NO. 20- (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

REINALDO DENNES,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX

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APPENDIX CONTENTS

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
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No. 17-70010

REINALDO DENNES,

Petitioner – Appellant

v.

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

Respondent – Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:14-CV-19

Before JONES, SMITH, and DENNIS, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Reinaldo Dennes ("Dennes"), a Texas death row inmate, seeks review of the district court's denial of his federal habeas petition. We granted a certificate of appealability ("COA") on his claims that the State wrongly suppressed impeachment evidence in violation of *Brady v. Maryland* and *Banks v. Dretke*. We AFFIRM the district court's denial of relief on those claims and DENY a COA on Dennes's challenges to the selection of two jurors.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. Background

On September 4, 1997, Dennes was convicted of capital murder and sentenced to death for the murder of Janos Szucs during the commission of a robbery. The Texas Court of Criminal Appeals ("TCCA") affirmed his sentence and conviction on direct appeal. *See Dennes v. State*, No. 72,966 (Tex. Crim. App. Jan. 5, 2000). Dennes filed a state application for a writ of habeas corpus, which the TCCA denied based on the findings of fact and conclusions of law made by the trial court. *See Ex Parte Dennes*, No. WR-34,627-02, 2013 WL 6673058 (Tex. Crim. App. Dec. 18, 2013).

Dennes then sought federal habeas relief on thirty-three grounds in the Southern District of Texas. The district court denied habeas relief on all grounds and denied a COA, finding that "each of Dennes's claims" was "foreclosed by clear, binding precedent." *Dennes v. Davis*, 2017 WL 1102697, at *17 (S.D. Tex. Mar. 22, 2017). Dennes then sought a COA from this court, which we granted limited to the following three issues:

> 1. the claim that the state suppressed evidence that Balderas was a "long-time informant" for law enforcement in Harris County, Texas; and
>
> 2. the claim that the state suppressed evidence or denied due process by not timely revealing information about Balderas's, Fugon's, and Elvira's participation in the Tsang robbery; and
>
> 3. how petitioner satisfies the cause/prejudice standards for not having raised these issues in the state court.

The TCCA summarized the relevant facts of the crime in its opinion on direct appeal:

> In December of 1995, Antonio Ramirez came from Ecuador to work in Texas. Shortly after his arrival, Ramirez met a man

named Francisco Rojas who sold jewelry for [Dennes].[1] Some time later, Ramirez gave several rings to Rojas that he wanted to sell. Rojas then took Ramirez and the rings to [Dennes] at [Dennes]'s office in the Greenrich Building on Richmond Avenue. During this visit, Ramirez noticed a lathe in [Dennes]'s jewelry workshop and began to play with it. [Dennes] asked Ramirez if he knew how to operate the machine and Ramirez said that he did. [Dennis] then "hired" Ramirez to make watch bezels for him.[2]

Shortly thereafter [Dennes] invited Ramirez to travel to Mexico with him to buy a diamond. After the diamond purchase, the pair returned to Texas and [Dennes] gave Ramirez more work. In early January, 1996, [Dennes] made a sketch for Ramirez and asked him if he could make the object depicted. By the time he completed the job, Ramirez had manufactured what turned out to be a silencer for [Dennes]. After the silencer was completed, [Dennes], his brother Alberto, and Ramirez went to a field a few minutes away to test it. Thinking the silencer did not work as it should, [Dennes] modified his design and had Ramirez make another one. [Dennes] test fired this model in his office.

Shortly after the completion of the second silencer, [Dennes] asked Ramirez to help him and Alberto rob a jewelry dealer who also had an office in the Greenrich Building. [Dennes] explained that he would take the videotape from the security station while Ramirez secured the diamonds and Alberto shot the dealer. Ramirez consented, but returned to South America two days later.[3]

Estrella Martinez, [Dennes]'s lover, had a cleaning job at the Greenrich Building. In January of 1996, [Dennes] told Martinez he wanted her to let him in a side door of the building after working hours. He told her he was going to take some videotapes from the security guard's station on the first floor. On January 22, 1996, [Dennes] gave Martinez a cellular phone with which he planned to call her to tell her when to let him and Alberto into the building.

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[1] [Dennes] ran a business called "Designs by Reinaldo."

[2] Ramirez stated that he did not expect to be paid for this work, but thought it would be a good thing to do while waiting to get money from the sale of his rings.

[3] Ramirez testified that he only consented so as not to alarm the Dennes brothers; however, he had no intention of helping them.

[Dennes] also wanted Martinez to distract the guard so he could take the tapes.

Janos Szucs was a reputable wholesale diamond dealer who had an office in the Greenrich Building. Shortly before his death, Szucs had a diamond inventory worth more than $3,600,000 which he kept in his office safe. He also had approximately $200,000 in cash that he planned to use to purchase diamonds on an upcoming trip. Szucs did not have a receptionist or secretary; access to his office was controlled through an electronically-locked door. Szucs had a television monitor in his office so he could see who was at the door and he would allow people in by pushing a remote button located on his desk. In early January 1996, Szucs and Sam Solomay formed a partnership and Solomay moved into Szucs's office suite.

On January 24th, Solomay left the office at 5:40 p.m., but Szucs remained, explaining that he had an appointment that evening. David Copeland was the security guard on duty at the Greenrich Building that evening, working the 3:00 p.m. to 11:00 p.m. shift. A videotape recorder at the security desk recorded the images from the security cameras around the building. When Copeland arrived for his shift, a technician was there working on the surveillance system.

Around 6:30 p.m. that same evening, [Dennes] called Martinez on the cellular phone he had provided her and told her to open the loading dock door. [Dennes] and Alberto entered and immediately turned into a stairwell, thereby avoiding the security guard's desk. Shortly after 7:00 p.m., [Dennes] called Martinez and told her to distract the security guard. Martinez told Copeland that she had locked her keys in a fifth floor office and asked him to help her retrieve them. A little after 7:30 p.m., [Dennes] again called Martinez and told her that he needed another distraction. The security guard kept the key to the snack bar so Martinez approached Copeland and told him that she needed to clean the area and asked if he would let her in. Shortly after Martinez began cleaning, however, the owner of the snack bar arrived and told her to come back later.

When Copeland returned to the lobby, he found a man kneeling behind the security desk apparently working on the security system. Copeland assumed this was related to the earlier repairs. As Copeland approached, the man scrambled to his feet and walked briskly toward the loading dock door. As Copeland neared

the security desk, the man turned and headed back toward the guard. When he reached Copeland, the man placed his left hand on Copeland's shoulder, stuck a .9 mm gun with a silencer to Copeland's chest with his other hand and fired. The man shot the guard again after he had fallen. As Copeland lay there playing dead, he heard the man walk to the security desk. He then heard equipment and wires being moved around followed by footsteps running toward the loading dock door.[4] The owner of the snack bar called "911."

Houston Police Officer Paul Terry arrived on the scene to find Copeland lying face down in the lobby. Copeland told Terry what had happened and the officer unsuccessfully searched for a suspect. Inside the lobby, Terry found spent shell casings and fragments of a fired bullet. He also noticed that the video equipment was missing.

That same evening, Szucs's wife, Nicole, became concerned that her husband had not arrived home. After several failed attempts to reach her husband, she received a call from a friend who worked in the Greenrich Building who told her that the building guard had been shot. Nicole asked the friend to contact the building's office manager. Sometime after 11:00 p.m., the building manager approached one of the officers remaining at the scene. Officer M.R. Furstenfeld and a couple of other officers then accompanied the manager to Szucs's suite to check on his welfare. Upon gaining access to the office, Furstenfeld found Szucs's dead body. Detectives who arrived at the scene noted no signs of a forced entry. They also noticed that the safe was empty and there were no signs of the $3.6 million dollar diamond inventory Szucs maintained or the $200,000 he was supposed to have on hand in cash. Plus, Szucs was not wearing the five-carat diamond pinky ring he always wore nor was the ring ever recovered.[5] The

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[4] As she walked toward the restrooms, Martinez looked into the lobby and saw a man in overalls approaching the guard with his hands behind his back. Martinez recognized this person as [Dennes] by his walk, but noted that he was wearing a mustache and some sort of disguise. Shortly after entering the bathroom, Martinez heard a strange sound. When she returned to the lobby, Martinez saw the guard lying on the floor bleeding.

[5] Nicole testified that her husband was wearing the ring that morning when she took him to work.

> detectives also discovered that Szucs's computer had been damaged as if someone had tried to remove a disc with tweezers.[6]
>
> The police eventually focused their investigation upon [Dennes]. A search of his office revealed a lathe that had been broken down and boxed up, a fired .9 mm bullet, and an owner's manual for a .9 mm Taurus handgun. Firearms examiner Robert Baldwin determined that the bullets recovered from Szucs's body, the bullet found in [Dennes]'s office, and the bullets found in the lobby of the Greenrich Building were all fired from the same gun. Moreover, the cartridge casings found in the lobby of the Greenrich Building and those found in the field where [Dennes] tested the silencer were fired from the same gun. The weapon was determined to be either a Taurus or a Beretta .9 mm handgun.

Dennes, slip op. at 2–7 (Tex. Crim. App. Jan. 5, 2000) (footnotes in original).

Evidence presented at the punishment phase of trial contributed to the jury's findings that it was probable that Dennes would commit acts of criminal violence constituting a continuing threat to society and that he caused and intended Szuc's death or anticipated that a human life would be taken. The jury was informed that Dennes had been placed on deferred adjudication for 180 days for indecent exposure.

Relevant here, and more important, Dennes was linked to another robbery that took place in 1995, within a few months of the Szucs murder. Specifically, Dennes had approached an acquaintance, David Balderas, to suggest robbing diamond courier Albert Ohayon, whom Dennes knew from past employment. Balderas testified that he acted as a middleman between Dennes and the perpetrators, Hector Fugon and Francisco Elvira, to carry out the 1995 robbery. Dennes's involvement was significant: he suggested that Balderas commit the robbery himself or find others to do so, met with Balderas, Fugon, and Elvira at a fast food restaurant to discuss the robbery; provided Balderas with the address and drove Balderas to the neighborhood to show

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[6] Szucs kept his diamond inventory records on the computer.

him the house; and contacted Balderas when he learned the occupant was home. As it turned out, Fugon and Elvira, at the direction of Balderas, mistakenly invaded the home belonging to Danny Tsang, not Albert Ohayon. They terrorized the Tsang family, took some jewelry, a watch, a camera, some clothing, a gun, and a stereo system, and fled in Tsang's car. When the police checked on Ohayon the following day, they learned he was in the diamond wholesale business and had just returned from a trip with approximately $500,000 worth of diamonds.

II. Standards of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), "our review [of Dennes's habeas petition] is limited by the COA." *Adekeye v. Davis*, 938 F.3d 678, 682 (5th Cir. 2019). "COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Id.* (citing *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997)). To merit a COA, a petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S. Ct. 1029, 1040 (2003) (internal quotation marks and citations omitted).

Further, under AEDPA, federal "court[s] may not grant habeas relief on a claim that a state court has adjudicated on the merits," *Harrison v. Quarterman*, 496 F.3d 419, 424 (5th Cir. 2007), unless the state courts' decision "was contrary to, or involved an unreasonable application of, clearly established Federal law . . . ," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2). When assessing a denial of habeas relief, "we review the district court's findings of fact for clear error and its conclusions of law de novo." *Dorsey v. Stephens*, 720 F.3d 309, 314 (5th Cir. 2013).

III. Discussion

A. Brady Claims

With respect to the district court's denial of his *Brady* claims, Dennes contends the State suppressed material impeachment evidence that: (1) Balderas[7] was a police informant;[8] and (2) parts of Fugon's and Elvira's testimony at their separate trial impeached important aspects of Balderas's testimony concerning the Tsang robbery.[9] Dennes also asserts that he can show cause and prejudice for his failure to present relevant facts in support of his *Brady* claim in state court. Dennes contends that the State deliberately delayed disclosure of this impeachment evidence and suppressed critical information about the Tsang robbery, such that Dennes's counsel could not make effective use of the information at trial.[10] The district court denied all of Dennes's *Brady* claims because "the bulk of the allegedly suppressed evidence was available to Dennes and was not suppressed within the meaning of *Brady*,"

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[7] Balderas was called as a witness during the punishment phase and testified that he was never arrested or charged for the Tsang robbery, that he told prosecutors everything he knew about the Tsang robbery, and that he hoped to receive immunity for his role in the robbery in exchange for his testimony.

[8] Until Dennes petitioned this court for a COA, his claims regarding Balderas's status as a police informant focused on an undisclosed contractual arrangement between Harris County and Balderas in which the State dismissed two criminal charges against Balderas in exchange for his providing information unrelated to Dennes's case. In his COA petition, Dennes placed much greater emphasis on his claim that Balderas had an "ongoing-informant relationship" with the State that lasted ten years and existed during Dennes's trial. Neither the TCCA nor the district court addressed this point below.

[9] Specifically, Dennes argues that during their trial for the Tsang robbery, (1) Fugon and Elvira both failed to identify Dennes as being involved; (2) Fugon denied knowing Balderas and denied that Balderas was involved in the Tsang robbery; and (3) Elvira never identified Balderas or Dennes as being involved in the Tsang robbery.

[10] Specifically, Dennes argues that if his trial counsel had received timely advance notice of the Tsang robbery, "trial counsel could have moved for a continuance of Dennes's trial until exculpatory witnesses Fugon and Elvira no longer had a Fifth Amendment privilege against self-incrimination, after their appeals became final, and Dennes could then compel their exculpatory testimony."

Dennes "fail[ed] to demonstrate that the evidence was material;" and at least some of his allegations were procedurally barred for failure to exhaust state court remedies. *Dennes*, 2017 WL 1102697, at *6–7.

To establish a *Brady* violation, Dennes had to prove that (1) the prosecution actually suppressed evidence, (2) the suppressed evidence was favorable to him, and (3) the suppressed evidence is material. *See Kyles v. Whitley*, 514 U.S. 419, 433–34, 115 S. Ct. 1555, 1565–66 (1995); *see also Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948 (1999) ("The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."). Evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004). But if the suppressed evidence was discoverable through due diligence, a petitioner's *Brady* claim necessarily fails. *United States v. Brown*, 650 F.3d 581, 588 (5th Cir. 2011), *cert. denied*, 566 U.S. 970, 132 S. Ct. 1969 (2012).

1. Evidence Concerning Balderas's Status as a Police Informant

In his motion for a new trial in state court, Dennes alleged that Balderas's status as a police informant was material impeachment evidence that had been suppressed from the defense. Specifically, Dennes asserted that the state failed to disclose a contractual arrangement with Harris County involving different criminal offenses from those in Dennes's case, and that the state had dismissed two criminal charges against Balderas in exchange for his

providing information also unrelated to Dennes's case. The deal allegedly prompted Balderas to testify falsely against Dennes.

The state courts rejected these contentions. The state trial court evaluated the evidence of dealings between Harris County and Balderas and concluded it did not see "the relevancy at all with regard to the trial of [Dennes's] case or the testimony of anybody that has provided any evidence in [Dennes's] case regarding the effect of these documents on [Balderas's] testimony." Indeed, the trial court emphasized that because the contract involved wholly different offenses and the parties had fulfilled their contractual obligations months before Dennes's trial began, this evidence provided no incentive for Balderas to taint his testimony in favor of the State. The TCCA agreed, holding, "As [Balderas] had no relation to the instant case and the contract was completed before the trial in [Dennes's] case, [Dennes] fails to show there was a reasonable probability the outcome of the trial would have been different."

The district court also agreed that the completed contract between Harris County and Balderas was not impeachment material because it provided no reason for Balderas to fabricate his testimony against Dennes. *See Dennes*, 2017 WL 1102697, at *6.

In his brief to this court, Dennes argues that the information about these dealings is material because it shows a relationship between Balderas and the State, which he analogizes to the relationship between the sheriff's office and the informant who was a star witness at the Banks capital murder trial. *Banks v. Dretke*, 540 U.S. 668, 693–94, 124 S. Ct. 1256, 1273–74 (2004). In *Banks*, the Supreme Court held that a *Brady* violation had occurred where the prosecution failed to turn over evidence of a money payment to the testifying informant *for his involvement in the case against defendant Banks.* 540 U.S. at 685, 124 S. Ct. at 1269. *Banks* is distinguishable, among other reasons,

because the arrangement between Balderas and Harris County existed prior to and wholly independent of the case against Dennes.[11] And the *Bagley* case is distinguishable because there, the witness received a benefit from testifying, whereas Balderas received none in this case. *Bagley*, 473 U.S. at 671–72, 105 S. Ct. at 3378–79 (1985). As to this element of the claim, which was exhausted in the state courts, the TCCA did not unreasonably apply governing Supreme Court law by denying relief.

Dennes also seeks to enhance his *Brady* claim by asserting that the State failed to disclose that Balderas was an ongoing informant for Harris County from at least 1989 through 1999, two years after Dennes's trial. Dennes raised this argument about Balderas's ongoing informant status for the first time in his petition for a COA from this court. Dennes makes three claims based on this allegation: 1) at trial, the State falsely represented that Balderas was not an ongoing informant at the time of Dennes's trial; 2) this was valuable impeachment evidence that *Brady* compelled the state to provide the defense and which could have been used to attack Balderas's credibility under *Davis v. Alaska*, 415 U.S. 308 (1974); and 3) the State trial court suggested it may have ruled differently "if there was an ongoing relationship."

Several procedural hurdles must be overcome for Dennes to succeed on this argument. The evidence in support of his contention that Balderas was an ongoing informant for the State derives from statements made by Balderas's attorney in a federal court sentencing hearing in 1999, the transcript of which was never presented to the state courts. Federal courts are precluded, absent limited circumstances, from considering evidence in habeas

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[11] Dennes's related claim, raised for the first time in federal court, that Balderas's drug charges were dismissed as consideration for his testimony in Dennes's case, is not only entirely speculative but is procedurally barred because he failed to present the claim to the TCCA for review on either direct appeal or in his state habeas application, as recognized by the district court. *See* 28 U.S.C. § 2254(b)(1); *Dennes*, 2017 WL 1102697, at *6–7.

proceedings that was not produced before the state courts for adjudication on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 185, 131 S. Ct. 1388, 1400–01 (2011). On that basis alone, this claim fails. But to the extent that Dennes raises this as a standalone *Brady* claim, it is also procedurally barred by not having been raised at all in the state courts. *See* 28 U.S.C. § 2254(b)(1).

Dennes attempts to show cause and prejudice as a means to overcome the procedural bar against his unexhausted claim and to avoid AEDPA's limitation on federal courts' review to evidence developed in state court records. Dennes relies on *Banks* for the proposition that a petitioner can overcome a procedural bar to a *Brady* claim if suppression of material exculpatory evidence caused the default. *Banks*, 540 U.S. at 691, 124 S. Ct. at 1272.

Cause, in this context, means that the State prevented Dennes from gaining access to the relevant *Brady* information. "[A] petitioner shows 'cause' if 'the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence.'" *Murphy v. Davis*, 901 F.3d 578, 597 (5th Cir. 2018) (quoting *Banks*, 540 U.S. at 691, 124 S. Ct. at 1272). Dennes claims he was not aware of Balderas's alleged longstanding status as an informant for Harris County because the State withheld the information. But evidence is not suppressed under *Brady* if the defendant knew or should have known of Balderas's status. Here, there is ample evidence to suggest that, at minimum, Dennes should have known about Balderas's status.

At the motion for new trial hearing, Dennes's counsel argued that Balderas "had a working relation and we believe the documents speak of an *ongoing working relationship* with the State of Texas out of which he received a dismissal of a major drug case . . . that relationship with the State and his desire to work with the state in order to secure dismissal of the case . . . should have been disclosed under *Brady*." During the course of these proceedings, the

State also turned over Balderas's informant contract to the trial court and acknowledged his informant relationship with the State. And, as if this evidence were not enough, Dennes's counsel proffered the testimony of Balderas's attorney, John Munier, who was present at the motion for new trial hearing and was willing to testify about Balderas's informant relationship with the State.[12] Taken together, these points establish that Dennes had, if not actual knowledge, sufficient opportunity to learn of Balderas's status by the conclusion of the motion for new trial hearing.

Dennes claims, however, he first learned of Balderas's status from the transcript of Balderas's 1999 sentencing hearing. But supposing this is true, the TCCA did not decide his direct appeal until Jan. 5, 2000, and his state habeas appeal remained pending until 2013. *Dennes v. Davis*, 2017 WL 1102697, at *3 (S.D. Tex. Mar. 22, 2017). Thus, since Dennes should have been aware during state court proceedings, he could have supplemented his brief or raised this suppression issue in state courts before filing his federal habeas petition.[13]

Even assuming *arguendo* that Dennes's long-term informant status was "suppressed," it is not material. "Unless suppressed evidence is material for *Brady* purposes, [its] suppression [does] not give rise to sufficient prejudice to

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[12] John Munier was Balderas's attorney who also later handled Balderas's 1999 sentencing hearing, the transcript of which allegedly notified Dennes of Balderas's ongoing relationship with the State.

[13] Dennes claims that he could not have raised this suppression issue in state habeas proceedings because the TCCA would have treated an amendment to his habeas application as a successor petition. But if the 1999 hearing did reveal new and suppressed information, then it would have satisfied the successor petition standard that the "current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]" *E.g.* TEX. CODE CRIM. PROC. ANN. ART. 11.071 § 5(a)(1) (West 2003).

overcome [a] procedural default." *Banks*, 540 U.S. at 698, 124 S. Ct. at 1276 (quotation marks and citations omitted). The test for materiality and prejudice is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 124 S. Ct. at 1276; *Banks*, 540 U.S. at 698, 124 S. Ct. at 1276; *Strickler*, 527 U.S. at 280, 119 S. Ct. at 1948. Balderas's conflict of interest had already been made glaringly obvious to the jury. At the time of Dennes's trial, Balderas had not received an official offer of immunity in exchange for his testimony, and Dennes's counsel drew significant attention to this fact. Additionally, and contrary to the narrative Dennes attempts to craft suggesting that Balderas willingly helped the prosecution, Balderas testified that the prosecution subpoenaed his testimony. That Balderas was involuntarily "drug" into court suggests he did not take the stand pursuant to an ongoing relationship with the State. Moreover, Munier's testimony at the 1999 sentencing hearing affirmed that Balderas received no benefit for his testimony.

Evidence of Balderas's long-time informant status would have been, at best, cumulative proof of bias. But cumulative impeachment is not material. "Undisclosed evidence that is merely cumulative of other evidence is not material[.]" *Rocha v. Thaler*, 619 F.3d 387, 396 (5th Cir. 2010); *see Canales v. Stephens*, 765 F.3d 551, 575–76 (5th Cir. 2014) (finding that suppressed evidence of inmate-witnesses receiving assistance with their housing and parole issues in exchange for testimony was not prejudicial because "the jury heard at least some of this information at trial," as "Canales's attorney at least asked some inmate-witnesses about being encouraged to help the State in exchange for benefits"); *see also Felder v. Johnson*, 180 F.3d 206, 213 (5th Cir. 1999) (citing *United States v. Amiel*, 95 F.3d 135, 145 (2d Cir. 1996) ("Suppressed evidence is not material when it merely furnishes an additional

basis on which to impeach a witness whose credibility has already been shown to be questionable.")).

