void and explore Herrera's immunity from prosecution for his actions. Counsels' failure to do so constituted ineffective assistance of counsel.

Ground for *Habeas Corpus* Relief Number Six Restated

Applicant Was Denied Effective Assistance of Counsel by His Attorneys' Failure to Request an Accomplice Witness Instruction Regarding Veronica Cera Based On Samuel Herrera's Testimony.

Facts Relevant to Ground Number Six

Applicant adopts the facts regarding Samuel Herrera's testimony set out above. Additionally, the record affirmatively shows that counsel did not request an accomplice instruction regarding the evidence showing Cera's participation in the criminal offenses which Applicant is alleged to have committed.

Argument & Authorities - Ground Number Six

Applicant respectfully incorporates the discussion on ineffective assistance of counsel claims set out in connection with Ground for Relief Number One, above. In addition, Applicant submits the following.

Deficient Performance

Defense counsel participated in development of evidence which affirmatively showed that shots were fired at Samuel Herrera from the passenger side of the vehicle. Based on her own testimony, the evidence showed that Veronica Cera was that passenger. Although she stated that only Applicant fired a weapon, evidence was admitted at trial, and the State was aware of other evidence, which demonstrated that Cera also had a weapon and used it, firing at Samuel Herrera.

As set out above, an accomplice participates before, during, or after the commission of the offense and acts with the culpable mental state required for the offense. ***Paredes***, 129 S.W.3d at 536. An accomplice must commit an affirmative act that promotes commission of the offense. ***Paredes***, 129 S.W.3d at 536. As a matter of law, an accomplice is one who is susceptible to prosecution for the same offense as the defendant or for a lesser-included offense. ***Paredes***, 129 S.W.3d at 536.

The State tried to show that Cera was merely present during the commission of the offenses, having loaned her car to her boyfriend without any inkling of what was to occur. Of course, mere presence during commission of the offense does not make one an accomplice. ***Solomon***, 49 S.W.3d at 361. While the evidence was clear that Cera took steps to conceal the killing by cleaning her car, the failure to disclose or even active concealment of a known offense also does not make one an accomplice. ***Medina***, 7 S.W.3d at 641; ***Blake***, 971 S.W.2d at 454.

Cera was never charged with an offense, despite her testimony in this case as well as her incriminating statements in the Cornejo case.[4] The question for a court, however, is not whether the alleged accomplice has been charged, but

[4] In this case for example, Cera admitted that she was under the impression that they were traveling to buy four ecstacy pills with which to celebrate her birthday, clearly making her an accomplice to a drug offense, and all that flowed therefrom, under sections 7.01 and 7.02 of the Penal Code. In the Cornejo case she admitted to being an international drug and money courier as well as the bookkeeper for the Barrio Aztecas.

whether there is sufficient evidence in the record to support a charge. ***Blake***, 971 S.W.2d at 455.

In this case, based solely on the testimony of Samuel Herrera and the reasonable inferences therefrom, the State could have properly charged Cera with capital murder. Under Penal Code § 7.01(a), a person may be guilty as a party to capital murder if he or she committed the offense by his own conduct or, as it pertains to this case, by the conduct of another for which he or she is criminally responsible. See ***Gross v. State***, 380 S.W.3d 181, 186 (Tex.Cr.App. 2012). Additionally, under Penal Code § 7.02(b):

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

The State is not required to present evidence of a defendant's intent to kill as long as the evidence establishes that a felony was committed as a result of a conspiracy and the murder should have been anticipated in carrying out the

conspiracy to commit the underlying felony. ***Ruiz v. State***, 579 S. W.2d 206, 209 (Tex.Cr.App. 1979). In essence, a person can be convicted of capital murder as a party to the offense, without having had the intent to commit the murder. ***Ex parte Martinez***, 330 S.W.3d 891, 901 (Tex.Cr.App. 2011). ***Valle v. State***, 109 S.W.3d 500, 503-504 (Tex.Cr.App. 2003)("A defendant may be convicted of capital murder under § 7.02[b] without having the intent or actual anticipation that a human life would be taken"); ***Johnson v. State***, 853 S.W.2d 527, 535 (Tex.Cr.App. 1992)(holding that an individual may be found guilty of capital murder based on the law of parties).

What this demonstrates is that, based on the testimony at trial, Cera could have been convicted of any offense committed by Applicant under the "parties" theory. Consequently, Cera was an accomplice as a matter of law.

When a defendant has nothing to lose by requesting a defensive instruction and it would have been error for the trial court to refuse the instruction, deficient performance is

demonstrated, even without counsel's explanation for failing to request the instruction. ***Ex parte Zepeda***, 819 S.W.2d 874, 876 (Tex.Cr.App. 1991); ***Vasquez v. State***, 830 S.W.2d 948, 951 (Tex.Cr.App. 1992)(defense of necessity).

Under Articles 36.14 and 36.15, C.Cr.P., a defendant adequately objects to the omission of accomplice instructions or to otherwise defective instructions by presenting his objection before the charge is read, with an objection that embodies the claimed error. See ***Brown v. State***, 716 S.W.2d 939, 943 (Tex.Cr.App. 1986). No magic words are required, and a request need not be in perfect form. The only requirement is for the defendant to convey the substance of the requested instruction to the trial judge. ***Bennett v. State***, 235 S.W.3d 241, 243 (Tex.Cr.App. 2007); ***Chapman v. State***, 921 S.W.2d 694, 695 (Tex.Cr.App. 1996). The objection is adequate when the trial judge will know in what respect the charge is defective, such as to afford the trial judge the opportunity to correct the error before the charge is read to

the jury. Arts. 36.14, 36.15, C.Cr.P.; ***Brown***, 716 S.W.2d at 943.

Applicant's counsel neither requested the trial court submit an accomplice witness instruction pertaining to Cera nor objected to the failure to include such an instruction. The fact that trial counsel did not object to the omission of an accomplice witness instruction is very relevant in determining which standard of harm to apply. ***Jennings v. State***, 302 S.W.3d 306, 311 (Tex.Cr.App. 2010); ***Mann v. State***, 964 S.W.2d 639, 641 (Tex.Cr.App. 1998); ***Almanza v. State***, 686 S.W.2d 157, 171 (Tex.Cr.App. 1984) (opinion on reh'g). If the error in the charge was the subject of a timely objection, reversal is required upon a showing of any harm to the rights of the defendant. ***Almanza***, 686 S.W.2d at 171. In this case then, some harm would be enough, had trial counsel properly objected.

If no objection was made at trial, the defendant will obtain reversal under ***Almanza*** only upon a showing of

"egregious harm." ***Ovalle v. State***, 13 S.W.3d 774, 786 (Tex.Cr.App. 2000). The Court of Criminal Appeals has emphasized that, in reviewing a complaint regarding charge error, a reviewing court must first decide whether the jury instruction is erroneous, and, if so, the court only then determines whether the instruction harmed the defendant according to the "some harm" standard, if the complaint was preserved for appeal, or otherwise pursuant to the "egregious harm" standard. ***Zamora v. State***, 411 S.W.3d 504, 506 (Tex.Cr.App. 2013); ***Almanza***, 686 S.W.2d at 160-174.

Had the error been preserved, deciding whether that preserved error was harmful would require the appellate court to first consider the effect an accomplice witness instruction is meant to have on a trial. ***Herron v. State***, 86 S.W.3d 621, 631 (Tex.Cr.App. 2002). Article 38.14, C.Cr.P., provides a "conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the

corroboration is not sufficient if it merely shows the commission of the offense." Notably, a proper accomplice witness instruction does not say that the jury should be skeptical of accomplice witness testimony or that it should give less weight to such testimony than to other evidence. ***Herron***, 86 S.W.3d at 632. Rather, the accomplice witness instruction directly informs the jury that it cannot use, by law, the accomplice witness testimony unless there is also some non-accomplice evidence connecting the defendant to the offense. ***Herron***, 86 S.W.3d at 632.

Where the evidence clearly shows that a witness is an accomplice as a matter of law, the trial court has a duty to instruct the jury to consider the witness an accomplice. ***Paredes***, 129 S.W.3d at 536; ***Blake***, 971 S.W.2d at 455. If the evidence is unclear, the trial court must provide a definition of "accomplice" and instruct the jury to consider the witness an accomplice if it finds the witness meets the definition provided. ***Paredes***, 129 S.W.3d at 536.

The evidence that Cera was an accomplice witness is overwhelming. She testified that she went with Applicant thinking that they were going to buy drugs to celebrate her birthday. She knew that Applicant had armed himself, yet continued her association. Thus, even if the jury were to only believe what the State and Cera wanted them to believe, she confessed to that jury that she hid the vehicle at her sister's home, burned the complainant's shoe and cleaned the blood from the vehicle. She also counted the pills to assist Applicant in the robbery she was trying to pin solely on Applicant. Cera's confessed knowledge of what was to occur showed she knew full well they were driving to a drug deal and that Applicant was armed. Additionally, the testimony of Samuel Herrera demonstrates that Cera was also armed, which directly contradicts her claim of being unaware of what was happening, and demonstrates, within the meaning of the accomplice witness instruction and case law discussing it, that she was, in fact, an accomplice to whatever crimes

Applicant had planned. See ***Gross***, 380 S.W.3d at: ***Ruiz***, 579 S. W.2d at 209; ***Martinez***, 330 S.W.3d at 901; ***Valle***, 109 S.W.3d at 503-504; and ***Johnson***, 853 S.W.2d at 535.

The Court of Criminal Appeals has stated that a witness was an accomplice if the person could be prosecuted on the basis that the person was "blameworthy" for the offense in some way. ***Blake***, 971 S.W.2d at 454-455. It may be that a witness was per se "blameworthy" and, therefore, an accomplice witness as a matter of law if he was indicted for the same or for a lesser-included offense. ***Cocke v. State***, 201 S.W.3d 744, 748 (Tex.Cr.App. 2006); ***Blake***, 971 S.W.2d at 454-455. Whether intentional or not, the, "failure" of the State to seek an indictment of their only witness to capital murder does not alter the record before the Court, which affirmatively demonstrates Cera's blameworthiness for each and every offense she pinned on Applicant. ***Blake***, 971 S.W.3d at 454-455.

The function of the jury charge is to instruct the jury on the law applicable to the case. ***Dinkins v. State***, 894 S.W.2d 330, 338 (Tex.Cr.App. 1995). Thus, when the evidence clearly shows that a witness was an accomplice, whether an accomplice as a matter of law or an accomplice as a matter of fact, the jury should be instructed that it may not consider the accomplice witness' testimony absent corroborating evidence that tends to connect the defendant to the crime. See Arts. 36.14, 38.14, C.Cr.P.; see also ***Smith v. State***, 332 S.W.3d 425, 439 (Tex.Cr.App. 2011); ***Oursbourn v. State***, 259 S.W.3d 159, 180 (Tex.Cr.App. 2008); ***Paredes***, 129 S.W.3d at 536.

Given the testimony of Samuel Herrera that the passenger in the white SUV was firing a gun from that side of the vehicle, the jury should have been charged under the principles of accomplice witness law set out above. Herrera's statements clearly put the passenger, who Cera admitted to being, out of the car and firing a weapon while Applicant

dragged the deceased out of the car. Plainly there was no reason for the passenger to be firing a weapon at the car behind except to support the on-going criminal activity. At the very least the trial court would have been required to define the terms for the jury and instruct them to consider whether Cera met that definition. ***Paredes***, 129 S.W.3d at 536. The failure to request the charge which would have been required by the evidence was plainly deficient conduct.

Confidence in the Outcome is Undermined

Strickland also requires a showing that the deficient performance prejudiced the defense. ***Strickland***, 466 U.S. at 687; ***Jackson***, 973 S.W.2d at 956. When addressing the second prong of ***Strickland***, a court must examine counsel's errors not as isolated incidents, but in the context of the overall record. ***Menchaca***, 854 S.W.2d at 133. A harm analysis regarding an ineffective assistance of counsel claim, of course, involves error of constitutional dimension. ***Bone***, 77 S.W.3d at 833; see also Tex.R.App.Pro. 44.2(a). An

applicant for *habeas* relief must, therefore, show that this instance of deficient performance prejudiced his defense. ***Strickland***, 466 U.S. at 687. As the Court of Criminal Appeals explained, "[t]his means that the appellant must show a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different." ***Mitchell***, 68 S.W.3d at 642. See also ***Bone***, 77 S.W.3d at 833. A "reasonable probability" is one sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 687. An appellate court's examination considers "everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case." ***Motilla***, 78 S.W.3d at 355; ***Morales***, 32 S.W.3d at 867. When this examination is made in the instant case it is immediately apparent that the only witness who transformed this case from a simple shooting to

a capital murder is Veronica Cera. There is nothing else in the record, from any source, showing commission of a capital murder. Under the law, the jury would have had to find corroboration to consider Cera's testimony about what when on in the car, and there was none. Any consideration of the entire record must result in a finding of harm.

Whether error in failing to submit an accomplice-witness instruction should be deemed harmful is a function of how strong the non-accomplice evidence was, according to a flexible approach. ***Herron***, 86 S.W.3d at 632; ***Saunders v. State***, 817 S.W.2d 688, 689 (Tex.Cr.App. 1991). The strength of the non-accomplice evidence is a function of (1) its reliability or believability, and (2) how compellingly it tended to connect the accused to the charged offense. ***Saunders***, 817 S.W.2d at 689.

Non-accomplice evidence that was "exceedingly weak" may call for a conclusion that the failure to give the accomplice-witness instruction resulted in harm. ***Saunders***,

817 S.W.2d at 693. Non-existent non-accomplice testimony is not even "exceedingly weak."

In the instant case, Cera's testimony was the proverbial nail in the coffin for Applicant. She sculpted her testimony carefully, so as to avoid her own culpability. As noted in grounds for review two and three, the State had evidence that Cera was a highly placed participant in the Barrio Azteca criminal organization, and indeed acted as the accountant, bookkeeper and paymaster. It is also readily apparent that Cera had some agreement with the State in exchange for her not being charged in the instant offense, as the State had a plethora of evidence that she had actively participated in both the drug deal and the killing.

Even without the missing evidence of her position in the gang, her testimony clearly showed she was involved before, during and after the offense she stated Applicant committed. Her involvement was also clear based on Herrera's statements to the police, because she shot at Herrera. Although his

memory failed him and he was not sure who if anyone shot at him, and he stated he could not tell if the passenger was male or female, Herrera's testimony made clear that the passenger of the white SUV had a weapon and fired it during the offense. It is obvious that the narrative structured by the State tried to make the pieces of testimony from Cera and Herrera meld into a perfect fit so as to carefully not directly incriminate each other. Cera was at the very least a participant in the robbery, and then the murder, because she was present, did nothing to prevent it, and, in fact assisted in the offense by shooting at Samuel Herrera. Additionally, she intentionally tampered with the evidence by taking steps which tended to cover up the killing.

Non-accomplice evidence can be exceedingly weak, albeit not legally insufficient, when it was "inherently unreliable, unbelievable, or dependent upon inferences from evidentiary fact to ultimate fact that a jury might readily reject." ***Saunders***, 817 S.W.2d at 693. On the other hand, when it

is implausible that a jury would fail to find that the corroborating evidence tended to connect the accused to the commission of the offense, a reviewing court may "safely conclude" that there was no harm. ***Casanova v. State***, 383 S.W.3d 530, 539-541 (Tex.Cr.App. 2012). That cannot be said of the case at bar, given the fact that there was no corroborating evidence whatsoever as to what went on in Cera's car.

Even when the non-accomplice evidence is something more than "exceedingly weak," it should call for reversal on the appropriate facts, especially on review for only some harm. ***Saunders***, 817 S.W.2d at 693; ***Casanova***, 383 S.W.3d at 540-541. This is because the "exceedingly weak" analysis is meant to apply on review of both egregious and of ordinary harm. ***Saunders***, 817 SW.2d at 693; ***Casanova***, 383 S.W.3d at 540-541.

Here, however, Cera was the linchpin of the State's case. Without her testimony, Applicant could not be directly

implicated in capital murder. While Herrera's testimony was relevant and helpful to the State, his testimony was not credible and vague in certain, important areas, and could not be adequate to support a conviction for capital murder; murder in the course of a robbery.

When these tests are applied to counsel's performance and the case at bar harm is evident. There was evidence from a State's witness showing Cera's participation in the crime committed against that witness' nephew. To say that Cera's self-portrayal was self-serving is truly an understatement, especially when it is understood that her true identity as revealed in the Cornejo trial was not revealed to this jury. The harm caused by counsels' failures in this area cannot be said to be anything other than disastrous to the point of undermining confidence in the outcome of the trial.

Conclusion - Ground Number Six

Applicant was deprived of effective assistance of counsel by his attorneys' failure to request a charge based on Herrera's testimony which showed that Veronica Cera acted to promote and assist in the commission of the crime with which Applicant was charged. It is clear the evidence established that, because she was susceptible to prosecution for the same offense as Applicant, Cera was an accomplice as a matter of law. ***Paredes***, 129 S.W.3d at 536. Alternatively, she was, at the very least, an accomplice as a matter of fact. The jury should have been provided the vehicle of a jury charge regarding the requirements for treating evidence brought by an accomplice, so as to properly measure her credibility and her involvement in the robbery and the ensuing murder.

Counsels' performance, in not requesting the accomplice witness instruction, was deficient within the meaning of ***Strickland***, in that they certainly fell below that standard of

professionalism expected of lawyers qualified to represent the accused in a Texas' capital case. Applicant was extremely prejudiced by counsels' deficient performance, and, but for counsels' failure, the outcome of the proceedings would have been different, as the jury would have been properly instructed on what it had to find before considering Cera's testimony.

Ground for *Habeas Corpus* Relief Number Seven Restated

Applicant Was Denied the Effective Assistance of Counsel by His Trial Attorneys' Failure to Investigate and Discover Evidence in Mitigation of the Death Penalty.

Facts Relevant to Ground Number Seven

At the request of trial counsel, the trial court appointed Vince Gonzales to act as the defense team's mitigation specialist. Subsequently, also at trial counsels' request, the trial court appointed Dr. Annette McGarrahan, a licensed psychologist, to assist in the mitigation investigation.

On January 8, 2014, Dr. McGarrahan wrote to Mr. Gonzales, indicating that, due to his childhood history of

seizures and injuries he sustained in an automobile accident, "neuroimaging (brain imaging) is warranted in Mr. Valdez's case," and "Mr. Valdez should undergo 24-hour EEG monitoring for several days" (a copy of that message is attached as Exhibit "D" hereto.[5] No request was ever made for funding and the recommended testing was never performed.

Argument & Authorities - Ground Number Seven

Applicant respectfully incorporates the discussion on ineffective assistance of counsel claims set out in connection with Ground for Relief Number One, above.

Deficient Performance

The Supreme Court long ago made clear that counsel has a duty to investigate all aspects of a case. See ***Strickland***, 466 U.S. at 691 (acknowledging counsel's obligation to "make reasonable investigations or to make a reasonable decision that makes particular investigations

[5] This message was located in Mr. Gonzales' file. It was not in trial counsel's file, but lead counsel has acknowledged that the message had been forwarded to him.

unnecessary" but that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions"); see also ***Schriro v. Landrigan***, 550 U.S. 465, 478 (2007)(recognizing that the reasonableness of counsel's actions in investigating potential mitigation evidence is guided by a defendant's statements and actions); ***Wiggins***, 539 U.S. at 521-523 (recognizing counsel's duty to investigate mitigating evidence).

Similarly, trial counsel has a duty to investigate a defendant's mental health if "he has reason to believe that the defendant suffers from mental health problems." ***Roberts v. Dretke***, 381 F.3d 491, 498 (5th Cir. 2004); see also ***Bouchillon***, 907 F.2d at 595-597)(counsel was ineffective in failing to investigate defendant's competency in light of defendant's known history of institutionalization). The Third Circuit Court of Appeals has held that where "there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's

competency," counsel is deficient if he fails to request a competency hearing. ***Jermyn v. Horn***, 266 F.3d 257, 283 (3d Cir. 2001). The Seventh Circuit has issued a similar holding. ***Burt v. Uchtman***, 422 F.3d 557, 569 (7th Cir. 2005)(concluding "that in light of the overwhelming evidence of [defendant's] psychological problems and heavy medication, counsel's failure to request a new competency hearing was deficient performance").

Applicant recognizes that a childhood history of seizures and information that a defendant may have sustained a head injury in an automobile accident are not per se the same as having explicit information that a defendant has a known history of mental health problems. Nevertheless, he asserts that, for purposes of the collection and use of mitigation evidence, they are the same.

It is well known, for example, that a traumatic brain injury ("TBI") may cause psychiatric illness.[6] The risk of psychiatric illness, ascertained using several different indicators, was significantly increased following both mild and moderate to severe TBIs.[7] Knowledge that a capital defendant had suffered a TBI is exactly the type of evidence which can convince a death qualified jury to return a verdict of life in prison rather than death.

For example, after being convicted of capital murder in 1980, Roger DeGarmo looked at the jurors considering his punishment and admitted his guilt. He then told them that, if they didn't sentence him to death, they'd better sleep lightly because "you can bet that I would do it again, and you can

---

[6] Can Traumatic Brain Injury Cause Psychiatric Disorders? Robert van Reekum, M.D., F.R.C.P.C., Tammy Cohen, B.A.(H), and Jenny Wong, B.A.(H); The American Journal of Psychiatry; Summer 2000 (attached as Exhibit "E" hereto).

[7] Psychiatric Illness Following Traumatic Brain Injury in an Adult HealthMaintenance Organization Population; Jesse R. Fann, MD, MPH; Bart Burington, MS; Alexandra Leonetti, MS; et al; Arch Gen Psychiatry, January 2004 (attached as Exhibit "F" hereto).

bet that the first 12 people I would go for would be you."[8] That jury obliged him. He was sentenced to death, and the conviction and sentence were both upheld. ***Degarmo v. State***, 691 S.W.2d 657 (Tex.Cr.App. 1985). Degarmo's original conviction was later overturned and a new trial ordered. ***Degarmo v. Collins***, 984 F. 2d 142 (5th Cir. 1993).

Prior to his second trial, Degarmo's lawyers learned that he had sustained a head injury prior to the killing and that, subsequently, his behavior became more violent. In his second trial, the jury was informed of the head injury and the change in behavior. Like the first jury, the second found Degarmo guilty of capital murder. The second jury, however, did not impose a death sentence, but, rather, sentenced Degarmo to life in prison. ***Degarmo v. State***, 922 S.W.2d 256 (Tex.Cr.App. 1996). As evidenced by the affidavit of the lawyer who represented Degarmo in federal court and then later in State court on the second trial and on appeal, the

[8] See Killer Who Threatened Jurors Now up for Parole; Houston Chronicle; March 30, 2001 (attached as Exhibit "G" hereto).

evidence of Degarmo's head injury and behavioral changes were an important part of obtaining a life sentence at the second trial (see the affidavit of Greg Gladden, attached as Exhibit "H" hereto).

Because of the importance of mitigating evidence, "counsel has a duty to pursue leads indicating a defendant's troubled background . . .." ***United States v. Barrett***, 797 F.3d 1207, 1223 (10th Cir. 2015). Although that case was concerned with pure mental health issues, the evidence in the instant case is just as important, as demonstrated by the case of Roger Degarmo. Consequently, by not investigating the case as suggested by Dr. McGarrahan, counsel's performance fell below that expected of counsel in a Texas capital case.

Confidence in the Outcome is Undermined

During the *habeas* investigation in this case, it was learned that in May of 1997, Applicant was, as he had represented to Dr. McGarrahan, involved in an auto accident

which resulted in a head injury (see the affidavit of Charla Funk, attached as Exhibit "I" hereto). Although medical records other than an ambulance report (see Exhibit "J" hereto) could not be obtained (see the affidavit of Francisco Viniegra, attached as Exhibit "K" hereto), anecdotal evidence of negative change s in Applicant's behavior was obtained, and affidavits to that effect were obtained.

Alex Valdez, Applicant's brother, indicated that there were many changes in Applicant's behavior after the accident. He discussed observations of depression and severe mood swings. He has indicated that, after the accident, Applicant was much more easily frustrated and would quickly get angry over things, stating that, after the accident, Applicant "got mad more easily, like a fire cracker" (see Mr. Valdez's affidavit, attached as Exhibit "L" hereto).

Marcelino Trevino also provided an affidavit regarding negative changes in Applicant's behavior after the automobile accident. He stated that, following the accident, Applicant

became very "bossy" and "intolerant." He said that Applicant became more "isolated" and "grumpy," and started getting in street fights and running with gangs. Mr. Trevino also detailed numerous physical effects he observed, such as intense migraine headaches, depression, and an inability to be out in the sun (see Mr. Trevino's affidavit, attached as Exhibit "M" hereto).

Applicant's mother, Rosemary Valdez, also noticed negative changes in his behavior following the auto accident. She discussed the many changes she noticed, and stated that, following the accident, he started expressing himself like a "cholo"[9] (see Ms. Valdez's affidavit, attached as Exhibit "N" hereto).

Reymundo Trevino, a friend of Applicant's since age 10, also discussed changes in Applicant's behavior following the 1997 auto accident. He indicated that Applicant could no longer focus on things and would get more easily.

[9] See Merriam -Webster: (1) Southwest, often disparaging : a man or boy of Mexican descent (2) a Mexican-American youth who belongs to a street gang.

Importantly, he had to stop "hanging out" with Applicant because of the changes in his behavior (see Mr. Trevino's affidavit, attached as Exhibit "O" hereto).

While the testimony of these four individuals is not scientific evidence, it is evidence based on personal observations, not hearsay. It is evidence which could have been presented and evidence, which, like that in Roger Degramo's case, could have led to a life sentence.

Similar to this case are the facts in ***Wiggins***, *supra*. The record in ***Wiggins*** demonstrated that trial counsel's arranged for a psychologist to conduct a number of tests on their client. The psychologist concluded that Wiggins had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder. The "reports revealed nothing, however, of petitioner's life history." ***Wiggins***, 539 U.S. at 523.

> With respect to that history, counsel had available to them the written PSI, which included a one-page account of Wiggins' "personal history" noting his "misery as a youth," quoting his description of his own background as "`disgusting,'" and

> observing that he spent most of his life in foster care. *** Counsel also "tracked down" records kept by the Baltimore City Department of Social Services (DSS) documenting petitioner's various placements in the State's foster care system. Id., at 490; Lodging of Petitioner. In describing the scope of counsel's investigation into petitioner's life history, both the Fourth Circuit and the Maryland Court of Appeals referred only to these two sources of information.

Wiggins, 539 U.S. at 523-524. The Supreme Court ultimately found that trial counsel "counsel were not in a position to make a reasonable strategic choice as to whether to focus on Wiggins' direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable." ***Wiggins***, 539 U.S. at 536. The Court also determined that, "had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." ***Wiggins***, 539 U.S. at 536.

In instant case, the defense only put on a total of six witnesses. Applicant asserts that, like the jury and defendant in ***Wiggins***, the jury in this case was given no real evidence of Applicant's "life history."

The first defense witness was Sgt. John Navar, who worked in the El Paso County Jail. The import of his testimony was that another individual had asked to notarize a document which Navar believed was a confession to a murder, the facts of which were similar to one of the extraneous offenses the State introduced during punishment which were alleged to have been committed by Applicant. Navar gave no testimony regarding Applicant's life history (see RR Vol. 55, PP. 7-11).

The next witness was Erik Toyosima, another employee of the El Paso County Sheriff's department. All he testified about was Applicant having properly asked permission to get a hair cut. There was no testimony regarding Applicant's life history (see RR Vol. 55, PP. 12-22).

The next defense witness was Tommy Molinar, the "program director" at Aliviane men's residential facility, which he testified is a counseling program for alcohol and drug abuse counseling. He brought records pertaining to

Applicant's treatment at the facility, but nothing of any substance pertaining to Applicant's life history (see RR Vol. 55, PP. 24-27).

The next defense witness was Jose Escobedo, a local process server. He only discussed unsuccessful attempts at serving subpoenas at the "Jesus Chuy Terraza Center" and the "Recovery Alliance." As with the first three defense witnesses, Escobedo's testimony did not involve any of Applicant's life history (see RR Vol. 55, PP. 28-32).

The defense next called Rosemary Valdez, Applicant's mother (see RR Vol. 55, PP. 33-54). She spoke of many "happy memories" and discussed an injury she had sustained, but spoke remarkably little about any negative aspects of or influences on Applicant's life.

She indicated that there was a childhood history of seizures for which Applicant was given medication (see RR Vol. 55, P. 48) which she indicated she learned should not have been prescribed to a child (see RR Vol. 55, P. 49).

The final defense witness, called the next day, was Frank G. Aubuchon who works as a consultant. Generally, he discussed prison conditions, especially in maximum security units. He had never interviewed Applicant and offered nothing regarding Applicant's life history (see RR Vol. 5, PP. 4-106).

While counsel did put before the jury exhibits which might be considered to have contained mitigating information, such as the hospital records admitted as defense exhibit three, no one was called to explain the import of that evidence to the jury. Applicant's mother could not explain the effects of the injuries suffered by her son except anecdotally, while an expert in TBIs might well have seen and explained those injuries, as had Dr. McGarrahan. An expert of her standing might well have been able to explain the records which were introduced and how those records, along with other evidence, called for an investigation, not death.

The effects on Applicant's punishment defense of trial counsels' failure to investigate the continuing effects of the head injury Applicant had suffered years earlier cannot be minimized. The entirety of the defense punishment evidence was that Applicant was a sometime drug user who tried to quit and who had a mother who loved him. The failure to investigate Dr. McGarrahan's findings was devastating to Applicant's defense.

Ultimately, the total discussion about Applicant having a history of childhood seizures was limited to 3 pages of testimony (see RR Vol. 55, PP. 48-50). There was no testimony whatsoever about the auto accident discussed in Dr. McGarrahan's message (see Exhibit "D" attached hereto) to the mitigation specialist, which counsel has acknowledged he saw, and certainly nothing provided to the jury regarding the head injury Applicant sustained, and/or the long lasting negative effects it had on his behavior.

Conclusion - Ground Number Seven

Like the jury in ***Wiggins***, the jury in this case heard almost nothing in regards to mitigating evidence. It is clear that counsel was aware of Applicant's childhood history of seizures and injuries he sustained in an automobile accident, and that "neuroimaging (brain imaging) is warranted in Mr. Valdez's case." Counsels' decision not to investigate and present this mitigating evidence, like that of counsel in ***Wiggins***, fell short of the professional standards for attorneys in Texas' capital cases.

Applicant's trial counsel totally ignored the concept of mitigating evidence. Once they were aware of Dr. McGarrahan's message (see Exhibit "D" attached hereto) to the mitigation specialist, an investigation into Applicant's childhood seizures and head injuries was mandated. This mitigating evidence, explaining, as it did, both the source of and Applicant's inability to deal with the subtle manifestations of his head injury, could have provided the

jury with the vehicle for expressing its "reasoned moral response" discussed in ***Penry v. Lynaugh***, 492 US 302 (1989). Absent that evidence, the jury's decision was a bygone conclusion.

Applicant was denied the effective assistance of counsel by his attorneys' failure to conduct a proper mitigation investigation. Applicant is entitled to a new trial.

Request for Evidentiary Hearing

Because the overwhelming majority of the proof necessary to establish Applicant's claims was outside the record of trial or has occurred or been discovered after trial, a evidentiary hearing is necessary to establish the veracity of Applicant's allegations and claims. As the Court of Criminal Appeals held in ***Ex parte Rodriguez***, 334 S.W.2d 294, 294 (Tex.Cr.App. 1997), the trial court is the appropriate forum for findings of fact. Applicant requests, therefore, that the Court schedule an evidentiary hearing in this case.

Prayer

WHEREFORE, PREMISES CONSIDERED, Applicant, Fidencio Valdez, respectfully prays that these Honorable Courts will proceed as required by Article 11.071, C.Cr.P.; that an evidentiary hearing will be scheduled at which time Applicant can present live testimony in support of his claims; and, after such hearing, that the Court will enter its Order recommending that relief be granted; and, finally, that upon proper consideration by the Court of Criminal Appeals, Applicant will be granted the relief to which he is entitled.

Respectfully submitted

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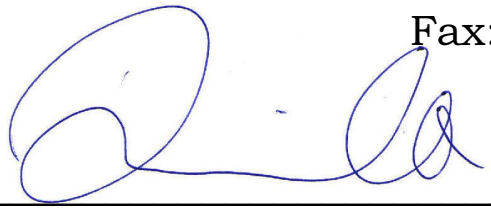

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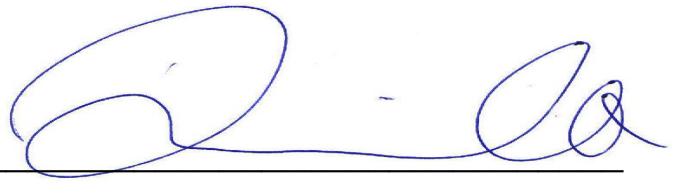
Certificate of Compliance and Delivery

This is to certify that: (1) this document, created using WordPerfect™ X8 software, contains 16,460 words, excluding those items permitted by Rule 9.4 (i)(1), Tex.R.App.Pro., and complies with Rules 9.4 (i)(2)(B) and 9.4 (i)(3), Tex.R.App.Pro.; and (2) on July 28, 2017, a true and correct copy of the above and foregoing "Original Application for Post-Conviction Writ of *Habeas Corpus* Pursuant to Article 11.071, C.Cr.P.," was transmitted via electronic mail (*eMail*) to Lily Stroud (lstroud@epcounty.com), at the El Paso County District Attorney's Office, counsel for the State of Texas.



