United States Court of Appeals for the Fifth Circuit

No. 19-50972

QUINN PALACIOS CRUZ, JR.,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:18-CV-243

ORDER:

Quinn Palacios Cruz, Jr., Texas prisoner # 1476178, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 application challenging his conviction and sentence for murder. In his § 2254 application, Cruz claimed that: (1) his trial attorneys rendered ineffective assistance during the guilt/innocence phase of his trial by failing to investigate and introduce mitigating evidence; (2) the State engaged in several instances of prosecutorial misconduct; (3) his trial attorneys rendered ineffective assistance during the punishment hearing because (a) they suffered from a conflict of interest, and (b) they withdrew from representing

Cruz without identifying new evidence that had been referenced in Cruz's motion for a new trial; (4) the trial court erred by allowing the State to make an improper closing argument at the punishment hearing which misled the jury to impose a $10,000 fine; and (5) the trial court's cumulative errors denied Cruz his rights to the effective assistance of counsel and a fair trial. The district court dismissed Cruz's fourth claim as procedurally barred, and it denied the remaining claims on the merits without conducting an evidentiary hearing. Cruz does not address, and has thus abandoned any challenge to, the denial of his second claim. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA with respect to the denial of a § 2254 application, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). When a district court has denied a request for habeas relief on procedural grounds, the prisoner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. When constitutional claims have been rejected on the merits, the prisoner must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* Cruz fails to make the necessary showing. Accordingly, his motions for a COA and appointment of counsel are DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
United States Circuit Judge

2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

QUINN PALACIOS CRUZ JR.,	§	
TDCJ No. 1476178,	§	
Petitioner,	§	
	§	
v.	§	EP-18-CV-243-DCG
	§	
LORIE DAVIS,	§	
Director, Texas Department of	§	
Criminal Justice, Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Petitioner Quinn Palacios Cruz Jr., a state prisoner confined at the Telford Unit in New Boston, Texas, challenges Respondent Lorie Davis's custody of him through a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254. After reviewing the record and for the reasons discussed below, the Court concludes that Cruz is not entitled to federal habeas relief. Accordingly, the Court will deny his petition and deny him a certificate of appealability.

BACKGROUND AND PROCEDURAL HISTORY

Cruz was indicted for the capital murder of his girlfriend, Tonya West, and her unborn fetus, in Cause Number 20060D581 in the 205th Judicial District Court in El Paso County, Texas. *Cruz v. State*, No. 08-08-00213-CR, 2010 WL 2949292, at *1 (Tex. App.—El Paso, July 28, 2010). The State gave notice it would not seek the death penalty.

Evidence at trial established Cruz and West moved into an apartment in El Paso, Texas, on October 18, 2005. Approximately one week later, they broke up and West moved into another apartment—Apartment 809—in the same complex.

On the morning of November 18, 2005, residents of the apartment complex observed Cruz, West, and West's two-year old daughter in the apartment parking lot. They heard a gunshot and a

woman scream. They saw West try to get away as Cruz followed her through the parking lot while firing a weapon at her. A resident who rushed to West's side asked if she knew who shot her. West replied, "Quinn Cru-." *Id.* Another resident testified Cruz calmly walked away. West died later at the hospital.

The medical examiner, Dr. Juan Contin, performed the autopsy on West. He determined four bullets had entered West's body, including one fired at close range, approximately twelve to fifteen inches from her body. He concluded West died from internal bleeding caused by multiple gunshot wounds. He also discovered West was about two-to-three weeks pregnant at the time of her death.

Cruz's medical expert, Dr. Harry Wilson, agreed with Dr. Contin's estimate of the embryo's stage of development. According to Dr. Wilson, there were no visible signs of pregnancy.

The trial court submitted the charged offense of capital murder—for both West and the unborn child—and the lesser-included offense of murder—West only—to the jury. The jury found Cruz guilty of capital murder as charged in the indictment. By statute, his punishment was automatically set at life in prison without parole. *See* Tex. Penal Code Ann. § 12.31 (Vernon Supp. 2009) ("An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for . . . life without parole . . .").

On appeal, the State conceded the evidence was legally insufficient to prove Cruz intended to kill the unborn child, as there was no evidence that Cruz knew West was pregnant. *Id.*, at *3. But it argued the appellate court should reform the judgment to reflect a conviction for the murder of West and remand the cause to the trial court for a new punishment hearing. The Eighth Court of Appeals agreed. *Id.* It found error, reformed the judgment to reflect the lesser-included offense of murder, and ordered a new punishment hearing. *Id.*, at *2–3. After the new punishment hearing, Cruz was sentenced to life in prison.

Cruz appealed again, but this time the appellate court affirmed the judgment. *Cruz v. State*, No. 08–14–00058–CR, 2016 WL 3194924 (Tex. App.—El Paso, 2016, pet. ref'd). He filed a petition for discretionary review, but it was refused. *Cruz v. State*, No. PD-1098-16 (Tex. Crim. App. 2017).

Cruz next filed a state application for writ of habeas corpus. State Writ Application 79–96, ECF 21-45. He raised five grounds for relief:

(1) His trial counsel provided constitutionally ineffective assistance during the guilt/innocence phase of the trial. Specifically, his trial counsel failed to present evidence that the victim had pulled a gun on him and threatened to shoot him on a prior occasion, had started several verbal arguments with him while they lived in Denver, Colorado, and had filed harassment and terroristic threat charges against him. *Id.*, at 84.

(2) His trial counsel provided constitutionally ineffective assistance during his second punishment trial. Specifically, all of his counsel were employed by the El Paso County Public Defender's Office, and, as a consequence, he believed his trial counsel at his second punishment hearing did not raise errors made by his counsel at the guilt/innocence phase of his trial. *Id.*, at 88.

(3) The State engaged in pervasive misconduct during trial. Specifically, the State made improper sidebar comments during the cross-examination of Cruz. The State also made improper arguments regarding probation, facts not in evidence, and community expectations. *Id.*, at 86.

(4) The State engaged in misconduct during closing argument. Specifically, the State discussed facts outside the record and misstated facts and the law. For example, the State asked the jury to impose the maximum fine of $10,000 because Cruz could work while he was in prison and earn money to pay off the fine. This statement was incorrect, but, as a result, he was fined $10,000. *Id.*, at 90.

(5) The trial court erred when it ruled on various motions. Specifically, it erred when it denied his trial counsel's motion to withdraw due to a conflict of interest, denied his motion for a new trial, and then granted his trial counsel's motion to withdraw and substitute counsel. *Id.*, at 92.

Cruz's application was denied without written order by the Texas Court of Criminal Appeals. *Ex parte Cruz*, WR-69,786-02 (Action Taken), ECF No. 21-41. Cruz's federal petition followed on August 13, 2018.

Cruz again raised five grounds for relief:

(1) His trial counsel provided constitutionally ineffective assistance during the guilt/innocence phase of the trial. Specifically, his trial attorneys refused to submit the guns found in West's apartment as mitigating evidence in his defense. He claimed West threatened to shoot him on a previous occasion and she filed numerous false accusations against him to get him in trouble. He conceded the guns and rebuttal evidence were later offered as defense evidence at his second punishment hearing, which occurred several years later. Pet'r's Pet. 6, ECF No. 1.

(2) His trial counsel provided constitutionally ineffective assistance during his second punishment trial. Specifically, his lead attorney, Felix Castanon, filed a pre-trial "Motion to Withdraw" citing a "conflict of interest." The trial court denied the motion, forcing Castanon to represent Cruz at the punishment phase of his trial. Consequently, Castanon did not raise the trial errors committed by his co-workers, who had represented Cruz at guilt/innocence phase of his trial several years before, and his client, Cruz, was sentenced to life and fined the maximum amount of $10,000. *Id.*, at 7.

(3) The State engaged in pervasive misconduct during trial. Specifically, the State made several improper sidebar comments during Cruz's cross-examination. Additionally, the State continued its improper misconduct by eliciting testimony that did not exist in the record from three witnesses. Also, the State forced Cruz to object another five times for improper arguments regarding probation, facts not in evidence, and community expectations. *Id.*, at 6.

(4) The State engaged in misconduct during closing argument. Specifically, Cruz was fined the maximum amount of $10,000 because the State incorrectly told the jury that he could work while he is in prison and earn money to pay off the fine. *Id.*, at 7.

(5) The trial court erred when it ruled on various motions. Specifically, the trial court denied Cruz's pre-trial "Motion to Withdraw," which cited existing conflict of interest; denied his "Motion for New Trial"; and granted his counsel's "Motion to Withdraw and Substitute Counsel" after he was sentenced to life in prison and fined $10,000. *Id.*, at 8.

Cruz asks the Court to order his immediate release from State custody. *Id.*, at 7. In the alternative, he asks the Court to order a new trial on both the guilt/innocence and punishment phases. *Id.* He also asks for an evidentiary hearing. *Id.*

Cruz's claims are the same or similar in his state application and federal petition. As a result, Davis "believes Cruz exhausted his state court remedies for the above claims and filed his petition in a

timely manner." Resp't's Answer 5, ECF 18.

APPLICABLE LAW

"[C]ollateral review is different from direct review," and the writ of habeas corpus is "an extraordinary remedy," reserved for those petitioners whom "society has grievously wronged." *Brecht v. Abrahamson*, 507 U.S. 619, 633–34 (1993). It "is designed to guard against extreme malfunctions in the state criminal justice system." *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring)). It provides an important, but limited, examination of an inmate's conviction and sentence. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("[S]tate courts are the principal forum for asserting constitutional challenges to state convictions.").

As a result, the federal habeas courts' role in reviewing state prisoner petitions is exceedingly narrow. "Indeed, federal courts do not sit as courts of appeal and error for state court convictions." *Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986). They must generally defer to state court decisions on the merits. *Moore v. Cockrell*, 313 F.3d 880, 881 (5th Cir. 2002). And they must defer to state court decisions on procedural grounds. *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991); *Muniz v. Johnson*, 132 F.3d 214, 220 (5th Cir. 1998). They may not grant relief to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996).

In sum, the federal writ serves as a "'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington*, 562 U.S. at 102–03 (quoting *Jackson*, 443 U.S. at 332, n.5). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

A. Adjudicated Claims

For claims previously adjudicated in state court, 28 U.S.C. § 2254(d) imposes a highly deferential standard which demands a federal habeas court grant relief only where the state court judgment:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The focus of this well-developed standard "is not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Moreover, the federal habeas court's focus is on the state court's ultimate legal conclusion, not whether the state court considered and discussed every angle of the evidence. *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc); *see also Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002) ("we review only the state court's decision, not its reasoning or written opinion"). And state courts are presumed to "know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Factual findings, including credibility choices, are entitled to the statutory presumption, so long as they are not unreasonable "in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Further, factual determinations made by a state court enjoy a presumption of correctness which the petitioner can rebut only by clear and convincing evidence. *Id.* § 2254(e)(1); *see Clark v. Quarterman*, 457 F.3d 441, 444 (5th Cir. 2006) (noting that a state court's determination under § 2254(d)(2) is a question of fact). The presumption of correctness applies not only to express findings of fact, but also to "unarticulated

findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001).

B. Unadjudicated Claims

A state prisoner must exhaust available state remedies before seeking federal habeas corpus relief, thereby giving the state the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. *See* 28 U.S.C. § 2254(b)(1) (explaining that habeas corpus relief may not be granted "unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State"); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999).

