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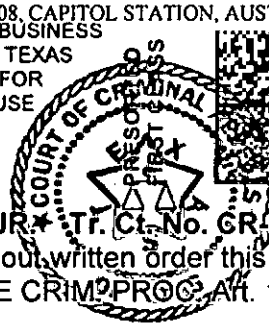

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RODRIGUEZ, HUMBERTO JR. Tr. Ct. No. CR-0403-00-A(2) WR-81,853-02

The Court has dismissed without written order this subsequent application for a writ of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

HUMBERTO RODRIGUEZ JR.
HUGHES UNIT - TDC # 1017893
RT. 2, BOX 4400
GATESVILLE, TX 76597

194-54

AB 76597

Appx. 1

S.F.
1-17

Cause No. CR-0403-00-A(2)

Ex parte	§	**In the District Court**
	§	
Humberto Rodriguez,	§	**92nd Judicial District of**
	§	
Applicant	§	**Hidalgo County, Texas**

STATE'S RESPONSE TO APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM FINAL FELONY CONVICTION UNDER CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas, by and through the Criminal District Attorney of Hidalgo County, and files this Response to Application for a Writ of Habeas Corpus Seeking Relief from Final Felony Conviction under Code of Criminal Procedure, Article 11.07, and would show that, pursuant to Section 3 of Article 11.07 of the Texas Code of Criminal Procedure, no hearing is necessary in this matter; and that, in fact, the application for a writ of *habeas corpus* should be **DISMISSED**.

Nature of the Case

Applicant was indicted on one count of Capital Murder and one count of Aggravated Kidnapping. Applicant was found guilty by a jury and was automatically sentenced to life imprisonment on count one and 28 years imprisonment on count two.

Statement of Facts

The records of the case below reflect the following:

1. Applicant was indicted on one count of Capital Murder (count one) and one count of Aggravated Kidnapping (count two).
2. On October 24, 2000, the jury returned a verdict of "Guilty" on the charge of Capital Murder and on the charge of Aggravated Kidnapping. The State having waived the Death penalty, the Trial Court sentenced Applicant to an automatic sentence of Life imprisonment on count one, the jury assessed a sentence of 28 years imprisonment on count two.
3. Applicant filed a Notice of Appeal and on August 14, 2003, the Thirteenth Court of Appeals reversed in part and affirmed in part Applicant's conviction in an unpublished memorandum opinion. [13-00-00771-CR].
4. On October 13, 2004, the Texas Court of Criminal Appeals reversed and remanded this cause to the Thirteenth Court of Appeals. [Rodriguez v. State, 146 S.W.3d 674 (Tex. Crim. App. 2004)].
5. On October 18, 2007, the Thirteenth Court of Appeals affirmed Applicant's conviction in an unpublished memorandum opinion. [13-00-00771-CR].
6. Mandate issued on March 7, 2008.

7. On April 28, 2014, Applicant filed his first application (hereinafter cited as "AA[1]") for writ of *habeas corpus* under the Texas Code of Criminal Procedure, Article 11.07, alleging: (1) Actual Innocence – no intent; (2) Actual Innocence – State didn't prove cause of death; (3) Legally innocent; (4) Indictment void; (5) State lacked jurisdiction over murder; (6) Conflict of interest with trial counsel also acting as appellate counsel; (7) Ineffective assistance of counsel – failure to object to jury charge; (8) Ineffective assistance of appellate counsel – didn't represent applicant on remand and, (9) Unconstitutional scheme.
8. The State of Texas was served on June 6, 2014 and filed a response to Applicant's first application for writ of *habeas corpus* on June 23, 2014.
9. On January 21, 2015, the Court of Criminal Appeals issued a mandate vacating the judgment in Count Two of Cause No. CR-0403-00-A.
10. Applicant now files his second application for writ of *habeas corpus* alleging the existence of a new law that was not considered during the time of his first application.
11. The State of Texas was served with applicant's second writ of *habeas corpus* on May 26, 2020, and the State's response is, therefore, due no later than June 10, 2020. *See* TEX. CODE CRIM. PROC. art. 11.07 § 3(b) (2018).

[1] Applicant continued the pagination from his application into his memo.

12. This Court must determine whether or not there are controverted, previously unresolved facts material to the legality of Applicant's confinement no later than June 30, 2020. *See id.* at § 3(c).

Argument

I. Lack of Jurisdiction.

In his sole ground, Applicant alleges that the State lacked jurisdiction. Applicant's allegation is based on the faulty premise that because the murder happened in Mexico the State of Texas lacked jurisdiction. This issue was raised in Applicant's first application for writ of *habeas corpus*; the Court of Criminal Appeals rejected said argument. This issue was also raised by Applicant on direct appeal, and the Court of Criminal Appeals rejected the argument there as well. Because the kidnapping—which occurred in Texas—was an element of the offense, the State retained jurisdiction of the Capital Murder charge. *See Rodriguez v. State*, 146 S.W.3d 674 (Tex. Crim. App. 2004). Applicant does not get another bite at the proverbial apple; any claims raised on direct appeal are barred from reconsideration on post conviction writ. *See Ex parte Schuessler*, 846 S.W.2d 850 (Tex. Crim. App 1993).

Moreover, according to article 11.07 of the Code of Criminal Procedure, subsequent applications for a writ of *habeas corpus* are generally barred from consideration by the court:

> 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:
>
> a. 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
>
> b. 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.
>
> TEX. CODE CRIM. PROC. art. 11.07, §4(a) (2011).

The claim raised in Applicant's second habeas application involves a challenge to the conviction for "want of extra-territorial jurisdiction." However, Applicant fails to include sufficient specific facts establishing that his current claim could not have been presented previously because the factual or legal basis for the claim was unavailable as is required. *See, e.g., Ex parte Evans*, 964 S.W.2d 643, 647 (Tex. Crim. App. 1998). The writ application fails to set forth sufficient facts establishing that an exception exists to article 11.07's prohibition against subsequent writs.

Applicant claims that the Court of Criminal Appeals erred in holding that the State of Texas had jurisdiction based on a civil case from the Supreme Court of the United States, viz. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016).

However, Applicant fails to present any authority showing that the civil case that he relies on has any bearing on the ruling from the Court of Criminal Appeals. In *RJR Nabisco*, the Supreme Court of the United States settled a civil issue between private entities arising from racketeering. *See id.*

The Supreme Court in RJR Nabisco states as follows:

> It is a basic premise of our legal system that, in general, "United States law governs domestically but does not rule the world." Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454, 127 S. Ct. 1746, 167 L. Ed. 2d 737 (2007). This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010). The question is not whether we think "Congress would have wanted" a statute to apply to foreign conduct "if it had thought of the situation before the court," but whether Congress has affirmatively and unmistakably instructed that the statute will do so. Id., at 261, 130 S. Ct. 2869, 177 L. Ed. 2d 535. "When a statute gives no clear indication of an extraterritorial application, it has none." Id., at 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535.

RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016).

The above quote shows that the case relied on by Applicant deals with basic premises of the legal system as applied to federal statutes. The quote also shows that the authority that the Supreme Court relied on existed at the time that the Court of Criminal Appeals rejected Applicant's argument. Therefore, Applicant has not presented any new authority that did not exist at the time, and the authority that Applicant presents is not applicable to the Capital Murder crime under the

laws of Texas, wherein one of the elements of the crime—the kidnapping—occurred in Texas. Furthermore, the State finds no such authority that might support Applicant's allegation that *RJR Nabisco* overrules the decision from the Court of Criminal Appeals. Applicant's sole ground is without merit and should be **dismissed**.

WHEREFORE, PREMISES CONSIDERED, the State prays that the Court enter findings of fact and conclusions of law, and recommend that the application for a writ of habeas corpus be dismissed.

Respectfully submitted,

/s/ Rodolfo Martinez, Jr.
Rodolfo Martinez, Jr., Assistant
Criminal District Attorney
State Bar No. 24092769

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Certificate of Compliance

I hereby certify that this document is in compliance with TEX. R. APP. P. 73.3 and has the following number of words: 1859.

/s/ Rodolfo Martinez, Jr.
Rodolfo Martinez, Jr.

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Cause No. CR-0403-00-A(2)

Ex parte	§	**In the District Court**
	§	
Humberto Rodriguez,	§	**92nd Judicial District of**
	§	
Applicant	§	**Hidalgo County, Texas**

FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION AND ORDER

Having considered the application for writ of habeas corpus, the State's response and all supplements and amendments thereto, and the Court's files in the above-numbered cause, including records of the underlying criminal case, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Applicant was indicted on one count of Capital Murder (count one) and one count of Aggravated Kidnapping (count two).
2. On October 24, 2000, the jury returned a verdict of "Guilty" on the charge of Capital Murder and on the charge of Aggravated Kidnapping. Because the State waived the Death penalty, the Trial Court sentenced Applicant to an

automatic sentence of Life imprisonment on count one. The jury assessed a sentence of 28 years imprisonment on count two.

3. Applicant requested trial counsel act as appellate counsel through a motion filed by said trial counsel. Trial counsel was not conflicted out.
4. Applicant filed a Notice of Appeal and on August 14, 2003, the Thirteenth Court of Appeals reversed in part and affirmed in part Applicant's conviction in an unpublished memorandum opinion. [13-00-00771-CR].
5. On October 13, 2004, the Texas Court of Criminal Appeals, after granting the State's petition for discretionary review, reversed and remanded this cause back to the Thirteenth Court of Appeals. [Rodriguez v. State, 146 S.W.3d 674 (Tex. Crim. App. 2004)].
6. Applicant was not abandoned by his appellate counsel upon remand to the Thirteenth Court of Appeals. Said counsel filed a supplemental brief with the Thirteenth Court of Appeals.
7. On October 18, 2007, the Thirteenth Court of Appeals affirmed Applicant's conviction in an unpublished memorandum opinion. [13-00-00771-CR]
8. Mandate issued on March 7, 2008.
9. On April 28, 2014, Applicant filed his first application for writ of habeas corpus under the Texas Code of Criminal Procedure, Article 11.07, alleging: (1) Actual Innocence – not intent; (2) Actual Innocence – State didn't prove cause of

death; (3) Legally innocent; (4) Indictment void; (5) State lacked jurisdiction over murder; (6) Conflict of interest with trial counsel also acting as appellate counsel; (7) Ineffective assistance of counsel – failure to object to jury charge; (8) Ineffective assistance of appellate counsel – didn't represent applicant on remand and, (9) Unconstitutional scheme.

10. The State of Texas was served on June 6, 2014 and filed a response to Applicant's first application for writ of *habeas corpus* on June 23, 2014.

11. On January 21, 2015, the Court of Criminal Appeals issued a mandate vacating the judgment in Count Two of Cause No. CR-0403-00-A. [Exhibit 1 hereto, a copy of the mandate].

12. Applicant now files his second application for writ of *habeas corpus* alleging the existence of a new law that was not considered during the time of his first application.

13. The State of Texas was served with applicant's second writ of *habeas corpus*.

14. This Court must determine whether or not there are controverted, previously unresolved facts material to the legality of Applicant's confinement no later than June 30, 2020.

15. Applicant alleges that the State lacked jurisdiction; Applicant's allegation is based on the faulty premise that because the murder happened in Mexico the State of Texas lacked jurisdiction.

16. Applicant's jurisdictional issue was raised in Applicant's first application for writ of *habeas corpus*; the Court of Criminal Appeals rejected said argument.

17. The jurisdictional issue was also raised by Applicant on direct appeal, and the Court of Criminal Appeals rejected the argument there as well.

CONCLUSIONS OF LAW

1. The indictment in this case properly alleged jurisdiction within the State of Texas. *See Rodriguez v. State*, 146 S.W.3d 674 (Tex. Crim. App. 2004).
2. Because the kidnapping—which occurred in Texas—was an element of the offense, the State retained jurisdiction of the Capital Murder charge. *See Rodriguez v. State*, 146 S.W.3d 674 (Tex. Crim. App. 2004).
3. Applicant does not get another bite at the proverbial apple; any claims raised on direct appeal are barred from reconsideration on post conviction writ. *See Ex parte Schuessler*, 846 S.W.2d 850 (Tex. Crim. App 1993).
4. According to article 11.07 of the Code of Criminal Procedure, subsequent applications for a writ of *habeas corpus* are generally barred from consideration by the court:

> 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:

a. 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

b. 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.

TEX. CODE CRIM. PROC. art. 11.07, §4(a) (2011).

5. Applicant fails to include sufficient specific facts establishing that his current claim could not have been presented previously because the factual or legal basis for the claim was unavailable as is required. *See, e.g., Ex parte Evans*, 964 S.W.2d 643, 647 (Tex. Crim. App. 1998).

6. The writ application fails to set forth sufficient facts establishing that an exception exists to article 11.07's prohibition against subsequent writs. TEX. CODE CRIM. PROC. art. 11.07, §4(a) (2011).

7. Applicant fails to present any authority showing that the civil case that he relies on, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016), has any bearing on the ruling from the Court of Criminal Appeals, *Rodriguez v. State*, 146 S.W.3d 674 (Tex. Crim. App. 2004).

8. The authority that the Supreme Court relied on in *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016) existed at the time that the Court of Criminal Appeals rejected Applicant's argument.

9. Applicant has not presented any new authority that did not exist at the time, and the authority that Applicant presents is not applicable to the Capital Murder crime under the laws of Texas, wherein one of the elements of the crime—the kidnapping—occurred in Texas.

RECOMMENDATION

It is the recommendation of this Court that Applicant's second application for writ of *habeas corpus* be dismissed.

