Appendix 1

GROUND ONE:

Counsel rendered ineffective assistance for failing to investigate out juror bais, violating his due process and fair trial rights.

FACTS SUPPORTING GROUND ONE:

The Applicant complains that Mr. Barry Alford (Applicant's trial counsel) rendered ineffective assistance during voir dire selection when Counsel failed to investigate out juror bais, seek to challenge and strike a clearly bais juror as follows: A) Mrs Tarver (juror #12) was being questioned by the State when she exhibited a clear bais against the Applicant's right to the presumption of innocence, and stated: "I have a bad feeling (assumption) that something bad has happened to my autistic grandson at the last program that he was in." The State asked "if we don't prove him guilty, if we don't prove it beyond a reasonable doubt guilty to you, are you going to find him guilty anyway?" Ms. Tarver responded and said, I probably will just because of where I am right now." RR2, 74. Ms. Tarver, right then exhibited a bais against the

Applicant and found him guilty "because of where Ms. Tarver is now." In other words, because counsel failed to question Ms. Tarver and challange her for cause, Applicant has a clearly baised juror that found him guilty before any of the evidence was even prodcued. Prejudice is visible because, had counsel objected, sought to see if Ms. Tarver could be fair, and/or try to strike her for cause, there is a reasonable probability that the outcome would have been different.

Accordingly, Applicant respectfully requests that this Honorable Court sustain this ground, and reverse to remand as rendered, or in alternative, designate this as a previously uncontroverted issue requiring resolution.

NO. C-213-010699-1317398-A

EX PARTE	§	**IN THE 213th JUDICIAL**
	§	
	§	**DISTRICT COURT OF**
	§	
JERRY LEE CANFIELD	§	**TARRANT COUNTY, TEXAS**

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

The State proposes the following Memorandum, Findings of Fact and Conclusions of Law regarding the issues raised in the present Application for Writ of Habeas Corpus.

MEMORANDUM

The applicant, JERRY LEE CANFIELD ("Applicant"), alleges his confinement is illegal because (1) he received ineffective assistance of trial counsel (Grounds One, Two, Three, Four, Five, and Six), (2) he received ineffective assistance of appellate counsel (Ground Seven), (3) the jury charge failed to instruct the jury that it could not consider the Tennessee allegations to decide his guilt in this case (Ground Eight), and (4) he is actually innocent (Ground Nine). *See* Application, p. 6-16. Specifically, Applicant alleges trial counsel was ineffective for the following reasons:

a. Counsel failed to investigate, challenge, and strike Juror Tarver for juror bias (Ground One),
b. Counsel failed to investigate, challenge, and strike Juror Fisher (Ground Two),

c. Counsel failed to investigate who said they might use it against Applicant if he did not testify (Ground Two),
d. Counsel failed to object to the testimony of Jessica Killion because it was vague (Ground Three),
e. Counsel failed to object to the testimony of Ronda Canfield because it was redundant (Ground Three),
f. Counsel failed to object to the testimony of Mike Canfield on the basis that it was redundant (Ground Three),
g. Counsel failed to object to the testimony of the victim and Araceli Desmarais (Ground Four),
h. Counsel failed to present a memory expert to prove that the victim was coached by the prosecutors (Ground Four),
i. Counsel failed to properly preserve and challenge the extraneous offense evidence (Ground Five), and
j. Counsel failed to object and investigate whether the State coaxed the victim into testifying falsely (Ground Six).

See Application, p. 6-15b.

In response to an order from this Court, Hon. Barry Alford, Applicant's trial counsel, and Hon. Scott Brown, Applicant's appellate counsel, have filed affidavits addressing Applicant's claims. In light of Applicant's contentions and the evidence presented in the Writ Transcript, the Court should consider the following proposed findings of fact and conclusions of law:

FINDINGS OF FACT

General Facts

1. Applicant was convicted by a jury of the first degree felony offense of continuous sexual abuse of a child victim under 14 years of age on April 3, 2013. *See* Judgment, No. 1317398R.

2. The jury assessed punishment at fifty years confinement in the Texas Department of Criminal Justice – Institutional Division. *See* Judgment.

3. The Seventh Court of Appeals affirmed the trial court's judgment on February 19, 2015. *See Canfield v. State*, No. 07-13-00161-CR, 2015 WL 739667 (Tex. App. – Amarillo Feb. 19, 2015, no pet.) (not designated for publication).