When a state prisoner presents unexhausted claims, the federal habeas court may dismiss the petition. *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) (citing 28 U.S.C. § 2254(b)(1)(A); *Rose v. Lundy*, 455 U.S. 509, 519–20 (1982)). If a state prisoner presents a "mixed petition" containing both exhausted and unexhausted claims, the federal habeas court may *stay* the proceedings or *dismiss* the petition without prejudice to allow the petitioner to return to state court and exhaust his claims. *Rhines v. Weber*, 544 U.S. 269, 278 (2005); *Pliler v. Ford*, 542 U.S. 225, 227 (2004). Alternatively, the federal habeas court may *deny* relief on an unexhausted or mixed claim on the merits, notwithstanding the petitioner's failure to exhaust the remedies available in state court. 28 U.S.C. § 2254(b)(2). A federal habeas court may *grant* relief on an unexhausted or procedurally defaulted claim *only* if the petitioner demonstrates cause for the default and actual prejudice arising from the default—or shows the failure to consider the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749–50; *Barrientes v. Johnson*, 221 F.3d 741, 758 (5th Cir. 2000). This means that before a federal habeas court may grant relief on an unexhausted claim, the petitioner must show that some objective, external factor prevented him from complying with the state procedural rule. *Martinez v. Ryan*, 566

U.S. 1, 13–14 (2012). When reviewing an unexhausted claim on the merits, the deferential standard of review does not apply. Instead, the federal habeas court examines unexhausted claims under a de novo standard of review. *Cullen v. Pinholster*, 563 U.S. 170, 185–86 (2011); *Carty v. Thaler*, 583 F.3d 244, 253 (5th Cir. 2009).

ANALYSIS

(1) Cruz asserts his counsel provided ineffective assistance when they failed to introduce evidence of West's threats against him during the guilt/innocence phase of his trial.

(2) Cruz contends his counsel provided ineffective assistance when they failed to raise errors in the guilt/innocence phase of his trial and during the second punishment phase of his trial.

Cruz argues his counsel provided ineffective assistance during the guilt/innocence phase of his trial when they failed to introduce mitigating evidence in the form of the victim's gun ownership and the victim's instigation of his threatening and violent behavior.

> Petitioner's trial attorneys refused to submit the guns that were found in Tonya West's apartment as mitigating evidence in his defense. West had threatened to shoot Petitioner on a previous occasion, and she had filed numerous false accusations against Petitioner to get him in trouble. The guns and rebuttal evidence were later offered as defense evidence at Petitioner's Punishment trial that occurred several years later.

Pet'r's Pet. 6, ECF No. 1. Cruz maintains—although he gunned down an unarmed West outside her apartment—his attorneys should have produced evidence that West had two guns in her home at the time of the shooting to support his claim that she had previously threatened him with a gun. *Id.* at 14. He also contends his attorneys should have presented evidence that West induced him to threaten to kill her and otherwise harass her. *Id.* In short, Cruz suggests the jury would have looked favorably on evidence that West caused him to fly from Colorado to Texas and fatally shoot her in a busy apartment complex in front of her two-year old daughter. *See* Reporter's R., vol. 4, pp. 182–83, ECF No. 20-26; *id.*, vol 5, pp. 24–25, 30–31.

He further argues his counsel provided ineffective assistance during the second punishment phase of his trial by failing to raise trial errors committed during the guilt/innocence phase of his trial, which had occurred several years before. Pet'r's Pet. 7, ECF No. 1. Specifically, he notes all of his counsel were employed by the El Paso County Public Defender's Office, and, as a consequence, he believes his trial counsel at his second punishment hearing did not raise errors made by his counsel at the guilt/innocence phase of his trial. *Id.*

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017). A court analyzes a defendant's claim that his counsel failed to provide effective assistance under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *United States v. Willis*, 273 F.3d 592, 598 (5th Cir. 2001). The burden of proof is on the habeas petitioner alleging ineffective assistance. *United States v. Chavez*, 193 F.3d 375, 378 (5th Cir. 1999). A petitioner must show (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 689–94.

To demonstrate deficiency, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Judicial scrutiny of counsel's performance is "highly deferential," with every effort made to avoid "the distorting effect of hindsight," and instead "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. As a consequence, federal habeas courts presume that counsel's choice of trial strategy is objectively reasonable, unless clearly proven otherwise. *Id.*

To demonstrate prejudice, a petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Porter v.*

McCollum, 558 U.S. 30, 38–39 (2009) (internal quotation marks and citation omitted). "That requires a substantial, not just conceivable, likelihood of a different result." *Cullen*, 563 U.S. at 189. A mere allegation of prejudice is not sufficient to satisfy the prejudice prong of *Strickland*. *Armstead v. Scott*, 37 F.3d 202, 206 (5th Cir. 1994).

If a petitioner fails to prove one prong, it is not necessary to analyze the other. *See Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994) ("A court need not address both components of the inquiry if the defendant makes an insufficient showing on one"); *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir.1997) ("Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim."). A petitioner must show both that his counsel's performance was outside the broad range of what is considered reasonable assistance and that this deficient performance led to an unfair and unreliable conviction and sentence. *United States v. Dovalina*, 262 F.3d 472, 474–75 (5th Cir. 2001). "[S]econd-guessing is not the test for ineffective assistance of counsel." *King v. Lynaugh*, 868 F.2d 1400, 1405 (5th Cir. 1989). "[M]ere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983).

In addition, a federal habeas court must review a state petitioner's ineffective-assistance-of-counsel claim "through the deferential lens of [28 U.S.C.] § 2254(d)." *Cullen*, 563 U.S. at 190. It must consider not only whether the state court's determination was incorrect, but also "whether that determination was unreasonable—a substantially higher threshold." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (citing *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). Thus, in light of the deference accorded by § 2254(d), "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington*, 562 U.S. at 101.

> The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one,

> so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Id. at 105.

In *Tuilaepa v. California*, 512 U.S. 967 (1994), the Supreme Court distinguished the two aspects of the capital decision-making process—the eligibility decision and the selection process.

> To be *eligible* for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. . . . To render a defendant *eligible* for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "*aggravating circumstance*" (or its equivalent) at either the guilt or penalty phase. . . . The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). . . . As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. . . . Second, the aggravating circumstance may not be unconstitutionally vague. . . .
>
> We have imposed a separate requirement for the *selection decision*, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. What is important at the *selection state* is an individualized determination on the basis of the character of the individual and *the circumstances of the crime*. That requirement is met when the jury can consider *relevant mitigating evidence* of the character and record of the defendant and the circumstances of the crime. . . .
>
> The *eligibility decision* fits the crime within a defined classification. Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to "make rationally reviewable the process for imposing a sentence of death." . . . The *selection decision*, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability.

512 U.S. at 971–73 (citations omitted) (emphasis added).

A grand jury indicted Cruz for the capital murder of his girlfriend, Tonya West, and her unborn fetus. According to Texas Penal Code § 19.03, "[a] person commits an offense [of capital murder] if the person commits murder as defined under Section 19.02(b)(1) and . . . the person murders more than

one person . . ." The aggravating circumstance in Cruz's case was the murder of more than one person. In other words, for Cruz to be eligible for capital punishment, the State had to first prove Cruz murdered more than one person.

The State presented evidence that Cruz murdered both West and her unborn child. Thus, the State presented evidence that Cruz was eligible for the death penalty.

Cruz's counsel did not present evidence that West had previously threatened and antagonized Cruz during either the guilt/innocence or first punishment phase of his trial. The evidence was not relevant to the eligibility decision. It was, however, relevant to establish why Cruz wanted to kill West. *United States v. McKinney*, 954 F.2d 471, 479 (7th Cir. 1992). Consequently, the omission of this evidence during the guilt/innocence phase of the trial was "sound trial strategy." *Strickland*, 466 U.S. at 689. But it was still mitigating evidence of the circumstances of the crime relevant to the selection decision. So, his trial counsel arguably erred when they did not present this evidence during the punishment phase of the trial.

The jury found Cruz guilty of capital murder, as charged in the indictment.

On appeal, the State conceded the evidence was legally insufficient to prove Cruz intended to kill the unborn child, as there was no evidence Cruz knew West was pregnant. *Cruz*, 2010 WL 2949292, at *3. The Eighth Court of Appeals accordingly reformed the judgment to reflect Cruz was guilty of the lesser-included offense of murder and ordered a new punishment hearing. *Id.*, at *2–3. As a consequence of the appellate court's decision, Cruz was no longer *eligible* for capital punishment.

At Cruz's second punishment hearing, his counsel presented mitigating evidence of the circumstances of the crime. They questioned a police officer about the weapons discovered in West's apartment:

Q . . . You entered Apartment 809 [West's apartment]?

A Yes, sir.

Q Okay. Did you see a shotgun located inside a closet closest to the front door?

A Yes, sir.

Q Did you take any photographs of it?

A Yes, sir.

Q Okay. And did you have an occasion to see . . . a black handgun, located inside another closet?

A Yes, sir. I believe that was actually in the master bedroom.

Reporter's R., vol. 4, p. 172, ECF No. 20-26. They also elicited testimony from Cruz about West antagonizing him in the past:

Q Quinn, at some point you find out that she has pressed some charges against you.

A (Moving head up and down). Yes, ma'am.

Q When did you find out about those charges?

A You know, the thing is, this is what it was. She would always call me up and begin arguments. She would make threats. I would react as well and make threats, but she would write down the things I say or supposedly said and then go to the police or somebody and say, "You know what? He's threatening me." And then she would call me up and throw it in my face like, "Oh, guess what? I have two threats against you." I'm like, "What are you doing? You know that I'm here." I end up talking to the detective while I was in Denver. I called the detective. The only reason I found out I had terroristic threats was she gave me the numbers and throwing in my face, laughing.

Q Let's just back up.

A Okay.

Q Where are you when she told you about the charges?

A I was in Denver, Colorado.

Q And where was she?

A She was in El Paso, Texas.

Q What information did she give you about those, the terroristic threat charges?

A Actually, she was saying that she filed threats against me and she gave me the actual numbers.

Q Which numbers? Explain to us.

A Would have been the case numbers.

Q Case numbers. Okay.

A The case numbers. And I wish I had the information with me but, you know, she ended up giving me the information. I ended up going through the police department. And through a series of calls, I ended up talking to the actual detective that actually did the terroristic threat.

Q So you're in Colorado.

A Uh-huh.

Q And you're calling to a detective in El Paso.

A Yes, ma'am.

Q Okay. You're speaking to him.

> A Yes. And I'm asking, because I was at my college trying to go back to reenroll. I'm freaking out because she's laughing at my face telling me, "I put all these charges against you." And then I called the detective asking him, "What's going on? Please tell me what's going on." And the detective told me to be careful because this woman is putting charges against you and you might get in trouble so be very careful.

Id., vol. 5, p. 173–74, ECF No. 20-27.

In sum, Cruz received a new punishment hearing after the Eighth Court of Appeals reformed the judgment. So, he was able to present his mitigating evidence that West had owned guns and antagonized him. Hence, Cruz cannot show his counsel made errors so serious that they were not functioning as the counsel guaranteed him by the Sixth Amendment when they did not address West's prior behavior during the guilt/innocence phase of his trial. Cruz also cannot show his counsel's performance was so deficient that it fell below an objective standard of reasonableness or that the performance prejudiced the defense because they presented evidence of West's prior behavior during the second punishment phase of his trial.

