No. 18-6943

IN THE
Supreme Court of the United States

GREGORY DEAN BANISTER,
Petitioner,

v.

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

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

JOINT APPENDIX

BRIAN T. BURGESS
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
bburgess@goodwinlaw.com
(202) 346-4000

Counsel for Petitioner

KYLE D. HAWKINS
Counsel of Record
TEXAS ATTORNEY GENERAL'S OFFICE
P.O. Box 12548 (MC 059)
Austin, TX 78711
kyle.hawkins@oag.texas.gov
(512) 936-1700

Counsel for Respondent

August 26, 2019

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 17, 2018
CERTIORARI GRANTED JUNE 24, 2019

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Relevant Docket Entries in United States Court of Appeals for the Fifth Circuit, *Gregory Dean Banister v. Lorie Davis, Director Texas Department of Criminal Justice, Correctional Institutions Division*, Case No. 17-10826.

Date Filed	#	Docket Text
07/28/17	1	PRISONER CASE WITHOUT COUNSEL docketed. NOA filed by Appellant Mr. Gregory Dean Banister [17-10826] (RAJ) [Entered: 07/28/2017 02:27 PM]
10/16/17	9	MOTION filed by Appellant Mr. Gregory Dean Banister for certificate of appealability [8614789-2]. Motion due deadline satisfied. [17-10826] (CNF) (Entered: 10/17/2017 09:38 AM)
10/16/17	10	BRIEF IN SUPPORT filed by Appellant Mr. Gregory Dean Banister in support of motion for certificate of appealability [8614789-2] (INCORPORATED IN MOTION FOR COA) Brief in Support deadline satisfied. [8614791-1] [17-10826] (CNF) (Entered: 10/17/2017 09:39 AM)
10/16/17	11	EXHIBITS IN SUPPORT of motion for certificate of appealability [8614789-2] filed by Appellant Mr. Gregory Dean

		Banister [17-10826] (CNF) (Entered: 10/17/2017 09:40 AM)
05/08/18	12	COURT ORDER denying Motion for certificate of appealability filed by Appellant Mr. Gregory Dean Banister [8614789-2]. (IN DETAIL) Judge: JWE [17-10826] (MFY) (Entered: 05/08/2018 01:32 PM)
05/29/18	13	MOTION filed by Appellant Mr. Gregory Dean Banister to recall this Court's mandate. Date of service: 05/22/2018 [17-10826] (CMB) (Entered: 06/01/2018 11:16 AM)
05/29/18	14	MOTION filed by Appellant Mr. Gregory Dean Banister for reconsideration of the 05/08/2018 court order denying Motion for certificate of appealability filed by Appellant Mr. Gregory Dean Banister in 17-10826 (INCOROPORATED WITHIN PETITION FOR REHEARING EN BANC) [8614789-2] [8790192-2]. Date of service: 05/22/2018 [17-10826] (CMB) (Entered: 06/01/2018 11:27 AM)
06/05/18	16	COURT ORDER denying Motion to recall mandate filed by Appellant Mr. Gregory Dean

		Banister [8790172-2] Judge(s): JWE. [17-10826] (MFY) (Entered: 06/05/2018 03:04 PM)
06/18/18	17	COURT ORDER denying Motion for reconsideration filed by Appellant Mr. Gregory Dean Banister [8790192-2]; denying Petition for rehearing en banc filed by Appellant Mr. Gregory Dean Banister [8792221-2] Without Poll. Judge(s): JWE, JEG and JCH. [17-10826] (RSM) (Entered: 06/18/2018 10:10 AM)
12/11/18	18	SUPREME COURT NOTICE that petition for writ of certiorari [8938903-2] was filed by Appellant Mr. Gregory Dean Banister on 09/17/2018. Supreme Court Number: 18-6943. [17-10826] (SMC) (Entered: 12/11/2018 02:32 PM)

Docket Entries in United States District Court Northern District of Texas, *Gregory Dean Banister v. Lorie Davis, Director Texas Department of Criminal Justice, Correctional Institutions Division*, Case No. 5:14-cv-00049-C.

Date Filed	#	Docket Text
04/09/14	1	PETITION for Writ of Habeas Corpus filed by Gregory Dean Banister. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas should seek admission promptly.
04/09/14	2	Brief/Memorandum in Support filed by Gregory Dean Banister re 1 Petition for Writ of Habeas Corpus, (Attachments: # 1 Additional Page(s), # 2 Additional Page(s)) (pjd)
04/15/14	6	Order to Show Cause, Notice, and Instructions to Parties. Notice, and Instructions to Parties. Respondent is directed to file an answer to Petitioner's petition pursuant to Rule 5 of the Rules Governing Section 2254 cases w/in sixty (60) days from the date of this Order. No extensions. Applicable issues must be raised in the answer filed by

		Respondent. Respondent shall mail a copy of the answer with a copy of any supporting briefs to the Petitioner or his attorney or record. Respondent shall file a certificate with the Clerk evidencing such service. All records must be filed with the Clerk w/in sixty (60) days from the date of this Order. Petitioner's response to Respondent's answer to be filed w/in (20) days from the date shown on Respondent's certificate of service. Copy of this Order mailed to Petitioner or his attorney of record. The clerk will electronically serve this order, the petition, and supporting documents to the designee for the Office of the Texas Attorney General. (Ordered by Judge Sam R Cummings on 4/15/2014) (lkw) (Entered: 04/15/2014)
06/16/14	11	RESPONSE to 1 Petition for Writ of Habeas Corpus, filed by William Stephens, Director TDCJ-CID. (San Miguel, Susan) (Entered: 06/16/2014)
05/15/17	26	ORDER: The instant Petition for Writ of Habeas Corpus is DENIED and dismissed with prejudice; All relief not expressly granted is denied and any

		pending motions are denied; and any request for a certificate of appealability should be denied. (Ordered by Senior Judge Sam R Cummings on 5/15/2017) (zzm) (Entered: 05/15/2017)
05/15/17	27	JUDGMENT: IT IS ORDERED, ADJUDGED, AND DECREED that the above-styled and-numbered cause is dismissed with prejudice. re: Administrative Record, 8 Administrative Record, 10 Administrative Record, 9 Administrative Record.(Ordered by Senior Judge Sam R Cummings on 5/15/2017) (zzm) (Entered: 05/15/2017)
06/15/17	28	MOTION to Amend or Alter Judgment with Brief in Support 27 Judgment, filed by Gregory Dean Banister (bmg) (Entered: 06/15/2017)
06/20/17	30	ORDER denying 28 Motion to Amend/Correct. After consideration of the motion, and review of the underlying materials in this case, the Court concludes that the motion should be DENIED. (Ordered by Senior Judge Sam R Cummings on

		6/20/2017) (bmg) (Entered: 06/20/2017)
07/26/17	31	NOTICE OF APPEAL as to 27 Judgment, to the Fifth Circuit by Gregory Dean Banister. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non- ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (egp) (Additional attachment(s) added on 7/26/2017: # 1 envelope) (egp). (Entered: 07/26/2017)

07/26/17	32	MOTION for Certificate of Appealabilty filed by Gregory Dean Banister. (egp) (Entered: 07/26/2017)
07/28/17	35	ORDER denying 32 Motion for Leave to Appeal; denying 34 Motion for Leave to Proceed In Forma Pauperis. Court notes that Petitioner has been granted leave to proceed in forma pauperis until further order of the Court by Order entered April 15, 2014. Consequently, his "Affidavit in Support of Motion to Proceed on Appeal In Forma Pauperis" construed as a motion for leave to proceed in forma pauperis on appeal should be DENIED as moot. Moreover, the Court has considered Petitioner's request for a certificate of appealability and finds that it should be denied pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 2 8 U.S. C. § 225 3 (c). (Ordered by Senior Judge Sam R Cummings on 7/28/2017) (zzm) (Entered: 07/28/2017)
05/08/18	37	ORDER of USCA as to 31 Notice of Appeal filed by Gregory Dean Banister. Banister's petition for a COA were construed as seeking a COA on the district Court's denial

		of his rule 59(e) motion, we would lack jurisdiction because the Rule 59(e) motion is a successive habeas petition that did not extend the notice of appeal filing period. We deny Banister's Petition for a COA because we lack jurisdiction over the appeal. (Attachments: # 1 USCA Letter) (bmg) (Entered: 05/08/2018)
06/18/18	38	ORDER of USCA as to 31 Notice of Appeal filed by Gregory Dean Banister. The Motion for Reconsideration is DENIED (Attachments: # 1 USCA Letter) (bmg) (Entered: 06/18/201)

No. 07-04-0479-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL B
SEPTEMBER 29, 2006
GREGORY BANNISTER, APPELLANT
V.

THE STATE OF TEXAS, APPELLEE
FROM THE 154th DISTRICT COURT OF LAMB COUNTY;
NO. 3900; HONORABLE FELIX KLEIN, JUDGE
Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ .

OPINION

The primary issue presented in this appeal is whether the procedural protections set out in *Miranda v. Arizona* and Article 38.22 of the Texas Code of Criminal Procedure are applicable to appellant's statement to a jailer concerning the charges against him. The second issue concerns admission of evidence of cocaine use and withdrawal. Rejecting appellant's arguments on both issues, we affirm.

Factual and Procedural Background

On a Saturday morning in May 2002 appellant Gregory Bannister was driving with a friend from Lubbock to his home in Clovis, New Mexico. Near the city of Amherst his vehicle left the roadway, striking and killing a bicyclist on the shoulder. Appellant was present when deputies and DPS troopers arrived and he consented to collection of a blood sample. Because

there was no indication he was intoxicated, appellant was not arrested. The sequence of events leading to his subsequent arrest is not clear from this record. It does show that testing of appellant's blood indicated the use of cocaine and he was charged with intoxication manslaughter and aggravated assault under two different cause numbers. This record concerns appellant's trial and conviction for aggravated assault and punishment, enhanced by prior convictions, of 30 years confinement.[1]

During trial the State sought to introduce testimony from Lamb County deputy sheriff Shaun Wilson that appellant had made a statement indicating he had used cocaine within a day before the collision. After voir dire of Wilson the defense objected on the basis the statement was the result of custodial interrogation without "proper warnings," in violation of his right to counsel, and the State had failed to give timely notice of its intent to call Wilson. The trial court overruled the objections. Wilson testified that while appellant was confined in the Lamb County jail in November 2003 he took appellant and another inmate to a clinic for medical treatment. According to Wilson, in the clinic's waiting room, while appellant was "talking in general to the other inmate and maybe a nurse .... I happened to ask him what he was incarcerated for." Appellant replied "he was being charged with Intoxicated Manslaughter." Wilson asked if the events occurred near the town of Earth. Appellant said it "happened on [highway] 84 up by Amherst." After further defense objections the court

[1] Disposition of the manslaughter charge is not shown in this record.

recessed for the evening to give the defense an opportunity to investigate the testimony.

The State recalled Wilson during rebuttal.[2] Wilson was asked again about appellant's answer to his first question and replied: "He responded that he was in jail for Intoxicated Manslaughter." Wilson testified appellant then "stated that he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine the day before." Wilson testified he did not document the statement at the time or take any steps then to make an investigator or prosecutor working on the case aware of it. The prosecutor only learned of the statement during a lunchtime conversation the Friday before trial. The prosecutor asked Wilson to reduce his recollection of the event to writing and provided a copy to defense counsel the same afternoon.

The State's rebuttal evidence also included testimony from Brian Cantrell, the other inmate at the clinic. Cantrell's testimony supported Wilson's version of events. He recalled that appellant asked Wilson, "How can they charge me with Intoxicated Manslaughter when I wasn't drunk, when I was on cocaine at the time." According to Cantrell that statement was not in response to questioning by Wilson.[3]

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[2] A defense expert testified that no conclusion could be drawn about when appellant consumed cocaine based on the analysis of his blood.

[3] At the time of appellant's trial Cantrell had discharged his sentence and testified he was not subject to probation, parole or pending charges.

Custodial Interrogation

Appellant's first four points advance different theories why admission of the evidence of his November 2003 statement was error. Point one rests on Article 38.22 of the Texas Code of Criminal Procedure. Point two asserts violation of his Sixth Amendment right to counsel. In point three he asserts violation of his Fifth Amendment right against self-incrimination and point four complains of the State's failure to timely disclose the statement. We review challenges to a trial court's evidentiary rulings for abuse of discretion. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex.Crim.App. 2005). That standard requires us to give almost total deference to a trial court's determination of historical facts that find support in the record. *State v. Ross*, 32 S.W.3d 853, 855 (Tex.Crim.App. 2000) (suppression hearing); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997).

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct.1602, 16 L.Ed.2d 694 (1966), the Supreme Court prohibited the prosecution's use of statements stemming from custodial interrogation unless it demonstrated the use of procedural safeguards to protect the accused's right against self incrimination. *Id.* at 444. Article 38.22 of the Code of Criminal Procedure imposes additional procedural steps designed to protect the same rights and, with a limited exception not applicable here, prohibits use of statements made as a result of custodial interrogation when the enumerated procedures are not followed. Tex. Code Crim. Proc. Ann. art. 38.22 (Vernon 2005). Section 5 of Article 38.22 reiterates that statements which do not result from custodial interrogation are not subject to

exclusion. The parties agree the procedures described in Miranda and set out in article 38.22, section 3 (governing oral statements) were not followed by Wilson. They also agree appellant was in custody at the time of the statements. Their dispute, and resolution of appellant's first and third points, turn on whether the statements were the result of interrogation.

Appellant relies primarily on the holding in *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), and cases following it holding "the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Id.* at 301. It defined an incriminating response to include any response the prosecution may seek to introduce at trial. *Id.* at 301 n.5. The defendant in Innis was arrested for a shooting where police believed he had discarded the murder weapon near a school. While transporting Innis to the police station after he had been given the warnings required by Miranda, officers discussed the importance of finding the gun before it was discovered by schoolchildren. *Id.* at 294-95. Innis told the officers to turn back and he would show them where the gun was. *Id.* at 295. Innis later argued the statement was the product of custodial interrogation and inadmissible. The court rejected that contention, holding the conversation between the officers was neither express questioning of Innis or its "functional equivalent." *Id.* at 302. It found the officers' statements "offhand remarks" not

reasonably likely to elicit an incriminating response. *Id.* at 303.

The record does not support appellant's conclusion that Wilson should have known the questions he asked were reasonably likely to elicit an incriminating response. A response to Wilson's first question would not be incriminating under the broad definition of that term in Innis. *But see Etheridge v. Johnson*, 49 F.Supp.2d 963, 981-82 (S.D. Tex. 1999) (arresting officer asked if defendant knew why he was being arrested). That appellant knew the charge against him was not a fact the State would seek to introduce at trial. Had Wilson asked what appellant had done, rather than what he was charged with, the question would likely have elicited an incriminating response. *See, e.g.*, *U.S. v. Webb*, 755 F.2d 382, 389 (5th Cir. 1985) (booking officer asked "what ... did you get yourself into?"). The same is true for Wilson's second question about the location of events leading to the charge. Both witnesses to the conversation who testified asserted appellant's statement concerning cocaine use was not in response to any question from Wilson.[4] We do not agree the facts presented here are

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[4] During defense counsel's voir dire examination of Wilson, he described the context of appellant's statements in the waiting room, stating, "He wasn't talking to me in general. He was speaking out loud to, basically, anybody that would listen to him. There was another inmate in the room at that time and I think the nurses were around as well." statement at issue occurred during a conversation between sheriff's deputies and the defendant on the way to jail. The officers admitted the conversation included questions about the shooting they were investigating, but contended the statement at issue was not in response to a question but "almost an afterthought." *Id.* at 588. The officers' questions about the shooting showed they were

more similar to cases cited by appellant where reviewing courts have found police conduct was the functional equivalent of express questioning. The distinguishing factor is that in those cases the statements were made to officers who were investigating the offense for which the defendant was in custody. In *Wortham v. State*, 704 S.W.2d 586, 589 (Tex.App. Austin, 1986, no pet.), the Eastland Court of Appeals followed Wortham in *Baxter v. State*, 718 S.W.2d 28 (Tex.App.Eastland 1986, pet. ref'd), holding statements made to officers during their search of a trailer containing a clandestine drug lab shortly after the defendant's arrest were the result of interrogation. On evidence the officers asked the defendant questions concerning the operations at the trailer, the court rejected the officers' claim the statements were made in "general conversation." *Id.* at 33. An investigating officer's statements to a defendant in an emergency room that another person involved in a traffic accident had died and the officer wanted to talk with the defendant about the accident were found to constitute interrogation in *Clemmer v. State*, 645 S.W.2d 918, 919 (Tex.App. Fort Worth 1983, no pet.). Following Innis, the court found the officer's statements reasonably likely to elicit an incriminating response and reversed the conviction. *Id.* at 920. *See also Etheridge*, 49 F.Supp.2d at 982 (arresting officer asked defendant if he knew why he was under arrest); *Castleberry v. State*, 100 S.W.3d 400, 404 (Tex.App. San Antonio 2002, no pet.) (post-arrest question by investigating officer at scene about ownership of weapon was interrogation, precluding

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investigating the offense and the court held the statement was the result of custodial interrogation. *Id.* at 589.

admission of the defendant's response in his prosecution for weapons offense).

By contrast, evidence shows Wilson had no involvement in the investigation of the charges against appellant.[5] The statements to which Wilson testified were made some eighteen months after the May 2002 death of the bicyclist.

In *Innis* the Court recognized that an officer's intent may have a bearing on whether he should have known his words or actions were reasonably likely to elicit an incriminating response. Innis, 446 U.S. at 301 n.7. *See also Wilkerson v. State*, 173 S.W.3d 521, 528-30 (Tex.Crim.App. 2005) (discussing application of Miranda and art. 38.22 to questions by state agent not participating in criminal investigation). The jailer in Webb placed himself into the law enforcement role by admitting he "saw his own role as one of helping in the FBI's investigation in whatever way he could," and by informing investigators of the defendant's statement. 755 F.2d at 389. The circumstances of appellant's statements in the waiting room of the clinic and Wilson's failure to record the statement or report it to investigators or the prosecutor further indicate he had no intent to act in an investigative capacity. The record supports a finding appellant's statement was not the result of interrogation. We overrule appellant's first and third points of error.

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[5] Questioned during his voir dire examination about his reaction to appellant's statements, Wilson testified, "Whenever he made that statement it - I didn't know what effect it would have on the case or I didn't know what kind of evidence they had or anything like that. A lot of times they may talk about their cases out loud."

Appellant's second point asserts admission of the statement violated his Sixth Amendment right to counsel. Protection of that right prohibits police from eliciting incriminating statements from a defendant concerning the pending charge after the defendant's right to counsel attaches, which occurs on commencement of adversarial proceedings *Fellers v. U.S.,* 540 U.S. 519, 523, 124 S. Ct. 1019, 157 L.Ed.2d 1016 (2004); *Kirby v. Illinois,* 406 U.S. 682, 688-90, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972). Custody of a defendant is not necessary to a Sixth Amendment violation. *Innis,* 466 U.S. at 300.

Appellant relies on the argument advanced under his first point to establish Wilson's conduct was designed to elicit incriminating statements in violation of his Sixth Amendment right to counsel. The State's brief contains no discussion of appellant's Sixth Amendment claim. We initially note the Sixth Amendment right to counsel is offense-specific. *Texas v. Cobb*, 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001); *Romo v. State*, 132 S.W.3d 2, 3 (Tex.App.-Amarillo 2003, no pet.). Even if Wilson's conversation with appellant were reasonably likely to elicit an incriminating statement, it concerned the charge of intoxication manslaughter. Admission of that evidence in his trial for aggravated assault, for which he apparently had not yet been indicted,[6] would not be

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[6] Appellant's indictment for aggravated assault appearing in the appellate record is dated in January 2004, after his November 2003 conversation with deputy Wilson. Wilson and Brian Cantrell testified appellant's statement during that conversation was to the effect he had been indicted for "intoxicated manslaughter." Nothing in the record makes clear

barred under the Sixth Amendment. *Id.* Moreover, for the reasons discussed, the record supports a conclusion that Wilson's questions to appellant were not designed or reasonably likely to elicit incriminating information. We overrule appellant's third point.

Appellant's fourth point of error complains of the State's failure to timely disclose his statement to the defense. He argues evidence of the statement should have been excluded because it was not disclosed to defense counsel until the second day of trial in violation of a pretrial order issued under article 39.14 of the Code of Criminal Procedure (Vernon 2005). The trial court order required disclosure of, inter alia, "all oral confessions, admissions and statements made by Defendant to the state in connection with this case, which were not electronically recorded[,] offense reports, police reports [and] reports of third parties . . . involving the alleged facts of the offense."

Article 39.14(a) authorizes a trial court to order the State to produce documents, written statements of the defendant and tangible objects under the control of the State which are relevant to the action. Tex. Code Crim. Proc. Ann. art. 39.14(a) (Vernon 2005). An order under that article "shall specify the time, place and manner of making the inspection" *Id.*, *Kinnamon v. State*, 791 S.W.2d 84, 92 (Tex.Crim.App. 1990), overruled on other grounds, *Cook v. State*, 884 S.W.2d 485 (Tex.Crim.App. 1994).

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whether appellant's earlier indictment included the aggravated assault charge.

Appellant's motion did not ask the trial court to set a time for production and the court did not do so. *See Kinnamon*, 791 S.W.2d at 92 (court does not err in failing to set date when there is no request). The record shows Wilson's statement concerning the event was provided to defense counsel the Friday before trial. In the absence of a deadline set by the court, disclosure on the eve of trial has been found timely. *Kirksey v. State*, 132 S.W.3d 49, 54 (Tex.App. Beaumont 2004, no pet.), *citing Murray v. State*, 24 S.W.3d 881, 893 (Tex.App.Waco 2000, no pet.). The facts here are indistinguishable from those of *Murray*. There the prosecutor received a witness statement at 5:35 p.m. on the Friday before trial. *Id.* at 893. She forwarded the statement to defense counsel thirty minutes later. The trial started the following Monday and the witness was called on Wednesday. *Id.* The Waco Court of Appeals found no violation of the discovery order and affirmed. *Id.* Finding that holding dispositive, we overrule appellant's fourth point.

Appellant's next three points challenge the admission of expert witness testimony concerning the presence of a cocaine metabolite in his blood and the effect of cocaine withdrawal. He argues the evidence was admitted in violation of Rules of Evidence 401[7] (point five), 702 (point six), and 403 (point seven). The disputed evidence was the testimony of Department of Public Safety chemist Kathy Erwin, who analyzed the blood collected from appellant. She found it contained

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[7] Trial defense counsel's objection to Erwin's testimony referred to Rule 401, which defines relevant evidence. It is Rule of Evidence 402 that makes evidence which is not relevant inadmissible.

.36 milligrams per liter of benzoylecgonine. This chemical is produced when the body metabolizes cocaine. Benzoylecgonine has no effect on the body but indicates cocaine had been present. According to Erwin the presence of benzoylecgonine does not indicate how or when the cocaine was ingested.[8] Erwin went on to testify that cocaine is a potent stimulant which can lead to a "crash phase" or "crash effect" during withdrawal where the user can experience fatigue and sleepiness and a general lack of energy.[9] The effect can exist even when the cocaine is no longer present.

Erwin was not asked for an opinion whether appellant had experienced cocaine crash or withdrawal. Except for her identification of appellant's blood sample and her recitation of the procedures utilized in the DPS lab and results of her analysis, Erwin's testimony was not related directly to appellant.

The defense presented expert testimony from toxicologist James Booker. His testimony was consistent with that of Erwin on the source of benzoylecgonine and the general scientific recognition of a cocaine crash or cocaine withdrawal. He agreed that effect can last from several hours to several days, but opined an occasional user of small amounts of cocaine would not suffer a withdrawal effect. When

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[8] Appellant's expert testified benzoylecgonine is normally present for two or three days, but that some reported cases found detectible amounts after two or three weeks in chronic cocaine users.

[9] She said that among its effects, cocaine "keeps you awake."

asked what information was needed to determine the effect of a drug on a person, he replied that for cocaine it would require information on when it was used, how much was used and the means by which it was administered, adding that information was not available in this case.

Following the plain language of Rule 401, appellant argues by his fifth point Erwin's testimony did not have any tendency to make a fact of consequence to the determination of the action more or less probable because it did "not establish that he was under the influence of cocaine when he struck the decedent." This argument misapprehends the State's theory at trial and the purpose of Erwin's testimony. It was not the State's theory that appellant was under the influence of cocaine at the time of the collision, but that he was fatigued and sleepy because he was suffering withdrawal from cocaine. This theory was within the indictment allegation that appellant operated a motor vehicle "without sufficient sleep, as a result of the introduction of cocaine into his body[.]"[10] Erwin's testimony was relevant because it established scientific acceptance of the effects of cocaine withdrawal. It also showed appellant had consumed cocaine in the recent past. That the testimony did not establish when the cocaine was consumed or conclusively establish appellant experienced cocaine withdrawal at the time of the collision did not make it inadmissible. As the Court of Criminal Appeals has explained, the insufficiency of a

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[10] Because the use of cocaine was alleged in the indictment, evidence of that use was not an extraneous offense. *Manning v. State*, 114 S.W.3d 922, 927 (Tex.Crim.App. 2003).

particular item of evidence, standing alone, to prove a fact does not make it inadmissible. *Manning*, 114 S.W.3d at 927. We overrule appellant's fifth point.

In his sixth point appellant challenges admission of Erwin's testimony because the State failed to establish the reliability of that testimony. When a party offers testimony of an expert witness, it is the trial court's responsibility to determine if the evidence is sufficiently reliable to assist the jury. *Sexton v. State*, 93 S.W.3d 96, 99 (Tex.Crim.App. 2002). Appellant argues the State "failed to shoulder its burden of showing that [Erwin's technique applying the cocaine crash theory was valid and that the technique had been properly applied in this case." As noted, however, Erwin's testimony did not apply the cocaine crash theory to appellant. Before the jury, she was not asked if appellant had experienced cocaine crash or withdrawal.[11]

The State showed Erwin had bachelor's and master's degrees in chemistry, had taken additional graduate courses in forensic toxicology and had over 20 years experience in the field of chemistry, with five of those in the DPS crime laboratory. She also identified literature reporting studies on the effects of cocaine use. Appellant presents no challenge to the reliability of Erwin's testimony about her analysis of his blood, that concerning the metabolite

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[11] Erwin was not directly asked if appellant had used cocaine. She testified appellant's blood sample contained the metabolite benzoylecgonine and that benzoylecgonine is produced in the body only following cocaine use. She agreed with the prosecutor that, from the presence of benzoylecgonine in a person's body, she could tell that cocaine "was used."

benzoylecgonine, or that describing the effects on the body of cocaine use and cocaine withdrawal. His challenge is to testimony that Erwin did not give. We overrule appellant's sixth point.

