APPENDIX A

TEXAS COURT OF CRIMINAL APPEALS' SUMMARY DENIAL

No. WR-90,899-02

October 14, 2020

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

10/14/2020

SALAZAR, PAUL **Tr. Ct. No. 2014CR5303-W1** **WR-90,899-02**

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing and on the Court's independent review of the record.

Deana Williamson, Clerk

DISTRICT ATTORNEY BEXAR COUNTY
300 DOLOROSA ST NO 5072
SAN ANTONIO, TX 78205
* DELIVERED VIA E-MAIL *

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SALAZAR, PAUL **Tr. Ct. No. 2014-CR-5303-W1** **WR-90,899-01**

On this day, this Court has denied applicant's "PETITIONER'S (IN UNDERLYING 11.07 HABEAS WRIT APPLICATION) PRO SE ADVISORY TO THE COURT / MOTION TO ADDRESS PROCEDURAL DUE PROCESS CONCERNS COMMON IN PRO SE CASES".

Deana Williamson, Clerk

78571

PAUL SALAZAR
HUGHES UNIT - TDC # 2103847
RT. 2, BOX 4400
GATESVILLE, TX 76597

APPENDIX B

144TH DISTRICT COURT OF BEXAR COUNTY, TEXAS' FINDINGS OF FACT AND CONCLUSIONS OF LAW

NO. 2014-CR-5303-W1

NO. 2014-CR-5303-W1

EX PARTE	§	IN THE DISTRICT COURT
	§	144TH JUDICIAL DISTRICT
PAUL SALAZAR	§	BEXAR COUNTY, TEXAS

ORDER

Petitioner Samuel Dooley, on behalf of Applicant, Paul Salazar, has filed an application for post-conviction writ of habeas corpus pursuant to Article 11.07 of the Texas Code of Criminal Procedure, collaterally attacking his conviction in cause number **2014CR5303**. (West 2018).

HISTORY OF THE CASE

On October 18, 2016, a jury found Applicant guilty in count I of continuous sexual abuse of a child (repeater) and guilty in count II of indecency with a child by exposure (repeater). The jury sentenced Applicant **thirty-five (35) years** in count I and **twenty (20) years** imprisonment in the Texas Department of Criminal Justice – Institutional Division in count II. The court ordered these sentences to run consecutively. On April 20, 2018, the Fourth Court of Appeals issued a mandate affirming both of Applicant's convictions. (04-16-0074-CR). Applicant filed this writ application on June 28, 2019. A copy of this application was received by the District Attorney pro tem on August 6, 2019.

ALLEGATIONS OF APPLICANT

1. In Applicant's first ground for relief, Applicant alleges that his conviction and sentence in count II is void because it violates double jeopardy. Applicant states that the alleged conduct in count II was subsumed by count I. In summation, Applicant alleges that there was no

evidence to support count II as a separate act and offense apart from count I.

2. In Applicant's second ground for relief, Applicant states that appellate counsel was ineffective by failing to raise on appeal the issue of double jeopardy with regard to count II. Applicant further states that due to this failure, he was denied his right to a meaningful appeal, and but for counsel's failure, Applicant would have prevailed on appeal.

3. In grounds three through eight, Applicant alleges ineffective assistance of trial counsel. Specifically, Applicant states that both counsels were ineffective by failing to object to the double jeopardy violation in count II, ineffective in the totality of their representation, and throughout voir dire in their questioning and use of challenges and strikes against prospective jurors.

4. In ground nine, Applicant alleges that he was denied due process. Applicant states that then elected District Attorney, Nico LaHood and his office, should have been disqualified from prosecuting Applicant's case. In support of this allegation, Applicant states that Mr. LaHood was previously partners with defense counsel, Joe Gonzales, and as such, assisted in representing Applicant.

FINDINGS OF FACT

1. On October 18, 2016, a jury found Applicant guilty in count I of continuous sexual abuse of a child (repeater) and guilty in count II of indecency with a child by exposure (repeater). The jury sentenced Applicant thirty-five (35) years in count I and twenty (20) years imprisonment in the Texas Department of Criminal Justice – Institutional Division in count II. The court ordered these sentences to run consecutively.

2. On April 20, 2018, the Fourth Court of Appeals issued a mandate affirming both of Applicant's convictions. (04-16-0074-CR).

3. On October 19, 2019, trial counsel, Joe D. Gonzales, submitted an affidavit to this court addressing Applicant's claims of ineffective assistance. (Attachment I).

4. In summation, Mr. Gonzales states the following:

   a. He was hired to represent Applicant throughout pre-trial and trial proceedings and if there was a meritorious double jeopardy claim, it would be incumbent upon Applicant's appellate attorney to pursue such a claim.

   b. Applicant was both aware of the jury selection process and an active participant in the process.

   c. Counsel and co-counsel conducted voir dire in order to assess individuals in the venire panel and make strikes accordingly.

   d. The strikes that were turned in to the court were the result of listening and analyzing the responses that were given by the venire panel to many questions.

   e. The strike list submitted to the court was a result of trial strategy.

   f. The final strike list was discussed with Applicant and it is custom for counsel to request that defendant sign off on the list submitted to the court demonstrating his consent.

   g. Counsel and his firm were not affiliated with Nico LaHood.

   h. Counsel was not partners with Nico LaHood.

   i. Nico LaHood was not involved in the representation of Applicant in any manner.

5. This court finds Mr. Gonzales' affidavit to be truthful and credible.

6. On May 20, 2020, trial co-counsel, Christian Henricksen, submitted an affidavit to this court addressing Applicant's claims of ineffective assistance. (Attachment II).

7. In summation, Mr. Henricksen states the following:

   a. Applicant's allegation with regard to counsel's failure to object to Applicant's conviction in count II as a violation of double jeopardy is based on the claim that there was no evidence presented at trial to support count II as a separate act from count I. Applicant's claim does not give rise to a proper double jeopardy claim, rather, Applicant's claim is one against the sufficiency of the evidence and was addressed at trial and on appeal.

   b. Counsel and co-counsel had an established practice used during voir dire and followed such practice in Applicant's trial. Applicant was engaged in and provided input throughout the voir dire process. The decisions made in voir dire with regard to questioning and challenges were informed, effective, and based on trial strategy.

   c. Mr. LaHood and Mr. Gonzales were part of separate law firms that shared office space in a building that was co-owned by Mr. LaHood and Mr. Gonzales. Nico LaHood never had any involvement in the defense of Applicant.

8. This court finds Mr. Henricksen's affidavit to be truthful and credible.

9. On April 28, 2020, appellate counsel, Oscar Cantu, submitted an affidavit to this court addressing Applicant's claims of ineffective assistance. (Attachment III).

10. In summation, Mr. Cantu states the following:

   a. In review of the testimony in the case, counsel found no basis to believe that a double jeopardy violation existed at trial or on appeal.

b. There was a sufficient basis in the record for a jury to conclude that an offense happened on more than one single occasion. Applicant's assertions are legally and factually incorrect.

c. "The record reflects that the victim used the plural form of wording to express how many time(s) she was violated in some fashion by the Defendant. Under the current law in this state the Fourth Court of Appeals has upheld this standard as sufficient in an evidentiary challenge. There is no double jeopardy issue raised, only a difference of opinion on factual sufficiency."

CONCLUSIONS OF LAW

1. In collaterally attacking a conviction through habeas corpus, an applicant has the burden to allege and prove facts which, if true, entitle him to relief. *Ex parte Russell*, 720 S.W.2d 477, 487 (Tex.Crim.App.1986); *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

2. The burden of proof in a habeas application is on the Applicant to prove his factual allegations by a preponderance of the evidence. *See Ex parte Thomas*, 906 S.W.2d, 22, 24 (Tex. Crim. App. 1995); *Ex parte Cruz*, 739 S.W. 2d 53, 59 (Tex. Crim. App. 1987).

