No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALEXANDER WILLIAM JOHNSON – PETITIONER

vs.

LORIE DAVIS, Director, Texas Department of Criminal Justice,
Correctional Institutions Division – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a 1½-page order that summarily denies a certificate of appealability without any analysis of the facts and the law in a murder case satisfies the requirement of *Buck v. Davis*, ___U.S.___, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017) that the court of appeals determine if "jurists of reason could disagree with the district court's resolution of [the applicant's] constitutional claims or . . . could conclude the issues presented are adequate to deserve encouragement to proceed further" in a habeas case?

LIST OF PARTIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished. The opinion of the United States district court appears at Appendix B to the petition and is unpublished. The order of the Texas Court of Criminal Appeals appears at Appendix C to the petition and is unpublished. The order of the District Court of Bexar County, Texas, 186th Judicial District appears at Appendix D to the petition and is unpublished.

JURISDICTION

The date on which the United States court of appeals decided this case was July 1, 2019. A copy of that decision appears at Appendix A. A petition for rehearing was not filed. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,

by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

This was a very close case on the issue of guilt-innocence. The jury deliberated on guilt-innocence over a two-day period of time and sent six questions to the judge regarding not being able to agree on a verdict and requesting testimony be read back to the jury. (R - v.5/7 - 1, 33-40; R - v.6/7 - 1, 6).[1] The issue in this case was whether the Petitioner, Alex, shot the complainant, Josue Manuel Berea-Torres, in self-defense.

Alex and Randi Flores were friends. (R - v.3/7 - 45-47, 73-74). Randi, however, was dating Andy Vela. *Id.* at 52, 131, 179. Andy Vela and Josue lived in the same apartment together. *Id.* at 155-156, 176-177. On May 13, 2010 at approximately 7:30 p.m., Alex was at Randi's apartment attempting to find Randi but left since Randi was not home. *Id.* at 48-49. Later that day, a black SUV that appeared to belong to Alex was driving slowly through the apartment parking lot. *Id.* at 54. Josue came out

[1]The clerk's record at trial will be referred to as "T and page number." The court reporter's record at trial will be referred to by volume and page number such as "(R - v.1/7 - 1)." The state habeas exhibits will be referred to as "Exhibit __."

of his apartment, approached the SUV, and confronted and screamed at the driver as if there was going to be a fight. *Id.* at 54-55, 78-80, 85-87, 89. Andy Vela in his testimony denied that Josue armed himself with a gun before leaving their apartment and confronting Alex. Josue was shot 4 times (according to the ME) and the SUV left the parking lot. *Id.* at 55. A gunshot residue (GSR) test was performed on Josue and the results were that Josue may have discharged a firearm. (T - 136-137; R - v.3/7 - 174-175; R - v.4/7 - 95-96). The GSR test results are attached to the writ. *See* writ Exhibit E. A .45 caliber Ruger pistol belonging to Alex was seized and submitted to ballistics testing along with shell casings found at the scene of the shooting. (R - v.4/7 - 20-21, 23, 31-37). Two different caliber casings were found at the scene – .45 caliber casings and a .40 caliber casing. *Id.* at 78. The .40 caliber casing could not have been fired from the .45 caliber Ruger pistol. *See* Exhibit F at 2.

Alex testified at both phases of the trial. The following is taken from the opinion of the Fourth Court of Appeals on the direct appeal for this cause. *See* writ Exhibit C. The court described Alex's testimony during the guilt-innocence phase of trial as follows:

> During the guilt-innocence phase of trial, appellant testified on his own behalf. He said he and Randi Flores both worked for University Health System. Appellant said he and Randi were friends and that he had feelings for her. When he was told she was dating someone else, he was "bothered," but not upset. In the evening of May 13, 2010,

appellant drove to an apartment complex to see Randi. While in the parking lot of the complex, he asked Randi if she was "with Andy now," she replied "yes," and appellant said "okay" and then drove away.

