APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-84,066-01

EX PARTE JUAN BALDERAS

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. 1412826 IN THE 179TH DISTRICT COURT HARRIS COUNTY

Per curiam.

O R D E R

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

The victim, Eduardo Hernandez, was a member of the La Tercera Crips ("LTC") street gang in Houston, but had stopped associating with them after he had "snitched" on a fellow gang member to the police. Applicant was also a member of the LTC and was the one who brought Hernandez into the gang. In early December 2005, senior members of the LTC held a meeting where those in attendance agreed that Hernandez needed to be

killed. Although they did not expressly select an individual to kill him, everyone understood that Hernandez was applicant's responsibility because he had introduced Hernandez to the LTC.

On December 6, 2005, at approximately 9:45 p.m., Durjan Decorado was in his apartment with his cousin and friends Karen Bardales, Wendy Bardales, Edgar Ferrufino, and Hernandez. A gunman came into the apartment and fired his gun as he ran around the living room. He eventually stopped, stood over Hernandez, and shot Hernandez in the back and head multiple times. Wendy later identified applicant as the shooter. At the time of his arrest, Applicant was in possession of the murder weapon.

In February 2014, a jury found applicant guilty of the offense of capital murder. At punishment, the jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Balderas v. State*, 517 S.W.3d 756 (Tex. Crim. App. 2016).

Applicant presents fourteen allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial court held an evidentiary hearing, and entered findings of fact and conclusions of law and recommended that the relief sought be denied.

This Court has reviewed the record with respect to the allegations made by applicant. The portion of claim 5 in which applicant complains his right to a fair trial was

violated because of an incident in which applicant's brother waved at the jury when their bus passed is procedurally barred because that issue was raised and rejected on direct appeal. *Balderas*, 517 S.W.3d at 782-91; *see also Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006) (holding that claims that have already been raised or rejected are not cognizable). Claim 10 in which applicant complains his equal protection rights were violated by the parties agreeing to strike numerous prospective jurors without questioning them is also procedurally barred because habeas is not a substitute for matters which should have been raised on direct appeal. *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004) (holding that even a constitutional claim is forfeited if the applicant had an opportunity to raise the issue on appeal).

In claims 1 and 2, applicant contends that his due process rights were violated when the State obtained a guilty verdict through the use of false evidence. Specifically, applicant alleges that the testimony of State's witness Israel Diaz was "concocted by the State." The trial court held a hearing and considered affidavits to determine if Diaz was recanting his trial testimony, whether Diaz was pressured by the State pre-trial to change his testimony, and whether Diaz testified falsely under oath. Based upon the record, applicant fails to support his claims with adequate facts as the evidence before us contradicts his allegation that Diaz provided false testimony. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

In claim 3, applicant complains that his due process rights were violated when the

State failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, applicant alleges that the State failed to disclose handwritten notes from the State's pre-trial interviews with Diaz. However, applicant must do more than state mere conclusions of law or allegations of error; applicant must support his claim with adequate facts. *Ex parte Maldonado*, 688 S.W.2d at 116. Applicant fails to do so here and the evidence before us shows that the complained-of notes were contained within the State's file and were reviewed by defense counsel in preparation for trial.

In claims 4, 6, 8, and 9 applicant contends that trial counsel were ineffective for the following reasons: (1) at the guilt/innocence phase: failure to investigate and prepare the defense case, failure to present eye-witness-identification expert testimony, and failure to investigate juror misconduct; (2) at the punishment phase: failure to investigate extraneous offenses, failure to investigate and prepare the mitigation case, failure to object to the trial court's denial of funding to transport witnesses from Mexico, failure to object to the State's questioning and jury argument allegedly attacking applicant's failure to testify, and defense counsels' behavior and alleged alienation of the jury; (3) failure to timely and competently assert applicant's right to a speedy trial; and (4) at jury selection: failure to address the topic of sexual abuse to determine if jurors would find it to be potentially mitigating, and failing to preserve the record regarding the reasons for the parties agreements to excuse a large number of prospective jurors without questioning them. Applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668

(1984). He fails to show by a preponderance of the evidence that his counsels' representation fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Id.* at 689.

In the remainder of claim 5, applicant alleges that his right to a fair trial was violated because his jury was "exposed to multiple external influences and engaged in rampant misconduct that tainted the verdict." Specifically, applicant complains that the jury was housed at a hotel near the crime scene on their first night of sequestration, and that a juror made several Facebook entries— beginning during jury selection through the end of his service as a juror. Concerning the hotel accommodations, applicant fails to do more than state mere conclusions of law or allegations of error; the evidence before us fails to show by a preponderance of the evidence that applicant was prejudiced or that the results of his trial were affected. *See Ex parte Maldonado*, 688 S.W.2d at 116. Applicant also fails to show that he was prejudiced by the Facebook posts or that he was denied a fair and impartial trial. *See Ocon v. State*, 284 S.W.3d 880, 885 (Tex. Crim. App. 2009)(holding that a defendant is not entitled to a mistrial after defense counsel overheard juror's phone conversation with unknown person because there was not evidence the juror was biased as a result of the improper conversation).

Additionally, in claim 5, applicant alleges that jurors failed to follow the trial court's instructions when they engaged in premature discussion of the evidence and relied upon their own expertise. However, we are unable to consider the merits of applicant's

allegations of juror misconduct concerning deliberations. Texas Rule of Evidence 606(b) prohibits testimony or other evidence regarding "any matter or statement occurring during the jury's deliberations" except that a juror may testify regarding outside influences or to rebut a claim that a juror was not qualified to serve. As this allegation concerns neither an "outside influence" or juror qualifications, the jurors' affidavits on this subject are not properly before the Court.

In claim 7, applicant contends that his due process rights were violated when the State obtained his death sentence through the use of the false or misleading testimony of punishment-phase witness Christopher Pool. However, applicant fails to demonstrate that that Pool's testimony was false and material to the jury's verdict. *See Ex parte Weinstein*, 421 S.W.3d 656, 665-66 (Tex. Crim. App. 2014)(holding applicant must show by a preponderance of the evidence that the testimony was, in fact, false and that the testimony was material—that there was "a reasonable likelihood that the false testimony affected the judgment of the jury."); *see also Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011)(holding that testimony is material if there is a "reasonable likelihood" the false testimony affected the jury's judgment).

In claims 11 through 14, applicant challenges the constitutionality of various aspects of Texas Code of Criminal Procedure Article 37.071: the constitutionality of the "10-12" rule, that the first special issue is unconstitutionally vague, that the punishment phase jury instructions restricted the evidence the jury could determine as mitigating, and

that Texas's capital punishment scheme is arbitrarily imposed. These claims have been repeatedly rejected by this Court and applicant raises nothing new to persuade us to reconsider those holdings. *See Davis v. State*, 313 S.W.3d 317, 354-55 (Tex. Crim. App. 2010)("10-12" rule, arbitrarily imposed capital punishment scheme); *Coble v.State*, 330 S.W.3d 253, 297 (Tex. Crim. App. 2010)(vague first special issue, restriction of evidence that can be considered mitigating).

Based upon the trial court's findings and conclusions and our own review, we deny relief.

IT IS SO ORDERED THIS THE 18th DAY OF DECEMBER, 2019.

Do Not Publish

APPENDIX B

CAUSE NO. 1412826-A

EX PARTE	§	IN THE 179th DISTRICT COURT
	§	OF
JUAN BALDERAS, Applicant	§	HARRIS COUNTY, TEXAS

COURT'S FINDINGS OF FACT & CONCLUSIONS OF LAW, AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus and associated exhibits; the State's Original Answer and associated exhibits; testimony presented at a post-conviction evidentiary hearing; arguments of counsel; and official court documents, filings, and records in cause nos. 1412826 and 1412826-A; makes the following findings of fact and conclusions of law in cause no. 1412826-A:

I.
FINDINGS OF FACT

1. The applicant, Juan Balderas, was indicted and convicted of the felony offense of capital murder in cause no. 1412826[1] in the 179th District Court of Harris County, Texas, for the murder of Eduardo "Powder" Hernandez, hereinafter called the complainant.

2. The applicant was represented during trial by attorneys Jerome Godinich, Jr., Alvin Nunnery, Robert Scott, and Scott Shearer.

3. Voir dire commenced on January 13, 2014, and concluded on February 7, 2014. (IV R.R. to XXI R.R.) On February 12, 2014, the trial court held a hearing on the applicant's motion for speedy trial. The Court denied the applicant's motion that same day. (XXII R.R.) Mr. Balderas was arraigned on February 17, 2014, and he entered a plea of not guilty. (XXIV R.R. 11). The guilt/innocence phase of the applicant's trial began later that same day. (XXIV R.R. 16). On February

[1] This offense was originally indicted as cause no. 1064857, then re-indicted as cause no. 1299912, and ultimately re-indicted as cause no. 1412826.

25, 2014, both sides presented closing arguments, and the case was submitted to the jury for guilt/innocence determination. (XXX R.R. 5-64).

4. On February 27, 2014, the jury found the applicant guilty as charged in the indictment (XXXII R.R. at 11).

5. On March 14, 2014, after the jury affirmatively answered the first special issue and negatively answered the mitigation special issue, the trial court assessed the applicant's punishment at death by lethal injection (XLIV R.R. at 8-12).

6. On November 2, 2016, the Court of Criminal Appeals affirmed the applicant's conviction in a published opinion. *Balderas v. State*, 517 S.W.3d 756 (Tex. Crim. App. 2016)(reh'g dism'd).

FIRST AND SECOND GROUNDS FOR RELIEF:
STATE'S ALLEGED PRESENTATION OF FALSE EVIDENCE
THROUGH WITNESS ISRAEL DIAZ

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7. Israel "Cookie" Diaz is a self-admitted former member of the La Tercera Crips ("LTC") criminal street gang, who at the time of the applicant's trial had been in the Harris County Jail for over seven years on unrelated aggravated robbery and capital murder charges (XXVI R.R. at 121-22, 126, 132-33).

8. Between 2007 and the applicant's trial in 2014, Diaz spoke with prosecutors assigned to the applicant's case on multiple occasions in the presence of his attorneys (XXVI R.R. at 124-26).

9. Attorney Roland Moore originally represented Diaz, but was forced to withdraw for health reasons, and Diaz was subsequently represented by Allen Isbell and David Bires (*Id.* at 163-65).

10. The Court finds handwritten notes now marked as the Applicant's Exhibit 57, are 23 pages of handwritten notes from pretrial interviews prosecutors Caroline Dozier and George Weissfisch conducted with Diaz in 2007 and 2008. *Infra* at *Third Ground for Relief*, nos. 75, 82.

11. The Court finds prosecutor Traci Bennett created typed notes from pretrial interviews she conducted with Diaz on January 27, 2014 and February 14, 2014 (II Post-Conviction Writ Status Conference—May 2, 2018 at 58); *Applicant's Motion to Supplement the Record and to Expand the Evidentiary Hearing* at Exhibit B (p.10-12).

12. The Court finds former prosecutor Spence Graham prepared a capital murder summary in the applicant's case dated April 27, 2011 which was an in-house report summarizing "the essential facts of the case ... and contemplat[ing] on ... all those things that would go into the determination on whether to certify it as capital and seek the death penalty[,]" and which included proffered testimony from Israel Diaz (II Post-Conviction Writ Status Conference—May 2, 2018 at 9); *Applicant's Motion to Supplement the Record and to Expand the Evidentiary Hearing* at Exhibit B (p.1-9).

13. The Court finds the capital murder summary in the applicant's case does not incorporate any disclosures made by Diaz subsequent to April 27, 2011.

14. On February 19, 2014, Diaz testified as a State's witness in the applicant's trial (XXVI R.R. at 118-96).

15. In exchange for Diaz's truthful testimony in the applicant's trial, as well as in future trials of LTC members Efrain Lopez and Jose Hernandez, the State agreed to reduce Diaz's capital murder charge to an aggravated robbery, and allow Diaz to concurrently plead guilty to the trial court on both charges without a recommendation on punishment from the State (*Id.* at 122-24).

16. Two days prior to his testimony in the applicant's case, Diaz pleaded guilty to both charges against him, and at the time of his trial testimony, was awaiting sentencing by the trial court judge (*Id.* at 122-23).

17. At trial, Diaz testified the applicant sponsored the complainant's membership in LTC, and the complainant was "cliqued in" as a member of LTC (*Id.* at 137-38).

18. At trial, Diaz testified that in 2004, he stole a car at gunpoint; loaned the stolen car to the complainant; the police stopped the complainant in the stolen car; the complainant told police he had gotten the car from Diaz; and Diaz was subsequently charged with aggravated robbery (*Id.* at 139-42).

19. At trial, Diaz testified he was released on bond in his aggravated robbery case in April 2005, and three weeks later, he spoke with the complainant and discouraged the complainant from cooperating with the police in the case (*Id.* at 143-44).

20. At trial, Diaz testified that although he believed he had the situation with his pending aggravated robbery charge and the complainant under control, Diaz and other LTC members were upset with the complainant for speaking with the police and no longer wanted the complainant in LTC (*Id.* at 141, 145).

21. At trial, Diaz testified the complainant's relationship with LTC members further deteriorated when the complainant was seen associating with rival gang members and photographs were discovered of the complainant "throwing" rival gang signs (*Id.* at 147-50).

22. At trial, Diaz testified that three to four days prior to the complainant's murder, LTC members held a meeting where they voiced their opinions about how to deal with the complainant's behavior (*Id.* at 151-53).

23. At trial, Diaz testified he did not care what happened to the complainant, but preferred that whatever happened be delayed until after the resolution of Diaz's aggravated robbery case so he would not be a suspect (*Id.* at 154).

24. At trial, Diaz testified he first learned that something had happened to the complainant when Efrain Lopez called him at home (*Id.* at 155, 184).

25. At trial, Diaz testified that after receiving Lopez's call, he drove to the home of twins Pedro and Alejandro Garcia, where he met several other LTC members and associates, and learned the complainant had been killed (*Id.* at 151, 157).

26. At trial, Diaz testified that from the Garcia (or twins') house, he and several others drove to a location across the street from the crime scene, where he saw an ambulance and police vehicles, as well as the applicant standing several feet away (*Id.* at 157-59).

27. At trial, Diaz testified the applicant was wearing a dark blue or black sweater-like shirt and khaki pants at the crime scene (*Id.* at 159).

28. At trial, Diaz testified the applicant approached him and the other LTC members who had driven to the crime scene, hugged each of them in a joyful manner, and gave Diaz a kiss on the cheek, which Diaz considered unusual (*Id.* at 159).

29. At trial, Diaz testified that when the applicant gave him a kiss on the cheek, the applicant said something which "basically, just took credit for the whole thing... he said he got him, he finally got him" (*Id.* at 160).

30. At trial, Diaz testified the applicant had a silver handgun, which Diaz had seen on many occasions, and was exchanging the magazine when Diaz interacted with him across from the crime scene (*Id.* at 160-61).

31. The Court finds (a) the proffered testimony contained in the State's capital murder summary, (b) the information contained in the 23 pages of pretrial notes now marked as the Applicant's Exhibit 57, and (c) the information contained in Bennett's typed pretrial interview notes, are materially consistent with Diaz's testimony at the applicant's trial regarding the applicant's involvement in and the circumstances surrounding the complainant's murder. The Court further finds that any inconsistencies are immaterial.

32. Bennett's typed pretrial interview notes reflect that after the complainant's murder, the applicant hugged and kissed Diaz at the twins' house and said "I got him," whereas at trial Diaz testified the applicant hugged and kissed him and said the applicant "got him" across from the crime scene; the Court finds the location of the applicant's conduct is immaterial to the nature of the conduct and the substance of the disclosure (XXVI R.R. at 159-60); *Motion to Supplement the Record and to Expand the Evidentiary Hearing* at Exhibit B (p.9).

33. Contrary to the applicant's habeas assertions of a trial-day or forced fabrication, the Court finds Bennett's typed pretrial interview notes with Diaz reflect that prior to trial, Diaz informed the State of the applicant's confession; the applicant's embrace and kiss on the cheek; and that other LTC members wanted to drive through the apartment complex where the shooting had occurred. *Applicant's Motion to Supplement the Record and to Expand the Evidentiary Hearing* at Exhibit B (p.10-12).

34. On May 11, 2018, this Court held an evidentiary hearing to assist the Court in resolving the issue of whether the State either knowingly or unknowingly presented false testimony at trial through Israel Diaz, and with the intention of permitting the applicant to present the testimony of Israel Diaz specific to whether Diaz was recanting his trial testimony; whether Diaz was pressured by the State pretrial to change his testimony; and whether Diaz testified falsely under oath at the applicant's trial. *See State's Proposed Supplemental Order Designating Issues to Be Resolved Via Evidentiary Hearing.*

35. On May 11, 2018, Israel Diaz testified under oath at a post-conviction evidentiary hearing in the applicant's case in the presence of Diaz's court-appointed attorney, Genesis Draper (IV Post-Conviction Writ Evidentiary Hearing—May 11, 2018 at 126-217).

36. The Court finds that at no point during the post-conviction evidentiary hearing did Diaz recant his original trial testimony (*Id.*).

37. The Court finds that at no point during the post-conviction evidentiary hearing did Diaz admit to previously recanting his trial testimony (*Id.*).

38. The Court finds that at the post-conviction evidentiary hearing, Diaz testified he had testified truthfully at the applicant's trial (*Id.* at 186).

39. At the post-conviction evidentiary hearing, Diaz testified he was not scared when he testified in the applicant's trial and was not concerned that he himself would face the death penalty (*Id.* at 135-38).

40. The Court finds Diaz's post-conviction evidentiary testimony regarding the complainant's murder was credible, was materially consistent with his trial testimony, and with the State's summation of Diaz's proffered testimony in the capital murder summary and pretrial interview notes with Diaz.

41. At the post-conviction evidentiary hearing, Diaz provided the following testimony regarding his pretrial interactions with the State:

    a. the State reached out to him in regards to testifying in the applicant's trial, gave him the option of testifying, and put the final decision to testify in his hands (*Id.* at 132, 139, 160, 184, 189, 200-01);

b. he went through a period where he did not want to cooperate with or testify for the State (*Id.* at 145-46);

c. he reached back out to the State after the State contacted him (*Id.* at 132);

d. the State never pressured him into testifying at the applicant's trial, nor did he feel forced to do it (*Id.* at 160-61, 189);

e. the State never pressured or coerced him to testify to anything other than the truth at the applicant's trial (*Id.* at 186);

f. the prosecutor told him he needed to "[c]hange the way I express myself verbally, like when I used profanity and slang" but that the prosecutor did not instruct him to change the content of his testimony (*Id.* at 145-46, 148); and

g. prosecutors did not coach him on what to say at trial (*Id.* at 146-47).

42. At the post-conviction evidentiary hearing, the applicant sought to impeach Diaz's credibility by introducing evidence regarding: Diaz's alleged involvement in an extraneous offense; information Diaz gave the police regarding an individual named Jose Luviano; statements Diaz made during an interview with police Sergeant Edward Gonzalez; and statements Diaz allegedly made to an individual named Monica Esquivel (IV Post-Conviction Writ Evidentiary Hearing—May 11, 2018 at 175-81, 214-16).

43. The Court finds that at the post-conviction evidentiary hearing, the applicant misconstrued Diaz's statements to Sergeant Gonzalez in an attempt to unsuccessfully impeach Diaz, and that Diaz consistently told Sergeant Gonzalez he was not involved in the Loma Vista murder because he was out of town at the time of that offense (*Id.* at 178-79, 207-10).

44. The Court finds the applicant failed to provide any post-conviction testimony (either live or via affidavit) from Monica Esquivel.

45. At the post-conviction evidentiary hearing, the applicant argued Jose Luviano was charged with murder as a result of statements Diaz made to the police; however, the Court finds the applicant's assertions regarding the State's charging decision are speculative and irrelevant (*Id.* at 175-81, 214-16).

46. At the post-conviction evidentiary hearing, Diaz provided the following testimony regarding his interaction with the applicant's habeas investigator Adrian de la Rosa:

    a. de la Rosa unexpectedly visited Diaz in custody (*Id.* at 134, 190);

    b. de la Rosa allegedly introduced himself as an attorney (*Id.* at 191, 204, 210-11);

    c. Diaz originally thought de la Rosa was an attorney assigned to help him with his parole (*Id.* at 204, 211);

    d. Diaz had a 15 minute conversation with de la Rosa which "was not enough to discuss a very serious case" (*Id.* at 158, 198);

    e. Diaz rushed the meeting with de la Rosa because Diaz wanted to go to his family visit (*Id.* at 135, 198-99);

    f. de la Rosa did not give Diaz anything to review (*Id.* at 204);

    g. towards the end of their meeting, de la Rosa took notes (*Id.* at 191, 203);

    h. at de la Rosa's insistence and instruction that Diaz "wasn't even going to be in trouble and it would help Balderas anyway" and believing that he would be paroled in a few months, Diaz wrote a short statement in his own words for de la Rosa (*Id.* at 142, 205-206);

    i. de la Rosa did not return for a second visit or bring an affidavit for Diaz to sign (*Id.* at 205, 212); and

    j. the words contained in de la Rosa's proffered affidavit (Applicant's Exhibit 7) are not Diaz's words (*Id.* at 142).

47. At the post-conviction evidentiary hearing, Diaz provided the following testimony relating to the handwritten statement he provided habeas investigator De la Rosa:

    a. in the statement, Diaz wrote he felt pressured to cooperate with the State, wanted to end the situation as soon as possible, and felt as if the prosecutors put him on the spot (*Id.* at 159);

b. Diaz explained he "felt pressured by the circumstance, but I never mentioned the government pressured me or the prosecutors forced me. I just felt the pressure of not having any response for seven years, eight years" (*Id.* at 160);

c. Diaz believed that after eight-and-half years of being in custody awaiting the resolution of his own charges, he "felt like [he] had a right to either go to trial and get a plea deal...instead of resetting and resetting" but that he was "not desperate" to get out of custody (*Id.* at 128, 130, 136);

d. Diaz expressed he never felt pressure to testify against the applicant because "that was just decision making," but that after spending so much time in custody awaiting the resolution of his own case, he just "felt the pressure of the case" and "the pressure of the unknown" waiting to know his own fate (*Id.* at 201-202, 213); and

e. Diaz clarified the State did not "put me on the spot to testify against [the applicant]," and his use of the phrase "put me on the spot" meant that he was caught off-guard "when I was not expecting their visit, they just showed up with my attorney" (*Id.* at 140, 160, 185, 199-200, 213).