3. Texas Penal Code, Section 21.02 provides the following, in relevant part:

> (b) A person commits an offense if:
> (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
> (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense.

(c) For purposes of this section, "act of sexual abuse" means any act that is a violation of one or more of the following penal laws:

(1) aggravated kidnapping under Section 20.04(a)(4), if the actor committed the offense with the intent to violate or abuse the victim sexually;

(2) indecency with a child under Section 21.11(a)(1), if the actor committed the offense in a manner other than by touching, including touching through clothing, the breast of a child;

(3) sexual assault under Section 22.011;

(4) aggravated sexual assault under Section 22.021;

(5) burglary under Section 30.02, if the offense is punishable under Subsection (d) of that section and the actor committed the offense with the intent to commit an offense listed in Subdivisions (1)-(4);

(6) sexual performance by a child under Section 43.25;

(7) trafficking of persons under Section 20A.02(a)(7) or (8); and

(8) compelling prostitution under Section 43.05(a)(2).

(d) If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.

(e) A defendant may not be convicted in the same criminal action of an offense listed under Subsection (c) the victim of which is the same victim as a victim of the offense alleged under Subsection (b) unless the offense listed in Subsection (c):

(1) is charged in the alternative;

(2) occurred outside the period in which the offense alleged under Subsection (b) was committed; or

(3) is considered by the trier of fact to be a lesser included offense of the offense alleged under Subsection (b).

Section (e) of this statute provides a safeguard against double jeopardy violations providing that a defendant may not be convicted for continuous sexual abuse of a child and also one of the eight predicate offenses listed in section (c), if that offense served as the underlying criminal action for the continuous sexual abuse offense. *Id.* In count II, Applicant was convicted of indecency with a child under Section 22.11(a)(2). Tex. Penal Code Ann. § 21.11(a)(2) (West). This conviction is not statutorily prohibited and it is reasonable to deduce that the legislature intended that indecency with a child by exposure, as a separate

offense not to be subsumed by Section 21.02(c) and (e). Further in considering Applicant's allegation that the conduct in count II was subsumed, presumably by the allegations of indecency with a child by contact as alleged in count I of the indictment, the Court has stated that Section 21.11(a)(1) and Section 21.11(a)(2)(A) of the Penal Code admit of separate allowable units of prosecution (and hence, punishment) for both the offense of indecency with a child by sexual contact and the offense of indecency with a child by exposure. *Speights v. State*, 464 S.W.3d 719, 723–24 (Tex. Crim. App. 2015). *See also Loving v. State,* 401 S.W.3d 642 (Tex. Crim. App. 2013). When both offenses are committed, they both may be tried, and the defendant may be convicted and sentenced for both in a single prosecution as well. *Id.* Additionally, in its analysis, the Court stated that the Legislature intended that both theories of indecency with a child may be pled and punished, even when the exposure precedes the contact and even when both acts occur within the same transaction. *Id.* In this instance, the Court inquires as to whether the evidence presented would actually support conviction and punishment under each theory of the offense. *Id.* As stated on appeal, the court finds that Applicant's conviction in count II is supported by the record. Thus, the court finds that Applicant has failed to prove that his conviction in count II violates double jeopardy.

4. Under the two-prong standard for reviewing ineffective assistance of counsel claims, the Applicant must show that (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). *See also McFarland v. State*, 845 S.W.2d 824, 842-43

(Tex.Crim.App. 1992), cert. denied, 508 U.S. 963 (1993). Moreover, the Court must presume that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

5. In review of both affidavits of trial counsel Joe Gonzales and Christian Henricksen, this court finds that Applicant has failed to show that he received ineffective assistance of trial counsel as alleged in grounds three through eight.

6. Applicant may challenge his conviction in an application for writ of habeas corpus in the event he has received ineffective assistance of counsel on direct appeal. *Ex parte Santana*, 227 S.W.3d 700, 705 (Tex. Crim. App. 2007). To prevail on an ineffective assistance of appellate counsel claim, "Applicant must demonstrate that counsel's decision not to raise a particular point of error was objectively unreasonable and that there is a reasonable probability that, but for counsel's failure to raise that issue, the applicant would have prevailed on appeal." *Id.* The remedy for ineffective assistant of counsel is an out-of-time appeal. *Ex parte Coy*, 909 S.W.2d 927, 928 (Tex. Crim. App. 1995).

7. In review of the affidavit submitted by appellate counsel, Oscar Cantu, this court finds that Applicant has failed to show that he received ineffective assistance of appellate counsel as alleged in ground two.

8. Applicant has failed to meet his burden as asserted in ground nine. To the contrary, trial counsels have both affirmed that Mr. LaHood was not partners with Mr. Gonzales, was not affiliated with his firm, and did not participate in Applicant's case.

9. Based on the foregoing findings of fact and conclusions of law, it is hereby recommended that this application be **DENIED**.

FILED
DISTRICT CLERK
BEXAR CO. TEXAS

Cause No. 2014CR5303-W1

EX PARTE 2019 OCT 15 P 12:41	X	IN THE DISTRICT COURT
DEPUTY	X	144TH JUDICIAL DISTRICT
BY Carolina Gandara		
PAUL SALAZAR	X	BEXAR COUNTY, TEXAS

Affidavit

My name is Joe D. Gonzales and I have been licensed to practice law in the state of Texas since 1988. I am currently in good standing with the State Bar of Texas. At the time of my representation of the above defendant, my address was 1924 N. Main Ave, San Antonio, Texas ,78212. I am currently the Bexar County Criminal District Attorney, my current address is 101 W. Nueva St., San Antonio, Texas 78205.

I wish to state the following in connection with my representation of Paul Salazar in the State of Texas v. Paul Salazar, Cause No. 2014CR5303-WI. I deny each and every allegation of ineffective assistance of counsel and assert that at all times my office provided zealous, competent and effective representation in the pursuit of Mr. Salazar's defense.

i. Counsel failed to raise, on direct appeal, that the conviction and sentence for count II was a double jeopardy violation.

Beginning on July 22, 2014, I filed a notice of appearance as retained counsel after Paul Salazar came to my office to retain me in connection with the above referenced case wherein Mr. Salazar was indicted for continuous sexual abuse of a child and indecency with a child. I explained to Mr. Salazar that my representation of his case included court appearances, investigation in preparation for trial, plea negotiations and actual trial, if necessary. The contract expressly stated that neither I nor my associate, Christian Henricksen, were appellate attorneys and that our representation would cease at the end of the resolution of his case and did not extend to an appeal. Over the next several months, our office spent numerous hours in preparation for trial including pre trial investigation. We ultimately proceeded to a jury trial wherein the jury found Mr. Salazar guilty of both the continuous sexual abuse of a child count as well as the indecency with a child by exposure with a repeater enhancement. At punishment, the jury assessed 35 years on the first count and 20 years on the second. Judge Rummel ordered that the sentences run consecutively.

At the end of the trial, in order to preserve Mr. Salazar's right to appeal and because he expressed a desire to appeal, I filed a notice of appeal on November 10, 2016. However, because I did not handle appeals, I informed Mr. Salazar that I would be filing a motion to withdraw as attorney of record. On November 14, 2016, Judge Rummel signed the order permitting me to withdraw as attorney of record. Pursuant to said order, as of that date I was no longer responsible for the appeal of this case. If in fact

Attachment I

there was a meritorious argument on the claim of double jeopardy as to the final conviction and sentence of Mr. Salazar it was incumbent upon Mr. Salazar's appellate attorney to pursue such a claim.

Notwithstanding the argument that my representation of Mr. Salazar ended with the sentence imposed by the court, Mr. Salazar asserts that I should have immediately objected to the imposition of the consecutive sentences as a violation of double jeopardy. Mr. Salazar has confused the legal principle of double jeopardy with the state's right to proceed on an indictment alleging separate offenses.

ii. Counsel failed to adequately investigate or question jurors further during voir dire after multiple jurors gave responses which raised "red flags" about whether they could be fair and impartial jurors.
iii. Counsel failed to request challenges for cause and make wise use of all peremptory strikes against prospective jurors when there was no legitimate tactical excuse to allow them to sit on the jury.