Cruz also suggests that because the El Paso County Public Defender's Office employed all of his counsel, his attorneys at his second punishment trial did not raise errors made by his attorneys at the guilt/innocence phase of his trial. Pet'r's Pet. 7, ECF No. 1. He explains "Attorney Castanon . . . filed a pre-trial 'Motion to Withdraw' . . . specifically citing a 'Conflict of Interest' as grounds for withdrawal." *Id.*, at 17. But the trial court denied the motion. Then his attorneys "did not raise the errors (cited in Ground One) that [his prior attorneys] committed at Cruz's Guilt-Innocence trial in September 2007." *Id.* Cruz adds "[t]he legal test for ineffective assistance of counsel based on conflict of interest is governed by *Cuyler v. Sullivan*, 446 U.S. 335 (1980)." *Id.*, at 18.

Cuyler provides an alternative framework for analyzing an ineffective-assistance-of-counsel claim alleging a conflict of interest. *Id.* at 350–51. The practical difference between the *Cuyler* framework and the *Strickland* framework is, simply, that under *Cuyler* a defendant need not show

prejudice. *See Beets v. Scott*, 65 F.3d 1258, 1265 (5th Cir. 1995). Under *Cuyler*, a petitioner must only show that his attorney labored under an actual conflict which adversely affected his attorney's performance to establish a Sixth Amendment violation. *Cuyler*, 446 U.S. at 348. "An 'actual conflict' exists when defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client." *Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000).

Cruz does not allege, much less prove, that his counsel at his second punishment hearing represented other clients with competing interests. Rather, his allegation derives from the fact that, many years before, he made negative comments about the Public Defender's Office. Pet'r's Pet. 17–18, 23–24, ECF No. 1. Consequently, Cruz fails to identify any facts remotely implicating *Cuyler*.

Moreover, the Eighth Court of Appeals reformed the judgment to reflect Cruz was guilty of the lesser-included offense of murder and ordered a new punishment hearing. *Cruz*, 2010 WL 2949292, at *2–3. At the second punishment hearing, Cruz's counsel presented evidence of West's alleged prior misconduct. Therefore, his attorneys did not need to raise the purported errors cited in ground one. Instead, they corrected them.

In sum, Cruz can neither establish deficiency or prejudice, nor rebut the presumption that his attorneys presented evidence in his case in a manner consistent with trial strategy. *See Strickland*, 466 U.S. at 689 (stating "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'") (citation omitted)).

More importantly, Cruz's ineffective-assistance-of-counsel claims fail to overcome the deferential standard of review in 28 U.S.C. § 2254(d) because he has not shown, or even attempted to show, that the state court's decision to deny him relief on these claims was contrary to, or an unreasonable application of, Supreme Court law. He is also not entitled to relief because he cannot

show "that the state court's ruling on the claim being presented in federal court [is] so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Cruz is not entitled to relief on his ineffective-assistance-of-counsel claims.

(3) Cruz maintains the prosecution elicited improper testimony from witnesses and made improper arguments regarding probation.

Cruz complains the State engaged in pervasive misconduct during trial. Pet'r's Pet. 6, ECF No. 1. Specifically, he alleges the State made two improper side bar comments during Cruz's cross-examination. In the first, the State queried "Are you going to ask me questions? Because I'll tell you where I want you to be. I want you to be in prison the rest of your life, sir. I don't want you dead." *Id.*, at 16. (RR5: 199). In the second, the State said, "Oh, I see it," after Cruz told the jury he was remorseful. *Id.* Also, he contends the State forced him to object another five times for improper arguments regarding probation, argument outside the record concerning a fine, and reference to community expectations. *Id.*

The appropriate standard of review for a claim of prosecutorial error on a writ of habeas corpus is "'the narrow one of due process.'" *Darden v Wainwright*, 477 U.S. 168, 181 (2009) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). The relevant question is whether the prosecutor's actions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643; *Kirkpatrick v. Blackburn*, 777 F.2d 272, 281 (1985). "Although the asserted prosecutorial misconduct may have made the defendant's trial less than 'perfect', that imperfection must have rendered the trial 'unfair' in order to be 'constitutional error.'" *Rogers v. Lynaugh*, 848 F.2d 606, 609 (5th Cir. 1988) (citing *Darden*, 477 U.S. at 181). The test to determine whether a trial error makes a trial fundamentally unfair is whether there is a reasonable probability that

the verdict might have been different had the trial been properly conducted. *Id.*

Cruz objected to the State's two side bar comments in his direct appeal. *Cruz*, 2016 WL 3194924, at *5. The Eighth Court of Appeals noted that Cruz's counsel objected to the comments, and the trial court sustained objections. *Id.* But it explained that "[u]sually, one or two instances of improper side bar remarks, even uncured, do not amount to a denial of a fair trial. *Id.* (citing *Jimenez v. State*, 298 S.W.3d 203, 214 (Tex. App.—San Antonio 2009, pet. ref'd). It concluded that "[w]e cannot agree that these two sidebar comments alone . . . amount to such flagrant misconduct that [Cruz] was denied a fair trial. Additionally, it explained that the trial court's instruction to disregard the prosecutor's remarks cured any error that may have occurred." *Id.* So, it overruled the objection. *Id.*

Cruz objected to the State's references to parole during closing argument. *Id.*, at *1. The Eighth Court of Appeals agreed that it was "improper for a prosecutor to apply the parole law specifically to the defendant during jury argument." *Id.* (citing Tex. Code Crim. Proc. Ann. art. 37.07, § 4(a)(West 2015); *Perez v. State*, 994 S.W.2d 233, 237 (Tex. App.—Waco 1999, no pet.)). Here, the State "essentially encouraged the jury to assess the State's desired sentence, a life sentence, based on the parole information." *Id.*, at 2. Consequently, the "argument encouraged the jury to consider the effects of parole on [Cruz's] punishment and therefore was improper." *Id.* The appellate court then applied the three-part test in Texas Rule of Appellate Procedure Rule 44.2(b): "(1) the severity of the conduct as evidenced by the prosecutor's argument (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure the misconduct; that is, the effect of any cautionary instruction given by the court; and (3) the certainty of conviction absent the misconduct." *Id.* (citing *Martinez v. State*, 17 S.W.3d 677, 692–93 (Tex.Crim.App.1998). It determined that (1) "the prejudicial effect on [Cruz] was minor," (2) "no curative measures were taken by the trial court," and (3) "the prosecutor's misconduct had little, if any, effect in light of the punishment assessed." *Id.* It

added, considering the evidence, that "it is unlikely that the jury would have sentenced [Cruz] to less time had the prosecutor's comments not been made." *Id.*, at *3. It found that the "improper jury argument did not have a substantial effect on the jury's verdict." *Id.* (citing *Fowler v. State*, 958 S.W.2d 853, 866 (Tex. App.—Waco 1997, aff'd, 991 S.W.2d 258 (Tex.Crim.App.1999)). Hence, it overruled the objection. *Id.*.

Cruz argued the State's references a fine as part of his sentence constituted improper jury argument. *Id.* The Eighth Court of Appeals explained that "[p]roper jury argument falls into four specific categories: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument by opposing counsel, and (4) plea for law enforcement." *Id.* (citing *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973); *Van Zandt v. State*, 932 S.W.2d 88, 92 (Tex. App.—El Paso 1996, pet. ref'd). However, "[t]o properly preserve a complaint about improper jury argument, the defendant must: (1) object; (2) request an instruction to disregard; and (3) move for mistrial." *Id.* (citing *Auguste v. State*, No. 08–99–00303–CR, 2002 WL 475226 (Tex. App.—El Paso Mar. 29, 2002, no pet.) (not designated for publication), citing *Harris v. State*, 784 S.W.2d 5, 12 n.4 (Tex. Crim. App. 1989)). Here, Cruz "failed to move for mistrial after the trial court sustained his objection and instructed the jury to disregard the statement." *Id.* Consequently, because he "did not pursue his objection to an adverse ruling, he has waived his contentions regarding that statement on appeal." *Id.* (citing *McFarland v. State*, 989 S.W.2d 749, 751 (Tex. Crim. App. 1999)). Therefore, it overruled the objection.

Cruz maintained the State's references to community expectations also constituted improper jury argument. The State argued during its closing:

> [Prosecutor]: On behalf of the State of Texas, we want to thank you. . . . We are not asking willy-nilly for life in prison. We are asking that you follow through what his original intent was. He was going to kill her and take his own life. He deserves. Justices

requires. This family deserves. Tonya West deserves.

[Defense counsel]: Objection, Your Honor. Improper argument.

[The Court]: Overruled.

[Prosecutor]: Tonya West deserves justice, and the community's safety deserves life.

Id., at *1. The Eighth Court of Appeals reviewed the evidence presented in the case:

> Several eyewitnesses testified that they either saw [Cruz] shoot West with a gun or heard gunshots and then saw West lying on the ground. Shortly after turning himself in to the police, [Cruz] directed them to the firearm's location where he disposed of it. . . . The police later discovered that [Cruz] flew from Commerce City, Colorado, to El Paso, Texas, arriving in El Paso the morning of murder. [Cruz] wrote several letters dated the day before the murder, wherein he gave away all his possessions to friends and family; asked them to pay all of his bills with the money in his bank account; and asked a friend to send a $10,000 check from his bank account to his parents. One letter in particular, addressed to his parents, stated that, "This is a war I must finish. I am going to kill her one way or another." Evidence was also introduced that approximately one month before the murder, [Cruz] threatened West. A police report documented [Cruz's] threats made to West:
>
> > [H]e would kill her anytime he wanted; he would cut off her f**king head; If you want a war, you got a war; I'm going to kill you. Trust me, I am; You're going to die, don't you know; Two to three minutes to chop off your head. Then you'll know I'm serious; I will find you and I will kill you in two minutes with no problem and just leave.
>
> The medical examiner testified that West's death was a result of a homicide due to multiple gunshot wounds causing her to bleed to death. West sustained a total of four bullet wounds.

Id., at *2–3. The appellate court agreed that the argument may have been improper but considered it unlikely "that [Cruz] would have received a lesser sentence if the improper comments had not been made." *Id.*, at *1. It therefore concluded "that the improper jury argument did not have a substantial effect on the jury's verdict. *Id.*, *3. And it overruled the objection. *Id.*

After reviewing the record, the Court finds that the State's errors were minor and did not infect "the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643. The Court further finds that there was not a reasonable probability that the verdict might have been different had the trial been conducted without the State's errors. *Rogers*, 848 F.2d at 609.

The standard of review, however, "is not whether a federal court believes the state court's determination was incorrect, but whether that determination was unreasonable—a substantially higher threshold." *Schriro*, 550 U.S. 465 (2007). The Court finds the state court's determinations were reasonable.