48. At the post-conviction evidentiary hearing, Diaz denied and refuted making the following statements to habeas investigator de la Rosa:

a. that the applicant had not confessed to the complainant's murder (*Id.* at 182-83);

b. that he had not seen the applicant at the "Corporate projects" the day the complainant was killed (*Id.* at 183);

c. that he had lied (*Id.* at 183);

d. that he had lied because he felt pressured by the prosecutors (*Id.* at 183);

e. that had lied because he needed to get out of prison (*Id.* at 183);

f. that prosecutors told him to change his testimony to reflect that the applicant had confessed to committing the murder to Diaz (*Id.* at 146);

g. that prosecutors instructed him to testify at trial that the applicant confessed to murdering the complainant (*Id.* at 147);

h. that the reason he did not testify against Efrain Lopez was because he felt guilty about the testimony he gave against the applicant (*Id.* at 154);

i. that there were things he would not put into writing for de la Rosa (*Id.* at 157);

j. that he was afraid his statements would later be used against him (*Id.* at 157-58); and

k. that he would not sign an affidavit because he wanted to speak with an attorney first (*Id.* at 212).

49. On May 11, 2018, Adrian de la Rosa testified at a post-conviction evidentiary hearing in the applicant's case (*Id.* at 218-78, 288-90);

50. Over the State's objection, de la Rosa testified at the post-conviction evidentiary hearing that Diaz told him the District Attorney's Office pressured him to lie at the applicant's trial and told him he needed to say the applicant killed the complainant (*Id.* at 223-24).

51. During de la Rosa's testimony, the Court clarified the purpose of the evidentiary hearing was "focused on whether or not there's an intent or desire to recant the [Israel Diaz] testimony" not whether what Diaz said at trial was truthful or untruthful (*Id.* at 228).

52. At the post-conviction evidentiary hearing, de la Rosa testified:

a. he is a post-conviction investigator with the Office of Capital and Forensic Writs, doing both mitigation and fact investigation, although he lacks any formalized training and is not certified by the Texas Commission on Law Enforcement ("TCOLE") as an investigator (*Id.* at 218, 236);

b. he has a law degree, but is not a licensed lawyer (*Id.* at 220, 236);

c. he "enjoy[s] building mitigation stories" (*Id.* at 220, 235-36);

d. he went to Pam Lychner State Jail to speak with Israel Diaz on October 23, 2015 without providing Diaz any advance notice (*Id.* at 221-22, 240-42);

e. he had not reviewed the trial testimony prior to visiting Diaz and could not recall what he had reviewed or if he had reviewed the State's evidence presented against the applicant, despite previously stating his office had

received the State's voluminous case file on October 21, 2015, and he was able to review the file, develop Diaz as a person of interest to the investigation, and arrange a jail visit with the requisite 24-hour notice by October 23, 2015 (*Id.* at 246-47, 249-51);

f. he conceded it would be important to become familiar with a case before interviewing a critical witness, however he had not do so (*Id.* at 249-51);

g. he failed to tape-record his interview with Diaz (*Id.* at 252-53);

h. he did not represent to Diaz that he was a lawyer (*Id.* at 222);

i. he did not advise Diaz he could face legal consequences for perjury, nor did he advise Diaz of his right to consult with counsel prior to speaking with de la Rosa (*Id.* at 255-56);

j. he asked Diaz to make a written statement at the close of their first meeting (*Id.* at 229, 243, 278);

k. in the written statement Diaz provided to de la Rosa, Diaz did not state he had lied at the applicant's trial, although de la Rosa claimed that Diaz told him so orally (*Id.*);

l. When de la Rosa returned to the jail the following week to substitute a formal statement he had written for the handwritten statement Diaz had previously given, Diaz refused to sign de la Rosa's statement. Per de la Rosa, Diaz said he was afraid he would get in trouble for admitting he had lied at the applicant's trial (*Id.* at 231-32);

m. although it is the general practice of the Office of Capital and Forensic Writs to document every witness interaction, de la Rosa did not create a memorandum to document his purported visit to Diaz on October 30, 2015 (*Id.* at 259-60); and

n. in the affidavit he prepared regarding his interactions with Diaz, de la Rosa: put quotation marks around sentences he attributed to Diaz which were not Diaz's direct words and which did not appear in de la Roas's handwritten notes; filled in words from memory which he attributed to Diaz, but that did not appear in de la Roas's handwritten notes; and included information that did not appear in de la Roas's handwritten notes, but that he thought Diaz had said during the interview (*Id.* at 266-70).

53. Having heard the testimony of De la Rosa, the Court does not find his claim that Diaz recanted his trial testimony to be credible nor otherwise supported by the evidence before the Court.

54. The Court finds de la Rosa gave conflicting testimony at the post-conviction evidentiary hearing regarding whether or not he told Diaz it would be helpful if Diaz gave de la Rosa an immediate written statement, namely:

    a. on direct examination, de la Rosa initially testified he did not tell Diaz he "needed [Diaz] to help [de la Rosa] out and it would help Juan Balderas if he wrote a statement" (IV Post-Conviction Writ Evidentiary Hearing—May 11, 2018 at 223);

    b. later on direct examination, de la Rosa admitted to telling Diaz that a written statement would be helpful, before immediately correcting himself, "[Diaz] initially said he'd like to sleep on it, but after – you know, I just said it would be helpful -- not helpful, it would be encompassing the conversation that we had right now" (*Id.* at 229); and

    c. on cross-examination, when confronted with his inconsistent responses, de la Rosa conceded he had instructed Diaz that providing a same-day statement would be helpful for the applicant (*Id.* at 244).

55. The Court finds de la Rosa's post-conviction testimony and habeas affidavit (Applicant's Exhibit 7) regarding his conversation with Diaz to be unpersuasive and not supported by the other evidence before the Court.

56. The Court finds both de la Rosa's post-conviction testimony and hearsay habeas affidavit (Applicant's Exhibit 7) to be unpersuasive evidence of Israel Diaz's alleged recantation or false testimony.

57. At the close of the post-conviction evidentiary hearing, the Court sustained the State's objections to the applicant's introduction into evidence of two affidavits from prison inmates Efrain Lopez and Jose Hernandez, purporting to contradict Diaz's trial testimony, which were notarized by de la Rosa; nevertheless, the Court permitted the applicant to include these affidavits as part of the record for appellate review (IV Post-Conviction Writ Evidentiary Hearing—May 11, 2018 at 280-88, 291-95; V Post-Conviction Writ Evidentiary Hearing—May 11, 2018 at Exhibits 2-3).

58. De la Rosa testified he met with inmates Lopez and Hernandez in prison; failed to record their interviews; did not ascertain whether either inmate was represented by counsel; did not apprise either inmate of their legal rights; did not bring his notes from either of those meetings to court with him; and that both affidavits were in de la Roas's handwriting (IV Post-Conviction Writ Evidentiary Hearing—May 11, 2018 at 280-90).

59. The Court finds the proffered habeas affidavits of Efrain Lopez and Jose Hernandez are unpersuasive impeachment or false testimony evidence against Diaz (V Post-Conviction Writ Evidentiary Hearing—May 11, 2018 at Exhibits 2-3).

60. The Court also denied the applicant's request to expand the evidentiary hearing to permit testimony on the potential dangers of informant testimony; nevertheless, the Court permitted the applicant to include a declaration from Professsor Brandon L. Garrett regarding informant testimony as part of the record for appellate review (IV Post-Conviction Writ Evidentiary Hearing—May 11, 2018 at 300-02; V Post-Conviction Writ Evidentiary Hearing—May 11, 2018 at Exhibit 1).

61. The Court finds the post-conviction affidavit of Diaz's trial counsel Allen Isbell, State's Habeas Exhibit 1, credible and persuasive, and the facts asserted therein to be true.

62. Per Isbell's affidavit,

> [t]he meetings that I attended between Diaz and the prosecutors did not occur in the manner set forth in de la Rosa's affidavit. Specifically, there was never a time when I was present in a meeting between the prosecutors and Diaz where the prosecutors told Diaz to change any portion of his story. Additionally, I was present in the courtroom when Diaz testified at guilt/innocence during the Balderas' trial, and his testimony was consistent with what I expected it to be.

State's Habeas Ex. 1, affidavit of Allen C. Isbell.

63. The Court finds Isbell's affidavit refutes the applicant's habeas assertions that (a) prior to trial, prosecutors told Diaz to change his story regarding the primary offense, and that (b) Diaz never told prosecutors that the applicant admitted to killing the complainant. *Id.*

64. The Court finds the post-conviction affidavit of trial prosecutor Traci Bennett, State's Habeas Exhibit 2, credible and persuasive, and the fact alleged therein to be true.

65. Per Bennett's affidavit, she, Caroline Dozier, Mary McFaden, and Allen Isbell met with the applicant on January 27, 2014, at which time Diaz (a) described the gathering of LTC members days before the complainant's murder, (b) stated the applicant came up to Diaz after the murder and hugged him as if he was happy to see him, and (c) kissed Diaz, which was unusual to Diaz and admitted to killing the complainant. *State's Habeas Ex. 2, affidavit of Traci Moore Bennett.*

66. Per Bennett's affidavit, the applicant's assertions that prosecutors told Diaz to change his story regarding the complainant's murder are false. *Id.*

67. The Court finds that Bennett's affidavit refutes the applicant's habeas assertions regarding Diaz's purported recantation and alleged statements Adrian to de la Rosa. *Id.*

68. The Court finds the applicant fails to present credible or persuasive testimony that Israel Diaz is presently recanting or previously recanted his trial testimony.

69. Given the totality of the record and the evidence, the Court finds the applicant fails to present credible or persuasive testimony that Israel Diaz testified falsely at the applicant's trial.

70. The Court finds the applicant fails to demonstrate Diaz's trial testimony left a false impression with the jury. *See* (XXVI R.R. at 118-96).

71. The Court finds the applicant fails to present credible or persuasive evidence that the State either intentionally or knowingly presented false testimony at trial through Israel Diaz.

72. The Court finds the applicant fails to demonstrate Diaz's trial testimony was material to the jury's verdict in light of the totality of the State's evidence of guilt against the applicant. *See infra* in *Fourth Ground for Relief* at no. 134

THIRD GROUND FOR RELIEF:
STATE'S ALLEGED FAILURE TO DISCLOSE IMPEACHMENT INFORMATION REGARDING WITNESS ISRAEL DIAZ

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73. Former Harris County Assistant District Attorney Spence D. Graham was assigned to the applicant's cases from May 2009 through December 2011, and maintained custody and control of the State's prosecution files during this period (XXII R.R. at 9, 21-22); *State's Habeas Ex. 3, affidavit of Spence D. Graham.*

74. The Court finds the post-conviction affidavit of former prosecutor Spence D. Graham, State's Habeas Exhibit 3, credible and persuasive, and the facts asserted therein to be true.

75. The Court finds according to Graham's affidavit:

    a. the handwritten notes now marked as the Applicant's Exhibit 57, are 23 pages of handwritten notes from pretrial interviews prosecutors Caroline Dozier and George Weissfisch conducted with Israel Diaz;

    b. during Graham's tenure over the applicant's case, the 23 pages of handwritten notes now marked as the Applicant's Habeas Exhibit 57 were located inside a manila folder labeled with Diaz's name along with transcripts from Diaz's police interviews, and kept in the State's prosecution files in Graham's office;

    c. the applicant's trial counsel were provided the opportunity to review the contents of the State's prosecution files, and did so;

    d. during Graham's tenure over the applicant's case, a copy of the State's capital murder summary was also included in the State's prosecution file and available for defense counsels' review; and

    e. the State's capital murder summary contained the following information regarding Israel Diaz:

        i. Diaz told police and prosecutors previously handling the case there was a hit out on the complainant and gang leaders had issued an "SOS" (or "shoot on Sight") [*sic*] for anyone in LTC that saw the complainant;

        ii. Diaz previously gave statements from jail with his lawyer to law enforcement that the applicant admitting to killing the complainant when they spoke that evening at Alejandro Garcia's house;

        iii. Diaz could assert that the hit out on the complainant was made by the leadership of the La Tercera Crips gang, and that it was because

of not only the complainant's potential testimony, but because of his friendship with rival gang members and that the complainant would share LTC secrets with the rival gang; and

iv. Diaz knew that the complainant's murder would occur.

State's Habeas Ex. 3, affidavit of Spence D. Graham.

76. The Court finds according to Bennett's credible affidavit:

a. when Bennett assumed responsibility of the applicant's case in early 2013, the 23 pages of Diaz notes now marked as the Applicant's Exhibit 57 were in a folder in the State's prosecution files not marked as work product, and which would have been available for defense counsel to review; and

b. during Bennett's tenure over the applicant's case, trial counsel Jerome Godinich reviewed the State's prosecution files on multiple occasions.

State's Habeas Ex. 2, affidavit of Traci Moore Bennett.

77. Godinich's out-of-court hours logs reflect over 70 hours reviewing the State's prosecution files and the discovery material provided to the defense by the State. *State's Habeas Ex. 4, Godinich hours logs submitted with payment vouchers.*

78. The Court finds the post-conviction affidavit of trial counsel Jerome Godinich, Jr. filed in cause no. 1412826-A to be credible and persuasive, and the facts asserted therein to be true.

79. The Court finds according to Godinich's affidavit:

a. prior to trial, counsel reviewed the 23 pages of Diaz notes now marked as the Applicant's Exhibit 57 at the District Attorney's Office;

b. Godinich took the 23 pages of Diaz notes now marked as the Applicant's Exhibit 57 as well as any inconsistencies in Diaz's statements into account during his trial preparation;

c. Diaz's trial testimony was as Godinich expected.

Affidavit of Jerome Godinich, Jr. at 1.

80. The Court finds the post-conviction affidavit of trial counsel Alvin Nunnery filed in cause no. 1412826-A credible and persuasive, and the facts asserted therein to be true.

81. The Court finds according to Nunnery's affidavit:

    a. prior to trial, Nunnery was aware of the 23 pages of Diaz notes now marked as Applicant's Exhibit 57; and

    b. Nunnery incorporated any information from the 23 pages of Diaz notes now marked as Applicant's Exhibit 57 he believed to be relevant, helpful, and in accordance with the defense strategy, into account during his cross-examination of Diaz.

    Affidavit of Alvin Nunnery at 1.

82. The Court finds the 23 pages of handwritten notes now marked as the Applicant's Exhibit 57 reflect the prosecutors' interpretations and impressions of what Diaz stated in pretrial witness meetings in 2007 and 2008, and potentially include gaps in the prosecutors' notation of information, inaccuracies, and the overlapping of information pertaining to multiple extraneous offenses.

83. The Court finds the 23 pages of Diaz notes now marked as the Applicant's Exhibit 57 contain much inculpatory information regarding the applicant's involvement in the complainant's death that is consistent with Diaz's trial testimony, including:

    a. the complainant was spending time with rival gang members (*Applicant's Exhibit 57* at 3, 7, 13, 22);

    b. there was concern among LTC members that the complainant would put LTC members in jeopardy and provide rival gangs with information concerning LTC (*Id.* at 3, 7, 13, 22);

    c. a photograph surfaced of the complainant with rival gang members where the complainant was displaying the rival gang's sign (*Id.* at 3, 13);

    d. there was a meeting of LTC members where they discussed shooting the complainant (*Id.* at 7, 13);

e. after the meeting discussing shooting the complainant, anyone who saw the complainant could kill him (*Id.* at 3, 13, 22);

f. the wall of the apartment on Corporate where the complainant was staying was tagged (*Id.* at 7);

g. Jose Vazquez, also known as Chango, informed LTC members of the complainant's whereabouts (*Id.* at 7-8, 13, 22);

h. Efrain Lopez, also known as Hairless, called Diaz and told Diaz that "they found him" and the complainant was killed soon after (*Id.* at 8, 14, 22);

i. Diaz went to the twins' house on the night of the murder and the complainant's death was discussed amongst those present (*Id.* at 8, 13-14, 22);

j. the applicant admitted to killing the complainant (*Id.* at 13-14, 22); and

k. the applicant carried two handguns, a .40 caliber and a .357 caliber (*Id.* at 13).

84. In the 23 pages of Diaz notes now marked as Applicant's Exhibit 57, the Court finds multiple references to an LTC meeting held to discuss the complainant's murder, but no specific mention that this meeting was held three days prior to the murder. *Id.*

85. The Applicant's Exhibit 56, a February 14, 2014 email from Godinich to the defense team, reflects that during that morning's pretrial hearing, the defense learned more information about the State's trial theory, specifically pertaining to anticipated testimony from Israel Diaz and Alejandro Garcia. *Applicant's Exhibit 56.*

86. The Court finds the Applicant's Exhibit 56 does not contradict statements in trial counsels' affidavits that the defense had pretrial knowledge of the Diaz notes.

87. The Court finds trial counsel were made aware prior to trial, of the existence of an LTC meeting three days before the murder where it was decided the complainant would be killed and that another gathering occurred after the murder wherein the applicant took credit for the murder when speaking to Diaz (XXIII R.R. at 4-16).

88. The Court finds the record does not reflect that the applicant's counsel were surprised or hindered in any way during Diaz's trial testimony or cross-examination (XXVI R.R. at 118-96).

89. The record reflects the applicant's counsel thoroughly cross-examined Diaz, including questions regarding Diaz's previous interviews with the State; the punishment Diaz anticipated receiving as a result of his testimony and cooperation with the State; Diaz's anger with the complainant for "snitching" to the police in his case; Diaz's discussions with the complainant where Diaz emphasized the complainant should not cooperate with the police in Diaz's case; Diaz's admission that all he had to offer the jury was his word; and Diaz's apathy at the complainant's death (*Id.* at 165-92, 194-96).

90. The Court finds the applicant fails to present credible or persuasive evidence that the State failed to disclose favorable, material, or impeachment evidence to the defense prior to trial.

FOURTH GROUND FOR RELIEF:
ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL IN GUILT/INNOCENCE PHASE

ALLEGED DEFICIENT PRETRIAL INVESTIGATION: FAILURE TO INVESTIGATE & PRESENT ALIBI DEFENSE OR EVIDENCE OF INNOCENCE

91. The Court finds trial counsel conducted an adequate and thorough pretrial investigation pertaining to the guilt/innocence phase of trial, despite numerous obstacles created by the applicant and the applicant's friends and family. *See Affidavit of Jerome Godinich, Jr.; see also Affidavit of Alvin Nunnery.*

92. In preparing for trial and presenting the applicant's case, the defense retained a team of investigators and experts in the fields of fact investigations, mitigation investigations, ballistics, eyewitness identification, mental health, gangs, prison systems, child abuse and brain development (I C.R. at 34-44, 61-66, 75; VII C.R. at 1765-68; VIII C.R. at 2077-78; XII C.R. at 3346-47); *Affidavit of Jerome Godinich, Jr.*; *Affidavit of Alvin Nunnery.*

93. The totality of the record reflects that defense counsel filed and urged multiple motions; thoroughly voir dired prospective jurors; extensively cross-examined witnesses; made relevant objections and preserved error; exhibited

comprehensive knowledge of the primary and extraneous offenses and applicable law; presented evidence on the applicant's behalf; made persuasive jury arguments; and objected to the court's charge and requested specific instructions.

94. The Court finds in preparation for trial, the applicant's trial counsel spoke with all witnesses who were identified by the defense team, investigators, mitigation experts, or who contacted counsel directly, and also interviewed all available State fact witnesses. *Affidavit of Alvin Nunnery* at 2*; see Affidavit of Jerome Godinich, Jr.* at 2.

95. The Court finds trial counsel intentionally did not present witnesses who counsel believed lacked credible accounts of the applicant's whereabouts for the date and time of the offense, or who only possessed information via hearsay or innuendo. *Affidavit of Alvin Nunnery* at 2.

96. The Court finds the defense's strategy of only presenting the testimony of witnesses who counsel deemed credible or beneficial for the defense was reasonable trial strategy. *See id.*

97. The Court finds counsel made a strategic decision not to present the testimony of Jesus Balderas at trial, due to concerns that Balderas would not appear credible because of his criminal history, relationship with the applicant, gang affiliation, and photographs obtained through discovery. *Affidavit of Jerome Godinich, Jr.* at 2.

98. The Court finds trial counsels' decision to not present the testimony of Jesus Balderas at trial was reasonable trial strategy.

99. The Court finds that prior to trial, the defense had learned information by speaking to various potential witnesses pertaining to Diaz's motives for testifying against the applicant; the hierarchy and inner-workings of LTC; and Wendy Bardales' prior intimate relationship with Diaz, by speaking to various potential witnesses; but made strategic decisions regarding what evidence should be presented in which phase of trial. *Applicant's Exhibit 53*; *Affidavit of Jerome Godinich, Jr.* at 2*;* (XXVIII R.R. at 136-231; XXIX R.R. at 4-14; XXXVII R.R. at 170-206, 238-43; XXXVIII R.R. at 5-19, 35-37, 39-41; XL R.R. at 37-50, 59-60).

100. The Court finds according to Godinich's credible affidavit, despite previously telling the defense she would testify at the trial, Yancy Escobar informed counsel she wanted to be present for the entirety of the trial, and as a result, chose not to testify on the applicant's behalf. *Affidavit of Jerome Godinich, Jr.* at 2.

101. Detailed invoices included with Godinich's payment vouchers reflect that during the pendency of the applicant's case, the defense team conducted numerous witness interviews and conferences with the applicant, his immediate and extended family members, and his girlfriend. *State's Habeas Ex. 5, defense invoices.*

102. The Court finds according to Godinich's credible affidavit, it was only as trial approached that the applicant's family attempted to create or assist with the defense, despite the defense team's long-standing requests for continued communication. *Applicants' Ex. 53.*

103. The Court finds the applicant's trial counsel explored every defense available to the applicant, including a possible alibi defense, but that neither the applicant nor his family provided counsel with timely or credible alibi information. *Affidavit of Jerome Godinich, Jr.* at 1; *Affidavit of Alvin Nunnery* at 2.

104. The Court finds according to Godinich's credible affidavit, in 2014 the defense was made aware of Oralia McCrary, a potential alibi witness, but was not provided with any contact information for her and was informed McCrary did not want anything to do with the case. *Affidavit of Jerome Godinich, Jr.* at 1.

105. The Court finds that in 2014, counsel conducted pretrial interviews of McCrary's daughters Anali Garcia and Ileana Cortes who were also identified as potential alibi witnesses, but following these respective interviews, counsel determined Garcia had no factual information about the applicant's case, and Cortes had no useful factual, alibi, or mitigation evidence for the applicant's defense. *Id.* at 2.