In his final point of error appellant argues that even if the evidence of the presence of benzoylecgonine was relevant, it should have been excluded because the probative value was substantially outweighed by the danger of unfair prejudice. *See* Tex. R. Evid. 403. In reviewing an objection to evidence under Rule 403, a court should consider, but is not limited to, the following factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Prible v. State*, 175 S.W.3d 724, 733 (Tex.Crim.App. 2005); *Manning*, 114 S.W.3d at 926. Appellant's argument reiterates the contentions regarding relevancy urged in support of his fifth point. His argument challenges the Court of Criminal Appeals' analysis of similar evidence in Manning, and its conclusion the failure to exclude such evidence under Rule 403 was not error. We find the analysis and holding in *Manning* dispositive and overrule appellant's seventh point.

Having overruled appellant's points of error, we affirm the trial court's judgment.

James T. Campbell
Justice

Do not publish.

STATE OF TEXAS
COUNTY OF HARRIS

AFFIDAVIT

BEFORE ME the undersigned authority this date personally appeared BRIAN W. WICE, who after being sworn by me did state upon his oath the following:

My name is BRIAN W. WICE. I am an attorney licensed to practice law in the State of Texas and have been so licensed since May 28, 1979. My State Bar number is 21417800 and I am currently in good standing with the Texas State Bar. I am also "AV" rated by Martindale-Hubbell. My office is 440 Louisiana, Suite 900, Houston, Texas, 77002. My office telephone number is 713.524.9922. I am also admitted to practice before the United States Supreme Court, the Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuit Courts of Appeals and the Southern, Northern, and Western Districts of Texas, and have been admitted *pro hac vice* before the Supreme Court of Kansas.

I am a former briefing attorney to Judge Sam Houston Clinton of the Texas Court of Criminal Appeals who frequently lectures on the subjects of appellate advocacy, preservation of trial error, and post-conviction writs of habeas corpus for the State Bar of Texas, the Texas Criminal Defense Lawyer's Project, the Texas Criminal Defense Lawyers Association, and the Houston Bar Association. I have also testified as an expert witness in post-conviction writs of habeas corpus and motions for new trials on the area of ineffective assistance of counsel and have

sat as a Special Master in a variety of post-conviction writs of habeas corpus involving, inter alia, the area of ineffective assistance of counsel. I devote my practice exclusively to appellate and post-conviction matters in both state and federal courts and have handled several hundred appeals, including eleven death penalty appeals, and one capital writ.

This affidavit is being as a result of a court order that I respond to the claims in the post-conviction writ of habeas corpus filed by my former client, Gregory Banister, alleging that I failed to render effective assistance of counsel on the direct appeal of his conviction to the Seventh Court of Appeals at Amarillo, Texas. Although some of the claims that Mr. Banister alleges are difficult to decipher, I will do my best to respond to them to the extent I can understand their substance. In providing this affidavit, I am relying on the best of my recollection given that many of the events at issue took place four years ago. My recollection is based on my review of my file, the documents contained therein that I filed on Mr. Banister's behalf, the reporter's record from Mr. Banister's trial, correspondence between Mr. Banister and me, and, his mother, as well as my visiting the web sites of the United States Supreme Court, the Court of Criminal Appeals, and the Amarillo Court of Appeals.

Before I respond to the individual claims in the writ, I would like to provide the Court with an overview of the circumstances surrounding how I came to be retained by Mr. Banister, as well as an overview of the work that I performed on his behalf.

Mr. Banister was referred to me by Bill Wischkaemper, a lawyer in Lubbock whom I first met while lecturing at continuing legal education seminars for the Texas Criminal Defense Lawyer's Association. I was contacted by Mr. Banister's mother, Cynthia Plata, who lived in Lubbock, and with whom I dealt as a family contact in the three years that I represented Mr. Banister. Ms. Plata agreed to retain me to handle Mr. Banister's direct appeal for a fee of $15,000. In fact, in a letter dated September 1, 2007, Mr. Banister refers to my "sterling reputation in the legal community" as the "primary reason" why his family retained me. Although the fee was paid and the fee contract signed on October 21, 2004, I filed an appearance of counsel in the Seventh Court of Appeals on October 18, 2004. I filed a designation of appellate record pursuant to TEX.R.APP.P. 34.1 on October 6, 2004, requested that the court reporter, Paige Eichman, transcribe the reporter's record on October 6, 2004, and I filed a sworn motion to obtain a free reporter's record pursuant to TEX.R.APP.P 20.2 on October 19, 2004. I also filed a docketing statement in the court of appeals on October 18, 2004. I traveled to Lamb County on November 12, 2004 for a hearing on my request for a free reporter's record. After I presented evidence on the matter, the trial court granted my request for a free reporter's record on December 3, 2004.

I received the reporter's record from the court reporter and the clerk's record from the district clerk in December of 2004. I filed a 48-page brief that contained six points of error with the court of appeals on January 11, 2005. On January 27, 2006, I filed a pre-submission letter of authority with the court of

appeals. I traveled to Lubbock to present oral argument on February 8, 2006. When the court of appeals affirmed Mr. Banister's conviction on September 29, 2006, I filed a motion to publish the court of appeals' opinion and a motion for rehearing.

After both motions were denied, I agreed to represent Mr. Banister in the Court of Criminal Appeals by filing a petition for discretionary review for a greatly-reduced fee of $5,000. I only did so because of my concern for his mother's limited finances and because of my concern that Mr. Banister had not gotten a fair shake in trial court or in the court of appeals. I filed my petition for discretionary review on December 6, 2006. After the Court of Criminal Appeals refused the petition for discretionary review on February 28, 2007,1 filed a motion for rehearing on March 12, 2007, as well as an amended motion for rehearing on March 21, 2007.

After these motions were denied, and again, because of my continuing concern for Mr. Banister, I agreed to investigate, draft, and file a petition for writ of certiorari in the United States Supreme Court on a *pro bono* basis, asking only that his mother pay the expenses I incurred. My usual and customary fee for this would have been no less than $25,000. I filed the petition for certiorari on June 25, 2007. When the petition for certiorari was denied by the Supreme Court on October 1, 2007,1 informed Mr. Banister that he had one year from October 7, 2007 to file a state petition for habeas corpus in the event that he wanted to seek review of the denial of his state writ in the federal courts. Although I had sent Mr. Banister copies of everything that I had filed on his behalf, I forwarded my entire file to his then-post-conviction

writ lawyer, Clint Broden, on August 27, 2008. My review of my voluminous file reveals that I promptly answered every letter and virtually every one of probably several hundred or more questions Mr. Banister posed to me in the time that I was his appellate lawyer. I can say with some degree of assurance that I did everything that the State Bar Rules and Canon of Ethics required me to do on Mr. Banister's behalf.

The issues that I raised on Mr. Banister's behalf were, in my professional legal opinion, the ones that I believed gave us the best chance for success on appeal. While I encouraged Mr. Banister's input, I informed him that I would be responsible for determining which issues would be included in the appellate brief. Moreover, I was limited to the fifty pages that the Rules of Appellate Procedure proscribe for appellate briefs in non-capital cases. In reviewing Mr. Banister's claims, I have tried to make every effort to evaluate my conduct from perspective at the time I drafted and filed the brief to eliminate the distorting effects of hindsight, *see Strickland v. Washington*, 466 U.S. 668, 691 (1984), knowing that I was not required to raise every non-frivolous issue that Mr. Banister wanted me to raise so long as I used my professional judgment in deciding what claims to raise or not raise. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Failure to Challenge the Legal Sufficiency of the Evidence

Mr. Banister claims that I was deficient in failing to claim that the evidence was legally insufficient to support his conviction for aggravated assault. I did not raise this claim because based on my experience,

training and expertise, I did not believe it to be meritorious. Department of Public Safety chemist Kathy Erwin testified that Mr. Banister's blood contained 36 miligrams per liter of benzoylecgonine, which she described as cocaine metabolite, indicating that he had consumed cocaine some time before the crash. Based on her expert testimony that Mr. Banister could have been suffering from cocaine withdrawal at the time of the crash, and because the jury could have rationally inferred that this cocaine withdrawal and resultant fatigue was the proximate cause for the crash, I believe that a rational juror could have found all of the elements of the offense beyond a reasonable doubt.

Failure to Challenge the Factual Sufficiency of the Evidence

Mr. Banister claims that I was deficient in failing to claim that the evidence was factually insufficient to support his conviction for aggravated assault. I did not raise this contention because based on my experience, training and expertise, I did not believe it to be meritorious. Based on the testimony of Ms. Erwin as set forth above, I did not believe that the State's evidence was "so obviously weak as to undermine confidence in the jury's determination," or that the State's proof of guilt, "was greatly outweighed by contrary proof."

Failure to Raise Writ Claims 4-9 on Direct Appeal

Mr. Banister claims that I was deficient in failing to raise the following claims on direct appeal:

"Denial of fair and impartial trial by outside influence on the jury: jury received false evidence not presented

at trial but given in the written charge [*sic*] that Banister was convicted of other offenses."

"The trial court denied Banister the right to an impartial and unbiased jury panel by introducing prejudicial and highly inflammatory information of barred [*sic*] prior convictions."

"The trial court violated Banister's privilege against self-incrimination by informing the jury to use unapproved [*sic*] prior convictions to evaluate Banister's credibility when he exercised his Constitutional Right not to testify."

"Constructive denial of counsel: Banister lost his Constitutional Rights to confrontation, cross-examination, and assistance of counsel because the trial court exposed [*sic*] inflammatory and false facts not in evidence and inadmissible [*sic*] after the close of the evidence."

"Trial counsel rendered ineffective assistance of counsel by failing to object to the trial court's erroneous instruction commenting on the weight [*sic*] of the evidence by informing the jury of unproved prior convictions."

"Trial counsel rendered ineffective assistance of counsel by failing to consult with Banister and move for a new trial when his jury obtained prejudicial evidence not introduced during trial."

My review of Mr. Banister's recitation of the "facts" forming the basis for these claims reveals that they purported legal conclusions and to the extent they are legal conclusions and not facts, they are unsupported by the trial record. Moreover, to the extent that they encompass matters outside the record, including but

not limited to the claim that trial counsel was ineffective, I could not, and would not, have raised them on direct appeal in the absence of a motion for new trial hearing. It is a fundamental tenet of Texas criminal law and procedure that these claims need to be raised in a post" conviction writ. I could not, therefore, have been deficient in raising claims that were not ripe for adjudication on direct appeal.

Failure to Raise Writ Claims 11-15 on Direct Appeal

Mr. Banister claims that I was deficient in failing to raise the following claims on direct appeal:

"Actual or constructive denial of appellate counsel'- State attributed [sic] to counsel's failure to perfect motion for new trial by failing to include the jury charge in the appellate record and by failing to dictate the charge into the record."

"Mr. Banister was deprived of a fundamentally fair trial when the presiding Judge became a witness for the State."

"Mr. Banister was deprived of a fundamentally fair trial because the trial Judge was bias [sic] in the State's favor."

"The State knowingly sponsored false testimony and failed to correct the judge's false statements to the jury."

"Trial counsel was ineffective for failing to object and request a mistrial when the judge became a witness for the State."

My review of Mr. Banister's recitation of the "facts" forming the basis for these claims reveals that they purported legal conclusions and to the extent they are

legal conclusions and not facts, they are unsupported by the trial record. Moreover, to the extent that they encompass matters outside the record, including but not limited to the claim that trial counsel was ineffective, I could not, and would not, have raised them on direct appeal in the absence of a motion for new trial hearing. It is a fundamental tenet of Texas criminal law and procedure that these claims need to be raised in a postconviction writ. I could not, therefore, have been deficient in raising claims that were not ripe for adjudication on direct appeal.

Failure to Raise the Denial of a Jury Charge on Deadly Conduct on Direct Appeal

Mr. Banister claims that I was deficient in failing to raise the claim that the trial court erred in denying his request for a jury instruction on deadly conduct. At the time I drafted Mr. Banister's brief, I recall having researched this question because I recognized that this issue was preserved for appeal by trial counsel. My research led me to conclude that deadly conduct, which was formerly known as reckless conduct, could, as trial counsel pointed out, be a lesser included offense of aggravated assault, *see McCloud v. State*, 692 S.W.2d 580, 594 (Tex.App—Houston [1st Dist.], 1985), even though *McCloud* involved the discharge of a firearm and not the operation of a motor vehicle. Assuming that deadly conduct was a lesser included offense of aggravated assault in this case, if I was wrong in my belief that there was no evidence from which a rational juror could have acquitted Mr. Banister of the greater offense of aggravated assault while convicting him of the lesser offense of deadly conduct, then my failure to have raised this issue would have been deficient conduct. In other words, if

this or any other court concludes that this claim would have been meritorious on direct appeal, then it really makes no difference why I did not raise this issue.

Failure to Raise Writ Claims 18-19 on Direct Appeal

Mr. Banister claims that I was deficient in failing to raise the following claims on direct appeal:

"The Trial Court Denied Banister [*sic*] Rights to Due Process by Denying Counsel's Timely Request for a 'Deadly Conduct' Instruction Where [*sic*] Raised by the Evidence."

"Trial counsel rendered ineffective assistance of counsel by not objecting and requesting a lesser-included offense of reckless driving when [*sic*] raised by the evidence."

I believe that I have addressed the first of these claims, *supra*. I did not raise the claim that trial counsel was ineffective in not requesting a jury instruction on the offense of reckless driving for a number of reasons. First, I did not believe it to be a lesser included offense of aggravated assault given the facts of this case. Second, I did not believe that there was any evidence in this case from which a rational juror could have acquitted Mr. Banister of the offense of aggravated assault and convicted him of reckless driving even if the latter offense was a lesser included of the former. Third, because this claim was not preserved, I did not feel, in the exercise of my professional judgment, that an appellate court would find that Mr. Banister suffered "egregious harm," assuming that the denial of this charge was even error in the first place.

Failure to Raise Writ Claims 21-22 on Direct Appeal

Mr. Banister claims that I was deficient in failing to raise the following claims on direct appeal:

"Banister's Due Process Rights [*sic*] violated by State: The aggravated assault statute is unconstitutional as applied in this case because it circumvents Texas' lesser-included laws [*sic*] by prohibiting criminally negligent homicide as a viable lesser-included offense."

"Banister's right to a fair trial and full benefit of the reasonable doubt standard denied [sic] by the State: Because the State did not prosecute Banister for manslaughter, the jury was precluded from considering criminally negligent homicide."

I did not raise either of these claims because, in the exercise of my professional judgment, I did not believe either of them to be meritorious. Beyond that, the "facts" forming the basis for these claims reveals that they purported legal conclusions and to the extent they are legal conclusions and not facts, they are unsupported by the trial record or by existing case law.

Failure to Raise Ineffective Assistance of Counsel on Direct Appeal Mr. Banister claims that I was deficient in failing to raise the claim on direct appeal that trial counsel was ineffective based on her allegedly deficient conduct set out in claims 24-35 of his writ. Because these claims are premised on matters that are outside the record, especially trial counsel's purported strategy, if any, for her conduct, I would not have raised them on direct appeal in the absence of a motion for new trial hearing. It is a

fundamental tenet of Texas criminal law and procedure that these claims need to be raised in a post-conviction writ. I could not, therefore, have been deficient in raising claims that were not ripe for adjudication on direct appeal.

Failure to Include the Manslaughter Indictment with the Appellate Record Mr. Banister claims that I was deficient in not including the indictment charging him with intoxication manslaughter in the appellate record because my failure to do so "precluded the Court of Appeals from making an informed decision regarding the right to counsel violation counsel advanced on appeal." While I should have included the intoxication manslaughter indictment in the appellate record, I do not believe that Mr. Banister was harmed because I do not think that the court of appeals, or for that matter, the Court of Criminal Appeals, believed that there were two distinct crashes and that the only fair-minded and reasonable interpretation of events was that the State charged two crimes arising out of the same criminal transaction, and, as the State conceded at trial. I spent considerable time in my petition for discretionary review arguing why the court of appeals' reliance on *Texas v. Cobb*, 532 U.S. 162 (2001) to hold that Mr. Banister's right to counsel had not attached was simply misplaced and incorrect. Finally, to the extent that Mr. Banister was not present at oral argument, his claim that the State "essentially conceded" that the "offense-specific" rule was inapplicable is simply false. I have examined my correspondence with him in the wake of oral argument — the only way he would have known what happened there unless he spoke with State's counsel,

and no fair-minded reading of it substantiates his bold claim of the State's "concession." The only thing the State conceded at oral argument was that error, if any, in the admission of Mr. Banister's oral statement to his jailer was not have been harmless beyond a reasonable doubt.

Failure to Cite Critical Portions of the Trial Record in Banister's Appellate Brief Mr. Banister claims that I was deficient in "fail[ing] to cite crucial portions of the trial record which would have supported his Sixth Amendment right to counsel claim he advanced on appeal." Specifically, Mr. Banister claims that I "failed to cite in the appellate brief an exchange where the prosecution and the Court agree that there was 'no question' that the offense of aggravated assault arose out of the same transaction." I have reviewed the appellate brief and acknowledge that Mr. Banister is correct in his assertion. While I should have included this exchange as part of my factual statement, I had no reason not to think that the court of appeals would not, and did not, review the entire trial record, including this exchange, as part of its analysis and resolution of this claim. Moreover, I do not think that the court of appeals, or for that matter, the Court of Criminal Appeals, believed that there were two distinct crashes and that the only fair-minded and reasonable interpretation of events was that the State charged two crimes arising out of the same criminal transaction. Indeed, I spent considerable time in my petition for discretionary review arguing why the court of appeals' reliance on *Texas v. Cobb*, 532 U.S. 162 (2001) to hold that Mr. Banister's right to counsel had not attached was simply misplaced and incorrect. Mr. Bannister's claim

that there is a reasonable probability that the outcome of this appeal would have been different if I had included this exchange is a hybrid of speculation and conclusion on his part.

Failure to Raise Meritorious Grounds on Direct Appeal Mr. Banister's final claim is that I was deficient in raising points of error that "lacked record support and were unsustainable" while "ignoring] other issues which were clearly meritorious. Mr. Banister attempts to buttress his conclusionary claim by asserting without foundation that, "The brief submitted by appellate counsel makes clear that he did not review the entire record." With all due respect to Mr. Banister, for whom I labored mightily to secure a new trial in the Seventh Court of Appeals, the Court of Criminal Appeals, and in the United States Supreme Court, his hyperbole is as unwarranted as it is insulting. The issues that I raised in the 48-page brief that I filed on Mr. Banister's were the result of my careful and considered review of the entire record viewed through the prism of that body of case law that I believed impacted those claims. No one was more disappointed with the result than I was. But not even the most skillful appellate advocate can force an appellate court to rule in his favor when that tribunal is unwilling or unable to do so, and not even the 65 claims in the 90-page writ Mr. Banister has filed can re-write history to his liking.

I have read the foregoing assertions and state under oath that they are true and SUBSCRIBED AND SWORN TO before me this 20th day of November, 2008. correct.

STATE OF TEXAS

COUNTY OF HARRIS

AMENDED AFFIDAVIT

BEFORE ME the undersigned authority this date personally appeared BRIAN W. WICE, who after being sworn by me did state upon his oath the following:

My name is BRIAN W. WICE. I am an attorney licensed to practice law in the State of Texas and have been so licensed since May 28, 1979. My State Bar number is 21417800 and I am currently in good standing with the Texas State Bar. I am also "AV" rated by Martindale-Hubbell. My office is 440 Louisiana, Suite 900, Houston, Texas, 77002. My office telephone number is 713.524.9922. I am also admitted to practice before the United States Supreme Court, the Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuit Courts of Appeals and the Southern, Northern, and Western Districts of Texas, and have been admitted *pro hac vice* before the Supreme Court of Kansas.

I am a former briefing attorney to Judge Sam Houston Clinton of the Texas Court of Criminal Appeals who frequently lectures on the subjects of appellate advocacy, preservation of trial error, and post-conviction writs of habeas corpus for the State Bar of Texas, the Texas Criminal Defense Lawyer's Project, the Texas Criminal Defense Lawyers Association, and the Houston Bar Association. I have also testified as an expert witness in post-conviction writs of habeas corpus and motions for new trials on the area of ineffective assistance of counsel and have

sat as a Special Master in a variety of post-conviction writs of habeas corpus involving, inter alia, the area of ineffective assistance of counsel. I devote my practice exclusively to appellate and postconviction matters in both state and federal courts and have handled several hundred appeals, including eleven death penalty appeals, one capital writ as a defense attorney and another as a special prosecutor.

Pursuant to a court order, I filed an affidavit in November of 2008 responding to the claims in the post-conviction writ of habeas corpus filed by my former client, Gregory Banister, alleging that I failed to render effective assistance of counsel on the direct appeal of his conviction to the Seventh Court of Appeals at Amarillo, Texas. In that affidavit, I asserted, *inter alia*, what I believed at the time to be my reasons for not claiming that the evidence adduced at Mr. Bannister's trial was legally and factually insufficient.

In the two years since I have filed my original affidavit, I have had the chance to review that original affidavit, pertinent portions of the trial record, and pertinent portions of the court of appeals' opinion affirming Mr. Bannister's conviction. Viewed against that backdrop, I now believe that my assertion as to why I did not challenge either the legal or factual sufficiency of the evidence was mistaken and that there was no tactical downside to having raised either of these issues. While I cannot say that either claim would have been meritorious, I recognize that, in the exercise of reasoned professional judgment, I should have raised both of these appellate issues. However, I stand by each and every other assertion in my original affidavit.

I have read the foregoing assertions and state under oath that they are true and correct.

BRIAN W. WICE

SUBSCRIBED AND SWORN TO before me this 19th day of November, 2010.

APPLICANT GREGORY BANNISTER APPLICATION NO. WR-70,854-03

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

DENIED WITHOUT WRITTEN ORDER.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

*******EVIDENTIARY HEARING RESPECTFULLY REQUESTED*******

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Gregory Dean Banister PETITIONER (Full name of Petitioner)	Neal-Unit (TDCJ-TD), Amarillo, TX CURRENT PLACE OF CONFINEMENT
vs.	1265563 PRISONER ID NUMBER
Brad Livingston RESPONDENT (Name of TDCJ Director, Warden, Jailor, or authorized person having custody of Petitioner)	5-14CV0049-C CASE NUMBER (Supplied by the District Court Clerk)

* * *

PETITION

What are you challenging? (Check all that apply)

☐ A judgment of conviction or sentence, probation or deferred-adjudication probation. (Answer Questions 1-4, 5-12 & 20-25)

☐ A parole revocation proceeding. (Answer Questions 1-4, 13-14 & 20-25)

☐ A disciplinary proceeding. (Answer Questions 1-4, 15-19 & 20-25)

☐ Other: _____
(Answer Questions 1-4, 10-11 & 20-25)

All petitioners must answer questions 1-4:

Note: In answering questions 1-4, you must give information about the conviction for the sentence you are presently serving, even if you are challenging a prison disciplinary action. (Note: If you are challenging a prison disciplinary action, do not answer questions 1-4 with information about the disciplinary case. Answer these questions about the conviction for the sentence you are presently serving.) Failure to follow this instruction may result in a delay in processing your case.

1. Name and location of the court (district and county) that entered the judgment of conviction and sentence that you are presently serving or that is under attack: 154th District Court of Lamb County, Texas, Littlefield Texas.

2. Date of judgment of conviction: Found Guilty on 9-16-04, Sentenced on 9-17-04.

3. Length of sentence: Thirty (30) years in TDCJ-ID.

4. Identify the docket numbers (if known) and all crimes of which you were convicted that you wish to challenge in this habeas action: Aggravated Assault, Cause No. 3900.

Judgment of Conviction or Sentence. Probation or Deferred Adjudication Probation:

5. What was your plea? (Check one)

☒ Not Guilty ☐ Guilty ☐ Nolo Contendere

6. Kind of trial: (Check one)

☒ Jury ☐ Judge Only

7. Did you testify at trial?

☐ Yes ☒ No

8. Did you appeal the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, in what appellate court did you file your direct appeal? 7th Court of Appeals.

Cause Number (if known): 07-04-479-CR.

What was the result of your direct appeal (affirmed, modified or reversed)? Affirmed

What was the date of that decision? 9-26-06

If you filed a petition for discretionary review after the decision of the court of appeals, answer the following:

Grounds raised: Appeals Court erred in holding that questions by deputy were not likely to elicit an incriminating response from Banister. Appeals Court erred in holding that deputy's repeated questioning of Banister were not calculated to deliberately elicit incriminating information , in violation of 5 & 6th Amendment.

Result: "Refused"

Date of result: 02-28-07

Cause Number (if known): Pd. 1861-06

If you filed a petition for a writ of certiorari with the United States Supreme Court, answer the following:

Result: "Refused" (See Banister v. State of Texas, (Mem) at 128 S.ct. 186)

Date of result: 10-01-07

10. Other than a direct appeal, have you filed any petitions, applications or motions from this judgment in any court, state or federal? This includes any state applications for a writ of habeas corpus that you may have filed. ☒ Yes ☐ No

11. If your answer to 10 is "Yes," give the following information:

Name of court: 154th District Court of Lamb County Texas

Nature of proceeding: State Habeas under Tex. C. Cr. Proc. art. 11.07

Cause number (if known): WR-70, 854-03

Date (month, day and year) you filed the petition, application or motion as shown by a file stamped date from the particular court: 09-23-08

Grounds raised: Numerous claims of trial and appellate counsel ineffective assistance. Prosecutorial misconduct claims; jury misconduct; various trial errors; denial of fair trial and accumulation of errors. Grounds same as those raised in this 2254 petition.

Date of final decision: April 2, 2014

What was the decision? "Denied without written order"

Name of court that issued the final decision: Texas Court of Criminal Appeals

As to any second petition, application or motion, give the same information:

Name of court: N/A

Nature of proceeding: N/A

Cause number (if known): N/A

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court: N/A

Grounds raised: N/A

Date of final decision: N/A

What was the decision? N/A

Name of court that issued the final decision: N/A

If you have filed more than two petitions, applications or motions, please attach an additional sheet of paper and give the same information about each petition, application or motion.