At some point in the evening, appellant drove to another apartment in search of some of his belongings. He asked Alexa Alvarez if she had any of his clothes or shoes, she said she did not, and he asked if he could come inside to look. Alexa said no because she did not feel comfortable with him in her house without Randi. Appellant told Alexa he "and Randi aren't talking anymore. That's why I came back by myself." He left Alexa's house and drove around, but he testified he was not upset. A few hours later, he returned to the apartments where he had earlier spoken to Randi to meet with Randi's mother who said she had some of his belongings.

While waiting in his car for Randi's mother, he saw a truck and two cars full of people and he thought to himself, "Something like this is not good. . . . Be careful." Appellant said Josue walked up to appellant's car and asked "What the, 'blank,' are you doing? What the F are you doing back here?" Appellant said Josue had his hands in his pockets as he was walking, as if he were holding his pants up under his shirt. Appellant said he asked Josue if he had his "stuff," to which Josue replied "Yeah, I got something for you," and Josue pulled out a gun. Appellant said he then reached for his gun and started firing, and then he drove away. Appellant could not remember how many times he fired, and he said he was terrified. Appellant was arrested at approximately 3:00 a.m. the next morning. On cross-examination, appellant said he knew Josue and that Josue was a "good guy," but "if he wouldn't have did what he did, then I would never have done that." Appellant said he shot Josue because Josue pointed a gun at him and he felt justified in shooting Josue because he believed his own life was in danger.

Id.

The trial judge instructed the jury on the law of self-defense. (T - 144-156). The court's instructions are attached to this writ. *See* writ Exhibit G. The defense in closing argument stated that Alex had no motive to shoot Josue. (R - v.5/7 - 21). The defense stated that Alex had gone to the apartments to find his girlfriend, Randi. *Id.* Josue then came up to Alex since Josue was sent to the apartments to find Randi. *Id.* Josue had a gun and Alex shot Josue in self-defense. *Id.* at 22. Josue's gun was not found, but Alex kept his gun. *Id.* No one saw who actually shot Josue. *Id.*

The prosecutor made misleading statements to the jury. The prosecutor attempted to deflect the medical examiner's testimony that the shots Alex fired were from a distance of 5'-15' away and not the 3' the prosecutor repeatedly stated at trial. This was an attempt to neutralize the damning evidence that Alex's attacker had gunshot residue on both of his hands. The prosecutor also incorrectly claimed that Alex's attacker, a known 210 Orejones gang member, was a youth minister even though the truth was that he was not a youth minister and had bad character to which even one of the detectives stated Alex's attacker and friends were not good people. Alex's attacker did not have any type of divinity certificate or degree, never preached sermons, never took part in ministerial training, was armed with a gun and knife, associated with known drug dealers, and inquired where to find guns. These misleading statements resulted in several questions from the jury during deliberations.

The jury deliberated on guilt-innocence over a two-day period of time. (R - v.5 - 1, 33-40; R - v.6 - 1, 6). During this period of time, the jury sent out six notes. (R - v.5 - ;R - v.6 - 5-6). These notes are also attached to the writ as Exhibit H. In the first note, the jury wanted to see the different caliber shell casings. (R - v.5 - 33-34). In the second note, the jury wanted to hear the testimony regarding the different caliber shell casings. *Id.* at 34. In the third note, the jury again wanted to hear the testimony regarding the different caliber shell casings and that testimony was read back to the jury. *Id.* at 35-36. In the fourth note, the jury wanted to hear more specific testimony read back regarding the different caliber shell casings. *Id.* at 36. In the fifth note, the jury informed the trial judge that the jury was deadlocked and requested further guidance. *Id.* at 36-37. In the final question, the jury asked the judge to have re-read to the jury the testimony of Alex regarding Josue's possession of a gun at the time of the shooting. (R - v.6 - 5-6).