106. The Court finds several of the applicant's own exhibits, pretrial emails between various members of the defense team, substantiate the obstacles, challenges, and lack of cooperation the defense faced in exploring a potential alibi defense and securing witnesses, specifically:

a. in the Applicant's Exhibit 25, a September 1, 2010, email from defense mitigation specialist Mary K. Poirier to members of the defense team, Poirier notes the applicant has put up a barrier and does not want the defense team speaking to his brother Jesus;

b. in the Applicant's Exhibit 26, an undated email from Spanish speaking mitigation investigator Adriana Helenek to Godinich, Helenek writes the applicant's mother does not want the defense contacting her family in Mexico, nor does she want the family from Mexico visiting the applicant;

c. in the Applicant's Exhibit 29, a November 7, 2010, email from Godinich to mitigation specialists Amy Martin and Mary K. Poirier, Godinich writes the applicant's mother is still visiting border towns under suspect circumstances, and denying it to the defense.

d. in the Applicant's Exhibit 35, a September 21, 2010, email from Godinich to members of the defense team, Godinich writes the applicant's girlfriend Yancy Escobar came to his office yesterday to discuss the case; was informed that the defense will continue to pursue any leads that may be helpful in the guilt/innocence phase; was asked to directly communicate any information or leads that she, Jesus Balderas, or the applicant's mother receive to Godinich; and that Escobar did not have any leads or information at that time;

e. in the Applicant's Exhibit 37, a November 5, 2012, email from Godinich to members of the defense team, Godinich writes he again met with Escobar and Jesus; asked for any witness information or information leads; and that they did not have any at that time;

f. in the Applicant's Exhibit 38, a January 30, 2013, email from Godinich to members of the defense team, Godinich writes he met with the applicant who claimed to have two guilt/innocence witnesses, but was unable to provide names, addresses, or phone numbers, and claimed that Escobar and Jesus would have this information. Godinich further writes that in contacting Escobar for this information, Escobar stated she did not have any information regarding these witnesses, nor did she know who they are, how to contact them, or what they know. Escobar was reminded to contact Godinich upon receipt of any information;

g. in the Applicant's Exhibit 39, a February 11, 2013, email from Godinich to members of the defense team, Godinich writes he met with the applicant who wanted to know why the defense had not met with the witnesses he identified, and was told that despite his claims, neither Escobar nor Jesus knew these witnesses or how to contact them. Godinich further writes the applicant was still unable to provide these witnesses' names;

h. in the Applicant's Exhibit 52, a January 31, 2014, email from Godinich's legal assistant Gloria Poa to the defense team, Poa writes the applicant's mother and Escobar have identified alibi witnesses for the first time, specifically Oralia (Jesus' former mother-in-law), Celeste Munoz, Billy, Anale[2] (Oralia's daughter), Walter, and Daniela. Poa writes that the family was instructed to provide any additional contact information as soon as possible. Poa also writes that a mitigation witness did not want to travel to Houston to testify for the applicant for fear of being deported;

i. in the Applicant's Exhibit 53, a February 4, 2014, email from Poa to the defense team, Poa writes Escobar did not have names or contact information for any of the information she provided regarding LTC. Poa also writes Eiliana Cortez[3] came by the office at the request of Jesus, and spoke with Godinich, but could not remember anything from 2005, including whether or not she was with the applicant on December 6, 2005. Poa also writes she obtained a phone number for a potential witness named "Billy" from Jesus, and spoke to an individual who stated he would call back to set up an appointment; and

j. in the Applicant's Exhibit 54, a February 13, 2014, email from Poa to the defense team, Poa writes witness Celeste Munoz missed her appointment for an in-person meeting; witness Billy has not called back to set up an appointment; she and Godinich spoke to Anale on the phone and Anale had no factual information on the case; Oralia does not want to be involved with the applicant's case; Escobar has not provided any contact information for Walter or Daniela; and the applicant's father cancelled and rescheduled his appointment with Godinich. Poa also writes the defense is waiting for confirmation on witness Vianet Jaimes' travel plans, and Godinich has offered to pay for her ticket, but the witness and the applicant's mother want to pay for it themselves.

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[2] The proper spelling of this witness' name has since been established as Anali Garcia.

[3] According to the applicant's habeas exhibits, the proper spelling of this witness' name is Ileana Cortes.

107. The Court finds a March 13, 2014, email sent by Godinich to the defense team during jury deliberation also corroborates the obstacles defense counsel experienced during trial as a result of the applicant's family, namely:

a. counsel learned the applicant's family was attempting to influence the testimony of the witnesses in Mexico by calling the witnesses and telling them what to say, resulting in differing testimony than what counsel was anticipating;

b. the family could not appreciate the importance of trial preparation; and

c. the family could not appreciate counsels' unwillingness to substitute or add last minute defense witnesses, particularly those who had never been interviewed by counsel.

Affidavit of Jerome Godinich, Jr. at Exhibit 5.

108. Notwithstanding the untimeliness of potential alibi information provided to the defense, the Court finds defense counsel adequately and appropriately investigated the information provided to them.

109. The Court finds the applicant's counsel employed reasonable trial strategy in choosing not to present the testimony of either Anali Garcia or Ileana Cortes during the guilt/innocence phase, after counsel interviewed these witnesses and found these witnesses had no useful information about the case. *Id.* at 2.

110. The Court finds according to Godinich's credible affidavit, the defense had no information regarding Octavio Cortes or Jose Perez during the pendency of the case. *Id.* at 2.

111. The Court finds the proffered affidavits of Jesus Balderas (Applicant's Exhibit 2) and Jose Perez (Applicant's Exhibit 16) are unpersuasive on the issue of an alibi defense, as these witnesses do not claim to be present in the apartment where the applicant allegedly spent the evening of the primary offense.

112. Octavio Cortes and Anali Garcia and Octavio Cortes provided sworn affidavits that were included in the applicant's habeas application as the Applicant's Exhibits 6 and 10, respectively, wherein both stated the applicant had been with them inside their apartment when the complainant was shot.

113. On May 11, 2018, this Court held an evidentiary hearing to assist the Court in assessing the credibility of Anali Garcia and Octavio Cortes, and in resolving the issue of whether trial counsel were ineffective for failing to present alibi testimony from these witnesses during guilt/innocence. *See State's Proposed Supplemental Order Designating Issues to Be Resolved Via Evidentiary Hearing.*

114. On May 11, 2018, Anali Garcia testified under oath at a post-conviction evidentiary hearing in the applicant's case (IV Post-Conviction Writ Evidentiary Hearing—May 11, 2018 at 19-80).

115. At the post-conviction evidentiary hearing, Garcia testified to the following regarding the night the complainant was murdered:

    a. she lived in a small, two-bedroom apartment at Wood Creek on the Bayou, off of Corporate Drive with her mother, two sisters, two brothers, and niece, all of whom were present when shots were heard (*Id.* at 21, 32-34);

    b. she does not remember if anyone else, including the applicant's brother Jesus, was in the apartment that night, but it was very crowded (*Id.* at 33-34);

    c. her apartment was within four minutes walking distance to the apartment complex where the shooting occurred which she considered "real close" (*Id.* at 39-40);

    d. she remembers the applicant being with her because Hernandez was close to all of them (*Id.* at 21);

    e. the applicant arrived at her apartment in the afternoon (*Id.* at 21);

    f. she was at home "burning DVD's and watching movies and looking at the covers from the DVD's that [the applicant] would sell" (*Id.* at 20-21);

    g. "[s]omeone at the house heard shootings" (*Id.* at 19-20);

    h. she and her family learned of the shooting when "[s]omeone around the apartment spread the word" but could not remember if anyone came to the door to tell the news (*Id.* at 43);

i. "the only thing I remember" was her mother "panicking" and saying someone heard a gunshot, so no one could go outside, "not even" the applicant (*Id.* at 22);

j. her mother immediately "panicked" at the sound of a shot, even though gunshots were frequently heard in the neighborhood" (*Id.* at 37);

k. unlike the other times gunshots were heard, "we weren't allowed to go nowhere that night" (*Id.* at 37-38);

l. she believed the shots were heard after 10 pm (*Id.* at 23);

m. she does not remember if she personally heard the gunshots or how many shots she may have heard (*Id.* at 42-43);

n. the applicant spent the night in her living room because her mother would not allow him to leave (*Id.* at 23-24);

o. she does not remember whether she, Octavio, or Ileana had a cell phone, or whether they had a land line at that time (*Id.* at 46-47);

p. she does not remember if the applicant had a cell phone, received any calls, or if he could have gone somewhere to have a private conversation (*Id.*); and

q. she stayed awake until 2 or 3 in the morning because she was scared and was wondering what had happened, and the applicant was still at her apartment at this point (*Id.* at 23-24).

116. At the post-conviction evidentiary hearing, Garcia provided alternative timelines for when she learned the applicant had been charged with the complainant's murder:

a. "once he was arrested, after -- after a while" (*Id.* at 25-26);

b. "around 2000", before this time, she thought he was jailed for aggravated assault because several of his fellow gang members had been arrested during a raid for similar charges (*Id.* at 26-27, 52);

c. "on his trial date" (*Id.* at 26-27); and

d. when she watched part of trial (*Id.* at 54).

117. At the post-conviction evidentiary hearing, Garcia testified:

a. she was good friends with the applicant and knew he was in a gang (*Id.* at 32, 36, 52);

b. she knew the complainant from middle school (*Id.* at 24-26);

c. she knew the applicant was arrested soon after the murder (*Id.* at 51);

d. she was in disbelief that the applicant was charged with the complainant's murder because he had been with her that night (*Id.* at 24-26);

e. she took no steps to help the applicant because she "was scared" and "didn't want to be involved in any of this" (*Id.* at 26);

f. she was given a phone number to call trial counsel Jerome Godinich "two or three days before trial" and she called him from her car to say "I'm a character witness and he was with us" (*Id.* at 27);

g. Godinich rushed her and told her he had enough witnesses and didn't need anything else (*Id.* at 27);

h. she attended trial once or twice, and thought maybe she would be called as a "surprise witness" like in the movies, but that did not happen (*Id.* at 28);

i. she could not recall the number of times she visited the applicant in jail while he awaited trial, but she and the applicant never discussed her having knowledge that could possibly lead to a dismissal of the charges against him (*Id.* at 70);

j. she blamed her years-long failure to come forward with her information on being in fear for her life from the "real" killer, who she believed would track her down and kill her and her entire family if she tried to clear the applicant's name (*Id.* at 28-29, 56);

k. she and insisted she could not be held accountable for her decisions at age 17 because she was not permitted to think for herself or make any decisions including choosing her own clothing at that age (*Id.* at 29, 44-46);

l. prior to the applicant's trial, she posted a petition on Facebook about his case, but failed to mention anything about his innocence or her alibi because "that's something you wouldn't post on there, especially if I'm scared of [*sic*] my life" (*Id.* at 54-55, 62);

m. she does not know a lot of the evidence or facts presented against the applicant at trial, including the fact that he was in possession of the gun that killed the complainant when he was arrested (*Id.* at 61);

n. although she believed her alibi evidence would make a difference at the applicant's trial, she thought his lawyers had other evidence and she did not, and still does not, wish to be involved (*Id.* at 28-29, 63-64);

o. it took the applicant's habeas counsel multiple efforts to convince her to provide her belated alibi testimony (*Id.* at 64);

p. she does not remember whether she or habeas investigator de la Rosa prepared her affidavit, or how many times she spoke with him before signing the affidavit ten years after the murder occurred (*Id.* at 65-68); and

q. although she knows the applicant's mother, she cannot remember if she ever told his mother she had exculpatory evidence (*Id.* at 69).

118. At the post-conviction evidentiary hearing, Garcia never said "I don't remember" during direct examination, but gave this response more than 45 times during cross-examination (*Id.* at 19-79, *passim*).

119. At the post-conviction evidentiary hearing, Garcia denied knowing the meaning of perjury, stated the applicant's habeas counsel never advised her about perjury, and became visibly distraught when the consequences of being convicted of aggravated perjury were explained to her and asked to stop participating in the hearing (*Id.* at 73-78).

120. At the post-conviction evidentiary hearing, Garcia admitted she refused to meet with representatives of the State prior to the hearing, and twice denied memory of a phone call with the District Attorney's Office Investigator Hartman in February 2018, before admitting to these conversations (*Id.* at 48-50).

121. The Court finds Anali Garcia's habeas affidavit and post-conviction evidentiary hearing testimony to not be credible in its entirety and completely unpersuasive. *See* (*id.* at 19-80); *see Applicant's Ex. 10.*

122. Given the totality of evidence, including the demeanor and presentation of the witness during the post-conviction evidentiary hearing, the Court finds trial counsels' decision to not present the testimony of Anali Garcia at trial was entirely warranted and constituted a reasonable and ethical trial strategy.

123. On May 11, 2018, Octavio Cortes testified under oath at a post-conviction evidentiary hearing in the applicant's case (*Id.* at 81-124).

124. At the post-conviction evidentiary hearing, Cortes testified:

a. growing up, he viewed the applicant has a father-figure and he still looks up to and respects the applicant (*Id.* at 95, 99);

b. he and the applicant are both uncles to Ileana Cortes' daughter with Jesus Balderas (*Id.* at 94);

c. he was first contacted on behalf of the applicant in 2015, by someone whose role was unclear to him, but who he believed was named Daniel de la Rosa, and with whom he spoke on the phone more times than he was able to count (*Id.* at 87-88);

d. he had spoken to the applicant's habeas counsel in person and on the phone several times over the past two months, despite initially denying any communication (*Id.* at 88-90);

e. over the past 13 years, he, his mother, and sisters had discussed that the applicant was accused of shooting Eduardo Hernandez and had spent time "trying to recollect what happened" (*Id.* at 91-94);

f. the last night the applicant stayed at his house was December 6, but failed to specify the year (*Id.* at 81);

g. he was aware the applicant was a gang member and there were multiple gangs in their neighborhood in 2005 (*Id.* at 96-97);

h. on the night of the shooting, he and the applicant were in his bedroom "picking out movie covers to put on a page" (*Id.* Hearing at 81);

i. at some point, his mom heard "something had happened" and his sister came and told Cortes and the applicant "that whatever happened" and "they were shocked...pretty much just panicked a little" and his mom told them all to stay inside (*Id.* at 82);

j. the evening of December 6th was "[e]xtremely unusual" because the only other memory he has of his mother acting this way and "locking down the house" was on the morning of 9/11, yet Cortes later admitted that shootings happened regularly in the neighborhood and his mother did not lock the door in those instances (*Id.* at 81-82, 111-15);

k. he went to bed by 10:30 and does not know what the applicant did after that (*Id.* at 117);

l. he would remember if the applicant had made or received a phone call on the evening of the shooting, but Cortes has no memory of that happening (*Id.* at 116-17);

m. he later learned from his sister Ileana that Eduardo Hernandez had been shot that night, although he did not personally know Hernandez (*Id.* 83-84);

n. the affidavit Cortes submitted on the applicant's behalf, which de la Rosa helped compose, was the first time Cortes told anyone that the applicant had been at his home the night of Hernandez's murder (*Id.* at 100-102);

o. although Cortes and his mother visited the applicant in jail throughout Cortes' high school years, the applicant never told Cortes to contact his lawyers with the alleged alibi information nor provided Cortes with his attorneys' information (*Id.* at 105, 108);

p. when visiting the applicant in jail, Cortes asked his mom why the applicant was in custody and she told him it was for " a murder, a shooting" (*Id.* at 93);

q. at the time of the applicant's trial, Cortes was 21 years old and in the Marines, and did not know the applicant was going to trial, charged with killing the complainant, or who the applicant's attorneys were (*Id.* at 84-85, 102-104);

r. he "was too busy, in the Marines" to want to know the details of why the applicant was in custody and made no effort to contact the applicant's lawyers (*Id.* at 102-104, 108-109); and

s. although he commented on Facebook in 2014 about the applicant's case, he did not mention the applicant's alleged innocence or any alibi information (*Id.* at 110-11).

125. In the post-conviction evidentiary hearing, Octavio Cortes gave multiple conflicting responses as to whether or not he was aware the applicant was charged with the complainant's murder, and the timeframe of when he learned this information. (*Id.* at 84, 91-93, 106-109, 119).

126. The Court finds Octavio Cortes' habeas affidavit and post-conviction evidentiary hearing testimony to be not credible and unpersuasive. *See* (*Id.* at 81-124); *see Applicant's Ex. 6.*

127. The applicant failed to present any post-conviction testimony (either live or via affidavit) from Oralia McCrary or Ileana Cortes.

128. Given the totality of the evidence, the Court finds trial counsels' decision not to present an alibi defense was a reasonable trial strategy.

129. Based on counsels' credible affidavits, the Court finds neither the applicant nor his family informed the defense team prior to trial that Israel Diaz had attempted to intimidate the applicant, and that had there been any admissible evidence of such, it would only have come from the applicant's own testimony, which the applicant was adamant he would not provide at trial. *Affidavit of Jerome Godinich, Jr.* at 2*; Affidavit of Alvin Nunnery* at 2.

130. The Court finds according to Godinich's credible affidavit, the applicant did not provide information that assisted the defense team with an innocence strategy. *Affidavit of Jerome Godinich, Jr.* at 2.

131. Contrary to the applicant's habeas assertions and notwithstanding the applicant's lack of assistance, trial counsel were nevertheless able to present evidence of the applicant's alleged innocence and an alternate shooter during guilt/innocence, namely:

    a. trial counsel attacked the reliability and credibility of Wendy Bardales' identification, and explored her prior history and bias towards the applicant (XXVI R.R. at 12-70, 77-80);

    b. during cross-examination, Karen Bardales testified the complainant had concerns about Diaz and what Diaz may do to him (*Id.* at 98-99);

    c. during cross-examination, Diaz testified he let the complainant know on more than one occasion that he was mad at him for snitching on him to the police (*Id.* at 172, 181-82);

    d. during cross-examination, Diaz testified he told other LTC members the complainant had snitched on him (*Id.* at 179-80);

e. during cross-examination, Diaz testified that as far as he knew, he was the only person on whom the complainant had snitched to the police (*Id.* at 185-86);

f. during cross-examination, Diaz testified the complainant's death did not bother or affect Diaz (*Id.* at 191);

g. during direct examination, Benitez testified to Diaz's bias against the complainant and call for an LTC meeting to discuss and urge the complainant's murder days before his death (XXVIII R.R. at 136-87, 221-29, 231); and

h. during direct examination, Benitez testified Arevalo confessed to him that he had taken care of the complainant, and Benitez's opinion that Arevalo meant he had killed the complainant himself (*Id.* at 225-26).

132. Although the applicant complains of trial counsels' failure to present the testimony of Jose Perez during trial, the record reflects that during the guilt/innocence phase of trial, the defense presented testimony via Walter Benitez consistent with the information recited in Jose Perez's habeas affidavit; namely:

a. Benitez saw Victor "Gumby" Arevalo on December 6, 2005, after the complainant's murder (XXVIII R.R. at 174-75);

b. Arevalo confessed to Benitez that he took care of the complainant, which Benitez interpreted as Arevalo killed the complainant himself (*Id.* at 225-26);

c. Arevalo was the leader of LTC and made all the decisions, while the applicant had no leadership role (*Id.* at 155, 226);

d. there was trouble between Diaz and the complainant because the complainant had snitched on Diaz to the police (*Id.* at 160); and

e. at the meeting of LTC gang members to discuss the issue of the complainant, Diaz tried to get permission from Arevalo to take care of or kill the complainant while the applicant attempted to intercede on behalf of the complainant (*Id.* at 169, 171).

133. The Court also finds portions of Benitez's trial testimony corroborate and are consistent with Diaz's trial testimony and information contained in the pretrial interview notes with Diaz now marked as Applicant's Exhibit 57, namely: multiple members of LTC were upset the complainant had snitched on Diaz, and an LTC meeting took place where plans for the complainant's murder were discussed (XXVIII R.R. at 160, 169, 171; XVI R.R. at 141, 145, 147-53).

134. Notwithstanding the defense's efforts to undermine the State's case, the Court finds the State presented compelling evidence of guilt against the applicant at trial, specifically:

a. LTC is a criminal street gang with no hierarchy in leadership, who values loyalty among its members, and where disrespect or disloyalty can get a member killed (XXVI R.R. at 129; XXVII R.R. at 90-99; XXVIII R.R. at 206-207);

b. the applicant was a documented member of LTC (XXVI R.R. at 227);

c. the complainant was a "cliqued in" member of LTC whose membership had been sponsored by the applicant (XXIV R.R. at 40; XXVI R.R. at 137-38); XXVIII R.R. at 105-106);

d. in December 2004, the complainant was arrested by the police and cooperated with the police's investigation into Diaz, and after which the complainant became scared of Diaz and of LTC (XXVI R.R. at 13-41, 139-41; XXVIII R.R. at 107-110; XXIV R.R. at 120);

e. LTC members were upset with the complainant for speaking to the police, spending time with rival gangs, "throwing" rival gang signs, and wanted the complainant out of LTC (XXVI R.R. at 141-145, 147-53);

f. an LTC meeting was held three to four days before the complainant's death to discuss the complainant and how to address his behavior (XXVI R.R. at 151-53);

g. on the day of his murder, the complainant was in the company of individuals associated with the gangs MS-13 and Cholos (XXIV R.R. at 41, 234-37; XXV R.R. at 36);

h. the complainant was killed inside Durjan "Rata" Decorado's apartment, which the complainant and the Bardales sisters had permission to be inside (XXIV R.R. at 37, 42, 119; XXV R.R. at 41);

i. several hours before the complainant's murder, an LTC gang member (later identified as Jose "Chango" Vasquez) wearing a red HEB shirt came to Decorado's apartment, spoke with the complainant in a back bedroom for quite some time, unsuccessfully tried to take the complainant with him, got into a heated confrontation with a Bardales sister, and left upset (XXIV R.R. at 46-48, 234, 238-40; XXVI R.R. at 162, 241-44, 248-50);

j. the complainant seemed worried after Vasquez left Decorado's apartment (XXIV R.R. at 48, 119);

k. on the evening of the complainant's murder, witnesses noticed graffiti on one of the apartment walls near Decorado's apartment referencing LTC (*Id.* 50-53, 262-64);

l. the shooter entered Decorado's apartment without consent (*Id.* at 53-55, 241-42, 267);

m. the shooter scanned the room, pointed a gun at the complainant's head, and shot the complainant multiple times (*Id.* at 55-59, 242-52; XXV R.R. at 183-86);

n. multiple witnesses stated the shooter was wearing khakis and a dark hoodie (*Id.* at 56, 253; XXV R.R. at 50, 180; XXVI R.R. at 159);

o. the shooter's hood fell off his head briefly during the shooting (XXV R.R. at 25-26, 183);

p. Wendy Bardales got a good look at the shooter (*Id.* at 189);

q. after the complainant was shot, the scene at the apartment complex was chaotic, paramedics were on scene, and a crowd formed outside (XXIV R.R. at 129-33, 257; XXVI R.R. at 157-59);

r. the applicant was seen at Decorado's apartment complex shortly after the murder with a silver handgun (XXVI R.R. at 160-61);

s. the applicant took credit for the complainant's murder, stating he "finally got him," and hugged and kissed other LTC members on the cheek shortly after the murder (*Id.* at 159-60);

t. police recovered eight - .40 caliber spent casings inside Decorado's apartment and two - .40 caliber spent casings outside the apartment door, all of which were manufactured by Smith & Wesson (*Id.* at 185-87, 200);

u. police recovered three fired bullet fragments from Decorado's apartment (*Id.* at 201);

v. police observed two bullet strikes to the front door of Decorado's apartment (*Id.* at 177-78);

w. Vasquez and Diaz were eliminated as the shooter (*Id.* at 255; XXV R.R. at 192-94; XXVI R.R. at 218-21, 243);

x. the shooter's physical description was consistent with the applicant (XV R.R. at 31-32; XXVI R.R. at 213);

y. the applicant was identified as the shooter in a photo array by Wendy Bardales, who in making her positive identification wrote "I'm positive that he's the one that killed Eduardo" in Spanish (XXV R.R. at 195-97; XXVI R.R. at 228-40);

z. the applicant was arrested ten days after the complainant's murder following a foot chase, during which the applicant discarded a green box and a black bag he had been carrying, jumped a fence, ran across a major intersection, and hid under a parked car (XXV R.R. at 212-18, 233; XXVI R.R. at 93-108);

aa. police obtained the applicant's cell phone following his arrest, and the cell phone records show calls made by the applicant to Vasquez on the night of the complainant's murder at 7:41 pm and again at 9:56 pm (near the time of the offense), and again after the murder (XXVI R.R. at 252-53; XXVII R.R. at 9-13);

bb. the medical examiner identified 11 gunshot wounds to the complainant's body, and recovered firearms evidence during the autopsy (*Id.* at 154, 158);

cc. the applicant claimed responsibility for all of the items (ammunition, magazines, bulletproof vests, firearms, cases and holsters) contained in the boxes and black bag that he and his friend had in their possession when they were arrested, which included a .40 caliber Smith & Wesson handgun (XXV R.R. at 220-22, 238, 245; XXVII R.R at 16);

dd. all ten-.40 caliber Smith & Wesson spent casings recovered from the crime scene had been fired from the .40 caliber Smith & Wesson firearm that was in the applicant's possession at the time of his arrest (XXVII R.R. at 36, 38-39);

ee. three fired bullets recovered from the crime scene had been fired from the .40 caliber Smith & Wesson firearm that was in the applicant's possession at the time of his arrest (*Id.* at 36, 40); and

ff. of the firearms evidence recovered during the autopsy by the medical examiner's office that was suitable for comparison, six bullets had been fired from the .40 caliber Smith & Wesson firearm that was in the applicant's possession at the time of his arrest (*Id.* at 36, 41, 53-54).