ORDER

The Clerk of this Court is hereby ORDERED to certify copies of the indictment, judgment and sentence in the above-numbered cause; all filings relating to this application for Writ of *Habeas Corpus*, including the State's response and all supplements and amendments thereto; and this Findings of Facts, Conclusions of Law, Recommendation and Order; and to send the foregoing to the Texas Court of Criminal Appeals.

The Clerk is further ORDERED to provide copies of this Order to Applicant and the State.

SIGNED FOR ENTRY this 9th day of September, 2020.

Luis M. Singleton
92nd District Court

App # 6

1 of 2 DOCUMENTS

Caution
As of: Dec 08, 2011

HUMBERTO RODRIGUEZ, JR., Appellant v. THE STATE OF TEXAS

NO. 1568-03

COURT OF CRIMINAL APPEALS OF TEXAS

146 S.W.3d 674; 2004 Tex. Crim. App. LEXIS 1739

October 13, 2004, Delivered

NOTICE: [**1] PUBLISH.

SUBSEQUENT HISTORY: On remand at *Rodriguez v. State, 2007 Tex. App. LEXIS 8261 (Tex. App. Corpus Christi, Oct. 18, 2007)*

PRIOR HISTORY: ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS. HIDALGO COUNTY.
Rodriguez v. State, 2003 Tex. App. LEXIS 6962 (Tex. App. Corpus Christi, Aug. 14, 2003)

DISPOSITION: Reversed as to capital-murder conviction and remanded.

COUNSEL: For APPELLANT: Hector J. Villarreal, Edinburg, TX.

For STATE: Matthew Paul, STATE'S ATTORNEY, Austin, TX.

JUDGES: Johnson, J., delivered the unanimous opinion of the Court.

OPINION BY: Johnson

OPINION

[*675] Appellant was convicted of aggravated kidnapping and capital murder. The jury sentenced him to twenty-eight years' confinement for the aggravated kidnapping, and life imprisonment for the capital murder, [1] in which the aggravating factor was kidnapping. On appeal, the court of appeals reversed the capital murder conviction, holding that Texas did not have territorial jurisdiction over the offense. *Rodriguez v. State, 2003 Tex. App. LEXIS 6962, No. 13-00-771-CR, 2003 Tex. App. LEXIS 6962 (Tex. App. - Corpus Christi, August 14, 2003)*. On the state's petition for discretionary review, we are asked to consider whether this holding is correct. Because the kidnapping was an element of the capital murder and the kidnapping occurred in Texas, [**2] we hold that the jurisdictional requirements of *TEX. PEN. CODE § 1.04(a)(1)* are met, and we reverse the judgment of the court of appeals as to the capital murder.

1 The state did not seek the death penalty.

Appellant participated in a conspiracy to kidnap Hector Salinas, a potential government witness in a pending federal drug trial. [2] Salinas was taken from his used-clothing store in McAllen, Texas, and transported to Mexico, where he was tortured and killed.

2 After Salinas' disappearance, all seven defendants were acquitted.

Section 1.04(a)(1) of the Texas Penal Code provides for territorial jurisdiction "if either the conduct or a result that is an element of the offense occurs inside this state." We read this language in a manner that avoids ambiguity and [*676] absurd results. Thus, we hold [**3] that the phrase "that is an element of the offense" applies to both

"conduct" and "result."

Section 1.04(b) also defines the result element: "If the offense is criminal homicide, a 'result' is either the physical impact causing death or the death itself." It is undisputed that the result element of this murder did not occur in Texas. Thus, territorial jurisdiction in this case depends on whether one or more of the conduct elements occurred in Texas.

To answer this question, the court of appeals looked to the Texas capital-murder statute, which reads in applicable part:

(a) A person commits an offense if the person commits murder as defined under *Section 19.02(b)(1)* and:

* * *

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery,

aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under *Section 22.07(a)(1)*, *(3)*, *(4)*, *(5)*, or *(6)*[.]

TEX. PENAL CODE § 19.03.

TEX. PENAL CODE § 19.02(b)(1), in turn reads:

(b) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual.

[**4] The court of appeals attached great significance to the fact that the capital-murder statute refers to the murder statute and incorporates it by reference, rather than setting out the elements of murder separately:

Because the penal code's capital murder provision explicitly directs us to its murder provision, we hold that the offense of murder or an element of murder (either the conduct or a result) must be committed within this state in order for Texas to have jurisdiction over the offense of capital murder.

*Rodriguez v. State, No. 13-00-771-CR, 2003 Tex. App. LEXIS 6962 at *8*. Because none of the elements of the murder occurred in Texas, the court of appeals held that this state was without jurisdiction over the capital murder.

The state argues that the reference to *§ 19.02(b)(1)* merely shows an intent by the legislature to limit the application of capital murder to cases in which the defendant "intentionally or knowingly causes the death of an individual," thus preventing murders committed with lesser levels of intent from being elevated to capital murder. [3]

3 The other articulated ways of committing murder, set out in *§§ 19.02(b)(2)* and *(3)*, require that a person

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than manslaughter,

and in the course of and in furtherance of the commission or attempt,

or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

TEX. PENAL CODE § 19.02

[**5] The state's argument is supported by the inclusion in *§ 19.03(a)(2)* of limitations on the use of terroristic threat for the required aggravating factor: placing a single person in fear of bodily injury is excluded, while threats which imperil numbers of people, emergency workers, or the functioning of government or public services may constitute the aggravating conduct. After reviewing the aggravating factors set out in *§ 19.03(a)(1-8)*, we are [*677] persuaded that the legislature's inclusion of the elements of *§ 19.02(b)(1)* in the capital-murder statute by reference only was not intended to require that the murder be committed in Texas, but was an expression of the legislature's desire to limit capital murder to intentional and knowing murders that are committed in circumstances that the legislature found particularly egregious.

In *Patrick v. State, 906 S.W.2d 481 (Tex. Crim. App. 1995)*, this Court discussed the elements that the state is required to prove in a prosecution for capital murder:

In proving capital murder, the State must prove that the accused intentionally or knowingly caused the death of an individual and also that the accused engaged in other criminal [**6] conduct (i.e., kidnapping, robbery, aggravated sexual assault, escape from a penal institution) or had knowledge of certain circumstances (i.e., that the victim was a peace officer). We have therefore recognized that capital murder is a result of conduct offense which also includes nature of circumstances and/or nature of conduct elements depending upon the underlying conduct which elevates the intentional murder to capital murder.

Patrick, 906 S.W.2d at 491, citing Hughes v. State, 897 S.W.2d 285 (Tex.Crim.App.1994). Thus, under our case law, the aggravating "nature of circumstances and/or nature of conduct elements" are elements of the offense

of capital murder. *See also, Reyes v. State, 84 S.W.3d 633, 636 (Tex. Crim. App. 2002).*

In this case, the state alleged and proved murder in the course of kidnapping. The kidnapping was the required aggravating "nature of conduct" element that elevated the offense from murder to capital murder. The kidnapping occurred in Texas, thus Texas has territorial jurisdiction over the offense under *Section 1.04(a)(1) of the Penal Code.*

We reverse the judgment of the [**7] court of appeals as to the capital-murder conviction, and remand the matter to that court for further action consistent with this opinion.