12. Do you have any future sentence to serve after you finish serving the sentence you are attacking in this petition?

☐ Yes ☒ No

(a) If your answer is "Yes," give the name and location of the court that imposed the sentence to be served in the future: N/A

(b) Give the date and length of the sentence to be served in the future: N/A

(c) Have you filed, or do you intend to file, any petition attacking the judgment for the sentence you must serve in the future? ☐ Yes ☒ No

Parole Revocation:

13. Date and location of your parole revocation: N/A

14. Have you filed any petitions, applications or motions in any state or federal court challenging your parole revocation?

☐ Yes ☒ No

If your answer is "Yes," complete Question 11 above regarding your parole revocation.

Disciplinary Proceedings:

15. For your original conviction, was there a finding that you used or exhibited a deadly weapon?

☒ Yes ☐ No

16. Are you eligible for release on mandatory supervision?

☐ Yes ☒ No

17. Name and location of the TDCJ Unit where you were found guilty of the disciplinary violation: N/A

Disciplinary case number: N/A

What was the nature of the disciplinary charge against you? N/A

18. Date you were found guilty of the disciplinary violation: N/A

Did you lose previously earned good-time days?

☐ Yes ☐ No

If your answer is "Yes," provide the exact number of previously earned good-time days that were forfeited by the disciplinary hearing officer as a result of your disciplinary hearing: N/A

Identify all other punishment imposed, including the length of any punishment, if applicable, and any changes in custody status: N/A

19. Did you appeal the finding of guilty through the prison or TDCJ grievance procedure?

☐ Yes ☐ No

If your answer to Question 19 is "Yes," answer the following:

Step 1 Result: N/A

Date of Result: N/A

Step 2 Result: N/A

Date of Result: N/A

All petitioners must answer the remaining questions:

20. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

A. **GROUND ONE**: Conviction Obtained As A Result Of Ineffective Appellate Counsel: Counsel Failed To Challenge The Legal Sufficiency of The Trial Evidence In The Direct Appeal.

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): For fact supporting this ground please see Attachment-A, which is bound hereto and immediately follows page 10 of this 2254 petition. For additional facts please see Banister's Memorandum of Law and Supplemental Facts labeled Attachment-B, which is separately bound but mailed along with this 2254 petition.

B. **GROUND TWO**: Conviction Obtained As A Result Of Ineffective Assistance of Appellate Counsel: Counsel Failed To Challenge The Factual Sufficiency of The Trial Evidence In The Direct Appeal.

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): For Facts please see Attachments A and B.

C. **GROUND THREE**: Conviction Obtained As A Result Of Ineffective Assistance Of Trial Counsel: Counsel Failed To Move For a Directed Verdict Of "Not Guilty" At The Close Of The State's Case.

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): For facts supporting this ground please see Attachments A and B which are incorporated herein for all purposes.

D. **GROUND FOUR**: Conviction Obtained As A Result Of Ineffective Assistance Of Trial Counsel: Counsel Failed To Move To "Strike" The State's Expert's Testimony When She Failed To "Connect It Up."

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): For facts supporting this ground please see Attachments

A and B which are incorporated herein for all purposes.

21. Relief sought in this petition: Because the State's evidence was insufficient I seek an acquittal. In the alternative, I seek relief in the form of a new trial; a reformation of my sentence to punishment for one of the lesser-included offenses to which I was entitled to but not given; or that I be given a new direct appeal.

22. Have you previously filed a federal habeas petition attacking the same conviction, parole revocation or disciplinary proceeding that you are attacking in this petition?

☒ Yes ☐ No

If your answer is "Yes," give the date on which each petition was filed and the federal court in which it was filed. Also state whether the petition was (a) dismissed without prejudice, (b) dismissed with prejudice, or (c) denied. 2254 filed with Northern District (Lubbock) on 10-22-08/ it was dismissed "without prejudice" on 2-23-09 by the Honorable Judge Sam Cummings.

If you previously filed a federal petition attacking the same conviction and such petition was denied or dismissed with prejudice, did you receive permission from the Fifth Circuit to file a second petition, as required by 28 U.S.C. § 2244(b)(3) and (4)?

☐ Yes ☐ No N/A

23. Are any of the grounds listed in question 20 above presented for the first time in this petition?

☐ Yes ☒ No

If your answer is "Yes," state briefly what grounds are presented for the first time and give your reasons for not presenting them to any other court, either state or federal. N/A

24. Do you have any petition or appeal now pending (filed and not yet decided) in any court, either state or federal, for the judgment you are challenging?

☒ Yes ☐ No

If "Yes," identify each type of proceeding that is pending (i.e., direct appeal, art. 11.07 application, or federal habeas petition), the court in which each proceeding is pending, and the date each proceeding was filed. "Suggestion For Reconsideration" of State Habeas, filed on April 8, 2014 with the Texas Court of Criminal Appeals.

25. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Angela French (Now Angela Overman)

(b) At arraignment and plea: Angela French

(c) At trial: Angela French, 709 Ave. G, Levelland, Tx 79336

(d) At sentencing: Angela French

(e) On appeal: Brian W. Wice, 440 Louisiana Suite 900, Houston, TX 77002-1635

(f) In any post-conviction proceeding: N/A pro-se

(g) On appeal from any ruling against you in a post-conviction proceeding: N/A

Timeliness of Petition:

26. If your judgment of conviction, parole revocation or disciplinary proceeding became final over one year ago, you must explain why the one-year statute of limitations contained in 28 U.S.C. § 2244(d) does not bar your petition.[1] My conviction became final the day my certiorari was refused, on 10-01-07.

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[1] The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as contained in 28 U.S.C. § 2244(d), provides in part that:

> (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

My state habeas was filed on 09-23-08, with approximately 7 days left on my 1-year AEDPA time-clock. This 2254 petition was given to prison officials for mailing prior to the passage of the 7 days. I had 7 days from the date of the denial of my state habeas, which was denied on 4-02-2014.

Wherefore, petitioner prays that the Court grant him the relief to which he may be entitled.

N/A
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for a Writ of Habeas Corpus was placed in the prison mailing system on April 7th 2014 (month, day, year).

Executed (signed) on 7th day of April 2014 (date).

Signature of Petitioner (required)

Petitioner's current address: Gregory Banister #1265563, Neal Unit, 9055 Spur 591, Amarillo, TX 79107.

PETITIONER'S GROUNDS FOR RELIEF

GROUND ONE: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL: COUNSEL FAILED TO CHALLENGE THE LEGAL SUFFICIENCY OF EVIDENCE ON DIRECT APPEAL

THE FACTS: At trial the State failed to produce legally sufficient evidence to support the elements as charged in the indictment. Specifically, the State did not provide the Jury with sufficient evidence for them to find that Banister suffered a "cocaine crash", or that the 0.36 milligrams of Benzoylecgonine-which was just .06 milligrams above the "cutoff for someone flying a plane"—found in his system had any contribution to the collision with the cyclist.

Additionally, the State offered **legally** insufficient evidence that "Mr. Banister failed to control his motor vehicle or drove his motor vehicle without sufficient sleep and that either of those was a result of the introduction of cocaine into his body which resulted in the accident." (This is precisely what the Court stated the State had to prove. See 3RR--48)

In spite of the above facts, appellate counsel did not challenge the **legal** sufficiency of the evidence on direct appeal. In appellate counsel's initial post-conviction affidavit he states that he "did not raise this claim because he did not believe it to be meritorious," and because he believed (erroneously) that the State's expert provided "testimony that Mr. Banister could have been suffering from cocaine withdrawal at the time of the crash, and the jury could have rationally inferred that this cocaine withdrawal

and resultant fatigue was the proximate cause for the crash....". See Wice's Aff. at PX-36 at p.5)

Appellate counsel's professed reasoning for not challenging the legal sufficiency is not sound because it was premised on his misguided belief that testimony was given that Banister "could have been suffering from cocaine withdrawal at the time of the crash...". But the trial record, and the Seventh Court of Appeal's opinion denying Banister's appeal, reveals that no such testimony was ever given:

> "Erwin [State's Expert] **was not asked** whether [Banister] had experienced cocaine crash withdrawal." At p.12
>
> "Erwin's testimony **was not related** directly to [Banister]." At p.12
>
> "Ervin's testimony **did not apply** the cocaine crash theory to [Banister]." At p.13
>
> "Erwin's testimony **did not apply** the cocaine crash theory to [Banister]." At p.13
>
> "Before the jury, [Erwin] **was not asked** if appellant had experienced cocaine crash or withdrawal." At p. 13
>
> See Gregory Banister v. Texas, NO. 07-04-0479-CR (Tx. App.-Amarillo 2006) at pages 12 & 13; also see Erwin's testimony at 5RR-8-68.

The appellate court further recognized that: appellate counsel's "challenge [on appeal] is to testimony that Erwin **did not give**." (See Id. At p. 14) In fact, appellate counsel based three of the seven grounds he raised on appeal on testimony that was never given.

Almost two years after filing his initial affidavit, appellate counsel admits in a letter to Banister, that he made a "mistake" regarding why he did not challenge the sufficiency issues, and informed Banister that he would be amending his affidavit. (See PX-40) in appellate counsel's "amended" affidavit he states:

> "I now believe that my assertion as to why I did not challenge either the legal or factual sufficiency of the evidence was mistaken, and that there was not tactical downside to having raised these issues. While I cannot say that either claim would have been meritorious, I recognize that, in the exercise of reasoned professional judgment, I **should have** raised both of these appellate issues." (See Brian Wice's Amended Aff. At PC-41)

In light of the above, it is unequivocally clear that appellate counsel failed to familiarize himself with the facts of banister's case when drafting the appeal. As such, he could never have conducted the required informed selection of potential claims in order to maximize the likelihood of success on appeal. Banister was harmed by appellate counsel's failure to challenge the legal sufficiency because it is reasonably likely that had he competently done so, the result of the appeal would have differed. This ground was extremely more meritorious than those he did raise. (See Ground **48** Infra) Given Mr. Wice's status "as an expert witness in post-conviction writs of habeas corpus...on [sic] the area of ineffective assistance of counsel...", his admission that he made a "mistake", and that he should have raised the legal and factual sufficiency issues tends a great deal of credence to Banister's claim that he was ineffective for not doing

so. Indeed, Mr. Wice's perspective is not only as the appellate attorney handling the case, but its also as an expert in the very subject of ineffective assistance of counsel.

GROUND TWO: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL: COUNSEL FAILED TO CHALLENGE THE FACTUAL SUFFICIENCY OF THE EVIDENCE ON DIRECT APPEAL.

THE FACTS: In addition to the facts set out in Ground One supra, the following facts support the conclusion that appellate counsel should have challenged the factual sufficiency of the evidence on direct appeal:

* The testimony concerning cocaine crash withdrawal was factually insufficient or too weak to support a rational finding that Banister experienced a cocaine crash at the time of the collision. (The cocaine crash theory was never applied nor "directly related" to Banister.) See Banister v. Texas, NO-07-04-0479-CR (Tx. App.Amarillo 2006) at pages 12-13.

* The testimony concerning cocaine crash withdrawal was factually insufficient or too weak to support a "rational" finding that the 0.36 milliliters of Benzoylecgonine found in Banister's blood was the proximate cause of the accident. (The State's expert admitted that Benzoylecgonine is "inactive" and has absolutely "no effect whatsoever on the body." 5RR-62 She also testified that Banister was just barely over the 0.3 milligram cutoff level for work-place testing. 5RR-54 The State offered no testimony establishing a causative relationship between the trace amount of Benzoylecgonine and the collision with the cyclist.)

* Under the factual sufficiency balancing scale, the contrary evidence on cocaine crash withdrawal is strong enough so that the beyond a reasonable doubt standard could never be met. (Dr. Booker testified that in order to determine in any scientifically reliable manner that the effect of a drug on an individual is, three thins had to be known: (1) when the drug was used?; (2) how much was used?; (3) the means by which the drug was administered. He noted that not one of these facts were available in this case. 5RR-114. In Dr. Booker's expert opinion, no difference could be drawn about the effect of cocaine on Banister because "there's just simply not enough fact to do it with." 5RR-121. The cocaine crash studies were all done on "chronic users", but no testimony was provided to the jury on whether Banister was a chronic user or not. Lastly, and probably most importantly is the fact that the State's very own witness, Trooper Manuel Ponce—an "18 year D.P.S. veteran—testified that Banister didn't exhibit any of the symptoms associated with a cocaine crash immediately after the accident. 4RR-145-146 & 5RR-166)

* A finding that Banister failed to get sufficient sleep is greatly outweighed by contrary proof. (No testimony was offered to the jury that Banister failed to get a sufficient amount of sleep. To the contrary, Able Delacruz testified that Banister went to sleep around 11:30 pm and awoke around 7 or 7:30 am. 5RR-128-130; 5RR-143. And Trooper Ponce testified that immediately after the accident that Banister did not appear to be fatigued. 4RR-145-146 & 5RR-166)

* A finding that Banister failed to control his motor vehicle is contrary to the great weight of the evidence and outweighed by contrary proof. (Trooper Ponce's

initial and supplemental reports depicts one of the cyclist in the roadway at the time of the collision. See PX-2 at p. 2& 4 In fact, the portion of those reports that asks for the "investigator's Narrative Opinion Of What Happened" state: "**Unit 2 was a bicycle and was riding in the right far lane**." See Id. Even the State's accident reconstructionist, Trooper Vandergriff, testified that both Banister and the cyclist were "legally in the roadway" at the time of collision [4RR-170-180], and that Banister had the right-of-way. 4RR-179 He also testified that "there's no evidence that shows" that Banister ever crossed the fog line. 4RR-177 Although the State did offer the jury evidence that Banister failed to control his motor vehicle 20 miles before the accident, in the construction zone, they failed to provide the jury any evidence or testimony that he failed to control his motor vehicle at the time of the collision. 4RR-5RR They surely did not provide evidence that Banister's failure to control—if any—was "as a result of introduction of cocaine into his body.")

Here, the State was "bound" by the theory alleged in the indictment. In this case, in order for the State to secure a conviction it had to prove the following:

*that Banister intentionally knowingly or recklessly caused serious bodily injury to B.J. Mitchell

* by failing to control or driving his motor vehicle without sufficient sleep

*** as a result of introduction of cocaine into the body**

* and thereby caused his motor vehicle to collide with B.J. Mitchell.

(See Indictment at CR-1 and Final

Charge at PX-3 at p.1)

But in this case, the contrary evidence on essential elements of the offense is so strong that the beyond a reasonable doubt could have never been met by the State. As such, appellate counsel should have challenged the **factual** sufficiency of evidence on direct appeal. In appellate counsel's "amended" post-conviction affidavit, he admits that he made a "mistake", and that he "should have raised" **this ground on appeal**. (See Mr. Wice's Amended Aff. At PX-41 at p.2) Banister was harmed by appellate counsel's failure to raise the ground because it is reasonably likely that had he competently done so, the result of Banister's appeal would have been different. This ground was extremely more meritorious than those counsel did raise. In fact, 4 of the 7 grounds raised were based on appellate counsel's misunderstanding of the facts of the case. (See Ground **48** Infra)

GROUND THREE: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO MOVE FOR A DIRECTED VERDICT

THE FACTS: As already established in Grounds 1 and 2 supra, the State failed to provide the jury with sufficient evidence to determine that Banister was guilty of aggravated assault because he failed to control, or drove his motor vehicle without sufficient sleep and that either of those was as a result of the introduction of cocaine into his body. In spite of this, trial counsel did not move for a directed verdict at the close of the State's case. (5RR-68).

In trail counsel's initial post-conviction affidavit, she states that she did not move for a directed verdict because the State's expert, Kathy Erwin, testified "that Mr. Banister could have been suffering from cocaine withdrawal or a 'cocaine crash' and hence he could have been experiencing fatigue and sleepiness when the accident occurred." (See French's initial Aff. At page 7). As already established in grounds 1 and 2 supra, Kathy Erwin never gave such testimony. Counsel even recognized this fact during the State's closing argument, when she raised the following objections: "Neither expert said he was crashing. They said they could not testify that he was crashing. They spoke generally of a crash effect and they said in this case they couldn't testify whether he was crashing...". (See 6RR-26).

After Mr. Banister wrote Ms. French a letter threatening to file a grievance against her for making false statements to a tribunal, Ms. French agreed to amend her affidavit to accurately reflect the scope of Kathy Erwin's testimony. (See French's Amended Aff. & Motion For Leave to Amend at PX-42, serve by facsimile on May 28, 2010.). In her amended affidavit Ms. French admits that "Mrs. Erwin did not testify that Mr. Banister was suffering from fatigue and sleepiness on the day of the accident." (See PX-42: Amended Aff. At page 7). Ms. French also state that Kathy Erwin "testified as to the general symptoms of cocaine but [that] this testimony could at best only lead to an inference." (Id.) She further stated that "Mrs. Erwin could not testify as to the amount, the manner, or the time that Mr. Banister had ingested cocaine." (Id.) In the end Ms. French concedes that she

"did not....move for a directed verdict on the issue of sleepiness or fatigue." (Id.)

Ms. French's failure to move for a directed Verdict was extremely harmful because there was simply no evidence presented to the jury for it to determine that Banister was guilty of aggravated assault as alleged in the indictment. In light of the absence of any evidence that Banister suffered from a cocaine crash or that the trace amount of "inactive" metabolite found in Banister's system caused him to fail to get sufficient sleep or fail to control his motor vehicle, Ms. French should have moved for a directed verdict. Had she done so the trail court would have been bound by law to have instructed a verdict of "not guilty."

GROUND FOUR: TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO MOVE TO STRIKE THE STATE'S EXPERT'S TESTIMONY WHEN SHE FAILED TO "CONNECT IT UP".

THE FACTS: In attempting to prove its case the State called D.P.S toxicologist Kathy Erwin to give testimony regarding the general scientific acceptance of a phenomenon known as "cocaine crash". (5RR-41-67). In voir dire of Erwin, defense counsel pointed out to the court that Erwin's testimony regarding cocaine crash was irrelevant unless Erwin could "tie" the cocaine crash to Mr. Banister. (5RR-27). In response, the court stated it was going to allow the State to proceed with this witness but that there was "additional foundation" that needed to be established before she (Erwin) went into any of her opinions. (5RR-29). Prior to this, Erwin informed defense counsel that she intended to offer an opinion

regarding the "cocaine used by Mr. Banister on his mental or physical faculties with respect to operating a motor vehicle." (5RR-13).

Because the studies related to cocaine crash were all done on "chronic" users, defense counsel objected to Erwin giving testimony regarding Banister suffering a cocaine crash unless she could show that Mr. Banister was a chronic user, and that he was "crashing from the amount of metabolite found in his system.") In response to defense counsel's objection the court made the following "conditional" ruling:

"Before she can give testimony as to the crash effect she's going to have to establish some way that she can tell from these tests that he would be suffering from the crash effect, otherwise, I don't see that it's relevant." (5RR-38) (emphasis mine).

"Anyway, I'm just cautioning you there, so. Anyway, but before she'll be allowed that testimony she'll need to be able to connect scientifically the results of the test with this: (5RR-39) (emphasis mine).

As already established in Grounds One, Two and Three supra, Erwin never "connected" or applied the cocaine crash theory to Mr. Banister. As noted in the Court of Appeal's opinion denying Banister's direct appeal: (Erwin was not asked for an opinion whether [Banister] had experienced cocaine crash or withdrawal. Except for her identification of [Banister's] blood sample and her recitation of the procedures utilized in the DPS lab and results of her analysis, Erwin's testimony was not related directly to [Banister]." (See Opinion at p.12, Gregory Banister v. Texas, NO.07-04-0479-CR (Tx. App. Amarillo 2006).

Because the State failed to "connect up" Erwin's testimony to the facts of Banister's case, defense counsel should have "moved to strike" Erwin's testimony and she should have requested the court to instruct the jury to disregard it. Counsel's failure in this regard was extremely detrimental to Banister's defense, because it permitted the jury to consider Erwin's "cocaine crash" testimony hen it should have never been able to do so. Without the use of Erwin's testimony the State would not have been able to mislead the jury—as it did—into believing that Mr. Banister had suffered a cocaine crash. (See State's closing arguments at 6RR 26, where it argued that the cocaine crash was proven "without question").

In the end, counsel's failure to raise the proper objections and move to strike Erwin's testimony allowed the jury to grant speculation the same force as evidence.

GROUND FIVE: TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO THE STATE'S IMPROPER ARGUMENTS.

THE FACTS: It is a known fact that when a defendant chooses not to testify and the prosecution calls the jury's attention to the absence of evidence that only a defendant's testimony could supply, the conviction subject to reversal. Here, Banister asserts that his failure to testify was taken as a circumstance against him because the prosecution's remarks (during closing argument, and cross-examination of the defense expert) called for contradictory evidence that only Mr. Banister was in a position to offer.

The prosecution's theory at trial was that Banister suffered a cocaine crash withdrawal, which in turn allegedly caused him to become fatigued or asleep, resulting in him colliding with the cyclist. The testimony by both experts revealed that the studies done on the phenomena known as "cocaine crash" were all done in clinical settings, involving only individuals who have either ingested large amounts of cocaine, or who were "chronic" users of the drug. But no one testified that Banister was a "chronic" user, or that he used a significant amount of cocaine prior to the accident. In spite of this lack of evidence, and despite the fact that there was no cocaine found in Banister's blood, the prosecution made the following remarks during its cross-examination of defense expert, Doctor James Booker:

"So you couldn't testify to this court whether or not the defendant was a chronic cocaine abuser, a recreational user, you just don't know, do you?" (5RR-119)

And again, during its closing arguments, the prosecution alluded to missing evidence that only Banister's testimony could provide:

"[The defense expert] comes in and says, I need more, I would need more... . [S]o did you talk to the defendant, did you find out more? No, no, I intentionally didn't do that. I didn't talk to him" (6RR-23)

These comments suggested to the jury that the only evidence Banister could have offered was damaging, especially in light of the prosecution's reference as to why Dr. Booker didn't interview Banister:

> "hey you know, what's the old saying? Don't bite the hand that feeds you." (6RR-23)

At a minimum, the prosecution's comments called for the denial of assertions of facts. Specifically, that Banister was not a chronic cocaine abuser, or that he didn't ingest a significant amount of the drug. In short, the prosecution's remarks focused attention to the absence of evidence that only Banister was in a position to provide. But counsel failed to object that the prosecutor's arguments were improper, or that the comments were an indirect comment on Banister's failure to testify. At a minimum, counsel could have requested an instruction to disregard the objectionable comments, followed by a request for a mistrial. Instead, defense counsel's inaction allowed the jury to equate Banister's silence with guilt.

In addition, had defense counsel preserved these errors for appellate review, a reviewing court could not have said that the error did not contribute to Banister's conviction. Most-compelling in reaching this conclusion is the very likely probability that the jury gave some weight to the prosecution's comments as to why Dr. Booker "intentionally" didn't interview Banister. Given the thinness of the State's evidence and considering the context in which the remarks were made, the jury would naturally and necessarily have taken the prosecutor's remarks as a comment on Banister's failure to testify that he was not a chronic user, or that he had not ingested a significant amount of cocaine. This was extremely unfair, because it shifted the burden to Banister to show that he was not a chronic user when all the while that burden was the States. A burden the State knew if could not and did not meet.

GROUND SIX: APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO RAISE THE PROSECUTOR'S IMPROPER ARGUMENT-AS ERROR—ON DIRECT APPEAL

THE FACTS: As already established by the proceeding grounds, no evidence was before the jury that Banister suffered a cocaine crash. In spite of this, the prosecutor was permitted to argue the following in its closing argument to the jury:

> "And you know from a cocaine crash **without question**.... [A]nd you [sic] **he's going to be crashing and you know he was fatigued**." (6RR-26) (emphasize mine)

Defense counsel immediately objected and pointed out to the court that "neither expert said he was crashing. They said they could not testify that he was crashing." (6RR-26). But the court overruled the objection, which only made matters worse. The jurors, being layman in the law and unschooled in the proprieties of closing argument, may have thought that defense counsel was objecting to the accuracy of the prosecutor's representations. If so, the courts overruling of the objection no-doubt signified to the jury that the prosecutor had correctly described the expert's testimony. In essence, the court permitted the prosecutor to "tie" the cocaine crash to Banister when neither expert could do it at trial.

In light of the State's theory of guilt, it was extremely detrimental to the defense to allow the State to mislead the jury into believing that it had proven the cocaine crash "without question". The argument was obviously contrived by the prosecution

to fill the gap left by its expert's failure to "tie" the cocaine crash to Mr. Banister.

Although this claim was preserved for appellate review, by trail counsel's objection (if it was not then trial counsel was ineffective), appellate counsel failed to raise this claim on direct appeal. Appellate counsel' failure to raise this claim on appeal was evidently attributed to his failure to review the trial record. Specifically, appellate counsel's initial post-conviction affidavit reveals that he erroneously believed that the State's expert testified "that Mr. Banister could have been suffering from a withdrawal at the time of the crash." (See PX-36 Wice's Aff. At p.5). As already discussed in grounds 1 and 2 supra, no such testimony exists and appellate counsel conceded to such in his "amended" affidavit, where he now states that he made a "mistake" regarding his understanding of the scope of the State's expert's testimony. (See PX-41, Wice's "Amended" Aff. At p.2).

GROUND SEVEN: TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT EDUCATING THE JURY ON THE STATE'S BURDEN OF PROOF AS IT RELATED TO THE AS A RESULT OF THE INTRODUCTION OF COCAINE INTO THE BODY ELEMENT.

THE FACTS: On the first day of trial, defense counsel, the State, and even the Court had difficulty understanding the "as a result of introduction of cocaine into the body" Language contained in the State's indictment. In spite of having some seven months to gain understanding of the State's indictment allegations, the following record excerpts

illustrates that counsel did not understand the as a result of introduction of cocaine element until the first day of trail:

> "[T]he **defense needs to know** in order **to properly present this case** what the State's claim is. Is it—it's corpus delicti; part of the element of the offense or if its simply another—because the way it is written it sounds like both the failure to control or the insufficient sleep is the result of the introduction, that's how it reads." (3RR-48)
>
> "so our just basically pleading this that both of these events which resulted from a prepatory offense, basically, the use of—or a continuing offense?' (Id.)