David A. Schulman

No. 20120D00749
CCA No. WR-85,941-01

Ex parte Fidencio Valdez

In the 384th District Court

El Paso County, Texas

List of Exhibits

A. Statement of Israel Gonzalez dated December 10, 2012.

B. Affidavit of Israel Gonzalez dated July 16, 2017.

C. Testimony of Veronica Cera during the trial of Juan Cornejo on January 7, 2015.

D. eMail from Dr McGarrahan to Vince Gonzalez dated January 8, 2014.

E. Article: "Can Traumatic Brain Injury Cause Psychiatric Disorders;" dated Summer 2000.

F. Article: "Psychiatric Illness Following Traumatic Brain Injury;" dated January 15, 2004.

G. Article: "Killer Who Threatened Jurors Now up for Parole;" dated March 30, 2001.

H. Affidavit of Greg Gladden dated July 28, 2017.

List of Exhibits
(CONT)

I. Affidavit of Charla Funk dated January 17, 2017.

J. Ambulance Report dated May 30, 1997.

K. Affidavit of Francisco Viniegra dated July 28, 2017.

L. Affidavit of Alexander Valdez dated June 27, 2017.

M. Affidavit of Marcelino Trevino dated June 27, 2017.

N. Affidavit of Rosemary Valdez dated June 27, 2017.

O. Affidavit of Reymundo Trevino dated June 30, 2017.

Exhibit “A”

SUPPLEMENTAL REPORT

Agency: EPPD OCA 10344263

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Investigator: Chairez, Rodrigo 630 Date / Time: 12/10/2010 21:18:06 Friday

Contact: Reference: SWORN OR WITNESS STATEMENT

WITNESS/SWORN/STATEMENT

COMPLAINANT: JULIO BARRIOS
ADDRESS: 110009 WEDGE

THIS STATEMENT GIVEN VOLUNTARILY TO: DET. R. CHAIREZ #2241
of the EL PASO POLICE DEPARTMENT BY: ISRAEL GONZALEZ
SOCIAL SECURITY #:
ADDRESS: [redacted]
DOB:
HOME PHONE NUMBER: 9915) [redacted]
WORK PHONE NUMBER: N/A
DRIVER'S LICENSE: TX ID
DATE & TIME: 12-10-2010/ 2130 HRS.

My name is Israel Gonzalez. I am 18 years old. I live at [redacted] with my parents, Jesus Rocha and Leticia Chavez, and my three sisters, Jessica Gonzalez, Jocelyn Veloz, and Genisis Rocha. We have lived there about 3 or 4 years. I am currently a senior at Paso Del Norte Academy. I speak English and Spanish. I am here at the El Paso Police Department Headquarters building giving my statement to Det. Chairez in reference to an incident I witnessed earlier tonight.

At about 6:30 PM, I was inside my house in the kitchen eating dinner. My friend, Forest Zozaya, was standing outside in my front yard talking on the phone. That's when I heard three gun shots. I ran outside to the front yard to see what was going on. Forest pushed me inside and said, "get inside, this shit is real". I kept looking towards the street. I saw a white car parked in front of my house and a white mid-sized SUV parked in front of the white car. They were facing west. The white SUV had tinted windows. There was a lot of people inside the white SUV. It looked like there was at least four people inside. I saw the driver and front passenger of the SUV step out and shoot at the white car. The driver of the SUV was tall and thin and wearing dark clothing. I couldn't tell if he was black, white or hispanic. I saw the flashes from the guns and one bullet hit the front windshield of the white car. I heard screaming coming from inside the white car. I saw two guys pull another guy out from the back seat of the SUV. They threw him on the floor and they drove off west bound on Tropicana really fast.

That's when I ran to the street to help the guy out. When I got there, I saw the guy laying on the floor. He had lots of blood on his head and neck. It looked like his left eye was swollen and popped out. A girl came running out of the white car towards us. I recognized the girl. I don't know her name, but I recognized her as Julio's girlfriend. Julio is an acquaintance of mine. We all go to the same school. I got on the phone with 911 and the operator was telling me how to treat him. Another guy came out of the white car and came towards us. He took off his shirt and put it underneath Julio's head. He was telling Julio to pray and to "stay with us". The guy took off and started to look for his phone, but couldn't find it. That guy was all freaked out about his phone, but he never found it. Julio was breathing heavy and shaking. There was a lot of blood. A short time later, the ambulance, fire truck and police got there. I had never seen any of the people in front of my house, except Julio and his girlfriend. I don't think I

can identify the shooter because it was dark.

I HAVE READ THE ABOVE STATEMENT AND FIND IT TO BE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Subscribed and sworn to before me, the undersigned authority, on this _____ day of _____ 20____.

WITNESSES:

R Chang #2241

R-Powell #1403

Exhibit “B”

AFFIDAVIT

STATE OF TEXAS)

) ss.

County of El Paso)

COMES NOW Israel Gonzalez being first duly sworn, under oath, and states that the following information is within his personal knowledge and belief:

My name is Israel Gonzalez. My DOB is 08/29/1992.

My SSN is 629-32-8232. My address is 15601 N. Poppy St. 85335.

City/State/Zip Code El Mirage, AZ. My phone number is (623) 202-6190.

I declare the following to be true to the best of my knowledge:

Everything in my first testimony (statement) was true and correct.

No one from the defense ever spoke with me.

No one from the prosecution ever spoke with me prior to trial.

AFFIDAVIT

Israel Gonzalez

Name

Signature

BEFORE ME, the undersigned authority on this day personally appeared Israel Gonzalez and upon his oath that the above information is true and correct to the best of his knowledge.

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public on this 16 day of July 2017.

FRANCISCO VINIEGRA
Notary Public
STATE OF TEXAS
My Comm. Exp. January 27, 2019

Francisco Viniegra
NOTARY PUBLIC – State of Texas

Exhibit “C”

REPORTER'S RECORD
VOLUME 9 OF 13 VOLUMES
TRIAL COURT CAUSE NO. 20120D05090
COURT OF APPEALS NO. 08-15-00039-CR

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
	)	
	)	
	)	
VS.	)	EL PASO COUNTY, TEXAS
	)	
	)	
	)	
JUAN CORNEJO	)	34TH JUDICIAL DISTRICT

****

TRIAL ON THE MERITS

****

On the 7th day of January 2015, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable William E. Moody, judge presiding, held in El Paso, El Paso County, Texas.

Proceedings reported by machine shorthand.

for that purpose.

MS. TARANGO: Thank you, Judge.

(Bench discussion concluded.)

THE COURT: I don't think we swore this witness in.

(Witness sworn by the Court.)

THE COURT: Okay.

VERONICA CERA,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Q. Good morning, Ms. Cera.

A. Good morning.

Q. Would you please identify yourself for the jury.

A. My name is Veronica Cera.

Q. And how old are you?

A. 38.

Q. Are you nervous?

A. Yes.

Q. I am just going to ask you to just stay calm and speak right into the microphone so that the jury can hear your answers; okay?

A. Okay.

Q. Did you know Roberto Renteria and Luis Antonio Fierro?

A. Yes, ma'am.

Q. How did you know them?
A. Roberto was my son-in-law, and Tony was my husband.
Q. Is Tony what you called Luis Antonio Fierro?
A. Yes, ma'am.
Q. Did he have any other nicknames?
A. Chuco.
MS. TARANGO: Your Honor, may I approach the stand to lower the monitor?
THE COURT: Yes.
MS. TARANGO: Thank you.
Q. (BY MS. TARANGO) How did you first meet Tony?
A. I had known Tony since we were in middle school together.
Q. And how long had you been with him as a common-law wife?
A. A year and a half.
Q. And what did you know about Tony, or Chuco? What did you know about him?
A. I don't understand your question.
Q. Okay. Well, at the time that you met him, did you know that he was in a gang?
A. Yes, ma'am.
Q. Okay. What did you know about that?
A. What do you mean? I don't understand.
Q. Well, what gang was he in?

A. He was an Azteca gang member.
Q. Were you familiar with the Barrio Azteca?
A. Yes, ma'am.
Q. How were you familiar with that gang?
A. I hung around with them since '98.
Q. Since '98.
Had you dated Barrio Azteca gang members?
A. Yes, ma'am.
Q. Were you ever involved with Tony in any Barrio Azteca business?
A. Yes, ma'am.
Q. What kinds of things would he do, or what kinds of things would you do to help him?
A. Drug deals, money, picking up money, and going to Juarez for him.
Q. Okay. And why would you go to Juarez?
A. To take money.
Q. Who would you take money to?
A. To a guy named Nano.
Q. Do you know Nano's real name?
A. I think it is Ricardo Zuniga.
Q. Okay. Can you tell the jury a little bit about what you know about the way -- I am talking, I guess, at the time that you were first with Tony, with Mr. Fierro, and as your relationship, I guess, developed in the time that you were with

him. What is your knowledge of the hierarchy or the way that the gang was structured? Who was in charge?

MR. SOLIS: I am going to object to hearsay, Your Honor, unless we determine that she has got personal knowledge of that. If it comes from a source other than her knowledge, then it's hearsay and we object to that.

THE COURT: All right. Well, limit your answers to only what you personally know.

Okay. Go ahead.

Q. (BY MS. TARANGO) So do you know?

A. Yes.

Q. Okay. So can you tell the jury how that was structured, how it was organized?

A. When I was around them, I know Nano was in charge, and then a guy named Vago, then my boyfriend Antonio -- my husband. Then after that -- I don't remember their names. I'm sorry.

Q. If you don't remember their names, are there other jobs that people have?

A. Yes, ma'am.

Q. So how was it organized? How many people are at the top, and how many levels are there?

A. It depends who's out here and who's inside in jail. It's different at the time.

Q. So back in the time when Nano was not in jail, was in

Juarez, how was it organized -- when Nano was in charge?

A. He was in charge. And then Tony and a guy named Vago would share -- they were sergeants.

Q. Were there other sergeants in town?

A. That I knew of, yeah. I don't know their names, though.

Q. Okay. And as a sergeant, what was Tony in charge of?

A. Of --

MR. SOLIS: Again, Your Honor, I am going to have to object to hearsay on confrontation grounds as well. If she knows this information from sources other than her own knowledge, I think that is hearsay and a confrontation problem, so I would like to take her on voir dire to see if we can iron that out.

THE COURT: Well, I will let you cross-examine her on it, but I think she has been instructed to answer only on personal knowledge.

So go ahead.

Q. (BY MS. TARANGO) Well, since this is becoming an issue, how do you know how the gang works? How do you know about the Barrio Azteca?

A. I have hanged around them for a long time. I dated several members. And I did a lot of work for them as well.

Q. You did a lot of work for them yourself as well?

A. Yes, ma'am.
Q. And you talked a little bit about the kinds of things you did for them. What kinds of things would you do for Tony?
A. I would go to Juarez and bring back drugs and also take money. Sometimes I would drive him around to do the drug ex- -- exchanges. I'm sorry.
Q. And would you take money to Juarez?
A. Yes, ma'am.
Q. To Nano?
A. Yes, ma'am.
Q. And sometimes would you do things by yourself for the gang?
A. Mostly with my husband's approval.
Q. With his approval?
A. Yes, ma'am.
Q. But did you go alone?
A. To Juarez?
Q. Yes.
A. Yes, ma'am.
Q. And did they ever have Azteca meetings at your house?
A. Yes, ma'am.
Q. And were you there?
A. Yes, ma'am.

Q. And did you ever hear Aztecas -- did you ever yourself have conversations with Aztecas while they are talking about Azteca business?

A. Not at the meetings.

Q. Not at the meetings?

A. No.

Q. But at other occasions?

A. Yes, ma'am.

Q. And this is something -- I guess this is sort of your life since 1998?

A. Yes, ma'am.

Q. How old were you back in 1998?

A. 21, around there.

Q. So when Nano was in Juarez and he was in charge, who reported to him, that you know?

A. Vago, my husband. I know that when I was around them, Silent, Wicked, Kiddo. Another guy named Silent. Some guy named Perry. And there is a lot more, but I don't remember all of them.

Q. Okay. And were these all -- were they all at the same level as Tony? Were they all sergeants or were they -- who did they report to?

A. At the time, Wicked, Kiddo, and Silent were just soldiers.

Q. Were just soldiers. And when you say Wicked, Kiddo

and Silent, who are you talking about? Who is Wicked? Do you know his real name?

A. Eddie Noreiga.

Q. And Kiddo, who is Kiddo?

A. I know his name right now, but I am really nervous. I'm sorry.

Q. Do you see Kiddo in the courtroom today?

A. Yes, ma'am.

Q. Can you please point him out and identify him by what he's wearing?

A. He is wearing a blue shirt with a striped tie with black and white.

MS. TARANGO: Let the record reflect the witness identified the defendant.

Q. (BY MS. TARANGO) And Silent -- do you know his name?

A. No.

Q. Okay. And how long had you known Wicked and Kiddo and Silent?

A. I met Kiddo in 2008 when I was dating another gang member.

Q. So you have known the defendant since 2008?

A. Kiddo. Wicked, I met him when he got released, when I was with Tony. And Silent, I met him in around 2008 as well.

Q. Okay. So they were soldiers; they were not sergeants like Vago and like Tony?
A. No, ma'am.
Q. Did they report to Vago or Tony?
A. Yes, ma'am.
Q. To both of them or to just one of them?
A. At the time Tony and Vago were sergeants, so they would all report to both of them.
Q. To both of them. Okay.
And as a sergeant, what were -- what was -- what was Tony's job? What were his duties as a sergeant?
A. To pick up money that was being collected by other drug dealers.
Q. And who was in charge of the money that he collected? What did he have to do with it?
A. Give it to Silent because Silent was in charge of the box.
Q. Did he get to keep some of the money from the box? Did Tony get to keep some of the money?
A. They would get money. The sergeants would get 150 weekly.
Q. Okay. And was there a time when you were aware of and in charge of, I guess, the -- I guess the books for that box?
A. Yes. I would make the -- I would do all the math and

write down all the names and the money that was being sent upstate and to the other gang members that were out here. I would write down the receipts.

Q. Okay. So you would do the receipts?

A. Yes, ma'am.

Q. So you had to account for this money; is that right?

A. Yes, ma'am.

Q. And when you say "upstate," what do you mean?

A. To other gang members in prison.

Q. So is money collected from drug deals in town by the Aztecas and then collected in the box?

A. Yes, ma'am.

Q. And then the money from the box goes --

MR. SOLIS: Object to leading, suggesting the answer to the witness, Your Honor.

THE COURT: All right. Sustained.

Q. (BY MS. TARANGO) What happens to the money that is then collected and in the box?

A. It's given to the lieutenants and to the sergeants. And then some of the money is put away for lawyer fees for other gang members. And some of the money is given to other family members of the gang members.

Q. And you were in charge, for a while, of keeping the receipts?

MR. SOLIS: Again, object to the leading nature of the question, Your Honor.

THE COURT: Yes. It sounded like it might have been leading.

Go ahead.

Q. (BY MS. TARANGO) Okay. How long -- how long were you involved with the -- with keeping track of the money in and out of the box?

A. When we had the box till. It was given to Silent.

Q. And when did you have the box?

A. Around that time, back and forth.

Q. Back and forth?

A. Yes, ma'am.

Q. And you are talking about 2012?

A. Yes, ma'am. And a little bit before that.

Q. At some point is Nano no longer in charge?

A. Yes, ma'am. He got arrested.

Q. He got arrested. About when was it that that happened?

A. I think he got arrested around 2011. I'm not sure exactly. About two or three months before my husband got killed.

Q. So two or three months before your husband got killed?

A. Yes, ma'am.

Q. So would it have been sometime in the summer of 2012?

A. Yes, ma'am.

Q. So what happened once Nano got arrested?

A. He would -- we put minutes on the phone so he would call collect to our house. And one of the conversations that he had with my husband, he --

MR. SOLIS: Objection to hearsay response coming, Your Honor.

Q. (BY MS. TARANGO) Well, you know, before when we talked about when Nano got arrested, had you ever been to his house in Juarez?

A. Yes, ma'am.

Q. How many times, approximately?

A. Around ten times.

Q. And were any of those times social visits, or were they all just you delivering money?

A. Almost all of them were to deliver money or letters from El Paso.

Q. Or letters. Who were the letters from?

A. From other gang members from jail and from the ones from here in El Paso.

Q. And why is it that you would be the one to go to Juarez instead of someone else, someone actually in the gang? Or why didn't Tony do it?

A. We went -- me and Tony went like twice. Then after a while, he stopped going. So he would send me to go because I would take him the money from the drugs that were being sold.

Q. At one point did you ever see Wicked, Silent, Kiddo -- the defendant -- Vago, and your husband interact together?

A. Yes. At Nano's house one time.

Q. At Nano's house one time.

Did you ever have Silent or Kiddo or Wicked at your house?

A. Yes, ma'am.

Q. How often were they at your house?

A. Almost on a daily basis.

Q. So let's just talk about Kiddo. How often would the defendant go to your house?

A. Almost every day or every other day.

Q. And why would he go to your house?

A. To pick up drugs or --

MR. SOLIS: Objection, Your Honor. We have a motion in limine.

THE COURT: All right. Sustained.

MR. SOLIS: Your Honor, I would ask for the instruction to the jury.

THE COURT: All right. Disregard that comment.

MR. SOLIS: Move for a mistrial, Your Honor.
THE COURT: Denied.
MS. TARANGO: May I approach the witness briefly?
THE COURT: What?
MS. TARANGO: May I briefly approach the witness just to instruct?
THE COURT: Yes.
(Sotto voce discussion between
Ms. Tarango and the witness.)

Q. (BY MS. TARANGO) And when the defendant or Kiddo would go and visit at your house, did he come by himself or did he come with anyone else?

A. Sometimes he would be by himself or his girlfriend, or sometimes he would go with Wicked.

Q. And of the two, who did you know the longest?

A. Kiddo.

Q. Kiddo?

A. Yes, ma'am.

Q. And Silent -- would he go to your house as well?

A. Yes, ma'am.

Q. What about Vago? Did Vago ever go to your house?

A. Yes, ma'am.

Q. How often would he go?

A. I saw him there around three or four times. And

another time when he went to a meeting that they had at my house.

Q. Okay. A meeting at your house?

A. Yes, ma'am.

Q. So talking again about when before Nano was arrested, did you ever see all of them together -- Vago, Nano, Tony, the defendant, Silent, and Wicked?

A. Yes, ma'am. They were at Nano's house one of those times.

Q. In Juarez?

A. Yes, ma'am.

Q. And what was going on?

A. They were all drinking and out partying.

Q. It was at a party at Nano's house?

A. Well, a get-together.

Q. A get-together?

A. Yes, ma'am.

Q. And based on your observations, what kind of a relationship -- and not just from this day, but from all the times that these people were at your house or at different places that you saw them together, what did you observe about the relationship between Tony and the defendant and Silent and Wicked and Vago?

A. They would always look at each other ugly or argue.

Q. So they would look at each other ugly and argue?

A. Yes, ma'am.
Q. But they would still go to your house?
A. Yes, ma'am.
Q. Okay. So tell the jury what you observed at that party in Juarez at Nano's house.
A. That day I stayed home because I didn't want to go. I was tired. Then around maybe eight o'clock or nine I received a call from Tony saying that --
MR. SOLIS: I am going to object to hearsay, Your Honor.
THE COURT: All right. Sustained.
Q. (BY MS. TARANGO) Without saying what Tony told you, what did you do after Tony called you?
A. He asked me to go to Juarez and take --
MR. SOLIS: Again, I object to hearsay, Your Honor.
THE COURT: Well, that's not hearsay. It's what they did after they received the call.
MR. SOLIS: Her response was, "He asked me to," so I think it's hearsay, Your Honor. I object to hearsay.
THE COURT: Oh. I thought she said that's what they did. Okay. Fine.
Q. (BY MS. TARANGO) So after the phone call, what did you do?
A. I got ready. I picked up beer and then pizza that

they asked me for, and I took them some stuff, some drug business stuff, and I went over there.

Q. To Nano's house?

A. Yes, ma'am.

Q. And who did you see at Nano's house?

A. I saw Kiddo; Silent; Nano's wife, April; Vago; Silent's wife; Wicked; and my husband; and a couple of other friends that I didn't know.

Q. And did you see anything that made you concerned?

A. Yeah. They were drinking, and when I was talking to Tony, he was giving his back towards the defendant and the other guys. They were laughing and throwing fingers at him.

Q. At Tony behind his back?

A. Yes, ma'am.

Q. What else happened?

A. Like, they were making fun of him.

Q. And then what happened?

A. I overheard one --

MR. SOLIS: Object to hearsay, Your Honor. Anything she hears is hearsay. And it repeats the -- whatever it is she heard and then repeats it is hearsay, Your Honor.

THE COURT: You might have to establish who she heard it from.

Q. (BY MS. TARANGO) Do you remember who said it?

A. Yes. Kiddo.

THE COURT: Okay. Did we establish approximately when this was?

MS. TARANGO: Not yet. No, I haven't. This was sometime --

Q. (BY MS. TARANGO) About what time of the year was this in 2012?

A. A little bit before Nano got arrested. Because a couple of days later we saw on the news that he had gotten arrested.

Q. Okay. So would this have been around June of 2012?

A. Yeah, around that time.

Q. Okay. And what did you hear the defendant say?

A. That somebody was going to die.

Q. How did you feel when you heard that?

A. I got scared and I told Tony. And he said that I was tripping. And I said, "No, you guys are all intoxicated. Let's just go home." Then I kept on telling him and telling him. And at the end, we got my boys and we went back to El Paso. And after that, he never went back.

Q. Tony never went back to Juarez after that?

A. No, ma'am.

Q. So what happens after Nano is arrested?

A. What do you mean?

Q. As far as within the Barrio Azteca, the way things were working in regards to what you-all were doing, what

happens after Nano is arrested?

A. After Nano got arrested, my husband was given the rank by Nano to be a -- to be a lieutenant for the Barrio Azteca because he could no longer be in charge because he was in jail.

MR. SOLIS: Again, Your Honor. That response could only have come from another source. I object to hearsay once again and on confrontation grounds as well, Your Honor.

THE COURT: Overruled.

Q. (BY MS. TARANGO) What is it called -- what do you call it when someone gives power to someone else because they are in jail?

A. To give him his muscle shirt.

Q. So how did that change for you? What did you and Tony have to do differently now that he had the muscle shirt?

A. Well, he wrote to Tolon. He is the higher-ranking of the Barrio Azteca.

Q. Who is Tolon?

A. He's one of the *capos* of the Barrio Azteca.

Q. One of the *capos*?

A. The five members that made Barrio Azteca in prison.

Q. So he is one of the founding members. And where is Tolon? Where was he at this time?

A. Incarcerated.

Q. So your husband wrote to him?

A. Yes, ma'am.

Q. What was he writing? What was the purpose of the letter?

MR. SOLIS: Again, that is hearsay. She is referencing the contents of a letter. That's hearsay, Your Honor.

MS. TARANGO: Your Honor, it isn't offered for the truth of the matter asserted. It's just to show the state of mind of the participants.

MR. SOLIS: If it is not offered for the truth, then it's not relevant, Your Honor.

THE COURT: Approach the bench.

(At bench, on the record.)

THE COURT: These are letters that she saw?

MS. TARANGO: I believe so, Your Honor. She was very much involved.

THE COURT: That she wrote or that he wrote -- or her husband wrote?

MS. TARANGO: He wrote.

THE COURT: And then --

MR. SOLIS: She is going to relate the content of that letter. I have not had the opportunity to see the letter.

THE COURT: You don't have the letter?

MS. TARANGO: No.

MR. SOLIS: And neither is the declarant available for -- well, not the declarant -- the author of the letter is not available for cross-examination, never has been. So it's hearsay. And the confrontation issue as well -- a lot of her testimony is that, in my opinion.

THE COURT: I mean, it seems like it's hearsay. How could it not be offered for the truth -- what is it being offered for?

MS. TARANGO: It's just to show what they're doing. They are writing to -- or he writes because they want to know if he is actually in charge. They're going up the chain. It's like -- it's almost like she's the custodian of records for a business, Judge, because she has knowledge of the workings and who can authorize what and who can't.

THE COURT: That sounds like the truth of the matter asserted.

MS. TARANGO: I am not trying to prove that he was or was not in charge. It's more the state of mind of the participants.

MR. SOLIS: Well, I think the comments are -- reveal what is up here. Trying to make her the custodian of records is just a way to get hearsay in, Your Honor. And I am hamstrung as to what I can do.

THE COURT: There isn't any record anyway --

MS. TARANGO: No.

THE COURT: -- nor is there any document.
MS. TARANGO: No.
THE COURT: I think their objection is well-taken.
MS. TARANGO: Okay.
MR. SOLIS: Your Honor, just -- off the record, I guess.
THE COURT: I am also in fear she might relate a lot of other things in the letter that, you know, might be other portions of the motions in limine and other things.
MS. TARANGO: No, Judge. It has nothing to do with any of that.
MR. SOLIS: Off.
(Off-the-record discussion.)
(Bench discussion concluded.)
Q. (BY MS. TARANGO) Without talking about what the letter says or said, do you know whether Tony sent a letter to Tolon?
A. Yes, ma'am.
Q. Did you mail it?
A. I went with him.
Q. Okay. And did he ever, to your knowledge, receive a response, a letter in the mail, from Tolon?
A. Yes, ma'am.
Q. What happened next?

A. After Tony got the letter, he got real happy and passed me the letter so I could read it. And it said that --

MR. SOLIS: I am going to object to hearsay.

Q. (BY MS. TARANGO) Without saying what the letter says --

A. Oh, okay.

Q. -- did you ever have a meeting at your house?

A. Yes, ma'am.

Q. Who was there at that meeting?

A. Vago, Silent, Wicked, Kiddo, another *carnal* named Perry, Silent, Chavira, and a couple of other ones that I can't recall right now.

Q. And what happened at this meeting that you know happened?

A. I don't understand your question.

Q. Well --

THE COURT: Approach the bench.

(At bench, on the record.)

THE COURT: I think, you know, you can get to the meeting if they're -- if she's present.

MS. TARANGO: She --

THE COURT: -- to see if there was an acknowledgement of him being the acting lieutenant. I mean, that is what you are getting to.

MS. TARANGO: Yes.

MR. SOLIS: Yes.

THE COURT: And I think that is legitimate because, I mean, she is present. They are going to acknowledge he is the lieutenant or whatever, acknowledge that the muscle shirt has been passed, whatever, that kind of stuff. You can go into that.

MS. TARANGO: Yes.

THE COURT: But be careful not to go into, you know, the -- but I think you can get to it that way.

MS. TARANGO: Yes. I won't --

THE COURT: As a --

MR. SOLIS: Here's the problem: When she says "I don't know what you mean" when she asked "What happened at the meeting?" She doesn't have personal knowledge. She was only told what happened at the meeting.

THE COURT: You can have personal knowledge because you can listen to the conversation.

MR. SOLIS: I understand.

THE COURT: There were the four people. The four of us are here. Okay. You know, I can tell you, "Hey, I have just been appointed judge," or whatever, "of the court." Okay. So you can then testify that I said ... and then you acknowledge it --

MR. SOLIS: Right.

THE COURT: -- the swearing in and whatever. I

mean, it is an acknowledgement of the meeting. And she can pass on the information. She can ask directly. It may be simpler to say, Was there any knowledge that he was the lieutenant? And that is not leading because the answer is either yes or no. Either he was or he wasn't. It doesn't lead to a response. It gets to exactly to the issue you want to get to, doesn't it? Isn't that the issue?

MS. TARANGO: Yes, essentially.

MR. SOLIS: My point is the question is asked, "What happened at the meeting?"

Her response is, "What do you mean? I don't know what you mean." That's because she doesn't know. She has only been told what has happened.

THE COURT: Well, she has established that she was at the meeting.

MS. TARANGO: She did say -- I guess I can get her to clarify.

THE COURT: You can reestablish that she was at this meeting and then -- I mean, it is kind of broad if you ask the question about what happened at the meeting because there is a lot of stuff that might not be relevant, that might go into a lot of other issues.

MS. TARANGO: Right. Right.

THE COURT: But the key thing is that some of it -- primarily, the knowledge of the meeting -- there might

have been other things done too. But the knowledge of the meeting and then how they took that acknowledgement, you know, and how they responded to it, I mean, because that might be some of the happenings or -- I don't know what they did.

MR. SOLIS: Your Honor, I just think that phrasing the question in that manner is suggesting the answer to the witness.

THE COURT: I do not, because I think a leading question is, Isn't true that he was acknowledged as the lieutenant at this meeting? That is a leading question. Of course, Was he acknowledged as the lieutenant at this meeting? does not suggest the answer because it could be -- the answer could be either yes, he was, or no, he was not. So it doesn't suggest the answer that he was.

I mean, I know we're splitting hairs a little bit. But I think that's -- at least that's the way I have always interpreted leading questions. Okay?

MS. TARANGO: Okay.

THE COURT: So I was trying to give you-all some guidance on trying to get to what you are trying to get to without getting into some things that we probably don't need.

MS. TARANGO: Thank you, Judge.

THE COURT: All right. Go ahead and proceed.

(Bench discussion concluded.)

Q. (BY MS. TARANGO) I guess, without talking about what

anyone said either before or during or after the meeting, at this meeting at your house, was it then understood from then on that Tony would be acting --

MR. SOLIS: That is a leading question. That does suggest the answer to the witness, Your Honor.

THE COURT: Okay.

Q. (BY MS. TARANGO) Was there any --

MR. SOLIS: Was it then understood? Then the following part of that question --

THE COURT: Well, she was rephrasing it.

So continue.

Q. (BY MS. TARANGO) Was there any acknowledgement?

MR. SOLIS: Object again. To my mind, that's a leading question, suggesting the answer.

THE COURT: Overruled.

You may answer the question about whether or not he was acknowledged.

A. Yes, ma'am.

Q. (BY MS. TARANGO) And what was the mood of the people? Were they -- were Wicked and Silent and Vago and Kiddo happy about it?

A. No. They were upset.

Q. How did you know they were upset?

A. Because --

Q. From what you yourself saw?

A. Well, I wasn't in the meeting.
Q. Yes. But after the meeting when you saw them, how did they seem?
A. They were mad when they left.
Q. Did all of them look mad or just some of them?
A. Some of them.
Q. Who looked mad?
A. I saw Vago that -- I saw Vago looking upset. And Kiddo was smirking.
Q. At the time -- now that Tony is acting lieutenant, what kinds of jobs -- how did your jobs change? What kinds of things were you doing that was different now?
A. He was in charge of all of El Paso, so everybody that was in charge of the different sections would report to him, including Vago.
Q. And were you there when Vago would report to him?
A. Sometimes. Not all the time.
Q. And the times that Vago did report to him, how did that go?
A. They would -- sometimes they would get along, and sometimes they would argue.
THE COURT: Excuse me. Now are you saying -- is it -- is it Vado, V-a-d-o, or Vato, V-a-t-o?
MS. TARANGO: V-a-g-o.
THE COURT: Vago?

MS. TARANGO: Vago.

THE COURT: Not Vato, V-a-t-o, or not Vado, V-a-d-o.

MS. TARANGO: Right.

THE COURT: Okay.

Q. (BY MS. TARANGO) And in the times that you interacted, both before and after Tony became the acting lieutenant, did you have contact with Kiddo, with the defendant?

A. Yes, ma'am.

Q. Did he -- did the way he acted around the defendant change before and after?

A. Yes, ma'am.

Q. How did it change?

A. He would always laugh or make faces at him when Tony would talk.

Q. Okay. Did that seem respectful, or was he joking, or how -- what was that like?

A. It looked like he was disrespecting.

Q. Did everything go fine for Tony while he was acting lieutenant? Did you guys continue these duties up until the very end, or did anything change?

A. Almost all the way to the end.

Q. Almost all the way to the end.

What happened before the end?

A. Before he got killed there was issues that they would try to bring up to not have him in that position.
Q. Why didn't they want him in that position?
A. Because they -- they didn't like him.
Q. They didn't like him. Did they ever talk about his heroin use as well?
A. Yes, ma'am.
Q. At the time were you also using heroin?
A. Not at the time. After.
Q. After.
When did you start?
A. I started maybe about a month before he died.
Q. A month before he died.
So what happened? What happened right before -- when they were complaining that maybe he shouldn't be in charge, what happened next?
A. Nano called on the radio saying that --
MR. SOLIS: I am going to object to hearsay.
THE COURT: Sustained.
Q. (BY MS. TARANGO) Were you present when Nano called?
A. Yes, ma'am.
Q. And Nano, where was he calling from?
A. Juarez.
Q. From Juarez.

This is before he got arrested?

A. Yes, ma'am.

Q. Afterwards, when we're talking about after Nano is in jail and Tony is the acting lieutenant, how long does he have that job for?

A. A couple of months.

Q. Okay. And does he do the job the whole time?

A. Yes, ma'am.

Q. Okay. Is there any time when he is not allowed to do any more Azteca business and you are not helping him to do anything anymore?

A. Yes, ma'am. He got parked.

Q. When did that happen?

A. Maybe like about a week or two weeks before he got killed.

Q. And what did that mean when he is parked?

A. That meant that he couldn't pick up money from the box or do any drug deals or be around the gang members.

Q. So for that time you are not doing anything either?

A. No, ma'am.

Q. And who has the box?

A. Silent.

Q. So what happens during this time when Tony is parked? Is he happy about that?

A. No. He was very upset.

Q. And during the time that he is parked, do you have any contact with the defendant or Wicked or Silent or Vago?

A. Yes, ma'am. They would come to the house.

Q. They would still come to the house?

A. Yes, ma'am.

Q. And what were they like when they would come to the house? Were they friendly or were they --

A. For the most part sometimes they were friendly. They would come and eat. Then sometimes they would, like, make faces or be mad. Just depended on their moods that day.

Q. So let's talk about the events of August 22nd of 2012.

THE COURT: Okay. And that -- that might be a good time to break.

MS. TARANGO: Okay.

THE COURT: Okay. And we will return at 12- -- it is twelve -- 1:15. 1:15.

(Court and jury in recess.)

(Open court; defendant present; jury not present.)

THE COURT: All right. Now, Mr. Solis, you have something before we bring in the jury?

MR. SOLIS: Yes.

Here's the thing, Your Honor: I am going to reurge my objection to the testimony elicited a little while

ago as hearsay and in violation of the Sixth Amendment confrontation -- right to -- clause.

Here's the problem, Your Honor. Over the lunch hour I reviewed Ms. Cera's statements to the detectives. And the testimony elicited today is entirely comprised of the statements given to the detectives. And the statements are replete with the following type of information.

For example, on the first statement given the 24th of August, "Nano called Chuco and told him." "Tolon telling him." "Tolon also told Chuco." "Chuco told everyone." "Chuco also told Kiddo." "Chuco told me." "Vago told Chuco." "Tolon told him." "Chuco called Silent and told him." "Chuco said." "They told him." "Tolon tells Chuco." "I remember Chuco getting pissed saying he was going ..." and on and on. "I heard him tell Silent." "Chuco tells Silent." "The word was Chuco was getting parked," et cetera. "Tolon wrote back telling Chuco." "Silent told Chuco." Although I don't know -- well, I recognize that is different. That is something she can testify to. "Chuco then told me." That is just on the first page.

On the second page of the 24th, again it starts like this: "My husband would tell me everything about related activities of the Azteca gang." Later on, "Chuco told me." "I remember Chuco told me." Again, "Chuco told me." "Chuco told me." "I was told by Chuco." "I was told by Chuco" again.