During jury selection or "voir dire", defense counsel participated in both general and specific voir dire. Within the time allotted by the court, myself and co-counsel, Christian Henricksen, were able to cover general principles of law in order to determine if anyone in the venire panel had any particular issue with those areas of law. Where appropriate, we made notes of individuals or groups that had any bias or prejudice. We exercised challenges for cause against those venire members that indicated that, for whatever reason, they could not be fair to Mr. Salazar. Likewise, Mr. Henricksen and I exercised our peremptory challenges to exclude those individuals that expressed a belief that they could not be fair.

Mr. Salazar was aware of the process as we had explained jury selection to him before trial. Moreover, he was engaged in the process, taking his own notes. He would inform us that he wanted a particular juror, for example, that seemed friendly or sympathetic. I explained to him this was more an elimination process than actually selecting individual jurors. He struggled with the notion that we had a limited number of preemptory challenges by law.

At the end of voir dire, the strikes that were turned in to the court were the result of listening to and analyzing the responses that were given by the venire panel to our many questions. The list that was submitted to the court was the result of trial strategy on our part to focus on the most informative responses in an effort to ferret out those potential jurors that could not be fair to Mr. Salazar. My recollection is that we discussed the final strike list with Mr. Salazar, and as is my custom, asked that he sign off on the list submitted to the court demonstrating his consent thereto.

iv. Was counsel ever partners with Nico Lahood on this case.

While officing at 1924 N. Main, the location where Mr. Salazar visited on numerous occasions, I maintained a sole proprietorship under the name of Joe D. Gonzales and Associates. Christian Henricksen was my sole associate. I employed a paralegal and an investigator. At no time, did I ever have any law partners. Nicolas "Nico" Lahood was one of 5 individual practitioners that had a business interest in the building. His firm of Lahood and Delcueto was a separate law firm that had no affiliation with my law office.

In his writ application, Mr. Salazar states that Mr. Lahood was involved in the defense of Mr. Salazar before Mr. Lahood took office in January of 2015. Nico Lahood was not involved in the representation of Paul Salazar in any manner. I do not recall ever discussing this case with anyone in Lahood and DelCueto or involving anyone else in that building outside of my immediate staff. Paul Salazar was likewise not referred to me by Nico Lahood or anyone else affiliated with that office. There would have been no conflict that arose in my representation of Paul Salazar because of the fact that Nico Lahood and I each owned an interest in a building where we maintained separate law offices and neither shared clients nor attorney's fees.

VERIFICATION

Before me, the undersigned Notary Public, on this day appeared JOE D. GONZALES, who being duly sworn and deposed does say that he is familiar with the contents of the above affidavit and that he swears and affirms that the information contained therein is true and correct to the best of his knowledge.

Joe D. Gonzales

Subscribed and sworn to before me on the 15th day of October 2019.

Notary Public

JESSICA JADE Z. BOGARDUS
Notary Public-State of Texas
Notary ID #13188634-2
Commission Exp. FEB. 08, 2023

SUBMITTED BY OFFENDOR

NO. 2014-CR-5303-W1

ORDERS

The District Clerk of Bexar County, Texas, is ordered to prepare a copy of this document, together with any attachments and forward the same to the following persons by mail or the most practical means:

a. The Court of Criminal Appeals
Austin, Texas 78711

b. Ed Shaughnessy
Criminal District Attorney, Pro Tem
Shaughnessy727@gmail.com

c. Sam Dooley, Petitioner for Applicant Paul Salazar
TDCJ ID: 1075237
Hughes Unit
Rt. 2, Box 4400
Gatesville, TX 76597

d. Paul Salazar, Applicant
TDCJ ID: 02103847
Hughes Unit
Rt. 2, Box 4400
Gatesville, TX 76597

SIGNED, ORDERED and DECREED ON 8 JUNE 2020.

JUDGE PRESIDING
Bexar County, Texas

Cause No. 2014CR5303-W1

EX PARTE	X	IN THE DISTRICT COURT
	X	144TH JUDICIAL DISTRICT
PAUL SALAZAR	X	BEXAR COUNTY, TX

2020 MAY 20 P 3:57

BY

Affidavit

My name is Christian Henricksen and I have been licensed to practice law in the state of Texas since 2005. I am currently in good standing with the State Bar of Texas. At the time of my representation of the above Applicant, my address was 1924 N. Main Ave, San Antonio, Texas, 78212. I am currently employed as an Assistant District Attorney at the Bexar County District Attorney's Office. My current office address in 101 W. Nueva St., 7th Floor, San Antonio, Texas, 78205.

I was hired to work as an Associate at the Law Office of Joe D. Gonzales around February of 2015. At that time, Joe Gonzales had already been retained to represent the Applicant, Paul Salazar, in the above case. From the time I was hired, I assisted Joe Gonzales as co-counsel in the representation of the Applicant through the Applicant's jury trial in October of 2016. I deny each and every allegation of ineffective assistance of counsel and assert that, at all times, Joe Gonzales and I provided competent and effective representation of Mr. Salazar.

I. Regarding Applicant's claim that counsel failed to object to Applicant's conviction in Count II as a violation of Double Jeopardy.

Applicant's allegation here is based on the claim that there was no evidence presented at trial that Count II consisted of a separate act from that of which Applicant was convicted in Count I. In the indictment, the allegations in Count II are distinct from the allegations alleged in Count I. The state's case was based on the idea that there were multiple allegations of abuse and that the allegations in Count II were independent of those supporting Count I. Part of the defense in this case was that the evidence was unclear as to the timing of the specific acts of abuse alleged in the indictment. This issue was also the basis for the appeal on this case. The Applicant now attempts to reframe this sufficiency of the evidence issue as a double jeopardy claim. However, the jury and the appellate court found that the evidence presented by the State was sufficient to support separate allegations of abuse as alleged in both counts of the indictment. In my opinion, the issues raised by the Applicant under this claim were addressed in trial (and by appellate counsel on appeal) through arguments relating to sufficiency of the evidence and do not give rise to a proper double jeopardy claim.

Attachment II

II. Regarding Applicant's allegation that trial counsel failed to adequately investigate, question, and strike prospective jurors during voir dire. (Grounds 5-8)

Mr. Gonzales and I had an established practice that we employed during voir dire in the Applicant's trial. When one of us was speaking, the other would takes notes regarding responses from panel members. We would gather as much information as possible for potential challenges for cause as well as for peremptory strikes. Information that we would use in making strategic decisions about strikes was based on statements made by panel members and written responses by the panel members on their individual information cards. We also considered tone, body language and other non-verbal ques not apparent in the record that might suggest that a panel member could favor one side over the other. Also, panel members were not always identified by name or number in the record when they spoke. As a result, we had additional information at the time of jury selection that is not reflected in the record that could have been used in making decisions on challenges and strikes. In addition, I recall that the Applicant was engaged in the voir dire process and took notes throughout at our request. His input was considered along with all other information when Mr. Gonzales and I made strategic decisions regarding the use of peremptory strikes.

The Applicant complains about the questioning of panel members and the use of challenges for cause and peremptory strikes. I do not independently recall why we chose to strike who we did, why we challenged who we did for cause, or the basis for the questioning of individual panel members. As stated above, our strategic decisions regarding these issues were informed not only by the information apparent in the record, but also information such as juror information cards, non-verbal ques from panel members and answers given by panel members unidentified in the record. Upon review of the record, Mr. Gonzales and I obtained significant information from the panel. This information allowed for numerous strikes for cause to be granted. All information obtained was then used, along with Applicant's input, to make informed decisions regarding challenges for cause. Based on my knowledge of our common practice, limited memory of voir dire in this case and a review of the record, the decisions that we made in this case dealing with questioning of panel members, challenges for cause and peremptory strikes were effective and based on sound strategy.