135. According to Godinich's credible affidavit, after trial Godinich learned members of the jury saw Benitez flash an LTC gang sign to the applicant during the testimony, and the applicant responded back in kind, undercutting Benitez's testimony. *Affidavit of Jerome Godinich, Jr.* at 2-3, Exhibit 4.

FAILURE TO PRESENT EYEWITNESS IDENTIFICATION EXPERT TESTIMONY TO JURY

136. The record reflects defense counsels' intent to avoid the introduction of evidence pertaining to the applicant's extraneous offenses during guilt/innocence (XXIX R.R. at 10-14).

137. Outside the presence of the jury, the defense presented the testimony of eyewitness identification expert Dr. Roy Malpass during a hearing to suppress the identification of the applicant by State's witness Wendy Bardales (XXV R.R. at 122-51, 172-74).

138. During the suppression hearing, Dr. Malpass testified there was a substantial likelihood of misidentification; the photo spread was impermissibly suggestive; the progression of Bardales' identification caused concerns of memory contamination and social influence; and Bardales' emotional reaction when ultimately identifying the applicant as the shooter was not a valid and reliable indicator (*Id.* at 134, 144-45, 149-50).

139. During his cross-examination in the suppression hearing, Dr. Malpass conceded the limited information he considered in arriving at his opinion on Bardales' identification; admitted scientific studies on the reliability of eyewitness identification do not include individuals who experience violent events such as those witnessed by Bardales; conceded he would not offer the jury an ultimate opinion on the accuracy or reliability of Bardales' identification; and backtracked on his prior statements of the suggestibility of the photo array (*Id.*. at 151-171).

140. The record reflects the applicant's trial counsel also conducted an *ex parte* in-camera review of anticipated testimony from Celeste Munoz and Officer Thomas Cunningham in order to seek a preliminary ruling from the trial court as to the potential ramifications of presenting testimony from these witnesses and from Dr. Malpass to the jury during guilt/innocence (XXIX R.R. at 4-14).

141. The record reflects that during the *ex parte* in-camera hearing, counsel proffered testimony from Celeste Munoz regarding Wendy Bardales (including Bardales' character and a prior altercation between Bardales and an applicant), and the trial court ruled Munoz's testimony would open the door to the applicant's extraneous capital murder during guilt/innocence (*Id.* at 4-13).

142. The Court finds the trial court made several statements during the *ex parte* in-camera discussion with the defense pertaining to the possibility of opening the door to the applicant's extraneous offenses, which could have reasonably affected the defense's strategy of which witnesses were called to testify during guilt/innocence, namely:

a. "I mean, certainly, I am open to arguments, but given what you have proffered, my initial ruling would be..." (*Id.* at 12);

b. "Because I know there are extraneouses that I'm not familiar with, that could possibly come in once we..." (*Id.* at 12);

c. "I don't mind y'all dotting your i's and crossing your t's if we get there, but that would be my initial ruling based on my understanding of case law and the rules of evidence" (*Id.* at 13); and

d. "I used that analysis without necessarily being familiar with that particular case" (*Id.* at 14).

143. The Court finds trial counsel made a strategic decision not to present Dr. Malpass' expert testimony to the jury, fearing it would open the door to the applicant's prejudicial extraneous conduct during the guilt/innocence phase. *Affidavit of Jerome Godinich, Jr.* at 3; *Affidavit of Alvin Nunnery* at 2-3.

144. Given the totality of the record and evidence, the Court finds trial counsels' decision not to present the testimony of eyewitness identification expert Roy Malpass to the jury was reasonable trial strategy.

145. The Court finds that although the defense did not present expert eyewitness identification testimony to the jury, the defense incorporated key aspects of this witness' proffered testimony in the cross-examination of other witnesses, and highlighted testimony of a suggestive, improper, and deficient photo array and eyewitness identification to the jury (XXVI R.R. at 12-70, 77-80; XXVII R.R. at 26-57, 69-70; XXVIII R.R. at 15-36, 58).

146. Given the totality of record and evidence, including the trial court's in-camera ruling that portions of Celeste Munoz's testimony would open the door to the applicant's prejudicial extraneous conduct, the Court finds trial counsels' decision not to present Munoz's testimony during guilt/innocence was reasonable trial strategy. *See* (XXIX R.R. at 4-14).

ALLEGED FAILURE TO INVESTIGATE JUROR MISCONDUCT

147. The Court finds trial counsel investigated the effect on the jury of the incident involving the applicant's brother waving at the jury on the evening of February 26, 2014, by questioning the implicated deputy and jurors, and counsel exhibited reasonable strategy in preserving any potential error by moving for a mistrial (XXXII R.R. at 12-28).

TOTALITY OF THE REPRESENTATION

148. The Court does not find the proffered affidavits of Dr. Roy Malpass (Applicant's Exhibit 1), Jesus Balderas (Applicant's Exhibit 2), Walter Benitez (Applicant's Exhibit 4), Daniella Chaves (Applicant's Exhibit 5), Octavio Cortes (Applicant's Exhibit 6), Adrian de la Rosa (Applicant's Exhibit 7), Yancy Escobar (Applicant's Exhibit 9), Anali Garcia (Applicant's Exhibit 10), Celeste Munoz (Applicant's Exhibit 15), or Jose Perez (Applicant's Exhibit 16) to be persuasive evidence of ineffective representation of counsel at trial.

149. The Court finds the defense exhibited a reasonable defensive strategy during the guilt/innocence phase of the applicant's trial.

FIFTH GROUND FOR RELIEF:
ALLEGED VIOLATION OF RIGHT TO FAIR TRIAL AS A RESULT OF JUROR MISCONDUCT AND EXPOSURE TO OUTSIDE INFLUENCES

HOTEL ACCOMMODATIONS

150. On February 25, 2014, jurors began deliberating guilt/innocence (XXX R.R. at 72-75).

151. The Court finds the post-conviction affidavit of Vickie Long, State's Habeas Exhibit 6, credible and persuasive, and the facts contained therein to be true. *State's Habeas Ex. 6, Affidavit of Vickie Long.*

152. Long, a Business Process Manager with the Administrative Office of the District Courts of Harris County, experienced "a great deal of difficulty in locating a hotel for the applicant's jury for the evening of February 25, 2014" due to events associated with Rodeo Houston, as "[m]any hotels were full...including the downtown hotels where the Harris County criminal courts normally accommodate their sequestered juries." *Id.* at 1.

153. According to the independent recollection of court reporter Renee Reagan, which this Court finds to be credible and persuasive, in looking for accommodations for the applicant's jury "[t]hey went all the way past Clear Lake. They looked everywhere" (I Writ Hearing—August 17, 2017 at 24).

154. Ultimately, jury accommodations for the evening of February 25, 2014, were located at the Motel 6 Houston-Westchase at 2900 West Sam Houston Parkway South. *State's Habeas Ex. 6, Affidavit of Vickie Long* at 1.

155. Long had no knowledge of the location of the underlying capital offense when making hotel accommodations for the applicant's jury. *Id.* at 2.

156. On the morning of February 26, 2014, the trial court told the jury "I want to sincerely apologize for your accommodations last evening and would like to tell you that that was beyond my control. But to the extent I have any control, I can assure you that if you are in need of accommodations this evening, you will not be staying at that hotel. The drive might be a little longer, but we will find you more suitable accommodations. I did not have any control over that and I apologize on behalf of the county" (XXXI R.R. at 7).

157. After the jury spent the entirety of the February 26, 2014, workday deliberating guilt/innocence, the trial court informed the jury that "[w]e have secured better accommodations for you this evening" (*Id.* at 27).

158. Jury accommodations for the second evening of guilt/innocence deliberations were located at the Holiday Inn NW Willowbrook at 18818 SH 249, Tomball Parkway. *State's Habeas Ex. 6, Affidavit of Vickie Long at 2.*

159. On the morning of February 27, 2014, the trial court told the jury, "I hope you found last night's accommodations to be more suited. I didn't book your first night's accommodations so, not my fault" (XXXII R.R. at 4-5).

160. The Court finds factors beyond the trial court's control caused difficulty in finding hotel accommodations for the jury on the evening of February 25, 2014.

BUS-WAVING INCIDENT

161. On direct appeal, the applicant asserted he was deprived due process and the right to an impartial jury as a result of an outside influence on the jury, namely an incident involving his brother standing near the street and waving at the jury's bus as jurors departed the courthouse, and that the trial court abused its discretion by overruling the defense's motion for mistrial; the applicant's claim was overruled by the Texas Court of Criminal Appeals. *Balderas*, 517 S.W.3d at 782-91.

162. In overruling the applicant's claim on direct appeal, the Court of Criminal Appeals held:

> [w]e doubt that Balderas' brother's conduct of waving and smirking at the jurors as their bus passed him on a public street constituted 'contact...about the matter pending before the jury.' The fact that some jurors recognized Balderas's brother because he had been a spectator in the courtroom did not necessarily transform his conduct of waving and smirking into a communication about the case....Further, the contact at issue was not particularly threatening or intrusive, and the evidence before the trial court rebutted any presumption of harm...Moreover, the record does not support Balderas' speculation that the jurors were deadlocked before the incident, but then, on the morning after the incident, those who favored a not-guilty verdict were so fearful that they abandoned their positions and returned a guilty verdict to 'escape the situation.'

Id. at 789-90 (internal citations omitted).

163. On the morning of February 27, 2014, the trial court was notified by Harris County Sheriff's Office Deputy Patrick Henning that as the jury was loading the bus to go to dinner the night before, members of the jury notified him an individual they believed to be the applicant's brother was waving at them (XXXIII R.R. at 12).

164. After the jury returned a guilty verdict on February 27, 2014, the trial court explored the bus-waving incident on the record with Deputy Henning and several jurors in the presence of both parties (*Id.* at 12-28).

165. Deputy Henning testified he did not personally see the incident, nor did he know what the applicant's brother looked like, but he saw an individual who matched the jurors' description of a person they believed was smirking and waving at them, and asked the bus to stop so he could follow or identify this person, but the person was too far away and Deputy Henning could not leave the jury (*Id.* at 12-13).

166. Deputy Henning testified approximately five or six jurors identified the individual who had waved at them as the applicant's brother based on the man's presence at the courthouse and in the courtroom; that several jurors seemed very alarmed by the incident; and that he informed the jurors not to discuss the incident among themselves (*Id.* at 14).

167. The record reflects Deputy Henning identified "A.B." and "D.T." as two jurors who had discussed the bus-waving incident with him, and that the trial court questioned and permitted both parties to question these two jurors regarding their reactions to the incident (*Id.* at 16-28).

168. Juror "A.B." testified she did not see the bus-waving incident, but was made aware of it by other jurors at the time it occurred (*Id.* at 17-18).

169. Juror "A.B." testified the bus-waving incident made her feel "cautious" but this "feeling of cautiousness" did not weigh into her deliberations (*Id.* at 17-19, 21).

170. Juror "D.T." testified she heard another juror say "Oh, my god, there's his brother" and when she turned she saw a man "standing on the curb with this smirk on his face and he just kind of was waving" (*Id.* at 23-24).

171. Juror "D.T." testified she was not certain the individual was in fact the applicant's brother, but that "[w]e just figured that that's who that was" and that she had seen the individual in the courtroom during the trial (*Id.* at 24).

172. Juror "D.T." testified there was "[n]ot very much [discussion about the incident on the bus] other than, oh, my god, there he is" and no discussion of the incident at dinner (*Id.* at 25-26).

173. Juror "D.T." testified she informed the two deputies at breakfast that morning she was "concerned" about the bus-waving incident because she "thought they were supposed to keep people away from us", but after speaking to the deputy, he put her "mind at ease" and said "it's perfectly normal for [her] to be jumpy" (*Id.* at 26-27).

174. Juror "D.T." testified "irregardless [*sic*] of what [the waving man] did and what I saw, it's not going to change my decision in this case" (*Id.* at 27).

175. The record reflects both jurors "A.B" and "D.T" testified the bus waiving incident would not affect or influence them as they continued to serve on the jury (*Id.* at 17-28).

176. The record reflects after jurors "A.B" and "D.T" were questioned by the court and the defense, the defense moved for a mistrial alleging the jury's verdict was reached as a result of an outside influence and the applicant was denied his right to an impartial jury, due process, and a fair trial; the trial court denied the defense's motion (*Id.* at 28-29).

177. The Court finds to the extent the proffered affidavits of jurors Armstrong, Birney, Norwood, Orosz, and alternate juror Browning-McCauley concern the deliberation process, and because they do not establish that jurors considered any impermissible extraneous influences or impropriety in their deliberations, they cannot be considered pursuant to TEX. R. EVID. 606(b). *See Applicant's Exs. 18-22.*

178. The Court finds the proffered affidavit of alternate juror Browning-McCauley unpersuasive and irrelevant to all the applicant's claims given that she did not deliberate in the applicant's case. *See Applicant's Ex. 20.*

179. Notwithstanding the preclusion of jurors Armstrong, Birney, Norwood, and Orosz's proffered affidavits per TEX. R. EVID. 606(b), the Court finds these affidavits are not dispositive on the merits of the applicant's habeas claims that he was denied the right to a fair trial or that the jury was subjected to an improper outside influence as a result of the first-night accommodations or bus-waving incident. *See Applicant's Exs. 18-19, 21-22.*

180. Notwithstanding the preclusion of jurors Armstrong, Birney, Norwood, and Orosz's proffered affidavits per TEX. R. EVID. 606(b), the Court finds these affidavits are speculative as to the effect of the jury's first-night accommodations and the bus-waving incident on the jury's deliberations. *See id.*

181. The Court finds the applicant fails to present credible, persuasive, or admissible evidence that the jury accommodations hampered his due process right to a fair trial or impartial jury.

182. The Court finds the applicant fails to present credible, persuasive, or admissible evidence that the bus-waving incident hampered his due process right to a fair trial or impartial jury.

FACEBOOK ENTRIES

183. Juror John R. Armstrong made 17 entries on his Facebook page between January 11, 2014 and March 14, 2014, specifically:

    a. the first entry was on January 11, 2014, two days before Armstrong's selection for jury service;

    b. the second and third entries were on February 17 and February 20, 2014, respectively, and made during guilt/innocence;

    c. the fourth entry was made wade on February 27, 2014 after the jury reached a guilt/innocence verdict;

    d. the fifth through fifteenth entries were made between March 1 and March 12, 2014, during punishment; and

    e. the last two entries were made on March 14, 2014, after Armstrong completed jury service.

    Applicant's Ex. 68.

184. Generally, Armstrong's Facebook posts consist of statements regarding: his difficulty in getting to jury service; the jury selection process; updates on the stages of trial; the length of time the trial lasted; the emotionally draining aspects of jury service; and the fact that some jurors were missing vacations due to jury service. *Id.*

185. Individuals who posted in response to Armstrong's Facebook entries generally made comments that they missed him or told him to "hang in there." *Id.*

186. In response to Armstrong's February 27, 2014, post, one individual commented, "Give them the chair!" with no response from Armstrong. *Id.* at 6.

187. On March 10, 2014 Armstrong posted he was on his fourth week of jury duty to which an individual commented, "Were any white Ford Broncos part of the testimony?" and Armstrong responded "No white cars...just never ending testimony of 'expert' witnesses..." *Id.* at 15.

188. The Court finds Armstrong's comment regarding "never ending testimony of 'expert' witnesses" is ambiguous and could have referenced experts presented by either or both parties. *See id.* at 15.

189. The Court finds in Armstrong's Facebook entries and responses to commentators from January 11, 2014 through March 14, 2014, Armstrong did not discuss the facts of the applicant's case, the jury's deliberation process, nor make any comment indicating bias or partiality. *Id.*

190. The Court finds there is no evidence Armstrong was influenced by commentators' responses to his Facebook entries from January 11 through March 14, 2014. *Id.*

191. The Court finds the applicant fails to demonstrate he was prejudiced by Armstrong's Facebook postings from January 11 through March 14, 2014, or that he was denied a fair and impartial trial.

ALLEGED PREMATURE DISCUSSION OF EVIDENCE & RELIANCE ON OWN EXPERTISE

192. The Court finds to the extent the proffered affidavits of jurors Armstrong, Norwood, Sullivan, and Orosz concern juror deliberations and do not establish that jurors impermissibly considered an "outside influence" during in their

deliberations, they cannot be considered pursuant to TEX. R. EVID. 606(b). *Applicant's Exs. 18, 21-23.*

193. In the alternative, the Court finds the proffered affidavits of jurors Armstrong, Norwood, Sullivan, and Orosz are not dispositive on the merits of the applicant's habeas claims that the jury allegedly engaged in misconduct by prematurely discussing evidence and relying on juror expertise on guns, ballistics, and Spanish translations. *See id.*

194. The applicant fails to establish the jury received any additional or impermissible evidence for consideration during deliberations.

195. The record reflects that during the punishment phase, the trial court was informed one or more jurors had concerns about the interpreter's translations of Spanish-speaking witness testimony (XXXIX R.R. at 26).

196. The record reflects the trial court questioned two jurors, identified as "D.T." and "L.M.", who had concerns about the accuracy of Spanish translations, overruled the defense's motion for a mistrial, and instructed the entire jury that each translator was certified in proficiency for translation; each translator had taken an oath to truly and correctly interpret; the interpreter's translation was the official testimony from the witness; and the jury was not to discuss the case until after the court's charge following closing arguments (*Id.* at 25-35).

ALLEGED FAILURE TO FOLLOW TRIAL COURT INSTRUCTIONS

197. Notwithstanding the preclusion of jurors Armstrong, Birney, and Orosz's proffered affidavits per TEX. R. EVID. 606(b), the Court finds these affidavits are not dispositive on the merits of the applicant's claims that the jury allegedly engaged in misconduct by: shifting the burden of proof to the applicant during the guilt/innocence phase; convicting the applicant despite not being convinced beyond a reasonable doubt; considering potential punishment when deciding guilt; and determining their verdicts before hearing all the evidence. *See Applicant's Exs. 18-19, 20.*

198. Notwithstanding the preclusion of jurors Armstrong, Birney, Norwood, and Orosz's proffered affidavits per TEX. R. EVID. 606(b), the Court finds these affidavits do not refute a presumption that the jury followed the trial court's instructions. *Id; see Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005).

SIXTH GROUND FOR RELIEF:
ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL IN PUNISHMENT PHASE

ALLEGED FAILURE TO INVESTIGATE & PRESENT MITIGATING EVIDENCE

199. Prior to trial, the State filed four notices of intent to use extraneous offenses and prior convictions for impeachment and/or punishment purposes, detailing more than 100 hundred offenses and bad acts, including *inter alia*, four capital murders, four aggravated assaults, an aggravated kidnapping, an aggravated robbery, and an arson committed by the applicant (II C.R. at 505-516; V C.R. at 1130; VII C.R. at 1911; XI C.R. at 3169).

200. Based on the credible affidavits of trial counsel, the Court finds counsel:

a. conducted a thorough pretrial mitigation investigation. *Affidavit of Jerome Godinich, Jr. at 3-4; Affidavit of Alvin Nunnery at 3*;

b. retained multiple expert witnesses including fact investigators, seven mitigation experts, and four expert witnesses. *Affidavit of Jerome Godinich, Jr. at 3; Affidavit of Alvin Nunnery at 3*;

c. sent defense experts to Mexico and New York on multiple occasions to develop mitigation information, evidence, and testimony. *Affidavit of Jerome Godinich, Jr. at 3*;

d. investigated the applicant's childhood, background, and familial history of mental illness. *Id.* at 3;

e. investigated whether the applicant was disassociating from LTC. *Id.* at 3;

f. explored various avenues for presenting the different types of mitigation evidence available. *Affidavit of Alvin Nunnery at 3*; and

g. made reasoned, strategic choices in the manner and witnesses through which mitigation evidence was to be presented. *Id.; Affidavit of Alvin Nunnery at 3.*

201. The Court finds the defense team sought pretrial assistance and information from the applicant's family to aid in the applicant's mitigation case, but that instead of assisting the defense team, the family created obstacles and tried to undermine the defense's efforts, namely:

a. the applicant's mother did not want sexual abuse information about the applicant presented in trial. *Affidavit of Jerome Godinich, Jr. at 4;*

b. the applicant's mother told her relatives in Mexico not to come to Houston, or testify for the applicant. *Id.;*

c. because of statements made by the applicant's mother, none of the applicant's relatives were going to testify, until the defense forced the applicant's mother to go to Mexico and apologize to them. *Id.;* and

d. the applicant's relatives in Mexico could not coordinate which of them would come to Houston. *Id.*

202. Despite any challenges arising from the applicant and his family, the Court finds that based on the entirety of the record, trial counsel conducted an expansive and thorough pretrial punishment and mitigation investigation.