Ineffective Assistance of Trial Counsel (Grounds One, Two, Three, Four, Five, and Six)

4. Hon. Barry Alford represented Applicant during the trial proceedings. *See* Judgment; Alford Affidavit, p. 1.

5. Hon. Alford determined that there were many prospective jurors that were affected in some form by sexual abuse. *See* Alford Affidavit, p. 1.

6. Hon. Alford successfully had several persons struck for cause. *See* Alford Affidavit, p. 1; [2 RR 120].

7. Hon. Alford tried to be very judicious with his ten peremptory challenges. *See* Alford Affidavit, p. 1.

8. Juror Tarver stated that she believed her grandson was abused at school and she was really affected by it. [2 RR 74]

9. When asked if she would find Applicant guilty regardless of whether the State met their burden, Juror Tarver stated, "I probably will just because of where I am right now." [2 RR 74]

10. Hon. Alford did not feel that Juror Tarver committed herself. *See* Alford Affidavit, p. 2.

11. Hon. Alford asked the venire if anyone could not hold the government to its burden. [2 RR 96]

12. When asked, no one stated they could not follow the law and agreed by their silence that they would hold the government to its burden. [2 RR 96]

13. Hon. Alford asked the panel if anyone would be more likely to find someone guilty if they were accused of multiple instances. [2 RR 98-99]

14. Juror Tarver did not come forward and state that she could not follow the law. [2 RR 98-99]

15. Hon. Alford did not challenge Juror Tarver because she did not state that she could not follow the law. *See* Alford Affidavit, p. 1-2.

16. Hon. Alford concluded that Juror Tarver rehabilitated herself by her silence when asked if she could follow the law. *See* Alford Affidavit, p. 1-2.

17. Hon. Alford concluded that Juror Tarver could follow the law.

18. Hon. Alford's decision to not challenge Juror Tarver was the result of reasonable trial strategy.

19. Juror Fisher stated that she is no longer affected by the fact that her daughter's friend was abducted twenty years ago. [2 RR 30-31]

20. Hon. Alford did not challenge Juror Fisher because she stated that she was no longer affected by her daughter's friend's abduction. *See* Alford Affidavit, p. 1.

21. Hon. Alford's decision to not challenge Juror Fisher was the result of reasonable trial strategy.

22. The State voir dired the venire on whether they would use a defendant's failure to testify against him. [2 RR 76-79]

23. Mr. Gamez stated that he believed a person would not testify at their trial if they were guilty. [2 RR 77]

24. Mr. Asprion stated he believed a person would not testify at his trial because they are not good at speaking. [2 RR 77]

25. Ms. Rivera stated she believed a person would not testify at his trial because they do not want to confess as they are embarrassed. [2 RR 77]

26. An unknown venire person stated that they would hold it against the defendant if he did not testify "[f]or the same reason as [the venire person] mentioned before." [2 RR 79]

27. The State referred to this unknown venire person as a "he." [2 RR 79]

28. In context, it appears that it was Mr. Gamez that said he would hold it against the defendant if he did not testify.

29. Later, Mr. Gamez admitted that he could not give Applicant a fair trial. [2 RR 106]

30. There is no indication in the record as to what number juror Mr. Gamez held. [2 RR 77-79, 106]

31. Hon. Alford specifically questioned the venire on whether they would use the fact that Applicant didn't testify against Applicant. [2 RR 96-97]

32. The parties agreed to strike juror numbers 3, 4, 9, 18, 20, 21, 26, 30, 36, 37, 40, 43, and 45. [2 RR 120]

33. Mr. Gamez did not serve on the jury. [2 RR 121]

34. Mr. Asprion did not serve on the jury. [2 RR 121]

35. Ms. Rivera did not serve on the jury. [2 RR 121]

36. There is no evidence that the person that stated they would use the fact that the defendant did not testify against the defendant served on the jury.

37. Jessica Killion ("Killion") testified that the victim told her Applicant touched her private parts while gesturing to her vagina, touched her private parts with his hands, mouth, and his private parts, and had the victim touch his private parts with her hands and body. [3 RR 53, 55, 56-57]

38. Hon. Alford's decision to not object to Killion's testimony on the basis that it was vague was the result of reasonable trial strategy.