Additionally, circumstantial evidence strongly corroborates Balderas's testimony. "[T]he impeached testimony of a witness whose account is strongly corroborated by additional evidence supporting a guilty verdict . . . generally is not found to be material[.]" *Rocha*, 619 F.3d at 396–97 (quotation marks omitted); *see also Kopycinski v. Scott*, 64 F.3d 223, 226 (5th Cir. 1995) (finding that a witness leading police to the decedent's body was corroborative of his testimony that the defendant had murdered the decedent such that "leading the police to the body essentially makes his testimony unimpeachable").

The Tsang home invasion was undertaken for jewelry, as shown by Fugon and Elvira's repeated demands for diamonds. Albert Ohayon and his wife, Rachel, the likely intended targets of the robbery, lived just a few doors away. Ohayon was a diamond salesman who had just returned to Houston with approximately $500,000 worth of diamonds in his briefcase. Ms. Ohayon testified that she knew Dennes from her work in the diamond business, and that Dennes and her husband had worked for the same company, albeit at different times. MGI, Ms. Ohayon's former place of employment, and Szucs Jewelry were both subsidiary companies of Satler's Jewelry, where Dennes had worked.

Neither Balderas, Fugon, nor Elvira would have had any reason to know where a diamond wholesaler lived. Balderas, for example, was an automobile body shop worker. Moreover, both robberies occurred close in time,[14] both were planned robberies of diamond wholesalers, and both were connected to the company Dennes had previously worked for. Such evidence makes it unlikely that a jury would have found Balderas to be any less credible based on his

[14] The Tsang home invasion occurred on November 15, 1995. Szucs's robbery and murder took place just over two months later, on January 24, 1996.

alleged informant status on unrelated matters. Once again, Dennes is unable to show materiality or prejudice.

Finally, several of Dennes's extreme claims about Balderas's "false" testimony simply do not square with the record. Dennes claims that the prosecution falsely presented Balderas as an honest witness who came forward of his own volition with information about the Tsang robbery and received nothing but immunity in exchange for his participation. Yet Dennes offers nothing except naked speculation to suggest this narrative is untrue. For example, Dennes asserts that Balderas lied when he testified that he "voluntarily" approached his brother-in-law, a Houston Police Department ("HPD") homicide detective, with information about the Tsang home invasion. In support, Dennes points to Balderas's arrest for felony possession of marijuana the same month he discussed the Tsang home invasion with the HPD. Besides the sequence of events, however, Dennes offers no evidence that there was a *quid pro quo*, the drug charges were dropped pursuant to a contract that concluded prior to his testimony Dennes's trial, and Dennes ignores that Balderas's testimony was subpoenaed. As another example, Dennes argues that the prosecution lied about their intent to use Balderas as a witness. Not only did the prosecution not have to disclose its witnesses or strategy at the January 1997 pre-trial hearing, Dennes offers no evidence that raising the Tsang home invasion or calling Balderas as a witness were definitive parts of the State's strategy at that point. The State counters that there was no intent to call Balderas until Fugon invoked his Fifth Amendment privilege and was unavailable to testify while his conviction was pending on direct appeal. This is corroborated by Officer Miller's 1996 letter indicating that he intended to focus on securing Fugon's testimony against Dennes.

Dennes raises these claims of "false" testimony to avail himself of the more lenient standard to establish prejudice under *Giglio v. United States*,

405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972) ("A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .") (internal quotation marks and citations omitted). But, as pointed out above, the allegations that the State knowingly used "false" testimony are dubious at best and largely foreclosed by the record. In *Giglio*, a key witness testified that he believed he could still be prosecuted for a crime even though the State had granted him immunity in exchange for his testimony. *Id.* at 151–52, 765. The prosecution's failure to correct this blatantly false testimony led the Supreme Court to remand for a new trial. Dennes has not shown that anything approximating that level of false testimony occurred during his trial, and he is therefore held to the stricter materiality standards under *Brady*. Accordingly, Dennes has failed to show cause or prejudice to overcome the procedural barriers to his claims.

2. Evidence Concerning Fugon's and Elvira's Testimony

Dennes's remaining *Brady* claims assert that the State failed to disclose until immediately before trial that the Tsang robbery would be offered as evidence of extraneous crimes during any punishment phase. Specifically, Dennes claims that the robbers' testimony at their trial for the Tsang home invasion was known by the Harris County District Attorneys who were handling that case,[15] but that the State did not disclose Fugon's name or his role in the crime until August 13, 1997, five days before the beginning of testimony at the guilt phase of Dennes's case on August 18. Dennes asserts his counsel had insufficient time to ascertain that both Fugon and Elvira had

[15] Balderas offers a letter from 1996 that was faxed from an investigator in the Dennes case to a then-prosecutor of Dennes regarding the investigator's discussions with Fugon, Elvira, and Balderas. Because this letter does not appear to have been introduced in the state courts, this court is prohibited from considering it. *Pinholster*, 563 U.S. at 185, 131 S. Ct. at 1400–01.

testified that they did not know Balderas and that they could not identify Dennes as an instigator of the Tsang robbery.[16] Consequently, Dennes was deprived of further impeachment evidence against Balderas, the only witness presented by the State concerning Dennes's involvement in the Tsang robbery. Dennes further argues that his federal habeas counsel only located Fugon's testimony after "several months" because the State allegedly failed to provide Dennes's trial counsel with Fugon's and Elvira's transcripts with enough time to "make meaningful use of the impeachment information."

As with the late-breaking claims about Balderas's status as a long-term police informant, the evidence of Fugon's and Elvira's testimony at the Tsang robbery trial was not raised in the state courts and is therefore not amenable to our consideration. *Pinholster*, 563 U.S. at 185, 131 S. Ct. at 1400–01.[17]

In addition, the district court, ruling on the merits, observed that most of this additional information originated from Fugon's trial, and thus "the bulk of the allegedly suppressed evidence was available to Dennes." *Dennes*, 2017 WL 1102697, at *6.

We agree that this evidence became available to Dennes at least in sufficient time for him to have used it in state court proceedings. The Tsang trial occurred almost a year before Dennes's capital murder trial. Fugon's and Elvira's convictions were on appeal at the time of Dennes's capital murder trial. Dennes had been informed in early 1996 of the State's plan to introduce evidence of his connection to an extraneous home invasion robbery. His

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[16] Dennes posed the timing issue in various ways in the state courts and was rebuffed. To the extent that the timing ultimately raised only issues of state law, no federal constitutional claims are involved.

[17] Dennes's contention that his federal habeas counsel had to pry out the trial testimony of Fugon and Elvira over "several months" rings hollow in light of the timing of their trial in 1996 and the fact that the TCCA did not issue its ruling on Dennes's direct appeal until January 5, 2000.

counsel was given access to the HPD offense reports about the robbery, which revealed the perpetrators' identities, before the beginning of the punishment phase when the evidence of the Tsang robbery was introduced. Most important for present purposes, even if, as counsel asserts, Dennes did not have timely access to the Fugon/Elvira trial transcript during his own trial, the transcript was certainly available during the over-two-year interlude between Dennes's conviction and the rendering of the TCCA opinion affirming his conviction in 2000. The State has no obligation to provide exculpatory or impeachment evidence that is available to the defense through the exercise of due diligence. *See Rector v. Johnson*, 120 F.3d 551, 558–59 (5th Cir. 1997); *see also Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002) ("*Brady* does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence."). The transcript was not suppressed during state court proceedings, yet Dennes never sought to offer it until his federal habeas petition. As a result, this claim is also unexhausted and procedurally barred from review in federal court. 28 U.S.C. Sec. 2254(b)(1).

B. Jury Selection Claims

Dennes also seeks a COA based on a claim that the trial court violated his Sixth and Fourteenth Amendment right to be tried by an impartial jury by denying his challenges for cause to two prospective jurors. Dennes contends that two venire members, Richard Miller and Martha Jean Gutierrez, were biased and that challenges for cause should have been granted as to both because their views would prevent or substantially impair the performance of their duties as jurors in accordance with their oaths. Dennes argues that the trial court erroneously required him to exercise his peremptory strikes to remove those jurors, and he was denied effective use of additional peremptory strikes whereby he would have removed two other allegedly biased jurors,

Irene B. Collins and Belle Symmank. The TCCA rejected this claim on the basis of state law.

The district court assumed *arguendo* that Miller and Gutierrez should have been removed for cause according to federal constitutional law, but because the record reflected that the trial court granted Dennes two additional peremptory strikes, after which both parties "promptly accepted the next juror on the list as the twelfth juror," Dennes failed to make any showing "that any of the jurors, including the alternates, were not impartial." *Dennes*, 2017 WL 1102697, at *12. The court reasoned that "[a]t most, Dennes was forced to accept an alternate juror who he would have challenged if he had an additional peremptory challenge," and thereby failed to demonstrate a Sixth Amendment violation. *Id.*

The Sixth and Fourteenth Amendments guarantee an accused the right to a trial by an impartial jury, but the forced use of a peremptory challenge does not rise to the level of a constitutional violation. *See Ross v. Oklahoma*, 487 U.S. 81, 85–88, 108 S. Ct. 2273, 2277–78 (1988). Rather, a "district court's erroneous refusal to grant a defendant's challenge for cause is only grounds for reversal if the defendant establishes that the jury which actually sat to decide his guilt or innocence was not impartial." *United States v. Snarr*, 704 F.3d 368, 386 (5th Cir. 2013) (internal quotation marks and citation omitted); *see also Jones v. Dretke*, 375 F.3d 352, 355 (5th Cir. 2004) ("As a general rule, a trial court's erroneous venire rulings do not constitute reversible constitutional error 'so long as the jury that sits is impartial.'" (internal citation omitted)).

Even assuming that the trial court should have granted Dennes's challenges for cause, Dennes cannot establish a constitutional violation because he used peremptory strikes to exclude both Miller and Gutierrez from the jury. *See Ross*, 487 U.S. at 85–88, 108 S. Ct. at 2277–78. Therefore, "[a]ny claim that the jury was not impartial . . . must focus not on [Miller and

Gutierrez], but on the jurors who ultimately sat." *Id.* at 86, 108 S. Ct. at 2277. Although Dennes asserts that Collins and Symmank were actually biased jurors who sat on his guilt-innocence and punishment phases of trial, he fails to identify how or why they were biased or why his counsel did not use peremptory strikes to remove them. Accordingly, there was no constitutional violation because the challenged jurors were removed from the jury by Dennes's use of peremptory challenges and Dennes cannot establish that he was sentenced by a partial jury. *Id.* Reasonable jurists would not debate the district court's application of the law governing juror selection and peremptory strikes in capital trials to the decisions made by the state courts.

IV. Conclusion

For the above-stated reasons, we **AFFIRM** the district court's denial of Dennes's federal habeas petition insofar as it raises *Brady* issues and **DENY COA** on the jury selection issues.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70010

REINALDO DENNES,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

Before JONES, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70010

REINALDO DENNES,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 4:14-cv-0019; Hon. Sim Lake, Judge Presiding

APPELLANT'S MERITS BRIEF

ORAL ARGUMENT REQUESTED IN THIS CAPITAL/HABEAS CASE

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CERTIFICATE OF INTERESTED PARTIES

No. 17-70010

REINALDO DENNES,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee.

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate their possible recusal or disqualification.

1. Lorie Davis, Respondent/Appellee. She is represented in the Fifth Circuit by:

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The same counsel represented Dennes in the district court.

/s/ Ken McGuire
Kenneth W. McGuire

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FED. R. APP. P. 34(a), Petitioner Dennes respectfully requests oral argument in this capital habeas/death penalty case. In support of this request, Dennes would note that Dennes' *Brady/Giglio/Napue* due process suppression and false evidence claim relies heavily upon the record, and involves a complex set of interrelated facts that are necessary to fully understand and adequately resolve the claims and would be aided by oral argument. Oral argument and the assistance of counsel in addressing any of the Court's questions would assist this Court in gaining a full understanding of the facts and the law which form the basis of these claims.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 2241. This Court has appellate jurisdiction under 28 U.S.C. § 1291, after granting certificate of appealability under 28 U.S.C. § 2253 on May 29, 2019.

STATEMENT OF ISSUES FOR REVIEW

This Court granted the COA limited to the following issues:

1. the claim that the state suppressed evidence that Balderas was a "long-time informant" for law enforcement in Harris County, Texas; and

2. the claim that the state suppressed evidence or denied due process by not timely revealing information about Balderas's, Fugon's and Elvira's participation in the Tsang robbery; and

3. how petitioner satisfies the cause/prejudice standards for not having raised these issues in the state court.

STATEMENT OF THE CASE

Due to the extreme page limitations for an opening merits brief, we refer the Court to the Motion for Certificate of Appealability for the Statement of the Case.

SUMMARY OF ARGUMENT

The state suppressed material *Brady/Giglio* impeaching evidence that key sentencing phase witness Balderas was a corrupt, long-time informant for law enforcement in Harris County, Texas committing serious crimes while acting as an informant, and presented false evidence under *Napue* and *Giglio* before the trial court and jury regarding its ongoing relationship with Balderas. The state also suppressed exculpatory evidence and denied due process by not timely revealing information about Fugon's and Elvira's participation in the Tsang robbery that impeached Balderas' testimony concerning the Tsang robbery, including Balderas' status as a corrupt informant while he participated in the Tsang robbery, or simply invented his knowledge. Dennes satisfies the cause/prejudice standards under *Strickler v. Greene*, *Banks v. Dretke*, and *Coleman v. Thompson*, for not having raised these issues in the state court, because the state's suppression of this information constitutes cause, and the cumulative total of the suppressed and false evidence presented was material to the jury's decision to impose the death penalty, and constitutes prejudice.

After grant of the issues stated in the Certificate of Appealability, Appellant would respectfully show the Court the following:

ARGUMENT

I. The Trial Testimony of David Balderas

A summary of undisputed facts related to Appellant's *Brady/Napue* claim regarding State's sentencing witness David Balderas ["Balderas"] is provided here to help frame the issues the Court has instructed the parties to address. It is important, therefore, to set forth these undisputed facts in summary fashion.

A. State Sentencing Phase Witness Balderas

David Balderas ["Balderas"] was the State's critical witness at the sentencing phase. Balderas testified that he hired two Hispanic males, Fugon and Elvira,[1] to commit a diamond robbery at the home of Danny Tsang, all at Dennes' instigation. Balderas also testified under oath that he then voluntarily approached his brother-in-law, a Houston Police Department homicide detective, over a family dinner in February 1997, with information about Balderas' involvement in the crime, and that the only benefit Balderas received was immunity for what he had told the police. ROA.2583-ROA.2589.

[1] Fugon and Elvira received fifty and thirty-year state sentences for their participation in the robbery that Balderas testified he orchestrated. Balderas was never charged or even arrested for the robbery he admitted to police he orchestrated. *See* HPD Sgt. Todd Miller Letter to ADA Rosenthal, dated 7/9/1996. ROA.4708-ROA.4710.

This is the sum total about Balderas disclosed by the prosecutors to the defense and the jury. Critically, the Texas Court of Criminal Appeals found Balderas' testimony was the only evidence linking Dennes to the Tsang home invasion robbery. Direct Appeal Opinion, ROA.5266.

The prosecution relied heavily on Balderas's testimony before the jury. The only other aggravating evidence presented at sentencing was the submission of a single misdemeanor deferred adjudication probation for indecent exposure when Mr. Dennes was in his early 30's. Thus Balderas's testimony about Mr. Dennes's alleged participation in another armed robbery was the critical additive sentencing fact relied upon by the prosecution to set the case apart from other murder cases un-deserving of death. Unsurprisingly then, the prosecution urged the jury to find Mr. Dennes a future danger and therefore worthy of the ultimate punishment, by arguing strenuously at closing argument the facts attested to by David Balderas:

> MR. SMYTH: Special Issue Number One [re: future dangerousness], we all talked to you about that ... You think about Danny Tsang. You think about Christina Tsang. You think about little nine-year-old Christina Tsang. Does that help you answer that question? And what is the answer? Yes, this man is a continuing threat to society.
> * * *
> Ladies and gentlemen, I don't want you to forget what this case is all about. ... After Danny Tsang met the defendant, his life has been changed forever. Defendant's hench men his life has been changed. And even with Christina Tsang, huddled under her covers, a pillow over her head, having never even seen the defendant's hench man, her life has been changed forever.

ROA.2820; ROA.2842-ROA.2844.

B. False Testimony, False Representations, and Undisclosed Facts re: Balderas

Subsequent to trial, many new, critical, previously undisclosed facts were revealed and/or discovered about Balderas, his testimony in this case, law enforcement's handling of him, and the manner in which the prosecution developed him as a witness and lied about many aspects of Balderas and his use as a critical sentencing phase witness. These facts, too, are not in dispute.

At all times before, during, and after the trial, Harris County law enforcement falsely presented Balderas as an honest witness who supposedly just came forward of his own "good citizen" volition with his alleged information about the Tsang robbery, and in exchange, received immunity for his participation in that robbery. Nothing else.

What the prosecution hid from defense, the jury, and the trial judge, was a far different picture about Balderas, and one that would have exposed Balderas to be what U.S. District Judge Hinojosa later described as a "worthless" witness no jury would find credible. The prosecution knowingly presented Balderas's false testimony, and failed to inform jury, defense, or judge. Moreover, the prosecution lied to the court and to the defense on multiple occasions about Balderas, his abjectly false testimony, and his status as a longtime and ongoing informant for Houston police. The prosecution in Mr. Dennes' case never affirmatively disclosed any of

this, and it was only discoverable and discovered by post-conviction counsel well after the possibility of timely presentation in any state court proceeding.[2]

The prosecution team was well aware that Balderas had maintained a long-standing relationship as an informant for the Houston Police Department, from at least 1989 until his federal sentencing in 1999. They never told anyone. Defense counsel was oblivious, as was the jury. And, the trial judge, who mistakenly assumed otherwise (because the prosecution had told him so) when denying Dennes' motion for new trial precisely on the basis that Balderas was not an ongoing informant for Houston police. (ROA.11943-ROA.11946). Prosecutors repeated to the trial court the false evidence that there was no ongoing informant relationship between the State and Balderas at the time of Balderas' testimony, and failed to disclose the relationship. (ROA.11945-ROA.11946).

The facts of Balderas's ongoing status as an informant were revealed in a July 1999 federal court proceeding, in which Balderas had been indicted and convicted

[2] During oral argument Judge Jones questioned whether state habeas counsel could have discovered Balderas' suppressed status as a corrupt longtime HPD informant and amended the state habeas petition with this new evidence so the CCA would have simply adjudicated the claim. The answer is no. Dennes exhausted his Balderas *Brady* claim on direct appeal. Any state habeas petition filed after the initial habeas filing deadline is considered a successor petition subject to the state successor bar. Art. 11.071 § 5. The State in its briefing argues Dennes' new *Brady/Napue* suppression evidence concerning Balderas is barred from consideration under the Texas successor petition bar, unless Dennes can show cause for the default and resulting prejudice under *Coleman v. Thompson*. "Now, even if he were given the opportunity to return to state court, there is no question that the CCA would dismiss any new application as successive pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5. *See Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998) (Texas's abuse-of-the-writ doctrine is regularly and strictly applied); *Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997) (finding an unexhausted claim, which would be barred by the Texas abuse-of-the-writ doctrine if raised in a successive state habeas petition, to be procedurally barred). Thus, Dennes's new claim is barred unless he can show cause for the default and resulting prejudice, or demonstrate that the court's failure to consider his claim will result in a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)." Respondent's Opposition to Application for Certificate of Appealability at 21-22.

for a federal cocaine trafficking conspiracy while still serving as an informant for Houston Police Department ("HPD"). ROA.4731-ROA.4732. (*USA v. David Balderas*, Sentencing Transcript). Balderas's attorney in that federal case, John Munier, a former prosecutor for the Harris County District Attorney, acknowledged these facts in the sentencing proceedings in this case. ROA.4726-ROA.4731. Balderas' longtime HPD informant status was even confirmed by the federal prosecutor Martinez in that same proceeding. ROA.4733-ROA.4734. Again, as for Mr. Dennes' case, these facts were not disclosed by the State of Texas, but rather were uncovered by federal habeas counsel through super-diligent efforts, and in any event were not available until well after trial and after all state court post-trial proceedings were over or unalterably underway.

Importantly, as the federal court record makes clear, Balderas was serving in his informant status w*hen he participated in the Tsang home invasion, and when he testified at Mr. Dennes's sentencing phase trial.* ROA.4730-31. This is critical: it means that the State -- aware or at least presumed to be so under well-established jurisprudence -- knowingly allowed Balderas to testify falsely at Dennes's trial, and presented him, and the context within which he testified, in a decidedly false light before the jury. The prosecution did so and *yet never disclosed* the false picture, or their own complicity in it, to the jury, the judge, or defense counsel.

Worse yet, and also never disclosed by the State, Balderas was not merely an informant, but a decidedly corrupt one, one who was engaging in serious criminal acts *while serving as an HPD informant*, and police and prosecutors knew this. ROA.4726-ROA.4734. United States District Judge Hinojosa, observing at the federal sentencing proceeding, without prompting or hesitation, made plain that with regard to a witness like Balderas, one who was committing crimes as an active police informant, there is "very serious distrust of that type of behavior" by juries. Balderas, according to Judge Hinojosa, was "worthless to the government" as a witness before a jury who knew this. No jury, Judge Hinojosa observed unremarkably, would trust his testimony if made aware of this information. ROA.4726-ROA.4732 (*United States v. David Balderas*, Sentencing Transcript, at p.8-14).

In fact, Balderas' federal attorney Munier attempted to argue in mitigation that Balderas was acting in his informant capacity for Houston Police Department when he was arrested by federal agents for the cocaine trafficking conspiracy. Judge Hinojosa had heard enough, applied his own credibility calculus to Balderas, and refused to believe that was true. ROA.4732-ROA.4734.

Balderas also lied at Dennes' trial about what was at stake for him in exchange for his testimony against Dennes. He testified that he "voluntarily" approached his brother-in-law, a Houston Police Department homicide detective, with information about Balderas' participation in the Tsang home invasion, and was never "arrested

on something else that led you to talk to the DA about this offense." ROA.2583. That was simply not true and the prosecution knew it full well.