203. During the punishment phase of trial, trial counsel presented the testimony of 18 defense witnesses, including seven experts, the applicant's juvenile caseworker, a guard at the Harris County Jail, and friends and family of the applicant (XXXVII R.R. at 170-243; XXXVIII R.R. at 5-19, 35-37, 39-95, 105-178; XXXIX R.R. at 6-21, 103-09, 112-28, 135-59; XL R.R. at 50-58, 60-68, 96-106, 115-47, 163-70, 174-82, 176, 182, 193-218, 242-52, 256-58; XLI R.R. at 37-50, 59-72, 75-109, 148-76, 186-201, 208-24, 246-70; XLII R.R. at 6-64, 87-96, 107-115, 123).

204. Contrary to the applicant's habeas assertions, the Court finds trial counsel presented evidence of the applicant's positive characteristics and role as a protector:

a. the applicant's mother Vicky Reyes testified since his arrest, the applicant has changed and become a God-seeking, good, and different person who deserves to live (XXXVIII R.R. at 83-84);

b. the applicant's cousin Vianet Reyes testified once the applicant adjusted to life after moving to Mexico, he was respectful, well-mannered, and happy (XXXIX R.R. at 119);

c. psychiatrist Dr. Mathew Brams testified the applicant has matured during his incarceration and shown he is better able to cope than he was before (*Id.* at 154-59);

d. the applicant's friend Daniella Chavez testified the applicant did not influence or force her to take part in any activities documented in the gang photographs shown at trial, and that she was not aware of the applicant forcing any female to do anything they did not want to do (XLI R.R. at 48-49);

e. the applicant's friend Judy Gallegos testified the applicant was over-protective of women, took care of women, and never forced women to do anything (*Id.* at 41);

f. psychologist Dr. Jolie Brams testified the applicant's graduation from high school demonstrated determination, and that the people she interviewed saw potential in the applicant, including his teacher who believed he had a good heart and that he got along with others (XLII R.R. at 58, 62-63); and

g. retired prison chaplain Carroll Pickett testified that during their meetings, he and the applicant discussed scriptures, and the applicant was repentant, asked for forgiveness, confessed to various things, and indicated things he would have done differently in his life (*Id.* at 96-98, 101-05).

205. Contrary to the applicant's habeas assertions, the Court finds trial counsel presented evidence of the applicant's familial history of mental illness:

a. Vicky Reyes testified she and Eleazar Hernandez had two sons together: Alejandro who committed suicide on July 22, 2011 at age 18, and Ivan who was diagnosed as schizophrenic and suicidal, and who had attempted suicide in July 2013 (XXXVIII R.R. at 53-55). Reyes also testified Hernandez visited a psychiatrist in Mexico in 1996 after attempting suicide (*Id.* at 57, 61);

b. the applicant's aunt Marina Reyes testified Eleazar Hernandez saw a psychiatrist about three times in Mexico (XXXIX R.R. at 19); and

c. Dr. J. Brams testified the applicant likely had nine of the ten risk factors from the ACES 10-point checklist predictive of health behavior, and that the effect from trauma was his major mental health issue (XLII R.R. at 44, 51).

206. Contrary to the applicant's habeas assertions, the Court finds trial counsel presented substantial evidence of the applicant's violent, abusive, and unstable childhood environment and upbringing through multiple witnesses:

a. Vicky Reyes testified she and the applicant's father fought because neither wanted to be responsible for the children (XXXVIII R.R. at 47); the applicant would hide under the bed, in a closet or in corners when his parents fought (*id.* at 48-48); on three occasions, the applicant saw his father physically hit her (*id.* at 48); she and the applicant's father separated when the applicant was three years old and the applicant's father did not actively seek to see the children (*id.* at 48-49); the applicant was affected by his father's leaving and was always sad, but she did not care how the applicant felt (*id.* at 49-50); she and Eleazar Hernandez had physical fights which the applicant witnessed (*id.* at 52-53); Hernandez punished the applicant by hitting him with a clothes hanger (*id.*); Hernandez called the applicant names (*id.* at 56); the applicant did not want to move to Veracruz with Reyes and Hernandez because Hernandez was sexually abusing the applicant (*id.* at 63); the applicant ran away because he did not want to move with Reyes and Hernandez, and three or four days later was found selling popsicles in the street (*id.* at 61-62); she did not believe Hernandez was sexually abusing the applicant, ignored what she was told, and did nothing because she was obsessed with Hernandez (*id.* at 64); she moved back to Houston with her kids when Hernandez tried to strangle her (*id.* at 64-66); it did not bother her when Hernandez abused the applicant (*id.* at 66); and upon returning to Houston, she and the children lived in a number of different places in search of the cheapest apartments (*id.* at 68-69);

b. Marina Reyes testified that when Vicky Reyes left the applicant in Mexico, the applicant missed his mother and initially had difficulty adjusting (XXXIX R.R. at 12-14); when Vicky and Eleazar Hernandez came to get the children in Mexico, the applicant ran away (*id.* at 15-17); Hernandez would sit next to the applicant on the sofa, caress the applicant, and touch "on his little parts" (*id.* at 17-18); and when she told Vicky about Hernandez's sexual conduct towards the applicant, Vicky said it was just because Hernandez loved the applicant (*id.* at 18);

c. Vianet Reyes testified that for several months after Vicky Reyes left the applicant in Mexico, he would sit on the roof and wait for his mother to return because he did not understand why she had left (XXXIX R.R. at 117-18); the applicant ran away for several days after learning he was leaving with Vicky and Hernandez because he did not want to be near Hernandez (*id.* at 123-24); and she told Vicky that Hernandez was touching the applicant, but Vicky did not believe her (*id.* at 123-25);

d. the applicant's father Juan Balderas, Sr. testified he and Vicky Reyes had problems and argued because she was seeing other men (XXXVIII R.R. at 87-91); he did not see the applicant for a long time after he separated from Reyes because he did not know where they lived (*id.* at 91); he re-connected with the applicant when the applicant was around 14 or 15 years old, but was not aware the applicant was involved with gang activity until after the applicant was arrested (*id.* at 93-94);

e. forensic psychologist Dr. Matthew Mendel testified Eleazar Hernandez's sexual abuse of the applicant started at age five, had a long duration, and was coupled with the applicant's emotional abuse and physical abuse such as being punched and placed in chokeholds (*id.* at 157-59, 161); the applicant reported sexual abuse at the hands of Hernandez as well as three females and another male (*id.* at 144); when the applicant was eight years old, a 16-year old girl kissed and touched him (*id.* at 146-47); when the applicant was 13, the applicant had sex with his mother's friend who was in her mid-20s (*id.* at 148); while in Mexico, the applicant had a sexual experience with his aunt's girlfriend (*id.* at 147-48); and the applicant reported a male neighbor abused him when he was young (*id.* at 145);

f. geographic information system analyst Amy Nguyen testified that using census data from the 1980s through 2000, she created several maps of southwest Houston where the applicant grew up to demonstrate the higher poverty rates, signs of community disorganization and lower educational level of Hispanics in the area compared to other groups and the county at large (XL R.R. at 125-65);

g. Dr. J. Brams testified the applicant was used by Eleazar Hernandez and his friends as a participant in human cockfights (XLII R.R. at 26); and

h. the applicant's former juvenile probation officer, Sofia Nolte testified that at the time the applicant attended boot camp, it was a militaristic, secured facility without many therapeutic services, but that if it had been known that the applicant had suffered trauma or sexual abuse, he would have been referred for treatment (XLI R.R. at 194).

207. Contrary to the applicant's habeas assertions, the Court find trial counsel presented substantial evidence of the applicant's "unstable, impetuous mother"[4]:

[4] *Applicant's Writ Application* at 227.

a. Vicky Reyes, testified she and the applicant's father were not ready to have a child (XXXVIII R.R. at 45); she was young when she had the applicant and did not want to be a mother (*id.* at 45); she felt it was a nuisance to be a mother and the applicant prevented her from living her life (*id.* at 46); when she separated from the applicant's father she began drinking and smoking and became careless with the children (*id.* at 50); after work, she would go out drinking and smoking with her friends, instead of going home (*id.* at 46); she would leave her children with neighbors or with the person she was dating and go out (*id.* at 46, 50); once she went to a dance after work, stayed out until 5:00 am, changed clothes, went to work without checking on her children, and did not care (*id.* at 51); after marrying Eleazar Hernandez, she would sometimes leave the applicant and his brother Jesus alone and in Hernandez's care (*id.* at 51-52); she did not object to Hernandez's method of punishing the applicant because she was afraid Hernandez would leave her (*id.* at 53); when she was married to Hernandez she did not worry about how the applicant felt about their household environment (*id.* at 56); when the applicant was beginning the second grade, she left him and his brother with relatives in Mexico so she could be alone with Hernandez (*id.* at 57-58); it was only when she was called to the applicant's school after he was in a fight, that she realized the applicant was hanging around the wrong people (*id.* at 69-70); she knew the applicant was in a gang, but ignored it (*id.* at 70-72); she made mistakes raising the applicant (*id.* at 82-83); neither she nor the applicant's father were good role models (*id.* at 85); and she left the applicant to himself and to find his own role models when he was growing up (*id.* at 85);

b. Marina Reyes, testified that when Vicky Reyes initially left Mexico, the family did not hear from her for nine years, and Vicky only returned to leave the eight-year old applicant and his brother Jesus in Mexico (XXXIX R.R. at 6-9);

c. Vianet Reyes testified the family was surprised when Vicky Reyes left the applicant and Jesus in Mexico because the family assumed she was dead (*Id.* at 116); and

d. Dr. J. Brams testified Vicky Reyes was an alcoholic who chose her abuser over the applicant; was ill-prepared to be a parent, or to connect and care about others; and was unable to bond with the applicant as a baby (XLII R.R. at 12-15, 21).

208. The Court finds trial counsel presented extensive expert testimony to explain the impact, consequences, and ramifications of the applicant's violent, abusive, and unstable childhood surroundings and upbringing (XXXVIII R.R. at 125-78; XXXIX R.R. at 103-109, 143-59; XL R.R. at 50-58, 60-63, 195-218, 242-52, 256; XLI R.R. at 251-70; XLII R.R. at 6-63, 87-94).

209. Forensic psychologist Dr. Matthew Mendel evaluated the applicant to determine the impact of childhood trauma or abuse the applicant experienced (XXXVIII R.R. at 125-78; XXXIX R.R. at 103-09).

210. Dr. Mendel testified to the wide scope of information he gathered, considered, and reviewed as part of his evaluation, which included his own interviews with the applicant and the applicant's friends and family (XXXVIII R.R. at 125-30, 170-73).

211. Dr. Mendel testified the applicant's sexual abuse at the hands of Eleazar Hernandez "was about as severe as it gets" and that sexual abuse predicts a worse outcome if it happens several times, begins at a young age, and the abuser is in a close relationship with the victim (XXXVIII R.R. at 140, 156-57); victims of sexual abuse suffer from a sense of powerlessness which may explain the importance of the applicant's being tough and hypermasculine (*id.* at 149-51); victims of sexual abuse suffer from betrayal which the applicant felt from his mother and Hernandez (*id.* at 151-51); victims of sexual abuse suffer from stigmatization which is more pronounced in male sexual abuse victims (*id.* at 149-50, 152); victims of sexual abuse are more likely to suffer sexual dysfunction – something the applicant reported (*id.* at 149-50, 153-54); many of the applicant's behaviors (such as drug and alcohol abuse and intentionally putting himself in emotionally painful situations) were forms of emotional suppression stemming from a sense of powerlessness that is common in victims of sexual abuse (XXXVIII R.R. at 163-68); and the applicant expressed rage, anger, and aggression when discussing past sexual abuse (*id.* at 162).

212. Dr. Mendel ultimately diagnosed the applicant with post-traumatic stress disorder (XXXVIII R.R. at 125-78); (XXXIX R.R. at 103-09).

213. Psychiatrist Dr. Matthew Brams testified that in evaluating the results of the Personality Assessment Inventory administered the applicant, he exhibited many trauma symptoms and experiences much anxiety stemming from his upbringing (XXXIX R.R. at 153-54).

214. Psychologist Dr. Jolie Brams evaluated the applicant to determine the correlation between the applicant's history and functioning, and whether his life influences affected his behavior (XLI R.R. at 251-70; XLII R.R. at 6-63, 87-94).

215. Dr. J. Brams testified that in the course of her evaluation, she interviewed the applicant, his friends, his family, and State witnesses; reviewed an extensive amount of background and diagnostic information; and ultimately concluded the pervasive trauma the applicant experienced as a child markedly impacted his functioning during his childhood and adolescence, and affected his behavior choices (XLI R.R. at 261-63, 268).

216. Dr. J. Brams testified the applicant suffered an extreme level of trauma of the type that studies show has a significant effect on brain development, behavior, and mental health functioning; the applicant's exposure to domestic violence and lack of good role models resulted in his inability to deal with emotions or solve problems; the applicant was the victim of a generational history of sexual abuse in Eleazar Hernandez's family; the applicant's life was filled with abandonment and abuse; and the applicant lived in a social environment of survival of the fittest where his poverty limited the available resources causing him to have to take care of himself (XLI R.R. at 268, XLII R.R. at 17-18, 20-24, 29-30, 45-46);

217. Dr. J. Brams testified the applicant was not properly assessed and diagnosed as a child or adolescent and consequently he was not given treatment from which he could have benefitted (XLI R.R. at 269-70).

218. Dr. J. Brams found the applicant showed signs of depression during his childhood and displayed symptoms of post-traumatic stress disorder, but was not exhibiting any meaningful signs of anti-social behaviors or antisocial personality disorder (XLII R.R. at 47-49).

219. The Court finds trial counsel used expert testimony to highlight the correlation between the applicant's childhood circumstances and upbringing to his gang affiliation:

    a. Dr. Mendel identified a number of traumatic events during applicant's childhood and found that the applicant's childhood abuse and trauma were central to his gang activity, with the gang serving as the applicants' family (XXXVIII R.R. at 135-39, 162);

b. Dr. J. Brams testified the profound trauma suffered by the applicant directly related to his gang involvement, because he experienced emotional detachment which led to his participation in gang/criminal activities, and that the gang gave him a sense of safety and an outlet for his anger (XLI R.R. at 268-69; XLII R.R. at 26, 28-30, 40-41).

c. criminology and criminal justice professor Dr. John Rodriguez testified that a review of the applicant's life history, police reports, and school records, revealed the applicant was the failed product of his society and environment (low education rates, high unemployment rates, and high property crimes); the applicant had a higher propensity to join a gang; and the gang gave the applicant an identity, environment, family, outlet for stress, and coping mechanisms (XL R.R. at 201-205, 208, 213-14, 252).

220. The Court finds trial counsel presented additional mitigation evidence that the applicant had family and friends who loved and supported him:

a. Vicky Reyes testified she supported the applicant (XXXVIII R.R. at 83-84);

b. Marina Reyes testified she had a close relationship with the applicant and loved him very much (XXXIX R.R. at 15);

c. Vianet Reyes testified she would be emotionally available for the applicant if he spent the rest of his life in prison (*Id.* at 128);

d. the applicant's cousin Paloma Reyes testified she loved the applicant like a brother and that he was very important to her (*Id.* at 193-95); and

e. Juan Balderas, Sr. testified that he would emotionally support the applicant if the applicant spent the rest of his life in prison (XXXVIII R.R. at 94-95).

221. The Court finds trial counsel presented lack of future danger evidence in the form of the applicant's generally positive behavior and performance while in custody or under court supervision, namely:

a. Dr. M. Brams testified that according to the Personality Assessment Inventory, which allows for comparisons between aggressiveness and mental health issues between individual inmates, he believed the applicant is less aggressive, more submissive, and less dominant than other inmates (XXXIX R.R. at 150-51, 153); the applicant would not be the aggressor, leader, or predator in an inmate population (*id.* at 151-53); the applicant

may avoid rather than start conflict (*id.*); and the applicant would continue to mature while incarcerated and adjust to incarceration better than most inmates (*id.* at 154-59);

b. prison consultant and former warden Terry Pelz testified an inmate's past institutional behavior indicates his future institutional behavior, and that after interviewing the applicant and reviewing his juvenile records, jail records, and some police reports, Peltz was optimistic for the applicant and believed the applicant would do fine in prison given his non-serious juvenile history, and propensity towards religion (XLI R.R. at 201-13, 215-17, 246);

c. Harris County Sheriff's Office Deputy Oscar Gonzalez testified he never had any problems with the applicant at the jail, and the applicant once helped calm a difficult inmate who was placed in the cell next to the applicant (XLII R.R. at 112-13);

d. Sofia Nolte testified that when the applicant was on her caseload as a juvenile, he was well-behaved, she had no problems with him, and wanted to work with him (XLI R.R. at 194, 199); the applicant was once referred to court because of a physical altercation, but was sent back to boot camp instead of TYC[5] (*id.* at 197); and the types of write-ups the applicant received during boot camp - constantly talking and leaving the assigned area - were not real offenses in the grand scheme of things she dealt with (*id.* R.R. at 199).

222. The Court finds trial counsel also presented lack of future danger evidence in the form of prison experts:

a. retired prison administrator Frank Aubuchon testified extensively concerning the prison classification system for inmates who receive a life sentence without parole for capital murder, and that LTC is not considered a security threat group in prison (*Id.* at 78-103); and

b. Pelz testified he believed there would be no incentive for the applicant to join a prison gang; prison gangs did not associate with or tolerate street gangs like LTC; and that inmates doing life without parole can be managed by prison (*Id.* at 220-21, 224).

[5] Texas Youth Commission.

223. Notwithstanding the defense's efforts to mitigate the applicant's punishment and show a lack of future danger at trial, the Court finds the State aggressively cross-examined defense experts and presented overwhelming and compelling punishment evidence against the applicant, specifically:

a. his juvenile criminal history, including theft, evading arrest, unauthorized use of a motor vehicle, and assault offenses (XXXIII R.R. at 11-44);

b. his disobedience, behavior problems, and violations while on juvenile probation (*Id.*. at 11-44);

c. his truancy from school, substance abuse, and disrespect towards his mother (*Id.* at 11-44, 50);

d. his failed attempts at gang disassociation and substance abuse rehabilitation (*Id.* at 11-44);

e. his gang membership, leadership role, participation in activities/meetings, and tattoos (XXVI R.R. at 126-62, 192; XXVII R.R. at 75-75, 87-99, 114-19, 121; XXXIII R.R. at 11-44, 54-55; XXXIV R.R. at 14-253; XXXV R.R. at 10-44; XXXVI R.R. at 257-82);

f. his psychological screening results showing he had an average IQ, a supportive family, and no history of reported abuse (XXXIII R.R. at 48-67);

g. his psychological screening results showing he exhibited adolescent onset conduct disorder, cannabis abuse, inhalant abuse, cocaine abuse, and alcohol abuse (*Id.* at 48-67);

h. his participation as a gunman and shooter in the capital murder of Daniel Zamora and the aggravated assault of Guadalupe Sepulveda on September 12, 2005 (XXXIII R.R. at 69-100, 106-28; XXXIV R.R. at 5-44, 68-120, 198-246; XXXV R.R. at 10-44; XLII R.R. at 278-80);

i. his participation as a gunman and shooter in the murder of Eric Romero on December 3, 2005 (XXXV R.R. at 10-31, 116-37, 140-72, 178-224);

j. his participation as a gunman and shooter in the aggravated assault of Luis Garcia on November 14, 2005 (*Id.* at 8-26, 31-49; XXXVI R.R. at 158-76);

k. his participation as gunman and shooter in the capital murder of Jose Garcia on December 15, 2005 (XXXVI R.R. at 55-89, 95-111, 152-58; XXXVII R.R. at 9-32; XL R.R. at 276);

l. the intentional arson of the applicant's car, which had been identified in the commission of multiple offenses via its license plate (XXXV R.R. at 12-14; XXXVI R.R. at 20-24, 35-40, 104-105 109-111, 123-47, 169-71);

m. his possession of a variety of different firearms, ammunition and firearm paraphernalia upon his arrest, including items traditionally sold only to law enforcement (XXXVI R.R. at 225-45, 248-65);

n. the discovery of various weapons, ammunition, drugs, drug paraphernalia, cell phones, large amounts of cash, bandanas, face masks, and gang-related items in his apartment by law enforcement (XXXVII R.R. at 34-82);

o. his propensity to carry firearms with him at all times, specifically a .357 caliber and a .40 caliber handgun (XXXIV R.R. at 195-98; XXXV R.R. at 19-20);

p. the .40 caliber Smith & Wesson handgun consistent with ballistics evidence from Eduardo Hernandez's murder was specifically identified as one of the applicant's two personal firearms he always kept with him (XXV R.R. at 238, 245; XXVII R.R at 16; XXXVII R.R. at 36-41, 53-54; XXXIV R.R. at 197);

q. two-.40 caliber Smith & Wesson fired cartridge casings recovered from the Zamora murder/Sepulveda aggravated assault crime scene had been fired from the .40 caliber Smith & Wesson handgun that was in the applicant's possession at the time of his arrest and which was specifically identified as one of the applicant's two personal firearms he always kept with him (XXV R.R. at 238, 245; XXVII R.R at 16; XXXVII R.R. at 118-19);

r. .40 caliber Smith & Wesson cartridge casings that had been "necked down" to .357 caliber from the Luis Garcia aggravated assault crime scene had been fired from the .357 Sig handgun that was in the applicant's possession at the time of his arrest (XXXVI R.R. at 231; XXXVII R.R. at 120-26);

s. eight-.357 caliber Sig cartridge casings; one-.40 caliber Smith & Wesson cartridge casing that had been necked down to .357 caliber; two fired bullet jackets; and a jacketed lead bullet from the Eric Romero murder scene had been fired from the .357 Sig handgun that was in the applicant's

possession at the time of his arrest (XXXVI R.R. at 231; XXXVII R.R. at 127-131, 143);

t. three-.40 caliber Smith & Wesson cartridge casings that had been "necked down" to .357 caliber, and three fired jacketed lead bullet from the Jose Garcia murder scene had been fired from the .357 Sig handgun that was in the applicant's possession at the time of his arrest (XXXVI R.R. at 231; XXXVII R.R. at 143-49);

u. the 9mm cartridge case recovered from the applicant's pocket when he was arrested matched the 9mm Luger handgun found in the applicant's residence (XXV R.R. at 230-32; XXXVII R.R. at 34-82, 159);

v. his assault on Houston Police Department Officer Woodrow Tompkins and another inmate on November 20, 2005 while in the city jail (XLII R.R. at 133-44);

w. his classification, housing and disciplinary history while in the Harris County Jail, which included being housed in a segregated cell since April 2007 and being found guilty of destroying, altering, or damaging county property; tattooing or possession of tattoo paraphernalia; possession of contraband; fighting; tampering; possession or manufacture of a weapon; and misuse of medication, (XLII R.R. at 149-87, 204-209, 212-22, 227-40, 242-53); and

x. an incident in the Harris County Jail on May 10, 2009, where the applicant grabbed a pocketknife from Detention Officer Chris Aguero and threatened Aguero with it (XLII R.R. at 256-67).

224. Given the totality of the evidence, the Court finds trial counsels' decisions to present lack of future danger and mitigation evidence in the manner presented at trial was reasonable trial strategy.