Johnson, J.

Delivered: October 13, 2004

Appx. # 5

NUMBER 13-00-771-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

HUMBERTO RODRIGUEZ, JR., **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 92nd District Court of Hidalgo County, Texas.

O P I N I O N

Before Chief Justice Valdez and Justices Yañez and Rodriguez
Opinion by Justice Yañez

By seven points of error, appellant Humberto Rodriguez, Jr. challenges his conviction for the aggravated kidnapping and capital murder of Hector Salinas after a jury found him guilty of both offenses. The jury assessed punishment for the aggravated kidnapping to be twenty-eight years confinement. As for the capital murder, the State did

not seek the death penalty and the judge sentenced appellant to life in prison. The trial court has certified that this case is not a plea bargain case and the defendant has the right of appeal. *See* TEX. R. APP. P. 25.2(a)(2). We affirm in part, and reverse and render in part.

I. Facts

Briefly, the State alleges appellant was part of a conspiracy to kidnap Hector Salinas in McAllen, Texas, then torture and murder him in Mexico. The following testimony outlines the evidence.

A. Non-accomplice Testimony

1. Background Regarding the Victim

DEA agent Tony Dominguez testified: Hector Salinas was arrested when drugs were found at his second-hand clothing store in McAllen on May 1, 1997; he made a deal to implicate the individuals for whom he was storing the drugs and was released the next day; and he was scheduled to testify in a federal trial on July 21, 1997.

Guadalupe Salinas, Hector's wife, testified that she saw appellant come to Hector's store the day before the kidnapping to ask him about a car in front of the store that was for sale.

2. Background Regarding Appellant

Juanita Mendoza, the wife of appellant's cousin, Victor Hugo Rojas, testified that appellant visited their home in McAllen two or three times in a green Suburban shortly before July 17, 1997, the date of the kidnapping.

Juan Garcia, an acquaintance of the appellant, testified that appellant often stayed

at a mobile home in the same area as his own and he had seen a dark Suburban parked near that mobile home.

Texas Ranger Israel Pacheco testified that, during his interview with appellant, appellant gave his address as the mobile home Garcia indicated.

3. The Crime

Eyewitnesses Pedro Magana and Jose Antonio Salinas, Hector's brother, testified: a green Suburban with dark windows arrived at Hector's store during the evening of July 17, 1997; a man got out and asked about a car that was for sale in front of the store; the man asked for Hector; after Hector identified himself, the man grabbed Hector and put a gun to his head; then, several men jumped out of the Suburban; and they pushed Hector into the Suburban. Jose Antonio further testified that the vehicle had Mexican license plates.

4. The Aftermath

Police officer Guadalupe Cavazos testified that a burned Suburban was found about a mile away from the store just hours after the kidnapping. Cavazos also testified that a can of charcoal lighter fluid, a pair of handcuffs and a beer can were found with the burned Suburban.

Lead detective Ralph Ramirez testified that he was notified of a body discovered wrapped in a blanket in Reynosa, Mexico on July 22, 1997. He further testified that the license plate found with the burned Suburban was traced by Mexican police and was found to be registered to a green Chevy Suburban.

Hector's wife testified that she was able to confirm the identity of the body found in

Reynosa as her husband.

Fulgencio Salinas testified that he performs autopsies and reviewed the autopsy report done by Dr. Ruben Santos, who is now deceased. He testified that the autopsy report indicated: the body was badly decomposed; the man had been dead for four to five days; the most likely cause of death was asphyxiation; and there was evidence that a plastic bag had been placed over the head and held in place with duct tape.

Evidence technician Miguel Alcantar and latent print examiner Heriberto Vigil testified that they were able to identify the thumbprint from the body as belonging to Hector.

B. Accomplice Testimony

Jose Angel Wyant and Freddy Camacho, two of the many accomplices to the crime, testified at trial that appellant was involved. Each has been imprisoned for his part in this crime.

Wyant offered the following relevant testimony: one of the other accomplices called Hector shortly before the kidnapping to tell him to be outside so they could look at the car for sale in front of the store; later on, appellant was at the house in Mexico; appellant was one of three in the room with Hector and hit him; Hector was hit several times with fists and a handgun; as a result, Hector was bleeding; Hector's eyes were not visible; Hector couldn't move; appellant left; and another accomplice strangled Hector.

Accomplice Freddy Camacho testified: he was approached by Rojas, who was accompanied by appellant, about the kidnapping and they spoke for thirty minutes; he overheard a twenty-minute phone call a few hours before the kidnapping from Rojas to

appellant in which arrangements were made;. Rojas then called Hector and made plans to look at the car for sale in front of the store; appellant drove the green Suburban to the meeting place--Rojas's home, to Hector's store, and to the burn site in the hours before the kidnapping; after the kidnapping, appellant switched vehicles and got in a brown van with other accomplices to take Hector across the border; at the checkpoint, appellant told Hector not to scream or do anything out of the ordinary or else he would face the consequences; once at a house in Mexico, appellant and two others took Hector to the bedroom and tied him face down to the bed with an extension cord and bed sheets; all three were on top of Hector and hitting him; and during the beating appellant threatened Hector's son.

C. Epilogue

The search for other accomplices continues. Meanwhile, the federal trial, in which Hector was supposed to testify, ended in an acquittal for all seven defendants.

II. Elements of the Offenses

A person commits aggravated kidnapping by intentionally or knowingly abducting another with the intent to inflict bodily injury on that person. TEX. PEN. CODE ANN. § 20.04(a)(4) (Vernon 2003). Abduction is a continuous and ongoing event, for which there is no time limit. *Weaver v. State*, 657 S.W.2d 148, 150 (Tex. Crim. App. 1983) (citing *Sanders v. State*, 605 S.W.2d 612, 614 (Tex. Civ. App. 1980)).

The penal code section that defines capital murder directs readers to the code section regarding murder. TEX. PEN. CODE ANN. §19.03 (Vernon 2003). That section provides, "A person commits [murder] if he . . . intentionally or knowingly causes the death

of an individual." *Id.* § 19.02(b)(1). The capital murder section completes the definition of capital murder by adding, "and . . . the person intentionally commits murder in the course of committing . . . kidnapping." *Id.* § 19.03(a)(2).

III. Analysis

A. Territorial Jurisdiction

By his first point of error, appellant contends the State lacks jurisdiction to charge him with capital murder. We agree.

Section 1.04 of the penal code provides, "This state has jurisdiction over an offense that a person commits . . . if either the conduct or a result that is an element of the offense occurs inside this state." TEX. PEN. CODE ANN. § 1.04(a)(1) (Vernon 2003). This Court has considered section 1.04 and determined that it gives the State of Texas jurisdiction over an offense if the offense or an element of the offense is committed within the state. *See Salazar v. State*, 711 S.W.2d 720, 724 (Tex. App.–Corpus Christi 1986, pet. ref'd).