III. Regarding Applicant's claim that trial counsel and then DA Nicholas LaHood were partners on the instant case prior to Mr. LaHood becoming DA.

Applicant appears to be confused about the nature of the past business relationship between Nico LaHood and Joe Gonzales. I began working at the Law Office of Joe D. Gonzales as an associate attorney around February of 2015. At that time, Joe Gonzales had already been retained by Paul Salazar in this case. Our office was in a building located at 1924 N. Main. Joe Gonzales had an ownership interest in said building. Nico LaHood had been a co-owner of the building with Joe Gonzales immediately prior to Mr. LaHood becoming Bexar County District

Attorney in January of 2015. The business relationship between Mr. Gonzales and Mr. LaHood was limited to the ownership of the building and did not extend to their respective law practices. In other words, Mr. LaHood and Mr. Gonzales were partners in separate law firms. To my knowledge, Nico LaHood never had any involvement in the defense of the Applicant.

VERIFICATION

Before me, the undersigned Notary Public, on this day appeared CHRISTIAN HENRICKSEN, who being duly sworn and deposed does say that he is familiar with the contents of the above affidavit and that he swears and affirms that the information contained therein is true and correct to the best of his knowledge.

Christian Henricksen

Subscribed and sworn to before me on the 20th day of May 2020.

Notary Public

CORINE CASAS
Notary ID #10410405
My Commission Expires
January 5, 2024

CAUSE NO. 2014 CR 5303-W1

EX PARTE	§	**IN THE DISTRICT COURT**
	§	
PAUL SALAZAR	§	**144th DISTRICT COURT**
	§	
	§	**BEXAR COUNTY, TEXAS**

AFFIDAVIT IN RESPONSE TO POST CONVICTION WRIT

State of Texas §

County of Bexar §

COMES NOW, Oscar L. Cantu, Jr. affiant in this Post Conviction Writ Affidavit and would, upon his oath, testify as follows:

"I have read the Application for Post Conviction Writ and would testify as follows: Upon my review of the testimony in this case, in particular the statements made by and in outcry form from the complainant-victim, I found no basis to believe the allegation raised by the Defendant, on post conviction appeal, that any "double jeopardy" issue arose during the course of the trial or the appeal.

Rather, it would appear from the face of the complaint that the Defendant refuses to accept the 4th Court of Appeal's explanation that there is sufficient basis in the record (testimony and evidence submitted) for a jury to conclude that an offense happened on more than one single occasion. That is the sole issue raised in this writ and it is legally and factually incorrect.

The record reflects that the victim used the plural form of wording to express how many time(s) she was violated in some fashion by the Defendant. Under the current law in this state the Fourth Court of Appeals has upheld this standard as sufficient in an evidentiary challenge. There is no double jeopardy issued raised, only a difference of opinion on factual sufficiency."

Attachment III

FURTHER AFFIANT SAYETH NOT

Affiant

SWORN TO AND SUBSCRIBED before me on this, the 28th day of April, 2020, by Oscar Luis Cantu, Jr.

MIREYA M. ESTRADA
Notary Public, State of Texas
Comm. Expires 12-16-2021
Notary ID 7223319

Notary Public in and for the State Of Texas

Prepared by:
OSCAR L. CANTU, JR.
Attorney at Law
1004 S. St. Mary's
San Antonio, Texas 78205
Telephone 210-846-0356
Telecopier 210-941-0811
Email: R3Oscar@aol.com

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this affidavit has been served upon all parties required addressed to the following on this, the 28th day of April, 2020:
Ed Shaughnessy via email to shaughnessy727@gmail.com and Sam Dooley TDCJ 1075237, Hughes Unit, Rt. 2, Box 4400, Gatesville, TX 76597.

_/s/ by Oscar Cantu
Oscar L. Cantu, Jr.

APPENDIX C

4TH DISTRICT COURT OF APPEALS OF TEXAS'

MEMORANDUM OPINION from direct appeal

No. 04-16-00743-CR

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00743-CR

Paul **SALAZAR**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2014CR5303
Honorable Lorina I. Rummel, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: October 11, 2017

AFFIRM

Appellant, Paul Salazar, was indicted on two counts, which alleged he: (1) committed two or more acts of sexual abuse against a child during a period that was thirty days or more in duration, from on or about October 1, 2011 through September 12, 2013; and (2) exposed part of his genitals, with the intent to arouse or gratify the sexual desire of any person and knowing the complainant child was present on or about September 12, 2013. A jury found appellant guilty on both counts. The jury assessed punishment under count one at thirty-five years' confinement and under count

two at twenty years' confinement, plus a $10,000 fine. In two issues on appeal, appellant challenges the sufficiency of the evidence regarding the dates alleged in both counts. We affirm.

BACKGROUND

Appellant and Leslie had two children together—a daughter, D.S. who is the complainant here, and a son, J.S. D.S. was born on February 20, 2005.[1] Although appellant and Leslie ended their relationship in either 2011 or 2012, appellant saw his children at least three times a week. Leslie testified appellant lived at three locations—on Catlin Street, on Cincinnati Street, and on West Fall—during the period of 2011 to 2013.

On the evening of Sunday, September 15, 2013, Leslie was at a laundromat with her two children. D.S. was eight years old and in the third grade. At some point, D.S. told Leslie, "My daddy molested me." When Leslie asked D.S. when the last time this happened, D.S. responded, "It was Thursday," which was September 12, 2013. Leslie said that on September 12, appellant stayed with D.S. and J.S. at her home while she was away.

After the September 15 outcry, Leslie and her children drove to the home of Leslie's mother, where D.S. told her maternal grandmother what she told Leslie. Leslie, her mother, and D.S. then drove to appellant's mother's house, where D.S. repeated what happened. Leslie, her mother, and D.S. returned home and called the police. According to Leslie, D.S. told the police officer, "That [appellant] had molested her and the last time was on Thursday when [J.S.] was upstairs and [appellant] and [D.S.] were downstairs." Leslie testified D.S. said the first time "it happened to her" was when D.S. was in the first grade, and she stayed home because she was sick. Leslie testified she had asked appellant to stay with D.S. on this day at Leslie's apartment. According to Leslie, D.S. said appellant "took her up to [Leslie's] bed and touched her private

[1] Trial commenced on October 10, 2016 at which time D.S. was eleven years old and in the sixth grade.

areas [under her clothes]," but he "did not insert anything into her vagina." At the time, the family lived in an apartment on Riverside. D.S. also told the officer about another incident when appellant put his penis in her mouth. Leslie later brought D.S. to a doctor for a physical examination and to ChildSafe for a forensic interview.

Leslie clarified the first abuse would have occurred in 2011, when D.S. was in the first grade, and about five or six years old. Leslie said she was not aware of any sexual abuse until the 2013 outcry. However, prior to the outcry she noticed a change in D.S.'s behavior between the first and third grade. She said D.S. was at first "a typical princess girl," who dressed up as favorite storybook princesses. However, starting in first grade, she played with dolls less, began roughhousing with boys, said she wanted to be a boy, decided she wanted to cut her hair short, and was seen once by her grandmother urinating while standing up.

Tina Castillo, the San Antonio Police Officer dispatched on Leslie's call to the police, described D.S. as shy, scared, and hunched over looking at the floor. She said she was not told about any "sexual contact" occurring on Thursday, and she only knew of a "kiss" occurring on Thursday.

Caroline Briones, who was a Bexar County Community Resources forensic interviewer in 2013, interviewed D.S. at ChildSafe on October 11, 2013. Briones said D.S. could state generally what happened, but had a difficult time stating specifically what happened. Briones testified D.S. was specific about what happened the first time, but was not specific about the other times. Instead, when D.S. talked about the other incidents, she said, "that would happen. Those things would happen when I was in first and second grade and the summer. And she also said [one time on] a weekend."