ALLEGED FAILURE TO INVESTIGATE & PRESENT EVIDENCE REBUTTING EXTRANEOUS OFFENSES

225. The Court finds trial counsel cross-examined State's witnesses as rebuttal evidence to the State's presentation of extraneous offenses (XXXIII R.R. at 100-105; XXXIV R.R. at 45-67, 121-37, 145-46; XXXV R.R. at 45-115, 128-30, 138-40, 172-76, 198, 224-231; XXXVI R.R. at 27-30, 50-54, 89-94, 112-22, 148-51, 176-207, 218-24, 232, 245-46, 263, 283; XXXVII R.R. at 32-34, 82-85,

149-59, 167-69; XLII R.R. at 131-33, 145-49, 188-203, 210-11, 220-223, 225-26, 235, 240-42, 245-47, 254, 268-75, 280-83).

226. The Court finds trial counsel presented testimony regarding the hierarchy and operations of LTC as rebuttal to the State's presentation of extraneous offenses:

    a. Celeste Munoz testified Wendy Bardales was "messing around" with the applicant, Israel Diaz and the complainant (XXXVIII R.R. at 14-15);

    b. Daniella Chavez testified she knew the applicant and identified Alejandro Garcia, Jose, Efrain Lopez, Cookie, Chango, and the applicant as members of LTC (XLI R.R. at 44-46); and

    c. Judy Gallegos testified Victor "Gumby" Arevalo was the leader of LTC in Alief (XXXVII R.R. at 175-82); gang members would vote on important matters, but Arevalo made the ultimate decisions (*id.* at 184-85); a person must be a fully "cliqued in" LTC member in order to commit offenses with other members (*id.* at 195); other people used the guns Arevalo would distribute (*id.* at 196-98, 200-02, 205); and Gallegos identified Arevalo's guns(*id.* at 196-98, 200-02, 205).

227. The Court finds according to Godinich's credible affidavit,

    a. Celeste Munoz and Daniella Chavez testified as the defense expected and hoped. *Affidavit of Jerome Godinich, Jr.* at 2; and

    b. counsel presented all the evidence available to them to rebut the State's extraneous offense allegations against the applicant. *Id.* at 3.

228. The Court finds trial counsel employed reasonable trial strategy to rebut the State's presentation of extraneous offense evidence.

ALLEGED FAILURE TO OBJECT TO & PRESERVE TRIAL COURT'S DENIAL OF FUNDING TO TRANSPORT WITNESSES TO THE UNITED STATES FROM MEXICO

229. Per Godinich's credible affidavit, the trial court would have paid for the transportation and housing of the defense witnesses from Mexico once these witnesses were inside the United States, and counsel was prepared to cover the fees associated with the witnesses leaving Mexico, but the witnesses were unable to coordinate among themselves who would come to Houston. *Id.* at 3-4.

230. Arrangements were made for several defense witnesses in Mexico to testify in the applicant's trial via Skype (XXXIX R.R. at 5).

231. During the testimony of the defense's Mexico witnesses, technical issues occurred with the Skype technology, which ultimately prompted the Court to take a break from Skype testimony in order to resolve the issue (*Id.* at 25, 35).

232. Ultimately, the parties successfully used speakerphone instead of Skype to finish questioning the applicant's witnesses in Mexico (XL R.R. at 173-75).

233. The Court finds that despite the distance and technological shortcomings of Skype, the parties were nevertheless able to present direct and cross-examination testimony from the applicant's witnesses for the jury's consideration.

234. Based on Godinich's credible affidavit, the Court finds the applicant's friends and family created obstacles and tried to undermine the defense's efforts during the punishment phase, namely:

    a. mitigation expert Adriana Helenek learned that Yancy Escobar was telephoning the witnesses in Mexico and instructing them how to respond to Godinich's questions. *Affidavit of Jerome Godinich, Jr.* at 4; and

    b. due to Escobar's interference with witness testimony, witnesses responded to Godinich's questions much differently than expected, and Godinich was unable to question the witnesses in Mexico as he had intended. *Id.*

235. The Court finds any obstacle the defense faced as a result of witness tampering with its witnesses in Mexico, was a result of the applicant's friends and family, and not the trial court's failure to fund travel expenses from Mexico. *See id.*

236. The Court finds that the applicant's witnesses in Mexico were outside the subpoena power of the Court, but that these witnesses voluntarily agreed to testify via Skype (I Writ Hearing—February 22, 2018 at 38).

237. The Court finds the applicant fails to show the trial court erred in denying the defense funding to transport witnesses from Mexico to the United States.

ALLEGED BAD BEHAVIOR & JURY ALIENATION BY TRIAL COUNSEL

238. Per Nunnery's credible affidavit, he has no personal recollection of calling the State's counsel "a bitch" or saying that someone "doesn't like me because I'm black." *Affidavit of Alvin Nunnery* at 4.

239. The Court finds the record does not reflect Nunnery referring to the State's prosecutor as a "bitch", nor does it reflect Nunnery making a comment to the effect that "so and so doesn't like me because I'm black."

240. The Court finds the applicant fails to show the complained-of remarks attributed to Nunnery affected trial counsels' representation or the outcome of the proceeding.

241. Per Nunnery's credible affidavit, because of juror notes sent out during the jury's guilt/innocence deliberations, Nunnery made a strategic decision to remind the jurors during his punishment closing argument of the importance of the oath they took as jurors to have individual votes, to keep to their personal convictions, and that if they changed their votes because of peer pressure, that they had violated their oaths. *Id.*

242. The Court finds that in his closing argument, Nunnery noted the attention given by the jury during the trial; expressed his appreciation and respect for the jury's efforts; respectfully disagreed with the jury's guilty verdict; reminded the jury of their commitment during jury selection; summarized the evidence; argued the lack of credibility of the State's witnesses; made reasonable inferences from the evidence; argued a lack of future dangerousness and the presence of mitigation evidence such that the jury's answers on the special issues should lead to a life sentence for the applicant; asked the jury not to abandon common sense; and pleaded the jury to show the applicant mercy (XLIII R.R. at 5-36).

243. Given the entirety of Nunnery's closing argument, the Court finds the content was reasonable trial strategy.

FAILURE TO OBJECT & PRESERVE ERROR ON STATE'S QUESTIONING AND CLOSING ARGUMENT ALLEGEDLY ATTACKING APPLICANT'S FAILURE TO TESTIFY

244. According to the credible affidavits of trial counsel, counsel did not object to portions of the State's cross-examination of Dr. Matthew Mendel and Dr. Matthew Brams regarding the failure to record conversations with the applicant, or the associated portions of the State's closing argument because counsel did

not construe these as comments on the applicant's failure to testify, and believed these were fair points for cross-examination and attacks on the credibility of the experts. *Affidavit of Jerome Godinich, Jr.* at 3; *Affidavit of Alvin Nunnery* at 3-4.

245. The Court does not find the State's argument and cross-examination of experts Matthew Mendel and Matthew Brams constituted a comment on the applicant's failure to testify, but rather appropriately raised questions concerning the credibility of the defense's sexual abuse evidence. *See* (XXXIX R.R. at 53-58; XL R.R. at 13-16; XLII R.R. at 66).

SEVENTH GROUND FOR RELIEF:
STATE'S ALLEGED PRESENTATION OF FALSE EVIDENCE THROUGH WITNESS CHRISTOPHER POOL

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246. On March 12, 2014, during the State's rebuttal punishment case, former Harris County Sheriff's Office ("HCSO") detention officer Christopher Pool testified regarding contraband he found during a search of the applicant's cell in the Harris County Jail (XL R.R. at 247-48).

247. Pool testified that on March 29, 2010 he was assigned to conduct a search of the applicant's single-man cell in the 1200 Baker Street jail, and during the search he found 34 Seroquel and Klonopin pills, two razor blades, and a pen (*Id.* at 248-49).

248. The applicant's false testimony allegations do not pertain to Pool's discovery of contraband in the applicant's cell, but rather the truthfulness of Pool's responses regarding the circumstances of his termination from the HCSO.

249. At trial, Pool testified he was currently employed by the Splendora Police Department but had previously worked for the HCSO for three and half years (*Id.* at 247-48).

250. On cross-examination and in response to defense counsel's questioning regarding why Pool left the HCSO, Pool testified that on August 22, 2012 he was terminated for a violation of policies, specifically "it was a round sheet, there was a failure to render aid and deception" (*Id.* at 254).

251. Pool concurred with defense counsel that the incident spurring his termination involved the death of an inmate (*Id.* at 254).

252. In response to the State's redirect examination question of "what happened yesterday in regard to that termination?" Pool testified that he was "cleared of all wrongdoing" in the incident spurring his termination and was eligible for rehire by the HCSO within 75 days (*Id.* at 255).

253. According to a March 12, 2014 letter from the Harris County Sheriff's Civil Service Commission, the commission

    a. modified Pool's termination to a suspension with time served from the termination date to the date of reinstatement and no award of back pay;

    b. stated "Pool is to be reinstated within 75 days from March 11, 2014, to his former pay grade but without seniority, from August 21, 2012 through the date of reinstatement"; and

    c. mandated the HCSO "immediately expunge from Christopher Pool's records any reference to a Dishonorable Discharge and/or termination and/or indefinite suspension arising from this incident at issue and immediately report to the Texas Commission on Law Enforcement that the previous determination as to Officer Pool's separate from duty has been modified to reflect the suspension referred to above."

    Applicant's Ex. 72.

254. The Court finds the applicant fails to demonstrate Pool's testimony, when examined in its entirety, left a false impression with the jury (XL R.R. at 247-48); *see Applicant's Exs. 70-72.*

255. The Court finds the applicant fails to demonstrate materiality in Pool's testimony regarding his termination from the HCSO, or that such testimony affected the jury's consideration of the special issues, in light of Pool's testimony about the contraband in the applicant's cell.

256. The Court finds the applicant fails to demonstrate materiality in Pool's testimony regarding his termination from the HCSO, or that such testimony affected the jury's consideration of the special issues, in light of the State's other extraneous punishment evidence including the applicant's juvenile history; murders of Daniel Zamora, Eric Romero and Jose Garcia; aggravated assaults of Luis Garcia and Guadalupe Sepulveda; vehicular arson; possession of firearms and firearm paraphernalia; and other bad behavior while in the city and county jails.

EIGHTH GROUND FOR RELIEF:
ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO TIMELY AND COMPETENTLY ASSERT APPLICANT'S RIGHT TO A SPEEDY TRIAL

257. The applicant was arrested in connection with the underlying capital murder on December 16, 2005 (XXV R.R. at 230).

258. Jury selection began in the applicant's case on January 13, 2014 (XII C.R. at 3417).

259. On January 17, 2014, the fifth day of jury selection, the applicant filed a *pro se* motion asserting his right to a speedy trial, but seeking no particular relief other than the trial court "grant this Motion for Speedy Trail [*sic*] in all things sought therein"; the trial court made no ruling on this motion (II C.R. at 496).

260. On January 29, 2014, the eleventh day of jury selection, defense counsel filed a "Motion to Dismiss the Indictment for Lack of a Speedy Trial" (IX C.R. at 3121).

261. The trial court held a speedy trial hearing on February 12, 2014, wherein the State presented the testimony of Spence Graham and Paula Hartman, former chief prosecutors of the 179th District Court, who had worked on the applicant's case, and the defense presented the applicant's testimony (XXII R.R. at 5-81).

262. During the February 12, 2014, speedy trial hearing, Spence Graham testified:

    a. he was assigned to the applicant's case in May 2009 when he became the chief prosecutor of the 179th District Court (*Id.* at 9);

    b. the applicant's case was several years old when it was assigned to Graham, but it was not the oldest capital murder on the court's docket, as the court had a backlog of approximately 21 capital murder cases and over 1000 pending cases, many predating the applicant's case (*Id.* at 27, 33);

    c. the applicant was charged with the underlying capital murder case, as well as another capital murder and an assault on a peace officer (*Id.* at 9);

    d. the State's file pertaining to the applicant's case was voluminous, consisting of six to eight boxes and a minimum of 11 large offense reports concerning homicides linked to the applicant and a larger police investigation into LTC (*Id.* at 10);

e. when Graham was assigned to the applicant's case, the District Attorney had not yet made a decision of whether or not to seek the death penalty against the applicant (*Id.*);

f. the applicant's cases were regularly on the trial court's docket every month or two, and Graham routinely spoke with defense counsel Nunnery and Godinich about their submittal of a mitigation packet for the District Attorney's consideration (*Id.* at 11-13, 31);

g. even after submitting a mitigation packet, Godinich asked Graham to wait before making a decision or presenting the applicant's case to the District Attorney, in hopes that Godinich could persuade the applicant to accept a plea bargain and avoid the death penalty (*Id.*at 13-16);

h. the District Attorney ultimately decided to seek the death penalty in the applicant's case and on April 28, 2011, the State filed a notice of intent to seek the death penalty (*Id.* at 17-18, 32);

i. part of the delay in the District Attorney's decision as to whether or not to seek the death penalty was the applicant's commission of an aggravated assault on a public servant while incarcerated, which was not immediately relayed to the State, and which required further investigation (*Id.* at 36);

j. even after the State's decision to seek the death penalty, defense counsel tried to persuade the applicant to plead to life without parole, but never presented Graham with an offer to plead (*Id.* at 19);

k. Nunnery never sought a trial setting (*Id.* at 16-17); and

l. prior to Graham's departure from the 179th District Court in late December 2011 or early January 2012, the applicant's case was set for a pretrial conference on May 10, 2012, and jury trial on August 9, 2012, due to the trial court's insistence (*Id.* at 20-22, 30).

263. During the February 12, 2014, speedy trial hearing, Paula Hartman testified:

a. she was assigned to the applicant's case in January 2012 when she followed Graham as the chief prosecutor of the 179th District Court (*Id.* at 43);

b. Godinich wanted the District Attorney's Office to consider a different resolution to the applicant's case other than the death penalty (*Id.* at 52);

c. she was prepared to start trial in August 2012, but on May 10, 2012, the defense filed a motion for a continuance asserting that the defense's guilt/innocence and punishment investigation would not be complete in anticipation of the August trial date (*Id.* at 45-47);

d. the trial court granted the defense's motion for continuance over "strong opposition of the State" and reset the trial for February 2013 (*Id.* at 48-49);

e. the State was prepared for trial in February 2013, but the case was removed from the trial docket because a new judge had assumed the bench (*Id.* at 49);

f. the parties agreed to set the case for trial in September 2013 (*Id.* at 50); and

g. Hartman left the 179th District Court in January 2013, at which time Traci Bennett was assigned as the chief prosecutor of the court and assumed responsibility of the applicant's case (*Id.* at 50-51).

264. During the February 12, 2014, speedy trial hearing, the applicant testified that during his extended incarceration, his ability to continue his education and earn an income were adversely affected; he lost a family member; and suffered strained relationships and severe stress (*Id.* at 62-64).

265. Following a hearing on February 12, 2014, the trial court denied the applicant's motion to dismiss the indictment for lack of a speedy trial (*Id.* at 811; XI C.R. at 3133).

266. On direct appeal, the applicant asserted the trial court erred in denying his motion to dismiss the indictment for lack of speedy trial, but his claim was denied by the Texas Court of Criminal Appeals after the Court balanced the four *Barker v. Wingo*, 407 U.S. 514, 530 (1972), factors. *Balderas*, 517 S.W.3d at 767, 767-73.

267. The Court of Criminal Appeals found that from 2009 to 2013, "defense counsel consistently sought additional time for investigation and negotiation." *Id.* at 771.

268. According to the credible affidavits of trial counsel, the Court finds:

a. the massive volume of discovery in the applicant's case, the State's evidence; the applicant's criminal history; and his continued bad behavior

in the jail required extensive investigation by the defense. *Affidavit of Jerome Godinich, Jr.* at 3; *Affidavit of Alvin Nunnery* at 4;

b. the defense purposefully engaged in prolonged ongoing negotiations with the State regarding whether the State would consider a guilty plea to a life sentence in lieu of seeking the death penalty. *Affidavit of Jerome Godinich, Jr.* at 3; *Affidavit of Alvin Nunnery* at 4;

c. the defense's timing in filing its motion to dismiss the indictment for lack of a speedy trial was rooted in trial strategy based on "the totality of circumstances at play[.]" *Affidavit of Alvin Nunnery* at 4.

d. defense counsel informed the applicant of every reset and continuance sought in his case and the reason for the request, and the applicant never objected to any of these request until the eve of trial. *Affidavit of Jerome Godinich, Jr.* at 3.

e. the applicant never indicated his desire for a ***speedy*** trial. *Affidavit of Alvin Nunnery* at 4-5 (emphasis added); and

f. the defense filed a motion to dismiss the indictment for lack of speedy trial solely to preserve the applicant's appellate rights on the issue, not because there were beneficial defense witnesses who were unavailable due to the delay or because the applicant's defense was hampered in any way due to the passage of time. *Id.* at 5.

269. Although the Court of Criminal Appeals "presume[d] that the lengthy delay here adversely affected [the applicant's] ability to defend himself," the Court finds trial counsels' affidavits credibly rebut this presumption. *See Balderas*, 517 S.W.3d at 772-73; *see also Affidavit of Jerome Godinich, Jr.* at 3; *Affidavit of Alvin Nunnery* at 4-5.

270. The Court finds the defense's delay in filing a motion to dismiss the indictment for lack of speedy trial was reasonable trial strategy.

271. The Court finds the applicant fails to establish that trial counsel were ineffective in the timing of their motion to dismiss the indictment for lack of a speedy trial, or that counsel incompetently asserted his right to a speedy trial.

NINTH GROUND FOR RELIEF:
ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL DURING JURY SELECTION

272. The Court finds that because the proffered affidavits of jurors Armstrong, Norwood and Orosz concern mental processes, and because they do not establish that jurors considered any impermissible extraneous influences or impropriety in their deliberations, they cannot be considered pursuant to TEX. R. EVID. 606(b). *See Applicant's Exs. 18, 21-22.*

273. Notwithstanding the preclusion of jurors Armstrong, Norwood and Orosz's proffered affidavits per TEX. R. EVID. 606(b), the Court finds these affidavits are not dispositive on the merits of the applicant's claims that trial counsel were ineffective for not addressing sexual abuse as mitigation during jury selection. *See Applicant's Exs. 18, 21-22.*

274. The record reflects that in conducting jury selection, defense counsel addressed issues that had arisen during the State's questioning of prospective jurors; questioned jurors about matters of concern on the juror questionnaires; and thoroughly examined individual jurors concerning their ability to answer the special issues, particularly the mitigation special issue – the avenue through which jurors could consider evidence of sexual abuse (IV R.R. at 111-29, 181-94; VI R.R. at 146-59; VIII R.R. at 60-82, 112-33; XI R.R. at 58-81; XII R.R. at 63-86; XIII R.R. at 60-88; XVI R.R. at 71-84; XVI R.R. at 115-33; XVII R.R. at 164-89; XIX R.R. at 63-85; XX R.R. at 77-106; XXI R.R. at 61-84).

275. According to the credible affidavits of trial counsel, the Court finds:

    a. counsel strategically employed the Colorado method of jury selection. *Affidavit of Jerome Godinich, Jr.* at 3;

    b. counsel strategically did not qualify jurors on the issue of sexual abuse because counsel believed it "inappropriate and not in accordance with the law." *Affidavit of Alvin Nunnery* at 5;

    c. counsel strategically chose to globally discuss mitigation with prospective jurors to ascertain whether prospective jurors could keep an open mind to mitigation evidence as a whole. *Id.; Affidavit of Jerome Godinich, Jr.* at 3.

    d. counsel did not believe it was appropriate to expound upon the details of their counsel and conversations with the applicant on the record, regarding

strategic reasons for agreeing to excuse each agreed-upon prospective juror. *Affidavit of Alvin Nunnery* at 5.

276. The Court finds the trial counsels' avoidance of committing prospective jurors as to whether or not they would consider sexual abuse as mitigating evidence was reasonable trial strategy.

277. The record reflects the applicant was consulted on every potential juror the parties agreed to excuse without examination, and the applicant affirmatively stated he had no objections (IV R.R. at 22-23; V R.R. at 28-29; VI R.R. at 53, 167-68; VII R.R. at 28-29; VIII R.R. at 28; IX R.R. at 136; X R.R. at 27; XI R.R. at 28; XII R.R. at 32-33; XIII R.R. at 26-27; XIV R.R. at 5-6, 31-32; XV R.R. at 6, 30-31, 130-31; XVI R.R. at 29-30, 217; XVII R.R. at 29, 193-94; XVIII R.R. at 6, 30-31, 168; XIX R.R. at 29, 200-01; XX R.R. at 28-29, 159; XXI R.R. at 26).

278. The Court finds trial counsels' failure to detail their counsel and conversations with the applicant on the record regarding the reason(s) for excusing each agreed-upon prospective juror was reasonable strategy and in accord with the principles of privileged attorney-client communications.

279. Notwithstanding trial counsels' strategy during jury selection, at the conclusion of the punishment phase, the trial court instructed the jury:

a. to consider all the evidence presented during the whole trial when determining the answer to the special issues;

b. to consider all evidence as to the defendant's background or character or the circumstances of the offense that militates for or mitigates against the death penalty;

c. a mitigating circumstance "may include, but is not limited to, any aspect of Juan Balderas also known as Apache's character, background, the personal moral culpability of the defendant or circumstances of the crime which you believe could make a death sentence inappropriate in this case;"

d. they need not agree on what particular evidence supports a "yes" answer to the mitigation special issue; and

e. in answering the mitigation issue, the jury "shall consider mitigating evidence to be evidence that a juror might regard as reducing Juan Balderas

also known as Apache's moral blameworthiness, including evidence of the defendant's background, character, or the circumstances of the offense that mitigates against the imposition of the death penalty."

(XII C.R. at 3334-36, 3338).

TENTH GROUND FOR RELIEF:
ALLEGED VIOLATION OF APPLICANT'S EQUAL PROTECTION RIGHTS DUE TO COUNSELS' AGREEMENTS TO EXCLUDE AFRICAN-AMERICAN JURORS

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280. According to Traci Bennett's credible affidavit, the parties' agreement to excuse certain jurors without examination were based on the jurors' responses to juror questionnaires, and not based on race or gender. *State's Habeas Ex. 3, Affidavit of Traci Moore Bennett.*

281. According to the credible affidavits of trial counsel, the Court finds:

a. the decision to excuse prospective jurors was rooted in trial strategy and based on the information provided in juror questionnaires and in accordance with the defense's method of jury selection, not race. *Affidavit of Jerome Godinich, Jr.* at 3; *Affidavit of Alvin Nunnery* at 5-6.

b. the defense strategy for agreeing to excuse prospective jurors was also rooted in keeping "one eye down the road in terms of which jurors are coming down the line next and what we needed to anticipate" and the attempt "to use our strikes effectively...so as to preserve future strikes for potential jurors coming down the road." *Affidavit of Alvin Nunnery* at 5-6; and

c. the applicant was fully informed of counsels' reasons for seeking strikes on the agreed-upon prospective jurors and he consented to the strikes. *Id.*; *Affidavit of Jerome Godinich, Jr.* at 3.