Key, crucial evidence was missed by trial defense counsel during pretrial preparation. No evidence was presented during trial regarding Josue's possession of a weapon on the night of the shooting. Defense counsel obtained the services of an investigator. *See* writ Exhibit I. The invoice of the investigator states that the investigator interviewed Alex, Alex's mother and father, Samantha Flores, Valerie Ingorvaia, and various people from the apartment. *Id.* The defense, however, failed to interview Jasmine Salinas. Had defense counsel interviewed Jasmine, counsel

would have discovered that Josue armed himself with a gun before leaving the apartment and confronting Alex in the apartment parking lot. *See* writ Exhibit J. Andy and Josue were both members of the street gang "210 Orejones." *Id.* After Josue was killed, a T-shirt with Josue's picture and "210 Orejones" was made as a memorial to Josue. *Id.* This means that Josue was a member of this gang at the time Josue was armed with a gun and confronted Alex in the apartment parking lot. *Id.* Jasmine was never interviewed by the police or by the defense prior to trial. *Id.* Jasmine was available to testify in this trial had she been subpoenaed to testify. *Id.*

Despite this evidence, the prosecutor made misleading statements to the jury. The prosecutor attempted to deflect the medical examiner's testimony that the shots Alex fired were from a distance of 5'-15' away and not the 3' the prosecutor repeatedly stated at trial. This was an attempt to neutralize the damning evidence that Alex's attacker had gunshot residue on both of his hands. The prosecutor also incorrectly claimed that Alex's attacker, a known 210 Orejones gang member, was a youth minister even though the truth was that he was not a youth minister and had bad character to which even one of the detectives stated Alex's attacker and friends were not good people. Alex's attacker did not have any type of divinity certificate or degree, never preached sermons, never took part in ministerial training, was armed with a gun and knife, associated with known drug dealers, and inquired where to find guns.

REASONS FOR GRANTING THE PETITION

The court of appeals has entered a decision in conflict with this Court. In *Buck v. Davis*, ___U.S.___, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017), this Court held that a court of appeals must determine if "jurists of reason could disagree with the district court's resolution of [the applicant's] constitutional claims or . . . could conclude the issues presented are adequate to deserve encouragement to proceed further" in ruling on whether or not to grant a certificate of appealability (COA). In the case at bar, the United States court of appeals failed to properly make this determination because the court merely made conclusory allegations as follows:

> In his COA motion, Johnson contends that his Sixth Amendment right to a public trial was violated because the public was excluded during voir dire; that trial counsel rendered ineffective assistance in failing to locate, interview, and call a witness at trial who would have provided testimony rebutting the testimony of a fact witness that the victim was unarmed; that trial counsel rendered ineffective assistance in failing to object to the closure of the courtroom to the public during voir dire; and that appellate counsel rendered ineffective assistance in failing to move for a new trial on the ground that Johnson's right to a public trial was violated by closure of the courtroom during voir dire.
>
> A COA movant must make "a substantial showing of the denial of a constitutional right" by demonstrating that reasonable jurists would find the district court's decision to deny relief with respect to these constitutional claims debatable or wrong or that reasonable jurists would conclude that his issues deserve encouragement to proceed

> further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Johnson has not made the required showing.
>
> Additionally, Johnson asserts that the district court erred in deferring to the state habeas court's findings of fact because the state habeas judge did not preside over Johnson's trial. Johnson has not shown "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The request for a COA is DENIED.

See order at Appendix A.

The following issues raised in this case were extensive and could not possibly have been properly resolved in the conclusory comments by the court below.

The Petitioner received ineffective assistance of counsel.