In addition to defense counsel's lack of understanding, the following excerpts illustrates that even the prosecution had difficulty understanding the as a result of cocaine language:

> "**I think** that's right. I mean, in my mind **I think it is an element** of it. What Ms. French is saying I agree with. **I think that's the way we did our indictment**. **I think** that's an element of the offense." (3RR-24-25). (emphasis mine)
>
> "Yeah **I guess so**. It's kind of like—here's what I'm thinking from my end. We say, did intentionally or knowingly or recklessly cause serious bodily injury to somebody as a result of stabbing him with a knife. That's the same thing as a result of cocaine in the body. **I think** Ms. French is right. **I think it's an element** on either one of the two previous thins, the elements to control the vehicle and the driving

of the vehicle without sufficient sleep." (3RR—49) (emphasis mine)

" think that was it." (3RR-52) (emphasis mine)

After a great deal of discussion and confusion on the as a result of cocaine language, defense counsel, the state and the court agreed that it was an independent element "that the State's going to prove." (3RR-21-24:47-52). In fact, the trial court clarified the State's burden of proof with the following statements:

> "It's the Court's understanding by the reading of the indictment that the intent is to indicate that Mr. Banister failed to control his motor vehicle or drove his motor vehicle without sufficient sleep and that either of those was a result of the introduction of cocaine into his body which resulted in the accident." (3RR-48).

Although the Court clarified the State's burden of proof for the attorneys, the jury never had the benefit of hearing the above discussions, or the Court's clarification.

In spite of all the difficulty these three legal professionals had understanding the 'as a result of cocaine element', the final charge to the jury contained no clarification on that element. (See Charge at PX-3). In fact, the application paragraph was word-for-confusing-word, the same as the indictment. The very same indictment the legal professionals couldn't really understand, it goes without saying that if defense counsel, the court, and the state (the very drafters of the language) couldn't readily understand the as a result of cocaine language, than surely neither could twelve laymen

jurors. Nevertheless, the jury was sent off to deliberate Banister's fate without any education or clarification on the state's burden of proof.

The lack of education of the jury by defense counsel, coupled with the sparse reference by the state and the court's charge, reasonably likely resulted in the jury not knowing that the state had to prove that not only did Banister suffer a cocaine crash, but that the cocaine crash was the proximate cause of the collision. Simply put, defense counsel (or anyone else for that matter) failed to direct the jury to the threshold of its duty which operated to deprive Mr. Banister of his right under the Constitution which gives a criminal defendant the right to have the jury determine his guilt of **every element** of the crime with which he is charged.

The following enumerated facts are indicative of the jury's failure to comprehend the as a result of cocaine element:

1) The jury's request while in deliberation that it "[w]ould like to see [the] board with proof of elements." (6RR-29) (The Court refused the request).

2) Juror Garcia's post-conviction letter stating that their decision as jurors "was either yes he [Banister] did ran [sic] over the person or no." (See letter at PX-7).

3) Juror Garcia's post-conviction affidavit indicating that he jurors discussion centered

around whether Banister ran over the cyclist instead of whether the accident occurred "as a result of the introduction of cocaine into the body." (See Affidavit at PX-34 paragraph #2)

4) Juror Garcia's post-conviction testimony that the jurors "had questions" and "**wanted clarification**" on the case. (See post-conviction evidentiary hearing conducted on December 10, 2009 at pages 9-10; labeled PX-35).

5) The fact that three legal professionals (defense, prosecutor and the Judge) couldn't readily understand the exact same language that Banister's jury was left to decipher on its own.

6) And finally, the fact that the jury returned a guilty verdict despite the absence of any evidence establishing that Banister suffered a cocaine crash, or that the cocaine crash was the proximate cause of the accident.

Because the state never proved a causal connection between the "inactive metabolite" in Banister's system and the collision, it is reasonably likely that had defense counsel properly "educated" the jury on the as a result of cocaine element the jury would have returned a verdict of **not guilty**. In fact, it would have been their duty to do so. But because of counsel's omission, the jury was not guide to its fact-finding duty and was misled (succumbing to the post hoc, ergo propter hoc fallacy) in its understanding of the issues it was called upon to decide.

In addition to the above, it is inconceivable how defense counsel could have rendered an adequate defense when—by her own admissions—she didn't understand just what the state intended to prove until the first day of trial.

GROUND EIGHT: MR. BANISTER'S PUNISHMENT HEARING WAS FUNDAMENTALLY UNFAIR BECAUSE THE TRIAL COURT RELIED ON UNSUPPORTED FACTS WHEN DETERMINING HIS PUNISHMENT.

THE FACTS: In determining Banister's punishment, the Trial Court relied on facts not only not in evidence bur actually contradicted by the evidence—even the State's. Specifically, the Court proclaimed (immediately prior to pronouncing the punishment) that Banister "ran off the road and hit the victim" despite the wealth of evidence showing that Banister was "legally in the roadway" when the accident occurred. (See 4RR-171,174,176-177; 5RR-174 & 183; also see Police Report at PX-2 and D.P.S. Accident Investigation at PX-21 at p. 10-11). There simply was no evidence that Banister "ran off the road and hit the victim" as alleged by the Court. (7RR-43).

The only testimony adduced at trial revealed that Banister got a regular night sleep and was not fatigued. Specifically, Delacruz testified that Banister went to sleep around "eleven o' clock" and woke up around 7:00 or 7:30. (5RR-128). Similarly, the "18 year veteran" D.P.S. Trooper who investigated the accident testified that Banister exhibited **no signs of fatigue** immediately after the accident. (4RR-145-146, 5RR-166). There simply was no evidence that Banister was fatigued, but in spite of that, the Trial court stated the following immediately prior to Pronouncing Banister's punishment;

> "And no telling how may countless other opportunities there that **you felt yourself fatigued**

> because of this cocaine crash that you could have stopped this whole thing, but you didn't you kept driving."
>
> (7RR-43 Lines 21-23) (emphasis mine).

In addition to the court's reliance on the above unsupported and contradicted facts, it also relied on the following statements as justification for sentencing Banister to thirty years in prison:

> "it was about your conscious choice to use drugs, your conscious choice to get into a car and drive when **you were impaired** not by the drug itself but **by the after effects of that drug**....[N]o telling how many countless other opportunities in there that you felt yourself **fatigued because of this cocaine crash** that you could have stopped this whole thing but you didn't you kept driving." (7RR-43).

As previously discussed in the grounds preceding this one, there was no evidence that Banister ever suffered from a cocaine crash. In fact, the trial testimony and evidence contradict a finding that Banister suffered a cocaine crash. (See Grounds 1 & 2 supra). As such, it was extremely unfair for the court to give explicit attention to this misinformation and rely on it as the basis for sentencing Banister to thirty years. It is difficult to comprehend how the Court could "tie" the cocaine crash theory to Banister (and base his sentence on that) when neither expert could do it at trial.

GROUND NINE: APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE -AS ERROR-ON DIRECT APPEAL, THE TRIAL COURT'S DENIAL OF COUNSEL'S REQUEST FOR A LESSER-INCLUDED OFFENSE INSTRUCTION OF DEADLY CONDUCT.

THE FACTS: During the charge conference counsel requested the Court to include a lesser-included instruction on the offense of deadly conduct but the Court refused the request. (6RR-4-6). Although trial counsel preserved this claim for appeal, by objecting and requesting that a deadly conduct instruction be included, appellate counsel did not raise the denial of the lesser-included offense as error on direct appeal.

In appellate counsel's post-conviction affidavit he states that he didn't raise the denial of the lesser-included because he believed that there was no evidence from which a rational juror could have acquitted Mr. Banister of aggravated assault. (See Aff. At PX-36 at p.8-9). While counsel does assume that Deadly Conduct is a lesser-included offense in Mr. Banister's case, his purported belief that no evidence existed from which a rational jury would have acquitted him of the greater offense can't be reconciled with the following facts:

1) the State offered no proof or opinion of the thing that worked a causal connection between the "trace amount" of "inactive" metabolite and the collision;

2) the State's expert's testimony dealing with the phenomena known as "cocaine crash" was

never directly related or applied to the facts of Banister's case;

3) the testimony presented by both experts was subject to "different interpretations";

4) Trooper Ponce's testimony that Banister exhibited none of the symptoms of a cocaine crash (4RR-145-146; 5RR-166);

5) no evidence was offered that Banister didn't obtain a "sufficient amount of sleep", let alone that he failed to get sufficient sleep "as a result of introduction of cocaine into his body";

6) the only witness testifying regarding sleep (Able Delacruz) testified that Banister went to sleep around 11:00 and awoke around 7 or 7:30 (5RR-128);

7) Trooper Ponce's police report placed the cyclist in the roadway at the time of the impact (See Police Report at PX-2); and Ponce testified that Banister was still in his lane when the accident occurred (5RR-174) (this goes against the State's claim that Banister "failed to control" his motor vehicle);

8) the State's expert Accident Reconstructionist (Trooper Vandergriff) testified that Banister had "the right of way" at the time of the collision (4RR-179) and his accident reconstruction mapping depicts the cyclist in the roadway when he was struck (See PX-21 at p. 10-11);

9) although there was evidence that Banister "failed to control" his motor vehicle twenty miles prior to the accident, there was no evidence presented that Banister "failed to control" his motor vehicle at the time of the collision. The jury

surely never heard that Banister "failed to control as a result of the introduction of cocaine into his body";

10) because some evidence revealed that Banister was asleep at the time of the collision (Strickland testified "I was thinking maybe the driver was asleep at the wheel" 4RR-70) there was "some" evidence that Banister was completely unaware of what was transpiring at the time he engaged in the "result of charged conduct (Aggravated assault is a "result of conduct" offense, which means that the culpable mental state relates to the result of conduct, i.e., the causing of the injuries). The jury could have chose to believe that Banister was asleep at the time of the collision and thus did not have the culpable mental state to be found guilty of aggravated assault -because it is impossible to "**consciously** disregard a risk to which one is unaware,' but it could have found that Banister was guilty of only the lesser-included offense of deadly conduct because it is not a "result oriented" offense because it does not prescribe a specific result but rather requires only that Banister engaged in the proscribed conduct; and

11)since deadly conduct is not a result oriented offense, the State can prove that offense by merely proving Banister engaged in the conduct without the additional requirement that a specific result (the colliding with the cyclist) was caused with the requisite criminal intent (**conscious** disregard).

In light of the above facts, a rational jury could have concluded that if Banister was guilty, he was only guilty of the lesser included offense of deadly

conduct. As such, the trial court erred in not including the requested deadly conduct instruction and appellate counsel should have raised the issue on direct appeal. Banister was harmed by appellate counsel' failure to raise this claim on direct appeal because it is reasonably likely that had he done so, Banister would have ether received a new trial or had his conviction reformed to deadly conduct.

GROUND TEN: TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF RECKLESS DRIVING.

THE FACTS: In trial counsel's post-conviction affidavit she states that "[t]o the best of her recollection, [she] raised reckless driving as a third alternative. (See Aff. At PX-42 at p.10). Trial counsel's claim that she requested the lesser-included offense of reckless driving is not supported by the trial record, as such, her alleged request was not sufficient to preserve the issue for appellate review. (6RR-5).

In this case reckless driving is a lesser included offense to aggravated assault, and there was more than a "scintilla" of evidence which warranted an instruction on the lesser-included offense of "reckless driving." At trial, the State made clear that reckless driving was an element of the offense and it also presented "some" evidence that Banister drove recklessly while coming out of the construction zone twenty miles prior to the collision but at the time of the collision, "some" evidence that Banister was asleep at the time he caused the result (colliding with cyclist), a rational jury could have found that banister

lacked the culpable mental state required for aggravated assault. Namely, that he consciously disregarded a risk to the cyclist and thereby caused his injuries. Additionally, since reckless driving is not a "result oriented" offense, the State could prove (and the jury could have found) that offense by merely showing that Banister engaged in the conduct (driving recklessly) without the additional requirement that a specific result (colliding with cyclist) was caused with the requisite criminal intent (conscious disregard). (It is impossible to disregard a risk to which one is unaware).

Trail counsel's failure to properly request the reckless driving instruction harmed Banister, because had she done so the trial court would have been required by law to have given it, and then the jury would have had a third option -other than guilty of aggravated assault or all-out acquittal. In the event that the trial court would have refused a properly requested reckless diving instruction, it would have been properly preserved for appellate purposes and there's a reasonable probability—given the facts and the law—that had it been preserved and competently raised on appeal, that Banister would have received a new trial, or at the very least a reformation to reflect a conviction for reckless driving.

Because the State's case against Banister was extremely weak, and in light of the juror's request during deliberations, to "add guilty by reckless" (6RR-31), it is reasonably likely that had the jury been given the reckless driving option it would have found Banister guilty of it instead of aggravated assault. (Juror Garcia believes Banister is not guilty. See PX-34 & PX-35 at p. 32-33).

GROUND ELEVEN: TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE COURT'S CHARGE INSTRUCTING THE JURY THAT BANISTER HAD BEEN CONVICTED OF OTHER OFFENSES.

THE FACTS: Throughout the trial there was no evidence admitted before the jury that Banister had been "convicted of other offenses". Although Banister does have a prior conviction, the jury heard no evidence of that because Banister opted not to testify in the guilt/innocence phase and chose to exercise his privilege against self-incrimination and his right to remain silent, specifically to prevent the jury from learning that he had a prior conviction. During the course of the trial, the State attempted to inform the jury of Banister's prior conviction, but the trial court ruled that is was "not going to allow those prior convictions to come in." (5RR-154).

In spite of the above facts, the court's final charge to the jury contained the following information:

> "You are instructed that certain **evidence was admitted** before you in regard to the defendant's having been charged and **convicted of other offenses** other than the one for which he is now on trial."(See Charge at PX-3 page-2 (emphasis min)).

There was absolutely no evidence before the jury that Banister had been convicted of other offenses. By law the jury should have never heard that Banister had been convicted before, and they surely should have not been told by the trial judge that they had received evidence of Banister's prior convictions when they had not. The court's actions were improper for

several reasons: (1) it biased the jury against Banister; (2) it violate Banister's privilege self-incrimination; (3) it denied Banister a fair and impartial trial; (4) it constructively denied him counsel because he lost his right confrontation and cross-examination regarding the unadmitted evidence; (5) the trial judge giving of evidence amounted to him becoming the "functional equivalent" of a witness; and (6) the trial court improperly commented on the weight of the evidence.

In trial counsel's post-conviction affidavit, she offers the following as justification for failing to object to the court's charge on the prior convictions:

> "At the outset of trial, I had requested a limiting instruction because I anticipated a possibility of the introduction of other crimes, wrongs or bad acts. I believed that since testimony alluded to Mr. Banister's incarceration and other criminal charges ...it was in the best interest of Mr. Banister to instruct the jury to disregard evidence that Mr. Banister had been charged **and convicted** of other crimes when determining guilt or innocence.(See French's Aff. At PX-42 page 2 (emphasis mine)).

Trail counsel's assertions that it was in Mr. Banister's "best interest" to instruct the jury to disregard banister's prior conviction(s) when that evidence was never before them is an illustration of her inattentiveness and ineffectiveness in the case. In light of the inherent stigma that the prior "conviction" information carried with it, an unacceptable risk was presented before the jury of impermissible factors coming into play when determining the verdict. And as a matter of strategy, there could be no plausible

strategic basis for counsel allowing the jury to hear that Banister had been previously convicted for however may "offenses" his jury was left to speculate about.

While the instruction regarding other "charges" may have been appropriate (because there was evidence of other charges) the portion regarding other "convictions" was not, and counsel should have objected to that portion. Had she done so, the trial court would have been constrained to have omitted the prior conviction instruction, and then the jury would have never learned that banister had been "convicted of other offenses". Because the evidence against Banister in this case was extremely weak, these impermissible factors had the grave potential to swing the pendulum in favor of a guilty verdict. Had Banister had effective counsel these factors would have never come into play.

GROUND TWELVE: TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE COURT'S CHARGE INSTRUCTING THE JURY TO USE PRIOR CONVICTIONS TO EVALUATE MR. BANISTER'S CREDIBILITY WHEN HE EXERCISED HIS CONSTITUTIONAL RIGHT NOT TO TESTIFY.

THE FACTS: The following instruction to the jury not only informed Banister's jury that he had been "convicted of other offenses", but it also instructed them to utilize the prior convictions when passing upon his credibility as a witness for himself:

> "You are instructed that certain evidence was admitted before you in regard to the defendant's

> having been charged and convicted of offenses other than the one for which he is now on trial. Said evidence was admitted before you for the purpose of aiding you... in **passing on the credibility of the defendant as a witness** for himself in this case, and to aid you, if it does aid you, in deciding upon the weight you will give to him as such witness...". (See Charge at PX-3 page 2).

Counsel should have objected to this portion of the charge because it not only informed the jury of unproven and unadmitted "convictions", but it improperly instructed the jury to evaluate Banister's credibility when he exercised his Constitutional right not to testify. It also focused the jury's attention to the fact that banister didn't testify. This instruction, taken in conjunction with the following closing arguments made by the prosecutor, had the serious potential to prejudice Banister:

> "One, I just want you to [sic] remember and the Court instructed you, on the defendant's testimony, the defendant did not testify in this case and he has an absolute right not to: don't consider that for any reason when you get back to the jury room. Don't consider the **lack of testimony**." (6RR-11).

and the next portion of argument the prosecutor alluded to missing evidence that could only come from Banister's testimony:

> "he comes in (Dr. Booker) and says, I need more, I would need more. ...well, so did you talk to the defendant, did you find out more? No, no, I intentionally didn't do that." (6RR-23)

And probably most-damaging of all, is the fact that the prosecutor told the jury that it had proven "cocaine crash, without question". (6RR-26). Viewed through the prism of the court's erroneous charge, the prosecutor's cross-examination of Dr. James Booker, and the prosecutor's closing arguments to the jury, it is highly likely that the jury did consider Banister's "lack of testimony" when evaluating the evidence and determining his guilt.

Trial counsel should have objected to the Court's charge -instructing the jury to evaluate Banister's credibility with unadmitted and unproven convictions when he elected not to testify—because had she done so, the court would have been required to omit the instruction. And if counsel would have objected, the error would have been preserved for appellate review under the "any harm" standard, instead of the more demanding "egregious harm" standard which governs charge errors which are unobjected to at trial.

GROUND THIRTEEN: MR BANISTER WAS ACTUALLY OR CONSTRUCTIVELY DENIED APPELLATE COUNSEL BECAUSE THE COURT CLERK OMITTED THE COURT'S FINAL CHARGE TO THE JURY FROM THE APPELLATE RECORD.

THE FACTS: Although appellate counsel filed a timely Motion for Designation of the Appellate Record on October 11, 2004, requesting inter alia, "The trial court's charge at both stages of trail," the Clerk's Record failed to contain the court's final charge given to jury during the guilt/innocence phase of the trial. (See CR-1-114 & Motion at PX-4). After discovering that the charge was not included in the appellate record, appellate counsel file an "unopposed Motion to

supplement The Record", requesting that the Clerk be ordered to supplement the record with the court's jury charge at the guilt/innocence stage. (See PX-4).

In spite of appellate counsel's "Unopposed Motion", and the fact that the rules of appellate procedure requires the court's charge to the jury be included in the appellate record, the court's charge was still not made part of the appellate record. Not only was the court's final charge to the jury not included in the appellate record, the reading of the charge was not transcribed into the record by the Court Reporter. Although the trial court had granted trial counsel' "Motion To Have The Court Reporter Make Full Record", requiring that "[a]ll communications between the court and the jury" be recorded (See CR—47), when the court orally read the charge to the jury it was not transcribed, but merely contained a parenthetical displaying: "(Charge read by the court)". (See 6RR-9).

The Reporter's failure to transcribe the reading of the charge, coupled with the fact that the Court Clerk failed to include it with the record on appeal, operated to actually or constructively deprive Banister of effective appellate counsel because appellate counsel was prevented from raising the charge errors in a motion for new trial, and was likewise prevented from asserting the charge errors on direct appeal.

GROUND FOURTEEN: MR. BANISTER WAS DEPRIVED OF A FUNDAMENTALLY FAIR TRIAL BECAUSE THE JUDGE BECAME A WITNESS IN THE CASE.

THE FACTS: When the trial judge read the jury charge to the jury, informing them that Banister had

been convicted of other offenses, when no such evidence was admitted during the course of the trial, the judge became the "functional equivalent" of a witness in the case. The Trial Judge became a witness for the state the moment he read the jury charge interjecting unadmitted evidence that Banister had been "convicted of other offense". (6RR-9). Not only was no evidence of Banister's prior conviction(s) ever admitted during the course of the trial, that evidence could not have been properly admitted in light of the fact that Banister did not testify. (4RR-5RR).

In essence the trial judge abandoned his required role as a neutral arbiter and assumed the position of an active participant when he conveyed factual information to the jury that was neither admitted nor admissible. The trial judge's participation in imparting inherently prejudicial information to the jury operated to deprive Banister of his due process rights and his right to a fair trial.

GROUND FIFTEEN: THE STATE KNOWINGLY SPONSORED FALSE TESTIMONY AND FAILED TO CORRECT THE JUDGE'S FALSE TESTIMONY TO THE JURY.

THE FACTS: The State knew that during the course of the trial the jury heard no evidence that Banister had been convicted before. (4RR-5RR). In fact, the State's attempt to inform the jury of Banister's prior "conviction" was expressly disallowed by the trial court. (5RR-154-155). In spite of this, the prosecutors stood silently by while the trial judge told Banister's jury that "...evidence was admitted before [them] in regard to [Banister] having been charged and convicted of offenses other than the one for which

he is now on trial:" (6RR-9; also see charge at PX-3 p.2).

As discussed in the previous grounds, supra, the trial judge became the "functional equivalent" of a witness the moment he conveyed factual information to the jury which was not in evidence. The record shows that the "testimony" given by the judge was false, because evidence was not admitted before the jury regarding prior convictions. Although the State knew what the judge was telling the jury was false, it never uttered a word to attempt to correct it, even though it was the prosecutor's duty to correct false testimony when it appeared. But he did not do so, and as a result, the jury was misled by the trial judge into believing that they had received evidence of prior "convictions" when they never had.

The State knew, or should have known, that this inherently prejudicial information had the serious potential to unfairly influence the verdict, and that it would deny Mr. Banister a fair trial. It cannot be said that the evidence against Banister was so overwhelming that the jury was not unfairly influenced by the false testimony, nor can it be said that there was no "reasonable likelihood" that the jury verdict was not affected by the false testimony.

GROUND SIXTEEN: APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE Of COUNSEL BY FAILING TO RAISE THE ABOVE GROUNDS (GROUNDS-11-15) ON DIRECT APPEAL

THE FACTS: The court's charge to the jury was mysteriously not included with the appellate record. That is even after appellate counsel requested, and

the court granted, counsel's "Motion To Supplement" the appellate record with the court's charge. (PX-4). Although the court's charge was never officially made part of the appellate record, appellate counsel attached the charge to his brief as an "Appendix".

Despite appellate counsel's knowledge of the court's charge, he either failed to recognize or just plain ignored the significant errors it contained. Specifically, he failed to raise any of the above Grounds (11-15) relating to the erroneous conveyance of prior convictions.

In appellate counsel's post-conviction affidavit he inexplicably swears that he didn't raise the above enumerated grounds on appeal, because they "are not supported by the record", and "were not ripe for adjudication on direct appeal." (See Wice's Aff. At 7-8-Labeled PX-36). Because the trial record unequivocally reveals that the court's charge was clearly at odds with the facts and law applicable to the case, appellate counsel's claim that these grounds were unsupported by the record is wrong. It was that Appellate counsel failed to conduct a "conscientious" examination of the trial record, and as a result, could not have exercised his professional judgment when determining what grounds to raise on appeal. Appellate counsel's failure to master the record is evident from the following facts:

1. he failed to recognize the erroneous charge informing the jury that Banister had been "convicted of other offenses" and that the jury should use those convictions to evaluate his credibility as a witness;

2. he erroneously believed that the State's expert, Kathy Erwin, gave testimony that Banister "could

have been suffering from a cocaine withdrawal at the time of the crash" when no such testimony existed. (See Grounds-1 & 2, Supra);

3. he raised seven grounds on appeal, five of which contained no record support to be sustained. (See Ground-48 Infra)

4. he failed to recognize that the record contained evidence which would have permitted the jury to find Banister guilty of only deadly conduct. (See Ground-9, supra).

In reality, the jury charge errors were supported by the record and appellate counsel's failure to recognize and raise them amounted to ineffective assistance of counsel because these grounds were significantly more meritorious than those he raised. To the extent that this court finds that these grounds were not preserved for appellate review, than trial counsel was ineffective for not properly preserving them.

GROUND SEVENTEEN: CONVICTION OBTAINED AS A RESULT OF THE DENIAL OF A FULL AND FAIR OPPORTUNITY TO LITIGATE A FOURTH AMENDMENT CLAIM IN THE TRIAL COURT.

THE FACTS: Banister's conviction is tainted because the trial court, the State, and even his defense counsel failed to rely on controlling Supreme court authority relating to individuals who are not under arrest when blood samples are withdrawn from them; and instead erroneously relied on the Texas "implied consent" law in overruling Banister's motion to suppress. (4RR-121)

Because Banister was never arrested, the implied consent law was inapplicable in his case because it applies only to persons who are under arrest. (4RR-117) However, the Supreme court requires probable cause, exigent circumstances, and a reasonable method of extraction to be shown before a warrantless search and seizure of a person's blood will be held to be reasonable. None of these requirements were ever demonstrated, nor were they required by the court because it erroneously terminated Banister's Fourth Amendment issue based on the inapplicable Texas implied consent law. (4RR-121)

In this case banister was not afforded a full and fair opportunity to litigate his Fourth Amendment claim because: (1) the State misled the court into believing that the implied consent law was applicable in this case (4RR-121); (2) the court overruled the motion to suppress based on the inapplicable implied consent law(td.); (3) defense counsel -apparently unfamiliar with the implied consent law—failed to inform the court that it was not applicable in this case because Banister was not arrested; (4) appellate counsel failed to litigate any of the Fourth Amendment issues on direct appeal; and (5) the State failed to disclose the DIC-24 form.