282. The Court finds the practice of reaching mutual agreements to excuse certain jurors without examination was reasonable strategy by both parties, and a means for parties to avoid using limited peremptory strikes.

283. The Court finds the manner in which trial counsel conducted jury selection was reasonable trial strategy.

284. The Court finds the applicant fails to present credible or persuasive evidence that trial counsel were deficient or harmful in the manner in which they conducted jury selection.

ELEVENTH GROUND FOR RELIEF:
DEATH SENTENCE'S ALLEGED VIOLATION OF EQUAL PROTECTION, DUE PROCESS, AND CRUEL & UNUSUAL PUNISHMENT CLAUSES

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285. On January 3, 2014, the applicant filed a pretrial motion to preclude the death penalty as a sentencing option, arguing it was arbitrarily imposed because the decision as to which defendant is subject to the death penalty varies between counties in Texas; the trial court denied the applicant's motion on February 12, 2014 (IV C.R. at 920, 928).

286. The applicant did not reurge his argument that the death penalty is arbitrarily imposed by county as point of error on direct appeal.

287. The Court finds the applicant's reliance on the findings of the Scott Phillips report *Continued Racial Disparities in the Capital of Capital Punishment: the Rosenthal Era* are misplaced and that the findings are irrelevant to the applicant's case because: the time frame of the Phillips report is inapplicable to the applicant's case; the victim in the applicant's case is neither white nor female; and the Phillips report does not take into account the egregious facts of the applicant's case and the applicant's multiple violent extraneous offenses.

288. The Court finds the applicant's reliance on the findings of the Raymond Paternoster report *Racial Disparity in the Case of Duane Edward Buck* are misplaced and that the findings are irrelevant to the applicant's case because: the time frame of the Paternoster report is inapplicable to the applicant's case; and the evidence presented at the applicant's trial was markedly different from that in Buck's.

289. The Court finds the applicant fails to show the Texas death penalty scheme is unconstitutional as applied to him based on his arguments of a long-past prior racial segregation in the Harris County public school system; the Klu Klux Klan successfully sponsoring political candidates in the 1920's; a 1900 case in which a defendant's motion to quash was improperly denied because African-Americans were excluded from jury service; African-American attorneys allegedly being excluded from the Houston Bar Association almost six decades

ago; the alleged display of "Jim Crow art" or artwork with slavery images in a Harris County District Court jury room and the federal courthouse; pretrial incarceration statistics for Hispanics and African-Americans in Harris County; and purported personal indiscretions of former District Attorney Chuck Rosenthal.

290. The Court finds that despite the applicant's arguments of discrimination claims arising from *Batson v. Kennedy*, 476 U.S. 79 (1986), in other Harris County death penalty cases, the applicant neither pleads nor proves a *Batson* error in his own case.

291. The Court finds the applicant fails to show the exercise of prosecutorial discretion in the Harris County District Attorney's Office's decision to seek the death penalty in his case violated his constitutional rights.

292. The Court finds the applicant fails to show disparate treatment between himself and other similarly situated defendants in Harris County.

293. The Court finds the applicant fails to show the Texas death penalty scheme is facially unconstitutional or unconstitutional as applied to him, based on the bare allegation that the Harris County District Attorney's Office sought the death penalty against the applicant because he is Hispanic or that he received the death penalty because he is Hispanic.

294. The Court finds the applicant fails to prove the Texas death scheme was enacted or maintained because of any anticipated discriminatory effect in violation of equal protection, and fails to prove the sentencing scheme, as applied to him, was discriminatory in violation of equal protection.

295. The Court finds the Court of Criminal Appeals has repeatedly held the Texas death penalty scheme constitutional under both U.S. CONST. amends. VIII and XIV and TEX. CONST. art. I, §§ 10, 13, and 19. *See Saldano v. State,* 232 S.W.3d 77, 107-8, n.30 (Tex. Crim. App. 2007)(declining to revisit previous holdings of constitutionality of Texas death penalty scheme under United States and Texas Constitutions)(citing *Perry v. State,* 158 S.W.3d 438, 446-9 (Tex. Crim. App. 2004)); *Russell v. State,* 155 S.W.3d 176, 183 (Tex. Crim. App. 2005); *Escamilla v. State,* 143 S.W.3d 814, 827-9 (Tex. Crim. App. 2004); *Rayford v. State,* 125 S.W.3d 521, 532 (Tex. Crim. App. 2003); *Hughes v. State,* 24 S.W.3d 833, 844 (Tex. Crim. App. 2000); *Wyatt v. State,* 23 S.W.3d 18, 30 (Tex. Crim. App. 2000); *Chamberlain v. State,* 998 S.W.3d 230, 238 (Tex.

Crim. App. 1999); *Pondexter v. State,* 942 S.W.2d 577, 587 (Tex. Crim. App. 1996)).

TWELFTH GROUND FOR RELIEF:
ALLEGED VIOLATION OF CONSTITUTIONAL RIGHTS AS A RESULT OF 10-12 RULE

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296. On January 3, 2014, the applicant filed a pretrial motion to hold the Texas death penalty scheme unconstitutional and complained about the 10-12 rule which prohibits the trial court from instructing the jury as to the effect of a single "no" vote; the applicant's motion was overruled by the trial court on February 12, 2014 (IV C.R. at 941-56, 1005-27).

297. The Court finds the applicant did not present his complaint about the 10-12 rule on direct appeal.

298. The Court finds the Court of Criminal Appeals has repeatedly rejected a capital defendant's challenge to the constitutionality of art. 37.071 §(2)(a), based on allegations it misled the jury on the effect of a single "no" vote. *See Williams v. State,* 301 S.W.3d 675, 694 (Tex. Crim. App. 2009); *Druery v. State,* 225 S.W.3d 491, 509 (Tex. Crim. App. 2007); *Prystash v. State,* 3 S.W.3d 522, 536 (Tex. Crim. App. 1999).

299. The Court finds the Court of Criminal Appeals has held Texas' death penalty scheme is critically different from the unconstitutional capital sentencing schemes in *Mills v. Maryland,* 486 U.S. 367 (1988), and *McKoy v. North Carolina,* 494 U.S. 433 (1990). *Hughes v. State*, 897 S.W.2d 285, 300-301 (Tex. Crim. App. 1994).

300. The Court finds the applicant fails to show the Court of Criminal Appeals' interpretation of *Mills* and *McKoy* is unconstitutional.

301. The record reflects that during his punishment argument to the jury, Nunnery explained the effect of the jury's failure to agree on the special issues despite the State's objections (XLIII R.R. at 7-9).

302. The record reflects that during the trial court's general voir dire, each venire panel was informed by the trial court of their failure to agree on the special issues, and specifically that if a jury answered the special issues in any other way than "yes" and "no", a life sentence would result (IV R.R. at 17; V R.R. at

20; VII R.R. at 23; VIII R.R. at 21; IX R.R. at 24; X R.R. at 20; XI R.R. at 21; XII R.R. at 26-27; XIII R.R. at 21; XIV R.R. at 25; XV R.R. at 24; XVI R.R. at 23; XVII R.R. at 23; XVIII R.R. at 24; XIX R.R. at 22; XX R.R. at 22-23; XXI R.R. at 20).

303. The Court finds the proffered affidavits of jurors Armstrong, Birney, Norwood and Sullivan are not dispositive on the merits of the applicant's claims regarding the effect of the 10-12 rule. *See Applicant's Exs. 18-19, 21, 23.*

304. The Court finds the proffered affidavits of jurors Armstrong, Birney, Norwood and Sullivan cannot be considered pursuant to TEX. R. EVID. 606(b) because they concern mental processes and do not establish that jurors considered any impermissible extraneous influences or impropriety in their deliberations. *Id.*

305. Notwithstanding the preclusion of jurors Birney and Sullivan's proffered affidavits per TEX. R. EVID. 606(b), the record reflects the trial court specifically instructed these jurors that if the defendant were found guilty of capital murder, there were only two possible punishments: life without parole or the death penalty, and that if the jury returned any answer other than a unanimous "yes" to the first special issue and "no" to the second special issue, then a life sentence would result (XIII R.R. at 30; XVI R.R. at 30-31).

THIRTEENTH GROUND FOR RELIEF:
DEATH SENTENCE ALLEGEDLY ARBITRARILY AND CAPRICIOUSLY ASSIGNED BASED ON JURY'S ANSWER TO FIRST SPECIAL ISSUE AND THE LACK OF DEFINITIONS FOR KEY TERMS

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306. On January 3, 2014, the applicant filed a pretrial motion to declare the Texas death penalty scheme unconstitutional, in part, based on the absence of definitions for terms in the first special issue and the alleged failure to narrow the class of death-eligible defendants; the applicant's motion was overruled by the trial court on February 12, 2014 (IV C.R. at 933-34, 940).

307. The Court finds that on direct appeal, the applicant did not complain the first special issue allegedly failed to narrow the class of death-eligible defendants, or that his sentence was arbitrary and capricious because of allegedly unconstitutionally vague definitions of key terms in the first special issue.

308. The Court finds the Court of Criminal Appeals has consistently and repeatedly held the terms "deliberately," "probability," "criminal acts of violence" and "continuing threat to society" require no special definitions, and TEX. CODE CRIM. PROC. art. 37.071 is not unconstitutional for lack of such definitions. *See Blue v. State,* 125 S.W.3d 491, 503 (Tex. Crim. App. 2003).

309. The Court finds the Texas death penalty scheme properly narrows the class of death-eligible defendants at guilt, rather than through the special issues at punishment. *See Bell v. State,* 938 S.W.2d 35, 53-54 (Tex. Crim. App. 1996).

FOURTEENTH GROUND FOR RELIEF:
DEATH SENTENCE ALLEGEDLY UNCONSTITUTIONAL FOR LIMITING THE EVIDENCE THE JURY COULD CONSIDER MITIGATING

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310. On January 3, 2014, the applicant filed a pretrial motion to declare the Texas death penalty scheme unconstitutional, in part, based on an impermissible limitation of evidence the jury could consider mitigating; the applicant's motion was overruled by the trial court on February 12, 2014 (IV C.R. at 941-56).

311. The Court finds on direct appeal, the applicant did not complain his sentence was unconstitutional due to an impermissible limitation of the evidence the jury could consider mitigating.

312. At the conclusion of the punishment phase, the trial court gave the jury thorough instructions on what the jury could consider in their deliberations of the special issues (XII C.R. at 3334-36, 3338).

313. At the conclusion of the punishment phase, the trial court charged the jury with the statutory mitigation issue, specifically asking the jury whether it found "from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Juan Balderas also known as Apache, that there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a sentence of death be imposed?" (*Id.*. at 3343).

314. The Court finds the Court of Criminal Appeals has previously rejected the argument that TEX. CODE CRIM. PROC. art. 37.071 unconstitutionally narrows a jury's discretion to consider as mitigating only those factors concerning moral blameworthiness. *Shannon v. State,* 942 S.W.2d 591 (Tex. Crim. App. 1996); *Williams,* 301 S.W.3d at 694.

315. The Court finds that at trial, the applicant did not object to the punishment charge on the basis that it unconstitutionally limited the evidence the jury could consider as mitigating.

316. The Court finds the applicant fails to show the Texas death penalty scheme unconstitutionally prevented his jury from considering as mitigating only evidence that reduces moral blameworthiness.

317. The Court finds the applicant also fails to show the Texas death penalty scheme is unconstitutional as applied to him.

II.
CONCLUSIONS OF LAW

FIRST AND SECOND GROUNDS FOR RELIEF: STATE'S ALLEGED PRESENTATION OF FALSE EVIDENCE THROUGH WITNESS ISRAEL DIAZ

1. The applicant fails to demonstrate by a preponderance of evidence that the State presented false testimony at trial via Israel Diaz, or that Diaz's testimony as a whole left a false impression with the jury. *See Ex parte Weinstein,* 421 S.W.3d 656, 665-67 (Tex. Crim. App. 2014)(citing *Chavez*, 371 S.W.3d 200, 207-10 (Tex. Crim. App. 2012)).

2. In the alternative, the applicant fails to demonstrate by a preponderance of the evidence that Diaz's trial testimony was material to the jury's verdict, in light of the totality of the State's guilt evidence against the applicant. *Id.* at 665-69.

3. The applicant fails to demonstrate by a preponderance of the evidence that his constitutional rights were violated because the prosecution obtained his guilty verdict through the knowing use of false evidence via Israel Diaz. *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959).

4. The applicant fails to demonstrate by a preponderance of the evidence that his constitutional rights were violated because the prosecution obtained his guilty

verdict through the unknowing use of false evidence via Israel Diaz. *See Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009); *see Chavez*, 371 S.W.3d 200.

THIRD GROUND FOR RELIEF: STATE'S ALLEGED FAILURE TO DISCLOSE IMPEACHMENT INFORMATION REGARDING WITNESS ISRAEL DIAZ

5. The applicant fails to demonstrate by a preponderance of the evidence that the State violated the precepts of *Brady v. Maryland*, 373 U.S. 863 (1963) as he fails demonstrate: (1) the State suppressed the 23-pages of Diaz pretrial interview notes now marked as Applicant's Exhibit 57 from the defense prior to trial; (2) that the notes contained in Applicant's Exhibit 57 were favorable to the defense; or (3) that the notes contained in Applicant's Exhibit 57 were material. *See Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999).

FOURTH GROUND FOR RELIEF: ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL IN GUILT/INNOCENCE PHASE

6. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance during either phase of trial, such that their performance was not in accord with prevailing professional norms, when their pretrial investigation included more than 70 hours reviewing the State's prosecution files; speaking with the applicant; interviewing witnesses; filing pretrial motions; and retaining a team of investigators and experts in the fields of criminal investigations, mitigation investigations, ballistics, eyewitness identification, mental health, gangs, prison systems, child abuse and brain development; and keeping in continued communication with these experts. *See Strickland v. Washington*, 466 U.S. 668, 700 (1984)(ineffective assistance of counsel claim denied for failure to demonstrate deficient performance); *Ex parte McFarland*, 163 S.W.3d 743, 754-60 (Tex. Crim. App. 2005)(ineffective assistance of counsel claim denied for failure to demonstrate deficient performance; trial counsel conducted an adequate pretrial investigation when he read a leading treatise, reviewed the State's files, filed multiple pretrial motions, hired an investigator, and consulted with other attorneys).

7. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance during either phase of trial, such that their performance was not in accord with prevailing professional norms, when their trial performance included conducting individual voir dire examinations on prospective jurors; extensively cross-examining witnesses; making relevant objections; preserving error; pursuing a motion to suppress the eyewitness

identification; presenting evidence on the applicant's behalf; making persuasive jury arguments; objecting to the court's charge; and requesting specific jury instructions. *See Strickland*, 466 U.S. at 694, 700.

8. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to present testimony at trial from Anali Garcia, Jesus Balderas, or Ileana Cortes, such that counsels' performance was not in accord with prevailing professional norms or that there is a reasonable probability the outcome of the trial would have been different had these witnesses testified, when: (a) counsel interviewed these witnesses prior to trial; (b) counsel determined the testimony of these witnesses would not be beneficial or useful for the defense; and (c) counsel believed the State could thrive on the weaknesses and biases of these witnesses. *Id., see also Ex parte Kunkle,* 852 S.W.2d 499, 506 (Tex. Crim. App. 1993)(holding counsel's strategic choices made after thorough investigation of law and facts virtually unchallengeable under Sixth Amendment); *see Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004)(applicant must show the witness' testimony would have benefitted the defense).

9. The applicant fails to demonstrate by a preponderance of evidence that trial counsel rendered ineffective assistance by failing to investigate and present an alibi defense during guilt/innocence, such that counsels' performance was not in accord with prevailing professional norms or that there is a reasonable probability the outcome of the trial would have been different had the defense pursued an alibi defense, when: (a) the applicant himself never provided alibi information for counsel to pursue; (b) the alibi information presented by the applicant's family on the eve of trial revealed either uncooperative witnesses or those who counsel believed lacked credible or personal knowledge; (c) the proffered affidavits from Jose Perez and Jesus Balderas fail to provide personal accounts of the applicant's whereabouts on the night of the offense; (d) Anali Garcia and Octavio Cortes did not provide persuasive alibi testimony in the post-conviction evidentiary hearing; and (e) trial counsels made a strategic decision to only present testimony from witnesses counsel "deemed credible or beneficial" and not those "who could not account for the date and time of the offense in any credible way, or who only possessed information by means of hearsay or innuendo." *See Strickland*, 466 U.S. at 694, 700; *Kunkle*, 852 S.W.2d at 506; *see White*, 160 S.W.3d at 52.

10. The applicant fails to demonstrate by a preponderance of evidence that trial counsel rendered ineffective assistance by failing to present the testimony of Jose Perez, such that counsels' performance was not in accord with prevailing professional norms or that there is a reasonable probability the outcome of the trial would have been different had Perez's testimony been presented, when: (a) Perez fails to account for the applicant's whereabouts in his proffered habeas affidavit; and (b) counsel elicited substantially similar testimony from Walter Benitez compared to what Perez proffered in his habeas affidavit. *See Strickland*, 466 U.S. at 694, 700; *see White*, 160 S.W.3d at 52.

11. The applicant fails to demonstrate by a preponderance of evidence that trial counsel rendered ineffective assistance by failing to present the testimony of Yancy Escobar, such that counsels' performance was not in accord with prevailing professional norms or that there is a reasonable probability the outcome of the trial would have been different had Escobar's testimony been presented, when: (a) Escobar chose to watch the proceedings, instead of testifying on the applicant's behalf; and (b) counsel elicited substantially similar testimony from other witnesses compared to what Escobar proffered in her habeas affidavit. *See Strickland*, 466 U.S. at 694, 700; *see White*, 160 S.W.3d at 52.

12. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to investigate and present evidence of the applicant's innocence, such that counsels' performance was not in accord with prevailing professional norms, when: (a) the applicant did not provide information that assisted the defense with an innocence strategy; (b) counsel cross-examined the credibility and reliability of State's eyewitnesses; (c) counsel attacked the credibility and highlighted the bias of Israel Diaz; and (d) counsel presented the testimony of the applicant's innocence and an alternate shooter via Walter Benitez. *See Strickland*, 466 U.S. at 694, 700; *see also Kunkle,* 852 S.W.2d at 506.

13. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to call Celeste Munoz as a guilt/innocence witness, such that counsels' performance was not in accord with professional norms or that there is a reasonable probability the outcome of the trial would have been different had Munoz's testimony been presented, when the trial court ruled that Munoz's testimony would open the door to the applicant's extraneous offenses during guilt/innocence. *See Strickland*, 466 U.S. at 694, 700; *see Busby v. State,* 990 S.W.2d 263, 268 (Tex. Crim. App.

1999)(holding appellate court's judicial scrutiny of counsel's performance must be highly deferential when reviewing claim of ineffective assistance and representation not to be judged by hindsight).

14. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to call Dr. Roy Malpass to testify as an eyewitness identification expert in front of the jury, such that counsels' performance was not in accord with professional norms, when the record is abundantly clear counsel was cautiously avoiding opening the door to the applicant's extraneous offenses during guilt/innocence; counsels' decision to not present Dr. Malpass' testimony to the jury despite the court's preliminary ruling is indicative of a strategic decision that to present such testimony would not be in the applicant's best interest. *See Strickland*, 466 U.S. at 694, 700; *see Garcia v. State,* 57 S.W.3d at 436, 440 (Tex. Crim. App. 2001)(holding that reviewing court "commonly will assume a strategic motivation if any can possibly be imagined," and will not find challenged conduct constitutes deficient performance "unless conduct was so outrageous that no competent attorney would have engaged in it.").

15. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance, such that counsels' performance was not in accord with professional norms, in the manner by which they challenged the State's eyewitness identification evidence. *See Busby,* 990 S.W.2d at 268.

16. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to investigate juror misconduct as a grounds for a motion for new trial, such that counsels' performance was not in accord with professional norms or that there is a reasonable probability the results of the proceeding would have been different, when: (a) the record reflects trial counsel questioned a deputy and two jurors on the record as to any potential outside influences stemming from the bus-waving incident, moved for a mistrial, and were overruled by the trial court; and (b) the Court of Criminal Appeals ruled the bus-waving incident was not an improper outside influence. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985)(applicant in post-conviction habeas proceeding has the burden of proving facts that would entitle him to relief).

17. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance in any way, such that counsels' performance was not in accord with professional norms or that there is a

reasonable probability the results of the proceeding would have been different, given the totality State's evidence of guilt against the applicant during guilt/innocence.

FIFTH GROUND FOR RELIEF: ALLEGED VIOLATION OF RIGHT TO FAIR TRIAL AS A RESULT OF JUROR MISCONDUCT AND EXPOSURE TO OUTSIDE INFLUENCES

18. The applicant fails to demonstrate by a preponderance of the evidence that he was prejudiced or that the results of his trial were affected in any way by the hotel accommodations secured for the jurors. *See Maldonado*, 688 S.W.2d at 116.

19. Because the applicant's claim regarding the alleged improper outside influence stemming from the bus-waving incident was raised and rejected on direct appeal, the applicant is procedurally barred from asserting the same ground in the instant proceeding. *Ex parte Schuessler*, 846 S.W.2d 850, 852-53 (Tex. Crim. App. 1993)(recognizing "law of the case" doctrine such that once a specific question of law has been finally resolved in a case, it will not be reconsidered in subsequent proceedings of the same case).

20. The applicant fails to demonstrate by a preponderance of the evidence that he was prejudiced or that the results of his trial were affected in any way by Juror Armstrong's Facebook entries before, during, or after trial. *See Maldonado*, 688 S.W.2d at 116; *see Ocon v. State*, 284 S.W.3d 880, 885 (Tex. Crim. App. 2009)(defendant not entitled to mistrial after defense attorney overheard juror's telephone conversation with unknown person because there was no evidence the juror was biased as the result of the improper conversation).

21. The applicant's proffered juror affidavits are irrelevant, speculative, inadmissible, and have no bearing on the applicant's instant habeas claims. *See* TEX. R. EVID. 606(b)(prohibiting a juror from testifying about "any matter or statement occurring during the jury's deliberations" except that a juror may testify about "whether any outside influence was improperly brought to bear upon any juror" or "to rebut a claim that the juror was not qualified to serve"); *see McQuarrie v. State*, 380 S.W.3d 145, 154 (Tex. Crim. App. 2012)("outside influence" is something originating from source outside of jury room and other than from jurors themselves); *see also Coyler v. State*, 428 S.W.3d 117 (Tex. Crim. App. 2014)(external events or information, unrelated to the trial which cause jurors to feel personal pressure or hasten deliberations are not "outside

influences" because those pressures are caused by a juror's personal and emotional reaction to information that is irrelevant to trial issues).