"Vago gave a copy." "Chuco didn't tell me anything else." "Chuco told me" again. "Chuco told me." "Chuco told me," that paragraph. "Chuco told me about Cholo." "Chuco told me about" some other person. "Chuco told me about" this and that. Chuco also told me about "Shy Boy." That is the second page.

On the third, "Chuco told me" on the second paragraph. "I heard Filo tell Lenton." "Some of the guys told him." "Chuco told me." And "He told me." "He told me." "He told them." "They told him." "Chuco also told me." "Chuco also told me again." "Chuco" --

Again and again and again it's referencing how Chuco conveyed information to Ms. Veronica Cera.

Veronica Cera comes in here today relating that information told to her by Chuco. It's hearsay. The statements given to the detectives indicate that that information was not of her own knowledge. It was information imparted to her by Chuco. She comes here today and testifies to those statements. Chuco is not available. I have never had the opportunity to cross-examine him or anyone else that she had information from.

I really want to reurge my objection as I mentioned earlier today, Your Honor, or, at the very least, have the opportunity to voir dire the witness on exactly the source of information she has testified to today before any further testimony is developed. Because in the event the Court

decides to grant my objection or sustain my objection, it is going to be mighty hard to unring that bell.

So that's what I have, Your Honor. Thank you.

THE COURT: All right. Your response?

MS. TARANGO: Thank you, Your Honor.

Judge, I was careful in my questions and I was instructed by the Court on the ways -- the things that I could ask her and what I could not ask her. Everything that she has testified to thus far was based on what she knows. As far as -- I mean, I haven't offered her written statements. I haven't offered -- I haven't asked her specifically evidence from hearsay yet. But I want to, Judge, and I am going to -- I would like to ask her about the letters because she -- she was married to Chuco Fierro. They were married.

She testified that they did everything together or she would do things for him. So she was working -- she was essentially his right arm. She would go to Juarez. She would come back. She would turn in money. She would keep the receipts for the box and know what money was coming in and what money was going out. She knew the deals that were happening at her own house. She knew when meetings were present [sic]. She would see these defendants almost on a daily basis and see their conversations and talk to them and see their interactions. So her testimony is based on her own knowledge.

She cannot be classified as a Barrio Azteca

because she was a woman so she wasn't a member. But she was there and she was participating in all of these activities.

MR. SOLIS: Except that's not -- I'm sorry.

MS. TARANGO: I haven't offered her written statements. I would like to. I know I would never be allowed to do so. And I haven't asked her anything that anyone said, other than the defendant, which are statements by a party-opponent, and then the letters, Judge.

And the reason I am bringing up the letters is because I anticipate an objection again. And we talked about it before the break. The letters themselves, or the gist of the letters, the fact that the letters existed, is important not because of the truth of the matter asserted within the letters.

I'm not trying to prove that Chuco did have the muscle shirt for a certain amount of time or did not have the muscle shirt. It's just the fact that those statements were said.

And I did some research over the lunch break. I found many, many cases on the same headnote, and when I did the search I found that, in Texas, under the rules of evidence, extrajudicial statements or writings offered for the purpose of what was said rather than the truth of the matter therein stated is not hearsay.

And they're not hearsay. I am not offering -- I

am not trying to prove that Chuco was, in fact, officially the acting lieutenant of the Barrio Azteca here in El Paso. Because I could have easily just had someone like the defendant or Vago who would disagree, or someone who is in charge, another *capo* in a federal prison, might disagree and say "I don't think he was in charge." I'm not trying to prove that he was or that he wasn't. I am just trying to prove that these statements were being made because -- they formed the basis of the motive for this murder.

It's not whether or not it was true, because they disagreed as to whether it was true. It's just the fact that they were said.

It's the equivalent of having a witness testifying, "I heard the victims say that he thought the defendant was a horrible, vicious person and that's why the defendant murdered him. I am not trying to have the victim -- statements that the defendant is a horrible person for the truth of the matter. It's just to show kind of the relationship between them, the state of mind, and the motive as to why the defendant might murder the victim.

And I would cite the Court to -- there is multiple cases out of the Court of Criminal Appeals. *Dinkins* against state. That's at 894 S.W.2d 330. That's a 1995 capital murder case. There is the *Porter v. State* at 623 S.W.2d 77- -- 374. That is a 1981 case out of the Court of

Criminal Appeals. And *Gholson* against state, and that went to the Supreme Court of the United States. That's 542 S.W.2d 395 from 1976. *Crane* against state, 786 S.W.2d 338, from 190. *Lyle* against state, 418 S.W.3d 901, from 2013.

And these cases talk about all kinds of different scenarios, and they vary from capital murders to manslaughters, different types of cases where the state is offering statements not to prove that they are true, but to show the context in which everything was happening.

It's the same sort of thing as a confession. Like a DVD of a confession where we have not just the defendant's statement in writing signed at the bottom, where we now have a detective asking questions and interjecting facts and getting the defendant's responses to facts or statements that the detective is making.

What the detective is saying is not being offered for the truth of the matter asserted. Oftentimes, as a detective will testify, they will lie or they will exaggerate their evidence to a defendant to try to get them to confess. And it's understood what the detective is saying is not so much for the truth of what the detective is saying on the confession. It's to show the defendant's response, the context of what's happening. It's just to show the context of what is being said. It is a strange distinction, but it's there and it's recognized in the law.

And I would argue that those letters to and from Tolon -- "Am I in charge?" "Yes, you are in charge" -- I am not offering them to show that, you know, this case is a civil suit over a dispute over a leadership. It is just trying to show the context and the fact that these people are saying these things, which gives rise to the motive for the murders.

MR. SOLIS: That's a nice pivot from the issue I was addressing. We will get to the letters in a little bit. Remember, we don't have any letters. All we have is testimony from this witness who got it from another deceased witness now, so it's double hearsay.

But here's an example: You remember the testimony where -- or the testimony where she says Nano gave Chuco some authority? Well, in the statement she says this: "Nano called Nano" -- "Nano" -- strike that. "Nano called Chuco from jail and told him since he was now in jail he was giving him the spot to take control of the streets." So she gets that directly from Chuco because Nano told Chuco. It's rank hearsay.

And to talk about the letters -- it's one thing if we have the letters. I understand that. But we don't have any letters. She is getting that information from Chuco. And we don't know whether, in fact, Chuco conveyed the accurate information. We don't know that because we don't have the letters. So I just have to disagree.

If you look at the statements, it's essentially a paraphrasing of the testimony today of what she gave the detectives. And she again and again is saying "He told me," "I told him," "They told each other," and on and on and on, clearly referencing hearsay, Your Honor. Clearly, without exception, it is hearsay.

THE COURT: Well, what I have let in is the issue of where she said she was present and the defendant was present and her husband was present and that the authority was being given -- that there was an acknowledgement of the authority as he being the lieutenant; okay?

And from that standpoint -- she was present. And that standpoint being telling her -- admonishing her that it had to be based on personal knowledge and not on hearsay.

And now you are going to get to cross-examine her thoroughly on this issue. There is no question that you will. You know -- if, you know, it appears that something is rank hearsay, well, then, I may have to change my ruling. But I don't know.

But at this point, I mean, I think we have a clean trial on this issue. I don't think there is any question that we have a clean trial on the issue. We may -- and we're talking about this gang leadership, gang activity acknowledgement.

I'm a little concerned because Counts II and

III -- you know, if we weren't trying for the issues of engaging in organized criminal activity -- you know, they are going to the truth of the matter asserted there, I mean, as to gang activity, the leadership in the gang. These are all establishing matters that are critical and controversial to the case.

I mean, I think they're critical -- they are much more critical to Counts II and III than they are to Count I. And I just see some confusion to try to instruct the jury that you can consider the evidence as to Count I but not as to Count II and III. You know, I am just not sure they can do that.

MS. TARANGO: Well, it is all the same transaction, contextual evidence, Judge. This is all -- it is -- and it goes -- it does go somewhat to Counts II and III because she isn't directly saying that the defendant was also a member of the Barrio Azteca. And that's part of how she -- that is the only reason she knows him. But she also did testify from her own personal knowledge that their duties changed once he became acting lieutenant, that their job changed, that the money changed. And now --

THE COURT: In fact, I have let that evidence before the jury.

MS. TARANGO: Right.

THE COURT: And I know you don't think I should

let any of that in. But I think a lot of that is based on not just what she heard but on the way she saw the people act and the way -- who had the charge of the box, you know, how much people got paid, you know, all of that.

MR. SOLIS: My recollection is that insofar as that type of question and response that she was present and observed these activities, that's probably -- what? -- a fifth of her testimony in its entirety. The rest of it, comparing her statements, comes from some other person, principally Chuco. And she has conveyed that today as if it is personal knowledge, but it's not conveyed as personal knowledge from the statements she gave previously.

Maybe the thing to do is have His Honor review the statements or allow me to take her on voir dire. I understand we get to cross-examine her on that, but, again, my concern is you say, "Well, you know, after reconsidering, ladies and gentlemen, we're going to strike or not allow you to consider the following," so the proverbial "How do you unring that" becomes an issue.

THE COURT: Well, I mean, if what you are saying is true, I mean, I have already let all that evidence in anyway.

Now, if you are talking about letting in some additional evidence and asking me to reconsider letting in testimony about the letters, about what she remembers the

letters said -- right?

MS. TARANGO: Yes, Judge. Right. She was there when they were written. She read the letters. She read the responses. They were together during all of this.

And, again, my argument is not only as to the letters but as to everything that she testified as to who is in charge and who does what. It's not to prove who was in actual charge, because, again, that's always going to be contested. I can have her testify all day today on who was in charge and who was not in charge according to her perception, and someone else is going to completely disagree.

But that's the point. The point is that there was contention and disagreement about who was in charge. It's not -- I am not trying to show who was or who was not in charge. I'm just trying to show that these conversations were happening to put it in all context, to put the motive in context for the jury.

THE COURT: Okay. Well, I still don't think you can go as far as going into what she was -- looking at the content of the letters and, you know, "This is my memory of what somebody said," "what my deceased husband said." Otherwise, I mean, I am not sure the hearsay rule would have any value at all. I mean, I just don't. It wouldn't -- it would just -- we wouldn't need a witness, you know.

MS. TARANGO: Well --

MR. SOLIS: Just bring the letters. I do want to make clear that --

I'm sorry.

MS. TARANGO: Chuco Fierro is dead so obviously we cannot have his testimony about what happened. We don't have the letter because it was taken from his body by the defendant and his codefendants after he was killed. So I can't bring the letter as well. And I would argue that part of this forfeiture by wrongdoing is --

MR. SOLIS: That hasn't been established that anyone took any letter from anyone. There is no evidence of that at this point.

And just so the record is clear, I have been objecting as the trial has gone on with regard to her testimony. This is not my first -- this is my reurging on the same objection. But on that topic, there is no testimony that a letter was taken from Chuco or anyone else. In fact, there is not even talk about a letter, but there is no copy of a letter, there is no -- there is nothing.

THE COURT: Let me see your cases.

MS. TARANGO: Yes, Judge.

THE COURT: I mean, I can look at them. I don't know if they are going to be expositive or --

MS. TARANGO: I didn't print them out. I printed quotes from them and then the cite at the bottom.

THE COURT: You looked at a headnote. Is that what it is?

MS. TARANGO: I did. I looked at several cases. I started a headnote search, then I think there is, I think, upwards of 80 cases in support of that headnote.

(Brief pause while the Court reviews documents.)

THE COURT: You only really have the headnotes here. It is difficult to see in what context some of this is. I may have to look at this later.

At this point I am going to keep my ruling in place. I will look at this after we recess for the evening, look at the cases and evaluate it. But I really -- in the middle of trial, I don't have time to do that. I want to move the testimony along so that we can hear some of the testimony.

And I think you are establishing -- I mean, at least this witness has established a lot of that motivation of what you were trying to. Maybe not as much and maybe not as artfully as you would like, but I think it is there and I think from their standpoint it is much more than they would have preferred. But, I mean, so far I think that my rulings have been fairly sound based on the law.

This, I am not sure of; okay? I am letting in what you are suggesting simply under contextual or state of mind. And I am not sure. I guess it would be her state of mind, his state -- the deceased's state of mind. I am not

sure.

MS. TARANGO: I guess, so that the Court understands where I would like to go with this and why I think this is so crucial, the testimony, where we ended up, he had been acting lieutenant and they were doing the acting lieutenant duties for a while, and then he had been parked so they didn't do anything. Then he gets a letter from Tolon, a response to his letter. He gets a letter from Tolon in the mail, and he gets very excited. The letter tells him, "You are in charge. You are in charge. They didn't have the authority to do that."

That's when he calls -- in her presence, he calls the codefendant, Luis Rodriguez, tells him he needs to get the money box back from Vago because he is in charge and he has a letter to prove it. Whereupon the defendant then takes the phone and Ms. Cera hears him say, "Well, bring the letter that proves you're in charge. Bring the letter and come and we will have a meeting and we will talk about it at Wicked's house." And that is the last time he is seen alive.

THE COURT: That's going to come in, the last part about what -- where you are talking about what the defendant is saying.

MR. SOLIS: She allegedly hears --

MS. TARANGO: It is the letter that spurs it. It's the letter that he receives from Tolon in prison that

spurs that. And that's the motive.

MR. SOLIS: She allegedly hears his voice on speakerphone. I will tackle that.

But the other part where she testifies about the context of the letter, what Chuco said to other people on the phone, that is hearsay. The question then becomes is it offered for the truth of the matter? Well, what else is it offered but for that?

Remember, there is the two engaging counts. This is all about the context of this power struggle that they are talking about. So I understand that she can testify about allegedly hearing the parties on the -- or at least the party opponent on the cell phone speaker, the speaker cell phone. But the other I still have --

THE COURT: She was listening to the conversation between her husband and the defendant; right?

MS. TARANGO: Yes. He had it on speakerphone. He was so excited when he got the letter, he was --

THE COURT: I assume he was telling -- allegedly telling the defendant, "I've got the letter that says I am in charge."

MS. TARANGO: Right. And the defendant says, "Bring the letter."

THE COURT: "I want to see it."

MS. TARANGO: Right. "Bring the letter. We're

at Wicked's house. Bring the letter."

THE COURT: Now, that, I think is admissible because, I mean, he is directly involved in this conversation and that -- from that standpoint, I do see that. And that is what is going to -- I think, from your theory of the case, the state's theory of the case, that is what's going to lead to the fatal encounter.

MS. TARANGO: Yes. That was the final straw, I think, that sealed it.

THE COURT: No, I don't have a problem with that part. I do have problems with the -- there is another letter or something.

MS. TARANGO: Well, it was the letter he wrote to Tolon asking, "They parked me. I am not in charge anymore. Can you please confirm or verify whether I am in charge or not." So he writes that letter. They send it to Tolon in prison. Then he gets this response where he is vindicated and calls them to tell them, "I have a letter from him" -- from the main boss -- "saying I am in charge."

THE COURT: Okay. I am going to let in the part you are talking about right now only, you know, because it's discussed with the defendant, the defendant responds and -- in his presence. So, I mean, this is not quite the same, in my opinion. Because this does have the context of the alleged fatal encounter, from the state's standpoint.

MR. SOLIS: So, Your Honor, I reurge my objections that I made throughout the testimony. The Court is denying that?

THE COURT: Yes.

MR. SOLIS: I also ask the Court to allow me to take the witness on voir dire prior to proceeding with further questioning on direct. Is the Court denying that as well?

THE COURT: That's denied, but I am going to let you cross-examine her.

I guess we will need the witness on the witness stand.

(Witness enters courtroom.)

(Jury enters courtroom; proceedings continue.)

THE COURT: All right. Please be seated.

You may continue your examination, Ms. Tarango.

MS. TARANGO: Thank you, Your Honor.

DIRECT EXAMINATION (continued)

BY MS. TARANGO:

Q. Okay. Ms. Cera, we had left off talking about August 22nd of 2012. At that time who was living in your house?

A. My daughter; my set of twins; my son-in-law, Roberto Renteria; and my husband, Tony.

Q. Do you remember how old Roberto Renteria was?

A. I believe he was 19 at the time.

Q. Do you remember how old Tony was?
A. 32.
Q. 32.
Okay. During the summer, besides doing things with Tony as part of the Barrio Azteca, did you have any other jobs? Did you have a job?
A. Yes. I worked as a waitress at a Mexican restaurant.
Q. Were you working that day?
A. Yes, ma'am.
Q. And where were you on that afternoon of the 22nd?
A. After I got out of work?
Q. Yes.
A. It was around four o'clock when I got out of work, and Tony picked me up.
Q. Where did you go after that?
A. After that we went to go pick up my son-in-law, Roberto, to his place of work.
Q. Where did he used to work?
A. Off of Americas, by the warehouses.
Q. What -- what was Tony driving?
A. A green Tahoe.
Q. A green Tahoe.
Do you know whether he had a gun?
A. Yes, ma'am.

Q. Where did he keep it?
A. In the back side by the tire, on the inside, in the panels.
Q. In the panels?
A. Yes, ma'am.
Q. Do you remember what kind of a gun it was?
A. A .22.
Q. And after you picked up Roberto at his job, where did you go next?
A. Back home.
Q. And what were you doing when you got home?
A. I got off to go inside and talk to my daughter. Then Tony went to pick up the mail right there by the street.
Q. Okay. Going back to all your time with him and your time even before you were with him, how familiar are you with the way the Barrio Azteca organization works?
MR. SOLIS: That question has been asked several times now, Your Honor. I am going to object to the repetitive nature of the question. It has been asked and answered.
THE COURT: I don't think that exact question has been asked and answered. Overruled.
A. Can you repeat the question?
Q. (BY MS. TARANGO) Over -- since 1998, I think you had said, up until 2012 with your dealings with the Barrio Aztecas, how familiar were you with the way the organization worked?

A. Very familiar. I worked with different -- different lieutenants and different sergeants.

Q. So you worked with different lieutenants?

A. Throughout those years, yes, ma'am.

Q. And during all those years, were you familiar with who was a lieutenant and who was the sergeant?

A. Most of the times.

Q. Were they divided by geographical region, or how was it divided up?

A. The sergeants were divided by -- they would be in charge of a different place of the city, like the east side, central, west side, Chaparral, Socorro.

Q. At the time that you were with Chuco, was he in charge of a certain part of town?

A. He was in charge of the Azteca business.

Q. Of the Azteca business?

A. Yes, ma'am.

Q. So he was a high-up sergeant, or was this when he was acting as a lieutenant?

A. When he was a sergeant.

Q. When he was a sergeant?

A. Uh-huh.

Q. And then at some point were you aware, based on your own knowledge and your own working with the box, or however you may or may not know -- if you know, was the defendant ever a

sergeant?

A. Yes, ma'am. He was getting a check.

Q. He was getting a check?

A. Yes, ma'am.

Q. And you were giving him a check?

A. I was making -- I would make the checks and put them in envelopes. Then I would give them to Tony.

Q. And did he at one point stop getting the checks as a sergeant?

A. No. As a lieutenant.

Q. No. I mean at one point did the defendant stop getting a check as a sergeant?

A. Yes, ma'am.

Q. So based on your knowledge, was the defendant -- how long was the defendant a sergeant for?

A. A couple of months, maybe even weeks.

Q. And did you yourself deal with the defendant before he was a sergeant and then while he was a sergeant and then after he was a sergeant?

A. Yes, ma'am.

Q. Did his attitude towards you or towards Chuco change during those times?

A. He got real arrogant.

Q. So we're talking about that day, August 22nd, in the afternoon when you-all come back to your house. What did you

do when you got home?

A. I walked in and my daughter was cooking dinner. Tony came back inside from getting the mail. He was all excited because he received a letter from Tolon.

Q. And what did he do next?

A. After that he read it in front of me -- out loud. I'm sorry. And then it said --

Q. Without saying --

MR. SOLIS: Objection to hearsay.

THE WITNESS: Excuse me.

Q. (BY MS. TARANGO) We're not allowed at this point to talk about what the letter said. But was Tony happy or upset about it?

A. No. He was upset. He was jumping up and down and he was hitting the table. He was really mad.

Q. He was mad. Who was he mad at?

A. At --

MR. SOLIS: She can't possibly know unless she was told. Objection to hearsay.

Q. (BY MS. TARANGO) Based on all of your dealings with all of these people, do you know who he was mad at?

MR. SOLIS: Calls for speculation, Your Honor.

THE COURT: Overruled.

Q. (BY MS. TARANGO) Who was he mad at?

A. At Wicked and Kiddo and Vago and Silent for parking

him.

Q. This is while, on August 22nd, as of that day, he was still considered parked?

A. Yes, ma'am.

Q. So once he received this letter from Tolon, without saying what it said, what did he do next?

A. He called Silent on the phone. He put it on speaker.

Q. While you were -- while you were doing these business dealings and helping Tony with the business, did you ever have reason to call any of these people, Wicked or Silent or --

A. I would call Silent, and I would answer most of the calls. Like if he was busy doing something, he would tell me "Pick it up." And I would answer or I would dial for him.

MS. TARANGO: Your Honor, let the record reflect I am tendering to the defense what I marked as State's Exhibits 90 and 91, which are business records previously provided.

THE COURT: All right.

MS. TARANGO: Your Honor, at this time I would offer State's Exhibits 90 and 91.

MR. SOLIS: We would object to relevance or lack of it. Those are business -- phone records pertaining to some other individual and not this defendant. For that reason they are not relevant, Your Honor.

THE COURT: You may have to show the phone

numbers to see if she is familiar with it.

MS. TARANGO: May I approach the witness, Your Honor?

THE COURT: Yes.

Q. (BY MS. TARANGO) Ms. Fierro, I am showing you what I have marked as State's Exhibits 90 and 91. I'll ask you -- I know you probably won't recognize the discs. But if you look at the phone numbers listed -- this number here?

A. Silent's.

Q. And this number here?

A. My daughter's.

Q. And do you remember looking at the actual phone records from the CD on a computer screen in our office?

A. Yes, ma'am.

MS. TARANGO: I would offer State's Exhibits 90 and 91.

MR. SOLIS: Still no establishment as to how they were relevant to this defendant. None of those telephone -- or those records are Mr. Cornejo's.

MS. TARANGO: She has testified that one is her daughter's phone number and one is her -- is Silent's number. And she has just testified that --

THE COURT: Right. I know about Silent. So now he has been mentioned several times.

MS. TARANGO: Yes.

THE COURT: In fact, these questions just preceded you asking her about the phone calls with him.

But what time frame are these records?

MS. TARANGO: Well, they are, I think, the day of August 22nd and maybe a day or so before as well.

THE COURT: For those dates, the objection is overruled. They are admitted.

MS. TARANGO: Thank you, Your Honor.

Q. (BY MS. TARANGO) And how did you recognize -- how did you remember Silent's phone number from the records that you looked at?

A. I was familiar with most of the numbers. I was real good with memorizing, so when we would change phones, I would always program his phones. Or if we were using somebody else's phone, he would ask me for the numbers.

Q. And the other number was your daughter's --

A. Yes, ma'am.

Q. -- cell number.

Why? Did you-all have a house phone at the house?

A. No. We had cell -- a cell phone.

Q. And did Chuco have his own cell phone?

A. Yes. But we lost it like three days before that.

Q. So when he calls Silent, whose phone did he use?

A. My daughter's.

MS. TARANGO: May the record reflect I am tendering to defense what I have marked as State's Exhibit 92.

May I approach the witness, Your Honor?

THE COURT: You may.

Q. (BY MS. TARANGO) When I asked you to look at your daughter's cell phone records showing the numbers in and out for that time frame, for that day, that afternoon, did you notice Silent's number on those records?

A. Yes, ma'am.

Q. And is that the number that is highlighted on this little excerpt from the business records from the phone records?

A. Yes, ma'am.

MS. TARANGO: I would offer State's Exhibit 92.

MR. SOLIS: Objection.

THE COURT: All right. Overruled.

Q. (BY MS. TARANGO) So here in -- what we're looking at in State's Exhibit 92, which is Silent's phone number?

A. The 313.

Q. The 313 number?

A. Yes, ma'am.

Q. Whose number is the 407-9130?

A. My daughter's.

Q. So, based on your memory, do these highlighted calls reflect when you were present, either you calling Silent on that day or Chuco calling Silent in your presence, at least for the later ones?

A. Only the one where he had it on speakerphone.

Q. Okay.

So what happens when he calls Silent on speakerphone?

A. He was yelling, telling him --

MR. SOLIS: Objection to hearsay.

THE COURT: Well, establish whose voices are on the phone. Because you said there is a speakerphone going on between -- who is on one end, who is on the other, so I can understand.

MS. TARANGO: Yes.

Q. (BY MS. TARANGO) When he calls Silent on speakerphone, who answers the phone?

A. Silent.

Q. And can you hear Silent's voice?

A. Yes, ma'am.

Q. But you are the one on speakerphone. You don't know whether Silent had his phone on speakerphone as well; is that right?

A. No, ma'am.

Q. At some point do you hear anyone else get on the

line?

A. Yes. I heard Kiddo's voice.

Q. What happens?

A. He asked Chuco to bring the letter that he received from Tolon, to bring it over to Wicked's house so they could see it.

Q. What happened next?

A. After that Chuco left.

Q. How did he leave?

A. He asked my son-in-law, Chavalon.

MR. SOLIS: Objection. Hearsay.

Q. (BY MS. TARANGO) Without saying what he said, how did he leave the house?

A. He left with my son-in-law, Robert.

Q. And who drove?

A. Robert.

MS. TARANGO: Your Honor, may the record reflect I am tendering what I have marked as State's Exhibit 93.

May I approach the witness, Your Honor?

THE COURT: Yes.

Q. (BY MS. TARANGO) Ms. Cera, I am handing you what I have marked as State's Exhibit 93, and I will ask you if you recognize this photo.

A. Yes. This is mine.

Q. Does this photo fairly and accurately reflect you and

Tony Fierro when you were together?

A. Yes, ma'am.

MS. TARANGO: I offer State's Exhibit 93.

MR. SOLIS: I am going to object, Your Honor. There is no real purpose for the photo. There is no dispute that Mr. Luis Fierro is deceased. There is no dispute that she was, in fact, living with and dating him. And it won't survive, in my opinion, a 403 balancing test. It's simply meant to inflame the jury, Your Honor. We would object.

THE COURT: Well, overruled.

MS. TARANGO: Thank you, Your Honor.

Q. (BY MS. TARANGO) Looking at State's Exhibit 93, what is -- what is Mr. Fierro wearing in this photograph?

A. A chain that I gave him for Valentine's.

Q. Okay. Is he wearing one or two chains in this photo?

A. Two.

Q. What about the other chain he is wearing?

A. The other one was a gift to Nano that we never took to him.

Q. It was a gift to Nano that you never took to him?

A. Yes, ma'am.

Q. Which was the chain that was intended for Nano?

A. The thicker one.

Q. The thicker one?

A. Yes.
Q. About what time was it when Mr. Fierro --
MS. TARANGO: May I approach the witness, Your Honor?
THE COURT: What?
MS. TARANGO: May I approach?
THE COURT: Yes.
Q. (BY MS. TARANGO) At what time was it when Mr. Fierro left your house with Mr. Renteria that day?
A. Around five o'clock, a little bit earlier.
Q. Can you tell the jury a little bit about the thicker necklace, the one that was intended for Nano? About when did you buy that or get that necklace?
A. In December for Christmas.
Q. Then you ended up never giving it to Nano?
A. We were supposed to buy him another part that was an Aztec calendar. And we never got to it, so we never sent it. Then he got arrested, so we never gave it back.
Q. At some point did the defendant ever have reason to touch that necklace?
A. Yes. He got it from one of my tables in the living room on one of the days that he went by, and he put it on.
Q. About when was this?
A. A while back. Like maybe a month, a month and a half. I am not sure when.

Q. And did he leave with it?
A. He took it with him.
Q. Then did you ever see the necklace again?
A. Yes. Tony got it back from him.
Q. Tony got it back.
When you got it back, when you saw it on Tony again, was it different in any way?
A. It was torn so Tony put it back with one of the twisties from the bread.
MS. TARANGO: May I approach the witness, Your Honor?
THE COURT: Yes.
Q. (BY MS. TARANGO) I am showing you what has been admitted into evidence as State's Exhibits 81 through 86. And I'll ask if you recognize the people depicted in those photographs?
A. This is Kiddo and this is Wicked.
Q. So looking at State's Exhibit 85, which one is Kiddo and which one is Wicked?
A. Wicked is in a muscle shirt, and Kiddo is in a black shirt.
Q. This here on the lower left corner?
A. Yes, ma'am.
Q. And what about in State's Exhibit 81?
A. That's Wicked.

Q. Which one?
A. The one in the muscle shirt.
Q. And State's Exhibit 82?
A. That is Kiddo, the one in the black shirt.
Q. When you first saw these, the surveillance photos or the surveillance video, did you notice anything else in the video?
A. Yes.
Q. What did you notice?
A. He had Tony's chain on.
Q. Who had Tony's chain on?
A. Kiddo.
Q. Prior to this, did the defendant wear -- did you see him wearing necklaces around your house on all the multiple times he was there apart from the time that he took Tony's necklace, the one that was intended for Nano?
A. No.
Q. How much time passed from the time that they left at five in the afternoon on that day until you learned what happened?
A. Well, I saw it on the news like around nine o'clock in the night. I saw that two men had gotten murdered, but I didn't really think anything of it until the morning when the detectives showed up, like around 6:30 in the morning.
Q. And at that time did you want to cooperate with them?

A. As soon as they got there, I asked for -- to speak to the feds.
Q. To the feds?
A. Yes, ma'am.
Q. And did you do that? Did that happen?
A. Yes, ma'am.
Q. And what did you do when you did meet with the feds? Did you give them anything or tell them anything?
A. I gave the detectives my statement.
Q. Did you have any -- any documents or anything at your house that --
A. Yes. I gave all the ledgers and the receipts and the books with all the information from the Barrio Azteca that Tony had in safes.
Q. After that -- after you did that, then did your life change?
A. Yes, ma'am.
Q. How?
A. I stopped using drugs, I started working, and I became a better mom.
Q. Have you had any more contact since then with any members of the Barrio Azteca?
A. No, ma'am.
Q. Have you happened to run into any of them at any of the places?

A. No, ma'am. Just this morning.
Q. Just this morning.
What happened this morning?
A. I bumped into two of the girls that are Kiddo's friends, and they cussed me out at the elevator.
Q. What are their names?
A. Jodi and Lucy.
Q. Thank you very much.
MS. TARANGO: I pass the witness.

CROSS-EXAMINATION

BY MR. SOLIS:

Q. All right. Ms. Cera, so you were Chuco's girlfriend; is that right?
A. Common-law wife.
Q. Okay. And you have been common-law wife to a lot of the *carnales*, haven't you?
A. I dated some of them.
Q. Wilo for one, Blanco, Filo, Pollo, Kid Silvas, to name but a few; right?
A. No.
Q. Those were all your guys?
A. No. Not Pollo, not Kid Silvas.
Q. How about Wilo and Blanco?
A. Wilo --
Q. They were your common-law husbands?

A. Wilo lived with me, yes, sir.
Q. So you have been involved with these individuals for a long, long time, haven't you?
A. Yes, sir.
Q. Okay. Now, in fact, you did more than just trafficking narcotics and participating in extortion. You did more than those felony activities. You did more than that, didn't you?
A. I don't understand your question.
Q. Well, sure. I mean, you are an admitted drug trafficker; right?
A. Yes, sir.
Q. You are an admitted money extortioner; correct?
A. Yes, sir.
Q. All right. So you did more serious things, didn't you?
A. Yes, sir.
Q. Including participating or being an accessory to murder?
A. Yes, sir.
Q. Right?
A. (No verbal response.)
Q. That would be with Mr. Fidencio Valdez; right? Filo?
A. Yes, sir.

Q. So your activities there involved actually being involved in covering up for murder of at least three people; is that right? Two different events, three victims altogether; isn't that true?

A. I don't understand.

Q. Well, sure. You remember the event that happened over at the northeast part of town?

A. Yes, sir.

Q. Right. In fact, you willingly drove Filo, your boyfriend or common-law -- or whatever he was at the time, to a house where you knew he had guns. Do you remember that?

A. I never drove. He drove.

Q. Okay. But you accompanied him, didn't you?

A. Yes.

Q. You knew what he was up to. He had guns stored there, didn't he, and you knew it?

A. Yes.

Q. And you knew when you were doing that that you were driving him --

MS. TARANGO: I would object as to relevance and improper impeachment. She has admitted to the activities she has participated in, but as far as impeaching with --

MR. SOLIS: This is cross-examination.

MS. TARANGO: -- prior bad acts, I think that is impermissible motive impeachment.

MR. SOLIS: Cross-examination, Your Honor.

THE COURT: I will permit a little more. I don't know if it's going to lead into the other case or something. I am not sure.

MR. SOLIS: Well, we are certainly dealing in her character, and that is fair ground for cross-examination.

THE COURT: Well, I don't know if there is motivation. I don't know what is going on here. But I will permit cross.

MR. SOLIS: Thank you.

Q. (BY MR. SOLIS) So you drove to the house where you knew he had guns -- and you knew that, didn't you?

A. Yes, sir.

Q. Okay. You drove him to where he was going to meet up with a kid who ended up dead; right?

A. I went with him.

Q. And you were in the truck -- you were in the truck when the Filo guy turned around and shot that kid. You were there, weren't you?

A. Yes, sir.

Q. And the police questioned you about that, and you didn't admit; you denied knowledge; in fact, you even covered up for him. You remember that?

A. I spoke to the detectives that day, and I let them know what happened.

Q. Not that first time you didn't. Shall we repeat your testimony from that trial?

A. I spoke to him the first time they picked me up. They only picked me up one time.

Q. But you never were truthful the first time, were you?

A. No, not all the way.

Q. You were covering up for him, weren't you?

A. Yes, sir.

Q. You were lying to a police detective; right?

A. Yes, sir.

Q. On a serious thing, some kid gunned down in your boyfriend's/common-law husband's truck; right?

A. Yes, sir.

Q. Then you went further. You tried to cover up, or did, by excluding, hiding, destroying evidence that Filo had. You remember that?