D.S. told Briones the first incident of abuse happened when D.S. was home from school sick, and her father stayed with her. According to what D.S. told Briones, appellant laid D.S. on

her mother's bed, removed her pajama pants and underwear, removed his pajama pants and underwear, and then laid with the front of his body to the back of her body. D.S. said appellant put his "private against her butt," "she could feel him rubbing there," and he "was getting closer to her trying to put it in." Appellant then turned D.S. around "putting it in the front private." Appellant also made D.S. kiss him using their tongues.

D.S. also told Briones that appellant pushed her head down under the covers and put her mouth on his penis. D.S. said another time appellant made her hand go up and down on his penis. D.S. said these incidents all occurred when she was six and seven years old, while she was in the first and second grades, and in the summer between those years. D.S. told Briones nothing happened when she was eight years old and in the third grade. However, Briones clarified D.S. would have been eight years old for part of the second grade.

Dr. Nancy Kellogg preformed the medical exam on D.S. on October 28, 2013. Dr. Kellogg testified D.S. said she was six years old the first time anything happened and she was eight years old and in the third grade the last time anything happened. D.S. told Dr. Kellogg, "My dad would sometimes take care of me when I was sick. He kinda molested me." When asked to clarify "molest," D.S. said, "He touched me where he's not supposed to with his hand, mostly the lower area," and she gestured to her buttocks and her genital area. D.S. also told Dr. Kellogg that appellant touched her with his front private, "sometimes in my front private and mostly the back private," he put her hand on his private, and he made her put her mouth on his private.

D.S. testified the first incident happened when she was at home with her father because she was sick. She was asleep in her bedroom when her father picked her up and carried her to her mother's bedroom and laid her on the bed. Appellant removed her pants and underwear and removed his underwear. As they both lay under the covers, appellant made her kiss him. When she turned around, appellant "put his private into [her] behind . . . where [she] go[es] to the

restroom." She turned back again to face appellant, and he "put his private into [her] front part," which she said was where she urinates when she goes to the bathroom. Appellant laid on his back and made her hand go up and down on his penis. He also put her mouth on his penis.

D.S. said there were other times when appellant put his "private part" in her "private part," or put her mouth on his "private part." Sometimes this would happen at Leslie's home on Riverside and sometimes at appellant's residence. D.S. stated no abuse happened when she was eight years old, but she could not remember how old she was when she was in the third grade.

STANDARD OF REVIEW

When an appellant challenges the sufficiency of the evidence supporting the jury's verdict, we review all the evidence in the light most favorable to the verdict to determine whether, based on the evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). The jury is the sole judge of credibility and the weight attached to the testimony of the witnesses. *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). When the record supports conflicting inferences, we presume the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Id.* at 525-26.

COUNT TWO: INDECENCY BY EXPOSURE

As applicable here, the elements of indecency with a child by exposure are: (1) the defendant; (2) with a child less than seventeen years of age; (3) with intent to arouse or gratify the sexual desire of any person; (4) exposed his genitals; (5) knowing a child was present. *See* TEX. PENAL CODE ANN. § 21.11(a)(2)(A) (West 2011). Appellant's first issue challenges the sufficiency of the evidence on count two, which alleged that, "on or about the 12th day of September, 2013, in Bexar County, Texas, [appellant] did with the intent to arouse or gratify the sexual desire of any

person, expose part of his genitals, knowing that [the complainant], a female child, was present." Appellant argues count two is date specific and there is no evidence to support the jury's finding that he exposed himself on September 12, 2013.

D.S. made her outcry about the September 12, 2013 "Thursday" incident when she was eight years old and in the third grade. However, neither Leslie nor D.S. testified to specifically what happened on or about September 12, 2013. Courts recognize the difficulty children often have in remembering specific dates or ages, and that they frequently relate the time of the occurrence of an event to other significant dates or events, such as holidays, or seasons, or the grade they are in at school at the time of the event, as D.S. did here. *See, e.g., Michell v. State*, 381 S.W.3d 554, 561 (Tex. App.—Eastland 2012, no pet.) (child complainant could not provide specific dates of sexual abuse, but could provide details of where the abuse took place, the grade she was in, and the season of the year); *see also, e.g., Smith v. State*, 340 S.W.3d 41, 48 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (child complainant related time of abuse to when her mother was pregnant with twins and when the twins were two weeks old).

Also, the State is not required to allege a specific date in an indictment. *Sledge v. State*, 953 S.W.2d 253, 255 (Tex. Crim. App. 1997). An indictment is sufficient if, among other things, the alleged date is "anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation." TEX. CODE CRIM. PROC. ANN. art. 21.02(6) (West 2009). Thus, the "on or about" language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is before the presentment of the indictment and within the statutory limitation period. *Sledge*, 953 S.W.2d at 256. Therefore, here, the State could prove appellant exposed himself knowing D.S. was in the room on a date other than September 12, 2013 as long as the date was before September 12, 2013. There is no statute

of limitations for continuous sexual abuse of a child or indecency with a child. TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(D), (E) (West Supp. 2016).

The jury heard testimony that the abuse occurred at Leslie's home and the two locations where appellant lived between 2011 and 2013, when D.S. would have been seven to eight years old and in the second or third grade. Although D.S. said no abuse occurred when she was eight years old, she told Dr. Kellogg she was eight years old and in the third grade "the last time." We presume the jury resolved any conflicts in favor of the verdict, and we defer to that determination. We conclude the jury could have determined, beyond a reasonable doubt, the last incident of abuse occurred on or before September 12, 2013.

CONTINUOUS SEXUAL ABUSE

The offense of continuous sexual abuse of a child has five elements: (1) a person (2) who is seventeen or older (3) commits a series of two or more acts of sexual abuse (4) during a period of thirty or more days in duration, and (5) each time the victim is younger than fourteen. TEX. PENAL CODE ANN. § 21.02(b) (West Supp. 2016). The State alleged six acts of sexual abuse against D.S. Three acts alleged appellant penetrated D.S.'s mouth, sexual organ, and anus with appellant's sexual organ. Three acts alleged sexual contact: appellant touched D.S.'s genitals, appellant caused D.S. to touch part of his genitals, and appellant touched D.S.'s anus. The State alleged the acts occurred in a period of thirty days or more occurring between October 1, 2011 and September 12, 2013. Although the State alleged six acts of sexual abuse against D.S., the State was not required to prove all of the acts of sexual abuse charged in the indictment. Instead, the State was required to show, at a minimum, only that appellant committed two of the alleged acts of sexual abuse against D.S. during a period of at least thirty days in duration. *See id.* § 21.02(b)(1).

In his second issue, appellant's complaint focuses on whether the State proved sexual assault happened at least twice during a period more than thirty days apart. According to appellant,

the six instances of sexual abuse are attributable to the "first time" or one single day in Leslie's home. Appellant contends there is no evidence these events occurred anywhere else with any specificity to establish the "more than thirty day" period.

The Texas Legislature "created the offense of continuous sexual abuse of a child in response to a need to address sexual assaults against young children who are normally unable to identify the exact dates of the offenses when there are ongoing acts of sexual abuse." *Baez v. State*, 486 S.W.3d 592, 595 (Tex. App.—San Antonio 2015, pet. ref'd) (quoting *Michell*, 381 S.W.3d at 561). Although the exact dates of the abuse do not need to be proven, "[t]he jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse." TEX. PENAL CODE § 21.02(d). Also, the jury is not required to unanimously agree on which specific acts of sexual abuse defendant committed or the exact date on which those acts were committed. *Baez*, 486 S.W.3d at 595.

The jury heard testimony that the abuse started in 2011 at Leslie's apartment when D.S. was in the first grade and either five or six years old, and occurred again at the two locations where appellant lived between 2011 and 2013, when D.S. would have been seven to eight years old and in the second or third grade. Although D.S. said no abuse occurred when she was eight years old, she told Dr. Kellogg she was eight years old and in the third grade "the last time." Although D.S. provided details about the first incident, when she was in the first grade, D.S. could not provide details about the later other incidents. However, D.S. referred to "other incidents" during the time period when she was in the first and second grade, the summer, and a weekend, and occurring at her mother's apartment and one or both of appellant's residences.