Here, there is no evidence that either the offense of murder or any of its elements were committed in Texas. Not only did the torture and strangling (conduct), which caused the death, take place in Mexico, but the body (result) was found in Mexico, too. In other words, neither "the conduct or a result that is an element of [murder] occur[red] inside this state." TEX. PEN. CODE ANN. § 1.04(a)(1) (Vernon 2003).

Because the penal code's capital murder provision explicitly directs us to its murder provision, we hold that the offense of murder or an element of murder (either the conduct or a result) must be committed within this state in order for Texas to have jurisdiction over the offense of capital murder.

Consequently, the State did not have jurisdiction over the offense of capital murder. Had an element, either the conduct or a result, of the offense of murder occurred in this state, then Texas would have jurisdiction over the offense of capital murder. However, that is not the case here. Appellant's first point of error is sustained. The remainder of the analysis will focus on the aggravated kidnapping conviction.

B. Accomplice Corroboration

By his third point of error, appellant contends the State failed to corroborate the testimony of accomplice witnesses. We disagree.

Article 38.14 of the code of criminal procedure provides, "[a] conviction cannot be had upon the testimony of . . . accomplice[s] unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." TEX CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979). To determine whether the accomplices' testimony is corroborated, we eliminate the accomplices' testimony and review the remaining evidence to determine whether it *tends to connect* appellant to the offense. *Munoz v. State*, 853 S.W.2d 558, 559 (Tex. Crim. App. 1993) (emphasis added). The corroborative evidence need not directly link appellant to the crime or be sufficient in itself to establish guilt. *McDuff v. State*, 939 S.W.2d 607, 612 (Tex. Crim. App. 1997). The corroborative evidence may only be circumstantial. *Brown v. State*, 672 S.W.2d 487, 488 (Tex. Crim. App. 1984).

When the testimony of the accomplices is eliminated from our consideration, the non-accomplice testimony outlined earlier demonstrates: (1) appellant was at the scene of the crime the day before asking about a car for sale in front of the store; (2) appellant

had been seen driving a green Suburban shortly before the crime; (3) Hector was kidnapped by men who asked about the car for sale in front of the store; (4) the kidnappers drove a green Suburban with Mexican license plates; (5) a burned green Suburban with Mexican license plates was found near Hector's store a few hours after the kidnapping; and (6) handcuffs were found with the burned Suburban.

This non-accomplice testimony tends to connect appellant to the offense. *Munoz*, 853 S.W.2d 559. As such, the State did not fail to corroborate the accomplices' testimony. Appellant's third point of error is overruled.

C. Legal Sufficiency

By his second point of error, appellant contends the trial court erred by denying his motion for directed verdict because there is not legally sufficient evidence to prove aggravated kidnapping. We disagree.

The basis of appellant's motion was the State's alleged failure to corroborate the accomplices' testimony and otherwise provide sufficient evidence to prove aggravated kidnapping. Having concluded that the accomplices' testimony was corroborated, we now examine appellant's challenge to the legal sufficiency of the evidence as a whole.

For a legal sufficiency challenge, we review the evidence in a light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 43 U.S. 307, 319 (1979); *Johnson v.* State, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000); *Rosillo v. State*, 953 S.W.2d 808, 811 (Tex. App.–Corpus Christi 1997, pet. ref'd). As fact finder, the jury is the exclusive judge of the credibility of witnesses and the weight to be afforded their testimony.

Chambers v. State, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). The jury is free to accept one version of the facts, reject another, or reject all or any of a witness's testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). Sufficiency of the evidence is measured by the hypothetically correct jury charge, which accurately sets out the law, is authorized by the indictment, and does not unnecessarily increase the State's burden of proof. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997); *Cano v. State*, 3 S.W.3d 99, 105 (Tex. App.–Corpus Christi 1999, pet. ref'd). In conducting this analysis, we may not re-weigh the evidence and substitute our judgment for that of the jury. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim App. 2000).

At trial, the State called two accomplices to testify as to appellant's involvement in the kidnapping. The testimony outlined earlier demonstrates that appellant was involved in: (1) the planning of the kidnapping in McAllen; (2) the kidnapping itself; (3) transporting Hector to a house in Mexico; and (4) torturing him there.

After measuring the legal sufficiency, we conclude the evidence adduced from the accomplices and others was sufficient to allow a jury to find the elements of aggravated kidnapping (intentional/knowing abduction, intent to inflict bodily injury) beyond a reasonable doubt. We hold that the evidence is legally sufficient to support appellant's conviction for aggravated kidnapping. The trial court did not err by denying appellant's motion for directed verdict. Appellant's second point of error is overruled.

D. The Rule

In his fourth point, appellant contends the trial court abused its discretion by

exempting Texas Ranger Israel Pacheco from rule of evidence 614.[1] We agree, but hold that the error is harmless.

"The purpose of placing witnesses under the sequestration rule . . . is to prevent the testimony of one witness from influencing the testimony of another." *Bell v. State*, 938 S.W.2d 35, 50 (Tex. Crim. App. 1996). The party seeking an exception under rule 614 has the burden of showing that one of the enumerated sections is met. *Bath v. State*, 951 S.W.2d 11, 23 (Tex. App.–Corpus Christi 1997, pet. ref'd). If the prosecution claims that the witness's presence is essential to the presentation of its cause (a section three exception), as is the situation here, a "showing" is required. *Id.* (quoting *Barnhill v. State*, 779 S.W.2d 890, 892-93 (Tex. App.–Corpus Christi 1989, no pet.)). "[A] conclusory explanation does not constitute the showing contemplated by [rule 614]." *Hernandez v. State*, 791 S.W.2d 301, 306 (Tex. App.–Corpus Christi 1990, pet. ref'd) (prosecutor's explanation that it would be "necessay and essential" for him to confer with requested witness during testimony is conclusory); *see Barnhill*, 779 S.W.2d at 892 (prosecutor's explanation that requested witness is a caseworker is not a showing). "It is within the trial court's discretion to decide if a requested exemption from . . . rule [614] is justified." *Aguilar v. State*, 739 S.W.2d 357, 358-59 (Tex. Crim. App. 1987); *see Bell*, 938 S.W.2d at 50.

After the jury had been selected, but prior to the first witness, the State requested an exception to rule 614 for Pacheco, so he could remain in the courtroom at counsel table

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[1] Rule of evidence 614 provides, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." TEX. R. EVID. 614(3). However, the rule "does not authorize exclusion of: a person whose presence is shown by a party to be essential to the presentation of the party's cause." *Id.* Practitioners commonly use the phrase "invoking the rule" when they request that the trial court exclude the witnesses during testimony.

to assist the State in presenting its case. In support of the request, the State said:

> The evidence is going to show that federal agents from the DEA, the FBI, the McAllen police were involved, the Texas Rangers were involved in this case. Now, this is a fairly complicated case, a very complicated case, and for that reason we are requesting that you allow a witness to remain in the courtroom throughout the trial and his name being Israel Pacheco. He is from the Texas Rangers.