A. Yes, sir.

Q. Okay. And that is just one. There is the other event. You remember the other event?

A. Yes, sir.

Q. You destroyed clothes and masks and other items that he used to kill that other person. Do you remember that?

A. Yes, sir.

Q. Why don't you tell the jury what event that was?

A. The Sal's murder.
Q. Sal's Lounge?
A. Yes, sir.
Q. You knew about that, didn't you?
A. After it happened.
Q. Right. But you didn't tell anyone for a long time, did you?
A. No.
Q. And you covered up for him and you destroyed evidence; right?
A. Yes, sir.
Q. When the police came to talk to you, you denied it initially; isn't that true?
A. Yes, sir.
Q. You didn't go willingly to them or anyone else with the information; right?
A. I went with them when they picked me up the first time.
Q. Right. Had they not come to talk to you the second or third time, you never would have told them; right?
A. Yes, sir.
Q. So it's not just drug trafficking and extortion and picking up *cuotos*, it's also accessory to murder; isn't that true?
A. Yes, sir.

Q. Okay. A little while ago you said something about --

MR. SOLIS: Bear with me one moment, Your Honor.

Q. (BY MR. SOLIS) You said something about -- we will get into your statement in a little while. But on testimony you said that you weren't included in a meeting that occurred. Do you remember that?

A. Yes, sir.

Q. So you weren't included in some of the affairs of the Aztecas; is that right?

A. Not the meetings. We weren't allowed.

Q. Okay. And so when you're not allowed at the meeting, that's to keep you from information that is important or significant to the gang?

A. Yes, sir.

Q. So you want the jury to believe that on another event that is just as important, according to your testimony, it just happens to be put onto speakerphone; is that right?

A. Yes, sir.

Q. That's your testimony?

A. My husband always told me everything.

Q. Is that your testimony?

A. Yes, sir.

Q. It sounds like you describe these *carnales* had a lot of drinking, a lot of drug use going on; is that right?

A. Yes, sir.

Q. And in spite of your testimony that there was, quote/unquote, ugly looks and all that, you testified that, in fact, you welcomed all these individuals in your home quite frequently.

A. Yes, sir.

Q. Sometimes every day; right?

A. Yes, sir.

Q. You didn't exclude them or not invite them; they were welcome at your house all the time?

A. Yes, sir.

Q. That's because you were carrying on and partying with them too; isn't that true?

A. Yes, sir.

Q. So what we also know from your testimony here today is that you say Chuco picked you up at your work at about four o'clock; is that right?

A. Yes, sir.

Q. Then you say that you-all went to pick up Renteria a little later?

A. Right after he picked up.

Q. Then you went home; right?

A. Yes, sir.

Q. Then you say Mr. Renteria and Mr. Chuco left about five?

A. Around that time.

Q. About five.
A. Around that time.
Q. Not 2:45, not to 2:50, not three o'clock?
A. It takes about 20 minutes to get from my work.
Q. What I am saying is they left your house at five or thereabouts; is that right?
A. Around that time.
Q. Not 2:50, not three o'clock?
A. No, sir. I got out of work at four.
Q. I understand that. Just so we're clear, everyone is clear, in fact, at 2:50 you were still at work and so was Renteria; is that right?
A. Yes, sir.
Q. At three o'clock as well?
A. Yes, sir.
Q. At 3:15, still at work?
A. I'm at work.
Q. Right.

It's not uncommon -- since you are so intimately involved in and aware of the activities of the Aztecas -- that these individuals call each other all the time; is that true?
A. Yes, sir.
Q. They call each other, they communicate with each other, cell phone or otherwise, all the time; right?
A. Yes, sir.

Q. And, in fact, when something happens, whether it's Filo's arrest or Chuco's release or whatever, that information travels pretty quickly throughout the Barrio Azteca, doesn't it?

A. Yes, sir.

Q. And one learns that information, second-, third-, and fourthhand; isn't that right?

A. Yes, sir.

Q. And sometimes, as is usually the case, by the time you get second- and thirdhand information, sometimes it's skewed or wrong or it changed from the initial account; is that true?

A. Sometimes.

Q. But it happens?

A. Yes, sir.

Q. And whatever happens, they all learn about it, including you?

A. Yes, sir.

Q. You see that exhibit there?

A. Yes, sir.

Q. Okay. The areas that are shaded in gray, what is that? That right there. That.

A. That's Silent's number.

Q. Okay. And whose number is that?

A. Silent's number.

Q. And so all these 313-2890 is Silent?
A. Yes, sir.
Q. Is that correct?
A. Yes.
Q. Okay. So at 1511, which is 3:11:09 right here, three o'clock, you are still at work. He hasn't picked you up yet? That is, he -- being your common-law husband -- hasn't picked you up yet; right? He picks you up at four?
A. Yes, sir.
Q. Okay. And here at 1639, 4:39, your husband is calling Silent. Is that what that indicates?
A. Yes, sir.
Q. Okay. At that hour, you are still going to pick up or you have gone to pick up Renteria?
A. We were already at home.
Q. You were at home at 4:39?
A. Yes, sir.
Q. So shortly thereafter, sometime closer to five, your common-law and Renteria left?
A. Yes, sir.
Q. Do you see this photograph? Hold on. I am sorry.
You see that?
A. Yes, sir.
Q. Who's that at the very bottom? This right here.
A. In the muscle shirt?

Q. Yeah.
A. Wicked.
Q. What is that around his neck?
A. A necklace.
Q. When you went to the feds, in response to Ms. Tarango's question, you turned in all the drug ledgers, all that sort of thing. You remember --
A. Yes, sir.
Q. -- that's what you said.
And you spoke to the feds, you said?
A. Yes, sir.
Q. And they didn't prosecute you?
A. No, sir.
Q. You knew that they were looking for you or looking at you for potential prosecution under the RICO statute?
A. At that time I didn't know.
Q. But now you are not being prosecuted?
A. No, sir.
Q. Now you have been rewarded; is that right?
A. No. I got immunity.
Q. Okay. What's immunity exactly?
A. Not prosecuted. They didn't prosecute.
Q. You are not going to get prosecuted. Kind of like a reward; right? Kind of like a reward?
A. Yes, sir.

Q. I mean, it's a very valuable reward. It ain't money, but it sure beats doing 20 years in the pen, doesn't it?
A. Yes, sir.
Q. So you have been essentially rewarded to come testify? Essentially, that's what it boils down to; isn't that right?
A. Yes, sir.
Q. Now, you had opportunity to review --
MR. SOLIS: May I approach, Your Honor?
Might I approach the evidence, Your Honor?
THE COURT: You may.
MR. SOLIS: I am just going to put these up there.
Q. (BY MR. SOLIS) You have had opportunity to review your statement before -- your statements -- more than one -- before you testified today; right?
A. Yes, sir.
MR. SOLIS: Can I see those, Ms. Tarango?
MS. TARANGO: Her statements?
MR. SOLIS: Yeah.
Q. (BY MR. SOLIS) Earlier today you were testifying about the workings, inner workings, it appears, of the Azteca organization. Remember?
A. Yes, sir.
Q. And in reviewing your statement it appears to me that

a lot of information you got from or received from or you had knowledge from Chuco?

A. Not all of it. I worked with other *carnales*, not just Chuco.

Q. That's right. So but when you say "Chuco told me," then you got that information from him?

A. Some of the things, yes, sir.

Q. So when the statement said "Chuco told me X, Y, and Z," you got it from him?

A. Yes, sir.

Q. And the other information you made reference to that didn't come from Chuco, let's say, Wilo -- did Wilo give you information?

A. No. I worked with Wilo as well.

Q. But he told you things too about the inner workings of the Aztecas?

A. Yes, sir.

Q. Not that you knew about it; he told you about it. Right?

A. I was around them most of the time.

Q. But you didn't learn them all by simply observing; they told you about the things. Right?

A. Yes, sir.

Q. So they told you about it, and that's how you learned of it; right?

A. And I worked for them. I did paperwork for them. I did.

Q. I understand that. You did paperwork. But they also told you about how it works -- Wilo and Blanco and Filo and Kid Silvas, Pollo, and Chuco; right?

A. Not Pollo. I really never talked to Pollo that much.

Q. Okay. But the other fellows did, and they told you how it worked?

A. Some things, yes.

Q. A lot of things?

A. Not all of them.

Q. Well, when you say in your statement that --

MR. SOLIS: Bear with me one second, Your Honor.

Q. (BY MR. SOLIS) -- "My husband would tell me everything related to the Azteca gang including their criminal activities," you didn't say some things. You said, "My husband would tell me everything about the Azteca gang, including their criminal activities." That's what you said in your statement.

Do you want to see it?

A. I know what I said.

Q. So that's what you said. He used to tell you everything about it; right?

A. Yes, sir.

Q. So your testimony here today to the jury was based on

what he told you?

A. No. because I was there around with him, with Kiddo and the guys.

Q. So when you say over here, "He used to tell me everything about the Aztecas," that's not accurate?

A. Mostly. Because most of the things I see, and some things he told me.

Q. Perhaps you are not understanding. Your statement said, "He used to trust me with everything including the gang affairs. He would tell me everything related to the Azteca gang including their activities." That is your statement, isn't it?

A. Yes, sir.

Q. So then what you testified to today was what he told you?

A. Mostly.

Q. A lot of it? Most of it?

A. Most of it.

Q. Most of it; right?

I know you observed some comings and goings, the little gang signs and the little making faces and all that business. But the other things you testified today about, Chuco told you?

A. Some things.

Q. A little while ago you said mostly everything. Now

you say some things. Which is it?

A. I did some work for him, and some things he told me.

Q. A lot of things he told you?

A. A lot, yes, sir.

Q. What you testified earlier today about, a lot of it came from what Chuco told you?

A. Not all of it.

Q. Well, stuff he received from, let's say, some guy in Juarez; you didn't actually see anything. He told you about it, didn't he?

A. Oh, I read all his letters.

Q. You read all his letters?

A. Yes. He would show me all of his things.

Q. You read all his letters?

A. I would always read all his letters. He would always show me and ask me what I would think about it.

Q. And those letters someone else wrote to him?

A. Yes, sir.

Q. Not something you observed, but someone else telling him, and then you read that letter. Right?

A. Yes, sir.

Q. Okay. So you learned it from someone else, whatever the activities were? Not just Chuco, but someone else; right?

A. Yes, sir.
Q. Now, you know that -- because you say you know these guys pretty well; right? You say you have known Mr. Cornejo for some time and Silent for some time as well. In fact, all these guys know each other and party all the time and get drunk and do drugs; right?
A. Yes, sir.
Q. So you know that Chuco -- rather -- I beg your pardon -- Mr. Cornejo and Luis had known each other for a long time?
A. I have seen them at parties together.
Q. Do you know they have known each other for a long time?
A. I don't know exactly how long, but I have seen him at parties that I have gone to.
Q. So do you have friends that you have known for a while?
A. Yes, sir.
Q. Do you call them?
A. Yes, sir.
Q. Text them, whatever it is friends do?
A. Yes, sir.
Q. Sometimes four or five or six times a day?
A. Yes, sir.
Q. Sometimes the next day only twice and the following

day only a few times?

A. Yes, sir.

Q. So it's not uncommon for friends to keep in touch with one another; right?

A. Yes, sir.

Q. Because that's what friends do; isn't that true?

A. Yes, sir.

Q. Also, if you are involved in whatever it is the Aztecas do, you are going to be in touch as well; isn't that true?

A. Yes, sir.

Q. So if you looked at records that go back to July and March and August -- not August -- July, June -- July, June, May, and April, just to name a few months in 2012, you would expect to see Mr. Cornejo's number communicating with Luis's -- Silent's -- phone number; is that right?

A. Yes, sir.

Q. Because that's, like you said, what friends do?

A. Yes, sir.

MR. SOLIS: Just one moment, Your Honor.

Q. (BY MR. SOLIS) Your testimony a little while ago that back in June or thereabouts of 2012 you were out in Nano's house in Juarez -- do you remember you testified about that?

A. A little bit. Yeah, around that time.

Q. Well, it might have been May?

A. I'm not sure.
Q. It might have been May; right?
A. Around the time he got arrested. I'm not sure exactly when he went to jail.
Q. Sure. At some before he got arrested. In fact, you are not sure because at one point you said 2011; Ms. Tarango suggested maybe 2012; you said, yeah, maybe June 2012.
Do you remember that?
A. Well, there was different times we went. We went in 2011 and 2012.
Q. Okay. We're going to have records here. You said you-all went in June or so of 2012. Do you remember you said that?
A. Yes, sir.
Q. You said they are all drinking and partying and making fun of Mr. Fierro, Chuco. You remember that?
A. Yes, sir.
Q. And then you said that Kiddo was motioning that someone is going to die and they are all intoxicated. Is that what you said? Remember?
A. Yes, sir.
Q. But, yet, your testimony also was they kept coming to your house, you had them over all the time, they would come eat?
A. Yes, sir.

Q. They'd come buy drugs from you, or whatever it is they do; right?
A. Yes, sir.
Q. And you get high with them?
A. Yes, sir.
Q. You have a good time at your house?
A. Not at my house.
Q. Okay.
A. They would come to my house to pick up or do Azteca business but not party.
Q. But they would eat at your house. That's what you said?
A. Yes. I would feed them.
Q. So, in the end, you say Chuco, Mr. Fierro, was in charge of all of El Paso. Almost how you ended. Is that what you said?
A. Yes, sir.
Q. And since you are so intimately aware of how the Aztecas work, you know that the rubbing out, taking out, killing a guy who's in charge of El Paso, a ranking member, probably higher if there is such a thing -- I don't know the structure -- is punishable very severely; right?
A. Yes, sir.
Q. By death even; is that true?
A. Yes, sir.

Q. Because, after all, he is a ranking member; is that right? In charge of the streets of El Paso?

A. Yes, sir.

Q. And, in fact, Chuco had had a problem. He had stitches in the back of his head just a few weeks before this happened?

A. Yes, sir.

Q. Because he had a run-in and a problem with someone else out in Socorro or Tigua or somewhere out there?

A. Yes, sir.

Q. Some bazaar out there?

A. Yes, sir.

Q. And that was because it was a personal thing with someone else?

A. Yes, sir.

MR. SOLIS: I am going to pass the witness, Your Honor.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MS. TARANGO:

Q. Ms. Cera, you were asked earlier a little bit, by Mr. Solis, regarding the activities with Filo and the two capital murders that he committed. This was -- when did those murders take place? What year? Do you remember?

A. 2010.

Q. One was December 10th of 2010, and was one was Thanksgiving of 2010; is that right?

A. Yes, ma'am.

Q. And back in 2010, were you still very much aligned within the Barrio Azteca community?

A. Afterwards, not really more, until I met Chuco.

Q. Until you met Chuco?

A. Yes.

Q. Then you were still kind of in the Barrio Azteca?

A. Yes, ma'am.

Q. Then once -- once you were told that Tony and Roberto had been killed and you turned this evidence over and your statements over to the FBI, did you agree to testify -- not only for the FBI for their Azteca investigation, did you also testify right nextdoor against Filo in his capital murder trial?

A. Yes, ma'am.

Q. And that was -- when was that when you testified next door?

A. I think it was last year.

Q. Okay. You talked about the phone call and being on speakerphone after you see Tony coming back in with a letter from the mailbox. Can you describe -- not by anything he is saying, but can you just describe the way Tony was acting? How did he look?

A. He was real mad. He was jumping up and down, and he was sweating and yelling and hitting the table, telling me, "I told you" --

MR. SOLIS: Object. The testimony has already been gone over and elicited. I would object to asked and answered and also for the hearsay, Your Honor.

THE COURT: Overruled.

Q. (BY MS. TARANGO) When you see him in this excited state, this very agitated state, and he calls Silent on the phone, what is his tone of voice when he is talking with Silent and you are listening to the conversation?

A. He is mad, demanding things.

Q. And how is his tone of voice? Is he talking slow?

A. He is talking real fast and loud.

Q. Fast and loud. And what is he saying on the phone?

A. He is telling them that he wants to talk to -- to see Kiddo and Vago and Silent and Kiddo and that he wants the money box.

Q. Thank you.

MS. TARANGO: I pass the witness.

RECROSS-EXAMINATION

BY MR. SOLIS:

Q. You make it sound like 2010 was a generation ago. That's just -- today is January, first week in January of 2015. So that is just 24 years ago -- three and a half years ago --

A. Yes, sir.
Q. -- when you were involved in those capital murders with Filo. You remember?
A. Yes, sir.
Q. So it's not a long time ago; right?
A. No, sir.
Q. Then you went back to it. You were a narcotic and drug trafficker, money launderer; right?
A. Yes, sir.
Q. You say you didn't go back to Juarez after you had this episode where you saw the *carnales* making fun of Chuco in Juarez?
A. Chuco didn't go back. I did.
Q. Chuco didn't go back.
A. I kept on going back.
Q. I beg your pardon.

MR. SOLIS: Pass the witness.

MS. TARANGO: I have no further questions, Your Honor.

THE COURT: You may step down.

(Witness exits courtroom.)

MR. SOLIS: Your Honor, I'm going to make a motion. I can do it here or outside the presence.

THE COURT: Well, approach the bench.

(At bench, on the record.)

MR. SOLIS: Your Honor, I am going to reurge my motion to strike the entirety of the testimony from this witness. She has essentially admitted that the entirety of her testimony was elicited from or was obtained from other individuals, not only Chuco but others, by virtue of letters or other information. It varies a lot or a little, but certainly at the end, she says a lot of it. That information she conveyed today, as I suspected, is entirely based on hearsay. So I am going to make the objection and ask the Court to strike the testimony and instruct the jury accordingly, Your Honor.

THE COURT: Do you want to respond?

MS. TARANGO: Well, briefly, Judge.

Each question, when she was asked, she qualified it either based on her own dealings or her knowledge of what she observed, or she explained it. These last questions she wasn't -- I don't think she was fully understanding. But everything that she testified about was based on her own knowledge. And I would ask, obviously, not to strike any of her testimony.

THE COURT: All right. Your motion is denied.

MS. TARANGO: Thank you.

(Bench discussion concluded.)

MS. TARANGO: The state calls Detective Andy Sanchez.

THE COURT: Detective who?

Exhibit “D”

Vince,

As we have discussed, I believe that neuroimaging (brain imaging) is warranted in Mr. Valdez's case in light of his history of a documented seizure at young age with a diagnosis of epilepsy and treatment with a powerful anticonvulsant and barbiturate medication (phenobarbital) for several years very early in life. In addition, there is information by Mr. Valdez and others who know him well regarding "episodes" that suggest the possibility of life-long seizure activity in the form of petit mal epileptic activity. These issues are compounded by the fact that Mr. Valdez engaged in extensive drug abuse, which could lead to brain impairment, and he also reports that he was involved in a major motor vehicle accident in which he sustained a significant blow to his head when he was unrestrained (not seat-belted) and struck the windshield, breaking his nose. He relates that the a car he was in traveling was going approximately 55 miles per hour. He has some posttraumatic amnesia for the event and lost consciousness, suggesting at least a mild traumatic brain injury. In my professional opinion as a psychologist with specialization in neuropsychology, Mr. Valdez should undergo 24-hour EEG monitoring for several days to determine the nature, extent, and severity of the "episodes" that have been described, which appear consistent with petit mal seizure activity. Further, PET or SPECT functional brain imaging to examine cerebral blood flow is recommended to assess this aspect of brain activity/functioning for the reasons outlined above. In conjunction with the brain imaging, a neurological work-up by a neurologist who specializes in seizures/epilepsy would be incredibly helpful to determine whether there are any gross neurological impairments present and to assist in characterizing these "episodes." I am continuing to work on the neuropsychological aspect of this case but feel that the brain imaging and neurological exam that I have indicated would be important to my understanding of his current cognitive and psychological status, including any diagnoses that I may give. Please let me know if you need anything further from me.

Exhibit “E”

Can Traumatic Brain Injury Cause Psychiatric Disorders?

Robert van Reekum, M.D., F.R.C.P.C.
Tammy Cohen, B.A.(H)
Jenny Wong, B.A.(H)

Traumatic brain injury (TBI) may cause psychiatric illness. This article reviews the evidence on the basis of an established set of causation criteria. The evidence is convincing for a strong association between TBI and mood and anxiety disorders. Substance abuse and schizophrenia are not strongly associated with TBI, and there is little research into the rates of personality disorders after TBI. Evidence for a biologic gradient is lacking, but such a gradient may not be relevant to TBI. Evidence for the correct temporal sequence is present. Preliminary evidence suggests a biologic rationale for TBI causing psychiatric illness. Further and methodologically improved research is supported and required.

(The Journal of Neuropsychiatry and Clinical Neurosciences 2000; 12:316–327)

Traumatic brain injury (TBI) has long been known to be associated with changes in mood, personality, and behavior.[1–19] The existing research has also contributed to the hypothesis that factors related directly to the TBI may be causative of these changes. However, this research, for the most part, relied on dimensional rating of symptoms and did not include an assessment of the presence or absence of psychiatric disorders. The data generated by this research do, however, suggest that psychiatric disorders may be present at increased rates after TBI. TBI is considered by some to be a risk factor for psychiatric disorders.[20,21]

The establishment of a causative relationship between TBI and psychiatric disorders is important in terms of our understanding of these possible sequelae of TBI, and it will also help us in our understanding of the pathogenesis of these illnesses more generally. If it is shown that TBI causes psychiatric morbidity, this should alert clinicians to observe for, or to attempt to prevent, these outcomes. Such a finding of causation will also have a role in litigation related to outcomes after TBI; rather than finding, as is sometimes the case, that an individual's post-TBI difficulties are secondary to psychiatric disorder rather than being due to TBI, it would be appropriate to label the person's difficulties as being sec-

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ondary to psychiatric disorder that in turn is secondary to TBI. Clearly establishing a causative role for TBI in producing psychiatric disorders is important from clinical, scientific, and legal perspectives.

Establishing an argument for causation of medical illness is often very difficult because the putative causative factor may be difficult to assess or may be confounded by the presence of other concurrent and potentially causative factors. This is certainly the case for TBI, in which the insult to the brain may be difficult to detect and may be accompanied by a host of other factors such as pain, losses, and hopelessness. It was not that long ago, however, that we also wondered about a causative relationship between newly discovered microscopic organisms grown in petri dishes and devastating epidemics of infectious diseases. This analogy is perhaps fitting, since clearly TBI may cause injury to the brain at the microscopic level and has been described as occurring at epidemic proportions.

How do we establish an argument for causation? Sir Bradford Hill[22] proposed criteria for causation that include 1) consistently demonstrating an association between the causative agent and the purported outcome; 2) demonstrating a biologic gradient (i.e., that more of the causative agent causes more of the outcome); 3) demonstrating an appropriate temporal sequence (i.e., that the causative agent comes first in time); 4) providing a biologic rationale; 5) using analogous evidence (which is soft evidence in the sense that the pathophysiology of TBI is very different from that of any other neurological disorder); 6) finding experimental evidence (which, although the most compelling evidence for causation, will not be available for TBI because clearly it is unethical to experimentally induce a TBI in humans, and animal models of psychiatric illness are very limited); and 7) finding evidence of specificity of causation (this criterion has since been deemphasized, because even in infectious diseases, it is clear that a single organism may produce a number of diseases and some diseases may be produced by a number of infectious agents).

In this article we review the evidence available to support the hypothesis that TBI may cause some psychiatric disorders, using the most relevant of Hill's[22] proposed criteria (criteria 1–4). Using these criteria is helpful because they 1) are widely accepted and applied throughout medicine, 2) increase rigor in establishing causation through the structure they provide, 3) facilitate teaching of important lessons about the role of the brain in producing psychiatric disorders (e.g., absence of a biologic gradient would suggest hypotheses related to brain function that might explain this finding), and 4) suggest research approaches (e.g., the need to establish a temporal sequence speaks to the need for prospective studies).

The *Diagnostic and Statistical Manual of Mental Disorders*[23] was developed to provide a widely accepted, systematic, and reliable diagnostic scheme for psychiatric disorders. Currently the DSM-IV[24] is used in psychiatry in North America, and the DSM or the *International Classification of Diseases* (ICD) is used elsewhere. Here we will emphasize research using the DSM or ICD diagnostic schema. The literature search was conducted in MEDLINE and included specific psychiatric disorders and "brain injury." The review focuses on psychiatric disorders of most relevance to adults and on research done on adult populations. Focusing on disorders of childhood (e.g., attention-deficit/hyperactivity disorder) is of course highly relevant but is beyond the scope of this review. Including research involving exclusively children or adolescents is also inappropriate for this review because the developing brain may well differ in its response to injury in comparison to the adult brain. Similarly, disorders generally associated with elderly populations (e.g., dementia) also are not included in this review. MEDLINE searches of a number of neurotransmitters (associated with psychiatric illness) and TBI were also completed. To search for biologic mechanisms, existing reviews into the pathological changes accompanying TBI were reviewed.

We initially summarize some of the main methodological limitations of the existing data. Each major psychiatric disorder for which there is some evidence is then reviewed in terms of the strength of the association, temporal sequence, and biologic gradient. This evidence is tabulated for each disorder. The coding system is summarized in Table 1 and the findings are presented in Table 2. The prevalence data are then totaled (the limitations of this approach, given some of the methodological limitations discussed below, are acknowledged), and, as per the approach of Hibbard et al.,[25] are contrasted with lifetime community prevalence data taken primarily from the Epidemiologic Catchment Area Survey.[26] At the close of the discussion on each disorder, we review the evidence for biologic mechanisms through which TBI (or associated phenomena occurring at the time of, or as a result of, the TBI) may cause the specific disorder. For each disorder, we review the existing reviews as well as some original data from studies of these disorders in TBI. A section more generally discussing possible biologic mechanisms (derived from research into the neuronal and biochemical alterations caused by TBI) follows. We conclude with a brief discussion of future research needs.

METHODOLOGICAL LIMITATIONS OF THE EXISTING DATA

A quick glance at Table 2 will reveal many of the methodological limitations of the existing data. Many of the studies are naturalistic in nature and do not include a control group. Blindness cannot be ensured in this type of study, and researcher bias may affect data collection, analytical approach, and interpretation of the results. Selection biases may operate at many levels; for example, individuals who can be found, or who agree to the study, may be different from those who are not found or who refuse.

Many of the studies do not report the number of subjects with whom contact was attempted, nor the refusal rate. Their apparent admission *N* and their final *N* are hence, of necessity, reported as being equivalent in Table 2. Corrigan et al.[27] demonstrated that a psychiatric disorder may contribute to loss of subjects at follow-up; specifically, they found that a history of alcohol abuse and the alcohol blood level at the time of the TBI were both strongly associated with loss to follow-up status one year after TBI. It is conceivable that the presence of other psychiatric disorders may also affect recruitment rates for outcome studies after TBI.

Summarizing the data is made difficult by the multitude of recruitment strategies and sources. Diagnostic criteria for TBI, and for the severity of TBI, varied widely (data not tabulated). Some of the research is further compromised by unstructured outcome assessment or a brief follow-up period. Where structured assessments were used, the difficulty comes from the myriad of instruments selected. Even the DSM diagnoses may be invalid in TBI populations[28] because TBI may conceivably mimic (as with concentration difficulties) or mask (e.g., frontal system damage producing expressive aprosody that may reduce the expression of sadness) psychiatric symptoms. Some of the research also did not assess for premorbid psychiatric status, thus limiting the assessment of temporal sequence, and some did not assess for a biologic gradient.

The validity of retrospective assessments of pre-TBI psychiatric histories has not been established. It is of course possible that either cognitive factors secondary to TBI or psychological factors related to the trauma of the event, or to the multiple ways that a TBI and associated injuries can affect an individual, may affect the recall of pre-TBI psychiatric histories.

The research into potential biologic mechanisms is limited by the number of variables assessed. It is always possible that the main etiologic factor was not well assessed or that an apparently causative agent is simply a marker for the true causative agent (i.e., that confounding may occur). Associations may also be missed because of a lack of power in some of the smaller studies. Finally, it should be noted that many of the findings related to biochemical alterations after TBI are derived from animal models of TBI, and as such may not accurately represent changes in humans.

STUDIES OF PSYCHIATRIC DISORDERS AND TRAUMATIC BRAIN INJURY

Major Depression

Ten studies assessing the prevalence of major depression (MD) following TBI were found.[25,29–37] The study by Jorge et al.[34] appears to have reported on a sample previously reported, and hence the data from this study are not included in the total. The study by Max et al.[31] included only children and adolescents and is therefore also excluded from the total. It is included in the table to highlight to the reader that data informing us about MD in this population are available. (Additional important references are summarized by Max et al.[31]) MD was found to have occurred in 289 of 653 subjects (44.3%) over a period of less than 7.5 years following TBI. This contrasts with the general community population, in which the lifetime prevalence is 5.9%.[26] Hence, TBI increases the risk of MD by a relative risk of at least 44.3 / 5.9 = 7.5. Clearly TBI significantly increases the risk of developing MD, and this result was fairly consistent across studies. The data regarding a biologic gradient are mixed, with some studies reporting evidence for such a gradient, others reporting that no gradient exists, and one suggesting that *less* severe TBI is associated with MD. The data related to the temporal sequence of MD in association with TBI were also mixed, with some studies strongly suggesting that MD follows TBI and others reporting that some of the sample had experienced MD prior to the TBI. None of the studies reported that MD consistently predated the TBI.

Alexander[35] felt that MD may be "a reaction to failure at normal activities in the absence of any obvious neurological dysfunction" (p. 229) or that it may emerge out of postconcussion syndrome (PCS). Silver et al.[21] review pre-DSM data that showed that depression was not related to severity of TBI but was associated with neuropsychological impairment and right hemisphere damage due to penetrating injuries. Robinson and Jorge[38] review their research[36] and conclude that premorbid psychiatric disorder and social impairments may contribute to MD following TBI. They also note that left dorsolateral frontal and left basal ganglia lesions are strongly associated with early MD and suggest that these sites may be important in eliciting biochemical re-

sponses that lead to depression. Finally, they note that MD is "not simply a psychological response to the severity of physical or intellectual impairment"[38] (p. 237) but that impaired social functioning does seem to play a contributory role. Fann[39] feels that the evidence supports a correlation between lesion location and emergence of psychiatric illness after TBI, but that the evidence does not support a biologic gradient. Rosenthal et al.[28] note that noradrenergic and serotonergic projections from the brainstem enter the cortex by way of the frontal pole, and since this is a common site of contusion during TBI, they hypothesize that even "a small lesion in this area could potentially disrupt widespread cortical aminergic function"[28] (p. 95). However, they feel that in general our knowledge about neurobiologic correlates of depression following TBI is limited and hence few conclusions can be drawn. Similarly, they conclude that there "are at present no experimental studies examining comprehensive psychosocial models and their proposed causal mechanisms of depression after TBI" (p. 95), while noting some of the retrospective data reviewed above by Robinson and Jorge.[38] Finally, they note that the severity of depressive symptoms increases with the time since injury and with the degree of neuropsychological dysfunction.

Fann et al.[33] found that the group of subjects with both depression and anxiety perceived themselves as being more ill, and functioning more poorly, than did the nondepressed anxious group. It is unclear whether depression with anxiety led to these altered perceptions of illness, or vice versa. The depressed and anxious group also had more symptoms of PCS. Deb et al.[29] performed a logistic regression analysis with presence of any psychiatric disorder as the dependent variable; younger age, poorer TBI outcome (as measured by the Glasgow Outcome Scale), pre-TBI alcohol and psychiatric histories, lower Mini-Mental State Examination score, and lower number of years of education all entered the model. Jorge et al.[34] found that the depressed group did not differ from the nondepressed group in terms of activities of daily living, cognitive functioning, or social functioning, nor did they differ in terms of their social supports. Logistic regression showed that depression was associated with left anterior CT scan lesions. Bowen et al.[30] found that only pre-TBI occupational status was associated with MD; 60% of those not working before their TBI became depressed, versus 33% of those who were working. Van Reekum et al.[32] found trend-level evidence of gender differences; 7 of 10 women, versus 2 of 8 men ($P = 0.06$), became depressed post-TBI. Persinger[40] analyzed MMPI data that suggested that "phasic or intermittent elevations of activity within limbic structures could be the primary etiology of depression"[40] (p. 1286) post-TBI. Saran[41] found that only 1 of 10 patients with melancholic depression after TBI had an abnormal dexamethasone suppression test, versus 91% of patients with primary melancholic depression, suggesting that melancholic depression post-TBI is not associated with hypothalamic-pituitary-adrenal axis dysfunction.

Bipolar Affective Disorder

Six studies have reported on 374 subjects after TBI;[25,32–34,37,42] however, one of the studies[42] was strongly affected by a selection bias (referrals to the study being dependent on the presence of psychiatric symptoms), so the data from this study ($N = 20$) are not included. Bipolar affective disorder (BAD) occurred in 15 of the remaining 354 subjects (4.2%) over a maximum of 7.5 years of follow-up, and this contrasts with the general community lifetime prevalence rate of 0.8%.[26] Hence the relative risk, as with MD, is large, at an estimated $4.2 / 0.8 = 5.3$. Data regarding a biologic gradient is mixed, but the evidence for a temporal sequence, when assessed, was consistently positive.

Shukla et al.[42] found that seizures were frequent, occurring in 50% of subjects, in their sample of 20 subjects who developed mania after closed TBI. Further evidence for a seizure hypothesis for secondary mania came from Pope et al.,[43] who noted a preferential response to valproate, versus lithium, in BAD after TBI. Starkstein et al.[44] found that 9 of 11 patients who developed manic syndromes after brain injury had right hemisphere involvement, and 8 of 11 had lesions involving the limbic system. Mean values for bifrontal and third-ventricle / brain ratios of the manic subjects were greater than those of nonmanic matched subjects. Five manic subjects had a family history of mood disorder. These data suggested that "the confluence of either anterior subcortical atrophy and a focal lesion of a limbic or limbic-connected region of the right hemisphere, or genetic loading and a limbic-connected right hemisphere lesion"[44] (p. 1069) may account for mania after TBI. Jorge et al.[34] found that mania after TBI was associated with temporal basal polar lesions and was not associated with severity of TBI, degree of physical or cognitive impairment, level of social functioning, or personal or family history of psychiatric disorder. van Reekum et al.[32] found evidence of gender differences, with 1 of 10 females, versus 4 of 8 males ($P = 0.06$), developing BAD or cyclothymia post-TBI.