Because the jury heard testimony that the abuse happened more than one time and at more than one location, we conclude a rational trier of fact could have found appellant committed two or more acts of sexual abuse over a span of thirty or more days. Therefore, the evidence is legally

sufficient to establish that element of the offense. *See Williams v. State*, 305 S.W.3d 886, 890 (Tex. App.—Texarkana 2010, no pet.) (J.A. said the acts occurred "more than twice," but was unable to speak to the span of time over which these abuses occurred; J.A.'s mother said she asked J.A., "How many times did he do that to you?" and J.A. replied, "Just about every time that I went out there to stay with grandmother." The mother testified that, as part of her normal habit or routine, whenever she went to work early in the morning, J.A. went to stay with her grandparents, and the mother regularly worked these early morning shifts during the five-month period alleged in the indictment.).

CONCLUSION

We overrule appellant's issues on appeal and affirm the trial court's judgment.

Sandee Bryan Marion, Chief Justice

Do not publish

APPENDIX D

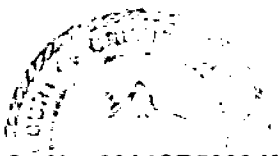
TEXAS COURT OF CRIMINAL APPEALS'
SUMMARY DENIAL of

Motion to STAY and Motion to Supplement the Writ Record

No. WR-90,899-02

July 23, 2020

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711



7/23/2020

SALAZAR, PAUL **Tr. Ct. No. 2014CR5303-W1** **WR-90,899-02**

On this day, this Court has denied applicant's "MOTIN FOR COURT TO CAUSE DISTRICT CLERK TO INCLUDE OMITTED ITEMS IN SUPPLEMENTAL CLERK'S (WRIT) RECORD";"MOTION TO STAY HABEAS PROCEEDINGS PENDING THE FILING OF EVIDENCE IN THE TRIAL COURT..."; "MOTION TO STRIKE THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW NOT SIGNED BY THE JUDGE PRESIDING..."; "MOTION TO REMAND TO THE TRAIL COURT FOR ADDIITONAL FACT FINDING AND OBJECTIONS TO THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW"

Deana Williamson, Clerk

PAUL SALAZAR
HUGHES UNIT - TDC # 2103847
RT. 2, BOX 4400
GATESVILLE, TX 76597

APPENDIX E

TEXAS COURT OF CRIMINAL APPEALS'
SUMMARY DENIAL of

Motion to Address Procedural Due Process Concerns Common in PRO SE Cases

(from mandamus case)

No. WR-90,899-01

APPENDIX F

EXTENDED STATUTORY PROVISIONS

Art. 11.07, Texas Code Criminal Procedure

Rule 73, Texas Rules of Appelate Procedure

*** FRONT AND BACK COPIES ***

county, to the detriment of the health of the neighborhood. The bond shall be signed by the defendant and his sureties and dated, and shall be approved by the court taking the same, and filed in such court.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

Art. 9.04. Suit upon bond

Any such bond, upon the breach thereof, may be sued upon by the district or county attorney, in the name of the State of Texas, within two years after such breach, and not afterwards; and such suits shall be governed by the same rules as civil actions.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

Art. 9.05. Proof

It shall be sufficient proof of the breach of any such bond to show that the party continued after executing the same, to carry on the trade, business or occupation which he bound himself to discontinue; and the full amount of such bond may be recovered of the defendant and his sureties.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

Art. 9.06. Unwholesome food

After conviction for selling unwholesome food or adulterated medicine, the court shall enter and issue an order to the sheriff or other proper officer to seize and destroy such as remains in the hands of the defendant.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

CHAPTER TEN. OBSTRUCTIONS OF PUBLIC HIGHWAYS

Article
10.01 to 10.03. Repealed.

Arts. 10.01 to 10.03. Repealed by Acts 2019, 86th Leg., ch. 467 (H.B. 4170), § 20.002, eff. Sept. 1, 2019

HABEAS CORPUS

CHAPTER ELEVEN. HABEAS CORPUS

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Art. 11.01. What writ is

The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

Art. 11.02. To whom directed

The writ runs in the name of "The State of Texas". It is addressed to a person having another under restraint, or in his custody, describing, as near as may be, the name of the office, if any, of the person to whom it is directed, and the name of the person said to be detained. It shall fix the time and place of return, and be signed by the judge, or by the clerk with his seal, where issued by a court.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

Art. 11.03. Want of form

The writ of habeas corpus is not invalid, nor shall it be disobeyed for any want of form, if it substantially appear that it is issued by competent authority, and the writ sufficiently show the object of its issuance.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

Art. 11.04. Construction

Every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

Art. 11.05. By whom writ may be granted

The Court of Criminal Appeals, the District Courts, the County Courts, or any Judge of said Courts, have power to issue the writ of habeas corpus; and it is their duty, upon proper motion, to grant the writ under the rules prescribed by law.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

Art. 11.051. Filing Fee Prohibited

Notwithstanding any other law, a clerk of a court may not require a filing fee from an individual who files an application or petition for a writ of habeas corpus.

Added by Acts 1999, 76th Leg., ch. 392, § 1, eff. Aug. 30, 1999.

Art. 11.06. Returnable to any county

Before indictment found, the writ may be made returnable to any county in the State.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966.

Art. 11.07. Procedure after conviction without death penalty

Sec. 1. This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

Sec. 2. After indictment found in any felony case, other than a case in which the death penalty is imposed, and before conviction, the writ must be made returnable in the county where the offense has been committed.

Sec. 3. (a) After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.

(b) An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law. The clerk of that court shall make appropriate notation thereof, assign to the case a file number (ancillary to that of the conviction being challenged), and forward a copy of the application by certified mail, return receipt requested, by secure electronic mail, or by personal service to the attorney representing the state in that court, who shall answer the application not later than the 15th day after the date the copy of the application is received. Matters alleged in the application not admitted by the state are deemed denied.

(c) Within 20 days of the expiration of the time in which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement. Confinement means confinement for any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus. If the

convicting court decides that there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the application, any answers filed, and a certificate reciting the date upon which that finding was made. Failure of the court to act within the allowed 20 days shall constitute such a finding.

(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection. The state shall pay the cost of additional forensic testing ordered under this subsection, except that the applicant shall pay the cost of the testing if the applicant retains counsel for purposes of filing an application under this article. The convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided in Article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. On completion of the transcript, the reporter shall immediately transmit the transcript to the clerk of the convicting court. After the convicting court makes findings of fact or approves the findings of the person designated to make them, the clerk of the convicting court shall immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as official records used by the court in resolving issues of fact.

(e) For the purposes of Subsection (d), "additional forensic testing" does not include forensic DNA testing as provided for in Chapter 64.

Sec. 4. (a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or

(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.

(b) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(c) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Sec. 5. The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the applicant to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

Sec. 6. Upon any hearing by a district judge by virtue of this Act, the attorney for applicant, and the state, shall be given at least seven full days' notice before such hearing is held.

Sec. 7. When the attorney for the state files an answer, motion, or other pleading relating to an application for a writ of habeas corpus or the court issues an order relating to an application for a writ of habeas corpus, the clerk of the court shall mail or deliver to the applicant a copy of the answer, motion, pleading, or order.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722, eff. Jan. 1, 1966. Amended by Acts 1967, 60th Leg., p. 1734, ch. 659, § 7, eff. Aug. 28, 1967; Acts 1973, 63rd Leg., p. 1271, ch. 465, § 2, eff. June 14, 1973; Acts 1977, 65th Leg., p. 1974, ch. 789, § 1, eff. Aug. 29, 1977; Acts 1979, 66th Leg., p. 1017, ch. 451, § 1, eff. Sept. 1, 1979; Acts 1995, 74th Leg., ch. 319, § 5, eff. Sept. 1, 1995; Acts 1999, 76th Leg., ch. 580, § 2, eff. Sept. 1, 1999; Acts 2007, 80th Leg., ch. 1006, § 1, eff. Sept. 1, 2007; Acts 2013, 83rd Leg., ch. 78 (S.B. 354), § 1, eff. May 18, 2013; Acts 2013, 83rd Leg., ch. 648 (H.B. 833), § 1, eff. Sept. 1, 2013.