The defense objected and stated:

> [Pacheco] is a very exculpatory witness to the Defense. To allow him to stay in the courtroom would . . . provide the State with the opportunity to educate Mr. Pacheco as to how we are going to proceed with our defense. They have invoked the rule and we will stand by it. . . . [Furthermore, Pacheco] is not the case agent.

The State responded by explaining that, "[Pacheco] brought the case to the District Attorney's office and conferred with the District Attorney's Office." The trial court then decided to allow the exception for Pacheco.

At that point, the trial court erred because the State's explanation was conclusory. The State merely informed the court that Pacheco was a Texas Ranger who brought the case to the prosecution and discussed it with them, which does not meet their burden to show that the exception to rule 614 was warranted. *See Hernandez*, 791 S.W.2d at 306; *Barnhill*, 779 S.W.2d at 892; *see also Peters v. State*, 997 S.W.2d 377, 385 (Tex. App.–Beaumont 1999, no pet.) ("The Rule contains no express exception for investigators."). Such an explanation is not a showing and lies in contrast to our holding in *Bath*, where we concluded that the State made a showing by explaining that: the witness in question "was involved with the investigation of [the] case since the date of the offense," "he was the lead investigator for the prosecution," he "helped coordinate with all law enforcement agencies," "he assisted the prosecution in preparing [the] case for trial,"

and "his assistance and expertise would be needed with numerous items of evidence to be presented at trial." *Bath*, 951 S.W.2d at 23.

After the first witness testified, the defense renewed its objection to the presence of Pacheco. The State then responded:

> [We have already] represented to this Court that this case is a very complex case and that we needed Mr. Pacheco in here to sort out all these details. There were hundreds of people that were interviewed in the process of investigating this case. Certainly we don't want to bring all these witnesses in here. We are trying to narrow it down to just the ones that are relevant to this case, and his presence is essential.

The trial court concluded, "The State has carried its burden. They have shown that this is a complex case so [Pacheco] will be allowed to stay."

Again, the trial court missed its opportunity to properly exclude Pacheco from the courtroom. The court mischaracterized the burden of the party requesting an exception to rule 614 for an allegedly essential witness by finding "that this is a complex case so [Pacheco] will be allowed to stay." When deciding whether to allow an exception for a witness who is allegedly essential to the presentation of the requesting party's cause, the court cannot be satisfied if the party shows that the *case is complex*. In such a situation, the court must require the requesting party to show that the *witness is essential*. *Bath*, 951 S.W.2d at 23; *Hernandez*, 791 S.W.2d at 306; *Barnhill*, 779 S.W.2d at 892. Whether or not the case is complex makes no difference, unless the party requesting the exception for the allegedly essential witness shows that the witness' necessity relates to the case's complexity.

In addition, while the State's new justification for the exception, that Pacheco was needed to sort out details, was less conclusory than the earlier justification, it was

conclusory nonetheless. *See Peters*, 997 S.W.2d at 385 (requesting party's explanation that an investigator is very knowledgeable of witnesses is not a showing). It is not clear to us that Pacheco's presence in the courtroom was necessary in order for him to sort out details. The State's vague explanation is not in line with the showing made in *Bath*, where the State specifically said its witness's presence was essential because "his assistance and expertise would be needed with numerous items of evidence to be presented." *Bath*, 951 S.W.2d at 23. Without a more explicit explanation, sorting out details appears to be a task that can be performed before witnesses are called, making Pacheco's presence in the courtroom unnecessary. In contrast, a witness, like the one exempted from rule 614 in *Bath*, whose knowledge and help is necessary to present items of evidence is actually needed in the courtroom with the evidence during other witnesses' testimony. *Id.* In this case, the State's entire support for their request amounts to nothing more than a conclusory explanation.

In essence, the trial court overruled the appellant's second objection to Pacheco's presence in the courtroom without requiring a showing by the State. Because no showing was made, the trial court abused its discretion by allowing the exception to rule 614 for Pacheco, as a witness whose presence was essential to the State's presentation. *Moore v. State*, 882 S.W.2d 844, 848 (Tex. Crim. App. 1994). We now examine whether the error is reversible. *Hernandez*, 791 S.W.2d at 306; *Barnhill*, 779 S.W.2d at 893. "We need not reverse if we determine that the error did not affect appellant's substantial rights." *Ladd v. State*, 3 S.W.3d 547, 566 (Tex. Crim. App. 1999) (citing TEX. R. APP. P. 44.2(b)). "In other words, we need not reverse if, after examining the record as a whole, we have fair

assurance that the error did not influence the jury's deliberations to appellant's detriment or had but a slight effect." *Id.*

Two relevant criteria in assessing this type of error are: (1) did the exempted witness actually hear the testimony of the other witnesses; and (2) did the exempted witness's testimony contradict the testimony of a witness he actually heard from the opposing side or corroborate the testimony of another witness he actually heard from the same side on an issue of fact bearing upon the issue of guilt or innocence. *Guerra v. State*, 771 S.W.2d 453, 475-76 (Tex. Crim. App. 1988);[2] *see Ladd*, 3 S.W.2d at 566.

Since Pacheco was allowed to remain in the courtroom, the first criteria has been met, and we proceed to the second. Because the defense called no witnesses, we will only examine whether or not Pacheco's testimony corroborated the testimony of the witnesses he heard.

In general, Pacheco's testimony explained the investigative process and his involvement in the investigation. Pacheco's testimony coincided with that of DEA agent Tony Dominguez and FBI agent Scott Sledd in that each testified that, based on their knowledge, Hector was not in the federal witness protection program. Pacheco's testimony also coincided with Sledd's with respect to how Pacheco became involved in the

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[2]We recognize *Aguilar* is more on point than *Guerra*, in that the former addresses how to review the trial court's decision to allow an exception to rule 614, as is the case here, and the latter addresses how to review the trial court's mistake of allowing a violation of rule 614 (*i.e.*, when rule 614 is invoked without exception, yet a witness remains in the courtroom afterwards and later testifies). *Guerra v. State*, 771 S.W.2d 453, 473-76 (Tex. Crim. App. 1988); *Aguilar v. State*, 739 S.W.2d 357, 357-60 (Tex. Crim. App. 1987). Nevertheless, we will apply the harm analysis set out in *Guerra*, because it updates the same harm analysis used in *Aguilar*. *Guerra*, 771 S.W.2d at 474-75; *Aguilar*, 739 S.W.2d at 359-60. However, we will not apply the additional two-step approach from *Guerra* to determine what kind of witness was involved, 771 S.W.2d at 476, as it is appropriate when analyzing harm resulting from the trial court's allowing a violation of rule 614, not when analyzing a trial court's decision to allow an exception to rule 614.