Generalized Anxiety Disorder

Five studies[25,29,32–34] have reported on the prevalence of generalized anxiety disorder (GAD) after TBI. In these studies, 36 of 398 subjects had GAD (9.1%) over a max-

TABLE 1. Coding system for terms and abbreviations used in Table 2

Column Headings	**Excl'n** = exclusion criteria; **BG** = biological gradient; **TS** = temporal sequence
Source	**I** = inpatient; **O** = outpatient (or community sample); **M** = mental health center; **R** = rehabilitation center; **T** = trauma center
Exclusion Criteria	**A** = adults; **C** = cognitive impairment; **I** = institutionalized; **M** = medical conditions; **O** = open TBI; **P** = premorbid psychiatric disorder
(Mean) Time	Approximate number of months since injury
(Range of) Severity	**Mi** = mild; **Mo** = moderate; **S** = severe
Type (of study)	**C** = cohort; **HC** = historical cohort; **N** = naturalistic study
Measures	**AES** = Apathy Evaluation Scale; **CIDI** = Composite International Diagnostic Interview; **DIS** = Diagnostic Interview Schedule; **GHQ** = General Health Questionnaire; **K-SADS-E** = Schedule for Affective Disorders and Schizophrenia for School Age Children–Epidemiologic Version; **NRS** = Neuropsychiatric Rating Scale; **PSE** = Present State Examination; **PTSDI** = PTSD Inventory; **SADS-L** = Schedule for Affective Disorders and Schizophrenia–Lifetime Version; **SCID** = Structured Clinical Interview for DSM; **SCAN** = Schedule for Clinical Assessment in Neuropsychiatry; **WSRS** = Wimbledon Self-Report Scale
Main Finding	Proportion of individuals meeting criteria for the psychiatric disorder
Biological Gradient and Temporal Sequence (BG, TS)	**Y** = evidence in support of a biological gradient or temporal sequence; **N** = evidence against a biological gradient or temporal sequence; **M** = mixed support; **N/A** = not assessed; **R** = reversed (i.e., increased outcome with milder TBI, or decreased outcome after TBI)
Limitations	**B** = brief follow-up period; **NB** = nonblinded outcome assessment; **P** = premorbid psychiatric history poorly assessed or poorly reported; **R** = reported on previously; **S** = selection bias possible; **U** = unstructured outcome assessment

TABLE 2. Traumatic brain injury and psychiatric disorders

	Subjects and Methods									Results			
Studies Listed by Disorder	**Admit *N***	**Final *N***	**Source**	**Excl'n**	**Time (mo)**	**Severity**	**Type**	**Measures**	**Criteria Set**	**Main Finding**	**BG**	**TS**	**Limits**
Depression													
Deb et al. 1999[29]	196	164	I	—	12.0	Mi-S	N	GHQ, SCAN	ICD-10	21/164	Y	M	S,NB
Bowen et al. 1998[30]	137	99	I	M,P	6.0	Mi-S	N	WSRS	—	38/99	N	N/A	S,NB,P
Hibbard et al. 1998[25]	100	100	O	—	91.2	Mi-S	N	SCID	DSM-IV	61/100	N	Y	NB
Max et al. 1998[31]	?	48	I	A,M,C	24.0–28.8	Mi + S	HC	K-SADS-E	DSM-III-R	S = 6/24 Mi = 1/24 OC[a] = 1/24	Y	Y	S,NB
van Reekum et al. 1996[32]	68	18	O,R	C,P	58.8	Mi-S	HC	SADS-L	DSM-III	9/18	N	M	S,NB
Fann et al. 1995[33]	50	50	O,R	C	32.5	Mi-S	N	DIS	DSM-III-R	27/50	N/A	Y	S,NB
Jorge et al. 1993[34]	66	66	I,T	O,M,C	12.0	Mi-S	N	PSE	DSM-III-R	17/66	N	Y	S,NB,R
Alexander et al. 1992[51]	36	36	O	—	37.4 + 30.9	Mi + S	N	—	DSM-III	Mi = 20/23 S = 4/13	R	M	S,NB,U,P
Fedoroff et al. 1992[36]	66	66	I,T	O,M,C	1.0	Mi-S	N	PSE	DSM-III	17/66	N	M	S,NB,B,P
Varney et al. 1987[37]	120	120	O	I	41.0	Mi-S	HC	—	DSM-III	92/120 vs. 23/60	N/A	N/A	S,NB,U
Total[b]										289/653 (44.3%)			
Bipolar affective disorder													
Hibbard et al. 1998[25]	100	100	O	—	91.2	Mi-S	N	SCID	DSM-IV	2/100	N	Y	NB
van Reekum et al. 1996[32]	68	18	O,R	C,P	58.8	Mi-S	HC	SADS-L	DSM-III	3/18	Y	Y	S,NB
Fann et al. 1995[33]	50	50	O,R	C	32.5	Mi-S	N	DIS	DSM-III-R	0/50	N/A	N/A	S,NB
Jorge et al. 1993[34]	66	52	I,T	M,C,P	12.0	Mi-S	N	PSE	DSM-III-R	6/66	N	Y	S,NB,P
Shukla et al. 1987[42]	20	20	O	—	105.6	Mi-S	N	SADS-L	RDC	13/20[c]	Y	N/A	S,NB
Varney et al. 1987[37]	122	120	O	I	41.0	Mi-S	HC	—	DSM-III	4/120	N/A	N/A	S,NB,U
Total										15/354 (4.2%)			
Generalized anxiety disorder													
Deb et al. 1999[29]	196	164	I	—	12.0	Mi-S	N	GHQ, SCAN	ICD-10	3/164	Y	M	S,NB
Hibbard et al. 1998[25]	100	100	O	—	91.2	Mi-S	N	SCID	DSM-IV	9/100	N	Y	NB
van Reekum et al. 1996[32]	68	18	O,R	C,P	58.8	Mi-S	HC	SADS-L	DSM-III	5/18	R	Y	S,NB
Fann et al. 1995[33]	50	50	O,R	C	32.5	Mi-S	N	DIS	DSM-III-R	12/50	N/A	Y	S,NB
Jorge et al. 1993[34]	66	66	I,T	O,M,C	12.0	Mi-S	N	PSE	DSM-III-R	7/66	N	Y	S,NB
Total										36/398 (9.1%)			

Obsessive-compulsive disorder													
Deb et al. 1999[29]	196	164	I	—	12.0	Mi-S	N	GHQ, SCAN	ICD-10	2/164	Y	M	S,NB
Hibbard et al. 1998[25]	100	100	O	—	91.2	Mi-S	N	SCID	DSM-IV	15/100	N	Y	NB
van Reekum et al. 1996[32]	68	18	O,R	C,P	58.8	Mi-S	HC	SADS-L	DSM-III	1/18	N/A	N	S,NB
Total										18/282 (6.4%)			
Panic disorder													
Deb et al. 1999[29]	196	164	I	—	12.0	Mi-S	N	GHQ, SCAN	ICD-10	11/164	Y	M	S,NB
Hibbard et al. 1998[25]	100	100	O	—	91.2	Mi-S	N	SCID	DSM-IV	14/100	N	Y	NB
van Reekum et al. 1996[32]	68	18	O,R	C,P	58.8	Mi-S	HC	SADS-L	DSM-III	1/18	N/A	Y	S,NB
Total										26/282 (9.2%)			
Posttraumatic stress disorder													
Bryant & Harvey 1998[47]	79	63	I,T	M,C	6.0	Mi	N	GIDI	DSM-III-R	15/63	N/A	N/A	S,NB,B
Hibbard et al. 1998[25]	100	100	O	—	91.2	Mi-S	N	SCID	DSM-IV	19/100	N	Y	NB
Warden et al. 1997[48]	47	47	I	C	(6.0	Mo	N	PSE	DSM-III-R	0/47	R	N/A	S,NB,B
Ohry et al. 1996[49]	24	24	O,R	—	6.0–8.0	?	N	PTSDI	DSM-III-R	8/24	N/A	N/A	S,NB,B
Mayou et al. 1993[50]	200	171	O	—	12.0	Mi	N	PSE	DSM-III-R	19/171	N/A	N/A	NB
Alexander 1992[51]	36	36	O	—	37.4 + 30.9	Mi + S	N	—	DSM-III	1/36	N/A	N/A	S,NB,V,P
Total										62/441 (14.1%)			
Schizophrenia													
Deb et al. 1999[29]	190	164	I	—	12.0	Mi-S	N	GHQ, SCAN	ICD-10	1/164	Y	N	S,NB
Max et al. 1998[31]	?	72	I	A,M,C	24.0–28.8	Mi-S	HC	K-SADS-E	DSM-III-R	S = 1/24 Mi = 0/24 OC[a] = 0/24	Y	Y	S,NB
van Reekum et al. 1996[32]	68	18	O,R	C,P	58.8	Mi-S	HC	SADS-L	DSM-III	0/18	N/A	N/A	S,NB
Varney et al. 1987[37]	120	120	O	I	41.0	Mi-S	HC	—	DSM-III	1/120	N/A	N/A	S,NB,U
Total										2/302 (0.7%)			
Substance abuse (or dependence)													
Deb et al. 1999[29]	196	164	I	—	12.0	Mi-S	N	GHQ, SCAN	ICD-10	6/164	Y	M	S,NB
Hibbard et al. 1998[25]	100	100	O	—	91.2	Mi-S	N	SCID	DSM-IV	28/100	N	R	NB
van Reekum et al. 1996[32]	68	18	O,R	C,P	58.8	Mi-S	HC	SADS-L	DSM-III	5/18	Y	N	S,NB
Fann et al. 1995[33]	50	50	O,R	C	32.5	Mi-S	N	DIS	DSM-III-R	4/50	N/A	Y	S,NB
Total										43/332 (13.0%)			
Personality disorders													
Kant et al. 1998[59]	83	83	O	—	?	Mi-S	N	AES	—	59/83[d]	Y	N/A	S,NB
van Reekum et al. 1996[32, e]	68	18	O,R	C,P	58.8	Mi-S	HC	SIDP-R	DSM-III-R	A = 5/18 B = 4/18 N = 3/18 H = 2/18 D = 2/18 O = 2/18 S = 1/18 P = 1/18 AS = 1/18 Sa = 1/18	M	N/A	S,NB,P
Total										N/A			

[a]OC = orthopedic control subjects.
[b]Excludes samples reported on more than once.
[c]The 20 subjects were referred based on the presence of psychiatric symptoms. Given this selection bias, the results of this study are not included in the totals.
[d]50/59 were also depressed according to their scores on the Beck Depression Inventory.
[e]A = avoidant; B = borderline; N = narcissistic; H = histrionic; D = dependent; O = obsessive-compulsive; S = schizoid; P = passive-aggressive; AS = antisocial; Sa = sadistic.

imum of 7.5 years, leading to a relative risk of 9.1/4.0[25] = 2.3. Evidence for a temporal sequence was consistently positive, whereas that for a biologic gradient was mixed. Two studies reported evidence consistent with an absence of a biologic gradient; one was positive for a biologic gradient; and one suggested an inverse gradient exists.

Epstein and Ursano[45] review the sparse literature related to anxiety disorders (in general) after TBI and conclude that "the interrelationships between anxiety and TBI are multifactorial, and the effect of specific tissue damage upon the nature of the symptomatology remains uncertain"[45] (p. 306).

Obsessive-Compulsive Disorder

Three studies have reported on 282 subjects.[25,29,32] Eighteen (6.4%) had obsessive-compulsive disorder (OCD) over a maximum of 7.5 years of follow-up, leading to an estimated relative risk of 6.4/2.5[26] = 2.6. Evidence for both a biologic gradient and temporal sequence was mixed.

Kant et al.[46] reviewed the available literature, along with data they derived from 4 cases of OCD following mild TBI. While noting that the evidence showed inconsistencies, they concluded that the weight of the evidence nonetheless indicated a possible causative role for frontal system impairment.

Panic Disorder

Three studies[25,29,32] have found rates of panic disorder averaging 9.2% (26/282) over a maximum of 7.5 years, yielding an estimated relative risk of 9.2/1.6[26] = 5.8. Evidence for a biologic gradient was mixed, but was more consistently positive for a temporal sequence. There are no available data to support pathophysiologic hypotheses in panic disorder after TBI.

Posttraumatic Stress Disorder

Six studies of 441 subjects[25,47–51] revealed a rate of 62/441 (14.1%) over a maximum period of 7.5 years for posttraumatic stress disorder (PTSD), yielding an estimated relative risk of 14.1/8.0[52] = 1.8. Evidence for a biologic gradient was not provided in most studies; in those in which data are reported, the results were either negative or showed an inverse relationship between severity of TBI and rate of PTSD. Evidence for a temporal association was also rarely given. One study suggested that a temporal association does exist.

Mayou et al.[50] found that PTSD is "not associated with a neurotic predisposition" but is "strongly associated with horrific memories of the accident"[50] (p. 647). PTSD did not occur, in their sample, in subjects who lost consciousness during the TBI or who were amnestic for the event. Similarly, Warden et al.[48] found that while 6 of 47 veterans (13%) who had suffered a moderate TBI and who were amnestic for the event developed avoidance and arousal criteria of PTSD, none developed the full syndrome, and none met the criteria of reexperiencing the event. Sbordone and Liter[53] found that although PTSD patients, after a motor vehicle accident (MVA), a fall, or a blunt trauma, could fully recall the event, PCS patients could not. Ohry et al.[49] found that women were predisposed to develop PTSD: 6 of 10 women, versus 2 of 14 men, developed PTSD following TBI. King[54] reported a single case of a patient who suffered 2.5 days of posttraumatic amnesia after an MVA. Only a single "island" of memory was preserved, and that for a period immediately after the MVA when the patient was on the ground after having been thrown from the vehicle. Reexperiencing of this island of memory was felt to possibly contribute to the development of PTSD in this patient. Bryant and Harvey[47] found that PTSD occurred in 82% of mild-TBI patients who had experienced acute stress disorder earlier (<1 month postinjury), but in only 11% of those who did not suffer acute stress disorder.

Schizophrenia

Schizophrenia (SCZ) appeared to be relatively uncommon in the four studies reporting data.[29,31,32,37] When we excluded the study of children and adolescents by Max et al.,[31] the resulting rate was 0.7% (2/302) over a maximum of 4.9 years of follow-up. This yields a relative risk of 0.7/1.5[26] = 0.5. Clearly these low numbers limit an assessment of the biologic gradient; however, the data did suggest that one may exist, since the cases were restricted to those with severe TBI (for those cases in which severity was reported). The evidence for a temporal sequence was mixed. Wilcox and Nasrallah[55] performed a case-control study of SCZ and found that "head trauma" before age 10 years was more common in hospitalized SCZ subjects (22/200) than in those with BAD (6/122, $P = 0.06$) or depression (3/203, $P = 0.0001$) or in surgical control subjects (1/134, $P = 0.0001$).

Smeltzer et al.[56] reviewed the evidence related to anatomical localization of brain injury and relationship to psychosis. They found the evidence to be sparse, severely flawed, and inconsistent. O'Callaghan et al.[57] reported on a patient with early-onset SCZ (age 16 years) who had sustained a blow to the left frontal-parietal region at age 14. A problem with this study, at least from the standpoint of localization, was the finding of generalized atrophy on CT scan. Buckley et al.[58] reported on 3 patients with a history of cerebral trauma (loss of consciousness greater than 4 hours) and SCZ, and compared them with 2 patients with schizoaffective disorder and cerebral trauma. MRI scanning showed evidence of

left temporal lobe abnormalities in all of the SCZ patients and in neither of the schizoaffective patients.

Substance Abuse

Substance abuse (SA) or dependence was common, at 13.0% (43/332), in the four reporting studies[25,29,32,33] over a maximum follow-up period of 7.5 years. However, this rate is lower than that reported for the general community, with data suggesting a lifetime prevalence of substance abuse of 16.7%.[26] The data from Deb et al.[29] may have skewed this estimate, as they are reporting on substance dependence rather than substance abuse. Deleting their data yields a rate of 37/168 = 22.0%, and a relative risk of 22.0/16.7 = 1.3. Evidence for a biologic gradient, and for a temporal sequence, was mixed. There are no available data to support pathophysiologic hypotheses in substance abuse disorder after TBI.

Personality Disorders

Only one study has reported on DSM personality disorders, with avoidant, borderline, and narcissistic personality disorders being the most common.[32] The numbers, however, are very low. Evidence for a biologic gradient was mixed, and the temporal sequence was not assessed. A categorical approach to the diagnosis of apathy[59] is also reported on; this personality syndrome appears to be common after TBI and is associated with a biologic gradient. However, apathy is not recognized in the DSM series. The temporal sequence was not reported on in the study of apathy. Of note was the finding that apathy was found concurrently with MD in 50 of 59 cases. A full discussion of neurobiological issues related to personality change is beyond the scope of this paper, but frontal system involvement is frequently implicated.[60–62]

BIOLOGICAL MECHANISMS

Although pathophysiologic considerations related to each of the psychiatric disorders are discussed above, much can also be inferred from consideration of the pathophysiologic changes observed after TBI in general. Hume et al.[63] note that diffuse axonal injury post-TBI is usually observed in the corpus callosum and in the brainstem. Levin et al.[64] found that 17 of 20 subjects admitted for mild to moderate TBI had lesions on MRI, primarily involving the frontal and temporal regions. Alavi[65] reviewed PET data that showed whole brain glucose hypometabolism post-TBI that correlated with the Glasgow Coma Scale score. Frontal region hypometabolism was also reported by Alavi.

Silver et al.[66] note that TBI may cause contusional injuries affecting brain regions involved in the mediation of mood, especially "along the temporal lobes and frontal cortex" (p. 13), as well as diffuse axonal injury—which, in addition to disrupting neuronal circuits directly, may also disrupt neurotransmitter systems such as norepinephrine, serotonin, dopamine, and acetylcholine. Preliminary data that support the possibility of changes to these neurotransmitter systems were reviewed. Hypoxia may lead to free radical and excitotoxic neurotransmitter release, which cause further neuronal damage to these systems. Silver and Yudofsky[67] note that several studies have reported neurochemical changes post-TBI, with indications that norepinephrine, serotonin, dopamine, and acetylcholine "are dramatically affected by TBI"[67] (p. 637). Cholinergic deficits were shown to be associated with behavioral changes in moderately fluid-concussed rats.[68] More recently Tanaka et al.[69] found acute (i.e., at 25 seconds) increases in acetylcholine in concussed mice, as well as decreased norepinephrine, in the absence of changes to dopamine and serotonin. Tang et al.[70] demonstrated that increased dopamine after mild TBI is associated with memory deficits in mice. Cerebrospinal fluid levels of substance P and serotonin were lower, and the levels of lipid peroxidation products were higher, in patients who had suffered a recent TBI versus healthy subjects having minor surgical procedures.[71] The CSF changes did not correlate with the Glasgow Coma Scale score. In another study, increased serotonin levels in the extracellular fluid were also observed 10 minutes after brain trauma in rats.[72] Increases in γ-aminobutyric acid have also been found, particularly in the dentate gyrus of brain-injured rats.[73]

Some of the changes to neurotransmitter systems may occur weeks after the initial TBI. Ciallella et al.[74] found that there were no changes in vesicular acetylcholine transporter protein or in M_2 receptors at 1 day and 1 week post-TBI in rats. At 2 and 4 weeks, however, a 40%–50% increase in vesicular acetylcholine transporter protein and a 25%–30% decrease in M_2 receptors were observed. These changes particularly involved the hippocampus. These changes may have occurred in response to chronically lowered acetylcholine neurotransmission, which has also recently been demonstrated after TBI in rats.[75]

DISCUSSION

There are now a number of studies examining the issues related to DSM- or ICD-based psychiatric disorders after TBI. Although these studies have methodological limitations as discussed above, there is a strong and growing body of evidence to support the hypothesis that TBI frequently causes some, but not all, psychiatric disorders

in those who have suffered a TBI. There is compelling evidence of causation for *major depression*, *bipolar affective disorder*, and the *anxiety disorders* after TBI. The evidence for psychosis and substance abuse suggests that TBI imposes either no increased risk or a very minor increased risk of these disorders. In the case of schizophrenia, the available research suggests that TBI may actually be protective for the disorder. However, psychosis is both a rare event and one that may be hard to detect, since many of these persons may have been receiving care in the psychiatric system, may be hard to find for other reasons, or may refuse to participate. These difficulties, in combination with the relatively small sample size currently available, suggests that this may be an inaccurate finding. Selection biases may also have limited the evaluation of risk associated with developing substance abuse disorders. There is very little research into the personality disorders, but the sparse research that does exist suggests that some of the personality disorders may also occur at high rates after TBI.

These results strongly support the need for a thorough and reliable assessment of mood, anxiety, and personality disorders in all persons who have suffered a TBI. Psychiatric illness, even in the absence of TBI, can cause impairment and disability contributing to handicap. Given the impact on functioning, and on subjective well-being, that these diagnoses can cause, there is a need to further study the impact of treatment of psychiatric disorders in the TBI population. Although we did not examine treatment in this article, few publications exist that address, with rigorous methodology, treatment issues of these disorders after TBI.

In terms of the prevalence of psychiatric disorders, major depression was the most common, at approximately 44% across all available studies. Bipolar illness was much less frequent, at approximately 4%. The anxiety disorders were common, ranging from approximately 6.5% for OCD to a high of approximately 14% for PTSD. Substance abuse was also fairly common, at 22%, while psychosis was uncommon at less than 1%. Little research was available that contrasted these rates with a control population. Estimate of the relative risk (RR) of psychiatric disorders, based on comparisons with community rates, is potentially problematic. Use of these data, however, generated estimates of relative risk as follows. The highest relative risk was for major depression, with an RR of 7.5. Bipolar disorder also had a high RR of 5.3. The RRs for the anxiety disorders clustered around an approximate figure of 2.0, with the exception of panic disorder with an RR of 5.8. The RRs for schizophrenia and substance abuse were close to or less than 1.0, suggesting either no, or a minor, increased risk for these disorders.

As discussed previously, the most rigorous data demonstrating an association between TBI and psychiatric disorders will derive from properly controlled studies. We found only three controlled studies. The study by Max et al.[31] involved only children and adolescents, and that of van Reekum.[32] studied a control group with known psychiatric pathology (these data were derived from a larger study of borderline personality disorder). Hence, only the study by Varney et al.[37] provided well-controlled data in adults. They found an RR of 2.0 for MD. RRs for schizophrenia and bipolar affective disorder could not be calculated because no cases were found in the back-injured control population. Hence, the data of Varney et al. are generally supportive of the naturalistic studies, but the data related to MD suggest that relative risk estimates generated by comparison with the community may inflate the relative risk versus that generated by comparison with other injured populations. Demonstration of an *association* between the disorders with high RR and TBI meets the main criteria for causation but does not in and of itself establish causation.

Sir Bradford Hill's[22] remaining criteria are now discussed. The evidence for a *biologic gradient*, in which increased severity of the TBI is associated with increased risk of psychiatric disorders, was mixed for all disorders with the exception of PTSD, for which there was compelling evidence of an inverse gradient (i.e., increased risk of PTSD with milder TBI). This would seem to weaken the argument for causation based on this criterion. As discussed above, though, it is possible that even small or minor injury occurring in critical areas of the brain may disrupt widespread neuronal systems and/or have dramatic effects on neurotransmitter systems. Further, it may be that our approach to assessing the severity of TBI (at present based largely on measures of the initial severity of the TBI, such as depth and duration of coma) may be fundamentally limited. It may also be that more severe TBI is protective for some psychiatric disorders via other mechanisms, such as reduced insight or other direct effects on brain systems involved in the production of these disorders. Hence the absence of a biologic gradient does not lessen the argument for causation. Indeed, the apparent lack of a biologic gradient for psychiatric disorders post-TBI is in and of itself an important clinical finding. If true, this finding implies that all individuals, regardless of the initial severity of the TBI, may be at risk of developing many of the psychiatric disorders reviewed herein. As regards the special case of PTSD, the finding of an apparent inverse relationship, as well as some of the evidence reviewed previously, strongly suggests that recalling the event is crucial for development of the full disorder. However, there is also evidence that TBI, regardless of severity,

may increase the risk of developing PTSD symptoms by contributing to the production of increased arousal and avoidance behaviors.

In terms of the *temporal sequence*, it is clear from the data that some psychiatric disorders were present in some patients prior to the TBI. However, it is also clear that many more subjects had apparent onset of their disorders after the TBI. Furthermore, there was no consistent demonstration that pre-TBI psychiatric illness was a strong risk factor for post-TBI psychiatric illness. For the most part the temporal sequence criterion is being satisfied, although some of the available data suggest that pre-TBI psychiatric status may also be a risk factor for some post-TBI psychiatric disorders. What is also clear from the research, however, is that some of the psychiatric illnesses may have their onset months to years after the TBI, and this may seem to lower the evidence for causation. Some of the neurotransmitter research reviewed above suggests at least one possible mechanism in this regard, since it is increasingly clear that biochemical changes to the brain may occur at some period of time after the TBI.

In terms of *biologic plausibility*, there has been considerable research related to the mood disorders after TBI, but much less so for the other psychiatric disorders. There certainly appears to be a growing body of evidence related to changes in the brain that are strongly associated with psychiatric illness, and the research is suggesting some tantalizing leads into the operative biologic mechanisms in psychiatric illness after TBI. Nonetheless, this is an area that requires a significant expansion of research. Although the data were not reviewed herein, there is a strong biologic argument that personality disorders can be caused by TBI, but this causation argument is limited by the small number of prevalence studies and the absence of data regarding temporal sequence or biologic gradient.

Further research into the hypothesis that TBI causes psychiatric illness is certainly strongly supported by the existing data and is much needed. Methodological limitations of the existing data need to be addressed in future research; however, it is likely that doing so will be very difficult. For example, addressing some of the selection biases and loss-to-follow-up issues is challenging. It is obvious that appropriate control samples are required, but which group is best and most feasible? Spinal cord injury controls may be ideal from many points of view; however, some members of this group may also have had a TBI during the traumatic event, and this would carefully need to be assessed. Furthermore, how can one ever be sure, based on retrospective assessments, of the pre-TBI psychiatric history and presence of pre-TBI psychiatric risk factors? And yet how does one feasibly perform a prospective study? A large study over many years of follow-up of a high-risk (for TBI) sample would be best, but may be unfeasible. Another approach would be to document the pre-TBI history immediately after the TBI to minimize the risk of recall biases developing as the individual begins to become more aware of the outcome of the TBI over time. The challenge here, of course, will be to perform this assessment in the period when cognitive impairments are likely to be at their most severe. Family members as informants will almost certainly be needed. Ensuring blindness to TBI status at the time of psychiatric outcome assessment will also be difficult. Assessing TBI severity as related to the biologic gradient criterion is problematic, especially because small or minor lesions may have dramatic effects on brain function. Ultimately, research investigating the function of the brain in association with psychiatric illness is more likely to be fruitful than research relying on crude measures of severity such as the depth and duration of coma. Finally, it is obvious that much more research is required into the biological and psychosocial contributors to psychiatric illness in these populations. A comprehensive approach examining multiple probable contributing factors is needed. The research should be guided by some of the clues reviewed above and by the research into the pathogenesis of primary psychiatric illness.

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Exhibit “F”

ORIGINAL ARTICLE

Psychiatric Illness Following Traumatic Brain Injury in an Adult Health Maintenance Organization Population

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Background: Psychiatric illness after traumatic brain injury (TBI) has been shown to be prevalent in hospitalized and tertiary care patient populations.

Objective: To determine the risk of psychiatric illness after TBI in an adult health maintenance organization population.

Design: Prospective cohort study.

Setting: Large staff-model health maintenance organization.

Participants: Nine hundred thirty-nine health plan members diagnosed as having TBI in 1993 and enrolled in the prior year, during which no TBI was ascertained. Three health plan members per TBI-exposed subject were randomly selected as unexposed comparisons, matched for age, sex, and reference date.

Main Outcome Measure: Psychiatric illness in the 3 years after the TBI reference date, determined using computerized records of psychiatric diagnoses according to the *International Classification of Diseases, Ninth Revision, Clinical Modification*, prescriptions, and service utilization.

Results: Prevalence of any psychiatric illness in the first year was 49% following moderate to severe TBI, 34% following mild TBI, and 18% in the comparison group. Among subjects without psychiatric illness in the prior year, the adjusted relative risk for any psychiatric illness in the 6 months following moderate to severe TBI was 4.0 (95% confidence interval [CI], 2.4-6.8) and following mild TBI was 2.8 (95% CI, 2.1-3.7; $P<.001$) compared with those without TBI. Among subjects with prior psychiatric illness, the adjusted relative risk for any psychiatric illness in the 6 months following moderate to severe TBI was 2.1 (95% CI, 1.3-3.3) and following mild TBI was 1.6 (95% CI, 1.2-2.0; $P=.005$). Prior psychiatric illness significantly modified the relationship between TBI and subsequent psychiatric illness ($P=.04$) and was a significant predictor ($P<.001$). Persons with mild TBI and prior psychiatric illness had evidence of persisting psychiatric illness.

Conclusions: Both moderate to severe and mild TBI are associated with an increased risk of subsequent psychiatric illness. Whereas moderate to severe TBI is associated with a higher initial risk, mild TBI may be associated with persistent psychiatric illness.

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High rates of mood, psychotic, and substance abuse disorders following traumatic brain injury (TBI) have been found in hospitalized trauma and tertiary care referral populations.[1-5] A population-based secondary analysis of the New Haven portion of the National Institute of Mental Health Epidemiologic Catchment Area Study[6] by Silver and colleagues examined patients at varying time points after self-reported "severe head injury that was associated with a loss of consciousness or confusion,"[7(p237)] making the TBI exposure susceptible to recall bias. The study found that adjusted odds ratios (ORs) for all psychiatric diagnoses except bipolar disorder were increased in the group reporting a history of head injury compared with the group reporting no history of head injury. Data on injury severity and time since injury were not available. Few data exist on the longitudinal risk of psychiatric disorders in large, population-based ambulatory primary care settings following the entire spectrum of TBI severity, particularly mild TBI.

Studies have confirmed that disability caused by psychiatric disorders may contribute to the disability associated with TBI.[2,8] Identifying the extent of psychiatric problems following TBI, particularly mild TBI, may assist in targeting secondary and tertiary prevention efforts for TBI-related disability.

Psychiatric history has been shown to be a risk factor for post-TBI psychiatric illness in some but not all studies.[1,9-11] Similarly, the relationship between TBI severity and prevalence of subsequent psychiatric disorders has been inconsistent.[2,12-14] The effects of psychiatric history and TBI severity on risk of psychiatric problems following TBI have not been systematically and longitudinally studied in large TBI and comparison samples.

The goals of this study were to determine the prevalence of psychiatric illness following mild as well as moderate to severe TBI in an adult health maintenance organization (HMO) population, the ORs for prevalent psychiatric illness and relative risks (RRs) for incident psychiatric illness following TBI compared with patients without TBI, and the effect of prior psychiatric illness on the relationship between TBI and subsequent psychiatric illness.

METHODS

This prospective cohort study was conducted using computerized records from the Group Health Cooperative of Puget Sound (GHC), a consumer-governed regional HMO that serves approximately 450 000 members in the Puget Sound area of western Washington State. As a staff-model HMO, it builds and owns its facilities, and the physicians and other staff are employees of the health plan. The GHC population is broadly representative of the greater Seattle population in terms of age, sex, race, and marital status; GHC enrollees have slightly higher educational attainment and less representation at the high end of income distribution.[15] This study used data obtained in conjunction with a previously reported case-control study of psychiatric risk factors for TBI.[16] Subjects received medical care from one of GHC's facilities, located in 6 counties. Data on health plan members were derived from GHC's computerized databases, which included information on all inpatient and outpatient visits and diagnoses, all prescriptions dispensed from GHC pharmacies, age, sex, and insurance type (Medicare, Medicaid, GHC individual or family plan, GHC group plan, or other plan), which was used as a proxy for socioeconomic status. Each GHC member has a unique and permanent number that makes linkage of all utilization possible; GHC tracks enrollment closely and has a low rate of member disenrollment (13.1% for 1992 through 1993), which made it possible for us to maintain a stable study base. Diagnoses in 1992 were recorded on 95% of all visit records.[12] Only about 7% of GHC members had dual insurance coverage, so ascertainment of utilization was nearly complete. The study was approved by the institutional review boards of GHC and the University of Washington, Seattle.

TBI-EXPOSED GROUP

The TBI-exposed group included patients 15 years or older diagnosed at an emergency department, hospital, or outpatient clinic as having a TBI in 1993. The following diagnostic categories and codes from the *International Classification of Diseases, Ninth Revision, Clinical Modification* (*ICD-9-CM*)[17] were used to identify TBI: fracture of the vault or base of the skull (800.0-801.9); other, unqualified, and multiple fractures of the skull (803.0-804.9); and intracranial injury, including concussion, contusion, laceration, and hemorrhage (850.0-854.1). These diagnostic categories for TBI were used by the Centers for Disease Control and Prevention in their TBI surveillance studies.[18] If a person received a TBI diagnosis at more than 1 visit in 1993, the first diagnosis was considered the incident TBI. The reference date for cases was the date of this incident TBI diagnosis. Patients with TBI were required to have been continuously enrolled at GHC for the year prior to their TBI diagnosis to ensure that records were available to assess indicators of prior psychiatric illness. We included patients from 6 counties in the Puget Sound area that provided complete health service utilization data. To maximize the likelihood of ascertaining incident TBI cases, subjects who had an *ICD-9-CM* diagnosis of TBI in the year prior to their reference date were excluded from the TBI-exposed group.

Severity of TBI was dichotomized into mild TBI and moderate to severe TBI using the categorization criteria of the Centers for Disease Control and Prevention.[19] The TBI exposure was considered to be mild if *ICD-9-CM* codes indicated brief (<1 hour) or no loss of consciousness and no documented traumatic intracranial lesions. The TBI exposure was considered to be moderate to severe if *ICD-9-CM* codes indicated prolonged loss of consciousness or a documented traumatic intracranial or brain lesion. Persons whose TBI severity was undetermined were excluded from the study.

TBI-UNEXPOSED COMPARISON GROUP

To compare the effects of recent incident TBI exposure with no recent TBI exposure, 3 subjects per TBI-exposed patient were selected at random from GHC enrollment files and were frequency matched with TBI-exposed patients by sex, age in 5-year groups (15-19 years up to ≥95 years), and enrollment at the time of the TBI-exposed patient's reference date. Similar to the patients with TBI, TBI-unexposed patients had to be GHC members on their assigned reference date as well as continuously during the year prior to this date and could not have received a TBI diagnosis during that year.

PSYCHIATRIC ILLNESS INDICATORS

Psychiatric illnesses in the year prior to and 3 years following the reference date were ascertained using 3 separate indicators: presence of a psychiatric diagnosis, filling of a prescription for psychiatric medication, or utilization of psychiatric services. Presence of a psychiatric illness was recorded in 6-month blocks for the 3 years following the reference date. The denominator for each period was the number of subjects who were enrolled at any time during that period. Therefore, except for those who were disenrolled as a result of death on the reference date all patients had psychiatric illness outcome data in the first 6 months after the reference date.