"[W]hen a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), *citing Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). The court below failed, in its bare bones conclusory statements, to make this required threshold inquiry into the underlying merit of the claims presented in the case at bar. Pursuant to 28 U.S.C. § 2253(c)(2), "a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Miller-El*. "A petitioner satisfies this standard

by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*

In determining whether to issue a COA, an appellate court must conduct an overview of the claims in the habeas petition and a general assessment of the claims' merits. *Id.* An appellate court will "look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Id.* The petitioner is not required to establish the appeal will succeed. *Id.* "Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.*

"A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Miller-El*. For the issuance of a COA, it is not required that the petitioner prove that some jurists would grant the habeas petition. *Id.* "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

Effective assistance of counsel is a right guaranteed by the Sixth Amendment of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this test, one must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.* Prejudice means there is a reasonable probability that but for counsel's acts or omissions, the outcome of the proceeding would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

This Court has conducted a materiality standard for a *Brady* claim which is the same showing required to demonstrate the above prejudice from counsel's deficient performance. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The reviewing court should view the favorable evidence and determine if it reasonably puts the whole case in such a different light so as to undermine confidence in the verdict. Id.; *See Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (suppressed impeachment evidence may have consequences for the case far beyond discrediting the witness' testimony). Materiality must be assessed in terms of the suppressed evidence considered as a whole, not item by item. *Kyles v. Whitley, supra*, 115 S.Ct. at 1567. Prejudice under *Strickland* should be considered in the same manner. *See also Westley v. Johnson*, 83 F.3d 714, 719 (5th Cir. 1996) (prejudice analysis should not focus on determination of outcome but on whether error ensures that the result of

the proceeding was fundamentally unfair or unreliable); *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

Thorough factual investigation is required for effective representation. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "It is not enough to assume that defense counsel thus precipitated into the case thought that there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts." *Id.* at 58; *See Strickland v. Washington, supra*, 466 U.S. at 691. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington, supra*, 104 S.Ct. at 2066; *see Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

The court below has previously discussed counsel's omissions as follows:

> Whether counsel's omission served a strategic purpose is a pivotal point in *Strickland* and its progeny. The crucial distinction between strategic judgment calls and plain omissions has echoed in the judgments of this court. For example, in *Nealy* we found counsel's performance deficient and stressed that at a post-conviction hearing, the defense counsel did not testify that such efforts would have been fruitless, nor did he claim that the decision not to

> investigate was part of a calculated trial strategy. He simply failed to make the effort. Counsel did not **choose**, strategically or otherwise, to pursue one line of defense over another. Instead, [he] simply abdicated his responsibility to advocate his client's cause.

Loyd v. Whitley, 977 F.2d 149, 158-159 (5th Cir. 1992), *cert. denied*, 508 U.S. 911, 113 S.Ct. 2343, 124 L.Ed.2d 253 (1993), *citing Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985)(emphasis in original).

Failure to interview witnesses or discover readily available evidence is an error in trial preparation, not trial strategy. "Tactical decisions must be made in the context of a reasonable investigation, not in a vacuum. 'It is not enough to assume that counsel . . . thought there was no defense, and exercised [his] best judgment . . . '" *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990), *citing Powell v. Alabama*, *supra*.

Failure to locate and interview and use crucial witness.

This was a very close case on the issue of guilt-innocence. The jury deliberated on guilt-innocence over a two-day period of time and sent six questions to the judge regarding not being able to agree on a verdict and requesting testimony be read back to the jury. (ROA.18-50408.1400, ROA.18-50408.1432 - ROA.18-50408.1437, ROA.18-50408.1440, ROA.18-50408.1444). The issue in this case was whether the Petitioner, Alex, shot the complainant, Josue, in self-defense.

Alex and Randi Flores were friends. (ROA.18-50408.800-802, ROA.18-50408.828-829). Randi, however, was dating Andy Vela. (ROA.18-50408.807, ROA.18-50408.886, ROA.18-50408.934). Andy Vela and Josue lived in the same apartment together. (ROA.18-50408.910 - ROA.18-50408.911, ROA.18-50408.931 - ROA.18-50408.932). On May 13, 2010 at approximately 7:30 p.m., Alex was at Randi's apartment attempting to find Randi but left since Randi was not home. (ROA.18-50408.803 - ROA.18-50408.804). Later that day, a black SUV that appeared to belong to Alex was driving slowly through the apartment parking lot. (ROA.18-50408.809). Josue came out of his apartment, approached the SUV, and confronted and screamed at the driver as if there was going to be a fight. (ROA.18-50408.809 - ROA.18-50408.810, ROA.18-50408.833 - ROA.18-50408.835, ROA.18-50408.840 - ROA.18-50408.842, ROA.18-50408.844).