Banister was harmed because had he been given a full and fair opportunity to litigate the Fourth Amendment issues following this ground, and had the proper standards been applied to the facts of his case, it is reasonably likely that the blood evidence would have been suppressed. Absent the blood evidence the State could not have prosecuted Mr. Banister and would have been constrained to dismiss the case.

GROUND EIGHTEEN: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO OBJECT TO THE PROSECUTION'S IMPROPER ARGUMENT TO THE COURT THAT THE TEXAS IMPLIED CONSENT LAW APPLIED IN BANISTER'S CASE.

THE FACTS: Because the Texas implied consent law applies only to persons under arrest, and Trooper Ponce testified that Banister was never placed under arrest (4RR-117), the implied consent law was inapplicable in Banister's case. Despite this crucial fact, defense counsel failed to correct the State's erroneous argument to the court that the Texas implied consent law applied in this case. Specifically, after defense counsel objected to the blood evidence, citing the U.S. and Texas Constitution, the State countered with the following argument;

> **MR. YARBROUGH**: "I would just respond, Judge, that **we have an implied consent law** in the state of Texas that you're implied to consent if driving a vehicle to the taking of a specimen....He was **not in custody**, and we would, therefore, ask the Court to overrule Ms. French's-[motion to suppress]." (See 4RR-121) (emphasis mine)

Immediately after this uncontested counter argument by the State, the trial court overruled defense counsel' motion to suppress. (Id.) Trial counsel's failure to know that the Texas implied consent law didn't apply in Banister's case, and her failure to bring this to the court's attention, caused severe harm to Banister's case. It is reasonably likely that had counsel objected and informed the trial court

of the inapplicability of the Texas implied consent taw, the court would not have overruled her motion to suppress. Absent the blood evidence the State's case evaporated.

GROUND NINETEEN: CONVICTION OBTAINED BY ILLEGAL DETENTION OR ILLEGAL ARREST: BANISTER'S CONSENT TO THE BLOOD SEARCH WAS THE PRODUCT OF AN ILLEGAL DETENTION OR ILLEGAL ARREST.

THE FACTS: Banister complains that because he was involuntarily confined within the police vehicle absent probable cause or reasonable suspicion, the involuntary detention exceeded the limited restraint permitted by law.

Trooper Ponce testified that after the accident he did not suspect Banister to be under the influence of alcohol or drugs. (4RR-118; 145) He also testified that Banister didn't appear to be sleepy or fatigued. (5RR-166) According to Banister's unsworn declaration, which is incorporated herein, Ponce obtained Banister's driver's license and then ordered him into the locked police suburban after telling him it was "mandatory" that he submit to a withdrawal of his blood "because someone had died". (See PX-8) Ponce also testified that he "would have detained him; had he tried to leave the scene". (4RR-119) Ponce also testified that he believed that it was "mandatory" that he "draw a blood sample from the driver [Banister]." (4RR-142) Able Delacruz's affidavit, which is incorporated herein, also supports that he and Banister were ordered into the police suburban and that Trooper Ponce told Banister that it was "mandatory" that he give a blood sample. (See PX-39)

Ponce testified that he instructed Deputy Ojeda to transport Banister to the hospital to have his blood withdrawn. (4RR-119) Ponce admitted that he did not accompany Ojeda and Banister but remained at the scene. (Id) During this time Ponce maintained Banister's New Mexico Driver's license and did not return it to Banister until Banister came back from the blood withdraw. (See PX-8 39)

Because Banister was illegally detained/arrested by the police when his blood was seized, the blood evidence was subject to suppression as the "fruit of a poisonous tree". Without the blood evidence the State would not have been able to prosecute Mr. Banister.

GROUND TWENTY: CONVICTION OBTAINED AS A RESULT OF BANISTER'S ACQUIESCENCE TO A CLAIM OF LAWFUL AUTHORITY: DPS TROOPER MANUEL PONCE MISINFORMED BANISTER THAT IT WAS "MANDATORY" THAT HE SUBMIT TO A BLOOD WITHDRAWAL.

THE FACTS: An affidavit submitted by Banister with this petition, and incorporated herein for all purposes, reveals the following facts: After the accident, Banister was confronted by DPS Trooper Manuel Ponce. Ponce took Banister's license and informed him that because "someone had died" it was "mandatory" that he give a blood sample. (See PX-8) The only reason Banister got into the police suburban was because he was ordered to. (Id.) Banister did not feel free to leave at that time because: (1) Ponce still had possession of Banister's driver's license; (2) Ponce told Banister that it was "mandatory" he submit to a blood withdrawal; and (3) Ponce ordered Banister into a locked police suburban.

In addition to Banister's affidavit, the other occupant of the vehicle, Able Delacruz, swears to the following pertinent facts:

> "I remember one of the officers at the scene taking Greg Banister's license and then telling us to get into the police suburban. Although I don't remember the police officers names, I do remember them telling Greg that because someone had died that Greg had to go to the hospital and give a blood sample; that it was mandatory. After they brought Greg back, they gave him his license back...". (See PX-39)

Not only does Banister's and Delacruz's affidavits support that Trooper Ponce misinformed Banister that a blood test was "mandatory", the following trial testimony supports this fact as well:

> **PONCE**: "I believe that it's **mandatory** that we draw a blood sample from the driver." (emphasis mine) (4RR-142)

Trooper Ponce was wrong in his belief that it was "mandatory" for Banister to give a sample of his blood. As stated in the previous grounds, supra, it was only "mandatory" if Banister was under arrest, and according to Ponce, he never placed Banister under arrest. (4RR-117) Banister was harmed because had Ponce not wrongly informed Banister that it was mandatory, that he submit to a blood withdrawal, Banister would not have allowed his blood to be withdrawn, and then the State would not have initiated charges against Banister.

GROUND TWENTY ONE: CONVICTION AS A RESULT OF DEPUTY OJEDA'S MISSTATEMENT OF THE CONSEQUENCES FLOWING FROM A REFUSAL TO SUBMIT TO THE BLOOD WITHDRAWAL.

THE FACTS: After Trooper Ponce took Banister's drivers license and ordered him into the police suburban, he instructed Deputy Alex Ojeda to transport Banister to the hospital to have his blood extracted. (4RR-118-119) While at the hospital Deputy Ojeda gave Banister the written and oral warnings outlined in the DIC-24 form, which "apply only to a person **arrested** for an offense involving the operation of a motor vehicle." Trooper Ponce testified at trial that he never placed Banister under arrest. (4RR-117) Deputy Ojeda erroneously informed Banister that if he refused to submit to a blood withdrawal then his "driver's license would automatically be suspended." (See DIC Form at PX-25) At the time Ojeda was giving these warnings to Banister Trooper Ponce still maintained possession of Banister's license at the accident scene. (See PX-8 & 39)

Based on what Ojeda told Banister, about his "driver's license being automatically suspended", Banister felt that if he refused the test then he would not get his driver's license back from Trooper Ponce. (See PX-8) As a result, Banister submitted to the blood withdrawal and signed the consent form. (Id.) Because Banister was not arrested these warnings were inapplicable and should have never been given because Banister's driver's license could not have been "automatically suspended" as Deputy Ojeda had told

him. If Banister would have known this he would have refused to give a sample of his blood. (See PX-8)

Here, because Banister's purported consent was induced by Deputy Ojeda's misstatement of the consequences flowing from a refusal to take the test, the consent was not voluntary.

GROUND TWENTY TWO: CONVICTION OBTAINED AS A RESULT OF THE STATE'S FAILURE TO DISCLOSE COERCIVE INAPPLICABLE WRITTEN WARNINGS (DIC-24 FORM) GIVEN TO BANISTER BY DEPUTY OJEDA.

THE FACTS: Approximately four months prior to trial, counsel filed, and the court granted, counsel's Motion For Discovery where counsel specifically requested that the court order the State to disclose "any written consent" or "written waiver" that Banister may have signed regarding a search and seizure. (See CR-40 and CR-73). At the pretrial hearing the State expressly stated that it had "no opposition" to the request. (2RR-15). In spite of these facts, the State did not provide counsel with , nor did it inform her of the written consent form that Banister signed immediately prior to having his blood seized. As discussed in the previous grounds, supra, the DIC-24 form was given to Banister by Deputy Ojeda at the hospital. These warnings were not applicable to Banister because—according to Trooper Ponce's testimony—he was not arrested. (4RR-117)

Had the State disclosed the DIC-24 consent form to counsel—as it was required to do—it is reasonably likely that she could have successfully challenged the admittance of the blood evidence because the

warnings were inapplicable and rendered any purported consent involuntary.

GROUND TWENTY THREE: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO SPEAK WITH DEPUTY OJEDA ABOUT THE WRITTEN AND ORAL WARNINGS HE GAVE BANISTER PRIOR TO EXTRACTING HIS BLOOD.

THE FACTS: Trial counsel claims in her post-conviction affidavit that: "[t]o the best of [her] recollection [she] did speak with Deputy Ojeda." (See PX-42 at p. 12). But the facts support that counsel never spoke with Deputy Ojeda because had she done so she surely would have discovered that Ojeda had given Banister the inapplicable written and oral warnings contained in the DIC-24 form. (See PX-25)

Counsel's failure to speak with, or otherwise discover that Deputy Ojeda had given Banister the inapplicable warnings in the DIC-24 form harmed Banister because had counsel discovered these facts, it is reasonably likely that she could have challenged the admittance of the blood evidence. Because the warnings in the DIC-24 form were inapplicable to Banister, the blood evidence was vulnerable to a motion to suppress. (See Ground 21 supra) But because counsel was unaware of these warnings she was not able to mount a challenge to the blood evidence.

GROUND TWENTY FOUR: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO OBJECT TO THE TRIAL COURT'S ASSUMED HOLDING THAT THE BLOOD WAS REASONABLY EXTRACTED BY A LEGALLY QUALIFIED INDIVIDUAL.

THE FACTS: In accordance with State statute, the State had to demonstrate that Banister's blood was extracted by a qualified technician before it could meet the proper predicate for its admittance. But at trial no one testified regarding the qualifications of the person who withdrew Banister's blood. In fact, no one who was actually present during the blood draw ever testified.

Counsel should have objected to the admittance of the blood evidence on the basis that the State failed to meet the proper predicate for its admittance because it had not shown that the blood was withdrawn by a person qualified for the task. In light of the State's subpoena list, it is reasonably likely that had counsel raised this objection the State could not have produced the necessary witnesses to establish that the blood was extracted by a "qualified technician". The State's subpoena list did not contain the name of the alleged nurse who extracted Banister's blood, nor did it contain any person's name who was actually present when Banister's blood was extracted. (See Subpoena lists at CR-56, 57 & 59, 60) (Presumably, the State did not want these witnesses to testify because had they done so the fact that Banister was given the erroneous warnings mentioned in Ground 21 would have come out and rendered the blood evidence vulnerable to suppression.) Had counsel raised the proper objection

the State would not have been able to produce the witnesses to establish that the blood was extracted in accordance with statute.

Counsel claims in her post-conviction affidavit, that she didn't raise this objection because she "expected that since the blood was withdrawn from Mr. Banister at the hospital, a person with the proper qualifications obtained the blood." (See PX-42 at p.13) counsel's expectation is unreasonable because it effectively relieved the State of its burden to prove that the blood was taken in compliance with the statute. At least one appellate court in Texas has held that a court may not "assume without proof, that the blood was drawn by a qualified technician."

GROUND TWENTY FIVE: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL STIPULATED TO THE BLOODS CHAIN OF CUSTODY.

THE FACTS: Blood evidence was admitted and was the center-piece of the State's case, in that they were alleging that the accident occurred "as a result of the introduction on cocaine into [Banister's] body." But there was absolutely no evidence adduced at trial that the blood that was seized and subsequently tested and admitted, belonged to Banister. Ponce testified that he instructed Deputy Ojeda to transport Banister to the hospital to have his blood extracted. But Ponce admitted at trial that he did not accompany Ojeda but stayed at the scene. (4RR-142) Ponce testified that after Ojeda came back from the hospital he gave him the blood sample. (Id. At 143)

Because Ponce was not present when the blood was extracted, he could not testify whether the blood belonged to Banister or not. The only persons who could have established that the blood belonged to Banister were the persons who were present when the blood was extracted. But none of these persons ever testified at trial. In fact, neither the seizing officer, Deputy Ojeda, nor the unknown female who extracted Banister's blood were listed on the State's subpoena list. (See lists at CR-56-57 & 59-60).

Because the relevant characteristics of the blood evidence was distinguishable only by scientific analysis, a chain of custody was essential to its proper admittance and the State had to demonstrate the "beginning of the chain" before its admittance. But defense counsel stipulated to the blood evidence and effectively relieved the State of its burden. (4RR-197) This was an uninformed and extremely unsound decision because absent counsel' stipulation the State was unprepared to establish the proper predicate for the admittance of the blood evidence. Had counsel not stipulated to the blood evidence, and had she raised the proper objections (that the State failed to prove the blood was Banister's), the trial court would have been constrained to have suppressed the blood evidence. And in the unlikely event that the State did produce either Deputy Ojeda or the alleged nurse who withdrew the blood, their testimony would have brought to light the fact that Banister was given the erroneous warnings contained in the DIC-24 form which would have provided another basis to have the blood suppressed, (see Ground 21 supra) Without the use of the blood evidence the State would not have been able to prosecute Mr. Banister.

GROUND TWENTY SIX: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO OBJECT TO THE STATE'S FAILURE TO SATISFY ALL BURDENS OF PROOF UNDER TEXAS LAW REGARDING WARRANTLESS SEIZURES OF BLOOD.

THE FACTS: Here, because Banister's blood was seized without a warrant, the State was required, by Texas law, to prove that Banister consented to the seizure by "clear and convincing" evidence. But at the time that defense counsel's motion to suppress was denied, no one had yet identified Banister as the same person who was involved in the accident let alone that he was the same person whose blood was seized and offered into evidence. (Rodgers: 4RR-40; Harris :4RR-65; Strickland: 4RR-73; Ponce: 4RR-116). In spite of the fact the trial court "overruled" counsel's motion to suppress. (4RR-121)

In addition to the above, counsel should have recognized and raised the fact that: Ponce ordered Banister into the Police suburban and, by his own admission believed it was "mandatory" that Banister submit to the seizure when it was not; (2) that no probable cause, exigent circumstances, or a reasonable method of extraction were ever present; (3) that Banister's detention or arrest was not lawful and therefore neither was its fruits; (4) that the State produced no witnesses who were actually represent when the blood was extracted or when Banister allegedly consented; and (5) that Deputy Ojeda had given Banister the inapplicable warnings contained in the DIC-24 form. All of these factors go against a

finding that Banister voluntarily consented to the seizure of his blood.

Trial counsel's failure to object to the State's failure to prove the reasonableness of the blood seizure—under Texas law—was extremely detrimental to Banister's case. It is reasonably likely that had counsel brought the above facts to the court's attention the court would have been constrained to have suppressed the blood evidence which would have left the State's case unprosecuteable.

GROUND TWENTY SEVEN: CONVICTION AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO FILE A TIMELY MOTION TO SUPPRESS WITHIN THE COURT'S DEADLINE.

THE FACTS: Counsel was forewarned over three months prior to the court's imposed deadline that the time for filing pretrial matters would expire on August 23, of 2004. In spite of counsel's knowledge of a deadline for filing pretrial matters, defense counsel waited until the first day of trial to file a motion to suppress the blood evidence. (CR-81-84). The court's "Order Setting Criminal Trials" expressly warned counsel that: "**[p]retrial matters**, preliminary matters, or so called limine matters of any kind **shall be filed prior to August 23,2004** at 1:30 p.m. **or they shall be deemed to have been waived**." (See CR-51 & 52; emphasis mine).

Although the deadline was set for August 23, 2004, counsel didn't file the motion to suppress until September 13, 2004. (See CR-81). Counsel's belated filing of the suppression motion is not only indicative of her inattentiveness in the case it is also illustrative

of her failure to advance Banister's best interest. Counsel's failure to meet the court's deadline was harmful because Banister was not afforded a pre-trial suppression hearing where he could have demonstrated that he was: (1) illegally detained or arrested; (2) that he was told it was "mandatory" to give his blood; (3) that he was given the inapplicable written and oral warnings contained in the DIC-24 form; and (4) that he did not voluntarily consent to the seizure of his blood.

At the suppression hearing Banister would have testified about all of the above enumerated factors. (See PX-8) And Able Delacruz could have also testified that Trooper Ponce told banister the blood test was "mandatory"; that Banister was "ordered" into the police suburban; that Ponce maintained Banister's driver's license until he returned from giving blood; and that Banister was lonely told he could leave after he returned from giving his blood, (see PX-39) In addition, had counsel secured a pretrial suppression hearing, she could have called Deputy Ojeda and she would have known that Banister was given the erroneous warnings in the DIC-24 form. She could have also called Trooper Ponce who would have given testimony on his belief that it was "mandatory" that Banister give his blood. (See Ponce's Testimony: 4RR-142)

Armed with the above facts, it is reasonably likely that counsel could have mounted a successful challenge to the admittance of the blood evidence. (See Grounds-18-27 supra) But because counsel failed to file a timely suppression motion, Banister was not afforded a pretrial hearing and none of the above facts were considered in determining the reasonableness of

the warrantless blood seizure. As a result, the blood evidence was admitted and Banister was convicted.

GROUND TWENTY EIGHT: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL AFFIRMATIVELY STATED "NO OBJECTION" TO THE ILLEGALLY SEIZED BLOOD EVIDENCE DURING ITS OFFER AND ADMITTANCE.

THE FACTS: Although defense counsel did file a motion to suppress the blood evidence, she affirmatively stated "no objection" when the State offered and admitted the evidence before the jury as State's Exhibit 6. (5RR-49). In doing so counsel not only waived any previous challenges to the admittance of the blood evidence, she also waived any previous challenges to the admittance of the blood evidence, she also waived any appellate review of these challenges. As a result of defense counsel's decision to affirmatively state "no objection", appellate counsel was not able to raise any of the above grounds (18-27) on direct appeal. In the event that this Court finds that appellate counsel could have raised these Grounds on direct appeal (18-28), then appellate counsel was ineffective for not doing so.

Given the law, and the facts surrounding the seizure of Banister's blood, it is reasonably likely that had counsel not waived appellate review of the admittance of the blood evidence, appellate counsel could have raised these grounds (18-28) on direct appeal, and could have succeeded in securing Banister a new trial.

GROUND TWENTY NINE: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO SPEAK WITH WITNESS ABLE DELACRUZ UNTIL THE THIRD DAY OF TRIAL.

THE FACTS: Able Delacruz was the owner of the vehicle, and the only other person with Banister, both the night before, and at the time of the accident. Although defense counsel had some eleven months to speak with Delacruz, counsel waited until the third day of trial to ever speak with him. (5 RR-69-71 & 5RR-95). Not only was Delacruz an important witness in the case, his name was also listed on the State's subpoena list (CR-56-57). The fact that counsel waited until the third day of trial to speak with one of the most important witnesses in the case is but another indication of her failure to conduct an adequate pretrial investigation of the case. It is well established that counsel cannot render effective assistance if counsel does not have "a firm command of the fact's".

Counsel's failure to speak with Delacruz until the third day of trial harmed Banister in the following ways:

1 counsel was unable to make a proper assessment of whether Delacruz's testimony would be beneficial to the defense and how that testimony impacted or altered the overall trial strategy; (as a result counsel called Delacruz and bolstered the State's case)

2 counsel was unable to properly prepare Delacruz to testify;

3 counsel didn't know that Delacruz could have testified at a pretrial suppression hearing

that Banister was ordered into the police suburban; told that it was "mandatory" that he go to the hospital and give blood; and that Trooper Ponce maintained Banister's license and only gave it back after he returned from the hospital. (See Delacruz's Aff. at PX-39) (as a result, counsel was not able to have the blood test results suppressed).

4 by her own admission, counsel had to delay the giving of her opening statement because she had not yet spoken with Able Delacruz (5RR-69-71).

Here, it is reasonably likely that had counsel spoken with Delacruz prior to trial, she would have been able to call him as a witness at a pretrial suppression hearing and would have been able to elicit sufficient facts to have the blood evidence suppressed. (See PX-39). And had counsel adequately spoken with Delacruz, she would have (or should have) realized that it was not a good idea to call him as a witness because he would bolster the State's claim that Banister consciously disregarded the risk to Mitchell, with his testimony that Banister said he saw the bicyclist in his peripheral vision before striking him. (5RR-148).

GROUND THIRTY: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL CALLED ABLE DELACRUZ AS A WITNESS AND AS A RESULT ESTABLISHED UNPROVEN ELEMENTS OF THE STATE'S CASE.

THE FACTS: Although Delacruz was subpoenaed by the State, they opted not to call him to testify. Instead, defense counsel opted to call Delacruz (after

only speaking with him for 5 or 10 minutes 5RR-95) and in doing so proved-up essential elements of the State's case that had thus-far went unproven. Specifically, all of the State's witnesses testified that they never saw Banister driving, and couldn't identify him he in the courtroom as the same person they saw that day. (See testimony of Rodgers 4RR-40; Harris 4RR-65; and Strickland 4RR-73). It wasn't until defense counsel called and elicited testimony from Delacruz that Banister was identified as the driver. (5RR-130;136). The only other person who came close to identifying Banister was Trooper Ponce, but that came only after a little prompting by the prosecutor. (4RR-116). However, Ponce admitted that he "never actually saw Mr. Banister drive the car". (4RR-145). And before the jury, during cross examination, Trooper Ponce admitted that he wasn't able to identify Banister earlier that day. (Id.)

While Ponce's identification might have been sufficient, his identification of Banister was highly suspect because he stated three times that he didn't see the person he interviewed in the courtroom. (4RR-116). Had trial counsel not called Delacruz as a witness, the jury could have entertained a reasonable doubt as to who was actually driving (Delacruz or Banister) when the accident occurred. In defense counsel's post-conviction affidavit she states that she "inquired whether Mr. Banister was taking the blame for Mr. Delacruz." (See affidavit at PX-42 p. 13) This statement indicates that even defense counsel harbored doubts as to who was driving when the accident occurred. However, because counsel decided to call Delacruz as a witness any doubts the jury may

have had regarding the driver was dispelled by the following testimony:

1 Delacruz testimony that Banister was driving when the accident occurred (5RR-129-130);

2 Delacruz's testimony identifying Banister (5RR-135);

3 Delacruz's testimony that Banister had told him "that we had hit a bicyclist." (5RR-133);

4 Delacruz's testimony that Banister "had told [him] that he had seen them (the bicyclists) in his peripheral vision" before hitting him. (5RR-148) (this was only evidence that Banister "consciously disregarded" a risk to the cyclists);

The fact that Able DeLaCruz's testimony helped the State's case was recognized by the prosecutor and utilized in its closing arguments to the jury. Specifically, the prosecutor reminded the jury that: "Able Delacruz, says yes, Gregory Banister is driving." (6RR-12-13); and that "Able Delacruz says he saw him, he said he saw him (the cyclist) over there." (6RR-13).

Had defense counsel not made the uninformed decision to call Delacruz as a witness, the jury would have not heard the above testimony and may have entertained a reasonable doubt that Mr. Banister was aware of the risk to the cyclist but consciously disregarded it. In fact, there is at least one juror who, till this day, still believes Banister is not guilty. (See Juror Aff. at PX-34 & Juror testimony at PX-35 at p. 32-33).

GROUND THIRTY ONE: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO INVESTIGATE THE WIND CONDITIONS WHICH WERE PREVALENT AT THE TIME OF THE ACCIDENT.

THE FACTS: At their very first meeting Banister informed counsel of the high winds which were prevalent at the time of the accident. (See PX-13). Although defense counsel had some eleven months to investigate the case, she failed to look into the weather conditions which were prevalent at the time of the accident.

During the course of the trial, several witnesses testified that it was not windy that day. (See 4RR-37; 4RR-55; 4RR-69; & 5RR-167). This was not true and Banister knew it. So the day after this testimony Banister gave his attorney a copy of a weather report which indicated that the wind speed was 25.3 mph at the very hour and vicinity of the accidents occurrence. (See Weather Report at PX-12 at p. 3 & PX-13). But the court refused to allow the jury to hear the facts in the report, claiming a problem with its reliability. (5RR-167-168). It is reasonably likely that had counsel conducted an investigation into the wind conditions in advance of trial, she would have been able to satisfy the court's admissibility requirement by obtaining more reliable information, and then the jury would have heard the truth about the wind conditions.

The weather report was extremely important to the case because if not only called into question the recollection of the numerous witnesses who testified

the wind wasn't blowing that day, but it also served to impeach these witnesses credibility. However, because of counsel's failures, these witnesses' credibility was left unassaulted before the jury.

The significance of the 25-mph wind conditions was essential to the jury's understanding of the circumstances surrounding the accident. The likely effect of high winds on a bicyclist is obvious to anyone who's ever ridden a bike before. But not only was the jury misinformed that the conditions for bike riding were ideal, but they were essentially deprived of considering evidence supporting a viable alternative as to what may have caused the accident. An alternative that went against the State's theory that it happened "as a result of introduction of cocaine into [Banister's] body".

GROUND THIRTY TWO: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO REQUEST A CONTINUANCE IN ORDER TO VALIDATE THE INFORMATION CONTAINED IN THE WEATHER REPORT.

THE FACTS: Counsel never requested a continuance when the trial court refused to allow her to bring in the facts contained in the weather report. Because the court refused to allow the report because it questioned its reliability, it is reasonably likely that had counsel requested a continuance (and it been granted) she could have easily obtained more reliable information in order to satisfy the court's reliability requirement. By trial counsel's own admission, she could have easily obtained more reliable information from a number of sources. (5RR-168). But because she

did not, the court sustained the State's objection and the jury never got to hear that the wind speed was 25.3 mph at the time of the accident.

Additionally, counsel was not able to impeach the numerous witnesses who had testified that it was not windy, and she likewise was unable to clear up the false impression left on the jury by these witnesses, that the conditions for bike riding were ideal. The testimony of Rodgers, Harris, Strickland, and Delacruz all created the false impression before the jury that the wind couldn't have possibly played a role in the accident, because according to them the wind was not blowing. The weather report, however, shows that that is not true, and the jury should have heard the truth. But because of counsel's failures, the jury was prevented from considering the wind speed as a possible causative factor in the accident.