22. The applicant fails to demonstrate by a preponderance of the evidence that he was denied the right to a fair and impartial jury because the jury received or considered evidence other than what was presented at trial. *See* TEX. R. APP. P. 21.3(f)(a defendant must be granted a new trial "when after retiring to deliberate, the jury has received other evidence"); *Bustamante v. State*, 106 S.W.3d 738, 743 (Tex. Crim. App. 2003)(to establish juror misconduct, applicant must show the evidence was received by the jury, and the evidence was detrimental or adverse to the defendant).

23. The applicant fails to demonstrate by a preponderance of evidence facts rebutting the presumption that jury followed the trial court's instructions. *See Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005).

SIXTH GROUND FOR RELIEF: ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL IN PUNISHMENT PHASE

24. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance during the punishment phase, such that their performance was not in accord with prevailing professional norms, when counsel retained multiple expert and mitigation witnesses, presented 18 defense witnesses, cross-examined the State's punishment witnesses, made relevant objections, preserved error, made persuasive jury arguments, and presented extensive mitigation evidence, much of which is the same evidence the applicant now claims was lacking. *See Strickland*, 466 U.S. at 694.

25. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance of counsel by failing to investigate and present testimony from Jesus Balderas, Anali Garcia, Octavio Cortes, German Enriquez, Yancy Escobar, Ivan Hernandez, Jose Perez, or Maria Guadalupe Francisco Reyes during the punishment phase, such that their performance was not in accord with prevailing professional norms or that there is a reasonable probability the outcome of the trial would have been different had counsel presented these witnesses, when: (a) their respective social history testimonies would have been cumulative of the testimony presented through other witnesses; (b) the State's punishment evidence of extraneous capital murders, aggravated assault, assault on a public servant, aggravated kidnapping, arson, and juvenile criminal history, and multiple bad acts was particularly strong; (c) counsel

interviewed at least five of these witnesses and determined their testimony would not be beneficial to the applicant's defense; and (d) the applicant and his family hampered counsels' investigation and preparation. *See Strickland*, 466 U.S. at 694, 700; *see McFarland*, 163 S.W.3d at 754-60; *see Kunkle*, 852 S.W.2d at 506; *see also Tucker v. Johnson*, 242 F.3d 617, 622-24 (5th Cir. 2001)(rejecting claim of ineffective assistance of counsel where defendant argued that counsel should have presented additional evidence of abuse; recognizing that defendant essentially arguing counsel should have presented *stronger* mitigating case; distinguishing *Williams v. Taylor*, 529 U.S. 362, 369-72 (2000)).

26. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to question Vicky Reyes, Juan Balderas, Sr., Walter Benitez, Daniella Chavez, Marina Reyes Mirafuentes, Paloma Reyes Mirafuentes, or Celeste Munoz more extensively, such that counsels' performance was not in accord with prevailing professional norms or that there is a reasonable probability the outcome of the trial would have been different with more extensive questioning, when counsel presented substantial testimony through these and other witnesses of the applicant's violent and abusive childhood surroundings, familial history of mental health illness, impetuous and unstable mother, positive character, support system, positive behavior while in custody or under supervision, and role as a "protector." *See Strickland*, 466 U.S. at 694, 700; *see McFarland*, 163 S.W.3d at 754-60; *see Kunkle*, 852 S.W.2d at 506; *see also Tucker*, 242 F.3d at 622-24.

27. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance during the punishment phase, such that their performance was not in accord with prevailing professional norms, when counsel presented expert testimony to explain the impact and ramifications of the applicant's childhood and upbringing on the applicant, his mental health, and his behaviors, and to correlate this evidence to the mitigation special issue. *See Blott*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979)(reviewing court will not "second-guess through hindsight" the strategy of counsel, nor will fact that another attorney might have pursued different course support finding of ineffectiveness); *see also Solis v. State*, 792 S.W.2d 95, 100 (Tex. Crim. App. 1990)(reviewing court will not use "hindsight to second guess a tactical decision" made by trial counsel that does not fall below objective standard of reasonableness).

28. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance during the punishment phase, such that their performance was not in accord with prevailing professional norms, when counsel presented both expert testimony and lay testimony of people who positively interacted with the applicant while he was in custody or under court supervision to show a lack of future danger. *See Blott*, 588 S.W.2d at 592; *see also Solis,* 792 S.W.2d at 100.

29. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to present evidence that the applicant was in the process of disassociating from LTC, such that their performance was not in accord with prevailing professional norms, when: (a) counsels' investigation showed the only evidence of disassociation was the applicant's own uncorroborated statement; and (b) the applicant did not want to testify at trial. *See Kunkle,* 852 S.W.2d at 506; *see Harris v. Cockrell,* 313 F.3d 238 (5th Cir. 2002), *cert. denied,* 494 U.S. 1090 (holding counsel not ineffective for allegedly failing to investigate and present mitigation evidence in light of weakness of evidence defendant argues should have been presented).

30. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to investigate and present evidence rebutting the extraneous offense evidence presented by the State, such that their performance was not in accord with prevailing professional norms, when: (a) counsel did conduct a thorough punishment investigation; (b) counsel interviewed witnesses and presented testimony regarding LTC membership, hierarchy, and operations; and (c) counsel extensively cross-examined State's witnesses. *See Kunkle,* 852 S.W.2d at 506; *see Solis,* 792 S.W.2d at 100.

31. In the alternative, the State is not required to prove extraneous offenses beyond a reasonable doubt, and the applicant fails to demonstrate by a preponderance of the evidence the specific effect of any of the extraneous evidence on the outcome of his proceedings. *See Ladd v. State,* 3 S.W.3d 547, 574-5 (Tex. Crim. App. 1999)(State is not required to prove extraneous offenses beyond a reasonable doubt); *see McFarland*, 163 S.W.3d at 754-60.

33. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to object to and preserve error on portions of the State's cross-examinations of Dr. Matthew Mendel and Dr. Matthew Brams and closing argument that the applicant now claims were comments on the applicant's failure to testify, when counsel did not construe the

State's questioning or argument to be as such, and believed them to be appropriate attacks on the witness' credibility. *See Johnson v. State,* 629 S.W.2d 731 (Tex. Crim. App. 1981)(holding isolated instances of failure to object do not constitute ineffective assistance of counsel); *see Howard v. State,* 153 S.W.3d 382, 385-6 (Tex. Crim. App. 2004)(State's argument that defendant did not show remorse was proper summation of evidence and not a comment on the defendant's failure to testify when evidence showed defendant had told officer he had no remorse).

34. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to object to and preserve error on the trial court's denial of funding to transport defense witnesses from Mexico to the United States, such that counsels' performance was not in accord with prevailing professional norms or that there is a reasonable probability the outcome of the trial would have been different had counsel preserved the alleged error, when: (a) the trial court had no subpoena power over these witnesses; (b) telecommunication technology was made available and used to present the testimony of theses witnesses to the jury; (c) both parties were able to question the witnesses presented via telecommunication; and (d) defense counsel offered to pay the expenses to transport the witnesses from Mexico to the United States, but the witnesses could not coordinate plans amongst themselves. *See Johnson,* 629 S.W.2d 731; *see White*, 160 S.W.3d at 53-55 (applicant must show trial judge would have committed error in overruling trial counsel's objection to prevail on ineffective assistance claim for failure to object); *see also Vaughn v. State*, 931 S.W.2d 564, 566-67 (Tex. Crim. App. 1996).

35. Although trial counsel learned trial testimony from witnesses in Mexico was being skewed by interference from the applicant's girlfriend, counsel was able to present the intended evidence of the applicant's childhood, his mother, and his mistreatment and sexual abuse by his mother's boyfriend through witnesses apart from those in Mexico, and as such, the applicant fails to show harm necessary to warrant relief on his claim that trial counsel should have preserved the court's refusal to grant funds for witnesses to travel from Mexico. *See Strickland,* 466 U.S. at 694, 700.

36. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel Alvin Nunnery rendered ineffective assistance by allegedly engaging in bad behavior that alienated the jury, was not in accord with professional norms, or affected the outcome of the proceeding, when: (a) the record does not reflect that Nunnery made any derogatory comments to the State's prosecutor or

racially-motivated comment within earshot of the jury; (b) when looked at in its entirety, Nunnery's jury argument properly summarized the evidence, made deductions from evidence, argued the special issues, and gave deference to the jury; (c) Nunnery made a strategic decision to remind jurors of their oaths given the juror notes sent out during guilt/innocence; (d) the applicant's proffered juror affidavits are speculative and inadmissible; and (e) in light of the totality of the State's punishment evidence against the applicant. *See Garcia,* 57 S.W.3d at 440; *see Orona v. State,* 791 S.W.2d 125, 130 (Tex. Crim. App. 1990)(any error in argument had no impact in light of other evidence); *see* TEX. R. EVID. 606(b); *see Coyler*, 428 S.W.3d 117.

37. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance in any way, such that counsels' performance was not in accord with professional norms or that there is a reasonable probability the results of the proceeding would have been different, given the State's overwhelming punishment evidence against the applicant. *See Strickland,* 466 U.S. at 694, 700; *see Busby,* 990 S.W.2d at 268.

SEVENTH GROUND FOR RELIEF: STATE'S ALLEGED PRESENTATION OF FALSE EVIDENCE THROUGH WITNESS CHRISTOPHER POOL

38. The applicant fails to demonstrate by a preponderance of the evidence that Christopher Pool's testimony as a whole left a false impression with the jury. *See Weinstein,* 421 S.W.3d at 665-67.

39. In light of the totality of the State's evidence of guilt against the applicant, the applicant fails to demonstrate by a preponderance of the evidence that Pool's trial testimony was material to the jury's verdict. *Id.* at 665-69; *see also Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011)(testimony is material if there is "a reasonable likelihood" the false testimony affected jury's judgment).

EIGHTH GROUND FOR RELIEF: ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO TIMELY AND COMPETENTLY ASSERT APPLICANT'S RIGHT TO A SPEEDY TRIAL

40. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to employ reasonable strategy in the timing of their assertion of the applicant's right to a speedy trial, such that counsels' performance was not in accord with prevailing professional norms, given the totality of the circumstances and evidence, including the assignment of

different State's prosecutors to the case, changes to who presided as trial court judge, ongoing negotiations between the parties, voluminous records, and the applicant's own behavior. *See Strickland,* 466 U.S. at 694; *see White*, 160 S.W.3d at 55.

41. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance in the timing of their motion to dismiss the indictment for lack of a speedy trial, such that there is a reasonable probability the outcome of the proceeding would have been different had the motion been urged earlier, in light of the credible affidavits of trial counsel and counsels' assertions that no intended, beneficial defense witnesses were rendered unavailable due to the passage of time. *Id.* at 700.

42. The applicant's post-conviction displeasure with counsels' strategy and timing in filing the motion to dismiss the indictment for lack of speedy trial does not warrant a finding of ineffective assistance. *See Blott*, 588 S.W.2d at 592; *see also Solis,* 792 S.W.2d at 100.

NINTH GROUND FOR RELIEF: ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL DURING JURY SELECTION

43. The applicant fails to demonstrate by a preponderance of evidence that trial counsel rendered ineffective assistance, such that counsels' performance was not in according with prevailing professional norms, by failing to commit prospective jurors to whether they would consider evidence of sexual abuse as mitigation. *See Moore v. State,* 999 S.W.2d 385 (Tex. Crim. App. 1999)(holding defense counsel improperly attempted to bind juror as to whether she would consider age of defendant as mitigating); *Curry v. State,* 910 S.W.2d 490 (Tex. Crim. App. 1995)(holding jury need not agree as to what evidence is mitigating, only that jury be given adequate vehicle to consider and give effect to mitigating evidence).

44. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to employ reasonable strategy during jury selection, such that counsels' performance was not in accord with prevailing professional norms or that there is a reasonable probability the outcome of the proceeding would have been different had counsel questioned individual jurors on their views of sexual abuse evidence as potential mitigation. *Strickland,* 466 U.S. at 700; *see Solis,* 792 S.W.2d at 100.

45. The applicant's post-conviction displeasure with the strategy and manner in which trial counsel conducted voir dire employed does not warrant a finding of ineffective assistance of counsel. *See Blott*, 588 S.W.2d at 592; *see also Solis*, 792 S.W.2d at 100.

46. In light of the trial court's thorough jury instructions at the conclusion of the punishment phase regarding the evidence the jury is to consider during their deliberation, the applicant fails to demonstrate by a preponderance of the evidence that he suffered any harm as a result of trial counsels' voir dire strategy. *See Strickland*, 466 U.S. at 700.

47. The applicant's proffered juror affidavits are not admissible evidence of any improper outside influence and have no bearing on the applicant's instant claim. *See* TEX. R. EVID. 606(b).

TENTH GROUND FOR RELIEF: ALLEGED VIOLATION OF APPLICANT'S EQUAL PROTECTION RIGHTS DUE TO COUNSELS' AGREEMENTS TO EXCLUDE AFRICAN-AMERICAN JURORS

48. Because the applicant affirmatively stated he had no objection to the release of every potential juror the parties agreed to excuse without examination, he is procedurally barred from asserting the instant ground for relief. *See* Tex. R. App. P. 33.1(a); *Hodge*, 631 S.W.2d at 757; *see also Hughes*, 191 F.3d at 614 (holding that defendant's failure to comply with Texas contemporaneous objection rule constituted adequate and independent state-law procedural ground sufficient to bar federal habeas).

49. In the alternative, the applicant's instant ground lacks merit as the decisions of trial counsel during jury selection were clearly a matter of strategy, and irrespective of the race of the potential jurors. *But c.f. Mata v. Johnson*, 99 F.3d 1261, 1269-1270 (5th Cir. 1996), *vacated on other grounds*, 105 F.3d 209 (5th Cir. 1997)(equal protection violation where all eight prospective black jurors were excused from the venire panel by agreement of parties); *see White*, 160 S.W.3d at 55.

ELEVENTH GROUND FOR RELIEF: DEATH SENTENCE'S ALLEGED VIOLATION OF EQUAL PROTECTION, DUE PROCESS, AND CRUEL & UNUSUAL PUNISHMENT CLAUSES

50. Given that the applicant complained in a pretrial motion that the death penalty was arbitrarily imposed because the decision as to which defendant is subject to

the death penalty varies between Texas counties, but was overruled by the trial court and subsequently failed to re-urge this argument on direct appeal, he is now procedurally barred from asserting the instant ground for relief. *See Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989).

51. In the alternative, the applicant fails to demonstrate by a preponderance of the evidence that his death sentence was unconstitutional under U.S. CONST. amends. VI, VIII and XIV, based on an alleged arbitrary system of administering death penalties in various Texas counties - specifically in Harris County rather than other counties. *See Cantu v. State,* 842 S.W.2d 667, 691-92 (Tex. Crim. App. 1992), *cert. denied*, 509 U.S. 926 (1993)(holding prosecutorial discretion does not render death penalty unconstitutional); *Allen v. State,* 108 S.W.3d 281, 286 (Tex. Crim. App. 2003)(citing *Bell v. State,* 938 S.W.2d 35, 55 (Tex. Crim. App. 1996); *King v. State,* 953 S.W.2d 266, 274 (Tex. Crim. App. 1997)(declining to reach merits of claim of disparate treatment based on cases being held in different counties; noting there was no empirical data, case law, or other factual basis to support claim)); *see and cf. Morris v. State,* 940 S.W.2d 610, 613-4 (Tex. Crim. App. 1996)(noting possibility of two defendants, who have committed identical murder, receiving different sentences based on differing degrees of mitigating character and background evidence).

52. The applicant fails to demonstrate by a preponderance of the evidence that his death sentence was unconstitutionally based on alleged racial bias. *See Cockrell v. State,* 933 S.W.2d 73, 92-93 (Tex. Crim. App. 1996)(rejecting defendant's claim that certain statistical studies allegedly establish Texas death penalty disproportionately imposed in racially discriminatory manner).

53. The applicant fails to demonstrate by a preponderance of the evidence that the Texas death penalty scheme is unconstitutional as applied to him. *Id.* (holding defendant must show scheme unconstitutional as applied to him to gain relief from death sentence).

54. The applicant fails to demonstrate by a preponderance of the evidence that the Texas death penalty scheme was enacted or maintained because of any anticipated discriminatory effect in violation of equal protection, and that the sentencing scheme, as applied to him, was racially discriminatory in violation of equal protection. *See and cf. McCleskey v. Kemp,* 482 U.S. 920 (1987)(holding a state's legitimate reasons for adopting and maintaining capital punishment precluded inference of discriminatory purpose on part of the state in adopting death penalty sentencing scheme and allowing it to remain in force despite

allegedly discriminatory impact and statistical study showing death penalty imposed more often on black defendants and killers of white victims than on white defendants and killers of black victims).

TWELFTH GROUND FOR RELIEF: ALLEGED VIOLATION OF CONSTITUTIONAL RIGHTS AS A RESULT OF 10-12 RULE

55. Because the applicant complained about the 10-12 Rule in a pretrial motion, but was overruled by the trial court, and subsequently failed to re-urge this argument on direct appeal, he is now procedurally barred from asserting the instant ground for relief. *See Banks*, 769 S.W.2d at 540.

56. In the alternative, the applicant fails to demonstrate by a preponderance of the evidence the unconstitutionality of art. 37.071 §(2)(a) based on the allegation it misled the jury as to the effect of a single "no" vote. *See Williams,* 301 S.W.3d at 694; *Druery,* 225 S.W.3d at 509; *Prystash,* 3 S.W.3d at 536.

57. The applicant fails to demonstrate by a preponderance of the evidence that the 10-12 jury instruction violates the United States and Texas Constitutions and the "Supreme Court precedent" of *Mills* and *McKoy*. *See Hughes,* 897 S.W.2d at 300-01(citing *Rousseau v. State,* 855 S.W.2d 666, 687 (Tex. Crim. App. 1993)(rejecting contention that 37.071 violates decisions in *McKoy* and *Mills)).*

58. The applicant's proffered juror affidavits are not admissible evidence of any improper outside influence and have no bearing on the applicant's instant claim. *See* TEX. R. EVID. 606(b).

59. In light of the trial court's explanation of the effect of the jury's voting during general voir dire and Nunnery's statements to the jury during closing argument, the applicant fails to show that he suffered any harm as a result the 10-12 Rule. *See Maldonado*, 688 S.W.2d at 116.

THIRTEENTH GROUND FOR RELIEF: DEATH SENTENCE ALLEGEDLY ARBITRARILY AND CAPRICIOUSLY ASSIGNED BASED ON JURY'S ANSWER TO FIRST SPECIAL ISSUE AND THE LACK OF DEFINITIONS FOR KEY TERMS

60. Because the applicant complained about the unconstitutionality of the death penalty due to the absence of definitions for terms in the first special issue in a pretrial motion, but was overruled by the trial court, and subsequently failed to re-urge this argument on direct appeal, he is now procedurally barred from asserting the instant ground for relief. *See Banks*, 769 S.W.2d at 540.

61. In the alternative, the applicant fails to show the unconstitutionality of TEX. CODE CRIM. PROC. art. 37.071, due to the lack of special definitions for "deliberately," "probability," "criminal acts of violence" and "continuing threat to society." *See Blue,* 125 S.W.3d at 503 (Tex. Crim. App. 2003)(re-affirming holdings where lack of following definitions not error: "continuing threat to society," "criminal acts of violence," "probability," "society," "personal moral culpability," and "moral blameworthiness").

FOURTEENTH GROUND FOR RELIEF: DEATH SENTENCE ALLEGEDLY UNCONSTITUTIONAL FOR LIMITING THE EVIDENCE THE JURY COULD CONSIDER MITIGATING

62. Because the applicant complained about the unconstitutionality of the death penalty based on an alleged limiting of evidence the jury could consider mitigating in a pretrial motion, but was overruled by the trial court, and subsequently failed to re-urge this argument on direct appeal, the applicant is now procedurally barred from asserting the instant ground for relief. *See Banks,* 769 S.W.2d at 540.

63. The trial court properly denied the applicant's pretrial motion objecting to the Texas death penalty scheme on the ground that the instruction concerning "moral blameworthiness" allegedly prevented the jury from considering and giving effect to all mitigating evidence; TEX. CODE CRIM. PROC. art. 37.071 does not unconstitutionally narrow a jury's discretion to consider as mitigating only those factors concerning moral blameworthiness. *See Williams,* 301 S.W.3d at 694 (rejecting claim that Texas death penalty scheme unconstitutional based on its definition of mitigating evidence allegedly limiting Eighth Amendment concept of "mitigation" to factors that render defendant less morally blameworthy for commission of capital murder); *see Shannon,* 942 S.W.2d 591 (holding that because consideration of mitigation evidence is open-ended subjective determination by each individual juror, art. 37.071 does not unconstitutionally narrow jury's discretion to factors concerning only moral blameworthiness).

64. In the alternative, the applicant fails to demonstrate by a preponderance of the evidence that the Texas death penalty scheme is unconstitutional as applied to him. *See Cockrell,* 933 S.W.2d at 93 (holding defendant has to show scheme unconstitutional as applied to him to gain relief from death sentence).

III.

In all things, the applicant fails to demonstrate his conviction was improperly obtained or that he is being improperly confined. Accordingly, it is recommended to the Texas Court of Criminal Appeals that habeas relief be **DENIED.**

SIGNED this 20th day of July, 2018.

Baylor Wortham

The Honorable Baylor Wortham
179th District Court, By Assignment
Harris County, Texas

CAUSE NO. 1412826-A

EX PARTE	§	IN THE 179th DISTRICT COURT
	§	OF
JUAN BALDERAS, Applicant	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 1412826-A and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. the applicant's writ application and exhibits filed in cause no. 1412826-A;
2. the State's original answer and exhibits filed in cause no. 1412826-A;
3. any and all filings including but not limited to motions, proposed orders, disclosures, notices, objections, and findings of fact and conclusions of law filed in cause no. 1412826-A;
4. all Court orders in cause no. 1412826-A;
5. all sealed exhibits in cause no. 1412826-A;
6. the affidavits of Jerome Godinich, Jr. and Alvin Nunnery filed in cause no. 1412826-A;
7. the Court's findings of fact, conclusions of law and order in cause no. 1412826-A;
8. the reporter's records in all post-conviction hearings in cause no. 1412826-A (March 31, 2015; October 27, 2015; December 1, 2015; September 8, 2016; August 17, 2017; February 22, 2018; May 2, 2018; and May 11, 2018);
9. the reporter's record in cause no. 1412826;

10. the appellate opinion in no. AP-77,036;

11. the clerk's record in cause no. 1412826; and

12. the indictment, judgment, sentence, and docket sheets in cause no. 1412826 and 1412826-A.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's habeas counsel: Katherine Black, Natalie Corvington, and Erin Eckhoff, Office of Capital and Forensic Writs; 1700 North Congress Ave., Suite 460; Austin, Texas 78701 and to the State: Farnaz Faiaz Hutchins; Harris County District Attorney's Office, 1301 Prairie, 5th floor, Houston, Texas 77002.

SIGNED this 20th day of July, 2018.

Baylor Wortham

The Honorable Baylor Wortham
179th District Court, By Assignment
Harris County, Texas