Psychiatric diagnoses were determined using *ICD-9-CM* codes and were categorized as follows: acute reaction to stress or adjustment reaction (308, 309); alcohol or drug intoxication, withdrawal, or dependence (291.0-292.9, 303.0, 303.9, 304, 305); anxiety (300.0, 300.2, 300.3, 799.2); depression (296.2, 296.3, 296.82, 296.9, 300.4, 311); hyperkinetic syndrome of childhood (314); malaise or fatigue (300.5, 780.7); organic psychotic mental disorders (290.0-290.9, 293.0-294.9); organic nonpsychotic mental disorders (310, 780.09); schizophrenia, hallucinations, or paranoia (295, 297.0-299.9, 780.1); somatoform disorders (300.1, 300.6-300.9, 306, 307.8, 307.89); or other psychiatric disorders (307, 316, V40.2-V40.9, V62.81, V62.89, V65.9).

Subjects were considered to have filled a psychiatric medication prescription if automated GHC pharmacy data indicated that a prescription for a psychiatric medication in any of the following classes was filled in the 3 years after the reference date: antidepressants, lithium, anxiolytics, antipsychotics, or psychostimulants. Surveys in 1985 and 1986 showed that more than 90% of all medications prescribed at GHC were filled in GHC pharmacies, and a study found that 97.6% of patients treated with antidepressant medications between 1991 and 1992 filled their prescriptions at GHC pharmacies.[15] Because anti-

depressants are commonly used for other conditions, they were considered to be for a psychiatric indication only if the prescription was filled within 60 days of a depression diagnosis. Anxiolytics were considered to be for a psychiatric indication if the prescription was filled within 60 days of an anxiety diagnosis. Psychostimulants were excluded if there was a diagnosis of narcolepsy in the year prior to the reference date.

Utilization of psychiatric services was ascertained based on computerized records of inpatient psychiatric hospitalizations, outpatient mental health clinic visits, and inpatient stays or outpatient visits for alcohol or drug treatment in the year before and 3 years after the reference date. Out-of-plan mental health care use is rare owing to comprehensive mental health services with small copayments in GHC.

To maximize clinical validity, the psychiatric illness indicators were further divided into the following clinical categories: (1) affective disorders (depressive or anxiety disorder diagnosis; antidepressant, lithium, or anxiolytic prescription), (2) psychotic disorders (schizophrenia, hallucinations, or paranoia or organic psychotic disorder diagnosis; antipsychotic prescription), (3) substance abuse disorders (alcohol or drug intoxication, withdrawal, or dependence diagnosis), (4) adjustment reaction (acute reaction to stress, adjustment reaction, malaise, or fatigue), (5) somatoform disorder, (6) organic nonpsychotic mental disorder, (7) hyperactivity (hyperkinetic syndrome of childhood; psychostimulant prescription), and (8) other psychiatric disorder. An overall summary determination of psychiatric illness was made based on the presence of any psychiatric diagnosis, psychiatric medication prescription, or psychiatric utilization during the year before and 3 years after the reference date.

INJURY AND MEDICAL COMORBIDITY

Comorbid injuries associated with incident TBI were determined using *ICD-9-CM* codes for fractures (805-829), internal injuries (860-869), open wounds (870-897), crushing injuries (925-929), injury to the nerves or spinal cord (950-957), and other injuries (958-959) during the 6 months before and 6 months following the reference date.

To adjust for medical comorbidity, we initially considered the Johns Hopkins Ambulatory Care Group (ACG) Case Mix Adjustment System,[20] a measure of relative health status designed to be indicative of expected resource consumption. This system uses age, sex, and *ICD-9-CM* diagnoses to assign a person to 1 of 106 mutually exclusive categories.[21] Although adjustment with the ACG system may be considered for continuous or large-count outcomes, its many categories make it less useful for dichotomous outcomes. Consistent with the cost-prediction design goal of the ACG, we used the logarithm of total costs in the year prior to TBI as a proxy for medical comorbidity and compared it with ACG adjustment. With the most prevalent outcomes, in which ACG adjustment was possible, logarithm of total costs and ACG adjustment were nearly interchangeable as adjustments to the effect of TBI, with logarithm of total costs tending to be a slightly stronger confounder.

STATISTICAL ANALYSIS

The proportion of subjects with psychiatric illness indicators within a particular period (p=prevalence) reveals the cumulative effects of exposure regardless of time of onset. Adjusted exposure effects are estimated with the OR (odds=$p/[1-p]$; OR=odds [exposed]/odds [unexposed]). Because of the potential for correlation among the psychiatric illness indicators for each subject, OR estimates were computed using generalized estimating equations. Separate regression analyses were reported for subgroups with and without psychiatric illness in the prior year. We used SAS version 8 statistical software (SAS Institute Inc, Cary, NC) for this analysis.

The proportion of subjects whose first psychiatric illness indicator occurs during a particular period (incidence) shows the effect of exposure on new cases. The RR expresses incidence among exposed subjects as a proportion of the incidence among unexposed subjects. The RR estimates were computed using complementary log-log generalized linear models for fixed-interval, interval-censored data.[22] Based on the a priori hypothesis of strong early effects of TBI with decreasing risk thereafter, we modeled the first 6-month RR separately along with a linear trend in RR for intervals 2 through 6. Because of the small number of substance abuse outcomes, the ORs and RRs for substance abuse are reported for a combination of mild TBI exposure and moderate to severe TBI exposure. Inferences are based on omnibus tests of any effect of TBI and nested tests for trends in RR across time. In addition, descriptive tests and confidence intervals (CIs) for individual periods are reported for comparison of the relative strength of TBI effects across time. Stata version 7 (Stata Corp, College Station, Tex) and S-PLUS version 6.1 (Insightful Corporation, Seattle) statistical software were used for this analysis.

RESULTS

PATIENT AND TBI CHARACTERISTICS

In 1993, 939 GHC members who were enrolled in the 6-county study region were diagnosed as having a TBI. These members had been enrolled in GHC for at least 1 year prior to their index TBI and had no evidence of a TBI in that year. Most TBIs were classified as mild (n=803; 85.5%) and were diagnosed in an outpatient setting (n=410; 43.7%) or in the emergency department (n=388; 41.3%), whereas 141 (15.0%) were diagnosed in the hospital. The overall annual incidence rate of TBI at GHC among all ages was 475.2 per 100000 person-years.[18]

Although 531 (57%) of all TBI-exposed subjects and 494 (62%) of mild TBI–exposed individuals were aged 15 to 44 years, 77 (57%) of those with moderate to severe TBI were 65 years or older. There were slightly more women (51%) than men. The TBI and comparison groups were similar with regard to insurance type; 74% were group plan subscribers or dependents, 4% received Medicare, and less than 1% received Medicaid. The TBI events were distributed evenly across months, although there was a slightly lower proportion in the winter months.

PREVALENCE AND ORs FOR PSYCHIATRIC ILLNESS

The prevalence of psychiatric illness categories for the year prior to and the 3 years following the reference date are shown in **Table 1**. Participants with TBI generally had higher rates of psychiatric illness indicators compared with those without TBI. Among subjects with moderate to severe TBI, 49% had evidence of a psychiatric illness in the year following TBI compared with 34% in those with mild TBI and 18% in non-TBI comparisons. The prevalence for subjects with TBI gradually dropped during subsequent years but usually remained greater than for the comparison group. Most psychiatric diagnoses were made by non–mental health professionals, with 48% made

Table 1. Prevalence of Psychiatric Illness Indicators in the Year Before and 3 Years After TBI Among HMO Enrollees 15 Years or Older*

Psychiatric Indicator	Prior Year (n = 3756)	1-12 mo (n = 3704)	13-24 mo (n = 3230)	25-36 mo (n = 2892)
Total No. in each exposure category†				
Mild TBI	803 (21.4)	788 (21.3)	691 (21.4)	620 (21.4)
Moderate to severe TBI	136 (3.6)	108 (2.9)	88 (2.7)	76 (2.6)
No TBI	2817 (75.0)	2808 (75.8)	2451 (75.9)	2196 (75.9)
Affective disorder				
Mild TBI	69 (8.6)	89 (11.3)	90 (13.0)	89 (14.4)
Moderate to severe TBI	15 (11.0)	13 (12.0)	10 (11.4)	7 (9.2)
No TBI	143 (5.1)	155 (5.5)	150 (6.1)	180 (8.2)
Psychotic disorder				
Mild TBI	20 (2.5)	24 (3.0)	20 (2.9)	24 (3.9)
Moderate to severe TBI	18 (13.2)	14 (13.0)	8 (9.1)	11 (14.5)
No TBI	42 (1.5)	52 (1.9)	48 (2.0)	60 (2.7)
Substance abuse				
Mild TBI	29 (3.6)	45 (5.7)	35 (5.1)	33 (5.3)
Moderate to severe TBI	5 (3.7)	9 (8.3)	4 (4.5)	3 (3.9)
No TBI	48 (1.7)	46 (1.6)	47 (1.9)	72 (3.3)
Adjustment reaction				
Mild TBI	67 (8.3)	57 (7.2)	46 (6.7)	60 (9.7)
Moderate to severe TBI	14 (10.3)	8 (7.4)	4 (4.5)	5 (6.6)
No TBI	118 (4.2)	128 (4.6)	123 (5.0)	132 (6.0)
Somatoform disorder				
Mild TBI	15 (1.9)	12 (1.5)	10 (1.4)	12 (1.9)
Moderate to severe TBI	2 (1.5)	2 (1.9)	1 (1.1)	2 (2.6)
No TBI	13 (0.5)	9 (0.3)	10 (0.4)	14 (0.6)
Organic nonpsychotic mental disorder				
Mild TBI	8 (1.0)	37 (4.7)	5 (0.7)	9 (1.5)
Moderate to severe TBI	1 (0.7)	11 (10.2)	0 (0.0)	4 (5.3)
No TBI	6 (0.2)	7 (0.2)	3 (0.1)	2 (0.1)
Hyperactivity				
Mild TBI	3 (0.4)	4 (.5)	6 (0.9)	8 (1.3)
Moderate to severe TBI	1 (0.7)	3 (2.8)	1 (1.1)	1 (1.3)
No TBI	14 (0.5)	15 (0.5)	15 (0.6)	15 (0.7)
Other				
Mild TBI	40 (5.0)	30 (3.8)	30 (4.3)	44 (7.1)
Moderate to severe TBI	10 (7.4)	9 (8.3)	7 (8.0)	5 (6.6)
No TBI	77 (2.7)	87 (3.1)	89 (3.6)	89 (4.1)
Psychiatric diagnosis				
Mild TBI	176 (21.9)	201 (25.5)	166 (24.0)	159 (25.6)
Moderate to severe TBI	42 (30.9)	41 (38.0)	24 (27.3)	20 (26.3)
No TBI	328 (11.6)	364 (13.0)	344 (14.0)	386 (17.6)
Psychiatric medication				
Mild TBI	61 (7.6)	81 (10.3)	81 (11.7)	82 (13.2)
Moderate to severe TBI	23 (16.9)	19 (17.6)	12 (13.6)	8 (10.5)
No TBI	126 (4.5)	144 (5.1)	141 (5.8)	158 (7.2)
Psychiatric utilization				
Mild TBI	102 (12.7)	132 (16.8)	101 (14.6)	78 (12.6)
Moderate to severe TBI	15 (11.0)	24 (22.2)	12 (13.6)	6 (7.9)
No TBI	239 (8.5)	223 (7.9)	191 (7.8)	157 (7.1)
Any psychiatric illness indicator				
Mild TBI	229 (28.5)	268 (34.0)	209 (30.2)	173 (27.9)
Moderate to severe TBI	51 (37.5)	53 (49.1)	29 (33.0)	20 (26.3)
No TBI	479 (17.0)	510 (18.2)	459 (18.7)	439 (20.0)

Abbreviations: HMO, health maintenance organization; TBI, traumatic brain injury.
*Data are presented as number (percentage). Percentages are among all subjects in each exposure category during the specified 12-month period.
†Data are given as the denominator, or the number of enrollees for each exposure category at midyear.

by family practice physicians (46% of TBI-exposed subjects and 50% of comparisons). During the 3 years, 60 subjects (44%) who had moderate to severe TBI, 183 (23%) who had mild TBI, and 621 (22%) without TBI were dropouts as a result of death or GHC disenrollment. Death on the reference date accounted for 47% (n = 28) of all dropouts in the moderate to severe TBI group compared with 8% (n = 15) in the mild TBI group and 1% (n = 9) in the comparison group.

Table 2 summarizes the adjusted OR estimates during the 3 years following TBI, stratified by psychiatric illness in the prior year, for prevalent affective disorders, psychotic disorders, and substance abuse disorders as well as diagnostic, medication prescription, utilization, and

Table 2. Estimated TBI vs No TBI Odds Ratios and 95% Confidence Intervals for Prevalent Psychiatric Illness Indicators in the 3 Years After TBI Among HMO Enrollees 15 Years or Older*

Psychiatric Indicator	*P* Value for Any Effect of TBI	1-12 mo	13-24 mo	25-36 mo
Affective disorder				
No prior psychiatric illness	.02			
Mild TBI		2.0 (1.3-3.1)†	1.8 (1.2-2.8)†	1.5 (1.0-2.3)
Moderate to severe TBI		1.9 (0.6-5.8)	1.6 (0.6-4.7)	0.5 (0.2-1.7)
Prior psychiatric illness	.05‡			
Mild TBI		1.2 (0.8-1.8)	2.1 (1.4-3.1)†	1.4 (0.9-2.2)
Moderate to severe TBI		1.0 (0.4-2.2)	1.0 (0.4-2.7)	0.9 (0.3-2.2)
Psychotic disorder				
No prior psychiatric illness	.54			
Mild TBI		2.3 (0.9-5.8)	1.0 (0.3-3.5)	1.1 (0.4-3.1)
Moderate to severe TBI		2.8 (0.5-14.9)	5.9 (1.6-22.1)†	3.6 (1.0-12.3)†
Prior psychiatric illness	.19			
Mild TBI		1.7 (0.8-3.4)	2.1 (1.0-4.3)†	2.3 (1.1-4.8)†
Moderate to severe TBI		2.9 (1.3-6.9)†	1.9 (0.6-5.9)	2.2 (0.8-6.3)
Substance abuse				
No prior psychiatric illness	<.001			
Any TBI		4.5 (2.6-7.6)†	1.8 (1.0-3.3)	1.4 (0.8-2.3)
Prior psychiatric illness	.05‡			
Any TBI		1.7 (0.9-3.1)	2.4 (1.2-4.8)†	0.9 (0.5-1.9)
Psychiatric diagnosis				
No prior psychiatric illness	<.001			
Mild TBI		2.2 (1.7-2.9)†	1.9 (1.4-2.4)†	1.5 (1.1-1.9)†
Moderate to severe TBI		3.5 (2.0-6.2)†	1.7 (0.9-3.1)	0.9 (0.4-2.0)
Prior psychiatric illness	.07			
Mild TBI		1.4 (1.1-1.9)†	1.5 (1.1-2.0)†	1.5 (1.1-2.2)†
Moderate to severe TBI		1.4 (0.8-2.5)	0.9 (0.5-1.7)	1.0 (0.5-2.1)
Psychiatric prescription				
No prior psychiatric illness	.18			
Mild TBI		1.8 (1.1-2.9)†	1.8 (1.1-2.8)†	1.6 (1.0-2.5)
Moderate to severe TBI		2.1 (0.7-6.2)	1.3 (0.4-4.7)	1.1 (0.3-3.6)
Prior psychiatric illness	.04			
Mild TBI		1.2 (0.8-1.8)	1.9 (1.3-2.8)†	1.5 (1.0-2.3)
Moderate to severe TBI		1.6 (0.8-3.3)	1.6 (0.7-3.5)	0.7 (0.3-1.8)
Psychiatric utilization				
No prior psychiatric illness	<.001			
Mild TBI		2.1 (1.4-3.0)†	1.7 (1.2-2.4)†	1.4 (0.9-2.2)
Moderate to severe TBI		4.5 (2.2-9.0)†	2.7 (1.1-6.5)†	0.6 (0.1-3.7)
Prior psychiatric illness	.19			
Mild TBI		1.3 (0.9-1.8)	1.5 (1.0-2.3)†	1.7 (1.1-2.7)†
Moderate to severe TBI		1.3 (0.7-2.6)	0.8 (0.3-1.9)	0.7 (0.2-1.9)
Any psychiatric illness indicator				
No prior psychiatric illness	<.001			
Mild TBI		2.1 (1.6-2.6)†	1.8 (1.4-2.3)†	1.3 (1.0-1.7)
Moderate to severe TBI		3.4 (1.9-5.8)†	1.7 (0.9-3.1)	0.9 (0.4-2.0)
Prior psychiatric illness	.02			
Mild TBI		1.4 (1.1-1.9)†	1.6 (1.2-2.1)†	1.4 (1.0-2.0)†
Moderate to severe TBI		1.6 (1.0-2.7)	1.0 (0.6-2.0)	0.8 (0.4-1.6)

Abbreviations: HMO, health maintenance organization; TBI, traumatic brain injury.

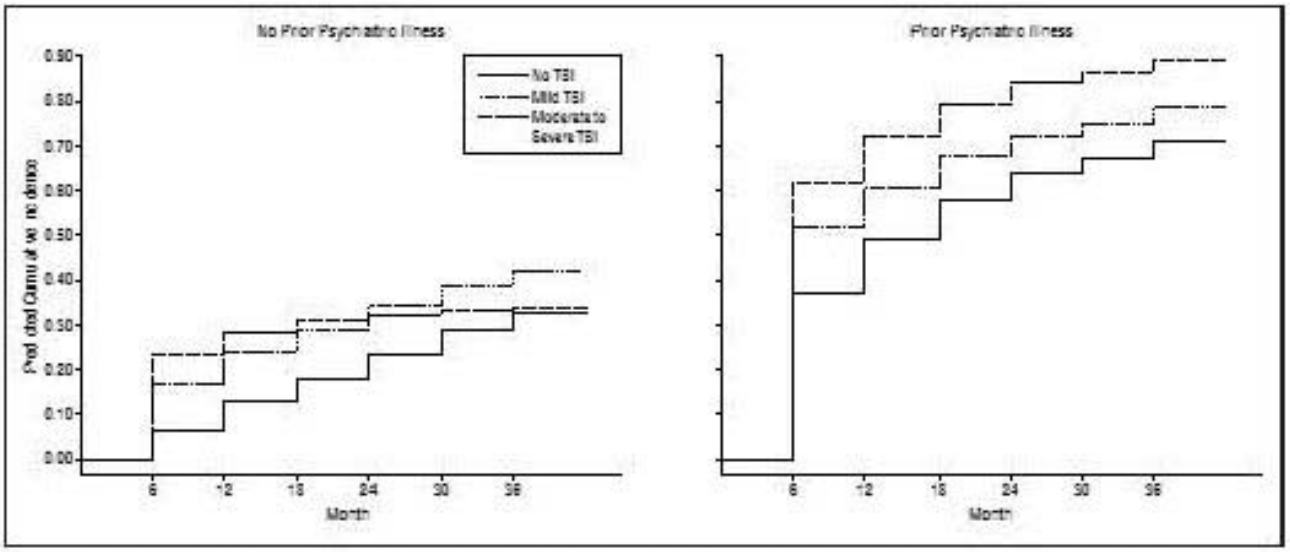
*Data are adjusted for age, sex, comorbid injuries, and logarithm of costs in the year prior to the reference date. *P* values for any effect of TBI represent tests for overall effect of TBI for each prior psychiatric illness stratum during the 3-year follow-up period.

†Represents statistical significance at $P<.05$ at the specific time point.

‡*P* value has been rounded up.

any psychiatric illness indicator categories. Time points for which $P<.05$ are marked with a dagger for comparison of the strength of effect across time. Adjusted ORs for subjects with prior psychiatric illness were computed separately so that the TBI effect estimates and all adjustments accounted for the effect modification due to prior psychiatric illness. For most outcomes, the estimated effects caused by TBI were greater among those without prior psychiatric illness and were often stronger for mild TBI. With a few exceptions, primarily in subjects with prior psychiatric illness who sustained mild TBI, the OR estimates decreased across time.

Among subjects without prior psychiatric illness, the OR estimates for prevalent affective disorder after mild TBI were greatest in the first 2 years. In those with prior psychiatric illness, the estimated ORs for affective disorder were not individually significant until the second year after mild TBI. In the first year after TBI, the



Estimated proportions of health maintenance organization enrollees 15 years or older with any psychiatric illness indicator. Estimates for each 6-month block are for the prior 6 months. Predicted proportions are for women aged 40 to 44 years with median index month (6), median log cost, and no comorbid injuries. The lines for the 3 traumatic brain injury (TBI) exposure groups overlap between the reference date and the end of the first 6-month period, for which the observed incidence is 0 by definition.

estimated OR for psychotic disorder was greatest for moderate to severe TBI exposure. However, the OR estimate increased in subjects with moderate to severe TBI without a psychiatric history and in those who had mild TBI with a psychiatric history. Although substance abuse was rare among GHC enrollees, precluding stratification by TBI severity, the OR estimate was highest in the first year among subjects without a psychiatric history and in the second year in those with a psychiatric history.

In examining the major psychiatric illness indicators (diagnosis, prescription, utilization, and any indicator), the OR estimates for prevalent psychiatric illness conferred by mild TBI were individually statistically significant at 18 of 24 time points compared with 4 of 24 time points in the moderate to severe cohort. Among subjects with mild TBI without prior psychiatric illness, the estimates tended to decrease; however, in those with prior psychiatric illness, they tended to increase.

INCIDENCE AND RR FOR PSYCHIATRIC ILLNESS

The **Figure** shows the predicted cumulative incidence of any psychiatric illness within the TBI exposure groups for subjects with and without prior psychiatric illness. As expected, those with prior psychiatric illness had a higher incidence of subsequent psychiatric illness. This may explain the smaller OR and RR estimates (**Table 3**) for the additional effect due to TBI in this subgroup. Subjects who sustained a moderate to severe TBI also developed subsequent psychiatric illness at a higher rate, particularly in the first 6 months. However, among those without prior psychiatric illness, there seems to be a "catch-up" phenomenon whereby those with no TBI and those with mild TBI close the gap in proportions at later time points. This may explain OR and RR estimates that are lower than 1 at the later time points.

Adjusted estimates of the RR for incidence of affective, psychotic, and substance abuse disorders and any psychiatric illness indicator are presented in Table 3. Statistically significant effects of TBI on incident affective disorders were seen in patients without prior psychiatric illness, particularly in the mild TBI cohort. However, RR estimates for incident psychotic disorders were greater for the moderate to severe TBI cohort compared with subjects who had mild TBI; CIs were large owing to the rarity of the outcomes. The estimated RR for substance abuse was significant in the group with no prior psychiatric illness, with individual significance continuing through month 30. In the category of any psychiatric illness, the estimated increase in risk of subsequent psychiatric illness conferred by TBI was initially greater in subjects without prior psychiatric illness and in those with moderate to severe TBI compared with mild TBI. However, nominally statistically significant risks were sustained longer in the mild TBI group.

For subjects without prior psychiatric illness, being female (adjusted RR=1.2; 95% CI, 1.1-1.4) and having higher costs in the prior year (adjusted RR=1.4; 95% CI, 1.3-1.6, for groups differing by a factor of 10) were associated with a higher risk of any psychiatric illness indicator in the 3 years following TBI. For those with prior psychiatric illness, sex was not a significant risk factor, but costs were (adjusted RR=1.3; 95% CI, 1.1-1.6). Comorbid injuries were not associated with higher risk of psychiatric illness in either psychiatric history stratum. Prior psychiatric illness significantly modified the effect of TBI on subsequent psychiatric illness ($P=.04$) and was also a strong predictor of subsequent psychiatric illness ($P<.001$). The RRs for any psychiatric illness in the 3-year follow-up period for prior vs no prior psychiatric illness were 2.9 (95% CI, 2.4-3.3) for the TBI-unexposed group, 2.3 (95% CI, 2.0-3.1) for the mild TBI group, and 3.0 (95% CI, 1.7-5.0) for the moderate to severe TBI group.

Table 3. Estimated TBI vs No TBI Relative Risks and 95% Confidence Intervals for Incident Psychiatric Illness Indicators in the 3 Years After TBI Among HMO Enrollees 15 Years or Older*

Psychiatric Indicator	*P* Value for Any Effect of TBI	*P* Value for Trend	1-6 mo	7-12 mo	13-18 mo	19-24 mo	25-30 mo	31-36 mo
Affective disorder								
No prior psychiatric illness	<.001	.03						
Mild TBI			2.7 (1.5-4.8)†	2.2 (1.4-3.6)†	1.9 (1.3-2.6)†	1.6 (1.2-2.1)†	1.3 (0.9-1.9)	1.1 (0.6-1.9)
Moderate to severe TBI			1.0 (0.1-7.6)	4.5 (1.8-11.7)†	2.2 (1.0-4.9)†	1.1 (0.4-3.0)	0.5 (0.1-2.3)	0.2 (0.0-1.9)
Prior psychiatric illness	.78	NA						
Mild TBI			1.3 (0.9-1.19)	1.0 (0.6-1.7)	1.1 (0.7-1.6)	1.1 (0.8-1.7)	1.2 (0.7-2.1)	1.4 (0.7-2.7)
Moderate to severe TBI			1.1 (0.5-2.5)	0.4 (0.1-2.6)	0.6 (0.2-2.0)	0.7 (0.3-1.9)	1.0 (0.4-2.8)	1.4 (0.3-5.9)
Psychotic disorder								
No prior psychiatric illness	.07	NA						
Mild TBI			2.6 (0.8-8.6)	3.0 (0.9-9.3)	2.5 (1.0-6.0)†	2.1 (1.0-4.4)	1.7 (0.8-4.0)	1.5 (0.5-4.3)
Moderate to severe TBI			2.0 (0.2-17.6)	9.2 (2.2-38.7)†	6.1 (1.8-20.3)†	4.0 (1.1-14.5)†	2.7 (0.5-13.4)	1.8 (0.2-14.3)
Prior psychiatric illness	.04	.76						
Mild TBI			1.6 (0.8-3.2)	1.4 (0.5-3.9)	1.7 (0.6-3.5)	2.0 (1.0-3.9)	2.3 (1.0-5.4)	2.7 (0.8-8.6)
Moderate to severe TBI			3.5 (1.5-8.1)†	1.2 (0.2-6.4)	2.0 (0.5-8.1)	3.1 (1.0-10.1)	5.0 (1.3-19.3)†	8.0 (1.3-50.1)†
Substance abuse								
No prior psychiatric illness	<.001	.17						
Any TBI			6.3 (3.1-12.8)†	2.0 (1.0-4.0)†	1.9 (1.2-3.2)†	1.8 (1.2-2.8)†	1.7 (1.1-2.8)†	1.6 (0.8-3.3)
Prior psychiatric illness	.20	NA						
Any TBI			2.3 (1.1-4.8)†	1.4 (0.6-3.4)	1.3 (0.7-2.5)	1.2 (0.7-2.1)	1.1 (0.5-2.2)	1.0 (0.4-2.6)
Any psychiatric illness indicator								
No prior psychiatric illness	<.001	<.001						
Mild TBI			2.8 (2.1-3.7)†	1.3 (0.9-1.7)	1.2 (1.0-1.5)	1.2 (0.9-1.4)	1.1 (0.8-1.4)	1.0 (0.7-1.5)
Moderate to severe TBI			4.0 (2.4-6.8)†	1.5 (0.7-3.2)	0.9 (0.5-1.8)	0.6 (0.2-1.4)	0.3 (0.1-1.3)	0.2 (0.0-1.2)
Prior psychiatric illness	.005	.24						
Mild TBI			1.6 (1.2-2.0)†	0.9 (0.6-1.5)	1.0 (0.7-1.4)	1.0 (0.7-1.5)	1.1 (0.6-1.8)	1.1 (0.5-2.3)
Moderate to severe TBI			2.1 (1.3-3.3)†	1.5 (0.5-4.3)	1.5 (0.76-3.3)	1.6 (0.7-3.6)	1.7 (0.5-5.6)	1.7 (0.3-9.8)

Abbreviations: HMO, health maintenance organization; NA not applicable; TBI, traumatic brain injury.

*Data are adjusted for age, sex, reference date, comorbid injuries, and logarithm of costs in the year prior to the reference date. *P* values for any effect of TBI represent tests for overall effect of TBI for each prior psychiatric illness stratum during the 3-year follow-up period. *P* values for trend represent nested tests for trend in relative risk.

†Represents statistical significance at $P<.05$ at the specific time point.

COMMENT

We found that the risk of psychiatric illness, ascertained using several different indicators, was significantly increased following both mild and moderate to severe TBI in an adult HMO population. The magnitude and pattern of risk for subsequent psychiatric illness was modified by whether patients had a history of psychiatric illness in the year prior to their TBI. The already high risk of subsequent psychiatric illness in those with prior psychiatric illness may have diluted the increase in risk due to TBI, accounting for the smaller RR estimates in this subgroup. The risk of incident psychiatric illness was greatest in the first 6 to 12 months after TBI. In patients without prior psychiatric illness, decreasing trends were generally evident in RR estimates across time. A few studies found that psychiatric history was a significant risk factor for psychiatric problems after TBI.[1,11]

The literature on the relationship between TBI severity and subsequent psychiatric disorders is inconsistent, with study findings ranging from positive or inverse to no relationship.[2,12-14,23,24] We found that although survivors of moderate to severe TBI with no prior illness had a greater initial elevation in risk of any psychiatric illness, the mild TBI cohort exhibited a more prolonged pattern of elevated risk that eventually surpassed that of the moderate to severe cohort. Our findings also suggest that the TBI-associated RR for incident psychiatric illness is highest shortly following injury in persons with no psychiatric history, whereas it may remain high or even increase in subsequent years in persons with prior illness.

Some psychiatric illnesses appear to persist after TBI. Table 2 shows sustained elevation and a delayed increase in ORs for certain prevalent psychiatric illnesses, particularly in patients who have mild TBI with prior psychiatric illness. This population often perplexes health care professionals with their persistent symptoms and disability.[25-27] The TBI may precipitate the expression of underlying psychiatric distress, which may initially appear as nonspecific somatic or postconcussive symptoms such as headache, decreased memory, or irritability.[2,28] Our data suggest the need to control for medical comorbidity when studying the relationship between TBI and psychiatric illness, although comorbid injuries did not confound this relationship.

Affective disorders were common in this HMO population with TBI. We found that patients with mild TBI had higher ORs and RRs for affective disorders than those with moderate to severe TBI. This finding is consistent with various reports that more severe TBI is not necessarily associated with a higher risk of depression.[2,12,13,15,24] Moreover, patients with a psychiatric history who sustained mild TBI had higher ORs for preva-

lent psychiatric illness in the second and third years after TBI compared with the first year. This subgroup seems to be at particularly high risk for persistent psychiatric morbidity.

There was also a pattern of delay for the relatively higher risk of psychotic disorder in TBI-exposed subjects with prior psychiatric illness. A psychotic disorder in the first year after moderate to severe TBI may represent delirium due to the TBI or to intensive care unit–related psychosis. However, RR increases in the second and third years in those with prior psychiatric illness, particularly with moderate to severe TBI, are consistent with findings from other reports of delayed psychosis after TBI.[3,29]

Substance abuse disorders have been found to initially decrease after moderate to severe TBI, but there may be a delayed increase after the first year.[4,30] Our OR data replicated this finding in patients with prior psychiatric illness, although those with no prior psychiatric illness had an initial increase that decreased with time. Relative risk estimates of incident substance abuse consistently decreased across time for both groups. The different OR patterns of substance abuse between those with and without prior psychiatric illness may be related to an initial heightened emphasis on alcohol abstinence among health care professionals toward prior substance abusers. Nearly all substance abusers with TBI had mild TBI.

From our findings, we hypothesize that psychiatric symptoms arising immediately after TBI may be etiologically related to the neurophysiological effects of the injury, as supported by an early relationship between TBI severity and psychiatric risk. However, other factors such as psychological vulnerability (eg, personality and attribution styles), self-awareness of deficits, social influences, and secondary gain may play subsequent roles, particularly in subjects with prior psychiatric illness and mild injury. These possible etiological correlates, which have been proposed by other investigators,[8,29,31,32] likely interact in complex ways and require further research.

Psychiatric diagnosis, prescriptions filled, and health care utilization were all recorded at the time of medical service. Therefore, possible bias due to differential recall between TBI-exposed and TBI-unexposed subjects was eliminated. Because of the completeness and uniformity of the database, the determination of psychiatric illness was not subject to the limitations of incomplete recall or information bias.[33] Also, because providers at GHC are not influenced by the risk that a psychiatric diagnosis may not receive full reimbursement, as may be the case in fee-for-service settings, reporting bias of psychiatric diagnoses owing to reimbursement rates was unlikely. Use of a comparison group allowed us to control for baseline fluctuations in psychiatric illness detection; there was a 1% increase per year in overall psychiatric illness in the comparison group during the 4-year study period, perhaps representing improved detection and coding efforts at GHC.

A limitation of this study is the possible lack of precision in TBI exposure measurement. Our study population had a higher proportion of women than other TBI populations; this may have been an ambulatory population with more women reporting mild TBI. This higher representation of women may have afforded the statistical power to find the association between female sex and risk of subsequent psychiatric illness. Insurance type was used as a proxy measure for socioeconomic status. Although it was not shown to be a confounder, there could be residual confounding by socioeconomic status that was not controlled for in the analyses.

Incident RR estimates that decline lower than 1, particularly for moderate to severe TBI exposure, suggest that TBI may advance the identification of psychiatric illness in groups that might have been diagnosed at a later date. The plot for no prior psychiatric illness best depicts this catch-up effect. Because individuals with TBI may visit their physician more frequently, such as for postconcussive symptoms, it is more likely that a psychiatric illness in these persons would be recognized and recorded; a person without TBI may not go to a GHC clinic, and thus a psychiatric illness might not be recognized. Those with TBI would be more likely to have a subsequent TBI,[34] further increasing the risk of psychiatric illness; therefore, our RR estimates may include risk associated with subsequent TBIs.

The method used to determine psychiatric illness may have been subject to misclassification. Psychiatric diagnoses assigned by non–mental health professionals may be less sensitive and specific than those made by mental health professionals. Subjects could have been incorrectly assigned to diagnostic categories or may not have received a diagnosis when a psychiatric illness was present. However, this potential nondifferential misclassification due to type of specialist would likely bias TBI effect estimates toward the null.