Furthermore, 28 U.S.C. § 2254(d) imposes a highly deferential standard for claims previously adjudicated in state court. For pure questions of law and mixed questions of law and fact, state court determinations receive deference unless the decision was contrary to or involved an unreasonable application of federal law. 28 U.S.C. § 2254(d)(1); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). A state court decision is contrary to federal law if (1) it applies a rule different from the governing law set forth in Supreme Court cases, or (2) it decides a case differently than the Supreme Court when there are "materially indistinguishable facts." *Poree v. Collins*, 866 F.3d 235, 246 (5th Cir. 2017); *Wooten v. Thaler*, 598 F.3d 215, 218 (5th Cir. 2010). A state court decision involves an unreasonable application of federal law when it applies a correct legal rule unreasonably to the facts of the case. *White v. Woodall*, 572 U.S. 415, 425 (2014). An unreasonable application of federal law must be objectively unreasonable; clear error will not suffice. *Boyer v. Vannoy*, 863 F.3d 428, 453 (5th Cir. 2017).

Cruz has not met his burden of showing that any of the state court decisions were contrary to clearly established Federal law or were unreasonable determinations of the facts. Cruz is not entitled to relief on these claims.

(4) Cruz asserts the trial court erred when it permitted the prosecution to argue he could work off his fine while incarcerated.

Cruz claims the the State discussed facts outside the record during closing arguments concerning a fine. Pet'r's Pet. 19, ECF No. 1. He explains that the State asked the jury to impose the maximum possible fine of $10,000 because he could work while he was in prison and earn money to pay off the fine. But he

further explains that the Texas Department of Criminal Justice does not normally pay wages to prisoners and, in any event, his disabilities preclude him from working. So, he could not pay a fine.

As the Court noted above, Cruz "failed to move for mistrial after the trial court sustained his objection and instructed the jury to disregard the statement." *Cruz*, 2016 WL 3194924, at *3. Consequently, because Cruz "did not pursue his objection to an adverse ruling, he . . . waived his contentions regarding that statement on appeal" in state court. *Id.* (citing *McFarland v. State*, 989 S.W.2d 749, 751 (Tex. Crim. App. 1999)).

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman*, 501 U.S. at 729. A procedural restriction is independent if the state court's judgement "clearly and expressly" indicates that it is independent of federal law and rests solely on a state procedural bar. *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir. 1995). To be adequate, the state procedural rule must be strictly or regularly followed and evenhandedly applied to the majority of similar cases. *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997). Texas' contemporaneous objection rule to properly preserve a complaint about improper jury argument has long been recognized as an independent and adequate state procedural ground sufficient to bar federal review. *Sharp v. Johnson*, 107 F.3d 282, 285–86 (5th Cir. 1997); *Amos*, 61 F.3d at 339–41. Failure to lodge a contemporaneous objection relegates a petitioner to showing cause and prejudice for his procedural default or demonstrating that the federal court's failure to review will result in a "fundamental miscarriage of justice." *Sharp*, 107 F.3d at 286; *Amos*, 61 F.3d at 339.

Cruz fails to make a showing of cause and prejudice for his procedural default. Procedural bar aside, the Court notes that a failure to move for a mistrial is an indication that the challenged argument was not perceived by Cruz at trial as having a substantial adverse effect or would not necessarily be

understood as advancing improper considerations. *Milton v. Procunier*, 744 F.2d 1091, 1095 (5th Cir. 1984). Cruz is, therefore, not entitled to relief on this claim.

(5) Cruz contends the trial court erred when it denied his counsel's motions to withdraw, for a new trial, and granted his counsel's motions to withdraw and substitute counsel.

Cruz alleges that the trial court erred and effectively deprived him of a fair trial and his right to counsel in the second sentencing hearing by denying his trial counsel's motion to withdraw based on a conflict of interest. Pet'r's Pet. 7, 17–18. Specifically, Cruz claims his trial counsel at his second sentencing hearing—lawyers with the El Paso County Public Defender's Office—based their motion to withdraw on the fact that some of the State's evidence consisted of letters from Cruz which contained negative comments about his prior representation by other lawyers with the El Paso Public Defender's Office. *Id.* at 23–24. Cruz further complains that the trial court erred by denying his motion for new trial and granting a counsel motion to withdraw and substitute counsel at the conclusion of his second punishment hearing. Cruz argues that the cumulative effect of these errors deprived him of a fundamentally fair trial. *Id.* at 8, 20–22.

Cruz relies on Supreme Court precedent in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). *Cuyler* provides an alternate analysis when an ineffective-assistance-of-counsel claim involves a conflict of interest. Under *Cuyler*, to establish a Sixth Amendment violation, a petitioner need only show that his attorney labored under an actual conflict which adversely affected his performance. *Cuyler*, 446 U.S. at 348; *Beets v. Scott*, 65 F.3d 1258, 1277 (5th Cir. 1995) (en banc). "An 'actual conflict' exists when defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client." *Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000).

Cruz fails to identify any facts remotely implicating *Cuyler*. Cruz does not allege, much less

prove, that his attorneys represented clients with competing interests as contemplated in *Cuyler*. Rather, Cruz's allegation derives from the fact that he made negative comments many years before about the Public Defender's Office. Pet'r's Pet. 17–18, 23–24, ECF No. 1. In essence, the facts underlying this claim are not the sort of facts that would have undermined his counsel's performance. Without any evidence that the denial of the motion to withdraw had any impact on his trial or the performance of counsel, Cruz cannot muster a constitutional claim.

To the extent Cruz briefly complains about the denial of his motion for new trial and granting a later motion to withdraw, Cruz provides no basis for believing either of those decisions were erroneous, much less error of constitutional magnitude. *Id.*, at 20–22. Without any substantial argument to back these complaints, his claims are meritless, if not waived by his lack of argument. *See Woods v. Cockrell*, 307 F.3d 353, 357 (5th Cir. 2002) (explaining a statement of a legal conclusion, without a serious attempt to argue or substantiate the issue, is a waiver or abandonment of the issue).

Moreover, Cruz cannot establish that the state court's denial of this claim is a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Therefore, the resolution of the claim is barred from re-litigation under 28 U.S.C. § 2254(d).

EVIDENTIARY HEARING

Cruz requests an evidentiary hearing to further develop the record in support of his claims. A federal court's review of claims previously adjudicated on the merits by a state court "is limited to the record that was before the state court." *Cullen*, 563 U.S. at 181; *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011). A court may hold an evidentiary hearing only when the petitioner shows that (1) a claim relies on a new, retroactive rule of constitutional law that was previously unavailable, (2) a claim relies on a factual basis that could not have been previously discovered by exercise of due diligence, or (3) the facts underlying the claim show by clear and convincing evidence that, but for the constitutional error,

no reasonable juror would have convicted the petitioner. 28 U.S.C. § 2254(e)(2). Here, Cruz's petition asserts multiple claims already adjudicated on the merits in state court. He does not rely on a new rule of constitutional law or new evidence. The evidence of his guilt was overwhelming. Therefore, he is not entitled to an evidentiary hearing.

CERTIFICATE OF APPEALABILITY

A certificate of appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 132 S. Ct. 641, 646 (2012). In cases where a district court rejects a petitioner's constitutional claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To warrant a grant of the certificate as to claims that the district court rejects solely on procedural grounds, the petitioner must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, Cruz has not made a substantial showing of the denial of a constitutional right. Thus, reasonable jurists could not debate the denial of Cruz's § 2254 petition or find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Therefore, the Court shall not issue a certificate of appealability.

CONCLUSIONS AND ORDERS

The Court concludes that Cruz is not entitled to § 2254 relief. The Court further concludes that Cruz is not entitled to a certificate of appealability. The Court, therefore, enters the following orders:

IT IS ORDERED that the Cruz's motion for an evidentiary hearing is **DENIED.**

IT IS FURTHER ORDERED that Cruz's "Petition for a Writ of Habeas Corpus by a Person in State Custody" under 28 U.S.C. § 2254 (ECF No. 1) is **DENIED.**

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED.**

IT IS FURTHER ORDERED that all pending motions are **DENIED.**

IT IS FINALLY ORDERED that the District Clerk shall **CLOSE** this case.

SIGNED this 6th day of August 2019.

DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

QUINN PALACIOS CRUZ, JR.,
TDCJ No. 1476178,
Petitioner,

v.

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

EP-18-CV-243-DCG

FINAL JUDGMENT

In accordance with the Memorandum Opinion and Order signed on this date, the Court enters its Final Judgment, pursuant to Federal Rule of Civil Procedure 58, as follows:

IT IS ORDERED that Petitioner Quinn Palacios Cruz Jr.'s "Petition for a Writ of Habeas Corpus by a Person in State Custody" under 28 U.S.C. § 2254 (ECF No. 1) is **DENIED**.

IT IS FURTHER ORDERED that Petitioner Quinn Palacios Cruz Jr. is **DENIED** a certificate of appealability.

IT IS FURTHER ORDERED that all pending motions are **DENIED**.

IT IS FINALLY ORDERED that the District Clerk shall **CLOSE** this case.

SIGNED this 11th day of September 2019.

DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

QUINN CRUZ, JR.,	§	No. 08-08-00213-CR
Appellant,	§	Appeal from
v.	§	205th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20060D00581)

OPINION

Quinn Cruz, Jr. appeals his conviction of capital murder. Prior to trial, the State gave notice that it would not seek the death penalty. A jury found Appellant guilty of capital murder and his punishment was automatically set at life imprisonment. *See* TEX.PENAL CODE ANN. § 12.31 (Vernon Supp. 2009). We reverse and remand for a new punishment hearing.

FACTUAL SUMMARY

Appellant and the victim, Tonya West, moved into the Crest Apartments on October 18, 2005. Approximately one week later, West left Appellant and moved into another apartment in the same complex. On the morning of November 18, 2005, Appellant and West had a conversation in the parking lot about their break-up. Several residents heard a gunshot and a woman scream and saw West attempting to get away from Appellant. The witnesses saw Appellant following her through the parking lot while firing a weapon at her at close range. One resident who rushed to West's side,

asked if she knew who shot her, and she replied, "Quinn Cru --." West died later at the hospital.

One witness testified that Appellant calmly walked away. Another witness, James Thomas, encountered Appellant as he left the scene and asked him what was going on. Appellant replied, "You better get over there, some serious shit just went down over there." Appellant then said he had to go. Later that same day, Appellant called the police and said he had done something horrible and wanted to turn himself into the police. He told the officer that he would go back to the scene and turn himself in. In a subsequent call to police, Appellant said he wanted to turn himself in, but he was afraid he would be shot. After being reassured he would not be harmed, Appellant told the detective that he was at a car wash near the apartments. Detectives went to the car wash and took Appellant into custody. Appellant later took the police to the drainage pipe where he had disposed of the gun.

The medical examiner, Dr. Juan Contin, performed the autopsy on West. He determined that four bullets had entered West's body. One of the shots had been fired at close range, approximately 12-15 inches. West died from internal bleeding caused by the multiple gunshot wounds. Dr. Contin discovered during the autopsy that West was about two to three weeks pregnant at the time of her death. The defense's medical expert, Dr. Harry Wilson, agreed with Dr. Contin's estimation of the embryo's stage of development as two to three weeks. According to Dr. Wilson, there would have been no visible signs of pregnancy and no one would have been able to tell from outward appearance that West was pregnant. It also was too early in the pregnancy for West to have experienced morning sickness.

A grand jury indicted Appellant for the capital murder of West and the unborn fetus by shooting West with a firearm. The trial court submitted to the jury the charged capital murder

offense (both West and the unborn child) and the lesser-included offense of murder (West only). The jury found Appellant guilty of capital murder as charged in the indictment. This appeal follows.