investigation. In addition, Pacheco's testimony coincided with accomplice Francisco Castaneda. When describing the events leading to the crime, Castaneda said, "At [the] trailer park . . . Hugo picked up the Suburban and we left in the Suburban." Later on in the trial, Pacheco testified that during the investigation Castaneda took him to a trailer park and said, "This is the mobile home where we picked up the Suburban." Our review of the record reveals that, apart from these instances, Pacheco testified to matters not addressed by the other witnesses. *Barnhill*, 779 S.W.2d at 893. Thus, we conclude that minor portions of Pacheco's testimony meet the second criteria of *Guerra*. *Id.*

"Nonetheless, we do not believe the error constitutes reversible error." *Id.* Pacheco's testimony concerned no issue of fact bearing upon the issue of appellant's guilt and explained the investigative process. *See Guerra*, 771 S.W.2d at 475-76; *Barnhill*, 779 S.W.2d at 893. His testimony that duplicates other witnesses' testimony could be characterized as background information that contains nothing to incriminate appellant. *Barnhill*, 779 S.W.2d at 893. While the trial court abused its discretion in exempting Pacheco from rule 614 without requiring a showing by the State, we hold that there is no reversible error because of the harmless nature of the evidence that was improperly introduced through Pacheco's testimony. *Id.* "On this record, we have fair assurance that the trial court's error did not influence the jury's deliberations to appellant's detriment or had but a slight effect." *Ladd*, 3 S.W.3d at 566. Appellant's fourth point of error is overruled.

E. Hearsay

By his sixth point of error, appellant contends the trial court improperly allowed the

State to introduce hearsay testimony from Pacheco, resulting in reversible error. We disagree.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). The admissibility of hearsay evidence is a question for the trial court, reviewable under an abuse of discretion standard. *See Coffin v. State*, 885 S.W.2d 140, 149 (Tex. Crim. App. 1994).

Before the prosecution began its direct examination of Pacheco a hearing was held outside the presence of the jury. Defense counsel objected on the basis that "anything [Pacheco] would have to offer . . . other than what he actually did . . . would be hearsay." The trial court overruled the objection. Counsel then objected to the introduction of Pacheco's report on the basis of hearsay, and the court sustained the objection. After the jury was called, counsel objected when Pacheco was asked about specific statements made by other agents on the case.[3] In response to these objections, the State explained the testimony was not being offered for proof of the truth of the matter asserted. Rather, the State argued, the testimony was offered to give background information and help the jury understand the investigation. The court agreed with the State and overruled both objections.

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[3]The following answers followed appellant's respective objections:

Pacheco: On July 24th of '97, Cumendante Oscar Alaniz had called me on the telephone saying he was trying to get a hold of the FBI and he had information about the Suburban to give them. I went ahead and took the information and called the FBI and gave them that information. . . .

On August 4th, '97, I received the results of an interview conducted by the FBI and also DEA Agent Tony Dominguez and McAllen PD investigator Ralph Ramirez of one of the suspects, Victor Hugo Rojas, in Reynosa.

After reviewing the record, it appears neither statement was made in order to prove the truth of the matter asserted. The purpose of Pacheco's answers was to explain the investigative procedures followed in this case. Whether or not Pacheco was actually called or advised by agents does not depend on the truth of what these agents said. The testimony of which appellant objects does not meet the definition of hearsay. TEX. R. EVID. 801(d). The trial court did not abuse its discretion by overruling appellant's objections. Appellant's sixth point of error is overruled.

F. Custodial Interrogation

In his fifth and seventh points, appellant contends his interview with investigators, before he was charged, was a custodial interrogation. As a result of the alleged custodial interrogation, appellant argues that his privilege against self-incrimination[4] and his due process rights[5] were violated. We disagree.

The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views of the officer or the person being questioned. *Stansbury v. California*, 511 U.S. 318, 323 (1994). Here, Pacheco testified: (1) appellant was a suspect but was not under arrest at the interview; (2) arrangements were made, at appellant's request, for him to make a phone call during the interview; (3) no statement

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[4]After being taken *into custody* by law enforcement officers, a person must be warned that any statement made may be used as evidence against the person. *See Stansbury v. California*, 511 U.S. 318, 323 (1994) (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)) (emphasis added).

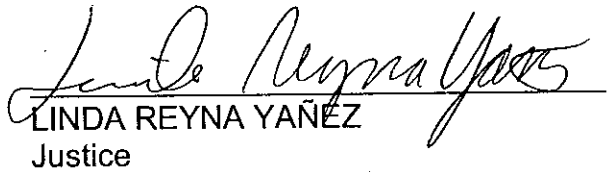
[5]Appellant alleges several violations of his due process rights under article 38.22 of the code of criminal procedure. This article outlines when statements from accused persons may be used. TEX. CRIM. PROC. CODE ANN. § 38.22 (Vernon 1979 and Supp. 2003). The article requires warning to be given and tape recording made prior to taking a defendant's statement. TEX. CODE CRIM. PROC. ANN. § 38.22(2-3) (Vernon 1979 and Supp. 2003). However, it only applies to statements obtained as result of *custodial interrogation*. *Rathmell v. State*, 653 S.W.2d 498, 501 (Tex. App.–Corpus Christi 1983, pet. ref'd) (emphasis added).

was taken during the interview; and (4) appellant left the interview freely and said he would call the officers the next day about his decision to cooperate or not.

In light of the above circumstances, we conclude the interview was not a custodial interrogation. Appellant's fifth and seventh points of error cannot stand because his due process and self-incrimination arguments depend upon a conclusion that the interview was a custodial interrogation. We overrule both points of error.

IV. Conclusion

Because we have sustained appellant's first point of error, we reverse appellant's conviction for capital murder and render an acquittal. The remaining points are all overruled. Appellant's conviction and sentence for aggravated kidnapping will stand. We AFFIRM the judgment of the trial court in part and REVERSE AND RENDER in part.



LINDA REYNA YAÑEZ
Justice

Do not publish. TEX. R. APP. P. 47.2(b).

Opinion delivered and filed this the
14th day of August, 2003.

FILED

Case No. CR-0403-00-A (2) AT 1:30 O'CLOCK M

(The district clerk of the county of conviction will fill in this blank.) MAY 05 2020

LAURA HINOJOSA, CLERK
District Courts, Hidalgo County
Deputy#43

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
APPLICATION FOR A WRIT OF HABEAS CORPUS
SEEKING RELIEF FROM FINAL FELONY CONVICTION
UNDER CODE OF CRIMINAL PROCEDURE ARTICLE 11.07

NAME: Humberto Rodriguez, Jr.

DATE OF BIRTH: 6.18.68

PLACE OF CONFINEMENT: T.D.C.J. A. Hughes Unit, Gatesville, Tx

WARDEN:

TDCJ-CID NUMBER: 01017893 **SID NUMBER:**

(1) This application concerns (check all that apply):

- ☒ **a conviction**
- ☐ **parole**
- ☐ **a sentence**
- ☐ **mandatory supervision**
- ☐ **time credit**
- ☐ **out-of-time appeal or petition for discretionary review**

(2) What are the court number and county of the district court in which you were convicted?