In light of the State's utter failure to offer any evidence that Banister suffered a cocaine crash, and that that was the proximate cause of the accident the absence of the truthful wind speed made the State's case significantly more persuasive all the while making Banister's less. And because this was an extremely close case, it is reasonably likely that at least one juror would have retained a reasonable doubt regarding the proximate cause of the accident had they known the truth about the high winds.

GROUND THIRTY THREE: MR. BANISTER WAS DEPRIVED OF A FAIR TRIAL WHEN THE COURT IMPROPERLY RESTRICTED HIS RIGHT TO PRESENT EVIDENCE OF SIGNIFICANT PROBATIVE VALUE.

THE FACTS: The trial court refused to allow counsel to inform the jury about the wind conditions which were prevalent at the time of the accident. (5RR-168) This was extremely unfair because numerous State witnesses testified that it was not windy at the time of the accident, and defense counsel was prevented from showing the jury that these witnesses were wrong. (See PX-12 at p.3). Because the weather report conflicted with these witnesses recollection of the weather that day, the report would have called into question not only these witnesses credibility, but also the accurateness of their remembrance of that day's events.

It is important to note that it was the State who "opened the door" to facts about the weather conditions. (4RR-37; 4RR-55; 4RR-69; & 5RR-167). In the process they created a false impression before the jury that the weather conditions were ideal, and therefore could not have played a role in the cause of the accident. Because it was the state who "opened the door" to the weather conditions, defense counsel should have been allowed to correct the false impression the state created. But she was not allowed to, and as a result the jury was sent off to deliberate with false facts, and was never able to consider the 25.3 mph wind speed when determining the cause of the accident.

GROUND THIRTY FOUR: CONVICTION OBTAINED AS A RESULT OF THE PROSECUTION'S USE OF INCRIMINATING STATEMENTS THAT WERE THE PRODUCT OF IMPERMISSIBLE CUSTODIAL INTERROGATION

THE FACTS: Deputy Shaun Wilson, a jailer and Sheriff's Deputy to whom Banister allegedly made an incriminating statement to while in his custody, testified that while he was transporting Banister to the health clinic, he "asked [Banister] what he was in jail for." (4RR-203; 5RR-208). Wilson testified that Banister replied that "he was in jail for intoxicated manslaughter at that time, and he didn't understand why he was being charged with intoxicated manslaughter if he hadn't been drinking **but used cocaine**." (4RR-193). But then, when Wilson was recalled during the State's rebuttal he slightly modified his recollection of the statement and testified that Banister had stated " he had used cocaine the day before." (5RR-209). Then, shortly after stating this new version of the statement Wilson would state yet another. Now Wilson claimed that Banister stated that "he had used cocaine earlier." (5RR-211-212). In the end Wilson would admit to asking Banister at least two questions while he was in his custody: (1) what was he in jail for?; and (2) was he the one involved in the manslaughter case in the Earth area? Wilson would admit though, that he didn't recall exactly what Banister's responses were. (Id. 211).

Not only did the jury hear (from Wilson) that Banister had admitted to using cocaine, it also heard Wilson testify that Banister had admitted to him "that he was the one who ran over" the cyclist. (4RR-203. These alleged statements were all brought about by

Wilson's questioning of Banister while he was in this custody, and without the required Miranda warnings or waivers thereof. At trial counsel raised these objections, but they were overruled by the trial court. (4RR-195; 202; 5RR-208-209).

In its closing arguments, the prosecution repeatedly referred to Banister's alleged statements to Wilson in urging the jury to convict. Specifically, the prosecutor argued that: "You also have Shaun Wilson and Brian Cantrell telling you that. Yeah, he told us he used cocaine." (6RR-16) And then in its rebuttal the prosecutor argued that: "you've got Shaun Wilson, you've got Brian Cantrell saying yes. You've got... you know the defendant used cocaine, you know he was coming off cocaine." (6RR-24).

Please note that although this ground was raised and reflected on direct appeal (See Gregory Bannister v. Texas, NO. 07-04-0479 (TX. App. Amarillo 2006), it was not accurately addressed by the appellate court. (See Ground-38 Infra).

GROUND THIRTY FIVE: CONVICTION OBTAINED AS A RESULT OF THE PROSECUTION'S USE OF EVIDENCE OBTAINED FROM THE POLICE BY THEIR DELIBERATE ELICITATION OF STATEMENTS FROM BANISTER AFTER HIS RIGHT TO COUNSEL HAD ATTACHED.

THE FACTS: While Banister was in custody for intoxicated manslaughter, he was questioned by Deputy Shaun Wilson without his counsel being present. At Banister's aggravated assault trial, Deputy Wilson testified that he had asked Banister at least two questions concerning his case: (1) what was

he in jail for; and (2) was he the one involved in the manslaughter case in the earth area?. (4RR-203). Although Wilson admitted that he knew Banister had been in custody for months (4RR-192), he inexplicably claimed not to have known that he had an attorney appointed to him at the time of his questioning. (4RR-193). (Banister had counsel woman Sara Moore appointed to him at this time. (See PX-14,15 &16)).

At Banister's aggravated assault trial, Deputy Wilson testified that he asked Banister the following questions, and that Banister made the following incriminating responses:

Q. "you asked him what"

A. "asked him what he was incarcerated for in our jail at that time."

Q. "what was his response?"

A. "He said he was being charged with intoxicated manslaughter."

Q. "Did he say anything else."

A. "I asked him - at first I didn't remember who he was or anything and he stated that he was the one who ran over-" the cyclist. (See 4RR-203).

And then, during the State's rebuttal. Wilson testified as follows:

Q. "Did Mr. Banister make any other statements to you at that time concerning this case that's on trial her today?"

A. Yes, he stated that he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine the day before." (5RR-209)

Q. "Now, you said on the stand that he said what, now, when he made this statement?"

A "That he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine earlier."

The admittance of Wilson's testimony regarding incriminating statements that he deliberately elicited from Banister without his counsel being present, violated Mr. Banister's Six Amendment right to counsel. Trial counsel raised this objection but it was overruled by the court. (4RR-202). Although appellate counsel raised this ground on direct appeal, it was never accurately addressed by the appellate court. (See Ground-38 Infra.)

GROUND THIRTY SIX: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO PROPERLY PRESERVE THE TRIAL RECORD FOR APPELLATE REVIEW OF BANISTER'S SIXTH AMENDMENT RIGHT TO COUNSEL CLAIM.

THE FACTS: Although counsel objected to the admittance of Banister's incriminating statements, she failed to ensure that the record contain evidence of Banister's intoxicated manslaughter indictment. Counsel's failure to do so resulted in the record being insufficient to establish that Banister's right to counsel had carried over from his initial charge of intoxicated manslaughter (the charge pending when Wilson obtained the incriminating statements),to his subsequent and convicting charge of aggravated assault (the case where the incriminating statements were admitted).

As a result of counsel's failure, the court of Appeals was not presented with the necessary evidence to determine whether Banister's right to counsel was violated by the admittance of the incriminating statements at his trial for aggravated assault. Consequently, the court of Appeals denied Banister's right to counsel claim on appeal based on their uninformed belief that both the aggravated assault and intoxicated manslaughter charge were not the same offense for purposes of double jeopardy, and that the "offense specific" rule applied. The Court of Appeal's opinion makes clear that they didn't know whether the intoxicated manslaughter and aggravated assault charge were the same offense for jeopardy purposes:

"[H]e was charged with intoxicated manslaughter and aggravated assault under two different cause numbers. This record concerns appellant's trial and conviction for aggravated assault...").

"Nothing in the record makes clear whether appellant's earlier indictment include the aggravated assault charge"(9 at n.6).

(See Gregory Bannister v. Texas NO.07-04-0479-CR (TX. App.-Amarillo 2006) at p.2 and 9 n.6)

In light of the Court of Appeal's rationale for denying Banister's right to counsel claim (based on offense specific rule (Id. at p.9)), it is reasonably likely that had counsel made Banister's intoxicated manslaughter indictment a part of the trial record, the Appellate Court would have known that the offense specific rule was inapplicable because Banister could not have been prosecuted for both offenses. Had they know this they would have known

that Banister's right to counsel carried over from his intoxicated manslaughter charge to his aggravated assault charge and thus his right to counsel had been violated when Wilson testified about statements Banister had made while incarcerated for intoxicated manslaughter. Consequently, the Court of Appeals would have been constrained to have sustained Banister's right to counsel claim, which would have entitled him to a new trial.

GROUND THIRTY SEVEN: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL: COUNSEL FAILED TO INCLUDE THE INTOXICATED MANSLAUGHTER INDICTMENT WITH THE RECORD ON APPEAL AND FAILED TO CITE CRUCIAL PORTIONS OF THE TRIAL RECORD IN HIS BRIEF.

THE FACTS: Appellate counsel failed to seek inclusion of the intoxicated manslaughter indictment into the appellate record and failed to cite crucial portions of the trial record which were essential to establishing the right to counsel violations he advanced on appeal. On appeal appellate counsel argued that Banister's right to counsel was violated when he was questioned by Deputy Wilson while under indictment for intoxicated manslaughter, and those statements were later admitted at his trial for aggravated assault. However, appellate counsel either failed to recognize, or just plain ignore the fact that he could not establish that Banister's right to counsel had been violated until he demonstrated that both the intoxicated manslaughter and aggravated assault were the same offense for jeopardy purposes.

Appellate counsel never brought any evidence to the Court of Appeals establishing that the intoxicated manslaughter and aggravated assault charges were predicated on injury to the same victim. Because the right to counsel is prosecution specific and in Texas the allowable unit of prosecution for assaultive offenses is each complainant, it was imperative that the court of Appeals know that both indictments involved injury to a single victim (B.J. Mitchell, and that the State was jeopardy barred from prosecuting both. If the State could not prosecute Banister for both offenses, then Banister's right to counsel had carried over from the intoxicated manslaughter to the aggravated assault, and thus the "offense specific" rule would not apply. However, because appellate counsel failed to include the intoxicated manslaughter indictment with the record on appeal the appellate court relied on the offense specific rule to deny Banister's right to counsel claim:

"Even if Wilson's conversation with appellant were reasonably likely to elicit an incriminating statement, it concerned the charge of intoxicated manslaughter. Admission of that evidence in his trial for aggravated assault, for which he apparently had not yet been indicted; would not be barred under the Sixth Amendment"

"We initially note the Sixth Amendment right to counsel is offense specific."(citations omitted)

"Nothing in the record makes clear whether appellant's earlier indictment included the aggravated assault charge." See Gregory Banister v. Texas, NO.7-04-0479-CR (Tx. App. Amarillo 2006) at page 9

In light of the above cited rationale, it is reasonably likely that had appellate counsel made the intoxicated manslaughter indictment a part of the appellate record, the result of Banister's appeal would have been different. In appellate counsel's post-conviction affidavit he concedes that he "should have included the intoxicated manslaughter indictment in the appellate record." (See Wice's Aff. At PX-36 at p.ll).

In addition to the above, appellate counsel also failed to cite a crucial portion of the trial record, where the State and the court agreed that there was "no question" that the offense of aggravated assault and intoxicated manslaughter arose out of the offense of the "same transaction". (4RR-200). In appellate counsel's post-conviction affidavit he concedes that he "should have included this exchange" in his brief. (See Wice's Aff. at PX-36 at p.12).

GROUND THIRTY EIGHT: CONVICTION SUSTAINED AS A RESULT OF THE DENIAL OF A FAIR FACTUAL, FIRST APPEAL AS-OF RIGHT: THE SEVENTH COURT OF APPEALS ANALYZED BANISTER'S FIFTH AMENDMENT INTERROGATION CLAIM WITH A QUESTION NOT SUPPORTED BY THE RECORD.

THE FACTS: In denying Banister's Fifth Amendment "custodial interrogation" claim on direct appeal, the Appellate Court opined:

"Had Wilson asked **what appellant had done rather than <u>what he was charged with</u>**, the question would likely have elicited an incriminating response."(emphasis mine)

See Gregory Banister v. Texas, No.07-04-0479-CR (TX.App. Amarillo 2006 at page 6.).

Although the record is devoid of any evidence that Deputy Wilson ever asked Banister "what [he] was charged with", the appellate court nevertheless utilized this fictitious question in analyzing, and ultimately denying Banister's custodial interrogation claim. The record clearly shows that Wilson's question to Banister was, "what are you in jail for" not "what are you charged with'; as erroneously alleged by the appellate court.

This word-play was of no minor consequence as evidenced by the Court of Appeal's very own written word, where it reasoned that: "Had Wilson asked what appellant had done rather than what he was charged with, the question would likely have elicited an incriminating response." (Id.) The Court's opinion should leave no-doubt in a logical mind that its analysis of Banister's custodial interrogation claim lived or died on the wording of the question asked. As such, it was fundamentally unfair for the appellate court to analyze Banister's custodial interrogation claim with a question lacking evidentiary support, and which was less analogous to the questions asked in the cases Banister aligned himself with in his appellate brief.

GROUND THIRTY NINE: CONVICTION SUSTAINED AS A RESULT OF THE DENIAL OF A FAIR, FACTUAL, FIRST APPEAL AS-OF RIGHT: THE SEVENTH COURT OF APPEALS ANALYZED BANISTER'S RIGHT TO COUNSEL CLAIM WITH THE INAPPLICABLE AND MORE STRINGENT FIFTH AMENDMENT INTERROGATION STANDARD.

THE FACTS: On appeal, appellate counsel claimed the Banister's Sixth Amendment right to counsel was violated when Deputy Shaun Wilson "deliberately elicited" an incriminating response from Banister while in his custody and in the absence of his appointed counsel. In analyzing, and ultimately denying Banister's right to counsel claim the Seventh court of Appeals opined:

"The record supports a conclusion that Wilson's questions to appellant were **not designed or reasonably likely** to elicit incriminating information."

And,

"Even if Wilson's conversation with appellant were **reasonably likely** to elicit an incriminating response, it concerned the charge of intoxicated manslaughter."

See Gregory Banister v. Texas, No. 07-04-0479-CR (Tx. App Amarillo 2006) at page 9 (emphasis mine).

This is not the applicable standard for evaluating Sixth Amendment Right to Counsel Violations. The United States Supreme Court has distinguished the sixth Amendment standard of "deliberate elicitation" from the more stringent Fifth Amendment "custodial interrogation" standard, which was erroneously

utilized by the court of Appeals to analyze, and ultimately deny Banister's Sixth amendment claim.

Because the Seventh Court of Appeals unfairly and improperly substituted the more narrow Fifth Amendment standard of "interrogation" for the more expansive Sixth amendment standard of "deliberate elicitation", the court deprived Banister of a meaningful appeal.

GROUND FORTY: CONVICTION OBTAINED ASA RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO ENLIST THE SERVICES OF A GUILT/INNOCENCE FACT INVESTIGATOR.

THE FACTS: Counsel (admittedly) never enlisted the aid of an independent fact investigator. (See PX-42 at p.19) As a result of her failure to do so numerous pertinent witnesses were never interviewed and counsel was left ignorant of crucial facts which were essential to rendering an adequate defense. Counsel's ignorance in the regard not only pervaded the entire trial, but also the retrial and post-trial proceedings, which resulted in:

1) her not understanding the State's theory of the case until the day of trial (3RR-23) & Ground-7 supra;

2) her inability to mount a successful challenge to the admittance of the blood evidence (See Grounds-18-28);

3) her inability to conduct meaningful cross-examination of the State's witnesses;

4) her inability to impeach the State's witnesses regarding their erroneous recollection of the wind conditions (See Grounds 31 & 32 supra);

5) her inability to admit the weather report and consequently the jury's inability to consider the facts it contained when determining the proximate cause of the accident (See Grounds 31 & 32 supra);

6) her inability to impeach the State's Accident Reconstructionist with his inconsistent testimony. (See Ground-42 Infra);

7) her inability to meet the Court's "deadline for pre-trial matters", which resulted in her waiving a re-trial hearing on the admissibility of the State's expert's testimony, and also resulted in her not being able to have a pre-trial hearing regarding the illegal detention and blood issues. (3RR-24);

8) her inability to obtain a copy of the D.I.C-24 form that Banister signed prior to eh extraction of his blood. (See Ground-22 supra);

9) her failure to know that Banister was not eligible for probation from the judge or the jury. (See Ground-49 Infra);

10) her inability to give banister wound and accurate legal advice on whether to proceed to trial or take the plea, and whether he should have the judge or the jury asses the punishment. (See Ground-44 Infra);

11) her inability to make an informed decision to call Able Delacruz as a witness in the case. (See Grounds-29 & 30 supra);

12) her inability to mount a challenge to the admittance of the accident reconstruction evidence because she didn't know that he vehicle was illegally seized and utilized to garner evidence against Banister. (See Ground-50 infra); and

13) her failure to discover the Lubbock Lab Report which showed that there was no alcohol detected in the blood sample. (The record reveals that counsel didn't know of the Lubbock lab report until the end of trial. Se 5RR-165-166)

14) and finally, counsel was unable to employ a sound trial strategy and to make "informed" tactical decisions in the best interest of Mr. banister.

If counsel would have informed Banister of the need to hire a fact investigator, banister would have given her the funds to do so. It is highly likely that had counsel enlisted the services of a fact investigator to investigate the case, he or she would have discovered some - if not all - of the above facts, because this was an extremely close case, it is reasonably likely that had counsel been apprised of the above facts the outcome of Banister's case would have differed.

GROUND FOURTY ONE: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO CONDUCT AN ADEQUATE INVESTIGATION INTO THE FACTS AND THE LAW OF THE CASE.

THE FACTS: In trial counsel's post-conviction affidavit she claims to have "conducted a reasonable

investigation of the facts of the case and the law of the case." (See PX-42 at p. 19) The following facts, however, indicate that counsel did not conduct a reasonable investigation into the facts of the case:

1) the record indicates that counsel did not know what the State intended to prove until the day of trial. (3RR-23 and See Ground-7 supra);

2) the record indicates that counsel failed to speak with witness Delacruz until the third day of the trial. (5RR-69, 70-71 and 95, and See Grounds 29 & 30);

3) the record indicates that counsel didn't know of the existence of the Lubbock lab report until the third day of trial. (4RR-165-166 See PX-38 at p. 38-39);

4) counsel did not know that Delacruz would have testified that Banister was ordered into the police suburban, and was told a blood test was "mandatory". (See Ground-19 supra);

5) counsel did not know that Delacruz did not consent to his vehicle being seized and subsequently tested by the police in their accident reconstruction. (See Ground-50 supra) And counsel didn't know that the vehicle was seized without the requisite probable cause. (See Id.);

6) counsel did not know that Trooper Ponce had told banister it was "mandatory" that he go the hospital and submit a sample of his blood. (See Grounds-19 & 20);

7) counsel did not know that deputy Alex Ojeda had given Banister inapplicable and coercive written and oral warning (DIC-24)

immediately prior to Banister's submission to having his blood drawn. (See Ground-22 supra);

8) counsel did not know that Banister had signed a consent form (DIC-24). (See Id.);

9) counsel stipulated to the chain of custody on the blood evidence. (See Ground 25 supra);

10) counsel didn't even know whether the DPS or the Sheriff's Department was the ones who transported Banister to the hospital. (See suppression motion at CR-81) this is an indication that counsel never spoke to the person, or persons, who transported Banister to the hospital;

11) counsel never investigated the weather condition for the day of the accident. (See Grounds-31& 32 supra);

12) counsel waited until the first day of trial to file a motion to suppress. (See Ground-27);

13) counsel failed to adequately confer with Banister regarding the facts of the case. (See Ground-44 Infra); and

14) all the factors enumerated in the preceding ground relating to counsel's failure to hire a fact investigator. (See Ground-40 supra).

Similarly, the following facts indicate that counsel did not conduct a reasonable investigation into **the law** of the case:

1) counsel failed to object to the State's misstatement of the implied consent law. (See Ground-18 supra);

2) counsel failed to know the law relating to discovery and thus failed to request that the trial court set a time for production. (See PX 38 at p. 43-44);

3) counsel was evidently unaware of Article 36.15 of the Texas code of Criminal Procedure and thus failed to preserve the lesser included offenses, that she claims to have requested of simple assault and reckless driving. (See PX 38 at p. 12-13);

4) counsel objected to the State's cocaine crash testimony under rule 401 which defines relevant evidence, instead of rule 402 which makes evidence which is not relevant inadmissible. (See PX 38 at p. 4-5);

5) counsel didn't know the law relating to the "same transactional contextual" exception allowing admittance of evidence of extraneous offenses only when it occurred in the same transaction and is "necessary" to the jury's understanding.;

6) counsel apparently didn't know that the right to counsel is "offense specific and thus she failed *t« seek inclusion into the record evidence that both of Banister's indictments charged injury to the same person. (See PX-38 at p. 44-45);

7) counsel affirmatively state "no objection" to the admittance of the blood evidence which effectively waived any previous challenge and any appellate review of the issue. (See PX-38 at p. 24);

8) counsel does not know the law as it relates to the State's burden to show that the blood was

withdrawn by a qualified person. (See PX-38 at p. 29-30);

9) counsel apparently failed to know that the U.S. supreme Court case Schmerber v California required the State to demonstrate probable cause, exigent circumstances, and reasonable method of extraction before warrantless search and seizure of blood would be held to be reasonable. (See Ground-17 supra);

10) counsel evidently didn't know and still doesn't know, that election of punishment must be done prior to trial. (See PX-38 at p. 59-60);

11) counsel didn't know that Banister was not eligible for probation. (PX-38 at p. 59-60);

12) counsel didn't know how to preserve a motion for mistrial. (See PX-38 at p.*);

13) counsel was apparently unaware that she had to "move to strike" the State's expert's testimony when she failed to connect it up by the close of the State's case. (See Ground-4 supra); and

14) counsel evidently didn't know that she could have requested a court appointed accident reconstructionist if Banister was found to be indigent. (See PX-38 at p. 52-53).

In light of the above facts, it is clear that counsel did not conduct an adequate investigation into the facts, or the law of the case. It is reasonably likely that had counsel done a reasonable investigation of the case, she would have discovered some - if not all - of the above facts and law. Had counsel been armed with

the above facts and law, it is highly likely that the outcome of Banister's trail would have differed.

GROUND FORTY TWO: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO IMPEACH THE STATE'S ACCIDENT RECONSTRUCTIONIST WITH HIS INCONSISTENT TESTIMONY.

THE FACTS: Counsel failed to impeach the State's Accident Reconstructionist, Trooper Phillip Vandergrift, with his inconsistent testimony concerning his speed calculations. Specifically, Vandergrift testified in voir dire that the speed in this case was considered in "terminal speeds (maximum speeds)". (4RR-105) and then when questioned by the prosecutor, before the jury, Vandergrift testified that he used what's known as a "critical curve speed" in this case to determine the speed of the vehicle, and stated that "That's the **maximum**...speed that vehicle was trying to turn upon that pavement at that time...". (4RR-169) Then while being cross-examined by defense counsel, Vandergrift testified to the exact opposite:

Q. "Now, that yaw mark, when you take that measurement and you talked about eh speed of the vehicle being inferred from the yaw mark, is that eh maximum speed it could be going?"

A. "It's not inferred, it's calculated. It's very, very, very accurate."

Q. I mean is that a certainty or is the a maximum? Is there a range of speed?"

A. "It's going to be more like a **minimum**....So

actually, this would be the **minimum** speed that would occur at that point." (See 4RR-175)

Despite this sudden polar-shift in the State's favor, defense counsel failed to bring Vandergrift's inconsistent testimony to the jury's attention, and as a result, Vandergrift's credibility was left unassaulted before the jury. Because the State was alleging that Banister was reckless, the speed factor was of critical importance to the State's case, and so was Vandergrift's credibility. In its closing arguments, the State relied on Vandergrift's testimony and used it to imply to the jury that Banister was speeding at the time of the accident: reminding them that Banister was traveling "a minimum of 74 miles per hour." (6RR-15)

Given the closeness of the case, coupled with the heavy reliance by the State on Vandergrift's accident reconstruction conclusions before the jury (that no evasive action was taken until after the impact), trial counsel' failure to point out Vandergrift's inconsistencies to the jury severely calls into question the reliability of this verdict.

GROUND FOURTY THREE: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO CONSULT OR HIRE AN INDEPENDENT ACCIDENT RECONSTRUCTIONIST.

THE FACTS: Counsel did not consult nor retain an Accident Reconstructionist Expert to conduct an independent investigation into the facts of the accident. Because counsel lacked knowledge in the highly technical field of accident reconstruction, it was

essential for her—in rendering a defense—to either consult or hire and independent accident reconstructionist in order to require the prosecution's case to survive the crucible of meaningful adversarial testing. Indeed, counsel knew that the State was claiming that Banister was driving recklessly, and that they intended to call Vandergrift as an expert in accident reconstruction to testify on the causes of the accident. This included the position of the cyclist and vehicle at the pint of impact, the estimated speed of the vehicle, the position of the yaw marks, and most-importantly, the expert's overall conclusion on the proximate cause of the accident.

Counsel's failure to hire or consult an independent expert was not a strategically decision because it essentially left the jury with only the State's version of the accident—a version full of discrepancies and implausible claims. For example counsel failed to recognize the contradictions in Vandergrift's testimony concerning "minimum vs. maximum" speed of the vehicle at the point of impact. Specifically, Vandergrift testified twice that eth speed of the vehicle was measured in terms of "maximum" speeds, but then when questioned by defense counsel he testified to the exact opposite, state that" [i]t's going to be more like a "minimum' speed." (4RR-169 & 4RR-175). Despite this obvious contradiction, counsel never informed the jury of Vandergrift's inconsistent testimony, nor did she impeach him with that testimony. Counsel' failure was of no minor consequence because Vandergrift's credibility was never called into question, and the importance of his testimony was underscored by the State in its closing

arguments, where they implied that Banister was speeding when the accident occurred. (6RR-15)

Had counsel consulted or retained an independent accident reconstructionist, she would have known that the speed of Banister's vehicle was in fact measured in terms of "maximum" speeds as opposed to " minimum" speeds. In light of the State's claim, that Banister was reckless, the maximum vs. minimum speed was an important fact for the jury to consider. However, because of counsel' failure they were left to weight the evidence with erroneous facts (that Banister was traveling a "minimum" of 74 miles per hour).