LEGAL SUFFICIENCY OF THE EVIDENCE

In Point of Error One, Appellant challenges the legal sufficiency of the evidence to prove he had specific intent to kill the unborn child. In reviewing the legal sufficiency of evidence, we consider all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979). A person commits murder if he intentionally or knowingly causes the death of an individual. *See* TEX.PENAL CODE ANN. § 19.02(b)(1)(Vernon 2003). A person commits capital murder if he intentionally or knowingly causes the death of an individual and he murders more than one person during the same criminal transaction. TEX.PENAL CODE ANN. § 19.02(b)(1); TEX.PENAL CODE ANN. § 19.03(a)(7)(A)(Vernon Supp. 2009). The Penal Code's definition of a "person" includes "an individual." TEX.PENAL CODE ANN. § 1.07(a)(38)(Vernon Supp. 2009). An "individual" is defined as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." TEX.PENAL CODE ANN. § 1.07(a)(26). If a person intentionally or knowingly causes the death of a woman and her unborn child at any stage of gestation, he commits the offense of capital murder. *See Lawrence v. State,* 240 S.W.3d 912, 915 (Tex.Crim.App. 2007), *cert. denied,* 553 U.S. 1007, 128 S.Ct. 2056, 170 L.Ed.2d 798 (2008).

At the time this case was tried, the concept of transferred intent applied to capital murder. *Norris v. State,* 902 S.W.2d 428, 437-38 (Tex.Crim.App. 1995), *overruled by Roberts v. State,* 273 S.W.3d 322 (Tex.Crim.App. 2008). Under this rule, if an accused killed his intended victim, and

also killed an unintended victim, he was criminally responsible for both murders. *Norris*, 902 S.W.2d at 437-38. But more recently, the Court of Criminal Appeals overruled *Norris* in *Roberts v. State*, 273 S.W.3d 322 (Tex.Crim.App. 2008). There, the defendant murdered a woman and her unborn child. The woman was eight to nine weeks pregnant, and as in the present case, there was no evidence that the defendant was aware the woman was pregnant. *See id.* at 327. In the context of a multiple-murder-capital-murder statute which requires that each death be intentional or knowing, the court held that when an accused only intends to kill one individual and actually kills that person, the intent manifested in that killing cannot also then transfer to another, unintended victim. *Id.* at 331.

The Court of Criminal Appeals reasoned that the concept of transferred intent cannot be used to charge capital murder based on the death of an unintended victim. Transferred intent may be used in regard to a second death only if there is proof of the intent to kill ths same number of persons who actually died; that is, with intent to kill two people and two other people are killed. *Id.* at 330-31. The court further held that in order to charge a person with intentionally killing the second person, an embryo in the *Roberts* case, there must be the specific intent to do so. *Id.* at 331. It then concluded that since Roberts did not know that the intended victim was pregnant, he could not form the specific intent to kill the embryo. *Id.* The court reformed the judgment to reflect a conviction for murder of the mother, and the case was remanded to the trial court for a new punishment hearing for a single murder conviction. *See id.* at 332.

The State concedes that the evidence is legally insufficient to prove that Appellant intended to kill the unborn child as there is no evidence he knew West was pregnant, but it argues that the judgment should be reformed to reflect a conviction for the murder of West and the cause should be

remanded for a new punishment hearing. We agree. The trial court submitted the lesser-included offense of murder to the jury. Further, Appellant has not challenged the sufficiency of the evidence proving he intentionally and knowingly caused the death of West by shooting her with a firearm. We therefore sustain Point of Error One. Unless we find reversible error in the remaining issues presented on appeal which would result in the granting of a new trial for purposes of guilt/innocence, the proper resolution will be to reform the judgment to reflect a conviction for the murder of West and remand the cause for a punishment hearing. *See Roberts*, 273 S.W.3d at 332; *see also Haynes v. State*, 273 S.W.3d 183, 187 (Tex.Crim.App. 2008). Having sustained Point of Error One, it is unnecessary to address Point of Error Two in which Appellant challenges the factual sufficiency of the evidence supporting the capital murder conviction. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App. 1996).

CONSTITUTIONALITY OF CAPITAL MURDER STATUTE

In Points of Error Three through Eight, Appellant contends that the statutory scheme permitting a capital murder prosecution and conviction for the murder of a pregnant woman and her unborn child is unconstitutional as applied to him in this case. The constitutionality of a statute should not be determined in any case unless such a determination is absolutely necessary to decide the case in which the issue is raised. *Turner v. State*, 754 S.W.2d 668, 675 (Tex.Crim.App. 1988). This court has held that if an appellant raises multiple issues on appeal, some of which challenge the constitutionality of a statute, the reviewing court should first resolve the non-constitutional issues and if a reversal is required, the issues regarding the statute's constitutionality should not be addressed. *Collins v. State*, 890 S.W.2d 893, 896 (Tex.App.--El Paso 1994, no pet.). Because we have found the evidence legally insufficient to support Appellant's capital murder conviction, we

decline to address Appellant's challenges to the constitutionality of the capital murder statutes.

WRITTEN QUESTIONNAIRES

In Point of Error Nine, Appellant complins that the trial court erred by failing to submit written questionnaires to the prospective jurors. He argues that the trial court's ruling deprived him of the effective assistance of counsel because it prevented counsel from being able to effectively question the jurors about various subjects, including the jurors' beliefs and attitudes towards the death penalty.

During a pretrial conference, defense counsel asked if a written questionnaire could be submitted to the jury panel. The trial court ruled that only the standard juror-information questionnaires would be used. Appellant subsequently filed a written request to submit additional questionnaires to the prospective jurors. Immediately prior to the beginning of voir dire, defense counsel again raised the written questionnaire issue but the trial court denied the request. That same day, Appellant filed a proposed written questionnaire which included a section addressing the potential jurors' beliefs regarding the death penalty.

The conduct of voir dire rests within the sound discretion of the trial court. *Woods v. State*, 152 S.W.3d 105, 108 (Tex.Crim.App. 2004); *Mata v. State*, 867 S.W.2d 798, 803 (Tex.App.--El Paso 1993, no pet.). Consequently, we review the trial court's decisions regarding the manner in which voir dire is conducted for an abuse of discretion. *Curry v. State*, 910 S.W.2d 490, 492 (Tex.Crim.App. 1995); *Mata*, 867 S.W.2d at 803. Generally, a trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex.Crim.App. 1990). Stated differently, a trial court abuses its discretion when it acts arbitrarily or unreasonably. *Id.*

Under Section 62.0132 of the Government Code, the Office of Court Administration is given the task of developing and maintaining a questionnaire to accompany a written jury summons. TEX.GOV'T CODE ANN. § 62.0132(a)(Vernon 2005). The statute mandates that the questionnaire require a person to provide certain biographical and demographic information relevant to service as a jury member. TEX.GOV'T CODE ANN. § 62.0132(c). A person who has received a written jury summons and the questionnaire is required to complete and submit the questionnaire when the person reports for jury duty. TEX.GOV'T CODE ANN. § 62.0132(c), (d). Appellant has not cited any rule, statute, or any other authority requiring the trial court to submit additional questionnaires requested by either the State or the defense. It therefore cannot be said that the trial court acted without reference to any guiding rules or principles. Appellant has not shown that the trial court's refusal to submit the questionnaire constituted an arbitrary or unreasonable act given that defense counsel had the opportunity to examine the venire and ask questions about numerous topics including those addressed in the questionnaire. Appellant nevertheless argues, citing sociological studies and law review articles, that written questionnaires are a superior method of obtaining truthful information from potential jurors. While that may well be true, Appellant failed to present any of this information to the trial court. Additionally, the Court of Criminal Appeals has cautioned against reliance on written questionnaires to supply any information that counsel deems material due to the possibility of misinterpretation of questions. *See Gonzales v. State*, 3 S.W.3d 915, 917 (Tex.Crim.App. 1999). Because the record before us does not demonstrate an abuse of discretion, we overrule Point of Error Nine.

RESTRICTION OF VOIR DIRE

In Points of Error Ten and Eleven, Appellant alleges that the trial court improperly restricted

voir dire by not permitting him to ask a hypothetical question addressing the prospective jurors' ability to consider the minimum punishment if they found him guilty of the lesser-included offense of murder.

The right to counsel guaranteed by Article I, Section 10 of the Texas Constitution includes the right of counsel to question the venire in order to intelligently exercise peremptory challenges. *Ex parte McKay*, 819 S.W.2d 478, 482 (Tex.Crim.App. 1990); *Mata v. State*, 867 S.W.2d 798, 803 (Tex.App.--El Paso 1993, no pet.). When an appellant challenges a trial judge's limitation on the voir dire process, the reviewing court must analyze the claim under an abuse of discretion standard, the focus of which is whether the appellant proffered a proper question concerning a proper area of inquiry. *Jones v. State*, 223 S.W.3d 379, 381 (Tex.Crim.App. 2007); *Howard v. State*, 941 S.W.2d 102, 108 (Tex.Crim.App. 1996). A proper question is one which seeks to discover a veniremember's views on an issue applicable to the case. *Howard*, 941 S.W.2d at 108. If a proper question is disallowed, harm to the appellant is presumed because he has been denied the ability to intelligently exercise his peremptory strikes. *Id.* However, a trial court is given broad discretionary authority to impose reasonable restrictions on the voir dire process. *Id.* The trial court is permitted to control the scope of voir dire by limiting improper questioning. *Smith v. State*, 703 S.W.2d 641, 643 (Tex.Crim.App. 1985).

During voir dire, defense counsel addressed the issue of the potential jurors' ability to consider probation for the lesser-included offense of murder:

> Now, assume with me that you are on -- wait a minute -- one more little point. We are talking about the definitions of unborn child and there is some suggestion that the fetus, an unborn child, is also another stage of gestation called embryo.
>
> And apparently under the definitions of the law an unborn child which can be

murder; an embryo.

Now, I want you assume with me that you are on the jury. Now in a hypothetical case in which the accused was charged with capital murder; this is, the indicted charges were the accused intentionally and knowingly caused the death of a certain individual by shooting that individual with a firearm and the accused intentionally and knowingly caused the death of another individual; namely, the unborn child of the first victim with a firearm and both murders were committed during the same criminal transaction.

It is your opinion in a hypothetical case where that was the original accusation. Assume further that you and your fellow jurors considered the case. You hear all the evidence, you went back in the juryroom. You have deliberated and you-all came to the conclusion and the verdict that the accused was not guilty of the capital murder for which he was indicted.

Okay. Assume with me further that after you and your fellow jurors found the accused not guilty of the capital murder, you considered all the evidence in the case and convicted the accused of the lesser included offense of murder.

And in order to do that, you would have had to determine that the accused committed intentionally, that he did it because he wanted to do it, that the accused was not forced to commit it, that the killing was not done in self defense, that it is not done in defense of a third party, that it was not an accident.

Not a mistake. That the accused was not insane, that the victim was totally innocent and that the victim did not provoke the murder or deserve to die.

After coming to these conclusions and arriving at a verdict of guilty of murder, your next job would be to determine the punishment in that case.

The prosecutor objected that the hypothetical was an improper attempt to have the jurors commit to a particular result under a particular set of facts. Appellant's attorney responded that he could include the elements of the indictment in the hypothetical. The trial court asked defense counsel to restate his hypothetical without getting into the facts of the case.