39. Ronda Canfield ("Ronda") testified that the victim told her Applicant touched her private parts. [3 RR 73, 77-78]

40. The trial court concluded that Ronda and Killion were a bit redundant but met the reliability test of Article 38.072 of the Texas Code of Criminal Procedure. [3 RR 36]

41. Hon. Alford did not object to Ronda's testimony because he concluded that Ronda was describing a different alleged assault. *See* Alford Affidavit, p. 2; [3 RR 13, 35].

42. Hon. Alford's decision to not object to Ronda's testimony because it described a different assault than described by Killion was the result of reasonable trial strategy.

43. Mike Canfield ("Mike") testified that the victim told him that Applicant kissed her private parts and touched her private parts with his. [3 RR 103, 115-16, 117]

44. Hon. Alford objected to Mike's testimony initially as an outcry witness because the substance was identical to the testimony of Killion and Ronda. [3 RR 35]

45. The trial court ruled that it would probably only allow either Ronda or Mike to testify. [3 RR 36]

46. When Mike was testifying, Hon. Alford objected, again, to his testimony as an outcry witness but the trial court found that Ronda did not testify as to what the victim said. [3 RR 101]

47. Hon. Alford's objections to Mike's testimony were the result of reasonable trial strategy.

48. Applicant presents no credible evidence or authority that the victim's testimony was objectionable. *See* Application; Memorandum.

49. Hon. Alford's decision to not object to the victim's testimony was the result of reasonable trial strategy.

50. Hon. Alford objected to the testimony of Lindsey Dula ("Dula") as duplicative of the outcry statements already presented. *See* Alford Affidavit, p. 3; [3 RR 152].

51. Hon. Alford objected to the testimony of Nurse Araceli Desmarais ("Desmarais") regarding the extraneous Tennessee offenses. *See* Alford Affidavit, p. 3; [3 RR 166].

52. Hon. Alford did not object to Desmarais' testimony generally. *See* Alford Affidavit, p. 3.

53. Desmarais testified regarding information that was made for and reasonably pertinent to the evaluation, treatment, and diagnosis of the victim. [3 RR 164-65]

54. Applicant presents no evidence to support his claim that a memory expert would have benefitted his defense. *See* Application, p. 12-13.

55. Applicant presents no evidence, affidavits, or names of memory experts who were available to testify on Applicant's behalf. *See* Application, p. 12-13.

56. Hon. Alford contacted Dr. Richard Schmidt, PhD, to testify regarding the reliability of the child's testimony at trial. *See* Alford Affidavit, p. 3.

57. After consulting with Dr. Schmidt regarding the specific facts of this case and Dr. Schmidt's anticipated testimony, Hon. Alford concluded that Dr. Schmidt's testimony would not be beneficial. *See* Alford Affidavit, p. 3.

58. Hon. Alford's decision to not call an expert to testify regarding the reliability of the child victim's testimony was the result of reasonable trial strategy.

59. Because Applicant's family would not testify on his behalf, Hon. Alford decided to hire Dr. Flynn to testify on his behalf during the punishment phase. *See* Alford Affidavit, p. 3.

60. Hon. Alford's decision to hire Dr. Flynn was the result of reasonable trial strategy.

61. During pre-trial, Hon. Alford objected to the use of the Tennessee offenses in the guilt/innocence phase. [3 RR 8-9]

62. The trial court overruled Hon. Alford's objection during the pre-trial proceedings. [3 RR 9]

63. During trial, Hon. Alford renewed his objection that the Tennessee offenses were inadmissible during the guilt/innocence phase. [3 RR 166]

64. The trial court overruled Hon. Alford's objection during trial. [3 RR 166]

65. The jury charge instructed the jury as follows:

> You are instructed that if there is any testimony before you in the case regarding the Defendant having committed offenses other than the offense alleged against him in the Indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses, if any, were committed. And even then you may only consider the same in determining motive, intent, opportunity, preparation, knowledge or absence of mistake or accident of the Defendant in connection with the offense, if any alleged against him in the Indictment in this case *and for no other purpose.*

[CR 96 (emphasis added)]

66. The jury charge limited the jury's consideration of the extraneous offense evidence to motive, intent, opportunity, preparation, knowledge, and absence of mistake or accident. [CR 96]

67. The jury charge instructed the jury that it must find, beyond a reasonable doubt, that the offense occurred in Tarrant County. [CR 96-98]

68. Hon. Alford's treatment of the extraneous offense evidence was the result of reasonable trial strategy.

69. Hon. Alford did not have any evidence that the State acted improperly or in bad faith. *See* Alford Affidavit, p. 3.

70. Hon. Alford did not see or hear anything that caused him to feel that an investigation into the State's conduct was warranted. *See* Alford Affidavit, p. 3.