In fact, Balderas was arrested on 2/4/1997 for felony possession of marijuana for more than 50 but less than 200 Pounds in Cause No. 744292, 339th District Court, Harris County, Texas. ROA.3674. The jury never knew this. This was the same month that Balderas claimed as a good citizen he had voluntarily approached his brother-in-law, the Houston Police Department homicide detective, with Tsang robbery information. ROA.2588. Thus Balderas' trial testimony to the question, "When did you get arrested on something else that led you to talk to the D.A. about this offense? A. Never did" was also false. A true answer would have been highly impeaching, and dramatically more so if Dennes' jury knew that, in addition to committing the felony marijuana offense while Balderas was serving as an HPD informant, Balderas orchestrated the Tsang home invasion while acting as a police informant. Furthermore, although no documentary evidence has ever been disclosed by the state, the February marijuana charge was dismissed by the Harris County DA's office in May 1997, without explanation. That alone should have been revealed to the defense, and thus the jury, as it clearly suggests this too was a benefit Balderas received in exchange for his testimony against Dennes, testimony which was secured by July 1996 according to HPD Sgt. Todd Miller and communicated to prosecutor

Rosenthal. *See* HPD Sgt. Todd Miller Letter to ADA Rosenthal, dated 7/9/1996. ROA.4708-ROA.4710.

C. *Brady* Suppression of Fugon's and Elvira's testimony contradicting Balderas concerning Dennes' participation in the Tsang robbery

Balderas' trial testimony concerning the Tsang home invasion robbery also conflicted with the statements of the two persons convicted for the Tsang home invasion robbery, Luis Hector Fugon and Angel Francisco Tabares Elvira. Law enforcement were well aware of this fact, and not only before the trial, but over a year before it. *See* HPD Sgt. Todd Miller Letter, Id. This clearly material *Brady/Giglio* impeachment information was never disclosed to Mr. Dennes' counsel.

II. State's Suppression of Impeaching Information

From early on, the prosecution knew they needed Balderas as a critical sentencing phase witness on future dangerousness. HPD Sgt. Todd Miller Letter, *Id.*, ROA.4710 ("If we can get something worked out with Fugon concerning the home invasion or just go with Balderas' statement, and taking into account the Burglary, and the shooting Albert lied about, maybe we can get "death" on Ray and or Albert.") They also knew, however, that their star witness was compromised, and so they hid information about him and suborned his perjury before the jury, in a careful manipulation of their relationship to Balderas, and their representations to the defense and to the court. All of this, by design and with effect, prevented the truth

about their highly impeachable star sentencing witness from ever reaching the jury's awareness.

The Dennes capital murder case was originally being handled by Harris County prosecutor Chuck Rosenthal (who later served as the elected District Attorney of Harris County, and resigned under a cloud of scandal[3]). Sgt. Todd Miller was the lead homicide detective. Unbeknownst to the defense, the jury, or the court, as early as July 1996 Rosenthal knew about Balderas, his offers of testimony against Dennes and what he claimed to know on the Tsang robbery case, *and* the conflict in the evidence between Balderas' statements and Fugon and Elvira's version of the participants and facts regarding the Tsang home invasion extraneous offense. This was well over a year before trial. ROA.4708-ROA.4710[4] (Sgt. Miller letter to Rosenthal). Contrast that with the fact that the prosecution claimed *during pretrial*

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[3] Brian Rogers, "*Rosenthal cites prescription drugs in resignation as DA*," Houston Chronicle, Feb. 15, 2008 https://www.chron.com/news/houston-texas/article/Rosenthal-cites-prescription-drugs-in-resignation-1600712.php (last visited July 29, 2019)("Rosenthal, 62, said a combination of prescription drugs had impaired his judgment, and constant media coverage of his controversial e-mails — which included some sexually explicit and racist content, along with affectionate notes to his executive assistant — had taken its toll on his family.").

[4] Sgt. Miller wrote to prosecutor Rosenthal regarding this suppressed *Brady* impeachment evidence: "We interviewed Luis Hector Fugon, and Francisco Elvira, the two crooks hired by Ray and Albert to rob the jeweler at his home. Fugon and Elvira both denied everything, especially regarding Ray and Albert.") Sgt. Miller mentions Fugon's written confession differing from Fugon's oral statement, but the written confession is in English, ROA.4686, Fugon speaks only Spanish and required an interpreter during his trial, ROA.4459, and the State never established that Fugon reads English. ROA.4463. When the State obtained written consent to search Fugon's apartment, the consent form HPD used and Fugon signed is in Spanish. ROA.4693; ROA.4463. The consent form for taking specimens from Fugon HPD used was also in Spanish. ROA.4696. Elvira's written confession (ROA.4690) like his statement to Sgt. Miller makes no mention of David Balderas or any Cubans, and is also in English, a language Elvira did not speak, read or write. ROA.4448, ROA.4451, ROA.4454. Fugon's written confession was subject to impeachment as being inaccurate and not a true statement of Fugon, because it was in a language Fugon admittedly did not understand, and was translated by his legal adversary-the HPD officers who arrested him. Elvira's written and oral statements to police failed to incriminate Dennes at all, and made no mention of David Balderas either. Fugon denied even knowing David Balderas when questioned by Sgt. Miller and HPD Officer De Los Santos, and Fugon testified at this trial that "it was a fantasy" that Fugon was involved with Balderas. First Amended Writ Petition, at 65-68, ROA.319-ROA.322 (citing State v. Luis Hector Fugon Trial Transcripts (RR. Vol. 3, p. 52-53) (ROA.4174-ROA.4175).

hearings in August 1997 that they'd only just learned of the Tsang case and witness Balderas.[5]

Sometime between the July 1996 letter to Rosenthal and the January 1997 pre-trial hearing, Rosenthal left the prosecution team in the Dennes case, and handed it off to Mark Vinson and Don Smyth. Rosenthal maintained involvement in Dennes' prosecution, as did Sgt. Miller, as both became fact witnesses who testified for the State against Dennes. ROA.11116 et seq (Rosenthal trial testimony); ROA.10157 (Sgt. Miller trial testimony). At that January 1997 pre-trial hearing exists the first recorded documentation of prosecutorial misrepresentations about Balderas: they falsely claimed that they had no extraneous offense evidence or witnesses to disclose to the defense at that time. ROA.5776. The State promised that it would comply with *Brady* information requested by defense counsel and ordered produced by the Court. ROA.5778-ROA.5779.[6] While it is possible it was unwitting at that point, later occurrences (namely their continued willingness to lie and hide evidence impeaching their case) suggest otherwise. In any event, that possibility is of no legal moment, as

[5] ROA.11905-ROA.11913; ROA.11914-ROA.11919.

[6] Direct appeal and state habeas counsel were entitled to rely on this representation and promise by the State to comply with their *Brady* obligations ordered by the state trial court, and by the State's continued assertion on direct appeal that there was no ongoing State relationship with Balderas. State's Direct Appeal Brief, at 31-35, ROA.5348-ROA.5352. This reliance constitutes cause for the procedural default. *Strickler v. Greene*, 527 U.S. 263, 283-88 (1999); *Banks v. Dretke*, 540 U.S. 668, 698 (2004) ("In summary, Banks' prosecutors represented at trial and in state postconviction proceedings that the State had held nothing back. Moreover, in state postconviction court, the State's pleading denied that Farr was an informant. It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutor's submissions as truthful. Accordingly, Banks has shown cause for failing to present evidence in state court capable of substantiating his Farr *Brady* claim.")

they worked in the same office with Chuck Rosenthal, and are legally presumed to know what police and Rosenthal knew about the case.[7]

Once the transition to new prosecutors was under way, the State played dumb and hide-the-ball thereafter. As noted, at the January 1997 pre-trial hearing, when specifically asked about any possible extraneous offense by defense counsel for Dennes's co-defendant, the prosecutors lied and claimed they had no plans to introduce an extraneous offense at punishment:

> MR. VINSON: But right now I don't see any reason, based on my understanding of the case, I don't see any reason for an extraneous other than the offense was committed during the course of the alleged crime and everything surrounding that alleged incident.
> THE COURT: Okay. So you are saying the State doesn't have any plans to offer any extraneous other than what are part and parcel of this offense.
> MR. VINSON: That's correct....

ROA.488-ROA.490.

These representations were false: Mr. Vinson was lying (or at least falsely representing information known within the DA's office and police) when he claimed he had no intention at that time to introduce an extraneous offense at Dennes' punishment phase: the prosecution already planned to do so, as reflected in the July

[7] "*Brady* suppression occurs when the government fails to turn over even evidence that is known inly to police investigators and not to the prosecutor." *Youngblood v. West Virginia*, 547 U.S. 867, 869-870 (2006)(*per curiam*). "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S., at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles v. Whitely*, 514 U.S. 419, 437-38 (1995).

1996 Sgt. Miller Letter to Rosenthal, and the fact that police had already interviewed Balderas about his alleged orchestration of the Tsang home invasion offense, had secured his cooperation, had not charged Balderas, but had charged and tried Fugon and Elvira. Vinson likewise lied about the prosecution not having any specific information about the Tsang robbery or their star witness Balderas as of the January 1997 hearing; this same letter documents the fact that they had plenty of details – names, witnesses, crime, etc. – about Balderas and the Tsang extraneous offense. They didn't say a word about any of this.

The prosecution continued to hide these facts until the Dennes trial was already underway. They failed to disclose even the existence of the Tsang robbery extraneous offense to Dennes' trial counsel Odom – even claimed only to have become recently aware of it, even though they had specific detail both about Balderas and about impeaching information regarding his testimonial proffer, as early as July 1996, over a year previously – until jury selection was almost completed, just days before the guilt-innocence trial began. At this point, as discussed during oral argument, it was too late for trial counsel to investigate, obtain and effectively use this information or carry out a reasonable investigation. ROA.4769-ROA.4774; ROA.3677-ROA.3679; ROA.3603-ROA.3608 (Affidavits

of Trial Counsel Wendell Odom and Investigator James Gradoni).[8] Furthermore, the State *never* disclosed to trial counsel the fact that Balderas was a longtime, ongoing and corrupt informant for the police, nor did they disclose Balderas had felony marijuana and misdemeanor assault prosecutions dismissed against him after he had spoken to HPD Sgt. Todd Miller in July 1996 regarding the Tsang home invasion offense, and Sgt. Miller had secured his cooperation.

The intentional late disclosure as trial was starting of Balderas and his planned testimony disrupted the ongoing proceedings. Trial counsel Odom moved for a continuance, to obtain sufficient time to investigate the late-disclosed Tsang home invasion extraneous. He did so orally, ROA.2530-ROA.2537, and by written motion, ROA.3677-ROA.3679, but the trial court denied the continuance motion. ROA.2537-ROA.2539. The trial court also denied trial counsel's motion to exclude the late-disclosed Tsang home invasion extraneous offense despite violation of its order. ROA.2534-ROA.2536. The prosecutors' efforts had worked out brilliantly: they had kept it secret that they had a long-time corrupt informant on their team, they snuck through the fact that he was going to lie for them, they had a star sentencing

[8] Trial counsel Odom could not have reasonably obtained, digested, and found that Balderas's proffer was not supported by the 982-page Fugon-Elvira trial transcript. Once federal habeas counsel identified the existence of the Fugon-Elvira trial transcript, it took habeas counsel approximately six weeks to find, locate, order and then obtain the Fugon-Elvira trial transcript from the First Court of Appeals Clerk. It would have taken diligent counsel at least a week of dedicated effort to digest the trial transcript, comprehend it, and locate the favorable *Brady* information contained within the transcript relative to Odom's client Dennes. Interviewing and developing potential witnesses, such as Fugon and Elvira, would have taken even longer and most likely could not have produced useable testimony. At the time of Dennes' trial, Fugon and Elvira's direct appeals were pending, and Fifth Amendment privileges still applied. *Mitchell v. United States*, 526 U.S. 314, 325-26 (1999).

phase witness who would bring it all home for them, and defense counsel were completely unprepared.

After the trial, during the hearing on the motion for new trial, the prosecution continued to lie about Balderas. In response to the defense's *Brady* assertions regarding Balderas, the State falsely told the court that they had disclosed all impeachable information about Balderas, and that any potential informant status had terminated well prior to the Dennes case and was in any event unrelated to that case. Without knowing what the prosecutors knew, which was only revealed in the unrelated federal proceedings well after trial, the defense were left empty-handed to rebut these false assertions. At the motion for new trial hearing, the trial judge denied the defense's *Brady* claims in express reliance upon the false representations of the prosecutor that there was no ongoing informant relationship with Balderas:

> THE COURT: I could see your point if there was an ongoing relationship, if the documents were to be clear enough that any relationship that may was already either -- well, let's say concluded well before the trial date, how exactly would that impact on Mr. Balderas' testimony? His obligations were totally severed at that point.

(RR. Vol. 36 p. 119), ROA.11943.[9]

[9] Counsel for Respondent asserted during the oral argument that Dennes's attorney could have discovered Balderas's status as an ongoing informant by simply inquiring of counsel for Balderas, John Munier. This flies in the face of the Supreme Court's decision in *Banks v. Dretke*, 540 U.S. 668 (2004), discussed infra. It is also contrary to settled ethical rules governing the attorney-client privilege under the Texas Disciplinary Rules of Professional Conduct, *see* Rule 1.05 regarding confidentiality, and clearly established Texas law, *see* Texas Rule of Evidence 503(b)(1) & (2) regarding lawyer-client privilege. The privilege belongs to the client, not the lawyer. Balderas' ongoing status as a police informant is not information Balderas himself volunteered while testifying at Dennes' punishment phase. Balderas' usefulness as a confidential informant would be destroyed if it became widely known among the legal community that he was an informant. The idea that Balderas would waive attorney-client privilege is specious, and in any event, could not have occurred when Balderas was not even present during the motion for new trial hearing.

A. Post-conviction Litigation of *Brady/Napue* Claim

Direct appeal counsel for Mr. Dennes exhausted a *Brady/Giglio* claim with respect to witness Balderas in two points of error (II and III) (ROA.5142) and in a motion for rehearing in the Texas Court of Criminal Appeals. ROA.5091. The claim was based upon all available information thus far disclosed by the State, namely, that the State had improperly suppressed the fact that Balderas had entered into a contract with Harris County prosecutors, and that two pending charges -- a misdemeanor assault charge and a felony marijuana possession charge – were dismissed shortly before his testimony in Dennes's punishment trial. Citing *Brady* and *Giglio*, appellate counsel argued that the contract and the dismissed charges were bias impeachment evidence under the confrontation clause, *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), and *Davis v. Alaska*, 415 U.S. 308 (1974), and should have been disclosed. (ROA.5142-ROA.5155, ROA.5156-ROA.5158, ROA.5091-ROA.5092).

Once the case reached federal court, undersigned counsel on a hunch searched federal court records for any charges levelled against Balderas, and fortuitously discovered he had been prosecuted and convicted for federal cocaine trafficking conspiracy. Further records requested from the National Archives ultimately led

months later to habeas counsel obtaining Balderas' federal sentencing transcript in 2015.

B. *Banks* Forecloses a Finding of Procedural Default

i. Standard of Review

Dennes alleged in his direct appeal that that the prosecution knowingly failed to turn over impeaching and exculpatory evidence involving Balderas in violation of Dennes' due process rights. (Point of Error II and III) (ROA.5142) and in a motion for rehearing in the Texas Court of Criminal Appeals. ROA.5091. Dennes thus satisfied the exhaustion requirement as to the legal ground for his Balderas *Brady* claim. *Banks*, 540 U.S. at 690; *Strickler*, 527 U.S. at 281-282. Because there is cause and prejudice for the failure to present additional evidence supporting Dennes' *Brady/Giglio/Napue* due process claim in state court, as shown below, the procedural default is excused. "'[C]ause and prejudice' in this case 'parallel two of the three components of the alleged Brady violation itself.' Thus, if Banks succeeds in demonstrating 'cause and prejudice,' he will at the same time succeed in establishing the elements of his Farr *Brady* death penalty due process claim." *Banks*, Id. at 691 (citing *Strickler*, Id. at 282).

As previously argued in the First Amended Writ Petition, at 92, ROA.346, this case is on all fours with the Supreme Court's decision in *Banks v. Dretke*, 540 U.S. 668 (2004). There, as here, the State of Texas suppressed critical information

about a critical witness at a Texas capital punishment phase and suborned the in-trial perjury of that witness and suppression of informant status. There, as here, the State of Texas continued to hide this information until well past trial, and well past the deadline for the filing of any state appeal or initial state post-conviction application. In both cases the defendant's attorney discovered the suppressed evidence well after the availability of state post-conviction remedies, and raised them at the first opportunity in federal habeas corpus proceedings. And finally, just as in this case, in *Banks* the State of Texas sought to benefit from its due process violations by arguing that the federal petitioner was procedurally barred from raising new facts/claims in federal court.

The *Banks* Court was unequivocal in its condemnation of such tactics: "[a] rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." 540 U.S. at 696. The Court thus explicitly rejected the notion that "the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence, so long as the potential existence of a prosecutorial misconduct claim might have been detected." *Id.* (internal quotation marks and citations omitted).

The Court in *Banks* therefore refused to oblige the State's reliance on procedural default, finding the State's suppression of the *Brady/Giglio* evidence provided "cause" for the failure to raise the new facts in support of the claim in prior

state court proceedings. *Banks*, 540 U.S. at 693 ("[S]tate habeas counsel, as well as trial counsel, could reasonably rely on the State's representations. In short, because the State persisted in hiding Farr's informant status and misleadingly represented that it had complied in full with its *Brady* disclosure obligations, Banks had cause for failing to investigate, in state postconviction proceedings, Farr's connections to Deputy Sheriff Huff.")[10]

Instead, the Court in *Banks* reached the merits of the *Brady/Giglio* claim, found the new facts material, and equated that with a finding of "prejudice" for the failure to previously present this information in the state courts of Texas, after finding the State's *Brady* suppression "cause" under *Coleman v. Thompson*. The same result should obtain here.

III. Cumulative Materiality under *Kyles*

It is important to emphasize at the outset that the applicable standard for materiality depends upon the type of claim asserted. An assertion of suppression only, under *Brady*, requires a showing of materiality as set forth in *Bagley*.[11] An assertion of knowing use of false testimony, however, under *Giglio* and *Napue,* has a completely different materiality standard and one that is decidedly more favorable

[10] *See also Amadeo v. Zant*, 486 U.S. 214, 222 (1988) ("If the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents.").
[11] *Bagley v. United States*, 473 U.S. 667, 682 (1985).

to the accused and much easier to meet. The materiality standard for the first type of claim requires a showing that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-470 (2009). A reasonable probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence," only that the likelihood of a different result is great enough to "undermine[ ] confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434.

The materiality standard for the second category of *Brady/Giglio/Napue* claim, where false testimony was presented to the court or jury that was known or should have been known to be false, or was allowed to go uncorrected, only requires a showing that there is any reasonable likelihood it could have affected the judgment of the jury. "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . .' *Napue*, supra, at 271." *Giglio v. United States*, 405 U.S. 150, at 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264 (1959). *See Wearry v. Cain,* 136 S.Ct. 1002, 1006 and at fn. 6 (2016) (*per curiam*) ("Given this legal standard, Wearry can prevail even if, as the dissent suggests, the undisclosed information may not have affected the jury's verdict."). Notably, just as here, the *Wearry* case involved both false evidence claims and non-disclosure *Brady* claims.

To be clear, this case presents, first and foremost, a claim involving a lying witness and prosecutors and law enforcement who allowed the lies, failed to correct them, and in fact knowingly covered them up on more than one occasion. Balderas expressly lied on cross-examination about the "voluntary" way in which he came forth with the Tsang robbery information, and the prosecutor knew it. It was not a good-citizen voluntary disclosure, but rather part of an ongoing informant relationship in which Balderas would bring information to the police to get leniency for ongoing criminal acts of his own. The prosecutor allowed this false testimony to go uncorrected.

As noted, the prosecutor had already lied about facts surrounding the development of Balderas as a witness against Mr. Dennes at the pre-trial hearings in January 1997 and August 1997.[12] Then at trial, also as noted, the prosecutor let Balderas lie and did nothing to correct the record or reveal the lies to defense counsel, the jury, or the court.

[12] As suggested above, while it is possible ADA Vinson did not personally know, in January 1997, about the facts surrounding the development of Balderas as a witness against Mr. Dennes (when he misrepresented those facts to the court and the defense at that January hearing), the knowledge of Rosenthal and the police is imputed to the prosecution team; Vinson had a legal duty to know *and* to disclose accurately, and he violated that duty. Moreover, at trial, Vinson repeated the false narrative about how Balderas had only just been discovered as a witness by the prosecution, when he argued against trial counsel Odom's request for a continuance. ROA.9566-ROA.9569. This was not true. Then later, by the time of the Motion for New Trial hearing, it was clearly a known lie and cover-up that there was no ongoing informant relationship between Balderas and the State, which suborned a false and erroneous trial judge ruling and formed the basis of his denying a new trial.

Next, during motion for new trial proceedings, the prosecutor continued to lie about Balderas and their development of him and handling of his trial testimony. They repeated the false claim that they had only "discovered" Balderas as a witness just before trial and offered him immunity on the underlying robbery. Critically, also noted above, prosecutors failed to correct the judge's erroneous statement, which formed the stated basis for his rejection of any legal claims involving *Brady* or *Napue*, namely, his declaration that Balderas's cooperation was done and over and thus there was no ongoing informant relationship and incentive at the time of the Dennes's trial. ROA.11943-ROA.11945; ROA.11947. That was not true, and the prosecutors and police knew it.

In short, the prosecution lied, they hid their own lies, their witness lied, and none of this was disclosed or provided to the defense, the jury, or the judge, before during or after trial. Such false testimony, and the false light in which the entire scenario was proffered, and repeatedly so, by the prosecution, presents a claim that is governed by the much more lenient materiality standard set forth in *Napue* and its progeny. *See Wearry v. Cain, supra.*

It is important to emphasize here that when assessing materiality, the Court *must* assess the impact of all prosecutorial suppression and misconduct at one time, and not in a piecemeal fashion. In fact the Supreme Court expressly overruled this Court's failure to have done so in *Kyles*. *See Kyles v. Whitley*, 514 U.S. 419, 441

("the result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*"); *see also Wearry v. Cain*, 136 S.Ct. at 1007 ("the state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively, see *Kyles v. Whitley*, 514 U.S. at 441 [requiring a 'cumulative evaluation' of the materiality of wrongfully withheld evidence],"). Ironically, it was the same argument the Texas Attorney General's office made in *Banks v. Dretke*, and it was rejected there as well. The Court should thwart Respondent's attempts to avoid either learning or applying settled Supreme Court jurisprudence.