Art. 11.071. Procedure in death penalty case

Sec. 1. Application to Death Penalty Case

Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Sec. 2. Representation by Counsel

(a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital and forensic writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital and forensic writs or, if the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section, the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) Repealed by Acts 2009, 81st Leg., ch. 781, § 11.

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital and forensic writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital and forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code. [1]

Sec. 2A. State Reimbursement; County Obligation

(a) The state shall reimburse a county for compensation of counsel under Section 2, other than for compensation of counsel employed by the office of capital and forensic writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital and forensic writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed $25,000. Compensation and expenses in excess of the $25,000 reimbursement provided by the state are the obligation of the county.

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed $25,000.

(c) The limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement, and a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement.

Notes and Comments

Comment to 2002 change: A requirement that briefs include a statement regarding oral argument is added.

71.4. Additional Briefs

Upon motion by a party the Court may permit the filing of additional briefs other than those provided for in Rule 38.

Adopted by Court of Criminal Appeals Dec. 11, 2013, eff. Jan. 1, 2014.

Rule 72. Extraordinary Matters

Notes and Comments

Comment to 1997 change: This is former Rule 211. The rule is amended to include all the Court's jurisdiction of extraordinary matters. Internal procedures of the Court are deleted. Other nonsubstantive changes are made.

72.1. Leave to File

A motion for leave to file must accompany an original petition for writ of habeas corpus, mandamus, procedendo, prohibition, certiorari, or other extraordinary writ, or any other motion not otherwise provided for in these rules.

Eff. Sept. 1, 1997.

72.2. Disposition

If five judges tentatively believe that the case should be filed and set for submission, the motion for leave will be granted and the case will then be handled and disposed of in accordance with Rule 52.8. If the motion for leave is denied, no motions for rehearing or reconsideration will be entertained. But the Court may, on its own initiative, reconsider a denial of a motion for leave.

Eff. Sept. 1, 1997. Amended by Court of Criminal Appeals Jan. 23, 2017, and Supreme Court Jan. 25, 2017, eff. Feb. 1, 2017.

Rule 73. Postconviction Applications for Writs of Habeas Corpus

Notes and Comments

Comment to 2000 change: Rules 73.1 and 73.2 are added, and a form is added in an appendix.

The Court of Criminal Appeals order dated October 16, 2000, provides in part:

"2. These changes take effect January 1, 2001. Unless this order provides otherwise, they shall govern all proceedings in motions for new trial, appeals, petitions for discretionary review, and petitions or applications for extraordinary writs thereafter brought and in all such proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which case the former procedure may be followed.

"3. The notes and comments appended to these changes are incomplete, are included only for the convenience of the bench and bar, and are not a part of the rules."

Comment to 1997 change: This is former Rule 4 of the Appendix for Criminal Cases. The rule is amended without substantive change.

73.1. Form for Application Filed Under Article 11.07 of the Code of Criminal Procedure

(a) *Prescribed Form.* An application filed under Article 11.07 must be on the form prescribed by the Court of Criminal Appeals.

(b) *Availability of Form.* The district clerk of the county of conviction shall make the form available to applicants on request, without charge.

(c) *Contents.* The applicant or petitioner must provide all information required by the form. The form must include all grounds for relief and set forth in summary fashion the facts supporting each ground. Any ground not raised on the form will not be considered. Legal citations and arguments may be made in a separate memorandum. The form must be computer-generated, typewritten, or legibly handwritten.

(d) *Length.* Each ground for relief and supporting facts raised on the form shall not exceed the two pages provided for each ground in the form. The applicant or petitioner may file a separate memorandum. This memorandum shall comply with these rules and shall not exceed 15,000 words if computer-generated or 50 pages if not. If the total number of pages, including those in the original and any additional memoranda, exceed the word or page limits, an application may be dismissed unless the convicting court for good cause shown grants leave to exceed the prescribed limits. The prescribed limits do not include appendices, exhibits, cover page, table of contents, table of authorities, and certificate of compliance.

(e) *Typeface.* A computer-generated memorandum must be printed in a conventional typeface no smaller than 14-point except for footnotes, which must be no smaller than 12-point. A typewritten document must be printed in standard 10-character-per-inch (cpi) monospaced typeface.

(f) *Certificate of compliance.* A computer-generated memorandum, including any additional memoranda, must include a certificate by the applicant or petitioner stating the number of words in the document. The person certifying may rely on the word count of the computer program used to prepare the document.

(g) *Verification.* The application must be verified by either:

(1) oath made before a notary public or other officer authorized to administer oaths; or

(2) an unsworn declaration in substantially the form required by Civil Practice and Remedies Code chapter 132 as set out in the verification section of the application form.

Adopted by Court of Criminal Appeals Aug. 10, 2000 and Oct. 16, 2000, eff. Jan. 1, 2001; adopted by Supreme Court Sept. 12, 2000, eff. Jan. 1, 2001. Amended Dec. 11, 2013, eff. Jan. 1, 2014; Nov. 5, 2018, eff. Dec. 1, 2018.

73.2. Non-Compliant Applications

The Court of Criminal Appeals may dismiss an application that does not comply with these rules.

Adopted by Court of Criminal Appeals Aug. 10, 2000 and Oct. 16, 2000, eff. Jan. 1, 2001; adopted by Supreme Court Sept. 12, 2000, eff. Jan. 1, 2001. Amended by Court of Criminal Appeals Dec. 11, 2013, eff. Jan. 1, 2014.

73.3. State's Response

Any response by the State must comply with length, typeface, and certificate of compliance requirements set out in rule 73.1 (d),(e) and (f).

Adopted by Court of Criminal Appeals Dec. 11, 2013, eff. Jan. 1, 2014.

73.4. Filing and Transmission of Habeas Record

(a) The district clerk of the county of conviction shall accept and file all Code of Criminal Procedure article 11.07 applications.

(b) In addition to the duties set out in Article 11.07, the district clerk shall do the following:

(1) If the convicting court enters an order designating issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of that order and proof of the date the district attorney received the habeas application.

(2) When any pleadings, objections, motions, affidavits, exhibits, proposed or entered findings of fact and conclusions of law, or other orders are filed or made a part of the record, the district clerk shall immediately send a copy to all parties in the case. A party has ten days from the date he receives the trial court's findings of fact and conclusions of law to file objections, but the trial court may, nevertheless, order the district clerk to transmit the record to the Court of Criminal Appeals before the expiration of the ten days. Upon transmission of the record, the district clerk shall immediately notify all parties in the case.

(3) When a district clerk transmits the record in a postconviction application for a writ of habeas corpus under Code of Criminal Procedure articles 11.07 or 11.071, the district clerk must prepare and transmit a summary sheet that includes the following information:

(A) the convicting court's name and county, and the name of the judge who tried the case;

(B) the applicant's name, the offense, the plea, the cause number, the sentence, and the date of sentence, as shown in the judgment of conviction;

(C) the cause number of any appeal from the conviction and the citation to any published report;

(D) whether a hearing was held on the application, whether findings of fact were made, any recommendation of the convicting court, and the name of the judge who presided over the application;

(E) the name of counsel if applicant is represented; and

(F) the following certification:

I certify that all applicable requirements of Texas Rule of Appellate Procedure 73.4 have been complied with in this habeas proceeding, including the requirement to serve on all the parties in the case any objections, motions, affidavits, exhibits, proposed findings of fact and conclusions of law, findings of fact and conclusions of law, and any other orders entered or pleadings filed in the habeas case.