71. Hon. Alford did not have any evidence that the State committed prosecutorial misconduct. *See* Alford Affidavit, p. 3.

72. Hon. Alford argued during closing arguments that the State failed to meet its burden of proof because the victim's testimony was inconsistent. *See* Alford Affidavit, p. 3-4.

73. Hon. Alford's affidavit is credible and supported by the record.

74. There is no evidence that a reasonable likelihood exists that the outcome of the trial would have been different but for the alleged misconduct.

Ineffective Assistance of Appellate Counsel (Ground Seven)

75. Hon. Scott Brown represented Applicant on direct appeal. *See* Brown Affidavit, p. 1.

76. Hon. Brown reviewed the clerk's record and the court reporter's transcript of the trial testimony. *See* Brown Affidavit, p. 2.

77. Hon. Brown researched potential points of appeal, including those points that were not preserved for appeal. *See* Brown Affidavit, p. 2.

78. Based on his review and research, Hon. Brown drafted a brief that he believed had all viable points of appeal. *See* Brown Affidavit, p. 2-3.

79. Hon. Brown did not attack the sufficiency of the evidence because several people testified that the victim outcried that the offenses occurred at different locations while Applicant lived with the victim in Tarrant County, Texas, for six months. *See* Brown Affidavit, p. 3-6; *see also Canfield v. State*, No. 07-13-00161-CR, 2015 WL 739667, *1-3 (Tex. App. – Amarillo Feb. 19, 2015, no pet.) (not designated for publication).

80. Hon. Brown's decision to not attack the legal sufficiency of the evidence based on the totality of the testimony and the jury charge was the result of reasonable appellate strategy. *See* Brown Affidavit, p. 6.

81. Hon. Brown's affidavit is credible and supported by the record.

82. There is no evidence that a reasonable likelihood exists that the outcome of the appeal would have been different but for the alleged misconduct.

Extraneous Offense (Ground Eight)

83. The jury charge instructed the jury as follows:

> You are instructed that if there is any testimony before you in the case regarding the Defendant having committed offenses other than the offense alleged against him in the Indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses, if any, were committed. And even then you may only consider the same in determining motive, intent, opportunity, preparation, knowledge or absence of mistake or accident of the Defendant in connection with the offense, if any alleged against him in the Indictment in this case *and for no other purpose.*

[CR 96 (emphasis added)]

84. The jury charge limited the jury's consideration of the extraneous offense evidence to motive, intent, opportunity, preparation, knowledge, and absence of mistake or accident. [CR 96]

85. The jury charge instructed the jury that they must find, beyond a reasonable doubt, that the offense occurred in Tarrant County. [CR 96-98]

Actual Innocence/Prosecutorial Misconduct (Ground Nine)

86. Applicant argues that the inconsistencies in the child victim's testimony demonstrate a "reasonable probability" the State coached her into testifying falsely. *See* Application, p. 14-15.

87. Applicant presents no additional evidence that the victim testified falsely. *See* Application, p. 14-15.

88. Applicant presents no additional evidence that the State coached the victim into testifying falsely. *See* Application, p. 14-15.

89. The victim testified that she talked to prosecutors about what she was going to say. [3 RR 239]

90. There was no testimony at trial that the State coached the victim into testifying falsely. [3 RR 239]

91. Applicant presents no newly discovered evidence that he is actually innocent. *See* Application, p. 14-15.

CONCLUSIONS OF LAW

General Writ Law

1. In a habeas corpus proceeding, the burden of proof is on the applicant. *Ex parte Rains*, 555 S.W.2d 478, 481 (Tex. Crim. App. 1977). An applicant "must prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Ex parte Williams*, 65 S.W.3d 656, 658 (Tex. Crim. App. 2001).

2. Relief may be denied if the applicant states only conclusions, and not specific facts. *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000). In addition, an applicant's sworn allegations alone are not sufficient to prove his claims. *Ex parte Empey*, 757 S.W.2d 771, 775 (Tex. Crim. App. 1988).