Regardless, under whatever standard of materiality is applied, when considered cumulatively, as is required, there is clear materiality presented by the claims here. As found by the Court of Criminal Appeals, Balderas was the only witness linking Dennes to the home invasion case. ROA.5266 ("No evidence other than Balderas testimony linked appellant to the Tsang robbery."). He lied to the jury about his true status and the true benefit-package and pendency. He told the jury he had just come forward voluntarily to his brother-in-law when in fact he was receiving substantial and ongoing undisclosed benefits, including the recent dismissal of two criminal charges and maintaining his longtime, ongoing informant status with police. Prosecutor Chuck Rosenthal stated to Fugon's attorney he "wanted to put a

needle in his [Balderas'] arm" for the Szucs murder, but then withdrew that threat when Balderas became a witness for the State. Amended Writ Petition at 61-63, ROA.315-ROA.317; Fugon Trial transcript, ROA.4435-ROA.4436; ROA.4744 (Robert F. Alexander Affidavit). Moreover, Balderas' proffer of testimony against Dennes was part and parcel of his *ongoing* informant relationship with the Houston Police Department, which investigated the homicide. In fact, he didn't volunteer information against Dennes at all, but rather provided information for incentives and cover as a part of an ongoing informant relationship that continued before and after the Dennes trial. The prosecution -- including police -- knew all of this and never disclosed it.[13]

As noted, Balderas ongoing informant relationship was confirmed in later federal proceedings before U.S. District Judge Hinojosa. Also, as Judge Hinojosa declared, had all of this been disclosed to the jury, Balderas' would have been a "worthless" state's witness. The State urged during closing argument that the Tsang robbery extraneous offense, and Balderas' testimony as the sole witness affirmatively linking Dennes to that robbery, helped as grounds for imposing the death penalty. Smyth Closing Argument, supra at 3, ROA.2842-ROA.2844 ("MR. SMYTH: Special Issue Number One [re: future dangerousness], we all talked to you

[13] HPD Sgt. Todd Miller, who wrote the July 1996 letter to prosecutor Rosenthal about Balderas and the conflict in his testimony with Fugon and Elvira statements, supra, testified as a fact witness at Dennes' guilt phase, ROA.10157, as did prosecutor Chuck Rosenthal, who received Sgt. Miller's letter. ROA.11116.

about that ... You think about Danny Tsang. You think about Christina Tsang. You think about little nine-year-old Christina Tsang. Does that help you answer that question? And what is the answer? Yes, this man is a continuing threat to society.")

The prosecution team a year before Dennes' trial felt the Tsang robbery extraneous offense was needed and material to "get death on Ray". HPD Sgt. Todd Miller Letter to Rosenthal, *Id.*, ROA.4710. By the State's own words to the jury, the Tsang robbery extraneous offense was material to the State obtaining death against Dennes. The State knew that Balderas' status as a longtime corrupt informant committing serious crimes while acting as an informant made Balderas a "worthless witness" before any jury, as found by U.S. District Judge Hinojosa, and disclosing Balderas' ongoing informant status during the motion for new trial hearing would have caused the state trial judge, in his own words, to grant the new trial motion.

Surely there can be no clearer indications the false evidence and suppression claim here was material under any standard. The false testimony and suppressed impeaching evidence cumulatively surely could in any reasonable likelihood have affected the judgment of the jury, *Giglio*, *Napue*, supra, even if it may not have affected the jury's verdict, *Wearry*, 136 S.Ct. at 1006 fn. 6, supra.

Furthermore, as noted, the prosecutor was aware of all of this despite false claims to the contrary. Rosenthal, the initial lead prosecutor in the case, already possessed a letter dating back to the summer of 1996 from the lead HPD police

officer in the Dennes case, Todd Miller, that not only was Balderas a key potential extraneous offense witness for the State in the Dennes case, but also that Balderas's story was impeachable on its face.[14] Even though Rosenthal handed off the case to other prosecutors before trial, they are all within the law enforcement penumbra of knowledge, and in any event, prosecutor Rosenthal remained involved in the case, as he was a *witness* at Mr. Dennes's trial (he testified, though he was the prosecutor initially representing the State, as a fact witness about his investigation of the murder). ROA.11116, as was Sgt. Miller. ROA.10157.

Also as noted, at the motion for new trial yet another state prosecutor misrepresented these facts to the trial judge:

> THE COURT: Well, again, I go back and I'll let the State pick this up -- I go back to the fact there is a contract and that contract has been fulfilled and concluded well before the time of trial. I don't really see the correlation between Mr. Balderas' testimony to be in favor or biased in favor of the State, any or all obligations that he may or may not have had with the State will be concluded long before the trial occurred, such that he would be under no incentive to taint his testimony, given the fact that any charges that may have been at one time pending against him had been concluded.

[14] Sgt. Miller wrote to prosecutor Rosenthal regarding this suppressed Brady impeachment evidence: "We interviewed Luis Hector Fugon, and Francisco Elvira, the two crooks hired by Ray and Albert to rob the jeweler at his home. Fugon and Elvira both denied everything, especially regarding Ray and Albert.") Sgt. Miller mentions Fugon's written confession differing from Fugon's oral statement, but the written confession is in English, ROA.4686, Fugon speaks only Spanish and required an interpreter during his trial, ROA.4459, and the State never established that Fugon reads English. ROA.4463. When the State obtained written consent to search Fugon's apartment, the consent form HPD used and Fugon signed is in Spanish. ROA.4693; ROA.4463. The consent form for taking specimens from Fugon HPD used was also in Spanish. ROA.4696. Elvira's written confession (ROA.4690) like his statement to Sgt. Miller makes no mention of David Balderas or any Cubans, and is also in English, a language Elvira did not speak, read or write. ROA.4448, ROA.4451, ROA.4454. These written confession were subject to impeachment as being inaccurate and not the true statements of Fugon and Elvira, because they were in a language neither understood, and were translated by their legal adversary-the HPD officers who arrested them.

> MR. CHARLTON: Again, those charges can be resurrected but nevertheless and within the statute of those charges resurrected, he still has a motive to stay on the --
> THE COURT: Does the State wish to respond?
> MS. VOLLMAN: Judge, there is a case this is a Court of Criminal Appeals out of Texas and an Ex Parte Scott Kimes. I think 872 SW 2d, 700.
> THE COURT: Spell that.
> MS. VOLLMAN: K-I-M-E-S and it basically talks about the Brady issue, if a prosecutor fails to provide certain evidence. The Court on page 702 said, "Thus, under Bragley [sic], a due process has occurred if" -- referring back to because information that was not provided under Brady has occurred -- if the prosecutor failed to disclose the evidence, the evidence is favorable to the defendant; and the evidence is material, such that there is a reasonable probability that had the evidence been disclosed to the defense, the outcome of the trial would have been different."
>
> "A prosecutor does not have a duty to turn over evidence that would be inadmissible at trial. Evidence offered by a party to show bias of an opposing witness should be excluded if that evidence has no legitimate tendency to show bias of an opposing witness."
>
> And I think in this particular case it's not directly on point, but I think it does go to show that the crucial issues in this case, what bias would that man have if the contract was completed and it was over, one issue, you know, one case. It was completed, and it was over with by the time he testified.
> THE COURT: That's my point.
> Does the State wish to further comment on the record? Does that pretty well qualify?

ROA.11944-ROA.11946. The prosecutor's claims about Balderas's informant status was a blatant falsehood, and it was never corrected by Harris County law enforcement, nor has it been to this day.

On the issue of materiality, it is important to note that Respondent makes much of the heinousness of the crime. However, and be that as it may, the fact of the

matter is Mr. Dennes had one prior misdemeanor deferred adjudication for public lewdness for having consensual sex in a public park with his girlfriend. That's it. This is not a case involving a career violent criminal, far from it.

In a sense, Respondent's current counsel continue to propagate the false light in which Balderas was handled and presented in this case. Respondent continues to argue, just as the trial prosecutors falsely claimed, that the impeachment value of Balderas's ongoing contract with law enforcement as a paid informant is negligible because that work was about other cases and was concluded by the time of his testimony against Dennes. *See* Respondent's reply at p. 17. Again, the record belies that assertion. Either Respondent is wrong and should be aware of that fact, or U.S. District Judge Hinojosa was misled himself; his statements about Balderas's character and status as a credible witness are either accurate and thus self-evident of clear materiality, or not, in which case Respondent has a duty to clear up the matter. Notably, the federal court record upon which Judge Hinojosa relied is backed by the consistent representations of both defense and government counsel (one of whom, Balderas attorney Munier, was himself a *former Harris County prosecutor*). However, should Respondent or this Court have any doubt about which view is accurate, a remand for further factual development is the only available remedy.

There is irony in the extreme here with Respondent's reliance in his COA Response upon the trial court finding at the motion for new trial, which was itself

based directly on the prosecutor's false denial about Balderas's ongoing status as an informant. Respondent's citation to a faulty trial court finding, the error of which is *derived from* the false prosecutorial statements made to that judge, strains credulity. Rather than simply acknowledging the prosecutor's unclean hands in suborning not only a witness's lies, but also a judge's erroneous ruling, Respondent tries to hide behind its falsity. And, although perhaps the particular contract concerning one of Balderas's ongoing crimes or set of crimes may have been concluded, it is simply painting the picture in a "false light" to leave out the fact that Balderas nevertheless had an existing and ongoing relationship as a corrupt HPD informant which was not concluded and would have undoubtedly been a factor in his motivation to testify and certainly, as Judge Hinojosa aptly notes, in his impeachability as a witness for the State before Dennes' jury, and in the state trial court's decision as to whether to grant the motion for new trial.

Finally, Respondent relies upon varying arguments of waiver and procedural default with regard to Mr. Dennes's *Brady* nondisclosure claims and his due process *Banks/Napue/Giglio* knowing use of false testimony and false representations claim. Once again, Respondent fails to adhere to the law set forth in *Banks*, a case the Texas Attorney General's office lost in the Supreme Court. *Banks v. Dretke,* 540 U.S. 668, 690-704 (2004) makes clear:

> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the

> evidence," so long as the "potential existence" of a prosecutorial misconduct claim might have been detected. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily, we presume that public officials have properly discharged their official duties." Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. (citations omitted). Id. at 696.

Thus part and parcel of a *Banks*-type error, embedded within the claim itself, is the appropriate rejection of Respondent's duplicitous reliance upon a waiver or default argument as to these claims: hiding evidence constitutionally required to be disclosed cannot produce a later finding of waiver or procedural default. Mr. Dennes expressly relied upon *Banks/Strickler* cause and prejudice in the lower court pleadings. There can be no question that these arguments are properly preserved and before this Court.

The jurisprudence makes clear that once a *Banks*-type error has been demonstrated, namely, that the state hid some *Brady* or *Napue* evidence, or both, then by that same token the state cannot hide behind an argument asserting a failure to previously raise the very claim or set of claims it had kept hidden from the defense. Here the information and evidence relied upon to demonstrate the *Brady* and *Napue* claims presented here were either affirmatively hidden by the state, or were simply not available until after they could have been presented in a timely manner in state court, on direct appeal or in state post-conviction proceedings, or both. Thus Mr.

Dennes's prior express reliance upon *Banks* settles the question of waiver or procedural default.

A. Respondent Concedes No Available State Process

As the Court is aware, the information concerning Balderas's ongoing status as an informant was never disclosed by the State, and was only discovered fortuitously by the undersigned from review of the sentencing proceedings in Balderas's federal case, which occurred two years after the trial in Appellant's case, and after the deadline for the filing of the state habeas corpus petition and direct appeal. Under these circumstances, Respondent has conceded that there is no available state corrective process for the litigation of this new information to support his pre-existing *Brady/Giglio* claim:

> [E]ven if he were given the opportunity to return to state court, there is no question that the CCA would dismiss any new application as successive pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5. Thus, Dennes's new claim is barred unless he can show cause for the default and resulting prejudice, or demonstrate that the court's failure to consider his claim will result in a "fundamental miscarriage of justice."

Respondent's Opposition to Application for Certificate of Appealability, at 21-22, 26, *quoting Coleman v. Thompson* 501 U.S. 722, 750 (1991). Under 28 U.S.C. § 2254(b)(1)(B)(i), therefore, all exhaustion requirements have been met.

CONCLUSION

For all the reasons set forth above and in prior pleadings and argument before

this Court, Dennes respectfully prays that this Court grant his appeal and enter an order granting Appellant a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,397 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). Counsel has moved to exceed the page limit set by the Court in the order granting Certificate of Appealability.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2016 in 14-Point Times New Roman font.

/s/ Ken McGuire
Kenneth W. McGuire

CERTIFICATE OF SERVICE AND CONFERENCE

I certify that this Brief on Appeal was filed with the Court in electronic format via the ECF system on the 29th day of July, 2019. I further certify that an electronic copy of the brief was served on all counsel of record by filing on the ECF System on the same date, and that counsel has conferred with opposing counsel below and their position on this motion is OPPOSED.

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CERTIFICATE OF SERVICE

I certify that one copy of this motion was served on Reinaldo Dennes, TDCJ Number 999248, on the 29th day of July, 2019, at the address below:

Reinaldo Dennes, TDCJ#999248
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Livingston, TX 77351

/s/ Ken McGuire
Kenneth W. McGuire

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

REINALDO DENNES,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	CIVIL ACTION NO. H-14-0019
LORIE DAVIS, Director,	§	
Texas Department of Criminal	§	
Justice-Correctional	§	
Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Petitioner Reinaldo Dennes, currently in the custody of the Texas Department of Criminal Justice, filed this federal habeas corpus application pursuant to 28 U.S.C. § 2254. Dennes was convicted of capital murder and sentenced to death for the murder of Janos Szucs during the course of a robbery. This case is before the court on Dennes's First Amended Death Penalty Case Application for Post-Conviction Writ of Habeas Corpus ("Amended Petition") (Docket Entry No. 22) and Respondent Lorie Davis's Answer with Brief in Support ("Respondent's Answer") (Docket Entry No. 30). Having carefully considered the Amended Petition, the Answer, and the arguments and authorities submitted by counsel, the court is of the opinion that Dennes's Amended Petition should be denied.

I. Background

The Texas Court of Criminal Appeals ("TCCA") set out the relevant facts in its opinion on Dennes's direct appeal.

> In December of 1995, Antonio Ramirez came from Ecuador to work in Texas. Shortly after his arrival, Ramirez met a man named Francisco Rojas who sold jewelry for [Dennes].[1] Some time later, Ramirez gave several rings to Rojas that he wanted to sell. Rojas then took Ramirez and the rings to [Dennes] at [Dennes]'s office in the Greenrich Building on Richmond Avenue. During this visit, Ramirez noticed a lathe in [Dennes]'s jewelry workshop and began to play with it. [Dennes] asked Ramirez if he knew how to operate the machine and Ramirez said that he did. [Dennis] then "hired" Ramirez to make watch bezels for him.[2]
>
> Shortly thereafter [Dennes] invited Ramirez to travel to Mexico with him to buy a diamond. After the diamond purchase, the pair returned to Texas and [Dennes] gave Ramirez more work. In early January 1996, [Dennes] made a sketch for Ramirez and asked him if he could make the object depicted. By the time he completed the job, Ramirez had manufactured what turned out to be a silencer for [Dennes]. After the silencer was completed, [Dennes], his brother Alberto, and Ramirez went to a field a few minutes away to test it. Thinking the silencer did not work as it should [Dennes] modified his design and had Ramirez make another one. [Dennes] test fired this model in his office.
>
> Shortly after the completion of the second silencer, [Dennes] asked Ramirez to help him and Alberto rob a jewelry dealer who also had an office in the Greenrich Building. [Dennes] explained that he would take the videotape from the security station while Ramirez secured the diamonds and Alberto shot the dealer. Ramirez consented, but returned to South America two days later.[3]

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[1] [Dennes] ran a business called "Designs by Reinaldo."

[2] Ramirez stated that he did not expect to be paid for this work, but thought it would be a good thing to do while waiting to get money from the sale of his rings.

[3] Ramirez testified that he only consented so as not to alarm the Dennes brothers; however, he had no intention of helping them.

Estrella Martinez, [Dennes]'s lover, had a cleaning job at the Greenrich Building. In January of 1996, [Dennes] told Martinez he wanted her to let him in a side door of the building after working hours. He told her he was going to take some videotapes from the security guard's station on the first floor. On January 22, 1996, [Dennes] gave Martinez a cellular phone with which he planned to call her to tell her when to let him and Alberto into the building. [Dennes] also wanted Martinez to distract the guard so he could take the tapes.

Janos Szucs was a reputable wholesale diamond dealer who had an office in the Greenrich Building. Shortly before his death, Szucs had a diamond inventory worth more than $3,600,000 which he kept in his office safe. He also had approximately $200,000 in cash that he planned to use to purchase diamonds on an upcoming trip. Szucs did not have a receptionist or secretary; access to his office was controlled through an electronically-locked door. Szucs had a television monitor in his office so he could see who was at the door and he would allow people in by pushing a remote button located on his desk. In early January 1996, Szucs and Sam Solomay formed a partnership and Solomay moved into Szucs's office suite.

On January 24th, Solomay left the office at 5:40 p.m., but Szucs remained, explaining that he had an appointment that evening. David Copeland was the security guard on duty at the Greenrich Building that evening, working the 3:00 p.m. to 11:00 p.m. shift. A videotape recorder at the security desk recorded the images from the security cameras around the building. When Copeland arrived for his shift, a technician was there working on the surveillance system.

Around 6:30 p.m. that same evening, [Dennes] called Martinez on the cellular phone he had provided her and told her to open the loading dock door. [Dennes] and Alberto entered and immediately turned into a stairwell, thereby avoiding the security guard's desk. Shortly after 7:00 p.m. [Dennes] called Martinez and told her to distract the security guard. Martinez told Copeland that she had locked her keys in a fifth floor office and asked him to help her retrieve them. A little after 7:30 p.m., [Dennes] again called Martinez and told her that he needed another distraction. The security guard kept the key to the snack bar so Martinez approached Copeland and told him that she needed to clean the area and asked if he would let her in. Shortly after Martinez began

cleaning, however, the owner of the snack bar arrived and told her to come back later.

When Copeland returned to the lobby, he found a man kneeling behind the security desk apparently working on the security system. Copeland assumed this was related to the earlier repairs. As Copeland approached, the man scrambled to his feet and walked briskly toward the loading dock door. As Copeland neared the security desk, the man turned and headed back toward the guard. When he reached Copeland, the man placed his left hand on Copeland's shoulder, stuck a .9 mm gun with a silencer to Copeland's chest with his other hand and fired. The man shot the guard again after he had fallen. As Copeland lay there playing dead, he heard the man walk to the security desk. He then heard equipment and wires being moved around followed by footsteps running toward the loading dock door.[4] The owner of the snack bar called "911."

Houston Police Officer Paul Terry arrived on the scene to find Copeland lying face down in the lobby. Copeland told Terry what had happened and the officer unsuccessfully searched for a suspect. Inside the lobby, Terry found spent shell casings and fragments of a fired bullet. He also noticed that the video equipment was missing.

That same evening, Szucs's wife, Nicole, became concerned that her husband had not arrived home. After several failed attempts to reach her husband, she received a call from a friend who worked in the Greenrich Building who told her that the building guard had been shot. Nicole asked the friend to contact the building's office manager. Sometime after 11:00 p.m., the building manager approached one of the officers remaining at the scene. Officer M.R. Furstenfeld and a couple of other officers then accompanied the manager to Szucs's suite to check on his welfare. Upon gaining access to the office, Furstenfeld found Szucs's dead body. Detectives who

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[4]As she walked toward the restrooms, Martinez looked into the lobby and saw a man in overalls approaching the guard with his hands behind his back. Martinez recognized this person as [Dennes] by his walk, but noted that he was wearing a mustache and some sort of disguise. Shortly after entering the bathroom, Martinez heard a strange sound. When she returned to the lobby, Martinez saw the guard lying on the floor bleeding.

> arrived at the scene noted no signs of a forced entry. They also noticed that the safe was empty and there were no signs of the 3.6 million dollar diamond inventory Szucs maintained or the $200,000 he was supposed to have on hand in cash. Plus, Szucs was not wearing the five-carat diamond pinky ring he always wore nor was the ring ever recovered.[5] The detectives also discovered that Szucs's computer had been damaged as if someone had tried to remove a disc with tweezers.[6]
>
> The police eventually focused their investigation upon [Dennes]. A search of his office revealed a lathe that had been broken down and boxed up, a fired .9 mm bullet, and an owner's manual for a .9 mm Taurus handgun. Firearms examiner Robert Baldwin determined that the bullets recovered from Szucs's body, the bullet found in [Dennes]'s office, and the bullets found in the lobby of the Greenrich Building were all fired from the same gun. Moreover, the cartridge casings found in the lobby of the Greenrich Building and those found in the field where [Dennes] tested the silencer were fired from the same gun. The weapon was determined to be either a Taurus or a Beretta .9 mm handgun.

Dennes v. State, No. 72,966 (Tex. Crim. App. Jan. 5, 2000), slip op. at 2-7 (footnotes in original, footnote numbering changed to keep notes sequential in this opinion).

The jury found Dennes guilty of capital murder for murdering Szucs during the commission of a robbery. (CR at 2, 137)[7] At the conclusion of the punishment phase of Dennes's trial, the jury found that there was a probability that Dennes would commit acts of criminal violence constituting a continuing threat to society, that

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[5]Nicole testified that her husband was wearing the ring that morning when she took him to work.

[6]Szucs kept his diamond inventory records on the computer.

[7]"CR" refers to the Clerk's Record on Dennes's state post-conviction proceedings.

Dennes caused Szucs's death, intended to kill Szucs, or anticipated that a human life would be taken, and that the mitigating evidence did not warrant imposition of a life sentence. Id. at 151-54. Accordingly, the trial court sentenced Dennes to death. Id. at 155-56.

The TCCA affirmed Dennes's conviction and sentence. Dennes v. State, No. 72,966 (Tex. Crim. App. Jan. 5, 2000). The TCCA subsequently denied Dennes's application for a writ of habeas corpus. Ex parte Dennes, No. WR-34,627-02 (Tex. Crim. App. Dec. 18, 2013).

Dennes filed his initial federal habeas corpus petition on December 17, 2014, and amended the petition on September 17, 2015. Respondent answered the amended petition on July 1, 2016.

II. The Applicable Legal Standards

This federal petition for habeas relief is governed by the applicable provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective April 24, 1996. See Lindh v. Murphy, 521 U.S. 320, 335-36 (1997). Under the AEDPA federal habeas relief based upon claims that were adjudicated on the merits cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in

the State court proceeding." 28 U.S.C. § 2254(d); Kitchens v. Johnson, 190 F.3d 698, 700 (5th Cir. 1999). For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this court may grant federal habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." See Martin v. Cain, 246 F.3d 471, 475 (5th Cir. 2001). Under the "contrary to" clause, this court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.'" Dowthitt v. Johnson, 230 F.3d 733, 740-41 (5th Cir. 2000) (quoting Williams v. Taylor, 529 U.S. 362, 406 (2000)).

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court . . . unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply . . . ." Williams, 529 U.S. at 407. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and

(2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." Hoover v. Johnson, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." Neal v. Puckett, 239 F.3d 683, 696 (5th Cir. 2001), aff'd, 286 F.3d 230 (5th Cir. 2002) (en banc). The sole inquiry for a federal court under the 'unreasonable application' prong becomes "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" Id. (quoting Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997)); see also Gardner v. Johnson, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'").