Defense counsel restated the hypothetical but again included the facts by asking the potential jurors whether they could consider five years probation in a case where the person was charged with

intentionally and knowing shooting and killing the victim and her unborn child and the jury found the defendant guilty of murder. The State objected to the hypothetical on the ground of improper contracting and stated that the prospective jurors only had to be able to consider the full range of punishment in any given case, not the specifics of the case on trial. The court instructed defense counsel to ask whether the jurors could consider probation in an appropriate case. Defense counsel insisted that he wanted to ask the question as stated and tendered the question in writing to the court. Ultimately, defense counsel was permitted to ask each prospective juror whether he or she could consider the minimum punishment where the defendant is found guilty of the lesser-included offense of murder.

During voir dire, an attorney cannot attempt to bind or commit a prospective juror to a verdict based on a hypothetical set of facts. *Standefer v. State*, 59 S.W.3d 177, 179-80 (Tex.Crim.App. 2001). A question is a commitment question if one or more of the possible answers is that the prospective juror would resolve or refrain from resolving an issue in the case on the basis of one or more facts contained in the question. *Id.* at 179-80. Not all commitment questions are improper. *Id.* at 181. The law requires jurors to make certain types of commitments. *Id.* Consequently, the attorneys may ask the prospective jurors whether they can follow the law in that regard. *Id.* For example, a prospective juror is challengeable for cause if he or she is unable to consider the full range of punishment provided for an offense. *Id.* Thus, the question, "Can you consider probation in a murder case?" is a proper question even though it commits a prospective juror to keeping the punishment options open (i.e., to refraining from resolving the punishment issues in a certain way) in a murder case. *Id.* But the question becomes improper when it adds facts beyond what is necessary to determine whether the prospective juror is challengeable for cause. *Id.* at 182. The

inquiry for improper commitment questions has two steps: (1) is the question a commitment question, and (2) does the question include facts--and only those facts--that lead to a valid challenge for cause? If the answer to (1) is "yes" and the answer to (2) is "no," then the question is an improper commitment question, and the trial court should not allow the question. *Id.* at 182-83.

Here, the answer to the first question is "yes" because Appellant concedes, and we agree, that the question he sought to ask is a commitment question. We further find that the answer to the second question is "no" because the hypothetical question utilized by defense counsel--stating that the defendant was accused of intentionally and knowingly killing a woman and her unborn child and the woman by shooting the woman, the woman was totally innocent, and the defendant did it because he wanted to do it--included facts beyond what was necessary to establish that a prospective juror was unable to consider the minimum punishment in a murder case. *See Standefer*, 59 S.W.3d at 181-82 (overruling *Maddux v. State*, 862 S.W.2d 590, 591-92 (Tex.Crim.App. 1993) which held that defendant in a murder case involving a child could inquire whether the prospective jurors could consider probation if the murder victim was a child). Thus, the hypothetical question Appellant sought to ask was an improper commitment question and the trial court properly disallowed it. Points of Error Ten and Eleven are overruled.

CHALLENGES FOR CAUSES

In Point of Error Twelve, Appellant maintains that the trial court erred by denying his challenges for cause to prospective juror number four and sixty-seven other prospective jurors who could not consider probation for the lesser-included offense of murder. Because Appellant was convicted of capital murder, the jury did not determine punishment. Consequently, any error relating to the punishment range of the lesser-included offense of murder is harmless because it made no

contribution to Appellant's conviction or punishment. *See King v. State*, 953 S.W.2d 266, 268 (Tex.Crim.App. 1997)(where defendant was convicted of capital murder, Court of Criminal Appeals found harmless the alleged error in the denial of the defendant's challenges for cause related to two potential jurors' inability to consider probation for the lesser-included offense of murder because it made no contribution to the defendant's conviction or punishment). Point of Error Twelve is overruled.

CUMULATIVE ERROR

In Point of Error Thirteen, Appellant contends that cumulative error during jury selection prevented defense counsel from providing the effective assistance of counsel guaranteed by the state and federal constitutions. There is some authority that a number of errors may be found harmful in their cumulative effect, but there is no authority holding that non-errors may in their cumulative effect cause error. *See Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex.Crim.App. 1999). We have found no error occurred in connection with Points of Error Nine, Ten, and Eleven. In Point of Error Twelve, we did not address the merits of the complaint but found that even if error occurred it was harmless. Because there is no basis for finding cumulative error, we overrule Point of Error Thirteen.

TRIAL COURT'S CONDUCT

In his final point of error, Appellant argues that the trial court violated his right to a fair trial by interrupting defense counsel during voir dire, making improper comments to the jury panel, assisting the prosecutor, and by questioning a witness. Appellant admits that he did not object to any of the instances of alleged improper conduct by the trial judge, but he contends that the judge's behavior amounts to fundamental error, and therefore, he was not required to object. In support of

his fundamental error argument, Appellant cites the Court of Criminal Appeals' plurality opinion in *Blue v. State*, 41 S.W.3d 129, 131 (Tex.Crim.App. 2000)(plurality op.).

Due process requires a neutral and detached judge. *Brumit v. State*, 206 S.W.3d 639, 645 (Tex.Crim.App. 2006), *citing Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Failure to raise a contemporaneous objection generally results in failure to preserve error for appellate review. *See* TEX.R.APP.P. 33.1(a); *see also Brewer v. State*, 572 S.W.2d 719, 721 (Tex.Crim.App. 1978)(where no objection is made, remarks and conduct of the court may not be subsequently challenged unless they are fundamentally erroneous). But Rule 103(d) of the Texas Rules of Evidence authorizes appellate courts to take notice of fundamental errors affecting substantial rights even though they were not brought to the attention of the trial court. TEX.R.EVID. 103(d). In *Blue*, the trial judge apologized to the venire for its long wait, stated the delay was because the defendant was indecisive on whether to accept a plea bargain, and expressed his preference that the defendant plead guilty. *Id.* at 130. A plurality of the Court of Criminal Appeals held that the trial judge's comments tainted the defendant's presumption of innocence in front of the venire and amounted to fundamental error of constitutional dimension which required no objection. *Blue*, 41 S.W.3d at 132. Thus, the defendant's failure to object did not constitute waiver. *Id.* at 132.

Blue is not binding precedent because it is a plurality opinion. *See Jasper v. State*, 61 S.W.3d 413, 421 (Tex.Crim.App. 2001)(acknowledging *Blue* as a plurality opinion that the court was not bound to follow). In *Brumit v. State*, the defendant relied on *Blue*, but the Court of Criminal Appeals held that we must look to the test set forth in *Marin v. State*, 851 S.W.2d 275 (Tex.Crim.App. 1993) when determining whether comments by the trial judge can be raised on appeal absent an objection. *Brumit v. State*, 206 S.W.3d 639, 644 (Tex.Crim.App. 2006). Under *Marin*, it must be determined

whether the alleged error violated (1) an absolute requirement or prohibition; (2) a right of the defendant that must be implemented by the system unless expressly waived; or (3) a right that is to be implemented upon request of the defendant. *See Brumit*, 206 S.W.3d at 644. Despite these comments, the court chose not to reach the preservation issue because it found that the judge's comments did not show partiality on the part of the judge. *Id.* at 644-45. In other words, the court did not reach the preservation issue because it addressed the merits and found no error. Because the Court of Criminal Appeals has not spoken definitively on the preservation issue, we will follow *Brumit's* approach and determine whether the trial judge's comments were erroneous.

A trial judge has discretion in maintaining control and expediting trial. *Jasper v. State*, 61 S.W.3d 413, 421 (Tex.Crim.App. 2001). It is not improper for a trial judge to interject to correct a misstatement or misrepresentation of previously admitted testimony. *Id.* Likewise, a trial judge is permitted to correct a misstatement of the law, explain a point of law or clear up confusion, or to expedite the proceedings. *See Jasper*, 61 S.W.3d at 421; *Moore v. State*, 275 S.W.3d 633, 636 (Tex.App.--Beaumont 2009, no pet.); *Murchison v. State*, 93 S.W.3d 239, 262 (Tex.App.--Houston [14th Dist.] 2002, pet. ref'd). Further, a trial judge is permitted to question a witness for the purpose of clarifying an issue or assisting the court in ruling on an objection. *Brewer v. State*, 572 S.W.2d 719, 721 (Tex.Crim.App. 1978); *Moore*, 275 S.W.3d at 636-37.

Comments During Voir Dire

Appellant first complains of five instances during voir dire when the trial court interrupted defense counsel to make comments. The first instance occurred while defense counsel was addressing pretrial publicity and possible bias. The court interrupted to comment on the value of the jury system and the failure of the media to be 100 percent accurate. The court also clarified that the

bias counsel was discussing existed prior to the jury hearing any evidence. The court's comments were a permissible exercise of the court's discretion to explain and clarify a point of law or clear up confusion. *See Jasper*, 61 S.W.3d at 421; *Moore*, 275 S.W.3d at 636; *Murchison*, 93 S.W.3d at 262.

The court also commented while defense counsel was addressing the defendant's right to remain silent. The court clarified the right to remain silent and emphasized that the State had the burden of proof. These comments were not improper because the court was clarifying the law. *See Jasper*, 61 S.W.3d at 421; *Moore*, 275 S.W.3d at 636; *Murchison*, 93 S.W.3d at 262.

Defense counsel then addressed what he referred to as gender bias on the part of the prospective jurors and he attempted to ascertain whether any of them felt it was easier to believe that a male defendant was the aggressor where the victim was female. The trial judge clarified the meaning of the term bias and asked questions to clarify a prospective juror's views. The trial judge acted properly by clarifying the meaning of the term bias. Further, given that the judge might be called upon to rule on a challenge for cause, the judge did not act improperly by clarifying the prospective juror's views on this subject.

The court also interrupted defense counsel when counsel was addressing whether the venire could consider the minimum range of punishment in a case where the defendant was found guilty of the lesser included offense of murder. As pointed out by the State, the judge made an initial comment clarifying the law, but the majority of the judge's comments were made at the bench outside the hearing of the jury. The court's comment made to the venire was directed at clarifying the legal issue and were made necessary because defense counsel was attempting to ask improper commitment questions. As such, it was a proper comment. Further, the comments made at the bench could not have tainted the presumption of innocence nor could they have vitiated the

defendant's right to an impartial jury trial. *See Murchison*, 93 S.W.3d at 261-62 and n.4 (judge's comments made outside of jury's presence could not have affected defendant's right to an impartial jury trial); *see also Baca v. State*, 223 S.W.3d 478, 482 (Tex.App.--Amarillo 2006, no pet.)(judge's comment made outside of jury's presence could not constitute comment on the weight of the evidence and did not amount to fundamental error).

Assisting the Prosecutor

In instances 6, 8, 9, and 10, Appellant asserts that the trial judge improperly assisted the prosecutors by instructing them to ask a witness certain questions and by telling the prosecutor how to lay a predicate. In the sixth instance set forth in Appellant's brief, a witness testified he saw a man shooting a gun and then leaving the scene. As the witness was about to be excused, the judge informed the parties at the bench that the prosecutor had not asked the witness to identify the shooter. In the jury's presence, the prosecutor asked a few additional questions and asked the witness if he could identify the shooter. The witness positively identified Appellant as the shooter. We agree that it was improper for the trial judge to remind the prosecutor, even outside of the jury's hearing, that she had not asked a witness to identify the defendant but the error does not demonstrate judicial bias nor does it rise to the level of fundamental error. *See Houston v. State*, No. 03-05-00188-CR, 2006 WL 431188 (Tex.App.--Austin February 24, 2006, pet. ref'd)(after defendant objected that State had failed to prove the prior DWI convictions in a felony DWI case, the trial judge stated that prosecutor could re-open the evidence and put on evidence of the prior convictions; court of appeals held that judge's suggestion was improper but it did not demonstrate judicial bias or amount to fundamental error). Appellant failed to preserve error because he did not object.