Ineffective Assistance of Trial Counsel (Grounds One, Two, Three, Four, Five, and Six)

3. The two-prong test enunciated in *Strickland v. Washington* applies to ineffective assistance of counsel claims in non-capital cases. *Hernandez v. State*, 988 S.W.2d 770, 771 (Tex. Crim. App. 1999). To prevail on his claim of ineffective assistance of counsel, the applicant must show counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability the results of the proceedings would have been different in the absence of counsel's unprofessional errors. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

4. The Court of Criminal Appeals will presume that trial counsel made all significant decisions in the exercise of reasonable professional judgment. *See Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992).

5. The totality of counsel's representation is viewed in determining whether counsel was ineffective. *See Cannon v. State*, 668 S.W.2d 401, 404 (Tex. Crim. App. 1984).

6. Support for Applicant's claim of ineffective assistance of counsel must be firmly grounded in the record. *See Johnson v. State*, 691 S.W.2d 619, 627 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865 (1985).

7. "[T]he constitutional right to trial by an impartial jury is not violated by every error in the selection of a jury." *Jones v. State*, 982 S.W.2d 386, 391 (Tex. Crim. App. 1998).

8. A fundamental error is presented only where the defendant "can show he was denied a trial by a fair and impartial jury." *Jones v. State*, 982 S.W.2d 386, 392 (Tex. Crim. App. 1998).

9. Bias against the law exists "when a venire person's beliefs or opinions 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and oath.'" *Sadler v. State*, 977 S.W.2d 140, 142 (Tex. Crim. App. 1998) (quoting *Riley v. State*, 889 S.W.2d 290, 295 (Tex. Crim. App. 1993)).

10. Venire persons are rehabilitated by remaining silent when they do not affirmatively state that they cannot follow the law. *See Leadon v. State*, 332 S.W.3d 600, 616 (Tex. App. – Houston [14th Dist.] 2010, no pet.); *Cubit v. State*, No. 03-99-00342-CR, 2000 WL 373821, *1 (Tex. App. – Austin Apr. 13, 2000, no pet.) (mem. op., not designated for publication).

11. Juror Tarver was rehabilitated by her silence.

12. Applicant has failed to prove that counsel's representation was deficient because counsel failed to ask Juror Tarver more questions.

13. Applicant has failed to prove that Juror Tarver was biased.

14. Counsel's decision to not challenge Juror Tarver for cause was the result of reasonable trial strategy.

15. Counsel's decision to not strike Juror Tarver was the result of reasonable trial strategy.

16. Applicant has failed to prove that counsel's representation was deficient because counsel failed to ask Juror Fisher more questions.

17. Applicant has failed to prove that Juror Fisher was biased.

18. Counsel's decision to not challenge Juror Fisher for cause was the result of reasonable trial strategy.

19. Counsel's decision to not strike Juror Fisher was the result of reasonable trial strategy.

20. Counsel properly questioned the venire on the effects of Applicant's decision to not testify.

21. Applicant has failed to prove that counsel did not strike the person that stated they would use the fact that defendant did not testify against defendant.

22. Counsel's decision to not object to Killion's testimony because it was not vague was the result of reasonable trial strategy.

23. Counsel's decision to not object to Ronda's testimony because it was not redundant was the result of reasonable trial strategy.

24. Counsel's decision to object to Mike's testimony because it was redundant was the result of reasonable trial strategy.

25. Counsel's decision to object to Mike's testimony on the basis that the trial court had said that both Ronda and Mike could not testify regarding the victim's outcry was the result of reasonable trial strategy.

26. Counsel's decision to not object to the victim's testimony was the result of reasonable trial strategy.

27. "A statement that is made for – and is reasonably pertinent to – medical diagnosis or treatment" is not inadmissible hearsay. Tex. R. Evid. 803(4)(A).

28. Desmarais' testimony was not inadmissible hearsay.

29. Counsel's decision to not generally object to Desmarais' testimony was the result of reasonable trial strategy.

30. Applicant has failed to prove that counsel should have presented a memory expert to testify.

31. Counsel's decision to not call an expert to testify regarding the reliability of the victim's testimony was the result of reasonable trial strategy.

32. Counsel's decision to present Dr. Flynn to testify during the punishment phase was the result of reasonable trial strategy.