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d)(2); Hill v. Johnson, 210 F.3d 481, 485 (5th Cir. 2000). The state court's factual determinations are presumed correct

unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); see also Jackson v. Anderson, 112 F.3d 823, 824-25 (5th Cir. 1997).

III. Analysis

Dennes's Amended Petition raises 33 claims for relief. The claims are addressed below.

A. Denial of Motion For New Trial

Dennes's first three claims relate to the trial court's denial of his motion for a new trial on the grounds that juror Irene Collins failed to disclose that she had been previously charged with two misdemeanor offenses. She received probation for both. (Amended Petition, pp. 23-50)

Respondent argues that Dennes's first claim relies entirely on state law, and is therefore not cognizable on federal habeas corpus review. She argues that the second claim, citing federal law, is unexhausted and procedurally defaulted. Dennes's third claim is not, in fact, a claim for relief but is an argument that any procedural default of these claims can be excused under Martinez v. Ryan, 132 S. Ct. 1309, 1318-19 (2012).

In fact, Dennes's first claim cites two federal cases. The first of these, McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984), addressed questions concerning the selection of a civil jury in federal court under the Federal Rules of Civil

Procedure and federal statute. It held that a party is entitled to a new trial when he can demonstrate that a juror gave inaccurate answers and was biased against that party. Id. at 556.

The second case cited by Dennes in support of his first claim is United States v. Scott, 854 F.2d 697 (5th Cir. 1998). In Scott the juror in question failed to disclose that his brother was a deputy sheriff in an office that performed some investigation in the case for which the juror was selected. The issue in Scott was the juror's bias, not merely providing an inaccurate answer.

While respondent's argument that Dennes's first claim is purely a state law claim is not accurate, the federal cases Dennes cites do not support his contention that the allegedly inaccurate answers, by themselves, merited a new trial. Rather, both McDonough and Scott stand for the proposition that a party's right to a fair trial is violated by a biased juror whose bias is undiscovered before trial because the juror gave inaccurate answers to material voir dire questions. Dennes, however, argues merely that the juror gave inaccurate answers. He makes no showing of bias by the juror. Indeed, as respondent notes, the juror's experiences with the criminal justice system seem more likely to make her biased against law enforcement than against one charged with a crime.

Assuming that Dennes's citations to McDonough and Scott were sufficient to alert the state courts to the federal constitutional nature of his claim, he nonetheless is not entitled to relief.

While the juror in question failed to disclose her arrests and probation for the misdemeanor charges of public lewdness and prostitution, Dennes fails to demonstrate any bias on her part. He therefore fails to demonstrate any entitlement to a new trial based on this juror's misleading answers, or any error by the trial court in denying his motion. He is not entitled to relief on his first, second, or third claims for relief.

B. Suppression of Evidence

In his fourth claim for relief Dennes contends that the State suppressed material impeachment evidence concerning punishment phase witness David Balderas. Balderas testified to Dennes's involvement in an extraneous robbery. According to Balderas, Dennes hatched a plan to rob a diamond courier. Dennes would follow the courier home when he knew that the courier had diamonds, and then call Balderas who would call two confederates to break in to the courier's home and steal the diamonds. When the call came, however, the two accomplices broke into the wrong house, detained Danny Tsang and his family, and stole some jewelry and other items from them. Balderas testified that he was never arrested or charged for the Tsang robbery, that he told prosecutors everything he knew about it, that he received immunity with regard to the Tsang robbery, and that he had not reached any other deal with prosecutors. (34 Tr. at 83-88) Dennes contends that the State failed to disclose that Balderas entered into an agreement with the

State to provide information unrelated to Dennes's case, and that the State dismissed two criminal charges against Balderas in exchange for the information.

A prosecutor must disclose evidence favorable to an accused if it "is of sufficient significance to result in the denial of the defendant's right to a fair trial." United States v. Agurs, 427 U.S. 97, 108 (1976). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). The question is not whether the result would have been different. Rather, it is whether given the non-disclosures of material evidence the verdict is less worthy of confidence. In defining the scope of the duty of disclosure, it is no answer that a prosecutor did not have possession of the evidence or that he was unaware of it. Rather, the prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Banks v. Dretke, 540 U.S. 668, 691 (2004) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)). In Strickler v. Greene the Supreme Court framed the three components or essential elements of a Brady prosecutorial

misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Banks, 540 U.S. at 691 (quoting Strickler v. Greene, 527 U.S. 263, 281-82 (1999)).

On Dennes's motion for a new trial the state trial court found that the contract between Balderas and law enforcement authorities was not Brady material because it was unrelated to Dennes's case, and because the terms of the contract had already been fulfilled by both parties before Balderas testified at Dennes's trial. Dennes now argues that the State failed to disclose additional information, including the fact that Balderas was considered a suspect in the Szucs murder, and that one of Balderas's alleged accomplices in the Tsang robbery -- Luis Hector Fugon -- testified at his own trial that he did not know Balderas.

Respondent points out that most of the new information submitted by Dennes comes from Fugon's trial. That trial took place almost a year before Dennes's trial. Respondent asserts that counsel could have obtained those transcripts, and correctly notes that the State has no obligation to provide exculpatory evidence that is available to the defense through the exercise of due diligence. See Rector v. Johnson, 120 F.3d 551, 558-59 (5th Cir. 1997). Thus, the bulk of the allegedly suppressed evidence was

available to Dennes, and was not suppressed within the meaning of Brady.

Whether or not the evidence was suppressed, Dennes fails to demonstrate that the evidence was material, i.e., that there is a reasonable probability that he would have been sentenced to life imprisonment had the evidence been disclosed. As noted above, the trial court found that the agreement Balderas had with the State was unrelated to Dennes's case, and was completed before Dennes's trial. Because the contract was completed by both parties before trial, it provided no reason for Balderas to fabricate testimony.

Dennes argues that Balderas testified falsely about the circumstances under which he provided information about the Tsang robbery. Balderas testified that he provided the information to his brother-in-law, a Houston homicide detective, and that it was not the result of Balderas being arrested. Dennes argues that Balderas provided the information in connection with his arrest for felony possession of marijuana, but provides nothing more than his speculation that the two events were connected. A petitioner's speculation about the suppression of exculpatory evidence is an insufficient basis to support a Brady claim. Hughes v. Johnson, 191 F.3d 607, 630 (5th Cir. 1999).

On direct appeal Dennes argued that information about the dropped charges was material because it showed a relationship between Balderas and the prosecution. See Brief for Appellant in Dennes's direct appeal, pp. 60-63. The TCCA rejected Dennes's

argument on the grounds that Balderas was never convicted on these charges, and that evidence of the alleged crimes would therefore be inadmissible under Texas law. Dennes v. State, No. 72,966 (Tex. Crim. App. Jan. 5, 2000) slip op. at 14. Dennes makes no showing that this ruling is incorrect.

To the extent that Dennes now argues that the charges were dropped as consideration for Balderas's testimony against Dennes, such a claim is unexhausted. The AEDPA requires that a prisoner exhaust his available State remedies before raising a claim in a federal habeas petition.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or
> >
> > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). As the Fifth Circuit explained in a pre-AEDPA case, "federal courts must respect the autonomy of state courts by requiring that petitioners advance in state court all grounds for relief, as well as factual allegations supporting those grounds." "[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief." Orman v. Cain, 228 F.3d 616, 619-20 (5th Cir. 2000); see 28 U.S.C.

§ 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State . . . ."). This rule extends to the evidence establishing the factual allegations themselves. Knox v. Butler, 884 F.2d 849, 852 n.7 (5th Cir. 1989) (citing 28 U.S.C. § 2254(b)); see also Jones v. Jones, 163 F.3d 285, 298 (5th Cir. 1998) (noting that "[s]ubsection (b)(1) [of AEDPA] is substantially identical to pre-AEDPA § 2254(b)"). Because Petitioner did not present this claim to the Texas state courts, he has failed to properly exhaust the claim, and this court may not consider it. Knox, 884 F.2d at 852 n.7.

Ordinarily, a federal habeas petition that contains unexhausted claims is dismissed without prejudice, allowing the petitioner to return to the state forum to present his unexhausted claims. Rose v. Lundy, 455 U.S. 509 (1982). Such a result in this case, however, would be futile because Petitioner's unexhausted claims would be procedurally barred as an abuse of the writ under Texas law. On habeas review, a federal court may not consider a state inmate's claim if the state court based its rejection of that claim on an independent and adequate state ground. Martin v. Maxey, 98 F.3d 844, 847 (5th Cir. 1996). A procedural bar for federal habeas review also occurs if the court to which a petitioner must present his claims to satisfy the exhaustion

requirement would now find the unexhausted claims procedurally barred. Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991).

Texas prohibits successive writs challenging the same conviction except in narrow circumstances. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a). The Texas Court of Criminal Appeals will not consider the merits or grant relief on a subsequent habeas application unless the application contains sufficient specific facts establishing the following:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Id. The Texas Court of Criminal Appeals applies its abuse of the writ doctrine regularly and strictly. Fearance v. Scott, 56 F.3d 633, 642 (5th Cir. 1995) (per curiam).

Dennes does not claim that he could not have presented the claim in his direct appeal or his state habeas petition because the factual basis for the claim did not exist, or that he is actually innocent. Therefore, his unexhausted claim does not fit within the

exceptions to the successive writ statute and would be procedurally defaulted in the Texas courts. Coleman, 501 U.S. at 735 n.1. That bar precludes this court from reviewing Dennes's claim absent a showing of cause for the default and actual prejudice attributable to the default, or absent a showing that this court's refusal to review the claim will result in a fundamental miscarriage of justice. Id. at 750.

"Cause" for a procedural default requires a showing that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule or a showing of a prior determination of ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488 (1986); Amadeo v. Zant, 486 U.S. 214, 222 (1988). Dennes makes no showing of cause.

A "miscarriage of justice" means actual innocence, either of the crime for which Butler was convicted or of the death penalty. Sawyer v. Whitley, 505 U.S. 333, 335 (1992). "Actual innocence of the death penalty" means that, but for a constitutional error, Butler would not have been legally eligible for a sentence of death. Id. at 343. Dennes makes no claim that he is actually innocent. Therefore, the miscarriage of justice exception to the procedural default rule is inapplicable. Because Dennes fails to demonstrate cause for his procedural default, this court cannot address his claim that the dropped charges constitute impeachment evidence.

C. Extraneous Offense Evidence

In his fifth through ninth claims for relief Dennes complains that the trial court erred in admitting evidence of his involvement in the Tsang robbery. Dennes's counsel testified that he was advised in early 1996 that the State was trying to develop evidence of Dennes's involvement in a home invasion robbery. (24A Tr. at 20; 36 Tr. at 47-49, 81-83) At a pretrial conference in January of 1997 the trial court ordered the State to provide notice of any extraneous offense evidence it intended to introduce at least two weeks before trial. (3 Tr. at 7-8)

The prosecutor testified that he had hoped to call Hector Fugon as a witness, but that Fugon's case was still on appeal at the time of Dennes's trial, and Fugon's attorney did not want him to testify. (36 Tr. at 82-84) It was only after learning that Fugon was unavailable that the prosecution became aware that Balderas could testify about the Tsang robbery. Id. at 84-85. The prosecutor spoke to Balderas on August 12, 1997, and informed defense counsel the following day of his intention to call Balderas. Id. at 85-87. Individual jury voir dire commenced on July 22, 1997, and was completed on August 18, 1997. (5 Tr. at 2, 24A Tr. at 44)

Defense counsel objected to the extraneous offense evidence because the State gave notice less than two weeks before trial. (24A Tr. at 4-21) He requested a continuance to prepare for Balderas's testimony. The State responded that it gave notice

immediately after obtaining the evidence. Id. at 17-18. Defense counsel renewed the objection and the request for a continuance before the beginning of the punishment phase. The trial court denied both. (34 Tr. at 29-38)

1. Notice/Unfair Surprise

In claims five, six, and seven Dennes contends that the admission of the Tsang robbery evidence unfairly surprised him, that he was not given proper notice of the State's intent to introduce this evidence, and that the trial court improperly denied his request for a continuance. Dennes disputes the timing of events discussed above, arguing that the State knew much earlier that Fugon would be unavailable to testify. Implicitly acknowledging that there is no federal constitutional basis for a claim that the State must disclose the identities of witnesses ahead of time, Dennes attempts to characterize this information as falling under the Brady standards discussed above, and argues that he is entitled to voir dire jurors about their attitudes toward extraneous offense evidence.

As discussed above, Brady and its progeny pertain to evidence that is either exculpatory or impeaching. There is nothing about the identity of the witness or the State's intention to introduce this evidence that is either exculpatory or impeaching.

While a defendant facing a possible death sentence does have a right to determine potential jurors' attitudes about the death

penalty, see, e.g., Adams v. Texas, 448 U.S. 38, 45 (1980); Witherspoon v. Illinois, 391 U.S. 510 (1968), the record clearly demonstrates that Dennes was aware that the State was at least considering presenting extraneous offense evidence at the time of jury voir dire. See 24A Tr. at 20; 36 Tr. at 47-49, 81-82. Dennes thus had the opportunity to inquire about jurors' attitudes. The fact that the State did not make its final decision until later did not impinge on that opportunity. Therefore, Dennes fails to demonstrate any constitutional violation caused by the timing of the State's disclosure, or by the trial court's denial of Dennes's request for a continuance.

2. Accomplice Testimony

In his eighth and ninth claims for relief Dennes notes that the only evidence linking him to the Tsang robbery was accomplice testimony by Balderas. He argues that it was unconstitutional to allow uncorroborated accomplice testimony.

Dennes correctly observes that the Supreme Court has held that the constitution imposes a requirement of heightened reliability on capital proceedings. See, e.g., Woodson v. North Carolina, 428 U.S. 280 (1976). He argues that this heightened reliability requires corroboration for accomplice testimony. Dennes acknowledges that federal courts have rejected the claim that accomplice testimony must be corroborated, see Thompson v. Lynaugh, 821 F.2d 1054 (5th Cir. 1987), but argues that this ignores the requirements of Woodson.

Dennes is unable to cite a single case in the almost 30 years since Thompson that holds that Woodson requires corroboration of accomplice testimony concerning an unadjudicated extraneous offense. In Thompson, however, the Fifth Circuit expressly rejected the claim now asserted by Dennes. "The state-law requirement that accomplice witness testimony be corroborated has no independent constitutional footing." Thompson, 821 F.2d at 1062. The fact that the Fifth Circuit has expressly rejected the claim that accomplice testimony must be corroborated, along with the fact that no federal court has ever held to the contrary, persuades the court that Dennes's eighth and ninth claims for relief should be denied.

D. Eyewitness Identification

David Copeland, the security guard at the building where Szucs had his office, identified Dennes in a photo spread and at trial as the person who shot him on the night of the murder. In his tenth and eleventh claims for relief Dennes argues that the photo spread and lineup at which Copeland identified him were unduly suggestive. In his twelfth claim for relief Dennes argues that Copeland's in-court identification of Dennes was tainted by the allegedly suggestive out-of-court identifications.

At a suppression hearing Copeland testified that he was shown a photo spread at his home on or about February 5, 1996. The photo spread consisted of two sheets, each containing six photos.

Copeland chose a picture that looked familiar to him. Copeland said that the person in the photo had similar facial features to the man who shot him. (6 Tr. at 72-75) The man he picked was not Dennes.

Dennes was arrested on February 22. The following day, Copeland viewed a lineup consisting of Dennes, his brother Albert, and four other men. Id. at 13. Copeland testified that he was told before the lineup that an arrest had been made, id. at 75, but the homicide detective who called Copeland disputed that statement, id. at 19. The detective testified that he told Copeland that the person who shot him might or might not be in the lineup, id., and Copeland testified that he was told that he was under no obligation to pick anyone out of the lineup, id. at 75. Copeland testified that all six of the men in the lineup were similar in height and weight. Id. at 76. Copeland identified Dennes as the one who was closest in appearance to the shooter, though Copeland noted that Dennes had shorter hair and was not wearing glasses or a mustache in the lineup. Id. at 77. Following the hearing, the trial court denied Dennes's motion to suppress the identification.

At trial Copeland testified about the photo spread and how he identified someone who looked similar to the shooter, but that it was not, in fact, the shooter. (25 Tr. at 149-52) He testified that he picked Dennes out of a lineup, and that he had some reservations because of the difference in Dennes's hair and the

absence of the disguise. Id. at 152-57. When Dennes donned the disguise in court, Copeland identified him as the shooter. Id. at 142-43.

An identification resulting from an unduly suggestive lineup must be suppressed. See, e.g., Stovall v. Denno, 388 U.S. 293, 298 (1967). The admissibility of identification evidence is governed by a two-step analysis. Initially, a determination must be made as to whether the identification procedure was impermissibly suggestive. Next, the court must determine whether, under the totality of the circumstances, the suggestiveness leads to a substantial likelihood of irreparable misidentification. Lavernia v. Lynaugh, 845 F.2d 493, 499 (5th Cir. 1988).

Dennes argues that the photo spread and lineup were impermissibly suggestive because Copeland knew that the police had a suspect in custody. That assertion is disputed in the record. Even assuming that it is correct, however, the identification contains sufficient indicia of reliability to be admissible.

The Supreme Court has noted several factors relevant to determining the reliability of an identification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

The record establishes that Copeland initially saw Dennes in the lobby of the office building from a distance of about 10 yards. The lobby was well lit. (6 Tr. at 67-68) He saw Dennes again a short time later when Dennes came within inches of Copeland and shot him. Id. at 69-71.

Copeland was working as a security guard and saw Dennes in the lobby. Dennes presents nothing to suggest that Copeland was inattentive. Copeland also gave a detailed and accurate description of the shooter to the police. (6 Tr. at 65-87)

Copeland identified Dennes at the lineup, expressing reservations only about the length of Dennes's hair and the lack of disguise. When Dennes put on the disguise in court, Copeland was certain of the identification. (25 Tr. at 142-43)

Copeland testified that the photo spread occurred somewhere around February 5, and the live lineup occurred on February 23, 1996. Both dates are within a month of the murder, on January 24, 1996.

Under the totality of the circumstances, the identification is reliable. The trial court did not err in admitting Copeland's identification.

E. Testimony of Antonio Ramirez

In his thirteenth through sixteenth claims for relief, Dennes contends that the trial court erred in admitting the testimony of Antonio Ramirez. Ramirez testified during the guilt-innocence

phase that he assisted Dennes in smuggling diamonds into the United States from Mexico, and that he manufactured two gun silencers for Dennes.

Dennes complains that this amounted to extraneous offense evidence that was not relevant to the crime for which he was on trial. He further argues that the trial court erred in not instructing the jury that it must determine if Ramirez was an accomplice and, if so, that his testimony must be corroborated. All of these claims allege errors of Texas evidence law. Dennes cites no federal authority in support of any of these claims.

As discussed above, the Fifth Circuit has held that there is no basis in the United States Constitution for a rule requiring corroboration of accomplice testimony. Therefore, Dennes's fifteenth and sixteenth claims for relief fail to state a cognizable claim for relief.

His complaints about the general admissibility of Ramirez's testimony are complaints about state court evidentiary rulings. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Because Dennes fails to identify a constitutional violation, he is not entitled to relief on his claims that the trial court erred with regard to the testimony of Antonio Ramirez.

F. Sufficiency of the Evidence

In his seventeenth and eighteenth claims for relief, Dennes argues that the evidence was insufficient to support his conviction for capital murder because the evidence did not prove the underlying offense of robbery or attempted robbery beyond a reasonable doubt. In addressing a sufficiency of the evidence claim, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). The sufficiency of evidence is a mixed question of law and fact. See Gomez v. Acevedo, 106 F.3d 192, 198 (7th Cir.), vacated on other grounds, 522 U.S. 801 (1997). Therefore, as noted above, this court may grant federal habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." Martin v. Cain, 246 F.3d 471, 475 (5th Cir. 2001).

The TCCA summarized the evidence in addressing these claims.

> Ramirez's testimony . . . indicated that [Dennes] intended to rob and murder a jewelry dealer who kept an office in the Greenrich Building. The testimony also indicated that [Dennes] test-fired a weapon in a field. Further testimony and physical evidence indicate that a jewelry dealer was shot to death in the Greenrich building with bullets matching those used to shoot the security guard as well as matching some spent casings from bullets test-fired in a field. [Dennes] was seen approaching the security guard and immediately thereafter the guard was found wounded and lying on the floor of the

> building where the murder victim was eventually found. All of this evidence connects [Dennes] to Szucs's murder.
>
> Regarding the proof supporting the robbery, testimony revealed that Szucs was in possession of $3.6 million in diamond inventory and approximately $200,000 dollars in cash at the time of the murder. Plus-Szucs's wife testified that the victim always wore a diamond ring on his pinky and had been wearing that ring the morning of his death. However Szucs was not wearing this ring when his body was found by the police shortly after he had been killed nor was the ring ever recovered. Finally access to Szucs's office was limited to persons who had a key or persons who were let in from the inside of the office.
>
> [Dennes] speculates that someone else could have taken these items during the course of the evening as he committed his own crime but he has presented no evidence that anyone else was near the scene of the murder. Hence the only reasonable conclusion for the jury to draw was that [Dennes] or his accomplice took the items and killed Szucs.

Dennes v. State, No. 72,966 (Tex. Crim. App. Jan. 5, 2000), slip op. at 7-8.

The TCCA's discussion accurately summarizes the evidence. Even if robbery by Dennes was not the only reasonable conclusion for the jury to have drawn, it was certainly a reasonable conclusion. Therefore, the evidence was sufficient under Jackson, the TCCA's conclusion is entitled to deference, and Dennes is not entitled to relief on his seventeenth and eighteenth claims for relief.

G. Denial of Challenges for Cause

In his nineteenth and twentieth claims for relief, Dennes argues that the trial court erred in denying his challenges for

cause to two venire members. Dennes asserts that Richard Wayne Miller stated that "I have my mind made up right now" that a defendant found guilty of capital murder would probably kill again in the future. 18 Tr. at 100. Venire member Martha Jean Gutierrez stated that she could not consider mitigating evidence after finding a defendant guilty of capital murder and finding that he would pose a future danger to society. In a capital case, a juror can be challenged for cause if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his . . . oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). Dennes used peremptory strikes to remove both Miller and Gutierrez after the trial court denied his challenges for cause.

Assuming that the trial court erred in denying Dennes's challenges for cause to these two venire members, Dennes nonetheless fails to demonstrate any constitutional violation. Dennes used peremptory strikes to remove both Miller and Gutierrez. While he contends that he used all of his peremptory challenges and was forced to accept an unfavorable juror, the record shows that the trial court granted him two additional peremptory strikes, and both parties then promptly accepted the next juror on the list as the twelfth juror. See 24A Tr. at 30-34. At most, Dennes was forced to accept an alternate juror who he would have challenged if he had an additional peremptory challenge. He makes no claim,

however, that any alternate juror participated in deliberations or in rendering the verdict.