Andy Vela in his testimony denied that Josue armed himself with a gun before leaving their apartment and confronting Alex. Josue was shot 4 times (according to the ME) and the SUV left the parking lot. (ROA.18-50408.810). A gunshot residue (GSR) test was performed on Josue and the results were that Josue may have discharged a firearm since he was 5'-15' away when shot. (ROA.18-50408.929 - ROA.18-50408.930, ROA.18-50408.1039 - ROA.18-50408.1040, ROA.18-50408.1063 - ROA.18-50408.1064). The GSR test results are attached to the writ as

Exhibit E. (ROA.18-50408.1250 - ROA.18-50408.1252). A .45 caliber Ruger pistol belonging to Alex was seized and submitted to ballistics testing along with shell casings found at the scene of the shooting. (ROA.18-50408.988 - ROA.18-50408.991, ROA.18-50408.999 - ROA.18-50408.1005). Two different caliber casings were found at the scene – .45 caliber casings and a .40 caliber casing. (ROA.18-50408.1046). Exhibit F attached to the writ stated that the .40 caliber casing could not have been fired from the .45 caliber Ruger pistol. (ROA.18-50408.1253 - ROA.18-50408.1255). It is clear that Josue was armed with a knife. (ROA.18-50408.955).

Despite these facts, the prosecutor made misleading statements to the jury. The prosecutor attempted to deflect the medical examiner's testimony that the shots Alex fired were from a distance of 5'-15' away and not the 3' the prosecutor repeatedly stated at trial. This was an attempt to neutralize the damning evidence that Alex's attacker had gunshot residue on both of his hands. The prosecutor also incorrectly claimed that Alex's attacker, a known 210 Orejones gang member, was a youth minister even though the truth was that he was not a youth minister and had bad character to which even one of the detectives stated Alex's attacker and friends were not good people. Alex's attacker did not have any type of divinity certificate or degree, never preached sermons, never took part in ministerial training, was armed with a gun and knife, associated with known drug dealers, and inquired where to find guns.

No evidence was presented during trial regarding Josue's possession of a firearm on the night of the shooting. It is unreasonable to assume that simply because no firearm was found at the scene that Alex was not threatened. Not finding a weapon at the scene does not automatically abolish a determination that a weapon was used or present at some point during the incident. Evidence exists in this case to prove that the deceased had a weapon. There was GSR on both of his hands and he was 5'-15' from Alex when shot. There was also a .40 caliber spent shell casing found at the scene, and the gun in Alex's possession was a .45. The federal habeas judge relied upon the findings of the state habeas judge regarding this issue. There should be no presumption of correctness, however, regarding the finding by the state habeas judge that the defense adequately investigated this case and that several witnesses, who stated they were available to testify at trial and were not interviewed by the defense, were not available at the time of trial. This was an unreasonable determination of the facts as the following demonstrates.

Alex testified at both phases of the trial. The following is taken from the opinion of the Fourth Court of Appeals on the direct appeal for this cause. (ROA.18-50408.1243 - ROA.18-50408.1244). The court described Alex's testimony during the guilt-innocence phase of trial as follows:

> During the guilt-innocence phase of trial, appellant testified on his own behalf. He said he and Randi Flores

both worked for University Health System. Appellant said he and Randi were friends and that he had feelings for her. When he was told she was dating someone else, he was "bothered," but not upset. In the evening of May 13, 2010, appellant drove to an apartment complex to see Randi. While in the parking lot of the complex, he asked Randi if she was "with Andy now," she replied "yes," and appellant said "okay" and then drove away.