92nd. Dist. Court, Hidalgo County, Texas

(3) What was the case number in the trial court? (Put only one case number here, even if it includes multiple counts. You must make a separate application on a separate form for other case numbers.)

CR-0403-00-A

(4) What was the name of the trial judge?

Hon. Homer Salinas

(5) **Were you represented by counsel? If yes, provide the attorney's name:**

Yes - Hector J. Villarreal

(6) **What was the date that the judgment was entered?**

Oct. 6, 2000

(7) **For what offense were you convicted and what was the sentence?**

Capital Murder - Life

(8) **If you were sentenced on more than one count of an indictment in the same court at the same time, what counts were you convicted of and what was the sentence in each count?**

Capital Murder - Life

Aggravated Kidnapping - 28 yrs.

(9) **What was the plea you entered?** (Check one.)

☐ **guilty-open plea**
☒ **not guilty**
☐ **guilty-plea bargain**
☐ ***nolo contendere*/no contest**

If you entered different pleas to counts in a multi-count indictment, please explain:

(10) **What kind of trial did you have?**

☐ **no jury**
☒ **jury for guilt and punishment**
☐ **jury for guilt, judge for punishment**

(11) **Did you testify at trial? If yes, at what phase of the trial did you testify?**

No

(12) **Has your sentence discharged?** ☒ **yes** ☒ **no**

If you answered yes, when did your sentence discharge? Agg. kidnapping Vacated by TCCA Double Jeopardy

(13) **Did you appeal from the judgment of conviction?**

☒ **yes** ☐ **no**

If you did appeal, answer the following questions:

(A) Which court of appeals decided the appeal? 13th Court of Appeals

(B) What was the case number? 13-00-771-CR

(C) Were you represented by counsel on appeal? If yes, provide the attorney's name: Hector J. Villarreal

(D) What was the decision and the date of the decision? Reversed Capital Murder-jurisdiction, affirmed Agg-kidnapping - Aug. 14, 2003

(14) **Did you file a petition for discretionary review in the Court of Criminal Appeals?**

☒ **yes** State's Appeal ☐ **no**

If you did file a petition for discretionary review, answer the following questions:

(A) What was the case number? No. 1568-03

(B) What was the decision and the date of the decision? Reversed Appellate Court, Reinstated Capital Murder - Oct. 13, 2004

(15) **Have you previously filed an application for a writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure challenging *the conviction in this case number*?**

☒ **yes** ☐ **no**

If you answered yes, answer the following questions:

(A) What was the Court of Criminal Appeals' writ number? WR-81,853-01

(B) What was the decision and the date of the decision? Vacated Agg. kidnapping

(C) **Please briefly explain why the current grounds were not presented and could not have been presented in your previous application.**

The U.S. Supreme Court made a new ruling in RJR Nabisco V. European Cmty., 136 S.Ct. 2090 (2016) not available to Petitioner for previous §11.07, stating a new 2-step rule to determine violations of extraterritorial jurisdiction. It proves Texas had no jurisdiction over murder in Mexico that this case involves. T.C.C.P. §11.07 (4)(a)(1)

(16) **Do you currently have any petition or appeal pending in any other state or federal court?**

☐ **yes** ☒ **no**

If you answered yes, please provide the name of the court and the case number:

(17) **If you are presenting a time credit claim, other than for pre-sentence jail time credit, have you exhausted your administrative remedies by presenting the time credit claim to the time credit resolution system of the Texas Department of Criminal Justice?** (This requirement applies to any final felony conviction, including state jail felonies.)

☐ **yes** ☐ **no** N/A

If you answered yes, answer the following questions:

(A) **What date did you present the claim to the time credit resolution system?**

(B) **Did you receive a decision and, if yes, what was the date of the decision?** _____

If you answered no, please explain why you have not presented your time credit claim to the time credit resolution system of the Texas Department of Criminal Justice:

(18) **Beginning on page 6, state concisely every legal ground for why you think that you are being illegally confined or restrained and then briefly summarize the facts supporting each ground. You must present each ground and a brief summary of the facts on the application form. If your grounds and a brief summary of the facts have not been presented on the application form, the Court will not consider your grounds. A factual summary that merely references an attached memorandum or another ground for relief will not constitute a sufficient summary of the facts.**

If you have more than four grounds, use pages 14 and 15 of the application form, which you may copy as many times as needed to give you a separate page for each ground, with each ground numbered in sequence. The recitation of the facts supporting each ground must be no longer than the two pages provided for the ground in the form.

You may include with the application form a memorandum of law if you want to present legal authorities or provide greater factual detail, but the Court will *not* consider grounds for relief set out in a memorandum of law that were not raised on the application form. The memorandum of law must comply with Texas Rule of Appellate Procedure 73 and must not exceed 15,000 words if computer-generated or 50 pages if not. If you are challenging the validity of your conviction, please include a summary of the facts pertaining to your offense and trial in your memorandum of law.

If the application form does not include all of the grounds for relief, additional grounds brought at a later date may be procedurally barred.

GROUND ONE:

Petitioner's conviction is void from its inception for want of extra-territorial jurisdiction, violating Substantive Due Process

FACTS SUPPORTING GROUND ONE:

Petitioner was convicted of capital murder as a party. The state argued he supplied a vehicle others used in the kidnapping of a man in McAllen, Tx, who was taken into Mexico and later murdered. On direct appeal the court overturned the murder conviction for lack of jurisdiction for murder occurring in Mexico. The state appealed and the T.C.C.A. reversed stating kidnapping is an element of capital murder, so state jurisdiction law allowed prosecution for murder in Mexico, see Rodriguez V. State, 146 S.W.3d 674 (2004). On first habeas corpus Petitioner argued the "state" jurisdiction law cited by the T.C.C.A. could not apply "extraterritorially". The state made no ruling on the issue and denied relief. Subsequently, the U.S. Supreme Court clerified in RJR Nabisco, 136 S.Ct. 2090, 2101 (2016) what constitutes "extra-territorial" by creating a two-step analysis. First the Court asks whether the statute relied upon gives a clear indication it applies

extraterritorially. (Texas does not) If there is no indication, the Court proceeds to step two. Here the court looks at the "focus" of the case to determine a merely domestic application. If the conduct relevant to the statutes focus occurred in the U.S., then it has a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred abroad, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S territory. The Texas Capital Murder statute first focuses on the murder, as the 13th Court of Appeals originally ordered. RJR Nabisco proves in this case a kidnapping in the U.S., does "not" grant extraterritorial jurisdiction over a murder in Mexico, even if the charge is capital murder. Murder and kidnapping are "crimes," capital murder is "punishment" for murder durring kidnapping. The T.C.C.A. erred by refering to the issue as territorial, instead of "extraterritorial," therefore their previous ruling must be reversed, and acquittal rendered due to lack of jurisdiction to try this case.