> As a general rule, a trial court's erroneous venire rulings do not constitute reversible constitutional error "so long as the jury that sits is impartial." United States v. Martinez-Salazar, 528 U.S. 304, 313, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) (quoting Ross v. Oklahoma, 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988)); see also United States v. Prati, 861 F.2d 82, 87 (5th Cir. 1988) ("Only in very limited circumstances ... will such an unintentional mistake warrant reversal of a conviction.").

Jones v. Dretke, 375 F.3d 352, 355 (5th Cir. 2004). Dennes makes no showing that any of the jurors, including the alternates, were not impartial. He therefore fails to demonstrate a Sixth Amendment violation.

Moreover, on federal habeas review, error is harmless unless it "had [a] substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (internal quotation marks and citation omitted). The burden of proving such injury is on the petitioner. Id. at 637. Dennes makes no showing that any juror whom he found unacceptable participated in deliberations. He therefore fails to demonstrate that any trial court error in denying his challenges "had a substantial and injurious effect or influence in determining the jury's verdict." Therefore, any error was harmless.

H. Burden of Proof on Mitigation Special Issue

One of the special issues submitted to the jury required the jury to determine:

> Whether, taking into consideration all the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. art. 37.071(e) (Vernon Supp. 1998). In his twenty-first claim for relief, Dennes argues that the trial court erred in not instructing the jury that the State bears the burden of disproving the existence of any mitigating evidence.

The Fifth Circuit

> has held that "[n]o Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof." Rowell v. Dretke, 398 F.3d 370, 378 (5th Cir. 2005). In Avila v. Quarterman, this court rejected a petitioner's argument "that allowing a sentence of death without a jury finding beyond a reasonable doubt that there were no mitigating circumstances sufficient to warrant a sentence of life imprisonment violated his Sixth and Fourteenth Amendment right to due process and a fair trial." 560 F.3d 299, 315 (5th Cir. 2009). Other decisions have likewise rejected the argument that failure to instruct the jury that the State has the burden of proof beyond a reasonable doubt on the mitigation issue is unconstitutional. See, e.g., Scheanette v. Quarterman, 482 F.3d 815, 828 (5th Cir. 2007); Granados v. Quarterman, 455 F.3d 529, 536-37 (5th Cir. 2006) . . . .

Druery v. Thaler, 647 F.3d 535, 546-47 (5th Cir. 2011). Therefore, well-established Fifth Circuit precedent shows that Dennes is not entitled to relief on this claim.

I. Meaningful Appellate Review

In his twenty-second claim for relief Dennes argues that the Texas capital sentencing scheme is unconstitutional because the

jury's conclusions on the special issues are not capable of meaningful appellate review. Federal death penalty jurisprudence requires states to provide an opportunity for review by appellate courts to guard against arbitrary imposition of the death penalty. See, e.g., Clemons v. Mississippi, 494 U.S. 738, 749 (1990). The Supreme Court has also held, however, that there is a difference between the jury's decision whether a defendant is eligible for the death penalty, and its decision whether to impose a death sentence. Tuilaepa v. California, 512 U.S. 967 (1994). While the former must follow a process that is rationally reviewable by appellate courts, the latter "requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability." Id. at 973. Accordingly, "the sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that [death] penalty.'" Id. at 979-80.

As the Fifth Circuit has explained,

> [a] capital murder trial in Texas proceeds in a bifurcated process. In the first, or "guilt-innocence," phase, a defendant's eligibility for consideration of the death penalty is determined. Once that eligibility is determined, the trial proceeds to the second, or "punishment," phase, wherein the defendant is either selected for death or for the alternative sentence of life imprisonment.

Woods v. Cockrell, 307 F.3d 353, 359 (5th Cir. 2002). Because the jury's answers to the special issues is not relevant to the

question of a defendant's eligibility for the death penalty, Dennes's twenty-second claim for relief has no merit.

J. The 12-10 Rule

Article 37.071 of the Texas Code of Criminal Procedure requires a jury instruction informing the jury that it must have at least 10 "no" votes to answer "no" on the aggravating special issues, and at least 10 "yes" votes to answer yes on the mitigation special issue. In his twenty-third claim for relief Dennes argues that this "12-10 rule" confuses jurors as to the effect of a single negative vote on the special issues, and might cause jurors inclined to vote against a death sentence to waver and vote for a death sentence instead.

Petitioner relies on Mills v. Maryland, 486 U.S. 367 (1988), and McKoy v. North Carolina, 494 U.S. 433 (1990), to support his claim. In those cases the Supreme Court held that capital sentencing schemes requiring the jury to unanimously find the existence of any mitigating factor before giving that factor any weight violated the Eighth Amendment. Instead, the Court held, each juror must be free to give any mitigating evidence any weight that juror deems appropriate in weighing mitigating against aggravating evidence.

The Fifth Circuit has rejected this claim. "Mills is not applicable to the capital sentencing scheme in Texas. We have concluded that '[u]nder the Texas system, all jurors can take into

account any mitigating circumstance. One juror cannot preclude the entire jury from considering a mitigating circumstance.'" Miller v. Johnson, 200 F.3d 274, 288-89 (5th Cir. 2000) (quoting Jacobs v. Scott, 31 F.3d 1319, 1329 (5th Cir. 1994)).

While the trial court in this case informed the jury that it could not affirmatively find that the mitigating evidence was sufficient to warrant a life sentence unless at least 10 jurors agreed, it never instructed the jury that any particular number of jurors had to agree that any particular piece of evidence was mitigating. In other words, even if only one juror felt that a specific piece of evidence was mitigating, that juror could give the evidence any weight he deemed appropriate. The instruction stated only that at least 10 jurors, individually weighing mitigating evidence, had to agree that there was sufficient mitigating evidence to impose a life sentence. Because this instruction does not suffer from the constitutional flaw underlying Mills and McKoy, Dennes is not entitled to relief.

K. Conclusory Claims

In his twenty-fourth through thirty-second claims for relief Dennes asserts numerous claims of error in conclusory fashion with no citations to the record, and only one citation to any authority. "The . . . presentation of conclusory allegations unsupported by specifics is subject to summary dismissal. . . ." Blackledge v. Allison, 431 U.S. 63, 74 (1977). Therefore, claims twenty-four through thirty-two will be dismissed.

L. Ineffective Assistance of Counsel

In his thirty-third and final claim for relief Dennes contends that he received ineffective assistance of counsel in several respects. To prevail on a claim for ineffective assistance of counsel, Dennes

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the Strickland test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id. at 687-88. Reasonableness is measured against prevailing professional norms and must be viewed under the totality of the circumstances. Id. at 688. Review of counsel's performance is deferential. Id. at 689.

Where a state court has decided an ineffective assistance claim adversely to the petitioner, the petitioner faces an extraordinarily difficult burden.

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," [Strickland, 466 U.S.] at 689, 104 S.Ct. 2052; Lindh v. Murphy, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, Knowles [v. Mirzayance], 556 U.S., at 123, 129 S.Ct. [1411], at 1420. The Strickland standard is a general one, so the range of reasonable applications is

> substantial. 556 U.S., at 123, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Harrington v. Richter, 562 U.S. 86, 105 (2011).

1. Probable Cause

Dennes first complains that counsel failed to object when police officer Todd Miller testified that Dennes was arrested pursuant to a warrant based on a probable cause determination by a judge. Miller explained what an arrest warrant is, and then stated: "Attached to the warrant is a detailed probable cause, which the judge goes over in which the officer . . . ." 27 Tr. at 154. Counsel then objected, and the objection was sustained. Id. Miller gave no further testimony about the contents of the warrant.

Dennes now complains that the reference to the finding of probable cause suggested to the jury that a judge had already made a determination of Dennes's guilt. He argues that counsel should have objected to the testimony as irrelevant and requested an instruction for the jury to disregard the testimony.

Dennes clearly cannot demonstrate that he was prejudiced by his attorney's conduct -- counsel objected, the objection was sustained, and the witness did not mention the objectionable subject matter again. Dennes makes no showing that a different objection would have produced a more favorable result.

Dennes also claims that counsel should have requested an instruction to disregard. Counsel submitted an affidavit in connection with Dennes's state habeas application. Counsel stated that he did not request an instruction because he did not wish to highlight the statement for the jury. He also noted that the judge stopped the witness's statement when counsel objected, and counsel did not think any further action was necessary. SH at 174. The state habeas court found that counsel was not ineffective because his objection was sustained, and it was a reasonable decision to choose not to emphasize the witness's statement. Id. at 240.

The Supreme Court has held that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." Strickland, 466 U.S. at 690. Thus, counsel's strategic decision not to emphasize the officer's statement is "virtually unchallengeable," and the state habeas court's conclusion that counsel did not render ineffective assistance is reasonable, and is entitled to deference under the AEDPA.

2. Hearsay

Dennes next complains that counsel should have raised a hearsay objection to testimony by Officer Miller concerning statements made by Dennes's counsel and by David Copeland at the pretrial lineup. Miller testified that he asked Dennes's lineup counsel, Ellis McCullough, if he had any problem with the fill-ins

used in the lineup, and that McCullough stated that they were "fine as they were." 27 Tr. at 167.

McCullough's statements were not hearsay. The Texas Rules of Evidence define hearsay as an out-of-court statement offered to prove the truth of the matter asserted. See Tex. R. Evid. 801(d). The State did not introduce McCullough's statement for the truth of the statement, i.e., that the fill-ins were fine, but to demonstrate that counsel was satisfied with the makeup of the lineup. Because the statement was not hearsay, counsel was not deficient for failing to raise a hearsay objection.

Miller also testified that David Copeland identified Dennes in the lineup, though he characterized the identification as tentative. When Miller was asked why the identification was tentative, counsel objected on hearsay grounds. Id. at 176-77. The prosecutor rephrased the question to ask if Copeland eliminated anyone from the lineup, and Miller responded that Copeland eliminated three fill-ins. Id. He also testified that Copeland stated that number five in the lineup, which was Dennes, looked closest to the shooter. Id.

There was nothing objectionable about Miller's testimony that Copeland eliminated three fill-ins. The testimony does not relate a statement, but an action that Miller observed. Thus, to the extent that Dennes complains about this testimony, the complaint is meritless.

The state habeas court found that Copeland's statement that Dennes looked most like the shooter came within the present sense impression exception to Texas's hearsay rule. See SH at 240 (citing Tex. R. Evid. 803(1). Therefore, it was not hearsay.

Because none of the complained-of statements were hearsay, any hearsay objection would have been futile. Counsel's failure to raise a meritless claim did not constitute deficient performance. See, e.g., Sones v. Hargett, 61 F.3d 410, 415 n.5 (5th Cir. 1995) ("Counsel cannot be deficient for failing to press a frivolous point."); Koch v. Puckett, 907 F.2d 524, 527 (5th Cir. 1990) ("This Court has made clear that counsel is not required to make futile motions or objections."). In addition, because such objection would have been without merit, it is not reasonably probable that counsel would have obtained any relief had the objection been made. Dennes fails to demonstrate deficient performance by counsel or Strickland prejudice.

3. Leading Questions

In his final claim Dennes argues that counsel was ineffective by failing to object to several allegedly leading questions posed to Estrella Martinez. Martinez was the cleaning lady in the Greenrich Building on the night of the murder.

Martinez testified through an interpreter. Respondent points out that the Texas Rules of Evidence allow for leading questions when necessary to develop the testimony of a witness, and argues

that leading questions were necessary here because of the language barrier. Dennes's trial counsel stated the same in his affidavit, SH at 176, and the state habeas court found that this was the case, id. at 241. Dennes makes no showing that the state court's conclusion was unreasonable. Moreover, even if the questions were improper and counsel was deficient by failing to object, Dennes makes no showing that such deficiency caused him any prejudice.

IV. Certificate of Appealability

Dennes has not requested a certificate of appealability ("COA"), but this court may determine whether he is entitled to this relief in light of the foregoing rulings. See Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny COA sua sponte. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. See Whitehead v. Johnson, 157 F.3d 384, 388 (5th Cir. 1988); see also Hill v. Johnson, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does.").

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2); see also United States v. Kimler, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir. 2000). The Supreme Court has stated:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "[T]he determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." Barrientes v. Johnson, 221 F.3d 741, 772 (5th Cir. 2000).

The court has carefully considered each of Dennes's claims and concludes that each of his claims is foreclosed by clear, binding precedent. The court concludes that Dennes has failed to make a "substantial showing of the denial of a constitutional right." 28

U.S.C. § 2253(c)(2). Dennes is not entitled to a certificate of appealability.

V. Conclusion and Order

For the foregoing reasons, it is **ORDERED** as follows:

1. Petitioner Reinaldo Dennes's First Amended Death Penalty Case Application for Post-Conviction Writ of Habeas Corpus (Docket Entry No. 22) is **DENIED** and is **DISMISSED with prejudice.**

2. No Certificate of Appealability shall issue.

SIGNED at Houston, Texas, on this 22nd day of March, 2017.

SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-34,627-02

EX PARTE REINALDO DENNES

ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. 750313 IN THE 263RD DISTRICT COURT
HARRIS COUNTY

Per curiam.

ORDER

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

Applicant was convicted in 1997 of capital murder committed in January 1996. TEX. PENAL CODE ANN. § 19.03(a)(2). Based on the jury's answers to the special issues set forth in the Texas Code of Criminal Procedure, Article 37.071, sections 2(b) and 2(e),

the trial court sentenced him to death. Art. 37.071, § 2(g).[1] This Court affirmed applicant's conviction and sentence on direct appeal. *Dennes v. State,* No. 72,966 (Tex. Crim. App. January 5, 2000) (not designated for publication).

Applicant presented nine allegations in his application in which he challenges the validity of his conviction and sentence. The trial judge entered findings of fact and conclusions of law and recommended that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions. Further, we hold that applicant's allegations one through four, and allegations six through nine, are procedurally barred. Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.

IT IS SO ORDERED THIS THE 18TH DAY OF DECEMBER, 2013.

Do Not Publish

[1] Unless otherwise indicated all references to Articles refer to the Code of Criminal Procedure.

FILED
Chris Daniel
District Clerk
AUG 19 2013
Time:
By
Deputy

P51

CAUSE NO. 750313-A

EX PARTE	§	IN THE 263RD DISTRICT COURT
	§	OF
REINALDO DENNES, Applicant	§	HARRIS COUNTY, TEXAS

STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus; the Respondent's Original Answer, the evidence elicited at the applicant's capital murder trial in cause no. 750313, affidavits submitted in cause no. 750313-A, and official court documents and records in cause nos. 750313 and 750313-A, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Reinaldo Dennes, was indicted and convicted of the felony offense of capital murder in cause no. 750313 in the 263RD District Court of Harris County, Texas.

2. The applicant was represented at trial by counsel Wendell Odom.

3. On August 28, 1997, the applicant was found guilty of capital murder (XXXIII R.R. at 107); on September 3, 1997 the trial court assessed the applicant's punishment at death after the applicant's jury answered the first and second special issues[1] affirmatively and the mitigation special issue negatively (XXXV R.R. at 108-9).

4. On January 5, 2000, the Court of Criminal Appeals affirmed the applicant's capital murder conviction in an unpublished opinion. *Dennes v. State,* No. 72,966 (Tex. Crim. App. Jan. 5, 2000)(not designated for publication).

[1] The first special issue asked whether there is a probability that the applicant would commit acts of violence that would constitute a continuing threat to society; the second special issue asked whether the applicant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

FACTS OF THE OFFENSE

5. The complainant, Janos Szucs, a wholesale diamond dealer, shared an office with another diamond wholesaler in a multi-story office building where the applicant, Reinaldo Dennes, a jewelry dealer, also had an office (XXXI R.R. at 163-8)(XXXII R.R. at 61).

6. In December, 1995, Antonio Ramirez met the applicant at his office and gave him rings from Ecuador that Ramirez wanted the applicant to sell for him (XXVI R.R. at 89-96).

7. In January, 1996, Ramirez made a silencer for the applicant after the applicant gave Ramirez a sketch of the device and money for materials; however, the applicant determined it was too loud after he test-fired it in an open field near his apartment (XXVI R.R. at 97, 113-25, 149).

8. After Ramirez made a second silencer at the applicant's instructions, the applicant's brother Alberto test-fired it in the same field and the applicant told Ramirez to modify the second silencer by placing more steel wool inside the silencer (XXVI R.R. at 128-32).

9. The applicant test-fired the modified silencer in his office in Ramirez's and Alberto's presence by firing the gun through telephone books; Ramirez also made modifications to a 9mm gun so that the silencer would fit on the gun (XXVI R.R. at 132-3, 136).

10. On January 18, 1996, the applicant asked Ramirez to participate in the robbery of a jeweler in the applicant's office building; the plan was that Alberto would shoot the jeweler; Ramirez would get the diamonds, and the applicant would take the building's security videotapes (XXVI R.R. at 153-58).

11. On January 19, 1996, Ramirez, who did not intend to participate in the robbery, called the applicant and unsuccessfully tried to get the silencer back from the applicant before Ramirez left for Ecuador the next day (XXVI R.R. at 159-62).

12. In January, 1996, the applicant talked to Estrella Martinez about her letting him in the side door of the office building after working hours so he could take videotapes from the security area; Martinez, who cleaned offices in the building, was in an intimate relationship with the married applicant (XXVIII R.R. at 8-13).

13. On January 22, 1996, the applicant bought Martinez a cell phone so he could phone her when she needed to distract the security guard so the applicant could get the videotapes; however, the robbery was postponed because certain people did not leave the building when expected (XXVIII R.R. at 14-23, 38).

14. On January 24, 1996, Martinez opened the loading dock door for the applicant and Alberto after the applicant called Martinez on the cell phone around 6:00 or 6:30 p.m.; the applicant called Martinez again around 7:00 p.m. and told her to distract the security guard so she told the guard she had locked her keys in an upstairs office (XXVIII R.R. at 44-8).

15. When the security guard, David Copeland, returned to the lobby, the applicant was kneeling behind the security desk and appeared to be working on the security system; Copeland assumed the applicant was a technician working on the system (XXV R.R. at 106-16. 120-1).

16. Later in the evening, the applicant called Martinez who again distracted Copeland by having him accompany her to the snack bar area; Martinez saw the applicant walking toward Copeland when she and Copeland returned to the lobby; the applicant was wearing overalls and a cap and had a mustache – something he normally did not have (XXVIII R.R. at 50-62).

17. Martinez went into the bathroom and the applicant, who had something in his hand behind his leg, walked to Copeland, shot him in the chest with a 9mm gun with a silencer, and then shot him in the back after he fell to the floor; Copeland, who played dead, was able to describe his shooter when police arrived around 8:00 p.m. (XXV R.R. at 16-9, 22, 122-35).

18. The video recording equipment was missing from the security area when police arrived after Copeland was shot; the police secured the building but did not search the locked offices in the multi-story building (XXV R.R. at 24).

19. The complainant's wife, Nicole Szucs, eventually called a business associate who alerted the building manager when the complainant did not come home that evening; police then discovered the complainant's body in his locked seventh-floor office that was accessed by the complainant buzzing someone through the locked doors (XXXII R.R. at 49-51)(XXVIII R.R. at 99-107, 186)(XXXI R.R. at 177-9).

20. Steel wool particles were on the complainant's body and desk; the complainant's computer disc drive was wrecked and his safe was nearly empty (XXVIII R.R. at 121, 124, 204, 207-10)(XXIX R.R. at 20, 106).

21. The complainant's five-carat ring was missing, along with $3,609,000 of diamond inventory and $200,000 cash the complainant was planning to use on a diamond-buying trip (XXXI R.R. at 193-4, 197-9)(XXXII R.R. at 50-52)

22. Although the murder weapon was never recovered, subsequent ballistic testing determined that the same weapon fired the shell casings that were recovered from the field where the applicant test-fired the silencer, the shell casings and bullet fragments recovered from the building lobby, the bullets and fragments recovered from the applicant's office, and the bullets recovered from the complainant's body and clothing during his autopsy (XXX R.R. at 86, 103-5, 139, 142, 162)(XXXV R.R. at 70-1).

23. According to Robert Baldwin, Houston Police Department firearms examiner, the recovered bullets and shell casings were most likely fired from a 9mm Luger Beretta or a Taurus handgun; on February 22, 1996, a 9mm fired bullet and an owner's guide for a 9mm Taurus semi-automatic weapon were recovered from the applicant's office (XXX R.R. at 27, 34-6, 166).

24. The fingerprints of the applicant's brother, Alberto Dennes, were found on the chair next to the door in the complainant's office (XXX R.R. at 115).

25. David Copeland, who survived the applicant's shooting him, underwent surgeries, suffered damage to his left lung, and lost the full use of his left arm; Copeland later identified the applicant as the man who shot him (XXV R.R. at 143, 145-6).

26. The complainant suffered five gunshot wounds, including two fatal gunshots: a gunshot to his head with the bullet recovered from the left frontal lobe of his brain and a gunshot to his left mid-chest that struck his heart and went through his diaphragm and pancreas and grazed his kidney (XXX R.R. at 74-82).

DEFENSE EVIDENCE AT GUILT-INNOCENCE

27. Firearms examiner Richard Earnst testified that he was unable to match or eliminate the bullets recovered in the instant case as being fired from the same weapon, so he could not give an opinion as to whether the bullets were fired from the same firearm; Earnst determined that all the cartridge casings were fired in the same chamber of the same weapon – either a Beretta 9mm or some copy of such weapon such as a Brazilian Taurus (XXXII R.R. at 83-119, 157, 170).

28. Attorney Ellis McCullough testifed that he was appointed to represent the applicant and his brother Alberto Dennes at the February 23, 1996 lineup; McCullough, who had no objections to the lineup fill-ins and who helped arrange the people in the lineup, testified that the sole male witness at the lineup did not identify anyone, but Ellis acknowledged that the officer conducting the lineup determined that a "strong tentative" identification had been made although Ellis disagreed with the officer (XXXII R.R. at 174-82, 200).

29. James Gradoni, private investigator, testified that he was present when the applicant's safety deposit box, containing only $1,000, was opened in Miami after the applicant's arrest (XXXII R.R. at 202-14).

30. Daisy Dennes, the applicant's ex-wife, testified that the applicant had noticeable markings on his abdomen, arm, and hand from being burned in a home accident in 1990; trial counsel had the applicant display his burns to the jury (XXXIII R.R. at 4 – 9, 27-8).

STATE'S PUNISHMENT EVIDENCE

31. On April 1, 1989, the applicant was placed on deferred adjudication for 180 days for the offense of indecent exposure, cause no. 8911934, County Court #13 (XXXIV R.R. at 147-8, 151-5).

32. In October, 1995, the applicant approached David Balderas about robbing a man of a large amount jewelry in his house on Portal Street; the applicant said that the man flew around the country with jewelry and would have diamonds in an attaché bag after he returned from the airport (XXXIV R.R. at 50-7, 67-70).

33. On November 16, 1995, the applicant paged Balderas and told him that the man was home; Balderas relayed the message to Hector Fugon and Francisco Elvira - men Balderas recruited to actually enter the house for the robbery (XXXIV R.R. at 45-7, 57-62, 70-1).