At some point in the evening, appellant drove to another apartment in search of some of his belongings. He asked Alexa Alvarez if she had any of his clothes or shoes, she said she did not, and he asked if he could come inside to look. Alexa said no because she did not feel comfortable with him in her house without Randi. Appellant told Alexa he "and Randi aren't talking anymore. That's why I came back by myself." He left Alexa's house and drove around, but he testified he was not upset. A few hours later, he returned to the apartments where he had earlier spoken to Randi to meet with Randi's mother who said she had some of his belongings.

While waiting in his car for Randi's mother, he saw a truck and two cars full of people and he thought to himself, "Something like this is not good. . . . Be careful." Appellant said Josue walked up to appellant's car and asked "What the, 'blank,' are you doing? What the F are you doing back here?" Appellant said Josue had his hands in his pockets as he was walking, as if he were holding his pants up under his shirt. Appellant said he asked Josue if he had his "stuff," to which Josue replied "Yeah, I got something for you," and Josue pulled out a gun. Appellant said he then reached for his gun and started firing, and then he drove away. Appellant could not remember how many times he fired, and he said he was terrified. Appellant was arrested at approximately 3:00 a.m. the next morning. On cross-examination, appellant said he knew Josue and that Josue was a "good guy," but "if he wouldn't have did what

> he did, then I would never have done that." Appellant said he shot Josue because Josue pointed a gun at him and he felt justified in shooting Josue because he believed his own life was in danger.

Id.

The trial judge instructed the jury on the law of self-defense. (ROA.18-50408.1260 - ROA.18-50408.1263). The court's instructions are attached to the writ at Exhibit G. (ROA.18-50408.1256 - ROA.18-50408.1269). The defense in closing argument stated that Alex had no motive to shoot Josue. (ROA.18-50408.1420). The defense stated that Alex had gone to the apartments to find his girlfriend, Randi. *Id.* Josue then came up to Alex since Josue was sent to the apartments to find Randi. *Id.* Josue had a gun and Alex shot Josue in self-defense. (ROA.18-50408.1421). Josue's gun was not found, but Alex kept his gun. *Id.* No one saw who actually shot Josue. *Id.* Alex never threw away his weapon, even though he had the chance, which indicates that Alex acted in self-defense.

The jury deliberated on guilt-innocence over a two-day period of time. (ROA.18-50408.1400, 1432-1439, ROA.18-50408.1440, 1446). During this period of time, the jury sent out six notes. (ROA.18-50408.1271 - ROA.18-50408.1277). In the first note, the jury wanted to see the different caliber shell casings. *Id.* In the second note, the jury wanted to hear the testimony regarding the different caliber shell casings. *Id.* In the third note, the jury again wanted to hear the testimony regarding

the different caliber shell casings and that testimony was read back to the jury. *Id.* In the fourth note, the jury wanted to hear more specific testimony read back regarding the different caliber shell casings. *Id.* In the fifth note, the jury informed the trial judge that the jury was deadlocked and requested further guidance. *Id.* In the final question, the jury asked the judge to have re-read to the jury the testimony of Alex regarding Josue's possession of a gun at the time of the shooting. *Id.*

There is a reason the jury sent out these notes. Key, crucial evidence was missed by trial defense counsel during pretrial preparation. No evidence was presented during trial regarding Josue's possession of a weapon on the night of the shooting. Defense counsel obtained the services of an investigator as shown in writ Exhibit I. (ROA.18-50408.1278 - ROA.18-50408.1279). The invoice of the investigator states that the investigator interviewed Alex, Alex's mother and father, Samantha Flores, Valerie Ingorvaia, and various people from the apartment. *Id.*