Secondly, counsel's failure to hire or otherwise consult an independent expert left it virtually impossible for her to conduct an adequate cross-examination, or to test the reliability of eh State's c conclusions on the cause of the accident. Specifically, counsel was ill-prepared to test Vandergrift's outrageous claim that the cyclist was thrown "248 feet" from the point of impact. (4RR-167) This allowed the State to tell the jury in its closing argument that, the cyclist was thrown "nearly a football field away." (6RR-15) Not only was this claim outrageous on its face, it also conflicted with the other witnesses testimony. Rodger's testified that the cyclist was thrown around" 30 yards in front of [him]" (4RR-38), and Judge Harmon testified that the cyclist laid "at least 20 or 30 feet beyond the bicycle" (4RR-184).

In addition, Vandergrift's testimony on the point of impact not only conflicted with what Banister had told counsel, it also conflicted with Trooper Ponce's initial and supplemental reports, which showed the cyclist in

the roadway at the point of impact. (See Reports at PX-2) In that report, where it asks for the "investigator's narrative opinion of what happened", Trooper Ponce wrote that "[u]nit 2 was a bicycle and was riding in the right far lane." (Id. At p.2 &4) (note that the jury never got to see this report because trial counsel inexplicably objected to its admittance; see 5RR-186-192)

In spite of all these inconsistencies counsel never hired or otherwise consulted and independent expert to determine if the State's accident reconstruction was impervious to attack. It is reasonably likely that had counsel consulted or hired an independent accident reconstructionist, she would have been able to bring some—if not all—of these inconsistencies to light. Confronted with evidence debunking the reliability of the State's accident reconstruction, the jury might have had a reasonable doubt about Banister's guilt.

Because the accident reconstruction evidence was fundamental to the State's case, it was simply unreasonable for counsel to fail to hire or consult and independent expert. This is especially true given the fact that Vandergrift's claim (that there was "no evasive action" taken to until after impact) was based on mere inches. (4RR-164-165)

Had trial counsel informed Banister that the State was claiming that he was "8 to 10 feet out of his lane" when the impact occurred, Banister would have insisted that counsel hire an independent accident reconstructionist. (See PX-19 at p.2) Banister could have, and would have, provide counsel the necessary funds for her to do so. (See PX-38 at p.53) Even in the unlikely event that Banister couldn't afford to hire an

accident reconstructionist, counsel could have requested the court to hire one because it was fundamental to counsel rendering an adequate defense. But counsel did neither, which ultimately left the State's reconstruction evidence virtually untested and unchallenged. Here, there was no adversarial testing, but only wholesale acceptance of the State's version of the accident.

GROUND FOURTY FOUR: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO ADEQUATELY CONSULT WITH BANISTER IN PREPARATION FOR TRIAL.

THE FACTS: Although counsel had some eleven months to confer with Banister regarding the facts of the case, she failed to confer with Banister on the following pertinent matters:

1) about the circumstances surrounding Banister's detention and subsequent seizure of his blood. (Had counsel adequately consulted with banister on this matter she could have mounted a successful challenge of the bloods admittance. See Grounds-18 through 28 supra);

2) never informed banister that the State was claiming that he was 8 to 10 feet out of his own lane when the collision occurred. (Had counsel informed him of such Banister would have insisted on hiring an accident reconstructionist. See PX-19 at d.2 & PX-38 at d.51 and Ground-43 supra);

3) wrongly informed banister that the judge could give him probation. (Had counsel accurately informed Banister he would have elected to have

the jury determine the punishment. See Ground-49 Infra);

4) wrongly informed Banister that the Judge was going to have to instruct the jury on the lesser included offense of Deadly conduct. (See PX-38 at p.60-61);

5) never informed or otherwise discussed the State's indictment relating to the "as a result of introduction of cocaine into the body" element. (The trial record shows that counsel didn't gain understanding of the State's indictment until the first day of trial. See Ground-7 supra);

6) never conferred with Banister on any strategy or defensive issues. (After an objective view of the record it is impossible to discern any defensive theory in the case. See 4RR; 6RR);

7) never conferred with Banister about what he was doing the night before the accident, and who he was with, and whether they could offer favorable testimony;

8) never conferred with Banister about hiring a guilt/innocence fact investigator. (See Ground-40 supra);

9) never conferred with Banister about hiring an independent accident reconstructionist. (See Ground-43 supra);

10) never conferred with banister regarding what witnesses to call or not call;

11) never conferred with Banister about the fact that he was required to wear glasses but was not wearing them while the accident occurred;

12) never conferred with Banister about the ramifications of taking the stand at eh punishment phase. (Had she adequately informed him of the consequences banister would not have testified.):

13) never conferred with Banister about the final charge to the jury. (Had she done so Banister would have recognized the erroneous charge regarding prior convictions and would have insisted she object. See Grounds-11 & 12 supra);

14) finally, counsel never conferred with Banister regarding the filing of a motion for new trial. (Although counsel did complete a motion for new trial that motion was never filed with the court. See PX-28)

In the end, counsel's inadequate consultation with Banister made it virtually impossible for her to render an adequate defense. This is seen throughout the trial record and is further evident in the Grounds discussed throughout this Petition. (See Grounds Supra and Infra) Here, it is reasonably likely that had counsel adequately consulted Banister regarding the above matters, the outcome of Banister's trial would have differed.

GROUND FOURTY FIVE: MR. BANISTER IS ENTITLED TO A NEW TRIAL BECAUSE THE CUMMULATIVE EFFECT OF HIS TRIAL COUNSEL'S ERRORS RENDERED THE PROCEEDINGS FUNDAMENTALLY UNFAIR AND DENIED HIM THE EFFECTIVE ASSISTANCE OF COUNSEL.

THE FACTS: Here, the synergistic effect of counsel's acts and omissions undermined the proper functioning of the adversarial process and Banister's trial cannot be relied upon to have produced a just result. Here, the errors of trial counsel are not isolated but are interwoven throughout the defensive tapestry, and are discussed in detail throughout this Petition, attached Memorandum, and in Banister's Rebuttal Affidavit. (See Grounds supra and Infra)

In light of the thinness of the State's evidence in the case, the presence of the multiple acts of deficient conduct by counsel severely calls into question the integrity of the verdict and the fairness of the proceedings. (For a good overview of counsel's lack of familiarity with the facts and the law of the case, please see "Banister's Rebuttal To Attorney French's Affidavit" at PX-38 at pages 46-47, which incorporated herein by reference for all purposes.

GOUND FOURTY SIX: MR. BANISTER IS ENTITLED TO A NEW TRIAL BECAUSE THE CUMMULATIVE EFFECT OF PROSECUTORIAL MISCONDUCT RENDERED THE PROCEEDINGS FUNDAMENTALLY UNFAIR.

THE FACTS: The numerous acts of misconduct by the State, in prosecuting this case, operated to deprive Mr. Banister of due process and a fundamentally fair

trial. These acts are set-out in detail throughout this Petition, and the attached Memorandum which is incorporated herein for all purposes. (See Grounds Supra and Infra and Attachment-B)

Either standing alone, or in accumulation, these acts severely undermine the integrity of this verdict. In light of the utter lack of evidence that the accident occurred "as a result of the introduction into [Banister's] body", the collective presence of the State created errors had the grave potential to unfairly influence this verdict. Given the closeness of the case, it is highly likely that had the prosecution not engaged in the acts of misconduct articulated in the Petition and Memorandum it would have been left without a case against Mr. Banister.

GROUND FOURTY SEVEN: MR. BANISTER IS ENTITLED TO A NEW TRIAL BECAUSE THE CUMULATIVE EFFECT OF THE STATE'S MISCONDUCT COUPLED WITH THE INEFFECTIVE CONDUCT BY HIS TRIAL COUNSEL RENDERED THE PROCEEDINGS FUNDAMENTALLY UNFAIR.

THE FACTS: The cumulative effect of the State sponsored errors, in conjunction with the numerous deficiencies attributed to defense counsel, operated synergistically to deprive Mr. Banister of his due process right to a fair trial.

Given the State's utter lack of evidence that the accident happened "as a result of the introduction of cocaine into the body", the collective presence of serious errors by defense counsel, and the State—discussed in detail throughout the Petition and attached Memorandum-severely undermines

confidence in the reliability of this verdict. (See Grounds Supra and Infra and attachment-B)

In addition to the above, the various errors of the trial court itself combined to form a conglomerate of unfairness against Mr. Banister.

GROUND FOURTY EIGHT: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL: COUNSEL RAISED FACTUALLY INSUPPORTABLE ERRORS ON APPEAL WHILE ABANDONING CLEARLY MERITORIOUS ONES WHICH CONTAINED AMPLE RECORD SUPPORT.

THE FACTS: Appellate counsel raised seven grounds on appeal, five of these lacked the proper record support to be sustained. For example, in point Two counsel claimed Banister's right to counsel was violated but he failed to provide the appellate court with the necessary evidence to prove that Banister's right to counsel had actually attached to the charge. (See Ground-37 Supra)

In point four, counsel claimed that the court erred in admitting an incriminating statement that wasn't disclosed to trial counsel until "**the second day of trial**", but the record unequivocally demonstrates that the statement was disclosed to trial counsel on "**the Friday before trial**". (3RR-1-5; 3RR-107; 4RR-113: 4RR-195; 4RR-209; also see Bannister v. Texas at page 10)

And in points 5, 6, and 7 counsel claimed that the trial court erred in admitting evidence that the cocaine metabolite in Banister's blood caused him to suffer a cocaine crash in violation of Rules, 401, 403,

and 702, but as the Court of Appeals noted in denying these claims:

> "Erwin was not asked for an opinion whether [Banister] had experienced cocaine crash or withdrawal....Erwin's testimony was not directly related to [Banister]."
>
> "Appellant argues the State failed to shoulder its burden of showing that Erwin's technique applying the cocaine crash theory and that he technique had been properly applied in this case. As noted however, Erwin's testimony did not apply the cocaine crash theory to [Banister]. Before the jury she was not asked if [Banister] had experienced cocaine crash or withdrawal".
>
> See Gregory Bannister v. Texas, NO. 07-04-0479-CR (TX. Cr. App,. 2006) at pages 12-13.

And again, the Appellate Court made clear that appellate **counsel's "challenge** [on appeal] **was to testimony that Erwin <u>did not</u> give**." (See Id at p.14) And probably the most-compelling indication that appellate counsel failed to conduct a conscientious review of the trial record can be found in appellate counsel's "amended" post-conviction affidavit, where he admits that he made a "mistake" regarding the scope of Erwin's testimony. (See Amended Aff. at PX-41)

In light of the above facts, it is unequivocally clear that appellate counsel failed to familiarize himself with the facts of Banister's case, and as such, he could never have conducted the required **informed** selection of potential claims in order to maximize the likelihood of success on appeal. Appellate counsel's failure in this

regard was extremely harmful to Banister's appeal because the numerous meritorious grounds mentioned throughout this Petition and discussed throughout the attached Memorandum, were never discovered. Had counsel discovered and competently raised any number of the ignored errors, it is reasonably likely that Banister would have obtained a reversal of his conviction or at the very least a reformation of his lengthy prison sentence.

It's important to note that even appellate counsel "recognize[s] that, in the exercise of reasoned professional judgment, [he] should have raised both of these [factual & legal insufficiency] issues." (See Amended Aff. at PX-41) It is also important to note that appellate counsel (Brian W. Wice) is not your run-of-the-mill type of appellate attorney, but is qualified "as an expert witness in post-conviction writs of habeas corpus...[in] the area of ineffective assistance of counsel and [has] sat as a Special Master in a variety of post-conviction writs of habeas corpus involving... the area of ineffective assistance of counsel." (See Id.) As such, Mr. Wice's admission that he made a "mistake" and that he "should have raised" both the factual and legal sufficiency issues, should carry significantly more weight in support of Banister's claim that he rendered ineffective assistance of appellate counsel.

GROUND FOURTY NINE: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL ERRONEOUSLY INFORMED BANISTER THAT HE WAS ELLIGIBLE FOR PROBATION.

THE FACTS: A few weeks prior to trial, Banister and his brother (Joe Banister), traveled to Levelland Texas and spoke with trial counsel regarding who should asses the punishment in the event Banister was convicted, While there, counsel advised Banister that he should have the judge assess the punishment, because according to her, "the judge can give you probation, but the jury cannot." (See Joe Banister's Aff. at PX-24) It was based on this advice that Banister elected to have the judge determine the punishment in the case. (See Banister's Aff. at PX-19 at p.1)

In trial counsel's post-conviction affidavit, she state's that she "cannot recall whether [She] told Mr. Banister that probation could be ordered by the judge...". (See Aff. at OX-42 p.24) Although counsel claims to have never told Banister he was eligible for probation, her assertion cannot be reconciled with the following facts:

* both Banister's and Joe Banister's affidavits swearing that she did tell him that he was eligible for probation if sentenced by the judge (See Aff. at PX-19 & 24);

* trial counsel's own "Case Data Sheet" which illustrates that she prepared and "Application For Community Supervision" just one day before trial. (See case Data sheet at PX-22);

* counsel's handwritten trial note, which is dated 9-2-04 (11 days prior to trial) and states: "**Make sure judge can do prob on Agg/Assault**." (See PX-43)

In light of the above, it is evident that counsel did tell Banister he was eligible for probation if sentenced by the judge. Counsel should have never told banister this because not only did the deadly weapon finding preclude Banister from receiving probation, but his prior felony conviction precluded his as well. This misadvise is an indication of counsel's inattentiveness and lack of familiarity in the case. Had counsel accurately informed Banister that he was ineligible for probation, Banister would have elected to have the jury determine the punishment, and may have even decided to plea the case. (See PX-19)

The following facts point to a conclusion that eh jury would have given Banister less time had they been called to determine the punishment:

* the thinness of the State's evidence that Banister suffered a "cocaine crash" and that the accident occurred "as a result of the introduction of cocaine into [Banister's] body." (See Grounds-1,2, &3 Supra);

* the fact that there were two jurors who had trouble finding Banister guilty, and there is one "to this day, [who doesn't] think he is guilty." (See Juror Garcia's Aff. at PX 34; and the post-conviction juror hearing at PX-35 at p. 32-33);

* the fact that Banister didn't flee the scene, but immediately called the police and returned to the scene to await them. (PX-30; and 5RR-133) Juror Garcia's affidavit reveals that this was an important factor for her in the case. (See PX-34);

* the fact that there was no drugs or alcohol detected in Banister's system immediately after the accident. (See 5RR-17 & 5RR-166)

* the fact that an 18 year veteran of the DPS, who's "well trained" in detecting signs of impairment, testified that he didn't give Banister a field sobriety test and notice no signs of impairment or fatigue. (4RR-118,145-146 & 5RR-166);

* the fact that Banister didn't receive a ticket for anything other than no insurance. (5RR-169);

* the fact that he was never arrested and was permitted to leave after his blood was withdrawn. (4RR-118 & 5RR-173);

* the fact that Banister was "legally in the roadway" and had the "right of way" when the collision occurred. (4RR-173-174,176-177; 4RR-179)

* the fact that the bicycle was "in the roadway" when the collision occurred. (4RR-174,178 & 5RR-174 and see Police report at PX-2 at p. 2 & 4);

* the fact that even the State was only recommending that Banister be sentenced to "no less than seven years." (7RR-40)

All the above mitigating facts point to a reasonable conclusion that he jury would have given Banister a less severe sentence than what the judge did had they been called to determine the punishment.

GROUND FIFTY: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO CHALLENGE THE ADMITTANCE OF THE ACCIDENT RECONSTRUCTION EVIDENCE WHICH WAS OBTAINED AS A RESULT OF THE AUTHORITIES ILLEGAL DETENTION OF A VEHICLE WITHOUT THE REQUISITE PROBABLE CAUSE.

THE FACTS: Able Delacruz, the owner of the vehicle involved in the accident, testified that because his driver's license was suspended he gave Banister permission to drive his vehicle the morning of the accident. (5RR-130)

After the accident Banister promptly sought emergency help for the injured cyclist, and then returned to the scene to await them. (4RR-39 & 5RR-133) The investigating officer, Trooper Ponce, testified that he never initiated a field sobriety test on Banister and that he didn't detect any signs of impairment or fatigue. (4RR-118,145-146 & 5RR-166) Ponce also testified that both Banister and the cyclist were legally in the roadway when the collision occurred. (4RR-174,176 & 5RR-174) In fact, Ponce's onsite police report not only depicts one of the cyclists in the lane of highway traffic, but it also states that: "[u]nit 2 was a bicycle and was riding in the right far lane." (See Report at PX-2) Ponce testified that he never placed Banister under arrest. (4RR-117,121)

Banister's and Delacruz's affidavits establish that they were informed by Trooper Ponce that they would have to find a ride home because "the care was going to be towed." (See PX-8 & 39) Ponce never informed,

nor sought the permission of Delacruz or Banister to conduct tests on the vehicle. In spite of these fact, and the fact that there was no "probable cause" to seize the vehicle, the Troopers seized the vehicle and utilized it for some seven hours at the scene to run tests on it to gather evidence against Mr. banister. (See towing Bill at PX-32, charging "7 hours on site time.")

The results of the tests performed on the vehicle were utilized by Trooper Vandergrift in his reconstruction of the accident. Vandergrift testified that he and various other officers conducted numerous tests on the vehicle that was involved in the accident which provided the basis for his conclusion that "no evasive action was taken" until after the impact with the cyclist. (4RR-165) These tests also provided the basis for Vandergrift's accident reconstruction drawing which was admitted a States Exhibit-5. (4RR-161)

Despite defense counsel's advance knowledge of the State's intention to offer accident reconstruction evidence, counsel never conducted an investigation into the events leading up to, and involving the police's seizer and utilization of the vehicle in garnering prejudicial evidence against Mr. Banister. Had counsel conducted an adequate investigation, counsel could have obtained ample facts that the vehicle was illegally seized by the police without the requisite probable cause. A reasonable attorney would have sought to have the accident reconstruction evidence suppressed on that basis. But here, counsel never moved to suppress the accident reconstruction evidence, and as a result, the jury was presented with otherwise inadmissible evidence which lent support to the State's theory that Banister failed to control or

drove his vehicle without sufficient sleep. (4RR-164-165) The State relied on Vandergrift's accident reconstruction in its closing arguments to the jury. (6RR-15)

Based on the above facts, it is reasonably likely that defense counsel could have mounted a successful challenge to the admittance of the accident reconstruction evidence. Given the thinness of the evidence in this case, coupled with the State's heavy reliance on the accident reconstruction evidence, it is reasonably likely that the State would not have been able to convict without the accident reconstruction evidence. As such, defense counsel's failure to challenge the admittance of the accident reconstruction evidence undermines confidence in the reliability of this verdict.

GROUND FIFTY ONE: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: COUNSEL FAILED TO OBJECT TO THE CALLING OF WITNESSES CANTRELL AND WILSON AS "REBUTTAL" WITNESSES.

THE FACTS: Both the State and defense experts testified that, based on the blood test results, they could not determine "when" Banister consumed the cocaine. (5 RR-62 & 5RR-114) Despite this uncontested fact, the State was unfettered in its calling of Brian Cantrell and Deputy Wilson during its rebuttal. (5RR-199 & 5RR-208) Trial counsel didn't object to the calling of these witnesses, nor did she request that the State articulate just what these witnesses were being called to rebut. In its opinion, denying Banister's appeal, the court of appeals

erroneously believes that these witnesses were called to rebut the defense expert's testimony "that no conclusion could be drawn about **when** [Banister] consumed cocaine." (See Banister v. Texas, NO.07-04-0479-CR at p.3 n.2)

The Court of Appeals is wrong for several reasons. First, the experts were in agreement that they could not determine when the cocaine was consumed. (5RR-62 & 5RR-114) Secondly, it was the State who first gave rise to the issue, by eliciting the following testimony from its expert: "I cannot tell how it was used or **when** it was used." (5RR-62) (It is well-established that the State cannot rely on its own questions as an invitation to rebuttal.) Here, the defense expert merely agreed with State's experts testimony that he could not determine when the cocaine was consumed based on the evidence provided. (5RR-114) Surely his agreement didn't entitle the State to call witnesses Cantrell and Wilson as rebuttal witnesses regarding Banister's alleged statement to them about when he consumed the cocaine . In fact, the record reveals that Wilson and Cantrell's testimony significantly conflicted with each other regarding when the cocaine was consumed. Specifically, Cantrell testified that Banister said: "[h]ow can they charge me with intoxicated manslaughter when I wasn't drunk, **when I was on cocaine at the time**. (5RR-199) But yet Wilson claimed that Banister "stated that he didn't understand why he was being charged with Intoxicated Manslaughter if **he had used cocaine the day before**." (5RR-209)

Because the calling of Cantrell and Wilson as rebuttal witnesses didn't rebut a defensive theory nor did it cure a false impression created by the defense,

Cantrell and Wilson were not proper rebuttal witnesses. As such, if called to task, the State could not have justified calling these witnesses under the guise of rebuttal. But because counsel failed to object, the jury was not only allowed to hear that Banister had been charged with intoxicated manslaughter, but that he had confessed to consuming cocaine either the day of the accident or the day before the accident (dependent on which version they believed. Cantrell's or Wilson's). Given that the indictment alleged the collision occurred "as a result of the introduction of cocaine into [Banister's] body", this testimony was extremely detrimental to the defense, especially given the fact that the testimony was repeated to the Jury six times. (5RR-199; 208; 209; 210; 211; & 212) It is also important to note that the State relied heavily upon Wilson's and Cantrell's testimony during its closing argument in urging the jury to convict. (6RR-15 & 24)

In the end, it was simply unreasonable for counsel not to object to the State's calling of these witnesses in its rebuttal. It is reasonably likely that had counsel properly objected, these witnesses would not have been permitted to testify as rebuttal witnesses. In light of the closeness of this case, it is reasonably likely that the outcome of Banister's trial would have differed had the jury not heard Wilson and Cantell's testimony.

GROUND FIFTY TWO: CONVICTION OBTAINED AS A RESULT OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL: COUNSEL FAILED TO RAISE THE TRIAL COURT'S ALLOWANCE OF EXTRANEOUS CONDUCT AS ERROR ON DIRECT APPEAL.

THE FACTS: On the second day of trial the State called Sheriff's Deputy Shaun Wilson and elicited testimony before the jury of an extraneous offense. Specifically, Wilson testified that white at eh Health Clinic with Banister and another inmate, he "[a]sked him what he was incarcerated for", and that Banister replied that he was "**charged with intoxicated manslaughter**" (4RR-203) This was the first time the jury had heard that Banister had been charged with intoxicated manslaughter—it wouldn't be the last.

Prior to the above testimony (in voire-dire), defense counsel objected several times to the allowance of any extraneous conduct coming before the jury, and she also reminded the court that she had "done motion after motion to prevent this very kind of thing from coming in and prejudicing the jury." (4RR-200) The Clerk's Record contains the motions to which counsel alluded. (CR-27;38-39) All of these motions were granted by the trial court. (CR-73 and 69) But in spite of the court's previous rulings, the trial court "overruled" counsel's objections and permitted the jury to hear that Banister had been "charged with intoxicated manslaughter." (4RR-203) (Banister never received the proper notice of the State's intention to offer the extraneous offense.)

Immediately prior to overruling counsels objection the State argued that because the intoxicated

manslaughter and aggravated assault were "part of the same transaction [it was] not an extraneous offense." (4RR-199)The court agreed and ruled that "[i]t's the same transaction" and therefore admissible. (4RR-200)

Although the intoxicated manslaughter and aggravated assault occurred in the "same transaction" that alone does not make the evidence that Banister had been charged with intoxicated manslaughter admissible. Because the testimony relating to Banister being charged with intoxicated manslaughter was "not necessary" to the jury's understanding of the case at bar (aggravated assault) that testimony was not admissible because it did not meet the "same transactional contextual" exception of admittance of such evidence. This is the very exception that the prosecutor's argued applied, and the one that the court relied on in overruling counsel's objection to the admittance of the evidence.

Because trial counsel objected to the admittance of the extraneous offense, appellate counsel could, and should have raised this as a ground on direct appeal. To the extent that this court finds trial counsel didn't properly preserve the claim for appellate review, than trial counsel was ineffective herself for failing to do so.

The harm inherent in telling the jury that Banister had been charged with intoxicated manslaughter is further compounded by the numerous time— six times— it was it was repeated to the jury, (see section 4RR-203; 5RR-199, 5RR-209, 5RR-210, 5RR-211 & 5RR-212) Obviously, this repetition had the serious potential to improperly influence the jury to Banister's detriment. It is also important to note that

the admittance of this evidence gave rise to the erroneous limiting instruction given by court in its final charge to the jury. (see section 4 of the attachment Memorandum and Supplemental Facts for a discussion as to why the limiting instruction was improper.)

GROUND FIFTY THREE: CONVICTION OBTAINED AS A RESULT OF THE DENIAL OF DUE PROCESS AND A FAIR TRIAL: A MEMBER OF THE JURY BASED HER VERDICT ON NON-EVIDENTIARY FACTORS AND FAILED TO OBEY THE MANDATORY INSTRUCTIONS GIVEN BY THE TRIAL COURT.

THE FACTS: In this case there is evidence that one of the jurors did not base her verdict on the evidence, and that she failed to adhere to the trial court's instruction that she acquit Mr. Banister if she has a reasonable doubt concerning his guilt. Although it is presumed that a jury followed the instructions given to it by the trial court, that presumption can be overcome with evidence to the contrary. Here, Banister presents compelling evidence, in the form of juror testimony, that the trial court's instructions were not followed by at least one juror. Specifically, the following testimony by juror San Juanita Garcia proves that she did not follow the court's mandatory" instruction requiring her to: (1) base her verdict solely on the evidence; and (2) that she acquit Mr. Banister if she had a "reasonable doubt" concerning his guilt.