33. Counsel's decision to not hire a memory expert was the result of reasonable trial strategy.

34. Counsel's objections to the Tennessee extraneous evidence was the result of reasonable trial strategy.

35. The State may not obtain a conviction through the use of perjured or false testimony. *Luck v. State*, 588 S.W.2d 371, 373 (Tex. Crim. App. 1979).

36. Knowingly using perjured or false testimony amounts to prosecutorial misconduct. *See Ex parte Fierro*, 934 S.W. 2d 370, 372 (Tex. Crim. App. 1996); *see also United States v. Bagley*, 473 U.S. 667, 679, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

37. Unknowing use of perjury or false evidence is considered a due process violation. *See Ex parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009).

38. Inconsistent testimony goes to the credibility of the State's witnesses and does not establish the use of perjured or false testimony. *Haywood v. State*, 507 S.W.2d 756, 760 (Tex. Crim. App. 1974).

39. Counsel's conclusion that the victim's inconsistent testimony was not evidence of prosecutorial misconduct was the result of reasonable trial strategy.

40. Applicant has failed to prove that his attorney's representation fell below an objective standard of reasonableness.

41. A party fails to carry his burden to prove ineffective assistance of counsel where the probability of a different result absent the alleged deficient conduct sufficient to undermine confidence in the outcome is not established. *See Washington v. State*, 771 S.W.2d 537, 545 (Tex. Crim. App.), *cert. denied*, 492 U.S. 912 (1989).

42. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. *If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.*" *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (emphasis added).

43. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel asked Ms. Fisher more questions.

44. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel challenged Ms. Tarver for cause.

45. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel struck Ms. Tarver.

46. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel asked Ms. Fisher more questions.

47. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel challenged Ms. Fisher for cause.

48. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel struck Ms. Fisher.

49. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel asked more questions of the jury panel.

50. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel objected to Killion's testimony.

51. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel objected to Ronda's testimony.

52. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel objected differently to Mike's testimony.

53. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel objected to the victim's testimony.

54. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel objected differently to Desmarais' testimony.

55. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel hired a memory expert.

56. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel objected more to the Tennessee extraneous offense evidence.

57. Applicant has failed to show that there is a reasonable probability that the result of the proceeding would have been different had counsel claimed the State committed prosecutorial misconduct.

58. Applicant has failed to show that there is a reasonable probability that, but for the alleged acts of misconduct, the result of the proceeding would have been different.

59. Applicant has failed to prove that he received ineffective assistance of trial counsel.

60. This Court recommends that Applicant's first ground for relief be **DENIED.**

61. This Court recommends that Applicant's second ground for relief be **DENIED.**

62. This Court recommends that Applicant's third ground for relief be **DENIED.**

63. This Court recommends that Applicant's fourth ground for relief be **DENIED.**

64. This Court recommends that Applicant's fifth ground for relief be **DENIED.**

65. This Court recommends that Applicant's sixth ground for relief be **DENIED.**

Ineffective Assistance of Appellate Counsel (Ground Seven)

66. The standard of review for ineffective assistance of appellate counsel claims is the *Strickland v. Washington* test and is the same as the standard for ineffective assistance of trial counsel claims. *Ex parte Jarrett*, 891 S.W.2d 935, 944 (Tex. Crim. App. 1994), *overruled on other grounds, Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997).

67. The two-prong test enunciated in *Strickland v. Washington* applies to ineffective assistance of counsel claims in non-capital cases. *Hernandez v. State*, 988 S.W.2d 770, 771 (Tex. Crim. App. 1999). To prevail on his claim of ineffective assistance of counsel, the applicant must show counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability the results of the proceedings would have been different in the absence of counsel's unprofessional errors. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

68. The Court of Criminal Appeals will presume that counsel made all significant decisions in the exercise of reasonable professional judgment. *See Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992).

69. The totality of counsel's representation is viewed in determining whether counsel was ineffective. *See Cannon v. State*, 668 S.W.2d 401, 404 (Tex. Crim. App. 1984).

70. Support for Applicant's claim of ineffective assistance of counsel must be firmly grounded in the record. *See Johnson v. State*, 691 S.W.2d 619, 627 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865 (1985).

71. An attorney is prohibited from raising claims on appeal that are not founded in the record. *See High v. State*, 573 S.W.2d 807, 811 (Tex. Crim. App. 1978).

72. An attorney is under an ethical obligation not to raise frivolous issues on appeal. *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 436 (1988).