In the eighth and ninth instances, the State attempted to elicit testimony from two witnesses,

James Thomas and Carlos Carrillo, regarding their observations of the victim at the scene. During Thomas' testimony, the State asked whether the victim made any statements but asked Thomas not to relate the statements. The defense raised a hearsay objection and the parties engaged in a discussion at the bench about the admissibility of the testimony. The judge told the prosecutor at the bench what part of the predicate the court believed had not been established. The trial court erroneously believed that under the dying declaration exception, the proponent of the evidence was required to prove that the witness believed that the declarant's death was imminent. Thomas testified in the jury's presence he believed West was dying but he never informed the jury of the substance of his conversation with her. Carrillo testified he asked the victim who had done this to her, but the defense raised two objections, hearsay and failure to lay the proper predicate, before the witness could answer.[1] During a bench conference, defense counsel stated the court had previously misstated the admissibility requirements of Rule 804(b)(2), and she argued that the State was required to prove that the declarant believed her death was imminent. The court sustained the objection after discussing the admissibility requirements with the attorneys at the bench. The trial court took the matter under advisement and asked the parties to provide authority.

We agree with the State that the trial judge was not "coaching" the State in either instance as alleged by Appellant but rather was engaging in a discussion about the admissibility of the testimony. Appellant provides no authority for the proposition that it is improper for a judge to explain to the parties, outside of the jury's presence, the basis for the court's ruling that evidence is or is not admissible. The State correctly observes that these types of discussions occur in virtually

---

[1] An objection that the proper predicate has not been laid is too general to preserve error. *Paige v. State*, 573 S.W.2d 16, 19 (Tex.Crim.App. 1978). To preserve error, counsel must inform the court just how the predicate is deficient. *Bird v. State*, 692 S.W.2d 65, 70 (Tex.Crim.App. 1985).

every trial. It should also be noted that the erroneous requirement that the trial judge placed on the State to prove that witness Thomas knew that the victim was dying could have proven extremely difficult for the State to establish had Thomas not been a Vietnam veteran who had seen numerous people die of gunshot sounds. The court's erroneous ruling was not helpful to the State. Finally, none of the judge's comments could have tainted the presumption of innocence or vitiated the impartiality of the jury because all of the comments occurred during bench conferences. *See Murchison*, 93 S.W.3d at 261-62 and n.4 (judge's comments made outside of jury's presence could not have affected defendant's right to an impartial jury trial); *see also Baca v. State*, 223 S.W.3d 478, 482 (Tex.App.--Amarillo 2006, no pet.)(judge's comment made outside of jury's presence could not constitute comment on the weight of the evidence and did not amount to fundamental error).

In the tenth instance, the State was eliciting testimony from Michael Jordan, Sr., a lieutenant with the El Paso Fire Department about his observations and emergency medical treatment of the victim at the scene. When the State attempted to ask Jordan whether the victim had made any statements about her condition, the defense raised a hearsay objection and the trial court conducted a hearing outside of the jury's presence. During this hearing, the parties and the court engaged in a discussion about the admissibility of the testimony. The court overruled the hearsay objection and the State elicited the challenged testimony in the jury's presence. Contrary to Appellant's assertions, the trial court did not tell the State how to lay the predicate in order for a dying declaration to be admissible. As was the case with the two previous issues, the judge's comments could not have tainted the presumption of innocence or vitiated the impartiality of the jury because all of the comments occurred during bench conferences. *See Murchison*, 93 S.W.3d at 261-62 and n.4; *see also Baca*, 223 S.W.3d at 482.

Questioning a Witness

Finally, in the seventh instance identified by Appellant, a witness testified through an interpreter that she saw the shooter walking away from the apartments. When testifying what direction the shooter walked, the witness indicated with her left hand, and the court interrupted to ask whether the witness was facing the apartments or the street. As conceded by the State, the better practice is for trial judges to refrain from questioning witnesses, but error is not shown when the trial court questions a witness for the purpose of clarifying previous testimony. *See Brewer*, 572 S.W.2d at 721 (questioning of witnesses at revocation of probation hearing by trial court, which maintained an impartial attitude throughout, for purpose of clarifying an issue before court, was permissible); *Moore*, 275 S.W.3d at 636-37 (trial court's unobjected-to questions to fingerprint expert, called during punishment phase of arson trial to show that defendant was person previously convicted of felonies alleged in indictment, were not fundamental error; questions merely clarified whether the fingerprint analysis had a potential for misidentification, and did not deprive defendant of a fair and impartial trial). Later during the witness' testimony, the trial judge instructed the jury that they were restricted to the official interpretation of what the witness said. The judge's instruction was a correct statement of the law and did not amount to fundamental error.

With the exception of one instance set forth above, we find that the trial court acted within its discretion during trial and the court's comments and actions did not taint the presumption of innocence or vitiate the defendant's right to an impartial jury. Even in the instance where error occurred, it does not rise to the level of fundamental error. Accordingly, Appellant was required to object in order to preserve error with respect to the arguments raised in this point of error. Because he failed to preserve error, we overrule Point of Error Fourteen.

Having sustained Point of Error One, we reverse the conviction for the offense of capital murder. We reform the judgment to reflect a conviction of the murder of West and remand the cause for a punishment hearing. *See Roberts*, 273 S.W.3d at 332; *see also Haynes v. State*, 273 S.W.3d 183, 187 (Tex.Crim.App. 2008).

July 28, 2010

ANN CRAWFORD McCLURE, Justice

Before Chew, C.J., McClure, and Rivera, JJ.

(Do Not Publish)

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

QUINN CRUZ, JR.,	§	No. 08-08-00213-CR
Appellant,	§	Appeal from
v.	§	205th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20060D00581)

JUDGMENT

The Court has considered this cause on the record and concludes the judgment of conviction for the offense of capital murder should be reversed. The judgment should be reformed to reflect a conviction of the murder of Tonya West and we remand the cause to the trial court for a new trial for a hearing on punishment only. This decision shall be certified below for observance.

IT IS SO ORDERED THIS 28TH DAY OF JULY, 2010.

ANN CRAWFORD McCLURE, Justice

Before Chew, C.J., McClure, and Rivera, JJ.

FILE COPY

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS

EL PASO COUNTY COURTHOUSE
500 E. SAN ANTONIO AVE., SUITE 1203
EL PASO, TEXAS 79901-2408
(915) 546-2240 FAX (915) 546-2252
WWW.TXCOURTS.GOV/8THCOA.ASPX

June 08, 2016

Hon. Ruben P. Morales
718 Myrtle
El Paso, TX 79901
* DELIVERED VIA E-MAIL *

Hon. Jaime E. Esparza
District Attorney
El Paso County Courthouse
500 E. San Antonio, Suite 201
El Paso, TX 79901
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 08-14-00058-CR
Trial Court Case Number: 20060D00581

Style: Quinn Cruz, Jr.
v.
The State of Texas

The Honorable Court of Appeals today rendered judgment affirming the judgment of the trial court, in accordance with the opinion of this Court. A copy of the opinion and judgment has been mailed to the attorney of record for each party.

Respectfully yours,

DENISE PACHECO, CLERK

Denise Pacheco

cc: The Honorable Francisco X. Dominguez
Norma L. Favela

remand, a jury assessed Appellant's sentence at life in prison with a fine of $10,000. This appeal follows.

IMPROPER JURY ARGUMENT

References to Parole

In Issue One, Appellant complains of the following excerpts of the prosecutor's closing arguments:

> [Prosecutor]: This is, ladies and gentlemen of the jury, such a clear-cut case of life in prison. It's not black and white. It is not coming in here and just, with no regard to the evidence, asking you to send somebody to life in prison. It is because the evidence continues to justify it, over and over and over again. We are asking for life because it is just. *He was going to take his own, and he didn't.*
>
> The last thing I want to make sure you understand is that we are asking for life, and it is a life with parole. You are no--What the law tells you in this jury charge is you may consider that. You may consider that at some point he will be eligible for parole. So it's not life without parole. *This man will be eligible for parole. This man would be eligible. Even with your life sentence, he would be eligible to get out.*
>
> What you can't do is predict when he would get the parole. But you may consider that even with a life sentence, he is still eligible to get out.
>
> [Defense counsel]: Objection, Your Honor. Improper argument.
>
> [The Court]: Overruled.
>
> [Prosecutor]: On behalf of the State of Texas, we want to thank you. By no means are we saying that we don't understand that this would be a difficult decision. But it is the right decision. It is a just decision. It is a decision that is completely backed up by the evidence. We are not asking willy-nilly for life in prison. We are asking that you follow through what his original intent was. *He was going to kill her and take his own life.* He deserves. Justices requires. This family deserves. Tonya West deserves.
>
> [Defense counsel]: Objection, Your Honor. Improper argument.
>
> [The Court]: Overruled.
>
> [Prosecutor]: Tonya West deserves justice, and the community's safety deserves life.

However, that is not the case here. The prosecutor explained the parole laws and then explained to the jury how that application would be applied to this particular defendant. The prosecutor said: "This man will be eligible for parole. This man would be eligible. Even with your life sentence, he would be eligible to get out." She essentially encouraged the jury to assess the State's desired sentence, a life sentence, based on the parole information. This argument encouraged the jury to consider the effects of parole on Appellant's punishment and therefore was improper.

Having decided that the prosecutor's comments constituted improper argument, we must now determine if this error was harmful. Because the error here involves the trial court's application of a Texas statutory right, rather than a constitutional right, we utilize Rule 44.2(b) of the Texas Rules of Appellate Procedure. TEX.R.APP.P. 44.2(b); *see Espinosa v. State*, 29 S.W.3d 257, 259 (Tex.App.--Houston [14th Dist.] 2000, pet. ref'd); *McGowen v. State*, 25 S.W.3d 741, 745 (Tex.App.--Houston [14th Dist.] 2000, pet. ref'd); *Moore v. State*, 868 S.W.2d 787, 789 (Tex.Crim.App. 1993). Under Rule 44.2(b), we utilize a three-part test to determine if the argument was harmful: (1) the severity of the conduct as evidenced by the prosecutor's argument (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) the measures adopted to cure the misconduct; that is, the effect of any cautionary instruction given by the court; and (3) the certainty of conviction absent the misconduct. *Martinez v. State*, 17 S.W.3d 677, 692-93 (Tex.Crim.App. 1998), *citing Mosley v. State*, 983 S.W.2d 249, 259 (Tex.Crim.App. 1998).

Here, the prejudicial effect on Appellant was minor. Even though the prosecutor's comments improperly referenced Appellant and attempted to apply the parole law to his situation, the comments were more than likely an attempt to explain the parole law as outlined in the charge, rather than an underhanded and premeditated attempt to invite the jury to consider

The medical examiner testified that West's death was a result of a homicide due to multiple gunshot wounds causing her to bleed to death. West sustained a total of four bullet wounds. Considering this evidence, it is unlikely that the jury would have sentenced Appellant to less time had the prosecutor's comments not been made. Accordingly, we find that the improper jury argument did not have a substantial effect on the jury's verdict. *Fowler v. State*, 958 S.W.2d 853, 866 (Tex.App.--Waco 1997, *aff'd*, 991 S.W.2d 258 (Tex.Crim.App. 1999). Issue One is overruled.