Moderate to severe TBI–exposed subjects were at higher risk for dropout, particularly resulting from higher injury-related fatality, than those with mild TBI and comparison subjects. It is possible that losses to follow-up may have affected the estimates of ORs and RRs, especially for later periods. When comparing these results with those in other populations, consideration should be given to differences in the distributions of disenrollment, death, and exposure severity within categories. The incident RR estimates may have been more resistant to disenrollment effects because they relied on incident vs prevalent psychiatric illness.

Despite these limitations, we found both mild and moderate to severe TBI to be significant risk factors for subsequent psychiatric illness. Evidence of psychiatric illness in the year prior to TBI significantly modified this relationship. Subjects with a psychiatric history had a substantially greater risk of post-TBI psychiatric illness. Their RR due to the effect of TBI was smaller compared with those without prior illness; the already high incidence among controls with prior illness left little room for other effects. The clinical implications of this study include evidence that patients should be screened for psychiatric morbidity within the first 6 to 12 months following TBI. However, continued vigilance for up to 3 years, particularly in patients with mild TBI and prior psychiatric illness, is also supported. Health care professionals working in primary care settings may have the best opportunity to identify and treat psychiatric morbidity in patients with mild TBI. It is also important to inquire about psychiatric history before attributing psychiatric symptoms to TBI.

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Exhibit “G”

Killer who threatened jurors now up for parole

ERIC HANSON, Copyright 2001 Houston Chronicle **Published 5:30 am, Friday, March 30, 2001**

RICHMOND -- After being convicted of capital murder in 1980, **Roger Leroy DeGarmo** looked at the jurors considering his punishment and admitted his guilt.

And then he said that if they didn't sentence him to death, they'd better sleep lightly because "you can bet that I would do it again, and you can bet that the first 12 people I would go for would be you."

That jury obliged him, but his conviction was overturned years later. He was convicted again, but that time got a life sentence.

Now the man nicknamed "Animal" by fellow death-row inmates is approaching his second eligibility for parole. The first came in July 1999, after he had been behind bars for 20 years, and he was denied release.

Wayne Strickler is determined to see that DeGarmo, 46, stays in prison for the rest of his life.

"He will kill again," Strickler, 70, said Thursday. "We need to keep these bad guys off the streets."

It was Strickler's daughter, **Kimberly Ann Strickler**, whom DeGarmo abducted and murdered in 1979. Strickler's ex-wife, **Shirley Parish**, was outspoken in the 1999 effort to deny parole, but now she suffers from dementia and cannot speak, Strickler said.

So he speaks for her -- and for their murdered daughter.

Strickler, of Houston, received a letter this month from the **Texas Department of Criminal Justice**, informing him that the state **Board of Pardons and Paroles** is reviewing DeGarmo's case.

He has been calling relatives, friends and state lawmakers, asking them to write to the board urging that parole be denied.

"We just cringe at the thought of this guy getting out," Strickler said.

On Jan. 8, 1979, DeGarmo and Helen Leydalia Mejia abducted 20-year-old Kimberly Strickler from a southwest Houston grocery parking plot. The pair were strung out on speed and looking for a car and drug money.

She was put in the trunk of her car and taken to a rural road in Fort Bend County, where the car got stuck in mud. As Strickler struggled and banged on the trunk, according to trial testimony, Mejia screamed at DeGarmo to kill their prisoner.

DeGarmo shot her in the head as she begged for her life.

The pair then grabbed a passerby, **John Moers**, when he happened upon the stuck car. They commandeered his pickup, but he jumped out as they drove.

"They were going to kill him and put his body in a boxcar," Strickler said. "There would have been two murders. We would have never known who did this if Moers hadn't gotten away."

DeGarmo was tried in 1980 and sentenced to death, but that conviction was overturned in 1994 when retired U.S. District Judge **James DeAnda** said prosecutors had made deals with Mejia that were not disclosed to jurors or to DeGarmo.

She originally received 10 years' deferred adjudication, but the probation was revoked and she now is serving a 40-year sentence.

In the 1980 trial DeGarmo shocked the court when he told jurors they were right in convicting him.

"I was the one that was there, and I was the one that did the crime," he told them.

And he assured them that they would be his next targets if they didn't sentence him to death.

During his 13 years on death row, DeGarmo gave numerous news interviews. In a 1982 session, he admitted killing Strickler and said he deserved to die.

He added: "If my mother got in my way, I'd kill her if it was necessary. See, because life and death is nothing to me."

DeGarmo's neighbors on death row called him "Animal" because he would snarl, growl and claw at people while crouched in his cell.

After his conviction was overturned he pleaded innocence, saying he was under duress during his numerous confessions.

The state sought the death penalty when DeGarmo was retried in 1994. Prosecutors and relatives were stunned when the jury handed him a life sentence.

Sid Crowley, a former Fort Bend County assistant district attorney now in private practice, led the prosecution and already has written a letter asking the parole board not to set the killer free.

"He is still a sociopath and a threat to society," Crowley said Thursday.

DeGarmo has been a model prisoner and professes to have found religion while in prison, Strickler said.

"He has changed his image because he knew he wasn't going to get out by being a bad boy."

He said he fears that the parole board will be taken in by the apparent transformation.

"They would love to have a bad guy like this turn around and become an angel and become a preacher," he said. "That gives them credit for converting him. They didn't convert him; he wants to get out of prison."

Meanwhile, Strickler said he is calling anyone who can help keep the killer behind bars.

"I'm doing everything I legally can do. I can't think of anything else."

Exhibit “H”

No. 2012-0D00749

EX PARTE	§	IN THE DISTRICT COURT
	§	
	§	
	§	384TH JUDICIAL DISTRICT
	§	
	§	
FIDENCIO VALDEZ		EL PASO COUNTY, TEXAS

Affidavit of Greg Gladden

THE STATE OF TEXAS }
}
COUNTY OF EL PASO }

BEFORE ME, the undersigned authority, on this day personally appeared Greg Gladden, known to me to be the person whose name and signature are affixed to this affidavit, and after being by me duly sworn on oath deposed and stated:

" My name is Greg Gladden. I have been licensed to practice law since May of 1978 and carry State Bar Card number 07991300. I was post-conviction writ attorney for Roger Degarmo. With other lawyers he was convicted of capital murder and sentenced to death April 1, 1979. That conviction was affirmed. I was his attorney in state and federal court proceedings concluding in ***Degarmo v. Collins***, 984 F.2d 142 (5th Cir. 1993) in which Mr. Degarmo was granted a new trial.

I represented Degarmo in the retrial. We were able to introduce evidence that, prior to the killing for which he received

the death sentence, Mr. Degarmo had suffered a closed head injury, evidence which was not obtained by the lawyers in the first trial, and which the jury in the first trial never heard. The jury in his second trial did hear this evidence, and they returned a life sentence.

I believe that the evidence of the head injury and the resulting negative change in Mr. Degarmo's behavior was a major factor in the second jury not assessing a death penalty.

Greg Gladden

TO WHICH WITNESS MY HAND AND OFFICIAL SEAL on the 28th day of July, 2017.

Notary Public, State of Texas

Printed Name: Diana M Caballero

My Commission Expires:
3/8/19

DIANA M CABALLERO
124488544
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
MARCH 8, 2019

Exhibit “I”

No. 2012-0D00749

EX PARTE	§	IN THE 384TH DISTRICT COURT
	§	
	§	OF
	§	
FIDENCIO VALDEZ	§	EL PASO COUNTY, TEXAS

Affidavit of Charla Funk

THE STATE OF TEXAS }
}
COUNTY OF EL PASO }

BEFORE ME, the undersigned authority, on this day personally appeared Charla Funk, known to me to be the person whose name and signature are affixed to this affidavit, and after being by me duly sworn on oath deposed and stated:

"I am more than 18 years old and capable of making this affidavit. On May 30, 1997, Fidencio Valdez and I were riding in a car in El Paso County, Texas. I was driving. Mr. Valdez was in the front passenger seat and was not wearing a seat belt. We were in an accident and he hit the windshield or the car frame above the windshield. He sustained several injuries and had to be taken by ambulance to the hospital.

SIGNED this 17 day of January (Month) CRF ~~17~~ 2017 (Year)

Charla R

Charla Funk

TO WHICH WITNESS MY HAND AND OFFICIAL SEAL OF OFFICE on this 17 day of January, 2017.

ANITA SPARKS
Notary Public
STATE OF TEXAS
ID#1043908-2
My Comm. Exp. Feb. 9, 2020

Anita Sparks

Notary Public, State of Texas

Printed Name: Anita Sparks

My Commission Expires:

Feb 9, 2020

Exhibit “J”

INCIDENT INFORMATION
Incident: 97-023371 Exp: 000 Types: 32 EMERG. MEDICAL 1 Cat: RESCUE
General Information
House: Street: GRUMMAN ST. / MONTANA AV., EP
AptRm: Zip: 79925- Census: 003401 Map: 30 RD: 380
Parcel: - Desc: ELMHURST/HONEYSUCKLE Mutual Aid:
Occ/DBA: CITY STREET Rel:
First Code: Name: CITY OF EL PASO
Person Phone: 915-541-4000 x: Address: 2 CIVIC CENTER PLAZA
City: EL PASO St: TX Zip: -
Second Code: Name:
Person Phone: - - x: Address:
City: St: Zip: -
Incident Date: 053097 FRIDAY Time: 081003 Aid: N N/A
Alarm: N N/A Alarm Company: N N/A
Station: 20 Shift: C Dispatched as: 30S Medical, Single Resp
Condition on Arrival: MVA/SMALL PROPANE LEAK FROM TANK
Incident Reporting
Created By: 274307 RODELA EDUARDO Rank: LT Date: 053097
Updated By: 274307 RODELA EDUARDO Rank: LT Date: 053097
Verified By: 274307 RODELA EDUARDO Rank: LT Date: 053097
Incident: 97-023371 Exp: 000 Types: 32 EMERG. MEDICAL 1 Cat: RES2UE
PATIENT INFORMATION General Information
Patient #: 001 Category: 02 PATIENT INFO ON Rpt #:
Name First: FIDEL Middle: Last: VALDEZ
P Address: 14913 LINDA RENEE City: EP MutuState: TX
Oc DOB: Age: 18/ (Yr/Mo) Sex: M Race: Phone: ( ) -
F Transport: M10A EMS Medic Unit 10 A Hosp: CE Columbia East Medical Center
Hosp Cont: 541-4000 x: Loc: C CENTER PLAZA
IRS Status: Date: St: TX Zip: -
Time Type Description/Rhythm Rate/Vol/Dose/Route/etc Emp ID
No patient detail information available
NARRATIVE
Author: RODELAEDF IP INCIDENT PATIEN on 05/30/97 at 0942
18 y.o male front passenger in a vehicle involved in MVA, damage to vehicle was severe to the front end, pt c/o pn to nose, right knee cap, pt. hadngle Resp discoloration and swelling to nose, pt. packaged and Tx'd w/o incident; pt. care sustained by EMS

Exhibit “K”

No. 2012-0D00749

EX PARTE	§	IN THE DISTRICT COURT
	§	
	§	384TH JUDICIAL DISTRICT
	§	
FIDENCIO VALDEZ	§	EL PASO COUNTY, TEXAS

Affidavit of Franicsco Viniegra

THE STATE OF TEXAS }
}
COUNTY OF EL PASO }

BEFORE ME, the undersigned authority, on this day personally appeared Francisco Viniegra, known to me to be the person whose name and signature are affixed to this affidavit, and after being by me duly sworn on oath deposed and stated:

" I am Francisco Viniegra, I am a private investigator working under State License Number A05584 (S.S. Investigations, Inc.), and we act as the court appointed investigators in the case of Fidencio Valdez.

Upon learning that Mr. Valdez was in an auto accident in May of 1997, I conducted a diligent search for records. We were able to obtain an ambulance report indicating that Mr. Valdez

was transported to a hospital, but we were unable to obtain any records of his treatment, because the hospital (Columbia West) closed a number of years ago and the location of their records, if they still exist, is unknown.

Francisco Viniegra"

TO WHICH WITNESS MY HAND AND OFFICIAL SEAL on the 28 day of JULY, 2017.

Notary Public, State of Texas

Printed Name: Salvador De La Cruz

My Commission Expires: August 09, 2020

SALVADOR DE LA CRUZ
My Notary ID # 129083347
Expires August 9, 2020

Exhibit “L”

AFFIDAVIT

STATE OF TEXAS)

) ss.

County of El Paso)

COMES NOW Alexander Valdez being first duly sworn, under oath, and states that the following information is within his personal knowledge and belief:

My name is Alexander Valdez. My DOB is 04/24/1975.

My SSN is TX-23325898. My address is 5517 Woodrow Bean Apt. 101.

City/State/Zip Code El Paso, TX 79924. My phone number is (915) 540-1348.

I declare the following to be true to the best of my knowledge: XXX-XX-1514 LAST (4) SSN.

I saw my brother Filo the day that he had a car accident. I came to visit a friend who's name is Gabriel Vazquez and Filo was ther with Charla Funk. My friend Gabriel used to live on a trailer ~~park~~ at Monda Vista neighborhood, where my Mom lives. I was 21 years old when this accident happened, Filo was about 18 years old. I remember giving him a kiss and a hug (to Filo) and he left with Charla Funk. They were on their way to Charla's school when they crashed. I saw my brother, Filo, one day after the

(1)

the accident. I noticed that his nose was broked. I asked him his nose, he did not want to tell me. Chaka was the one that told me about the accident about two days after it happened. After the car accident, my brother Filo had ups and downs, he was no longer very energetic.
After the accident my brother, Filo, would lay down on the couch for hours, he just dazed at for hours. I would ask him, what was up, and he would say "nothing".
After the accident, Filo get mad more easily like a fire cracker. He became more temperamental. the (Filo) also had mood swings after the accident, he would be in a good mood one minute and then suddenly become mad or in a bad mood.

After the accident, Filo, suffered from migrares, his eyes were red. I think it is because his glasses were broken.

After the accident Filo started hanging out with a new crowd. Before the accident he was always with me and my friends, after that, he found a new group of friends. His friends were older than him about 4 or 5 years older.

I remember that Filo use to get frustrated more easily after the accident. One day I told him I needed to change the pipes on my Mom's car and he would tell me: "this is how you doit,"

He would dismantle the car (Filo) and leave it half ways. Before the accident he did not leave tasks half ways.

Filo was depressed after the accident and more anxious. I remember he used to lay on the coach and would stay like that for days.

After the accident Filo stopped helping out my Mom in the yard, or cleaning the house. Before the accident he use to do this kind of things at my Mom's house.

After the accident Filo became more isolated and started going out with friends and stayed there for days. My Mom would have to try to find him (Filo)

or he would call me and I would meet him somewhere and pick him up.
My brother, Filo, use to wear a bandera on his head for the headaches after the accident.

My brother Filo became more anxious after the accident, he would say "lets do it fast, come on, do this or do that! He would get frustrated much more quickly.

After the accident, Filo, would never finish a task, he would get distracted, or do something else. For example he would be cooking and forget about so whatever he was cooking burned on the stove.

AFFIDAVIT

Filo use to get mad over little things after the accident, like. one time I was cooking some stuff and he would argue with me about how to do it. Cdtter the accident Filo's new friends use to give him drugs. Actually before the accident Filo use to smoke pot, but, after the accident he started doing heroin. Before the accident my brother, Filo, did not do hard core drugs. Before the accident, my brother, Filo was very responsible with his daughter Marina, he use to babysit her while her Mom was working, he became less responsible after the accident.

Alexander Valdez

Name

Alexander Valdez

Signature

BEFORE ME, the undersigned authority on this day personally appeared Alexander Valdez and upon his oath that the above information is true and correct to the best of his knowledge.

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public on this 27 day of June 2017.

FRANCISCO VINIEGRA
Notary Public
STATE OF TEXAS
My Comm. Exp. January 27, 2019

Francisco Viniegra
NOTARY PUBLIC – State of Texas

Exhibit “M”

AFFIDAVIT

STATE OF TEXAS)

) ss.

County of El Paso)

COMES NOW Marcelino Abraham Treviño being first duty sworn, under oath, and states that follow following information is within his personal knowledge and belief:

My name is Marcelino Abraham Treviño. My DOB is October 7, 1979, my SS is 459-59-2528. My address is 1901 W. Gonzalez Loop City/State/Zip Code Ft. Stockton Tx 79735 My phone number is (919) 819-4602

I declare the following is true to the best of my knowledge:

I met Fidencio Valdez when I was ten or eleven years old, we went to school together at Montana Vista School, we lived very close by in the Montana Vista neighborhood in El Paso, Texas. Fidencio is my best friend. He is very noble, honest and was always very protective of me. Fidencio had really good manners, he behaved very well at school. He was very obedient at school and he would answer in a formal manner "yes ma'am, no ma'am." Fidencio and I used to play in the afternoons, after school. He loved to play basketball, we had a basketball hoop in the neighborhood and we would play two or three times a day, sometimes until 10 or 11pm. Fidencio also liked to play football and ride bikes. He was very athletic. Fidencio had a very good relationship with his mom Rosemary Valdez. He and I used to help her by cleaning up the house, running errands, fixing the house. Fidencio used to drive his mom around and take her to the doctor after she injured her wrist. Fidencio was a very good dad to his daughters. He used to look after them when Triana their mom would go out to work. Fidencio has a strong character, but he is very easy going, fun to be around, outgoing, had a great sense of humor and was a very loyal friend to me. However, when he was about 18 years old he had a car accident and since then his behavior changed noticeably. I remember the day the accident took place very close to my house. I didn't run to the scene of the accident, but I know that an ambulance came and they had taken Fidencio. I saw Fidencio a day or maybe two days after the accident and he had bruises and scratches in his face, he also had a broken nose. Fidencio only told me that he had a car accident and that he was in the car with a friend of his, Charla Funk. Before the accident, Fidencio appeared calmer, easy going, after the accident he had a lot of mood swings and he started getting mad for no reason. After the accident he became very bossy and he always wanted to do things his way. He also was very intolerant and if you didn't want to do things his way he would just say "okay, see you later." After the accident he thought he

was better than everybody. He even changed his group of friends and became more compulsive, instead of thinking things through he would just react to them in an impulsive way and didn't appear to care if they were right or wrong. He stopped caring about things and if you told him something was wrong, he would say, "I don't give a shit." The guys that he started hanging out with were older than him and I think they came from California. About three or four months after the accident, Fidencio dropped out of school. Fidencio started to get involved in street fights with gangs. After the accident, Fidencio became more isolated and grumpy; he liked to spend days alone. He constantly complained about having headaches. A lot of times he wouldn't hang out with me and say "I don't feel good." This never had happened before the accident. After the accident, Fidencio became depressed and he did not want to do anything. I used to ask him "what's up bro." and he would say, "I don't feel well." After the accident his migraines were so bad that I remember he would ask me take over the wheel because his head was hurting and he would grab his head and it looked like he was going to faint and his eyes would roll back, I would hold the wheel for about two minutes. This happened very often after the accident. After the accident, Fidencio couldn't work in the sun; if he were out in the sun too much he would get a headache and would get weak. Before the accident, Fidencio used to smoke pot and after the accident he started doing hard-core drugs, like acid, cocaine and even heroine. He started doing heroine about three or four months after the accident. After the accident, Fidencio would get lost for two or three days and his mom used to go look for him, even I didn't know where he was or used to go during that time.

Marcelino A. Treviño

Name

Signature

BEFORE ME, the undersigned authority on this day personally Marcelino Abraham Treviño and upon his oath that the above information is true and correct to the best of his knowledge.

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public on this 29 day of June 2017.

ARELY SANCHEZ
Notary Public, State of Texas
My Commission Expires
July 07, 2019

Exhibit “N”

AFFIDAVIT

STATE OF TEXAS)

) ss.

County of El Paso)

COMES NOW Rosa Mary Valdez being first duly sworn, under oath, and states that the following information is within her personal knowledge and belief:

My name is Rosa Mary Valdez. My DOB is 06/03/1956.

My SSN is 453-15-2291. My address is 14913 Linda Rene Lane.

City/State/Zip Code El Paso, TX 79938. My phone number is (915) 803-4615.

I declare the following to be true to the best of my knowledge:

~~She~~ I remenbes that Filo (Fidencio Valdez) had a car accident when he was yung. Filo must have been around 18 years old. I remember that Filo had a bandana on his head to cover his head from the accident. Filo didnt wanted to tell he about the accident. I knew that he was with his Chaila, she was driving and he was on the passengers side. I know that Filo was taken to the hospital by the ambulance. I think I went to hospital to take the medicaid for him to get treated and for them to bill me.

Before the accident Filo did not have any tatoos or had been in jail. I noticed that my son Filo seemed more short tempered and impatient after the accident. Before the accident he liked to work in cars, after the accident he was less concerned about fixing things right. I think this is probably because he couldn't think clear. Before the accident he use to iron his cloths and after the accident he stopped doing it. For example, he would be fixing a car, and instead of putting the pieces back he would left things unfinished. After the accident he was lass interest in school and dropped out of school. After the accident my son, Filo, started hanging out with older people. They were about 10 years older than him. After the accident my son, Filo,

started wearing street clothing and putting handkerchiefs. I think he even got a ear pierced. The people he started hanging out with were a bad influence on him because they would give him drugs and beer. After the accident Filo started using cocaine and I think also heroin. After the accident he would get lost for days, after three days I literally went out looking for him. After the accident, my son, Filo, had headaches use to lay down a lot and sleep for hours in the living room. Before the accident my son, Filo, was very responsable with his children, Marina. Filo use to baby sit Marina his daughter when Trianna went to work. Trianna was his girlfriend and his child's Mom. After the accident,

AFFIDAVIT

my son, Filo, started hanging out with dangerous people, he changed and started getting intotrouble. After the accident, Filo became distant and avoided me if I tried to give him advise. He frustrated fast, he didn't like to be told what to do. After the accident he/st started expressing himself like a "Chola", he never called me "Jefa" before, he would call me Mom. He became more irritable, I remember asking him to help me with house work and he would refuse, he was always wearing a beany hat and a jacket with a hoody on. I think he did this to help him with his headaches.

Rosa Mary Valdez
Name

Rosa Mary Valdez
Signature

BEFORE ME, the undersigned authority on this day personally appeared Rosa Mary Valdez and upon her oath that the above information is true and correct to the best of her knowledge.

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public on this 27 day of June 2017.

FRANCISCO VINIEGRA
Notary Public
STATE OF TEXAS
My Comm. Exp. January 27, 2019

Francisco Viniegra
NOTARY PUBLIC – State of Texas

Exhibit “O”

AFFIDAVIT

STATE OF TEXAS)

) ss.

County of El Paso)

COMES NOW Raymundo Trevino being first duly sworn, under oath, and states that the following information is within his personal knowledge and belief:

My name is Raymundo Trevino. My DOB is 05/14/1977.

My SSN is 459-58-3240. My address is 3747 Lobo Marie, El Paso TX 79938

City/State/Zip Code El Paso, TX 79938. My phone number is (915) 215-2983.

I declare the following to be true to the best of my knowledge:

I've known Filo (Fidencio Valdez) since childhood. Filo and I were neighbors. I was about 10 years old when my family and I moved to that neighborhood where Filo and his family lived.

I met Filo when I was about 16 years old. Filo and I went to the same elementary school, the school was called Montana Vista. I graduated from high school from Mountain View High. Filo and I used to hang out after school two-three times a week and during the weekends. Filo had a strong character and was always a good person with everybody.

RT

Filo was also very protective with his friends. If someone bothered me he would tell them to stop. Filo also helped my Mom, Juanita, doing chores and cleaning up the house. Filo was an outgoing person, he was a people person. He talked to alot of people and would introduce me to people if I felt a little shy.

Filo met a girl called Triana when he was about 16 years old, they had a baby shortly after. Filo was very responsible with his child, he always took care of the baby. He was a very good Dad and nice to his girlfriend Triana. Filo was busy with school doing side jobs like painting houses and taking care of his baby. Filo was also very protective with his Mom, Pugimas, he was always there for her. He used to run errands for his Mom, clean up the house and take her to the doctor.

I never met Filos Dad and he didn't spoke about him.

FV

I found out that Filo had a car accident when I saw him with a bandage two or three days after the accident. Filo was about 15 years old when he had this accident. I remember that Filos face was swollen and the bandage covered his head. Filo told me that he almost died in this accident and came out of the wind shield. About three weeks after Filos accident I noticed that his behavior changed. Filo had mood swings, he became more aggressive. I noticed that he was not able to focus for example he would be cooking breakfast and he would leave his stove and start doing another task leaving that unattended. It was weird to hang out with him because at one moment he was happy

and then he became aggressive or mad without explanation. He had mood swings in just a couple of hours. I would tell him to calm down but he was impulsive. He used to tell me that he had terrible headaches, he constantly asked me for ibuprofen or tylenol because of his headaches. About three months after the accident, Filo came back to my house and he was covered with his own vomit. According to my Mom he didn't smell like alcohol or drugs, he took a nap and left.

I would be talking to him and he would be looking around he seemed to be very distracted, this only happened after the accident. After the accident Filo started to hang out with people I would not agree

AFFIDAVIT

with, the wrong people. They were about 10 - 20 years older than him. He started doing tattoos. ~~He~~ He started using hard drugs after the accident, I think that he could not stand his headaches. I know that he used to do crack or cocaine. These people that were a bad influence to him did this drugs also. I stopped hanging out with him because he was using more drugs and kept hanging out with this people. We parted ways and I found out about that Filo was in Jail about four or five years ago. I was surprised because I would never believe he would do something like that.

Reynaldo Treviño
Name

Signature

BEFORE ME, the undersigned authority on this day personally appeared Reynaldo Treviño, and upon his oath that the above information is true and correct to the best of his knowledge.

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public on this 27 day of June 2017.

FRANCISCO VINIEGRA
Notary Public
STATE OF TEXAS
My Comm. Exp. January 27, 2019

Francisco Viniegra
NOTARY PUBLIC – State of Texas

(5)

Exhibit “C”

Subsequent *habeas corpus* application filed July 6, 2018.

Filed 7/6/2018 4:21 PM
NORMA FAVELA BARCELEAU
District Clerk
El Paso County
20120D00749

No. 20120D00749
CCA No. WR-85,941-_____

Ex parte Fidencio Valdez

In the 384th District Court

El Paso County, Texas

Subsequent Application for Post-Conviction Writ of *Habeas Corpus* Pursuant to Article 11.071, C.Cr.P.

Submitted by:

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Issues Presented

First Subsequent Ground for *Habeas Corpus* Relief

Because Applicant's Trial Counsel Admitted Applicant's Guilt, Despite Knowing that Applicant Denied Involvement in the Murder and Had Provided Evidence of an Alibi, and that Applicant Objected to the Admission of Guilt, Applicant is Entitled to a New Trial.

Second Subsequent Ground for *Habeas Corpus* Relief

By Admitting Applicant's Guilt, Despite Knowing that Applicant Denied Involvement in the Murder and Had Provided Evidence of an Alibi, Trial Counsel Failed to Subject the Prosecution's Case to Meaningful Adversarial Testing.

Third Subsequent Ground for *Habeas Corpus* Relief

Applicant Was Denied the Effective Assistance of Counsel When Trial Counsel Admitted Applicant's Guilt, Despite Knowing that Applicant Denied Involvement in the Murder and Had Provided Evidence of an Alibi.

No. 20120D00749
CCA No. WR-85,941-_____

EX PARTE	§	IN THE DISTRICT COURT
	§	384th JUDICIAL DISTRICT
FIDENCIO VALDEZ	§	EL PASO COUNTY, TEXAS

Subsequent Application for Post-Conviction Writ of *Habeas Corpus* Pursuant to Article 11.071, C.Cr.P.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Fidencio Valdez, Applicant in the above styled and numbered cause, by and through his undersigned attorneys, Angela J. Moore, John G. Jasuta, and David A. Schulman, pursuant to Article 11.071, C.Cr.P., and files this subsequent application for writ of *habeas corpus* in the above styled and numbered cause, and in support of such would respectfully show the Court as follows:

Illegal Confinement and Restraint

Applicant is presently confined and restrained of his liberty by the State of Texas, pursuant to a judgment and sentence in the instant cause. Copies of the indictment, judgment and sentence

are not attached hereto, but are available as records of the Court. See Article 11.14, C.Cr.P.

Procedural History

On February 8, 2012, Applicant was charged by indictment with the December 10, 2010, murder of Julio Barrios, while "committing and attempting to commit the offense of robbery" (CR P. 6). On May 30, 2014, he was convicted of capital murder (RR Vol. 52, PP. 77-78). At the punishment phase of trial, the jury answered the first special issue "yes" and the second special issue "no" (RR Vol. 56, P. 156). On June 5, 2014, the trial court assessed a sentence imposing the death penalty on Count 1 based on the jury verdict (RR Vol. 57, PP. 5-6). Notice of appeal was given on July 3, 2014 (CR Vol. 7, 2617). On July 7, 2014, Appellant filed a motion for new trial (CR 2620), which was overruled by operation of law. Direct appeal in the Court of Criminal Appeals concluded on June 20, 2018, when the instant conviction was affirmed. See ***Valdez v. State***, AP-77,042 (Tex.Cr.App. June 20, 2018). Applicant's original *habeas corpus* application was filed of record with the Court on July 27, 2017.

Facts Relevant to Subsequent Grounds for Relief

Prior to trial, Applicant advised trial counsel that he was not involved in the predicate offense and had an alibi. He also told trial counsel he would not admit guilt as to the predicate murder because he wasn't involved. Applicant never abandoned this position.

Two or three weeks before trial was to begin, trial counsel learned that Applicant had received a traffic ticket approximately four hours after the shooting, while driving an automobile which trial counsel believed belonged to Veronica Cera, a purported witness to the instant offense, and which vehicle trial counsel believed was the vehicle at the scene of the offense. When confronted with this information, according to information recently related to the undersigned by trial counsel, Louis Lopez, Applicant "shut down," and stopped communicating with trial counsel.

Applicant tried to explain to trial counsel that the ticket he received was while driving a car belonging to Sonia Cera, not the vehicle belonging to Veronica Cera, which had been spotted at the scene of the crime. Applicant also reiterated to trial counsel that he had no personal knowledge of who was involved in the shooting

because he was not involved, wasn't there, and did not want to testify. Applicant also advised counsel that he did not want counsel to seek a lesser included conviction if it involved admitting he was guilty.

Attorney Lopez informed Applicant that he would make all necessary strategy decisions, because he had been practicing law for 25 years, and Applicant should follow his instructions. He also lectured Applicant on the subject of loyalty, advising Applicant that there was "no honor among gang members." Trial counsel and Applicant could not agree, and Applicant advised trial counsel that he would not testify, because "every decision I make I will have to deal with for the rest of my life."

Given the argument, and the tone taken by trial counsel, Applicant came to believe that his lawyers were not out to help him. Applicant and trial counsel did not thereafter discuss strategy.

Trial counsel has never indicated that Applicant backed away from his alibi. Counsel has only indicated that Applicant stopped communicating with counsel.

On the first day of individual voir dire, trial counsel questioned some of the potential jurors, about the possibility of a lesser included conviction. During individual voir dire of potential juror number 5, Jo Ann Cruz, the following occurred:

Q. (Mr. Lopez) Okay. So you understand that murder itself is not capital murder. So you can intentionally want to kill someone all you want to. Okay? You may dream about it, tell everybody, or blog about it, send tweets. Okay? "When I see Louis Lopez, I'm going to kill him. He took" -- "he spoke" -- "he asked me questions longer than he promised." But that's not going to put you at the point where you're going to be facing a death sentence in Texas if you do carry out that murder. You will have premeditated it, you will have thought about it a lot, it may be pretty intentional, but that's not going to get you to where you'll be looking at a death sentence.

Do you understand?

A. (Ms. Cruz) Yes.

Q. Okay. And the reason why I bring this up is because -- have you ever heard of the lesser included?

A. No.

Q. No, because most people don't. And it's kind of a trick question because it gives me an opportunity to explain what that is. When you are charged with capital murder -- okay? -- you have to remember -- just like I explained to you -- it's murder plus something. Well, if the state, during their case -- because remember, the burden of proof is on them. We don't have a burden. The burden of proof is on them. If they were to bring you a murder but then they failed to show you the plus -- okay? -- the other stuff that makes it capital -- if they just present to you that the defendant killed a person but they failed to show that the person was a fireman or policeman in the line of duty -- or let's say they presented evidence that person murdered -- the defendant murdered a child but failed to prove to you that the -- that was under the age of 10, then you would have just murder. That's a lesser included. Okay?

Does that make sense?

A. Yes.

Q. So then the defendant wouldn't be guilty of capital even though they're charged with capital, and that's what they say they're going to prove. If they only prove murder, then the person is guilty of just murder. Okay?

Now, the reason I'm getting to this -- this is what's important, and this will all loop back to your answer. In a murder case the type of punishments available for a jury to consider if you believe a person has committed intentional murder, premeditated murder -- if you have found beyond a reasonable doubt that that person has committed murder -- not capital, okay, but just murder -- the punishment for that is 5 years minimum up to 99 years or life. There's no death sentence for just regular murder. Okay? You can only get death when? When it's a capital murder. Right? So a regular murder, no death. All you can get is 5 to 99 or life, everything in between. It's like a gas tank. You can get an empty tank or a full tank, everywhere in between is what you can get -- okay? -- what the jury can consider.

Now, if you were a juror and you're sitting as a juror and you've -- okay. We've already found the person guilty of murder. They proved a murder, but the state didn't -- they couldn't get to that next level. They couldn't show the plus. Okay? Would you, as a juror, be able to consider the minimum punishment five years, given the statement that you wrote here that premeditated murder deserves the death penalty?

A. Yes. Because, to be honest, I didn't know the difference between capital murder until right now. You know, I didn't know that there was that plus. I didn't know the difference. So, yes, what I answered back then to now is different, and it would be just based on the evidence that I hear during those two times. If it's less and they do fail to show the other, the plus, then, you know, he's -- it's whatever is -- whatever evidence was brought forth and what actually is proven to me that would guide me to the decision that I need to make. I wouldn't right away presume, Oh, he's already -- you know, I'm not going to give him the five years because I think, you know, the evidence shows something else when it hasn't been presented. It's going to be strictly on what's -- and I would be able to do whatever sentence -- the lesser sentence if that's what should be because of the evidence that was shown.

Q. That is outstanding, because that's the answer I was looking for. What we are looking for as jurors is people who will listen to all the evidence, not have any preconceived ideas. In other words, they come in here a blank slate. Okay?

Now, you may have personal convictions and you may have certain ways of -- you may have personal convictions, you may be opposed to certain things or you may believe certain things, you may not be in agreement with certain things, but regardless of those feelings, what we ask is that -- we ask jurors to be able to set aside those

and to be able to sit at this table and to be able to look at the evidence that's presented and then answer the questions or follow the instruction that you're given according to the law.