_____ _____

Signature of District Clerk or Clerk's Representative — Date Signed

The Court of Criminal Appeals may by order adopt a form of summary sheet that the district clerks must use.

(4) The district clerk shall also include in the record transmitted to the Court of Criminal Appeals, among any other pertinent papers or supplements, the indictment or information, any plea papers, the court's docket sheet, the court's charge and the jury's verdict, any proposed findings of fact and conclusions of law, the court's findings of fact and conclusions of law, any objections to the court's

findings of fact and conclusions of law filed by either party, and the transcript of any hearings held.

(5) On the 181st day from the date of receipt of the application by the State of a postconviction application for writ of habeas corpus under Article 11.07, the district clerk shall forward the writ record to this Court unless the district court has received an extension of time from the Court of Criminal Appeals pursuant to Rule 73.5.

Former Rule 73.1 adopted eff. Sept. 1, 1997. Renumbered as Rule 73.3 by Court of Criminal Appeals Nov. 8, 2000, eff. Jan. 1, 2001. Renumbered as Rule 73.4 and amended by Court of Criminal Appeals Dec. 11, 2013, eff. Jan. 1, 2014. Amended by orders of Supreme Court February 16, 2016, and Court of Criminal Appeals Dec. 7, 2015, and February 29, 2016, eff. Jan. 1, 2016; Nov. 5, 2018, eff. Dec. 1, 2018.

73.5. Time Frame for Resolution of Claims Raised in Application

Within 180 days from the date of receipt of the application by the State, the convicting court shall resolve any issues that the court has timely designated for resolution. Any motion for extension of time must be filed in the Court of Criminal Appeals before the expiration of the 180–day period.

Adopted by Court of Criminal Appeals Dec. 11, 2013, eff. Jan. 1, 2014.

73.6. Action on Application

The Court may deny relief based upon its own review of the application or may issue such other instructions or orders as may be appropriate.

Former Rule 73.2 adopted eff. Sept. 1, 1997. Renumbered as Rule 73.4 by Court of Criminal Appeals Nov. 8, 2000, eff. Jan. 1, 2001. Renumbered as Rule 73.6 by Court of Criminal Appeals Dec. 11, 2013, eff. Jan. 1, 2014.

73.7. New Evidence After Application Forwarded to Court of Criminal Appeals

If an Article 11.07 or 11.071 application has been forwarded to this Court, and a party wishes this Court to consider evidence not filed in the trial court, then the party must comply with the following procedures or the evidence will not be considered.

(a) If the Court of Criminal Appeals has received an Article 11.07 or 11.071 application from the district clerk of the county of conviction and has filed and set the application for submission, a party has two options:

(1) The party may file the evidence directly in the Court of Criminal Appeals with a motion for the Court of Criminal Appeals to consider the evidence. In this motion, the party should describe the evidence, explain its evidentiary value, and state why compelling and extraordinary circumstances exist for the Court of Criminal Appeals to consider the evidence directly. The moving party must immediately serve copies of the motion and the evidence the party seeks to file on the other party or parties in the case. If the Court of Criminal Appeals grants this motion, the Court will consider the evidence in its review of the application. The Court of Criminal Appeals will grant such a motion only if the Court concludes the circumstances are truly exceptional.

(2) The party may file in the Court of Criminal Appeals a motion to supplement the record in the trial court. In this motion, the party should describe the evidence the party intends to file, explain its evidentiary value, and state why the evidence could not have been filed in the trial court before the Court of Criminal Appeals filed and set the application for submission. The moving party must immediately serve copies of the motion and the evidence the party seeks to file on the other party or parties in the case. If the Court of Criminal Appeals grants the motion, the party may file the evidence with the district clerk of the county of conviction, and should attach a copy of the motion to supplement and the Court of Criminal Appeals' order granting said motion. The district clerk shall immediately send a copy of the filed materials to the trial judge assigned to the habeas case and to the other party or parties in the case, and otherwise comply with the procedures set out in Rule 73.4(b) of these rules.

(b) If the Court of Criminal Appeals has received an Article 11.07 or 11.071 application from the district clerk of the county of conviction, but the Court has not yet filed and set the application for submission, the party must file in the Court of Criminal Appeals a motion to stay the proceedings pending the filing of the evidence in the trial court. In this motion, the party should describe the evidence the party intends to file and explain its evidentiary value. The moving party must immediately serve copies of the motion and the evidence the party seeks to file on the other party or parties in the case. If the Court of Criminal Appeals grants the motion, the Court will specify a designated time frame for the party to file the evidence with the district clerk of the county of conviction. The party should attach a copy of the motion to stay proceedings and the Court of Criminal Appeals' order granting said motion to the evidentiary filing. The district clerk of the county of conviction shall

immediately send a copy of the filed materials to the trial judge assigned to the habeas case and to the other party or parties in the case, and otherwise comply with the procedures set out in Rule 73.4(b) of these rules.

Adopted by Court of Criminal Appeals Jan. 23, 2017 and Supreme Court Jan. 25, 2017, eff. Feb. 1, 2017.

Rule 74. Review of Certified State Criminal-Law Questions

Notes and Comments

Comment to 1997 change: This is former Rule 214. The rule is amended without substantive change.

74.1. Certification

The Court of Criminal Appeals may answer questions of Texas criminal law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas criminal law having no controlling Court of Criminal Appeals precedent. The Court may decline to answer the questions certified to it.

Eff. Sept. 1, 1997.

74.2. Contents of the Certification Order

An order from the certifying court must set forth:

(a) the questions of law to be answered; and

(b) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose.

Eff. Sept. 1, 1997.

74.3. Transmission of Certification Order

The clerk of the certifying court must send to the clerk of the Court of Criminal Appeals the following:

(a) the certification order under the certifying court's official seal;

(b) a list of the names of each party to the pending case, giving the address and telephone number, if known, of any party not represented by counsel; and

(c) a list of the names and addresses of counsel for each party.

Eff. Sept. 1, 1997.

74.4. Transmission of Record

The certifying court should not send to the Court of Criminal Appeals the record in the pending case with the certification order. The Court of Criminal Appeals may later require the original or copies of all or part of the record before the certifying court to be filed with the Court of Criminal Appeals clerk.

Eff. Sept. 1, 1997.

74.5. Notice

If the Court of Criminal Appeals agrees to answer the questions certified to it, the Court will notify all parties and the certifying court. The Court of Criminal Appeals clerk must also send a notice to the Attorney General of Texas if:

(a) the constitutionality of a Texas statute is the subject of a certified question that the Court of Criminal Appeals has agreed to answer; and

(b) the State of Texas or an officer, agency, or employee of the State is not a party to the proceeding in the certifying court.

Eff. Sept. 1, 1997.

74.6. Briefs and Oral Argument

(a) *Briefs.* The appealing party in the certifying court must file a brief with the clerk of the Court of Criminal Appeals within 30 days after the date of the notice. Opposing parties must file an answering brief within 15 days of receiving the opening brief. Briefs must comply with Rule 38[1] to the extent that its provisions apply.

(b) *Oral Argument.* Oral argument may be granted either on a party's request or on the Court's own initiative. Argument is governed by Rule 39.[2]

Eff. Sept. 1, 1997.

[1] Vernon's Ann.Rules App.Proc., rule 38.1 et seq.

[2] Vernon's Ann.Rules App.Proc., rule 39.1 et seq.

74.7. Intervention by the State

If the constitutionality of a Texas statute is the subject of a certified question that the Court of Criminal Appeals has agreed to answer, the State of Texas may intervene at any reasonable time for briefing and oral argument (if argument is allowed) on the question of constitutionality.

Eff. Sept. 1, 1997.

74.8. Opinion on Certified Question

If the Court of Criminal Appeals has agreed to answer a certified question, it will hand down an opinion as in any other case.

Eff. Sept. 1, 1997.