References to Suicide and a Fine

In his second point of error, Appellant similarly complains that the prosecutor's references to his intent to commit suicide and her discussion of imposing a fine as part of his sentence constituted improper jury argument. The thrust of his contention is that the arguments introduced new and harmful facts (that the jury should impose a fine because Appellant had the ability to work while incarcerated) and were extremely inflammatory (discussing Appellant's intent to commit suicide). Proper jury argument falls into four specific categories: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument by opposing counsel, and (4) plea for law enforcement. *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex.Crim.App. 1973); *Van Zandt v. State*, 932 S.W.2d 88, 92 (Tex.App.--El Paso 1996, pet. ref'd). To properly preserve a complaint about improper jury argument, the defendant must: (1) object; (2) request an instruction to disregard; and (3) move for mistrial. *Auguste v. State*, No. 08-99-00303-CR, 2002 WL 475226 (Tex.App.--El Paso Mar. 29, 2002, no pet.)(not designated for publication), *citing Harris v. State*, 784 S.W.2d 5, 12 n.4 (Tex.Crim.App. 1989), *cert. denied*, 494 U.S. 1090, 110 S.Ct. 1837, 108 L.Ed.2d 966 (1990). Moreover, the defendant must object each time the prosecutor makes an improper argument, or else the complaint is waived.

> You and Edgar are like brothers to me and I will never forget all that you have done for me. I sincerely 'thank you' and wish the best of luck to you both. But before I go, there a few things I need you to do, just until my parents are notified. Well, I'm jotting a list of things that will make things easier for my parents in the long run.
>
> Hopefully my parents will come down to Colorado and figure out what they want to do with my belongings.
>
> Other than that, I hope this isn't too stressful. More than likely, I hope you never get to read this. But in case you do, then I thank you for being a great friend. Take care, bro. I'll miss you, man.

A letter addressed to his parents stated:

> This is a war I must finish. I am going to kill her one way or another. I am hurting pretty bad and want this pain to end as well. I am not well physically or mentally right now. The only way I'll have a piece of mind is to do what she did to me. She used and betrayed me for money. Now I must settle the score, live or die. I don't want to go to jail, so I'd rather end my suffering now.
>
> Mom and Dad, take good care of yourselves and know that I will always love and miss you both. Till we meet that one day. I love you. Thanks for everything. Love, Jun.

A final letter addressed to his friend, Edgar Nevarrez, stated:

> Anyhow, I'm also giving you the PSP, no charge fool, with all accessories. You can give the iPod to Luly as a gift from me. You can also have the golf clubs, which is in my storage. Other than that, I wish you all the best of luck. Take care and I appreciate all the help you've given. Your bro, Quinn.

Clearly, the prosecutor's references to Appellant's possible plans to commit suicide are supported by the record which includes the above letters. The reference to murder-suicide was not improper, but was rather a legitimate inference that could be drawn from the facts of the case. Accordingly, we overrule Issue Two in its entirety.

PROSECUTORIAL MISCONDUCT

During the prosecutor's cross-examination of Appellant, the following exchange occurred:

[Defense counsel]: I'm going to object to the side bar again, You Honor.

[The Court]: Sustained. Ladies and gentlemen of the jury, you'll disregard that last remark.

In Issue Three, Appellant complains that the prosecutor's two sidebar remarks made while cross-examining Appellant constituted prosecutorial misconduct. He also argues that these remarks taken together with the allegedly improper jury arguments amount to an atmosphere that was so flagrant so as to constitute prosecutorial misconduct which denied Appellant due process of law. We disagree.

"Side bar remarks are remarks of counsel that are neither questions to the witness nor comments addressed to the court." *Brokenberry v. State*, 853 S.W.2d 145, 152 (Tex.App.--Houston [14th Dist.] 1993, pet. ref'd). Usually, one or two instances of improper side bar remarks, even uncured, do not amount to a denial of a fair trial. *See Jimenez v. State*, 298 S.W.3d 203, 214 (Tex.App.--San Antonio 2009, pet. ref'd). As a general rule, an instruction to disregard will cure an objectionable comment, including a side bar remark, unless the comment is so inflammatory that its prejudicial effect cannot be removed by the admonishment. *Furtado v. State*, No. 08-00-00230-CR, 2001 WL 959437 (Tex.App.--El Paso Aug. 23, 2001, pet. dism'd)(not designated for publication); *Cooks v. State*, 844 S.W.2d 697, 727 (Tex.Crim.App. 1992), *cert. denied*, 509 U.S. 927, 113 S.Ct. 3048, 125 L.Ed.2d 732 (1993). Moreover, in order to obtain reversal of a judgment based on an improper side bar comment, Appellant here must prove the side bar remark interfered with his right to a fair trial. *Brokenberry*, 853 S.W.2d at 152; *In re W.G.W.*, 812 S.W.2d 409, 416 (Tex.App.--Houston [1st Dist.] 1991, no writ).

We cannot agree that these two sidebar comments alone or even in conjunction with the alleged improper jury arguments discussed above amount to such flagrant misconduct that

973 S.W.2d 954, 956 (Tex.Crim.App. 1998). If this two-pronged test is not satisfied the ineffective assistance of counsel claim is defeated. *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex.Crim.App. 2003).

On review, we presume that the attorney's representation fell within the wide range of reasonable and professional assistance. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex.Crim.App. 2001), *citing Tong v. State*, 25 S.W.3d 707, 712 (Tex.Crim.App. 2000). Ineffective assistance claims must be firmly founded in the record to overcome this presumption. *Thompson*, 9 S.W.3d at 813. In most cases, this task is very difficult because the record on direct appeal is undeveloped and cannot reflect trial counsel's failings. *Id.* at 813-14. Where, as here, the record is silent and fails to provide an explanation for the attorney's conduct, the strong presumption of reasonable assistance is not overcome. *Rylander*, 101 S.W.3d at 110-11. We do not engage in speculation in order to find ineffective assistance when the record is silent as to an attorney's trial strategy. *Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex.Crim.App. 2000). Accordingly, when the record lacks evidence of the reasoning behind trial counsel's actions, trial counsel's performance cannot be found to be deficient. *Rylander*, 101 S.W.3d at 110-11; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App. 1994).

Jurors must be able to consider the full range of punishment for the crime as defined by the law in order to qualify as a juror during the punishment phase of a trial. *Sadler v. State*, 977 S.W.2d 140, 142 (Tex.Crim.App. 1998). "They must be able, in a sense, to conceive both of a situation in which the minimum penalty would be appropriate and of a situation in which the maximum penalty would be appropriate." *Id.*; *Fuller v. State*, 829 S.W.2d 191, 200 (Tex.Crim.App. 1992), *cert. denied*, 508 U.S. 941, 113 S.Ct. 2418, 124 L.Ed.2 640 (1993).

2013 OCT 17 PM 3:09

FILED
NORMA L. FAVELA
DISTRICT CLERK

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

205TH JUDICIAL DISTRICT

2013 OCT 17 PM 3:15
EL PASO COUNTY, TEXAS
BY _____ DEPUTY

THE STATE OF TEXAS §
§
VS. § CAUSE NO. 20060D00581
§
QUINN CRUZ, JR. §

MOTION TO WITHDRAW

COPY

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes, FELIX CASTANON of the El Paso County Public Defender's Office, Attorney for Defendant herein and moves the court to enter an order permitting Counsel and the office of the El Paso County Public Defender to withdraw as counsel of record on this cause, and in support of such motion shows:

I.

The El Paso County Public Defender's Office was appointed to represent QUINN CRUZ, JR. and has done so faithfully to date.

II.

Counsel feels compelled to seek withdrawal on the following ground: Conflict of Interest. Specifically as stated in Texas Disciplinary Rules of Professional Conduct 1.06(f), if a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct; and 1.06(b)(2), reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or laws firm's own interests.

In the instant case, Counsel for Quinn Cruz believes the State intends to use the

Defendant's own writings. Within these letters, Mr. Cruz comments negatively about the representation he was afforded by his current counsel, the El Paso County Public Defender's Office, during the guilt/not guilt phase.

Counsel believes that its own interest would be at odds with Mr. Cruz's interest once these letters are introduced and read to the jury.

III.

To protect the Defendant's rights to effective legal representation, the Texas Rules of Professional Responsibility requires the Public Defender to withdraw as counsel of record and request the court appoint another attorney to represent the Defendant in this matter.

This MOTION TO WITHDRAW is not sought for the purposes of delay.

Current court settings are as follows:

10/28/13 9:00 a.m. Jury Trial

WHEREFORE, the undersigned counsel prays that the Public Defender and all Assistants be released as counsel of record in this case.

Respectfully submitted,

EL PASO COUNTY PUBLIC DEFENDER

By: _____

FELIX CASTANON
Attorney for Defendant
State Bar No. 24005302
500 E. San Antonio, Rm. 501
El Paso, TX 79901
(915) 546-8185
(915) 546-8186 (FAX)

NOTICE TO CLIENTS OF RIGHT TO OBJECT
TO SUBSTITUTION OF COUNSEL

Attached to this Notice is a MOTION TO WITHDRAW which is asking the Judge to change your attorney of record. What this means is that, if the Judge grants the MOTION TO WITHDRAW, the El Paso County Public Defender's Office will no longer represent you in your pending criminal case. You have the right to tell the Judge that you do not want the Public Defender's Office to withdraw from representing you. If you choose to object to the Motion to Withdraw, the Judge will consider your objections to the change in your attorney of record and the Judge may or may not allow our office to withdraw.

If you have any questions regarding your rights in this matter please contact our office immediately.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been hand-delivered to the District Attorney, 500 E. San Antonio, Room 201, El Paso, Texas 79901 and copy mailed to the Defendant on this the 17 day of October, 2013.

FELIX CASTANON

2013 NOV -8 PM 3:22

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

205TH JUDICIAL DISTRICT

THE STATE OF TEXAS	§	
	§	
VS.	§	CAUSE NO. 20060D00581
	§	
QUINN CRUZ	§	

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW NICOLE C. BOMBARA, Attorney for accused and would show the following:

I.

On October 31, 2013 Defendant was found "guilty" to the offense of murder and received a sentence to IDTDCJ for Life and $10,000.00 fine.

In the interest of fairness and justice the accused seeks a new hearing in the above referenced number and moves the Court to grant this motion.

The State is agreement with this Motion for New Trial as there is new evidence.

Respectfully submitted,

EL PASO COUNTY PUBLIC DEFENDER

BY: _____

NICOLE C. BOMBARA
State Bar No. 24073937
Attorney for Defendant
500 E. San Antonio, Rm. 501
El Paso, TX 79901
(915)546-8185/Fax (915)546-8186

CERTIFICATE OF SERVICE

I, NICOLE C. BOMBARA, hereby certify that a true and correct copy of the foregoing instrument has been hand-delivered to the District Attorney's Office, 500 E. San Antonio St., Room 201, El Paso, Texas 79901, and mailed to the Defendant, on this the **8th day** of **November, 2013**.

NICOLE C. BOMBARA