The defense, however, failed to interview Jasmine Salinas. Had defense counsel interviewed Jasmine, counsel would have discovered that Josue armed himself with a gun before leaving the apartment and confronting Alex in the apartment parking lot as shown in writ Exhibit J. (ROA.18-50408.1280 - ROA.18-50408.1281). The finding by the state habeas judge that the defense adequately investigated this case and that several witnesses, who stated they were available to testify at trial and were not

interviewed by the defense, were not available at the time of trial is an unreasonable determination of the facts. (ROA.18-50408.85). The federal habeas judge relied upon these unreasonable factual determinations in denying relief. (ROA.18-50408.147 - ROA.18-50408.150). The Respondent, in its answer to the federal writ, presumed that the defense investigator did an adequate job in locating witnesses, but this assumption is incorrect. ((ROA.18-50408.120 - ROA.18-50408.121). Writ Exhibit I reveals that witnesses located by the investigator were witnesses for the prosecution, and it is unreasonable to assume that they would have given testimony favorable to the defense. (ROA.18-50408.1278 - ROA.18-50408.1279). Writ Exhibit J reveals that some were friends of the deceased and others were neighbors who would have been intimidated by the deceased and his roommates' gang affiliation. (ROA.18-50408.1280 - ROA.18-50408.1281). Gang activity was still active in the apartment complex at the time this incident occurred.

The Respondent admitted that Jasmine Salinas heard from Andy Vela that the complainant armed himself with a gun prior to confronting the Petitioner. (ROA.18-50408.120). The Respondent then claimed that Jasmine's testimony, had defense counsel attempted to find her, would have been hearsay and therefore inadmissible so no harm in failing to find Jasmine. *Id.* This misses the point. Andy Vela told Jasmine that Vela saw the complainant, Josue, arm himself with a gun prior to confronting the

Petitioner. *Id.* Andy Vela in his testimony at trial, however, denied that Josue armed himself with a gun before leaving the apartment and confronting Alex. It is clear that Josue was armed with a knife. (ROA.18-50408.955). Vela was present at the location throughout the entire evening of the incident and was with the complainant just prior to the complainant walking out to the parking lot.

The testimony by Jasmine, that Vela told her Vela saw the complainant leave with a gun prior to confronting the Petitioner, would have been a prior inconsistent statement pursuant to Texas Rule of Evidence 613. Even defense counsel admitted the importance of such testimony when defense counsel stated, "However, I do agree with Applicant that testimony from a witness stating the victim had a gun and was threatening him would have made a difference in the result of his trial." (ROA.18-50408.800-117 - 118). Defense counsel also admitted that the witnesses knew each other. *Id.*

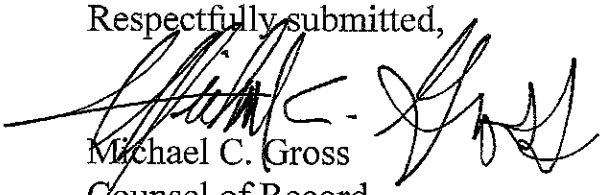
Andy and Josue were both members of the street gang "210 Orejones." (ROA.18-50408.1280 - ROA.18-50408.1281). After Josue was killed, a T-shirt with Josue's picture and "210 Orejones" was made as a memorial to Josue. *Id.* This means that Josue was a member of this gang at the time Josue was armed with a gun and confronted Alex in the apartment parking lot. *Id.* Jasmine was never interviewed by the police or by the defense prior to trial. *Id.* Jasmine was available to testify in this trial had she been subpoenaed to testify. *Id.*

The performance of defense counsel was deficient by failing to interview and call Jasmine as a witness at trial. This deficient performance prejudiced the defense by preventing the jury from hearing key, crucial evidence that Alex acted in self-defense after Josue armed himself with a gun prior to confronting Alex in the apartment parking lot. Additionally, this crucial evidence would have been of great importance to the judge in determining a sentence in this cause. Without this additional sentencing evidence, the Petitioner was assessed the maximum possible sentence – life in prison. The Petitioner should receive a new trial or, in the alternative, a new sentencing hearing. The court below failed to make a proper inquiry into the underlying merit of the claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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