73. Counsel's decision to not attack the legal sufficiency of the evidence on direct appeal because he concluded the evidence was legally sufficient, based on his independent review of the record, was the result of reasonable appellate strategy.

74. Applicant has failed to prove that his appellate attorney's representation fell below an objective standard of reasonableness.

75. A party fails to carry his burden to prove ineffective assistance of counsel where the probability of a different result absent the alleged deficient conduct sufficient to undermine confidence in the outcome is not established. *See Washington v. State*, 771 S.W.2d 537, 545 (Tex. Crim. App. 1989).

76. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffective claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland v. Washington,* 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

77. Applicant has failed to show that there is a reasonable probability the result of the appellate proceeding would have been different had counsel attacked the legal sufficiency of the evidence on appeal.

78. Applicant has failed to show that there is a reasonable probability that, but for the alleged acts of misconduct, the result of the proceeding would have been different.

79. Applicant has failed to prove that he received ineffective assistance of appellate counsel.

80. This Court recommends that Applicant's seventh ground for relief be **DENIED**.

Extraneous Offense (Ground Eight)

81. "[Evidence of a crime, wrong, or other act] may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Tex. R. Evid. 404(b)(2).

82. The jury charge properly limited the jury's consideration of extraneous offenses.

83. This Court recommends that Applicant's eighth ground for relief be **DENIED**.

Actual Innocence/Prosecutorial Misconduct (Ground Nine)

84. The State may not obtain a conviction through the use of perjured or false testimony. *Luck v. State*, 588 S.W.2d 371, 373 (Tex. Crim. App. 1979).

85. Knowingly using perjured or false testimony amounts to prosecutorial misconduct. *See Ex parte Fierro*, 934 S.W. 2d 370, 372 (Tex. Crim. App. 1996); *see also United States v. Bagley*, 473 U.S. 667, 679, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

86. Unknowing use of perjury or false evidence is considered a due process violation. *See Ex parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009).

87. Inconsistent testimony goes to the credibility of the State's witnesses and does not establish the use of perjured or false testimony. *Haywood v. State*, 507 S.W.2d 756, 760 (Tex. Crim. App. 1974).

88. Applicant has failed to prove that the State presented false testimony.

89. This Court recommends that Applicant's ninth ground for relief be **DENIED.**

WHEREFORE, the State prays that this Court adopt these Proposed Findings of Fact and Conclusions of Law and recommend that Applicant's grounds for relief be **DENIED.**

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County

Andréa Jacobs, Assistant
Criminal District Attorney
State Bar No. 24037596
401 West Belknap
Fort Worth, TX 76196-0201
Phone: 817/884-1687
Facsimile: 817/884-1672

CERTIFICATE OF SERVICE

A true copy of the above has been mailed to Applicant, Mr. Jerry Lee Canfield, TDCJ-ID# 01848978, Coffield Unit, 2661 FM 2054, Tennessee Colony, Texas 75884 on the ____ day of July, 2016.

Andréa Jacobs

CERTIFICATE OF COMPLIANCE

I certify that the total number of words in this State's Proposed Findings of Fact and Conclusions of Law is **5549** words as determined by Microsoft Office Word 2010.

Andréa Jacobs

FILED
THOMAS A WILDER, DIST. CLERK
TARRANT COUNTY, TEXAS
JUL 25 2016
TIME 11:10am
BY DEPUTY

NO. C-213-010699-1317398-A

EX PARTE	§	**IN THE 213th JUDICIAL**
	§	
	§	**DISTRICT COURT OF**
	§	
JERRY LEE CANFIELD	§	**TARRANT COUNTY, TEXAS**

ORDER

The Court adopts the State's Memorandum, Findings of Fact and Conclusions of Law as its own and recommends that the relief JERRY LEE CANFIELD ("Applicant") requests should be **DENIED**. The Court further orders and directs:

1. The Clerk of this Court to file these findings and transmit them along with the Writ Transcript to the Clerk of the Court of Criminal Appeals as required by law.

2. The Clerk of this Court to furnish a copy of the Court's findings to Applicant, Mr. Jerry Lee Canfield, TDCJ-ID# 01848978, Coffield Unit, 2661 FM 2054, Tennessee Colony, Texas 75884 (or to Applicant's most recent address), and to the post-conviction section of the Criminal District Attorney's Office.

SIGNED AND ENTERED this 25th day of July, 2016.

JUDGE PRESIDING