34. Around 10:30 p.m., Danny Tsang heard tapping on the back window of his house on Portal Street; Fugon and Elvira forced Tsang to open the door at gunpoint, tied up Tsang, and repeatedly asked him where the diamonds were kept; Tsang, who knew that his neighbor Albert Ohayon was in the jewelry business, told Fugon and Elvira that they had the wrong house (XXXIV R.R. at 102-11).

35. Fugon and Elvira awakened Tsang's wife Christina who was sleeping with their nine-year old daughter, demanded the diamonds they had been told were in the house, ransacked the house, took some jewelry and other items, and then fled in Tsang's car (XXXIV R.R. at 122-7).

36. Afterwards, Balderas told the applicant that it was the wrong house but the applicant did not believe him; the applicant had told Balderas that there was supposed to be one-half million to a million dollars worth of jewels in the house (XXXIV R.R. at 72-6, 82).

37. The next morning the police checked on Tsang's neighbors, Rachel and Albert Ohayon; Ohayon, who was in the diamond wholesale business, had just returned home the

previous evening with approximately $500,000 worth of jewelry; Ohayon knew the applicant because they both once worked for the same company (XXXIV R.R. at 128-33).

38. Nicole Szucs, the complainant's wife, testified that the complainant had a working relationship with the applicant and sent business to him (XXXIV R.R. at 135-6).

DEFENSE PUNISHMENT EVIDENCE

39. Calvin Wilson, Harris County Sheriff's Department, testified that the applicant had been written up on two occasions for three infractions in the year and a half that the applicant had been in jail; the infractions included refusing to obey an order and failure to be properly dressed in the day room (XXIV R.R. at 159-66).

40. Jerome Brown, psychologist, testified that he talked with the applicant's sister, administered a battery of tests to the applicant, and interviewed the applicant about his family background, any prior criminal history, any drug or alcohol use, education, work, marital information, his early life and development, and his understanding of the charges against him (XXIV R.R. at 185-9).

41. Brown testified that there was an extraordinary lack of information that would suggest the applicant was capable of committing capital murder; that Brown found nothing to explain why the applicant committed the offense; that the applicant did not have an antisocial personality disorder; that it was rare for someone to develop criminal aggression at the applicant's age; that the applicant had a stable family; that his first marriage lasted twenty years, an unusual event for inmates on death row; that the applicant expressed a strong religious commitment; and, that Brown could not have predicted that the applicant was in danger of doing something violent as few as six months before the offense (XXIV R.R. at 189-201).

42. Ray Dennes, the applicant's twenty-one year old son, testified that he was a student at UT Austin; that he went to college on scholarship and lots of support from his parents; that he worked as well as going to school full-time; that he was active in sports; that his father had always been supportive and encouraged him to achieve goals; and, that

he still considered his father influential and relied on him for advice and guidance (XXXIV R.R. at 245-8).

43. Demetria Dennes, the applicant's mother, testified that the applicant was born in Cuba and came to the United States with his family in 1961; that the applicant married at age eighteen and began working as a jeweler; and, that he has a twelve-year old daughter and a son with his first wife and a baby with his second wife (XXXV R.R. at 7-10).

44. Demetria Dennes identified photos of the applicant with his family and testified that the applicant was the best father who gave his children love, protection, and an education; that his children were affectionate toward him; that the applicant was a loving, attentive son on whom she could always count; that they were a close family; and, that the applicant being found guilty almost felt like death (XXXV R.R. at 12-7).

First Ground: trial court allegedly restricted cross-examination of Antonio Ramirez re his motive for testifying

45. During cross-examination of Antonio Ramirez, the applicant asked if anyone told Ramirez what the punishment was for "this type" of murder; the prosecutor objected based on relevance and the trial court sustained the objection (XXVII R.R. at 37).

46. The applicant later began asking Ramirez, "in your dealings with avoiding a state silencer law and any potential dealings involving any involvement in a murder case...," and the trial court sustained the prosecutor's objection that there was no evidence that Ramirez was involved in any murder case (XXVII R.R. at 41).

47. Prior to the applicant's objected-to questions, the prosecutor elicited testimony from Ramirez about meeting the applicant and Alberto, making the silencers at the applicant's request, being present when the silencers were test-fired, being asked to participate in the robbery with the applicant and Alberto, unsuccessfully attempting to get the silencer from the applicant, and leaving for Ecuador rather than participating in the planned robbery (XXVI R.R. at 89-97, 113-36, 149, 153-62). *See Findings Nos. 6-11, supra.*

48. During direct examination, Ramirez testified that he did not know it was against the law to make silencers until he talked to the FBI and he did not sign any written agreement with authorities, but he was aware that charges would not be pursued against him for making something illegal (XXVI R.R. 183-4).

49. During cross-examination, the applicant repeatedly questioned Ramirez as to whether he was told that he could be charged with capital murder and whether Ramirez knew that he could be charged with capital murder if he made a silencer that he knew would be used in a robbery/murder (XXVII R.R. at 22-29, 36).

50. When the applicant asked if Ramirez had been told he would not be prosecuted for any robbery/murder, Ramirez testified that he had been told he was not going to be prosecuted for making the silencer at the applicant's request but he had not been told that he would not be prosecuted for any robbery or any murder (XXVII R.R. at 37).

51. The applicant then questioned Ramirez about his status as a legal resident in the country, his wife's illegal status in the country, any agreement he had with HPD or INS about his wife, and any risk of deportation he faced for "harboring" his wife (XXVII R.R. at 37-40).

52. The Court finds that the trial court allowed the applicant to cross-examine Ramirez on numerous factors regarding his motive for testifying, including the possibility of being prosecuted for making a silencer, his possible involvement, if any, in the capital murder, the possibility of receiving a reward for giving information to the police, and any immigration consequences (XXVII R.R. at 22-41).

53. The Court finds that the subject of Ramirez not being involved in the capital murder had been exhausted before the trial court sustained the prosecutor's objections to the applicant's questions concerning whether anyone told Ramirez what the punishment was for "this type" of murder and concerning "any potential dealings involving any involvement in a murder case..." (XXVII R.R. at 37, 41).

54. The Court finds that evidence showed that Ramirez was not involved in the capital murder and that he was not aware of the applicant's planned use of the silencer when Ramirez made it; the Court finds that Ramirez's awareness, if any, of the punishment for capital murder is irrelevant.

Ground Two: alleged denial of fair trial based on Officer James Kay's testimony re criminal types

55. James Kay, Houston Police Department crime scene unit, testified that two possible suspects were brought to the scene of the offense by other officers, and that Kay did an anatomic absorption test on the palms of both men, Darrell Speers and Michael Dalpinia, to determine if either handled or fired a weapon in the last three hours (XXV R.R. at 53, 72-3).

56. In response to the prosecutor's question about the men's demeanor, McKay testified that they were scared and did not seem to know what was going on; the applicant objected when Kay began stating, "I didn't think they had anything to do –" and the trial court noted that the testimony was not responsive to the question (XXV R.R. at 73-5).

57. The prosecutor then asked McKay what were his feelings about the men based on McKay's eighteen years of training and experience working on crime scenes; the applicant objected to what McKay's feelings were or any speculation he may have had as to the two men, and the trial court overruled the objection (XXV R.R. at 73-5).

58. McKay testified that it was his opinion that the two men were in the wrong place at the wrong time and were scared and bewildered as to why they were picked up by the police and "[t]heir demeanor wasn't that of a criminal type;" the trial court overruled the applicant's objection of non-responsiveness and sustained the applicant's objection of "asked and answered" (XXV R.R. at 73-5).

59. The prosecutor asked McKay the basis of his opinion and the trial court sustained the applicant's hearsay objection made after McKay stated that, in over eighteen years of talking with hundreds of suspects, he had developed a trait where he "can tell

when a person is telling [him] the truth and these men were saying they had nothing to do with – " (XXV R.R. at 73-5).

60. The prosecutor asked Kay if the men were later excluded and Kay testified, "Yes, sir. Well, they were released" later that night (XXV R.R. at 75).

61. During cross-examination, the applicant elicited testimony that Kay did not participate in interviewing the two men; that it could take up to two weeks to get the results from the anatomic absorption test; and, that if the jury had the impression that the men were released as a result of the test, it was not true (XXV R.R. at 76, 93-5).

62. During redirect examination, the prosecutor asked if Kay drew his own conclusion that the two men did not have anything to do with the crime, and the trial court sustained the applicant's objection that Kay was not involved in questioning the men (XXV R.R. at 98).

63. The prosecutor then elicited testimony from Kay that there were no charges filed against the two men, and that they would not have left the crime scene if they were "good" suspects (XXV R.R. at 98).

64. The Court finds that, prior to Kay's testimony, Paul Terry, Houston Police Department, testified on cross-examination that he indicated in his report it was determined that the two suspects were not involved in the offense; neither Keith Vacek nor the cleaning lady could identify the men (XXV R.R. at 39-41).

65. During redirect examination, Terry testified that the two men were released because the "maid" determined that neither was the person she saw do the shooting, and that HPD would not release someone if it was believed that the person committed an offense (XXV R.R. at 46-7).

66. The Court finds that, after Kay's testimony, James Waltman, Houston Police Department homicide division, testified that he interviewed the two men that night; that there was no reason to hold the men; and, that later results of the anatomic absorption tests done on the two men did not give any reason to suspect them (XXVIII R.R. at 180-3).

67. During cross-examination of Waltman, the applicant elicited evidence that the men were released primarily because Waltman had no reason to continue holding them, and that neither Vacek nor Estrella Martinez could identify them as someone they had seen earlier than evening (XXIX R.R. at 43-5).

68. The Court finds that the applicant's habeas complaint - that he was denied a fair trial by Kay testifying, without being qualified as an expert, that he could identify criminal types and could tell when a person was telling the truth - does not comport with the applicant's objections at trial.

69. The Court finds that the essence of Kay's testimony – that the two men were released without being charged and that he did not think they were involved in the offense – was introduced into evidence without objection through Officer Terry's testimony and Sergeant Waltman's testimony. *See Findings Nos. 64-67, supra.*

70. The Court finds that Kay's testimony does not imply or produce an impression that the applicant was guilty because he was not released in contrast to the two men who were released without being charged.

71. The Court finds distinguishable from the instant case the Court of Criminal Appeals' opinion in *Yount v. State*, 872 S.W.2d 706, 711 (Tex. Crim. App. 1993), where the Court held inadmissible a health care professional's testimony that children rarely lie about sexual abuse based on the expert's testimony improperly bolstering the State's unimpeached victim.

72. The Court finds that, unlike the situation in *Yount,* the two men in the instant case were not witnesses and their out-of-court statements were not admitted at trial, and Kay did not comment on the truthfulness of any testifying witness.

Ground Three: alleged denial of fair trial based on admission of photographs of complainant's body at the scene of offense

73. The Court finds that the applicant did not object at trial to the admission of State's Exhibit 116, a photograph of the complainant's body.

74. The Court finds that State's Exhibit 114 depicts the complainant's body slumped in his office chair, with him holding a pair of eyeglasses; that State's Exhibit 115 depicts the complainant's body from a different angle than State's Exhibit 114 and shows the steel wool on the complainant's pants, shirt and desk; that State's Exhibit 116 is a close-up view of the complainant's head, neck, and chest with a gold chain necklace and bullet fragment visible at the neckline of the complainant's shirt; that State's Exhibit 118 depicts the complainant's desk and the complainant body in the chair at the desk; and, that State's Exhibit 119 depicts the counter behind the complainant's desk with only a portion of the complainant's body visible in the photograph. *See State's Writ Exhibit C, photos.*

75. The Court finds that the five photographs, State's Exhibit 114, 115, 116, 118, and 119, each depict something different; that the photographs show the relatively undisturbed nature of the complainant's desk and office, the condition and location of the complainant's body, the type and location of wounds, and details of the crime scene - such as the steel wool particles on the complainant's clothing and desk and the glasses in his hand.

76. The Court finds that the photographs are probative and are not cumulative or particularly gruesome; the Court further finds that their probative value is not substantially outweighed by possible prejudicial effect.

77. The Court finds that Sergeant Waltman's testimony concerning the matters depicted in the photographs was admissible at trial (XXVIII R.R. at 204-6)(XXIX R.R. at 5-17).

78. The Court finds that the photographs provide evidence of a firearm being used in the crime; that the steel wool depicted in the photographs indicates that a silencer was used in the shooting; and, that the lack of disarray and lack of signs of struggle indicate that the shooter was likely a friend or acquaintance.

79. The Court finds that the complained-of photographs comprise only five exhibits among approximately 174 State's exhibits introduced at trial.

Ground Four: alleged denial of fair trial based on testimony regarding arrest warrant for the applicant

80. The Court finds that the applicant challenged the legality of his arrest through a motion to suppress, alleging that there was no probable cause for his arrest and alleging that his arrest was unlawful, and the trial court denied the applicant's motion after holding a hearing on July 22, 1997 (I Cl.R. at 80)(VI R.R. at 3, 101).

81. During the applicant's trial, Todd Miller, Houston Police Department homicide division, testified that arrests were made in the case on February 22, 1996, pursuant to warrants (XXVII R.R. at 154).

82. When the prosecutor asked what an arrest warrant was, Miller testified it was a document signed by a judge authorizing police to arrest the person named in the warrant; the trial court sustained the applicant's objection made after Miller added "attached to the warrant is a detailed probable cause, which the judge goes over in the which the officer –" (XXVII R.R. at 154).

83. Miller acknowledged that he had an arrest warrant authorized and signed by a district court judge for the applicant and Jose Albert Dennes, and Miller identified photos of the applicant and Jose Albert Dennes as the men arrested pursuant to the warrants given under the judge's authority (XXVII R.R. at 154-8, 162).

84. When asked how he obtained a search warrant for the applicant's office, Miller testified "[m]uch in the same way as the arrest warrant process;" however, the trial court sustained the applicant's objection made when Miller began to state that he "present(s) the Judge with..." (XXVII R.R. at 177-8).

85. The Court finds that the prosecutor's questions concerning the circumstances of the applicant's arrest, including the obtaining of arrest and search warrants, were neither repetitive nor improper, regardless of repetition of the word "warrant."

86. The Court finds that the prosecutor did not repeatedly make or elicit comments about the fact that a judge had authorized the arrest of the applicant after the judge read a

detailed probable cause affidavit; instead, the only oblique reference to a probable cause affidavit was made by Miller after being asked to explain what an arrest warrant was – testimony to which the trial court sustained the applicant's objection (XXVII R.R. at 154).

87. The Court finds that Miller's testimony about obtaining an arrest warrant and search warrant was part of the circumstances of the applicant's arrest and such testimony did not imply or express that a judicial determination of the applicant's guilt had already been made.

Ground Five: alleged ineffective assistance of counsel

LACK OF OBJECTION TO ALLEGED IMPLICATION THAT JUDGE HAD DETERMINED APPLICANT'S GUILTY AFTER SEEING PROBABLE CAUSE AFFIDAVIT

88. According to the credible affidavit of trial counsel Wendell Odom made after he reviewed the transcripts of the applicant's trial, he objected and the trial court sustained his objection when the State began asking Sergeant Miller about the details concerning the applicant's arrest warrant; trial counsel Odom also objected and the trial court sustained his objection when the State questioned Miller about the circumstances surrounding the search warrant. *State's Writ Exhibit B, February 22, 2008 affidavit of counsel Odom.*

89. According to the credible affidavit of trial counsel Odom, he thought that an instruction to disregard or clarification questioning was not necessary after the trial court sustained his objections and stopped further questioning in the area of probable cause, and that an instruction to disregard only emphasizes the comment or testimony if an issue is not *per se* reversible error. *State's Writ Exhibit B, February 22, 2008 affidavit of counsel Odom.*

LACK OF OBJECTION TO ALLEGED HEARSAY

90. During the applicant's trial, Sergeant Miller testified that attorney Ellis McCullough was present when the lineup was composed and that McCullough assisted in positioning and dressing some of the lineup participants – including the applicant and his brother Alberto (XXVII R.R. at 167-9).

91. When asked if McCullough complained about the physical appearance of any of the fill-ins, Miller answered, "No. He said the fill-ins were fine as they were" (XXVII R.R. at 167).

92. The Court finds that McCullough's statement was not offered through Miller to show the truth of the matter, i.e., that the fill-ins were "fine" such that they did not create an impermissibly suggestive lineup, but to show that McCullough did not have any objections to the fill-ins.

93. The Court finds that McCullough's statement was made while he was viewing the potential participants of the lineup; the Court finds that McCullough's statement is a present sense impression exception to hearsay.

94. The Court finds that Miller's testimony that McCullough asked a fill-in if the applicant could wear his jacket during the lineup does not constitute an assertion that is objectionable hearsay; instead, it is a question.

95. In the defense's case-in-chief, the applicant called Ellis McCullough as a witness and elicited testimony that McCullough made suggestions concerning the fill-ins at the lineup; that he frequently had people in a lineup change clothes to look more uniform but he had no specific recollection of it in this case; that, in McCullough's opinion, the witness made no positive or tentative identification; and, that McCullough was aware that the officer noted a "strong tentative" identification – a determination with which McCullough disagreed (XXXII R.R. at 175-82, 200).

96. The Court finds that the applicant cannot complain that trial counsel is ineffective for failing to object to the prosecutor's eliciting the same evidence through Miller that trial counsel essentially presented in the defense's case-in-chief through witness Ellis McCullough.

97. According to the credible affidavit of trial counsel Odom, he did not believe that McCullough's statements were objectionable hearsay or that they harmed the applicant's case; McCullough's statements were a present sense impression regarding the composition

of the line-up and a question about an article of clothing. *State's Writ Exhibit B, February 22, 2008 affidavit of counsel Odom.*

98. Trial counsel objected to hearsay when the prosecutor asked Miller what "features" concerned David Copeland so that he did not make a positive identification at the lineup, and Miller testified that Copeland eliminated numbers three, four and six after the prosecutor rephrased the question (XXVII R.R. at 177).

99. David Copeland identified the applicant in-court as the person who shot him and Copeland testified that he viewed two photo arrays, State's Exhibit 33 and 34; that he did not identify anyone in State's Exhibit 33; that he selected a person in State's Exhibit 34 as "the closest" to the person who shot him but he was not the person who shot him; that he selected #5 from a live lineup as the person who shot him; and, that #5 "appeared to be the one" because the hair had been changed and he had no mustache (XXV R.R. at 143, 150-7).

100. During cross-examination of David Copeland, trial counsel elicited testimony concerning the composite sketch, the lineup composition and procedure, and the photospreads and also elicited testimony that Copeland did not positively identify the applicant as the shooter until July 22, 1997 (XXV R.R. at 158-68)(XXVI R.R. at 13-46).

101. The Court finds that the applicant cannot complain that trial counsel is ineffective for failing to object to the prosecutor's eliciting of the same evidence through Miller that trial counsel elicited during cross-examination of Copeland.

102. During redirect examination, Copeland testified that the applicant is the person who shot him; that he identified him at the identification hearing; and, that the applicant was without a mustache but Copeland was positive that he was the shooter (XXVI R.R. at 53-4).

103. According to the credible affidavit of trial counsel Odom, he questioned Copeland about his tentative identification of the applicant, his viewing a photo spread prior to the line-up, the statements made by Miller prior to the lineup-up, Copeland's first-time

positive identification of the applicant at the identification hearing, the applicant's manner of walking at the line-up, and the varying descriptions Copeland gave of the shooter. *State's Writ Exhibit B, February 22, 2008 affidavit of counsel Odom.*

104. The Court finds that witness David Copeland testified at trial prior to Miller's testimony; that Copeland was subject to cross-examination concerning his lineup identification of the applicant; and, that Miller's testimony about Copeland's identification of the applicant is governed by TEX. R. EVID. 801(e)(1)(C), stating that a statement is not hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person.

105. The Court finds that Copeland's tentative identification of the applicant and elimination of certain other individuals in the lineup was made immediately after viewing the lineup and, thus, falls within the present sense impression exception to hearsay.

LACK OF OBJECTION TO ALLEGED LEADING QUESTIONS OF ESTRELLA MARTINEZ

106. The Court finds that the applicant complains on habeas about the following five questions the prosecutor asked Estrella Martinez during direct examination:

(a) Is that Reinald Dennes who told you that he rented the motel room so people wouldn't know he was in Houston (XXVIII R.R. at 18-9)?

(b) Did you have any other conversations about letting the defendant, Reinaldo Dennes, in the side door of the building on Sunday, January 21, 1996, or Monday, January 22, 1996 (XXVIII R.R. at 22)?

(c) Did he let you (sic) tell you for somebody to let him in so he can give the tape to somebody upstairs (XXVIII R.R. at 23)?

(d) Has anybody for the district attorney's office, me or anybody else, promised to intercede on our behalf with the immigration people (XXVIII R.R. at 91)?

(e) And was that to make sure you didn't get deported before these trials are finished (XXVIII R.R. at 91)?

107. According to the credible affidavit of prosecutor Don Smyth, Estrella Martinez did not speak English so he used a Spanish-speaking interpreter to communicate with her prior to trial and during trial; Smyth also had a difficult time getting Martinez to answer only the question because she tended to ramble. *State's Writ Exhibit A, January 11, 2002 affidavit of prosecutor Smyth.*

108. According to the credible affidavit of prosecutor Don Smyth, he tried to carefully word his questions during direct examination of Martinez so they could be easily translated and so Martinez would limit her answers to the questions asked, and there was times when Martinez did not seem to understand his questions so he had to simplify the questions by asking questions that called for a "yes" or "no" answer. *State's Writ Exhibit A, January 11, 2002 affidavit of prosecutor Smyth.*

109. According to the credible affidavit of trial counsel Odom, certain questions to Martinez had to be carefully crafted because she did not speak English and testified through an interpreter; trial counsel did not think that the five cited questions were objectionable as leading because of the difficulty in eliciting Martinez's testimony; trial counsel had to ask the trial court for leeway in questioning Martinez because of the communication problem, and there were times during Martinez's testimony when trial counsel believed that the questioning had to be done in a leading fashion. *State's Writ Exhibit B, February 22, 2008 affidavit of trial counsel Odom.*

110. The Court finds that, pursuant to TEX. R. EVID. 611(c), leading questions may be used when necessary to develop the testimony of a witness; the Court further finds that leading questions may be used when a witness has a language deficiency.

111. The Court finds that that five cited questions were either necessary for understanding or to develop Martinez's testimony, or were a repetition or clarification of Martinez's previous answer, or were non-leading.