Does that describe you?

A. Yes.

(RR Vol. 10, PP. 153-156). Similar questioning occurred throughout individual voir dire. At the conclusion of voir dire, the defense elected to have the jury assess punishment, even if the defendant was found guilty of murder (RR Vol. 49, PP. 45-46).

During his final argument at guilt-innocence, attorney Lopez told the jury, "*Fidencio Valdez is involved in this murder. Plain and simple. You've heard it from me*" (RR Vol. 52, P. 39). Additionally, he advised the jury that:

> So what am I doing? Our defense has always been, from the very beginning -- and it is today, it was yesterday, it is now -- this is a drug deal gone bad. That's all it is. This is two people in a suspicious situation where there's not a lot of trust, where it's dangerous, and it went south. That's all.

RR Vol. 52, P. 40.

First Subsequent Ground for *Habeas Corpus* Relief Restated

Because Applicant's Trial Counsel Admitted Applicant's Guilt, Despite Knowing that Applicant Denied Involvement in the Murder and Had Provided Evidence of an Alibi, and that Applicant Objected to the Admission of Guilt, Applicant is Entitled to a New Trial.

Argument & Authorities - Subsequent Ground Number One

In ***McCoy v. Louisiana***, 584 U.S. _____ (No. 16-8255; May 14, 2018), the Supreme Court of the United States addressed a case involving the murder of three individuals who were the mother, stepfather, and son of the defendant's estranged wife. After he was extradited from Idaho, a grand jury indicted the defendant on three counts of first-degree murder, and the prosecutor gave notice of intent to seek the death penalty. His parents engaged Larry English to represent the defendant, and English was enrolled as trial counsel.

Trial counsel eventually concluded that the evidence against the defendant was over whelming and that, absent a concession at the guilt stage that the defendant was the killer, a death sentence would be impossible to avoid at the penalty phase (***McCoy***, slip op. at 3). The defendant, trial counsel reported, was

"furious" when told, two weeks before trial was scheduled to begin, that trial counsel would concede Petitioner's commission of the triple murders. He told trial counsel "not to make that concession," and trial counsel knew of the defendant's "complete opposition" to trial counsel telling the jury that Petitioner was guilty of killing the three victims" (***McCoy***, slip op. at 3).

At the beginning of his opening statement at the guilt phase of the trial, trial counsel told the jury there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion than Robert McCoy was the cause of these individuals' death." Trial counsel also told the jury the evidence is "unambiguous," "my client committed three murders." In his closing argument, trial counsel reiterated that Petitioner was the killer. On that issue, trial counsel told the jury that he "took [the] burden off of [the prosecutor]." The jury then returned a unanimous verdict of guilty of first-degree murder on all three counts (***McCoy***, slip op. at 4).

At the penalty phase, trial counsel again conceded that the defendant "committed these crimes," but urged mercy in view of

the defendant's "serious mental and emotional issues." The jury returned three death verdicts (***McCoy***, slip op. at 4).

Represented by new counsel, the defendant unsuccessfully moved for a new trial, arguing, as he did on direct appeal, that the trial court violated his constitutional rights by allowing trial counsel to concede the defendant "committed three murders," over the defendant's objection (***McCoy***, slip op. at 4).

The Louisiana Supreme Court affirmed the trial court's ruling that defense counsel had authority to concede guilt, despite the defendant's opposition to any admission of guilt. See ***State v. McCoy***, 218 So. 3d 535 (La. 2016). The concession was permissible, the Louisiana Supreme Court concluded, because counsel reasonably believed that admitting guilt afforded Petitioner the best chance to avoid a death sentence (***McCoy***, slip op. at 4-5).

The Supreme Court granted *certiorari* "in view of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." On May 14, 2018, the Court held that a defendant has the right to insist that counsel refrain from admitting guilt, even when

counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty (***McCoy***, slip op. at 1-2).

The Court wrote that "guaranteeing a defendant the right 'to have the Assistance of Counsel for his defence,' the Sixth Amendment so demands. With individual liberty -- and, in capital cases, life -- at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt" (***McCoy***, slip op. at 2).

Reading the first ten pages of the Court's opinion in ***McCoy***, one would think that the Court was going to further explain the application of either ***Strickland v. Washington***, 466 U.S. 668 (1984), or ***United States v. Cronic***, 466 U.S. 648 (1984). In part III of the opinion, the Court indicated that it was not going to use its "ineffective-assistance-of-counsel jurisprudence" (i.e., ***Strickland*** and/or ***Cronic***) to resolve the "prejudice" question. Rather, the Court resolved the matter as "structural error."

Citing ***McKaskle v. Wiggins***, 465 U. S. 168, 176-177 (1984), the Court noted that "Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review. The Court additionally cited to ***United States v. Gonzalez-Lopez***, 548 U. S. 140, 150 (2006). The Court wrote:

> Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review. See, e.g., McKaskle, 465 U. S., at 177, n. 8 (harmless-error analysis is inapplicable to deprivations of the self-representation right, because "[t]he right is either respected or denied; its deprivation cannot be harmless"); United States v. Gonzalez-Lopez, 548 U. S. 140, 150 (2006) (choice of counsel is structural); Waller v. Georgia, 467 U. S. 39, 49–50 (1984) (public trial is structural). Structural error "affects the framework within which the trial proceeds," as distinguished from a lapse or flaw that is "simply an error in the trial process itself." Arizona v. Fulminante, 499 U. S. 279, 310 (1991). An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." Weaver, 582 U. S., at ___ (slip op., at 6) (citing Faretta, 422 U. S., at 834). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. 582 U. S., at

___–___ (slip op., at 6–7) (citing Gonzalez-Lopez, 548 U. S., at 149, n. 4, and Sullivan v. Louisiana, 508 U. S. 275, 279 (1993)).

> Under at least the first two rationales, counsel's admission of a client's guilt over the client's express objection is error structural in kind. See Cooke, 977 A. 2d, at 849 ("Counsel's override negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole."). Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt. McCoy must therefore be accorded a new trial without any need first to show prejudice.

McCoy, slip op. at 11-12 (complete citations and footnotes omitted).

In ***McCoy***, the Court did two things. It both established what counsel cannot do, and set a standard for cases in which trial counsel "usurp[s] control of an issue within [the defendant's] sole prerogative." Agreeing "with the majority of state courts of last resort," the Court held that "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." ***McCoy***, slip op. at 11.

In the instant case, trial counsel not only admitted that Applicant was "involved in this murder" (RR Vol. 52, P. 39), he also told the jury that the incident giving rise to the prosecution was a

"drug deal gone bad" (RR Vol. 52, P. 40). While argument can be made about the language used, Applicant submits that a "drug deal gone bad" is exactly what the State was trying to convince the jury had occurred. Thus, by first admitting Applicant was "involved in this murder" then telling them that this was a "drug deal gone bad," trial counsel admitted Applicant was guilty of capital murder, because there is no other explanation for the meaning of a "drug deal gone bad."

Conclusion - Subsequent Ground Number One

Applicant has demonstrated that, as in ***McCoy***, trial counsel usurped "control of an issue" within Applicant's sole prerogative, by admitting Applicant's guilt over Applicant's "intransigent objection to that admission." As set out in ***McCoy***, the error is structural. No harm/prejudice analysis is necessary, and Applicant is entitled to a new trial.

Note Regarding Subsequent Grounds Two and Three

McCoy established, for the first time, that trial counsel cannot "usurp[s] control of an issue within [the defendant's] sole prerogative." Specifically, the Court held that "counsel may not

admit her client's guilt of a charged crime over the client's intransigent objection to that admission." ***McCoy***, slip op. at 11.

Although the Court made clear, in Part III, that it was resolving the case as structural error, the statement in Part II of the opinion that, "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission," cannot be read in any manner other than a recognition of the level of performance below which trial counsel cannot venture. Regardless of how one reads the Court's disposition in Part III of ***McCoy***, the Court clearly added to the "ineffective-assistance-of-counsel jurisprudence" of ***Strickland*** and ***Cronic***. Consequently, out of an abundance of caution, the undersigned raises the following two grounds for relief.

Second Subsequent Ground for *Habeas Corpus* Relief Restated

> **By Admitting Applicant's Guilt, Despite Knowing that Applicant Denied Involvement in the Murder and Had Provided Evidence of an Alibi, Trial Counsel Failed to Subject the Prosecution's Case to Meaningful Adversarial Testing**.

Argument & Authorities - Subsequent Ground Number Two

In ***Strickland*** and ***Cronic***, the Supreme Court set out the performance standards expected by trial counsel. ***Cronic***

addressed those situations in which a defendant was effectively denied counsel, while ***Strickland*** addressed situations in which a defendant had been denied effective counsel.

Relying on many of its own previous cases,[1] the ***Cronic*** Court held that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. ***Cronic***, 466 U.S. at 658.

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.[25] Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U. S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which " `would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " Id., at 318 (citing Smith v. Illinois, 390 U. S. 129, 131 (1968), and Brookhart v. Janis, 384 U. S. 1, 3 (1966)).[26]
>
> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of

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[1] Specifically, ***Flanagan v. United States***, 465 U. S. 259, 267-268 (1984); ***Estelle v. Williams***, 425 U. S. 501, 504 (1976); ***Murphy v. Florida***, 421 U. S. 794 (1975); ***Bruton v. United States***, 391 U. S. 123, 136-137 (1968); ***Sheppard v. Maxwell***, 384 U. S. 333, 351-352 (1966); ***Jackson v. Denno***, 378 U. S. 368, 389-391 (1964); ***Payne v. Arkansas***, 356 U. S. 560, 567-568 (1958); and ***In re Murchison***, 349 U. S. 133, 136 (1955).

> prejudice is appropriate without inquiry into the actual conduct of the trial. Powell v. Alabama, 287 U. S. 45 (1932), was such a case.

Cronic, 466 U.S. at 659-660.

In ***Cronic***, the Supreme Court recognized what is sometimes called a limited exception to the ***Strickland*** analysis for situations where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." The exception applies when there has been a "denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." ***Cronic***, 466 U.S. at 659. The ***Cronic***, standard applies, however, only when counsel's failure to test the prosecutor's case is "complete." See ***Bell v. Cone***, 535 U.S. 685, 696-697 (2002).

More often, the ***Cronic*** standard is not properly invoked, but courts have found the failure of counsel to be complete in situations where counsel is physically present but mentally absent. See, e.g., ***Ex parte McFarland***, 163 S.W.3d 743, 752 (Tex.Cr.App. 2005). Applicant asserts that, in the instant case, counsel's action constituted an abandonment of Applicant.

The State's theory was that Applicant killed Julio Barrios "in the course of committing or attempting to commit robbery."

Testimony of several witnesses demonstrated that Barrios went to the scene of the murder, accompanied by two others, to deliver drugs to Applicant. The testimony established that Barrios went to the scene with some ecstacy pills but had none on his body after the shooting.

Conclusion - Subsequent Ground Number Two

By telling the jury that Applicant was "involved in this murder" then telling them that this was a "drug deal gone bad," trial counsel admitted Applicant was guilty of capital murder, and, thus, trial counsel "entirely" failed "to subject the prosecution's case to meaningful adversarial testing." See ***Cronic***, 466 U.S. at 659. Counsel effectively abandoned Applicant during the guilt/innocence phase of trial. Applicant is entitled to a new trial.

Third Subsequent Ground for *Habeas Corpus* Relief Restated

> **Applicant Was Denied the Effective Assistance of Counsel When Trial Counsel Admitted Applicant's Guilt, Despite Knowing that Applicant Denied Involvement in the Murder and Had Provided Evidence of an Alibi**.

Argument & Authorities - Subsequent Ground Number Three

Under the now well known standard set out in ***Strickland***, a litigant claiming he or she was denied the effective assistance of

counsel must provide that (1) the attorney's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. ***Strickland***, 466 U.S. at 686.

Trial Counsel's Performance

Although the facts of ***McCoy*** and the instant case are not exactly the same, they are remarkably similar. For example:

- Both lawyers knew their clients denied involvement in the murder giving rise to the prosecution.
- Both lawyers had been told by their client not to admit guilt as to the murder giving rise to the prosecution.
- Both lawyers admitted their client's guilt as to the murder giving rise to the prosecution in front of the jury.

In ***McCoy***, defense counsel admitted to the jury that the defendant had "committed three murders" over the defendant's objection (***McCoy***, slip op. at 4). In the instant case, trial counsel told the jury that Applicant was involved in the murder and that the murder was "a drug deal gone bad" (RR Vol. 52, P. 40). Both attorneys admitted their client's involvement in the killings over their client's objections.

Part II of the Court's opinion in ***McCoy*** clearly established that trial counsel cannot "usurp[s] control of an issue within [the defendant's] sole prerogative." Specifically, the Court held that "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission. ***McCoy***, slip op. at 11.

Admitting his client's guilt over his "client's intransigent objection to that admission" is exactly what trial counsel did in the instant case. Consequently, under ***Strickland***, Applicant has demonstrated that trial counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." The first prong of ***Strickland*** is satisfied.

Confidence in the Outcome of Trial is Undermined

Applicant acknowledges that he must demonstrate that, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. ***Strickland***, 466 U.S. at 686. Applicant submits that, just like the admission made by counsel in ***McCoy***, the effects of the admission made by counsel in this case are "immeasurable,

because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt."

Applicant asserts that, as to the issue of guilt or innocence, in light of trial counsel's admission that Applicant was "involved in this murder," and that the situation was a "drug deal gone bad," the jury would have had no alternative other than to return a verdict of guilty. Thus, there is considerably more than a reasonable probability that the result of the trial would have been different. The second prong of ***Strickland*** is satisfied.

Conclusion - Subsequent Ground Number Three

As a result of his admission of Applicant's guilt over his "client's intransigent objection to that admission," trial counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." Further, because the jury would have been most certainly be swayed by trial counsel's concession of Applicant's guilt, the harm sustained by Applicant is immeasurable. Both prongs of ***Strickland*** have been satisfied, and Applicant is entitled to a new trial.

Subsequent Application Under Article 11.071, C.Cr.P

Applicant is aware that, under section 5 of Article 11.071, C.Cr.P., any *habeas corpus* application filed after the initial *habeas corpus* application is considered a "subsequent" application, and that the convicting court may not consider the merits of or grant relief based on a subsequent *habeas corpus* application unless the application contains sufficient specific facts establishing that:

❶ the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

❷ by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

❸ by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

In that regard, Applicant would show the Court that the claims and issues raised in this *habeas corpus* application have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the legal basis for the claims made was unavailable on the date the applicant filed the previous application.

Specifically, Applicant would show that, prior to ***McCoy***, raising the claim would have been frivolous. In fact, prior to ***McCoy***, there was no case from the Court of Criminal Appeals which held that trial counsel could not admit her client's guilt without his client's permission. Similarly, there was no case from the Fifth Circuit so holding, and no case from the Supreme Court of the United States with a holding similar to that in ***McCoy***.

Applicant is aware of the holding of the lower court in ***Nixon v. State***, 857 So. 2d 172, 176 (2003)(referred to by the Supreme Court as "***Nixon III***"), and addressed in ***Florida v. Nixon***, 543 U.S. 175, 190 (2004)(referred to herein as ***Nixon IV***), mentioned in the first sentence of ***McCoy***.

In ***Nixon III***, a divided Supreme Court of Florida determined that a concession of guilt by trial counsel was ***Cronic*** error. ***Nixon III***, 857 So. 2d at 178-179. The Supreme Court disagreed and reversed the Florida court.

> When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent.

Nixon IV, 543 U.S. at 192-193. As noted in ***Nixon IV***, the Florida court was unaware of whether the defendant consented to trial counsel's strategy, and merely presumed deficient performance. ***Nixon IV***, 543 U.S. at 189. In short, nothing in either ***Nixon III*** or ***Nixon IV*** would support the claims made in this application.

Conclusion

Trial counsel's admission of Applicant's guilt, during the guilt/innocence phase, usurped control of an issue within Applicant's sole prerogative, and thereby fell below an objective standard of reasonableness under prevailing professional norms. Whether the case is resolved under ***McCoy***, ***Cronic***, or ***Strickland***, Applicant is entitled to a new trial.

Request for Evidentiary Hearing

Because the overwhelming majority of the proof necessary to establish Applicant's claims exists outside the record of trial or has occurred or been discovered after trial, an evidentiary hearing is necessary to establish the veracity of Applicant's allegations and claims. As the Court of Criminal Appeals held in ***Ex parte Rodriguez***, 334 S.W.2d 294 (Tex.Cr.App. 1997), the trial court is the appropriate forum for findings of fact, as the Court of Criminal Appeals "does not hear evidence."

Much has been written about the necessity of confrontation in the search for truth, with a recognition that the courtroom is the place where that search is conducted.

> The courtroom is the crucible of the law, where the fire of litigation tests the intellectual and political forces that inform social policy. Discovery - the process by which litigants identify and assemble their evidence - provides the fuel for the fire.

James Gibson, ***A Topic Both Timely and Timeless***, 10 RICH. J.L. & TECH. 49 (2004). Our literature and case law are replete with references to the "crucible" of the courtroom.

Members of the Supreme Court of the United States use it often. Regarding the Confrontation Clause, for example, the Court recently wrote:

> To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 312 (2009). Along that line, in one its most landscape-changing Confrontation Clause cases, the Court wrote:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

Crawford v. Washington, 541 U.S. 36, 61-62 (2004). Similarly, forty-four years ago, Justice Marshall, joined by Justice Douglas

and Justice Brennan, albeit in dissent, wrote that, "In our system of justice, the right of confrontation provides the crucible for testing the truth of accusations . . .." ***Arnett v. Kennedy***, 416 U.S. 134, 214-215 (1974)(Marshall, J., dissenting). Also, seventy-three years ago, Justice Murphy, defending the right of the Associated Press to disseminate the news, wrote generally that evidence, unless undisputed, "should be thoroughly tested in the crucible of cross-examination and counter-evidence." ***Associated Press v. United States***, 326 U.S. 1, 57-58 (1945)(Murphy, J., dissenting).

The role of the trial court in *habeas corpus* matters brought under Chapter 11, C.Cr.P., is that of the fact-finder. The ultimate decision is to be made by the Court of Criminal Appeals, guided by the informed findings and recommendation of the trial court.

Because of the nature of the allegations before the Court and the change in law dictated by ***McCoy***, Applicant asserts that the only way the Court can properly assist the Court of Criminal Appeals in its investigation, fulfill its statutory duty to resolve the controverted facts in this case, is to designate all of the claims made in the original and subsequent *habeas corpus* application as

requiring resolution, and schedule a live evidentiary hearing, at which time Applicant would be able to introduce live testimony supporting his claims. Applicant would suggest that, due to the time required to obtain witnesses and ensure their presence, as well as to prepare for a full and complete hearing, the hearing be scheduled no less than sixty (60) days later than the date the Court issues its order setting a hearing date.

Prayer

WHEREFORE, PREMISES CONSIDERED, Applicant, Fidencio Valdez, respectfully prays that these Honorable Courts will proceed as required by Article 11.071, C.Cr.P.; that an evidentiary hearing will be scheduled at which time Applicant can present live testimony in support of his claims; and, after such hearing, that the Court will enter its Order recommending that relief be granted; and, finally, that upon proper consideration by the Court of Criminal Appeals, Applicant will be granted the relief to which he is entitled.

Respectfully submitted,

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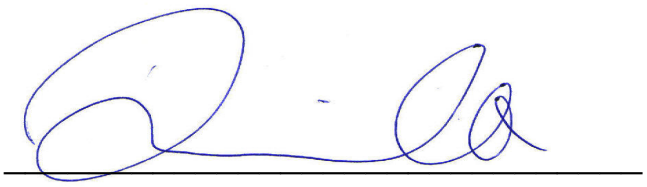
Certificate of Compliance and Delivery

This is to certify that: (1) this document, created using WordPerfect™ X9 software, contains 6,187 words, excluding those items permitted by Rule 9.4 (i)(1), Tex.R.App.Pro., and complies with Rules 9.4 (i)(2)(B) and 9.4 (i)(3), Tex.R.App.Pro.; and (2) on July 6, 2018, a true and correct copy of the above and foregoing "Subsequent Application for Post-Conviction Writ of *Habeas Corpus* Pursuant to Article 11.071, C.Cr.P.," was transmitted via electronic mail (*eMail*) to Lily Stroud (lstroud@epcounty.com), at the El Paso County District Attorney's Office, counsel for the State of Texas.



David A. Schulman

No. 20120D00749
CCA No. WR-85,941-01

Ex parte Fidencio Valdez

In the 384th District Court

El Paso County, Texas

List of Exhibits

A. Unsworn Declaration of Fidencio Valdez dated July 5, 2018.

Exhibit “A”

No. 2012-0D00749

EX PARTE	§	IN THE DISTRICT COURT
	§	
	§	384TH JUDICIAL DISTRICT
	§	
FIDENCIO VALDEZ	§	EL PASO COUNTY, TEXAS

UNSWORN DECLARATION OF FIDENCIO VALDEZ

My name is Fidencio Valdez, my date of birth is May 30, 1979; my TDCJ number is 00999594; my SID number is 05917860; I am confined in the Polunsky Unit of the Texas Department of Criminal Justice, in Livingston, Texas. I have seen and reviewed the subsequent habeas corpus application my attorneys have prepared and will file on July 6, 2018. All factual allegations in that application are true and correct. Specifically, I declare under penalty of perjury that the foregoing is true and correct.

Shortly after Louis Lopez was appointed to represent me, I advised him that I was not involved in the offense and had an alibi. I also told him that I would not admit guilt because I wasn't involved.

Two or three weeks before trial, Mr. Lopez told me that he had learned that I received a traffic ticket while driving Veronica Cera's car, approximately four hours after the shooting. I tried to explain to Mr. Lopez that the car belonged to Sonia Cera, not Veronica Cera, and wasn't the car which had been seen at the scene of the crime. I also again told him that

I had no personal knowledge of who was involved in the shooting because I wasn't involved, wasn't there, did not want to testify, and did not want him to seek a lesser included conviction.

Mr. Lopez told me that he would make all necessary strategy decisions, because he had been practicing law for 25 years and that I should follow his instructions. He also lectured me on the subject of loyalty, advising Applicant that there was no honor among gang members. I told Mr. Lopez that he was wrong, and that every decision I make I will have to deal with for the rest of my life.

Given the argument, and the tone taken by Mr. Lopez, I realized that the lawyers were not going to help me. There were no further strategy discussions with the lawyers before trial began.

I never told Mr. Lopez anything other than I wasn't involved, and I never changed my mind about him telling the jury I was guilty of a lesser included offense. .

Executed in Polk County, State of Texas, on the 5th day of July, 2018.

Fidencio Valdez #999594

Fidencio Valdez, Declarant

Exhibit “D”

Trial counsel's affidavit dated January 19, 2018.

LOUIS ELIAS LOPEZ, JR.
ATTORNEY AT LAW

Board Certified in Criminal Law and Appellate Law
Texas Board of Legal Specialization
State Bar of Texas

Margarita Betancourt
Office Manager

Thania Sierra
Legal Assistant

January 19, 2018

Mr. John Davis
Assistant District Attorney
El Paso County District Attorney's Office
500 E. San Antonio, Suite 400
El Paso, TX 79901

Re: *EX PARTE FIDENCIO VALDEZ*
20120D00749
WR-85,941-01
384TH DISTRICT COURT

AFFIDAVIT OF LOUIS ELIAS LOPEZ, JR.
TRIAL COUNSEL FOR APPLICANT VALDEZ
STATE OF TEXAS V. FIDENCIO VALDEZ

EL PASO COUNTY §
STATE OF TEXAS §

Below came the affiant, Louis Elias Lopez, Jr. and stated the following under oath:

"Dear Mr. Davis:

"My name is Louis Elias Lopez, Jr. I am the court appointed attorney that represented Mr. Fidencio Valdez, (herein referred to as Mr. Valdez), during his capital murder trial. The state sought the death penalty. A jury convicted Mr. Valdez and answered the special issues yes and no. The trial judge then sentenced Mr. Valdez to death by lethal injection.

"This affidavit is an effort to answer Mr. Valdez's ineffective assistance of counsel claims, (IEAOC). Prior to responding to Mr. Valdez's allegations, I must first list several factors so that my subsequent explanations of our trial decisions make sense.

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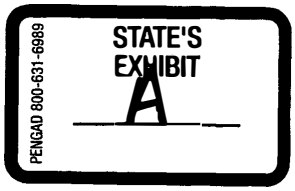

"1. From the onset of representation to the weeks before trial, Mr. Valdez maintained an alibi defense; specifically, that he was not with Veronica Cera at any time on the night of the shooting. Mr. Valdez maintained this defense even when we presented him with a traffic citation given to him three to four hours after the shooting by a Texas Department of Public Safety state trooper while he was driving Ms. Cera's vehicle. After this revelation, Mr. Valdez no longer assisted in his defense;

2. Mr. Valdez maintained that he was partying with a couple of male and female friends who could verify his alibi, even though he could only provide gang nicknames. We and our appointed investigator searched for every witness Mr. Valdez provided us. Despite wasting so much time searching for legions of fictitious people, I did discover one person, a Barrio Azteca, (BA), gang member. However, the BA member stated that he really didn't know Mr. Valdez much less party with him. And, according to what he heard, the state was doing the BA organization a favor. I took this to mean that the BA and its membership were not going to rush to Mr. Valdez's aid. Except for this one BA member, we never successfully found any persons;

4. Mr. Valdez, late in the evolution of the case (basically right before juror selection started), told us he knew the identity of the shooter even though we had been working on his case for over two years. However, he refused to tell us the "real" shooter's name no matter how hard we pressed; and

5. Lastly, when we discussed the possibility of trying to present evidence that Ms. Veronica Cera was a second shooter, Mr. Valdez instructed us specifically not to attack and accuse Ms. Cera (the state's number one witness) under any circumstances. Mr. Valdez whole heartedly believed Ms. Cera would not show up to testify against him in his trial. When she did testify, we still could not pursue the "2d shooter" defense because of an extraneous offense that will be discussed in further detail later in this affidavit.

ISSUE ONE – Counsel provided IEAOC by failing to call witness Israel Gonzalez before the jury to testify that the passenger had exited the vehicle and fired at least one shot at the car behind the car driven by the shooters of the decedent.

"Trial counsel did not call Mr. Gonzalez to the stand and testify as described by writ counsel because:

1. Mr. Valdez pretty much rejected the 2d shooter scenario. Mr. Valdez told us that Ms. Cena was not a shooter, nor was she involved in the shooting. Mr. Valdez stated there was only one shooter and that he knew who the person was, and it wasn't Ms. Cera. Either way, Mr. Valdez told us not to question Ms. Cera roughly.

2. Mr. Gonzalez' witness statement was all over the place, at one time putting four people in the shooter's car. The statement also had Mr. Gonzalez describing seeing two males pull the decedent out of the vehicle. It was bad enough that the state was already calling Mr. Forrest Zozaya, friend of Mr. Gonzalez, to describe the dragging out of the car and subsequent execution style killing of the decedent by the driver of the "white SUV," such that Mr. Gonzalez testimony would only add to that grizzly factor. We felt once was enough – thus limiting the effect a cold-blooded killing would have on the jury. Lastly, there was no ballistic evidence to support a second gun being shot at the decedent's uncle's car. If there were two shooters, then there must be two guns.

3. Prior to the start of jury selection, the state made us aware that Mr. Valdez was a person of interest in the murder of Ms. Cera's relatives (one victim named Chuco Fierro). While the state had another person indicted for the double homicide, the state felt they could link Mr. Valdez to the murder because copies of the police reports from the Tropicana murder (this case) believed to belong to Mr. Valdez had been sent to Ms. Cera prior to the "Chuco Fierro" double homicide. If we accused Ms. Cera of being a shooter, then we ran the risk of opening the door to the "Chuco Fierro" matter. The state would show that Ms. Cera was being threatened by Mr. Valdez by way of sending her highlighted police reports with the underlying message, "don't talk to the law enforcement."

4. Lastly, since Mr. Valdez stopped helping us with his defense, we chose the only believable defense which could make sense – that this was a drug sale gone bad and that the Tropicana shooting was simply a murder and not a capital offense. Our goal by this time was to save Mr. Valdez' life. We felt the best way to do this was to argue that this was a bad drug deal where two people got together to buy and sell ecstasy pills, who subsequently thought each was an undercover and wired-up, which resulted in a shooting – the intent to rob was not present at the time of the shooting.

ISSUE FIVE – Counsel provided IEAOC by failing to question Samuel Herrera, the decedent's uncle, as to whether he had made a "deal" with state authorities prior to his testimony or the statements provided to the police after the shooting.

1. When asked by counsel whether Mr. Hererra received from the state any "deals" from the state or police, the state told us no. Thus, there were no deals to ask about.

2. Also, we felt that for the "drug deal gone bad" defense to be successful, we felt that we needed to maintain some credibility with the jury. This meant forgoing asking "crazy left field" questions which would not survive the "eye-roll" test. Cera's a shooter and Herrera received secret deals from the state were the kind of incredulous questions we sought to avoid so as to maintain credibility with the jury.

ISSUE SIX – Counsel provided IEAOC by failing to ask for an accomplice witness instruction regarding Ms. Cera being a second shooter.[1]

1. I already answered this complaint in the responses contained under ISSUE ONE.

2. Also, we were very concerned about opening the door to Mr. Valdez's membership as a confirmed BA gang member. We successfully asked in limine that the trial court instruct the state to advise its witnesses not to mention that Mr. Valdez was a confirmed BA gang member. By arguing that Ms. Cera was an accomplice, we worried that we may be opening the door for the state to present evidence that Ms. Cera had been threatened by Mr. Valdez by way of him allegedly sending her copies of the Tropicana Murder police reports (previously discussed) highlighting where she was cooperating.

ISSUE SEVEN – Counsel provided IEAOC by failing to investigate and discover mitigating evidence specifically not seeking funds to have Mr. Valdez subject to brain imagining and a 24-hour EEG based on the childhood seizures Mr. Valdez suffered as a child.

1. Because of the childhood-seizure evidence we discovered during our mitigation investigation, we asked for funds to have Mr. Valdez examined by Dr. McGarrahan for any signs of mental impairment be it physical or organic. After two face-to-face interviews with Mr. Valdez, and having him answer a battery of written tests, Dr. McGarrahan stated that she did not see any indication that Mr. Valdez suffered from any physical or organic mental deficiencies. However, she did state that she had rarely met a person with such a high anti-social score as Mr. Valdez.

2. Over two years of knowing Mr. Valdez, we never noticed him to exhibit any signs of cognitive lapses. In fact, we found quite the opposite. One example of his above average cognitive abilities was his ability to prepare for and execute a well-thought-out plan. While we waited for trial, Mr. Valdez planned and effectuated his escape from his jail cell to beat-up another inmate by: 1) figuring out how to open his jail cell door by forcing an object underneath the door so as to jump the door off its tracks; 2) fashioning a rope by braiding

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[1] We are aware that Mr. Valdez is claiming the state failed to provide us with the evidence that Ms. Cera was heavily involved in the BA (from her testimony in the later "Chuco Fierro" trial). If we had been provided with such evidence I'm not sure it would have helped us. First her involvement in BA could quite possibly be irrelevant and not proper impeachment. Also, such questioning would have opened the door to the extremely inflammatory fact that Mr. Valdez was a confirmed BA member a fact that I took great pains to exclude during the guilt or innocence phase. And, as stated earlier, this line of questioning might have open the door for the state to present evidence of the "Chuco Fierro" murder, the relevance being that Ms. Cera had been threatened not to testify by BA members including Mr. Valdez

strips of his bedsheets and use the braided rope to slip under his sliding cell door and jump the tracks; 3) waiting for the soon-to-be-assaulted person to come out of his cell into the common area; and 4) started to beat the person once the jail cell door was opened; and 5) he knew how long he could beat the person because he knew that the individual floor detention offer could not stop the beating until the riot authorities arrived. According to reports and witnesses, Mr. Valdez beat the person repeatedly until the riot troops arrived on his floor.

3. During jury selection, we gave Mr. Valdez two books to read to pass down time – *Of Mice and Men,* by John Steinbeck, and *A Day in the Life of Ivan Denisovich*, by Alexandre Solzhenitsyn. He and I would read a chapter at night and discus the chapter the next day. Mr. Valdez completed both books. Two things stood out in my mind: 1) Mr. Valdez completely related with *Denisovich* finding a bread crumb under his bed and how prized such an item could be while being incarcerated in a prison gulag; and 2) Mr. Valdez told me that he would have shot Lenny (the mentally ill character in the book) in the first chapter of *Mice and Men* because Lenny was a dead-weight "Puto,"[2] and was keeping George from living high on the hog. Shocking assessment but relatively true – while Lenny was a burden to George, most people feel empathy for both characters and are deeply saddened at the end when George kills Lenny while he has him imagining they are on "their imaginary farm" feeding the rabbits. At any rate, Mr. Valdez did not exhibit any reasons to request such tests.

4. Regarding the email from Dr. McGarrahan stating that we should have Mr. Valdez subject to brain imagining and a 24 hour EEG, the writ presenters are not providing the court with the complete story behind the email or even the email itself.

    a. We did not have anything to present to the trial court to justify $25,000 in testing just so we could say we ruled it out;

    b. While we didn't think we needed them, we didn't want to be scrambling around trying to get documents to support such a request, especially when our Doctor told us that Mr. Valdez didn't suffer from any brain defects. But, if she stated she could never be 100% sure unless we have a brain imagining and a 24-hour EEG, then we felt we had enough to ask for the funds if we needed later.

    c. We asked Dr. McGarrahan for an email stating such so we could be ready if we decided later we needed the testing. Thus, Dr. McGarrahan did not tell us she needed the testing. Dr. McGarrahan did what we asked her to do in the event we decided that we needed to ask the trial court for the funds needed to have these tests

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[2] Although "Puto" has many meanings in the Spanish language, in this instance it meant "fucker."

administered. Dr. McGarrahan provided us with a reason for the tests, "I can't be 100 % sure unless we test him," so that we would have a reason, although not a good one, but a reason to justify a request.

"I submit this Affidavit in response to the Mr. Valdez's allegations."

Signed January 11, 2018.

LOUIS ELIAS LOPEZ JR.

Signed before me on January 11, 2018.

Margarita Betancourt
Notary Public

My commission expires: December 13, 2021

Margarita Betancourt
My Commission Expires
12.13/2021
ID No 128106903

Should you have any questions please contact me.

LOUIS ELIAS LOPEZ, JR.