ALLEGED CUMULATIVE EFFECT

112. The Court finds, based on the credible affidavit of trial counsel Odom, that trial counsel Odom was hired to represent the applicant in his capital murder trial; that trial counsel reviewed the State's file, including the offense report, the autopsy report, and witness statements; that trial counsel talked with the applicant many times about the case and the law; that trial counsel prepared and filed over twenty pre-trial motions, including motions to suppress evidence and the identification testimony; that trial counsel retained private investigators and expert witnesses; that trial counsel interviewed witnesses, talked to the applicant's family and visited the scene of the offense; that trial counsel obtained discovery from the State; that trial counsel talked with the applicant about his background and life; that trial counsel hired a mental health expert on the issue of future dangerousness; and, that trial counsel presented mitigating evidence. *State's Writ Exhibit B, February 22, 2008 affidavit of counsel Odom.*

113. The Court finds, based on the record, that trial counsel was familiar with the law and facts in the applicant's case; that trial counsel made timely objections; that trial counsel cross-examined State's witnesses; that trial counsel presented a defensive theory; that trial counsel presented evidence during the defense case-in-chief; that trial counsel presented mitigating evidence at punishment; and, that trial counsel made coherent jury argument.

114. The Court finds that trial counsel rendered effective representation in the applicant's case.

Ground Six: alleged denial of fair trial and due process based on alleged unfair surprise of admission of extraneous offense during punishment

115. The Court finds that the applicant presented on direct appeal the claim that he was unfairly surprised by the admission of the extraneous robbery of the Tsang family, and the Court of Criminal Appeals rejected such claim. *Dennes,* No. 72, 966, slip op. at 15.

116. The Court finds that TEX. CODE CRIM. PROC. art. 37.071 does not require that the State give notice of extraneous offenses in capital cases.

117. The Court finds that, on December 4, 1996, the applicant filed a written motion requesting notice of all extraneous offenses the State intended to use at punishment; that, on January 13, 1997, trial counsel informed the trial court that he had been told the State might introduce an extraneous aggravated robbery offense but he had not been given details of the robbery; that the State noted it was not obligated by law to give notice of extraneous offenses to be offered at punishment in a capital trial but the State agreed to give trial counsel notice and allow him to read the offense report of any extraneous offense the State proposed to offer; and, that the trial court ordered that notice of any punishment extraneous be give two weeks or fifteen days prior to trial. *Id.*, slip at 15-6.

118. The Court finds that a hearing was held on the extraneous matter on August 18, 1997, after individual *voir dire* as to capital issues but before the entire panel was questioned on general principles of law; that trial counsel complained that the notice given on August 13, 1997 was not timely because it was less than fifteen days prior to trial; that trial counsel filed a motion for continuance claiming he had not been given the necessary time to counter the extraneous evidence; that trial counsel conceded that the State had "hinted" of evidence of some home invasions; and, that the lack of detailed information prompted trial counsel to file his motions for notice of any evidence to be offered on extraneous offenses. *Id.*, slip op. at 16.

119. The Court finds that the jury returned a guilty verdict on August 28, 1997, and punishment began the next day; that trial counsel renewed his objection to the admission of extraneous evidence at the beginning of the punishment phase; and, that the trial court overruled the objection. *Id.*

120. The Court of Criminal Appeals, when holding on direct appeal that the applicant failed to show he was unfairly surprised by admission of the extraneous offense or that the trial court erred in denying his motion for continuance, noted that the applicant conceded

that he vaguely knew about the possibility of the extraneous offense being offered several months prior to trial; that he read the offense report describing the extraneous offense more than fifteen days prior to the offer of the extraneous offense testimony; that the applicant received notice at least fifteen days prior to the time the evidence was actually offered even though he was not given fifteen days notice prior to trial; that nothing shows that the applicant was prohibited from preparing for the admission of the extraneous offense; and, that nothing shows that the applicant was prevented from questioning prospective jurors about their views on extraneous offenses. *Id.*, slip op. at 17.

Grounds Seven through Nine: trial court allegedly erred in admitting evidence of Copeland's photospread identification, his out-of-court identification and his in-court identification

121. The Court finds that, on direct appeal of the applicant's conviction, the applicant contended that the trial court allegedly erred in admitting evidence of Copeland's out-of-court identification; that the photo spread and procedure were allegedly impermissibly suggestive; and, that Copeland's in-court identification was allegedly tainted by impermissible out-of-court procedures. *Id.*, slip op. at 18-9.

122. The Court finds that the Court of Criminal Appeals, on direct appeal of the applicant's conviction, held that, under the totality of the circumstances, it could not say that the trial court abused its discretion in finding that the pretrial identification procedures were not impermissibly suggestive and did not cause Copeland to misidentify the applicant. *Id.*, slip op. at 21.

123. The Court of Criminal Appeals, on direct appeal of the applicant's conviction, noted that, during the hearing to suppress identification, Copeland testified that detectives showed him a photo spread – two sheets of six photos each – around February 5, 1996; that he chose the photo of the person who looked "familiar" and who had similar facial features to the person who shot him; that he attended a lineup a few weeks later that included the applicant, his brother, and four fill-ins; that he knew at the time of the lineup that police had arrested someone; and, that he identified the applicant in the lineup as the

person who looked the closest to the person who shot him but noted that the applicant now had shorter hair and was not wearing glasses or a mustache. *Id.*, slip op. at 20.

124. The Court finds that the Court of Criminal Appeals, on direct appeal of the applicant's conviction, noted that it was reasonable for Copeland to give only a "tentative" identification at the lineup based on the fact that the applicant was wearing a disguise at the time of the shooting; that photos of the photo spread shows twelve men with similar features and characteristics; and, that the applicant was placed in a line-up with five other men with similar features and characteristics to his own, including his own brother. *Id.*

125. The Court finds that Copeland did not identify anyone from the photospread as the shooter; instead, Copeland testified that he viewed State's Exhibits 33 and 34 - two photo arrays each comprised of six men; that he did not identify anyone in State's Exhibit 33; and, that #5 in State's Exhibit 34 was the closest to the person who shot him but he was not the man who shot him (XXV R.R. at 143, 150-7).

126. The Court finds, according to the credible affidavit of prosecutor Don Smyth, that, to the best of Smyth's knowledge, the applicant was not in either of the photospreads shown to David Copeland. *State's Writ Exhibit A, January 11, 2002 affidavit of prosecutor Smyth.*

127. The Court finds that the photo spreads, State's Exhibit 33 and 34, cannot be considered impermissibly suggestive considering that Copeland did not identify anyone in the photo array as the shooter and that it is likely that the applicant was not included in the arrays.

128. The Court finds that there is conflicting testimony as to whether Copeland was informed prior to the live line-up that a suspect had been arrested: Sergeant Miller testified he called Copeland to come view the lineup and he did not tell Copeland that someone had been arrested or that a suspect was going to be in the lineup (VI R.R. at 19); Copeland testified that he was told that an arrest had been made and he needed to view a lineup (VI R.R. at 75).

129. The Court finds that Sergeant Miller testified that he told Copeland that the person who shot him may or may not be in the lineup and he was not required to pick out anybody in the lineup (VI R.R. at 20); Copeland also testified that he was told he was under no obligation to pick anyone out of the lineup (VI R.R. at 75).

130. The Court finds that whether Copeland was told someone had been arrested does not render the lineup impermissibly suggestive; it is likely that a witness would suppose that an arrest had been made when asked to view a lineup.

131. The Court finds that Copeland testified that he did not positively identify the applicant as the shooter until July 22, 1997, during the identification hearing; that his identification at the hearing was based on his recollection of the shooting; and, that his identification of the applicant at trial was from his recollection from the shooting as it was an event he would never forget (XXVI R.R. at 24, 40, 54, 72).

132. The Court finds that Copeland had adequate opportunity to view the applicant's face, build, and height at the time of the shooting in the well-lit lobby (VI R.R. at 66-71)(XXV R.R. at 139, 148); that Copeland testified he was very attentive when he saw the applicant in the building lobby and was able to describe the applicant with some detail (VI R.R. at 59, 65, 68-71, 87)(XXV R.R. at 126-9, 133, 139-40); that Copeland gave a detailed description of the applicant after the shooting and was able to assist in developing a composite sketch that is remarkably similar to the applicant (XXV R.R. at 141,2, 146-8, 159)(XXVI R.R. at 133-9); that Copeland was positive in his identification after giving a tentative identification of the applicant who had shorter hair and was not wearing glasses and a mustache at the lineup as he did during the offense and who donned a mustache and glasses at his trial at the State's request (VI R.R. at 77, 91, 142-3, 156); and, that the February 23, 1996 lineup was held just under a month after the January 24, 1996 shooting (VI R.R. at 19, 75)(XXV R.R. at 108, 112, 131).

133. The Court finds, based on the totality of the circumstances, that Copeland's in-court identification of the applicant was reliable.

CONCLUSIONS OF LAW

First Ground: trial court allegedly restricted cross-examination of Antonio Ramirez re his motive for testifying

1. The trial court properly allowed the applicant to cross-exam Antonio Ramirez concerning his motive for testifying, including the possibility of Ramirez being prosecuted for making a silencer, his possible involvement, if any, in the capital murder, whether he had been told he could be charged with capital murder, whether he had been told he was not going to be prosecuted for making the silencer, whether he might get a reward for giving information to the police, whether he had an agreement with HPD or INS, and the consequences of his wife being an illegal alien (XXVII R.R. at 22-41). *Carpenter v. State,* 979 S.W.2d 633, 634 (Tex. Crim. App. 1998)(noting that exposing witness' motivation for testifying is proper purpose of cross-examination).

2. The trial court properly sustained the prosecutor's objections to the applicant asking Ramirez if anyone told him what the punishment was for "this type" of murder and about his "dealings with avoiding a state silencer law and any potential dealings involving any involvement in a murder case," based on there being no evidence that Ramirez was involved in the capital murder and based on it being irrelevant whether Ramirez was aware of the punishment for capital murder (XXVII R.R. at 37, 41). *See Carroll v. State,* 916 S.W.2d 494, 498 (Tex. Crim. App. 1996)(noting trial court may limit cross-examination when a subject is exhausted, or to prevent repetition or marginally relevant interrogation).

3. The applicant fails to show that the trial court improperly restricted his cross-examination of Ramirez concerning his motive for testifying. *Id.*

Ground Two: alleged denial of fair trial based on Officer James Kay's testimony re criminal types

4. The applicant's habeas complaint that he was allegedly denied a fair trial based on Officer James Kay's testimony concerning criminal types because Kay not have been qualified as an expert witness or that, as an expert, Kay could not testify as to whether a witness was truthful does not comport with the applicant's trial objection to what Kay

thought from the men's demeanors, the applicant's objections based on speculation and non-responsiveness, his objection of "asked and answered" and his hearsay objection (XXV R.R. at 73-4). Because the applicant's habeas complaint does not comport with the applicant's objections at trial, the applicant's habeas complaint is waived. *See Carmona v. State,* 941 S.W.2d 949, 953 (Tex. Crim. App. 1997)(holding that trial objection based on attorney-client privilege does not preserve error for appellate claim based on work-product doctrine); *Guevara v. State,* 97 S.W.3d 579, 583 (Tex. Crim. App. 2003)(holding defendant did not preserve error where complaint on appeal differed from trial objection).

5. In the alternative, Kay properly testified that the two men's demeanor was not of a criminal type based on his perception of the men the night of the offense and based on his eighteen years experience dealing with suspects. *See* TEX. R. EVID. 701 (stating that a witness may testify in the form of an opinion when that opinion is rationally based on perceptions of the witness and is helpful to clear understanding of witness' testimony).

6. In the alternative, any harm in Kay's testimony – that the two men were released without being charged and that he did not think they were involved in the offense - was cured by essentially the same testimony being admitted without objection through the testimony of Officer Terry and Sergeant Waltman (XXV R.R. at 39-41, 46-7)(XXVIII R.R. at 180-3)(XXIX R.R. at 43-5). *See and cf. Anderson v. State,* 717 S.W.2d 622, 628 (Tex. Crim. App. 1986)(holding improperly admitted hearsay harmless if other evidence admitted without objection that proves same fact that inadmissible evidence sought to prove).

7. The applicant fails to show that Kay's testimony either implies or creates an impression that the applicant was guilty because he was not released in contrast to the two men who were released the night of the offense without being charged. The applicant fails to show that he was denied a fair trial or unfairly harmed by Kay's testimony. *See Ex parte Empey,* 757 S.W.2d 771, 775 (Tex. Crim. App. 1990)(holding that defendant's bare allegation insufficient to meet his burden of proof in habeas proceeding).

Ground Three; alleged denial of fair trial based on admission of photographs of complainant's body at the scene of offense

8. Based on the lack of objection to the admission of State's Exhibit 116, a photograph of the applicant's body, the applicant is procedurally barred from advancing his habeas complaint concerning the admission of such photograph. *See* Tex. R. App. P. 33.1(a); *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978); *see also Hughes v. Johnson*, 191 F.3d 607, 614 (5th Cir. 1999)(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).

9. In the alternative, the applicant's complaint concerning the admission of State's Exhibit 116 is without merit as is the applicant's habeas complaint concerning the admission of photographs labeled State's Exhibits 114, 115, 118, and 119; the trial court did not abuse its discretion in admitting the noted photographs. *See Williams v. State,* 958 S.W.2d 186, 195 (Tex. Crim. App. 1997)(holding admissibility of photos within sound discretion of trial court).

10. The trial court properly admitted the cited photographs – photos that are probative and not cumulative or particularly gruesome and that depict matters found in admissible testimony. *See Sonnier v. State,* 913 S.W.2d 511, 519 (Tex. Crim. App. 1995)(holding that trial court does not err in admitting gruesome photos into evidence that depict defendant's handiwork; noting nothing was depicted in photos that was not also in admitted testimony); *Chamberlain v. State,* 998 S.W.2d 230, 237 (Tex. Crim. App. 1999)(holding fact that some may find photos gruesome does not necessarily render them inadmissible).

11. The trial court properly admitted the cited photographs into evidence; their probative value is not substantially outweighed by possible prejudicial effect; the photos are few in number, depict the complainant's wounds, the position of his body, and provide a visualization of objects around his body, and were the subject of admissible testimony at

trial. *Id.* (noting that because photos portray reality of offense, they are powerful visual evidence, probative of important aspects of the State's case); *see also Williams,* 958 S.W.2d at 196 (holding photos' probative value not substantially outweighed by possible prejudicial effect). The applicant fails to show that he was denied a fair trial by the admission of the cited photographs.

Ground Four: alleged denial of fair trial based on testimony regarding arrest warrant for the applicant

12. The applicant fails to show that he was denied due process and a fair trial when the State elicited testimony regarding the arrest warrant for the applicant; the elicited testimony was neither irrelevant nor prejudicial. *See Maddox v. State,* 682 S.W.2d 563, 564 (Tex. Crim. App. 1985)(holding State is entitled to prove circumstances surrounding defendant's arrest).

Ground Five: alleged ineffective assistance of counsel

LACK OF OBJECTION TO ALLEGED IMPLICATION THAT JUDGE HAD DETERMINED APPLICANT'S GUILTY AFTER SEEING PROBABLE CAUSE AFFIDAVIT

13. Trial counsel is not ineffective based on an alleged failure to object to a purported implication that a judge had allegedly determined the applicant's guilty after seeing the probable cause affidavit in light of the fact that trial counsel objected to testimony about the judge reviewing the probable cause affidavit attached to the warrant, and trial counsel objected when the witness began explaining how an arrest warrant is obtained, and trial counsel's objections were sustained, (XXVII R.R. at 154). *See and cf. DeRusse v. State,* 579 S.W.2d 224 (Tex. Crim. App. 1979)(holding that having received the relief requested, error, if any, is cured); *Calloway v. State,* 743 S.W.2d 645, 651-2 (Tex. Crim. App. 1988)(holding that trial court's ruling, even if given for wrong reason, is not reversible if ruling was correct on any theory of law); *Tong v. State,* 25 S.W.3d 707, 712 (Tex. Crim. App. 2000)(citing *Strickland,* 466 U.S. at 689)(holding that review of counsel's representation is highly deferential; counsel is afforded strong presumption that actions fall within wide range of reasonably effective assistance).

14. Trial counsel cannot be considered ineffective for the reasonable defensive strategy of counsel deciding that an instruction to disregard was unnecessary after the trial court sustained his noted objections and counsel believing that an instruction to disregard only emphasizes the comment or testimony if an issue is not *per se* reversible error. *Solis v. State,* 792 S.W.2d 95, 100 (Tex. Crim. App. 1990)(reviewing court will not "second-guess through hindsight" the strategy of counsel, nor will fact that another attorney might have pursued a different course support a finding of ineffectiveness); *See Garcia v. State,* 57 S.W.3d 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.").

LACK OF OBJECTION TO ALLEGED HEARSAY

15. Trial counsel is not ineffective for failing to object to testimony that does not constitute objectionable hearsay, i.e., "He said the fill-ins were fine" (XXVII R.R. at 167). Trial counsel is not ineffective for not objecting to Ellis McCullough's present sense impression regarding the composition of the line-up and his question about an article of clothing or to David Copeland's present sense impression concerning his tentative identification of the applicant and his viewing of the lineup. *See Martinez v. State,* 17 S.W.3d 677, 688 (Tex. Crim. App. 2000)(holding that item of evidence that fails to meet definition of hearsay is not hearsay); TEX. R. EVID. 803(1) (noting present sense impression exception to hearsay).

16. Trial counsel is not ineffective for not objecting to the State's eliciting of the same evidence through Sergeant Miller that trial counsel essentially presented through defense witness Ellis McCullough and through cross-examination of David Copeland. *See and cf. Anderson v. State,* 717 S.W.2d 622, 628 (Tex. Crim. App. 1986)(holding improperly admitted hearsay harmless if other evidence admitted without objection that proves same fact that inadmissible evidence sought to prove); *see also* TEX. R. EVID. 801(e)(1)(C), stating

that a statement is not hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person.

LACK OF OBJECTION TO ALLEGED LEADING QUESTIONS OF ESTRELLA MARTINEZ

17. Trial counsel is not ineffective for not objecting to the five cited questions the State asked of Estrella Martinez - questions that were necessarily phrased in the manner they were asked because of Martinez's lack of knowledge of English and the need for an interpreter, Martinez's tendency to ramble, and the need for repetition and/or clarification of her answers at times. *See Hernandez v. State,* 643 S.W.2d 399, 400-1 (Tex. Crim. App. 1982)(noting that leading questions may be permitted when witness has language deficiency); TEX. R. EVID. 611(c) (stating that leading questions may be used when necessary to develop testimony of witness).

18. Trial counsel is not ineffective for not objecting to the five cited questions; counsel was aware that certain questions to Martinez had to be carefully crafted because of the language barrier; trial counsel is not ineffective for thinking that the five cited questions were not objectionable as leading because of the difficulty in eliciting Martinez's testimony and the necessity for propounding the questions in the manner asked. *See Garcia,* 57 S.W.3d at 440 (holding 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.").

ALLEGED CUMULATIVE EFFECT

19. The applicant fails to show ineffective assistance of counsel based on an alleged cumulative effect of alleged error; the applicant fails to show deficient performance much less harm. *See Strickland v. Washington,* 466 U.S. 668 (1984); *See Mallett v. State,* 65 S.W.3d 59, 63 (Tex. Crim. App. 2001)(holding review is highly deferential and presumes counsel's actions fell within wide range of reasonable and professional assistance); *Bone v.*

State, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002)(noting "[a] vague, inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally incompetent.").

Ground Six: alleged denial of fair trial and due process based on alleged unfair surprise of admission of extraneous offense during punishment

20. Because the applicant's habeas claim of alleged unfair surprise concerning the admission of the extraneous robbery of the Tsang family was raised and rejected on direct appeal, it need not be considered in the instant habeas proceeding or any subsequent proceeding. *See Ex parte McFarland*, 163 S.W.3d 743, 748 (Tex. Crim. App. 2005)(holding that claims that have been raised and rejected on direct appeal normally cannot be re-litigated in habeas proceedings); *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984).

21. In the alternative, the applicant fails to show that he was unfairly surprised by admission of the extraneous offense or that the trial court erred in denying his motion for continuance. The applicant conceded that he vaguely knew about the possibility of the extraneous offense being offered several months prior to trial; that he read the offense report describing the extraneous offense more than fifteen days prior to the offer of the extraneous offense testimony; that he received notice at least fifteen days prior to the time the evidence was actually offered even though he was not given fifteen days notice prior to trial; that nothing shows that he was prohibited from preparing for the admission of the extraneous offense; and, that nothing shows he was prevented from questioning prospective jurors about their views on extraneous offenses. *Dennes*, slip op. at 17; *see also* TEX. CODE CRIM. PROC. art. 37.071 (containing no requirement that State give notice of extraneous offense in capital cases).

Grounds Seven through Nine: trial court allegedly erred in admitting evidence of Copeland's photospread identification, his out-of-court identification and his in-court identification

22. Because the applicant's habeas claim that the trial court erred in admitting evidence of David Copeland's photospread identification, his out-of-court identification and

his in-court identification was raised and rejected on direct appeal, it need not be addressed in the instant habeas proceeding or any subsequent proceedings. *See McFarland,* 163 S.W.3d at (holding that claims that have been raised and rejected on direct appeal normally cannot be re-litigated in habeas proceedings); *Acosta,* 672 S.W.2d at 472.

23. In the alternative, under the totality of the circumstances, the applicant fails to show that the trial court abused its discretion in finding that the pretrial identification procedures were not impermissibly suggestive and did not cause Copeland to misidentify the applicant. *Dennes,* slip op. at 21.

24. The applicant fails to show that Copeland's out-of-court identification and his in-court identification of the applicant was based on impermissibly suggestive procedures; instead, Copeland's identifications were based on his recollection of the applicant at the time of the shooting. *See Loserth v. State,* 963 S.W.2d 770, 771-2 (Tex. Crim. App. 1998)(noting five factors to be weighed against any effect of any suggestive identification procedure in assessing reliability under totality of circumstances); *Harris v. State,* 827 S.W.2d 949, 959 (Tex. Crim. App. 1992)(holding lineup not rendered unnecessarily suggestive when witness told it contains a suspect because witness would normally assume that to be the case).

25. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

Cause No. 750313-A

EX PARTE	§	IN THE 263RD DISTRICT COURT
	§	OF
REINALDO DENNES, Applicant	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 750313-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. all of the applicant's pleadings filed in cause number 750313-A, including his application for writ of habeas corpus and any supplemental or amended applications for writ of habeas corpus;

2. all of the Respondent's pleadings filed in cause number 750313-A, including the Respondent's Original Answer;

3. this court's findings of fact, conclusions of law and order denying relief in cause no. 750313-A;

4. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent/State in cause no. 750313-A;

5. all affidavits and exhibits filed in cause no. 750313-A; and,

6. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 750313, unless they have been previously forwarded to the Court of Criminal Appeals.

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 counsel: Jerome Godinich; 929 Preston

St.; Houston, Texas 77002 and to the Respondent/State: Roe Wilson; Harris County District Attorney's Office; 1201 Franklin, Suite 600; Houston, Texas 77002-1901.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 750313-A.

SIGNED this _____ day of AUG 21 2013, 2013.

JIM WALLACE
Presiding Judge
263RD District Court
Harris County, Texas