The following excerpts from juror Garcia's sworn affidavit reveals that she not only had a reasonable doubt concerning Banister's guilt, but that she

actually believed - and still does - that Banister was not guilty:

> "really don't know what else to say. Other than the fact that I just, to this day, **don't think he is guilty**"(See Juror Garcia's Affidavit at PX-34 at p.2)

And at the live hearing, where the trial court questioned the juror's, juror Garcia makes clear that she did not believe that Banister was guilty:

> "And the other jurors just really put it plain that he was guilty. **And in my book he was not guilty at all**." (See Transcript of hearing at PX-35 at p.32)

> "The comment that I had made to my brother is that it was hard for me to live day by day **knowing that I had sent somebody to jail when I knew good and well that in my mind and in my heart** <u>**I felt that he was not guilty**</u>"

(See Id. At p.33)

The above facts establish that Juror Garcia failed to apply or otherwise follow the court's directive that she acquit Banister if she had a reasonable doubt concerning his guilt. In addition to Garcia's failure to follow the Court's reasonable doubt instruction, the following excerpts reveals that she did not base her verdict on the evidence, but instead was coerced into surrendering her **conscientious view - that Banter was not** guilty - out of fear of being ostracized by the other jurors:

THE COURT: "Okay. No one forced you or threatened you in any way to get you to [vote guilty]..."

JUROR GARCIA: "There were several of the - there were several of the ladies that were like kept telling me, 'you know he's guilty, you know he's guilty, you know that that's what it **shows**.' **And I just couldn't say yes**. you know. Like I said, it took us awhile because me and this other juror decided that it wasn't that way. And the reason why I felt bad is because the other two ladies I know because we're from the same town, and they really belittled me because I was really -I felt that they was - I felt that they were saying that I was really stupid because of the way I felt. And after a while I thought they would really talk about me bad, **so I'll go ahead and just give in, and that's why I went ahead and changed my mind then, because of that**."

(See Transcript from hearing at PX-35 at p. 34)

Although Banister is cognizant of the rule that prevents jurors form impeaching the validity of the verdict, Banister contends that the State "waived" any objection to juror Garcia's testimony because they were present at the hearing but failed to raise any objection to the above testimony when it was given. It's important to know, that although the State was permitted to attend the hearing, Banister was not, and he had no representation whatsoever at the hearing. (See Id. At p.4: Judge recognizes that "[t]here is no representation here on behalf of Gregory Banister.)

It is a well-**known** fact that the criminal trial has one well-defined purpose, and that is to provide a fair and reliable determination of guilt or innocence. This goal is reached only when the jury is capable and willing to give full effect to the reasonable doubt

standard, and when the jury decides the case based solely on the evidence before it. In Banister's case it is evident that he was deprived of due process and a fair trial by Juror Garcia's failure to: (1) follow the court's mandatory instructions; (2) base her verdict solely on the evidence before her; and (3) her failure to apply the reasonable doubt standard to Banister. These failures amounted to jury misconduct.

Banister has not only "rebutted" the presumption that the court's instructions were followed, but he has also shown harm from Juror Garcia's failure to follow the court's instructions, because had she done so a guilty verdict could not have been returned, and thus Banister would not have been convicted.

I declare under penalty of perjury that the foregoing is true and correct and that this Petition for a Writ of Habeas Corpus was placed in the prison mailing system on this the **7th day of April, 2014**.

Executed on: April 7, 2014.

Petitioner Pro-se
Gregory Banister #
1265563
Neal Unit TDCJ-ID
9055 Spur 591
Amarillo, Tx 79107

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY DEAN BANISTER Petitioner, v. LORIE CAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	CIVIL ACTION NO. 5:14-CV-049-C ECF

ORDER

Petitioner, Gregory Dean Banister, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on April 9, 2014. Respondent filed an answer with brief in support on June 16, 2014, and relevant records on June 6, 2014. Petitioner filed a response on August 7, 2014, and a supplement on August 14, 2014.

I. BACKGROUND

The Court has reviewed the pleadings and state court records and finds the following:

1. Petitioner is in custody pursuant to a judgment and sentence out of the 154th District Court of Lamb County, Texas, in cause number 3900, styled *The State of Texas v. Gregory Bannister*.[1] On February 6, 2004, Petitioner was indicted for one count of

[1] Petitioner spells his name "Banister" in the instant petition.

aggravated assault with a deadly weapon, enhanced by a prior conviction for trafficking cocaine in Cause No. 95-CR-12383 out of the 9th Judicial District Court of Curry County, New Mexico. The indictment states, in part, that on or about the 11th Day of May, 2002, Petitioner did then and there:

> intentionally, knowingly, or recklessly cause serious bodily injury to B.J. Mitchell by failing to control a motor vehicle or by driving a motor vehicle without sufficient sleep, as a result of the introduction of cocaine into his body and thereby caused his motor vehicle to collide with B.J. Mitchell.

2. Voir dire for the jury trial commenced on September 13, 2004. Trial commenced on September 14, 2004, and although Petitioner pleaded not guilty, the jury found Petitioner guilty as charged on September 16, 2004. The punishment phase commenced on September 17, 2014, and on the same day the court assessed Petitioner's punishment at thirty years' confinement. The trial court pronounced judgment the same day.

3. Petitioner filed a notice of appeal on September 8, 2004. In six issues on appeal, Petitioner argued that the trial court erred in admitting an oral statement by Petitioner in violation of Tex. Code Crim. Proc. Ann. art. 38.22, the Fifth Amendment, and the Sixth Amendment that the State failed to timely disclose in violation of Tex. Code Crim. Proc. Ann. art. 39.104. Petitioner also argued that the trial court erred in admitting evidence that the cocaine metabolite in his blood caused him to suffer cocaine crash over his objection in violation of Tex. R. Evid. 401, 702 and 403.

4. In an unpublished opinion filed September 29, 2006, the Seventh Court of Appeals affirmed the conviction. Petitioner filed a motion for rehearing that was overruled on November 6, 2006, and a Motion for Stay of Mandate that was denied on April 18, 2007. Mandate issued on May 10, 2007.

5. With the aid of counsel, Petitioner filed his petition for discretionary review on November 22, 2006, and it was refused by the Texas Court of Criminal Appeals (TCCA) on February 28, 2007.

6. Petitioner filed a petition for writ of certiorari to the United States Supreme Court that was denied on October 1, 2007.

7. Petitioner filed his application for writ of habeas corpus in the trial court on September 23, 2008. In State Writ No. 07,854-03, Petitioner raised sixty-five (65) grounds for review, which the Court will not recite here.

8. On May 2, 2012, the TCCA remanded the state writ to the trial court for findings regarding what advice trial counsel gave Petitioner concerning the inclusion of the deadly conduct offense as an alternative to going to trial. The trial court was also instructed to make additional findings regarding: whether counsel's advice led to rejection of a fifteen-year plea offer; whether, but for the advice, there was a reasonable probability the plea offer would have been presented to the court; whether the court would have accepted its terms; and whether the conviction or sentence, or both, under the plea offer's terms would have been less severe than under the actual judgment and sentence imposed. Finally, the trial court was directed to make findings of fact as to

whether the performance of trial counsel was deficient and, if so, whether counsel's deficient performance prejudiced Petitioner. Both Angela French Overman (trial counsel) and Brian W. Wice (appellate counsel) submitted affidavits and amended affidavits in order to address Petitioner's claims of ineffective assistance, as did the County Attorney and Assistant County Attorney.

9. On October 10, 2012, the trial court entered its findings on ineffective assistance of counsel, ultimately concluding that trial counsel was not ineffective on the grounds discussed, and that, even if she had been, Petitioner was not prejudiced by counsel's alleged advice regarding the deadly conduct charge.

10. On April 2, 2014, the Court of Criminal Appeals denied Petitioner's writ application without written order.

11. Petitioner filed a Suggestion on May 1, 2014, that the court reconsider on its own motion the denial of the application for a writ of habeas corpus that was denied by the TCCA.

12. Petitioner is deemed to have timely filed the instant petition. The Court understands Petitioner's stated grounds for review to allege fifty-three (53) individual grounds for review that the Court has consolidated for the purpose of its review into the following categories: (1) trial court error; (2) prosecutorial misconduct; (3) illegal arrest; (4) ineffective assistance of counsel at trial; (5) ineffective assistance of counsel on appeal; and (6) other (including allegations that Petitioner was denied an appeal and juror bias).

13. This Court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. §§ 2241 and 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

II. STANDARD OF REVIEW

"The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

Under the Antiterrorism and Effective Death Penalty Act, a petitioner may not obtain habeas corpus relief in federal court with respect to any claim adjudicated on the merits in state court proceedings unless the adjudication of the claim resulted in a decision contrary to clearly established federal constitutional law or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d).

This section creates a "highly deferential standard for evaluating state-court rulings,... which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (*per curiam*) (internal quotation marks omitted).

"In the context of federal habeas proceedings, adjudication 'on the merits' is a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural." *Neal v. Puckett*, 239 F.3d 683, 686 (5th Cir. 2001). In Texas writ jurisprudence, a "denial" of relief usually serves

to dispose of claims on their merits. *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000). *See Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997) (holding that "denial" signifies the Court of Criminal Appeals addressed and rejected the merits of a state habeas claim,[2] while "dismissal" signifies the Court declined to consider the claim for reasons unrelated to the merits).

A state-court factual determination is not unreasonable merely because the federal court would have reached a different conclusion in the first instance. *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013). Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. Petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. *Canales v. Stephens*, 765 F.3d 551, 563 (5th Cir. 2014). When the Texas Court of Criminal Appeals denies relief in a state habeas corpus application without written order, as in this case, it is an adjudication on the merits, which is entitled to this presumption. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997); *Singleton v.*

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[2] *In Ex parte Torres*, the Court of Criminal Appeals stated that "[dispositions relating to the merits should be labeled 'denials' while dispositions unrelated to the merits should be labeled 'dismissals' . . . ." *Id.* at 474. "A disposition is related to the merits if it decides the merits or makes a determination that the merits of the applicant's claims can never be decided." *Id.* (citing *Hawkins v. Evans*, 64 F.3d 543, 547 (10th Cir. 1995) (disposition is considered "on the merits" if the court refuses to determine the merits because of state procedural default)). *Accord Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004).

Johnson, 178 F.3d 381, 384 (5th Cir. 1999) (recognizing this Texas state writ jurisprudence).

Petitioner's burden before this Court is significantly heightened in that Petitioner cannot prevail even if he shows that the state court's determination was incorrect. Petitioner must also show that the state court unreasonably applied federal law or made an unreasonable determination of the facts. *Neal v. Puckett*, 286 F.3d 230, 235 (5th Cir. 2002), *cert*, *denied*, *Neal v. Epps*, 537 U.S. 1104 (2003).

The facts of the case were summarized by the Seventh Court of Appeals sitting in Amarillo, Texas, and such were recited in Respondent's Answer. Petitioner has provided no evidence to refute the summary; therefore, the Court shall not recite the facts again.

III. DISCUSSION

As to each of the issues raised by Petitioner in his petition, this Court looks to whether the Petitioner has shown a federal constitutional violation and prejudice. 28 U.S.C. § 2254(a); *Carter v. Lynaugh*, 826 F.2d 408, 409 (5th Cir. 1987), *cert*, *denied*, 485 U.S. 938 (1988). Errors of state law and procedure are not cognizable unless they result in the violation of a federal constitutional right. *Bridge v. Lynaugh*, 838 F.2d 770, 772 (5th Cir. 1988); *Jamerson v. Estelle*, 666 F.2d 241, 245 (5th Cir. 1982).

After carefully reviewing the state court records and the pleadings, the Court finds that an evidentiary hearing is not necessary to resolve the instant petition. *See Young v. Herring*, 938 F.2d 543, 560 n.

12 (5th Cir. 1991) ("[A] petitioner need not receive an evidentiary hearing if it would not develop material facts relevant to the constitutionality of his conviction.").

As a preliminary matter, the Court notes that Petitioner's 72-page Petition outlining his 53 grounds for review, 113-page memorandum in support, and 98-page reply brief exceed the 25-page limit for a brief and 10-page limit for a reply brief. *See* N.D. Tex. L. Civ. R. 7.2(c) (a brief must not exceed 25 pages (excluding table of contents and table of authorities), and a reply brief must not exceed 10 pages). Because Petitioner's memorandum in support and reply brief are in excess of this page limit, they are in violation of Local Rule 7.2(c). Petitioner's pro se status does not excuse his failure to comply with this Court's Local Rules.

The Court did not strike any of the above-mentioned pleadings at the time of their filing, and the Respondent responded to each claim almost seriatim. Petitioner even apologizes in his memorandum in support for the abundance of grounds and the amount of work that this Court will expend in determining the merits of all of the grounds because he felt them each worthy of review, but he then goes on to brief some of his arguments using styles similar to that of a play or short story.[3] Nevertheless, the Court admonishes Petitioner that raising every possible conceivable issue, however weak or outright frivolous, may have the effect of

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[3] *See e.g.*, Petitioner's Brief in Support section 4, page 4 (Doc. 2 at 94).

diluting any strong arguments that he may have. As the Supreme Court noted in *Jones v. Barnes*, 463 U.S. 745, 752 (1983), in the context of effective assistance of counsel on direct appeal:

> Most cases present only one, two, or three significant questions… Usually,... if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.

In other words, Petitioner's choice to raise so many arguments is about as effective as throwing spaghetti at a wall and just seeing if anything might stick. Nevertheless, the Court has endeavored to review each ground as thoroughly as practicable.

A. Trial Court Error (Grounds 8,14,17, 33)

Petitioner alleges that he is entitled to relief based on the following alleged trial court errors:

(1) the punishment hearing was fundamentally unfair because the trial court relied on unsupported facts when determining his punishment (Ground 8);

(2) the trial was fundamentally unfair because the judge became a witness in the case (Ground 14);

(3) he was denied a full and fair opportunity to litigate a Fourth Amendment claim (Ground 17); and

(4) he was denied a fair trial when the trial court improperly restricted his right to present

evidence of significant probative value (Ground 33).

"[A] state defendant has no constitutional right to an errorless trial." *Bailey v. Procunier*, 744 F.2d 1166, 1168 (5th Cir. 1984). Trial court errors must do more than affect the verdict to warrant relief in habeas cases - they must render the trial as a whole fundamentally unfair. *Id.* To determine whether an error by the trial court rendered the trial fundamentally unfair, it must be determined if there is a reasonable probability that the verdict would have been different had the trial been conducted properly. *Rogers v. Lynaugh*, 848 F.2d 606, 609 (5th Cir. 1988). The United States Supreme Court has held that a federal harmless error standard applies on federal habeas review of state court convictions. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). The test is whether the error had "substantial and injurious effect" or influence in determining the jury's verdict. *Id.* at 637. Habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice. *Id.* Habeas petitioners may not prevail in a federal habeas action simply by showing a violation of state law - they must show that the trial was fundamentally unfair, thus denying them due process by prejudicing the outcome of the trial. *Lavernia v. Lynaugh*, 845 F.2d 493, 496 (5th Cir. 1987).

In Ground 8 of his Petition, Petitioner argues that his punishment hearing was fundamentally unfair because the trial court relied on unsupported facts when determining his punishment. Specifically, Petitioner alleges that the trial court relied on facts that were actually contradicted by the evidence, such

as that Petitioner was fatigued and impaired because of a cocaine crash and ran off the roadway when he hit the victim, when the evidence actually showed that the Petitioner was legally in the roadway when the accident occurred. Respondent points out that the judge mentioned the above matters during the punishment phase, after a verdict had been entered and Petitioner had already been found guilty of aggravated assault with a deadly weapon. Respondent further notes that the thirty-year sentence he received was within the range of punishment for a first degree felony with a deadly weapon, enhanced by a prior conviction. Indeed, the Court notes that Petitioner's sentence was on the lower end of the range for sentencing, when he could have received up to ninety-nine years' imprisonment and a $10,000.00 fine pursuant to Tex. Code Crim. Proc. art. § 12.42(b). In his objection, Petitioner places special emphasis on his contention that because the matters mentioned by the trial court in sentencing were likely the same as those relied upon by the jury in reaching the guilty verdict, the trial court's rationale necessarily rendered the entire trial unfair. On the contrary, the trial court's reliance on the supposedly unsupported facts in assessing a thirty-year sentence in no way impacted the verdict in the case. Petitioner is not entitled to relief on this ground.

In Ground 14 of his Petition, Petitioner argues that the trial was fundamentally unfair because the judge became a witness in the case. Specifically, Petitioner contends that when the judge read the jury charge to the jury, informing them that Banister had been convicted of other offenses when no such evidence was admitted during the course of the trial, the judge

became the "functional equivalent" of a witness in the case and effectively abandoned his role as a "neutral arbiter and assumed the position of an active participant when he conveyed factual information to the jury that was neither admitted or [sic] admissible." At issue is the special instruction contained in the jury charge:

> You are instructed that certain evidence was admitted before you in regard to the defendant's having been charged and convicted of offenses other than the one for which he is now on trial. You are instructed that such evidence cannot be considered by you against the defendant as any evidence of guilt in this case. Said evidence was admitted before you for the purpose of aiding you, if it does aid you, in passing upon the credibility of the defendant as a witness for himself in this case, and to aid you, if it does aid you, in deciding upon the weight you will give to him as such witness, and you will not consider the same for any other purpose.

Pet'r Exhibit 3 at p. 2. Petitioner argues that the above instruction falsely informed the jury of other charged offenses resulting in conviction, when in fact no evidence of other convictions was ever admitted into evidence, and thus the trial judge was effectively testifying as a witness to those convictions, which was highly inflammatory and inherently prejudicial. In other words, Petitioner contends that the jury was not aware, until the trial court informed them, that Petitioner had a prior conviction.

Respondent counters that Petitioner has failed to demonstrate how the reading of the charge

transformed the judge into a witness or illustrated any sort of bias towards him, arguing that he has not overcome the presumption that the judicial officer is unbiased. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). Respondent presumes that Petitioner is "upset that the judge read a limiting instruction to disregard any evidence of prior conviction." Respondent further notes that the state habeas court held a hearing in response to Petitioner's motion to disqualify the judge wherein it was noted that evidence of extraneous offenses was admitted at trial.[4] Therefore, Petitioner has failed to show that the judge reading aloud the limiting instruction amounted to the judge acting as a witness for the state. In his reply, Petitioner argues that the extraneous offense evidence is irrelevant to this ground because the extraneous offense is not a conviction. Petitioner further argues that the evidence of prior convictions, presented by the judge as a witness, was inherently highly prejudicial evidence that would prejudice a person's ability to receive a fair and impartial trial. The Court disagrees. Even if Petitioner is correct that the judge's reading of the special instruction was error, he has not provided any authority, and the Court can find none, to support the conclusion that reading the instruction transformed

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[4] Such evidence was in the form of testimony by witnesses Deputy Wilson and Brian Cantrell who testified that Petitioner said he had been charged with intoxication manslaughter. SHCR-03 at 1389. "There was also testimony about the defendant "possibly leaving the scene of an accident where a person was killed, which would be another offense. Talked about the defendant drinking six or eight beers the day before. And then also there was testimony about the defendant using cocaine in Lubbock County, Texas." SHCR-03 at 1389.

the judge into a witness. Further, even if he could be characterized as a witness based upon the limiting instruction, Petitioner has not shown that the jury, upon hearing that Petitioner was convicted of an unspecified offense, placed significant weight on that information such that the information had a "substantial and injurious effect" or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). Petitioner is not entitled to relief on this ground.

In Ground 17 of his Petition, Petitioner alleges that he was denied a full and fair opportunity to litigate a Fourth Amendment claim concerning blood evidence when the trial court improperly relied on the Texas implied consent law to overrule his motion to suppress. In support of his claim, Petitioner argues that he was never arrested and thus the Fourth Amendment, rather than the implied consent law, applied. In Response, the State counters that Petitioner did have an opportunity to and in fact did challenge the search and seizure on Fourth Amendment grounds by filing a motion to suppress in the trial court alleging that he was arrested without a warrant and without probable cause, that the results of all tests taken after his arrest were the fruits of an illegal search, that Petitioner failed to consent to the seizure of his blood, and that tangible evidence seized in connection with this case was seized without a warrant or probable cause. In his reply, Petitioner disputes Respondent's argument, urging the Court to find that he did not receive a full and fair opportunity to litigate his Fourth Amendment claim due to a combination of trial counsel's failure to be aware of the facts of the case (which would have led Petitioner and

the witness Delacruz to testify in support of the motion), the prosecutor's misleading the trial court into believing that the implied consent law applied to his case, and consequently the trial court's failure to rule based on the appropriate constitutional standard.

As correctly pointed out by Respondent, the case of *Stone v. Powell*, 428 U.S. 465 (1976), bars federal habeas review of Petitioner's alleged violation of the Fourth Amendment. In *Stone v. Powell*, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494. The Fifth Circuit has since interpreted an "opportunity for full and fair litigation" to mean just that: "an opportunity." *Janecka v. Cockrell*, 301 F.3d 316, 320 (5th Cir. 2002) (*citing Caver v. Alabama*, 577 F.2d 1188, 1192 (5th Cir. 1978)), *cert. denied*, 537 U.S. 1196 (2003). "If a state provides the processes whereby a defendant can obtain full and fair litigation of a[F]ourth [A]mendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes." *Id.*

Petitioner's defense attorney filed a motion to suppress the State's evidence, and the trial court overruled the motion after conducting a hearing outside the presence of the jury. Although not raised on direct appeal, Petitioner attempted to re-litigate his Fourth Amendment claims on state habeas corpus review, and such claims were denied without written order. The record confirms that he was afforded ample

opportunity for review of his Fourth Amendment claims at the state level. This review is sufficient to trigger the Stone bar. *See Janecka*, 301 F.3d at 320; *see also Moreno v. Dretke*, 450 F.3d 158, 167 (5th Cir. 2006) ("absent a showing that... Texas courts systematically and erroneously apply the state procedural bar rule to prevent adjudication of Fourth Amendment claims," the Stone bar obtains). Petitioner is not entitled to relief on this ground.

In Ground 33 of his Petition, Petitioner claims that he was denied a fair trial when the trial court improperly restricted his right to present evidence of significant probative value. Specifically, Petitioner complains that the trial court refused to allow counsel to inform the jury about the wind conditions at the time of the accident by way of a weather report for Lubbock, Texas, on the day of the accident, despite the fact that the State had "opened the door" to such testimony because numerous State witnesses testified that it was not windy at the time of the accident. In support of his argument, Petitioner claims that the weather report conflicted with their statements and that such evidence would have called into question not only these witnesses' credibility, but also the accuracy of their remembrance of the day's events.

Respondent argues that Petitioner has failed to prove that the trial court's decision "had a substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)), because he has not demonstrated that such evidence would have been favorable to him, especially in light of the fact that if trial counsel had been able to admit such evidence, the

State would have been able to submit additional, potentially unfavorable wind-related evidence in response.

"A state court's evidentiary rulings present cognizable habeas claims only if they run afoul of a specific constitutional right or render the petitioner's trial fundamentally unfair." *Johnson v. Puckett*, 176 F.3d 809, 820 (5th Cir. 1999) (*citing Cupit v. Whitley*, 28 F.3d 532, 536 (5th Cir. 1994)). "The failure to admit evidence amounts to a due process violation only when the omitted evidence is a crucial, critical, highly significant factor in the context of the entire trial." *Id.* at 821 (*citing Thomas v. Lynaugh*, 812 F.2d 225, 230 (5th Cir. 1987). Petitioner has not demonstrated that evidence regarding the wind speed on the day of the accident would have been favorable to him or that its exclusion was harmful in the context of the entire trial. Accordingly, it cannot be said the exclusion of the evidence had a substantial and injurious effect or influence on the jury's verdict. Petitioner is not entitled to relief on this claim.

In sum, with respect to Petitioner's claims of trial court error, the Court finds that Petitioner states no violation of federal law or of his due process rights under the federal Constitution. The state court's determination of these habeas claims was not contrary to or an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence. See 28 U.S.C. § 2254(d).

B. **Prosecutorial Misconduct (Grounds 15, 22, 34, 35, 46, 47)**

Petitioner alleges that he is entitled to relief based on the following alleged instances of prosecutorial misconduct:

(1) the State knowingly sponsored false testimony and failed to correct the Judge's false testimony to the jury (Ground 15);

(2) the State failed to disclose coercive inapplicable written warnings (DIC-24 Form) given to Petitioner by Deputy Ojeda (Ground 22);

(3) the State used incriminating statements that were the product of an impermissible custodial interrogation (Ground 34);

(4) the State used evidence obtained from the police by their deliberate elicitation of statements from Petitioner after his right to counsel had attached (Ground 35);

(5) the cumulative effect of prosecutorial misconduct rendered the proceedings fundamentally unfair (Ground 46); and

(6) the cumulative effect of the State's misconduct coupled with the ineffective assistance of trial counsel rendered the proceedings fundamentally unfair (Ground 47).

"Prosecutorial misconduct is not a ground for [habeas] relief unless it casts serious doubt upon the correctness of the jury's verdict." *See Styron v. Johnson*, 262 F.3d 438, 449 (5th Cir. 2001). A prosecutorial misconduct claim requires a court to consider three factors: "1) the magnitude of the

prejudicial effect of the [prosecutorial action]; 2) the efficacy of any cautionary instruction given by the judge; and 3) the strength of the evidence supporting the conviction." *Id.* "Only where improper prosecutorial [comments] substantially affect the defendant's right to a fair trial do they require reversal." *Id.*

In Ground 15 of his Petition, Petitioner argues that the State knowingly sponsored false testimony and failed to correct the Judge's false testimony to the jury when he gave the special instruction contained in the jury charge that they had heard evidence that Petitioner had been convicted of offenses other than the one for which he was then on trial. This Ground is merely a restatement of the claim made in Ground 14, and the Court finds that for the reasons stated in its discussion of that Ground 14, Petitioner is not entitled to relief on this ground.

In his Ground 22, Petitioner claims that the prosecution failed to disclose evidence favorable to his defense in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), when the State failed "to disclose coercive inapplicable written warnings (DIC-24 Form) given to [Petitioner] by Deputy Ojeda." In other words, Petitioner contends that he was coerced into signing a consent form for a blood draw after Deputy Ojeda transported him to the hospital and gave him verbal and written warnings (that his driver's license would be automatically suspended if he refused) that applied only in the event of his arrest for an offense involving the operation of a motor vehicle. Petitioner further argues that pursuant to Trooper Ponce's testimony, the record reflects that he was not actually arrested and therefore the warnings given by Deputy Ojeda

were inapplicable, his consent was invalid, and the blood evidence that was used to procure his conviction should not have been admitted into evidence.

In his discursive Petition and brief in support, Petitioner attacks the blood evidence from several angles that seem to be interwoven. In this ground, Petitioner specifically cites to *Brady v. Maryland* and its progeny to support his contention that the DIC-24 was favorable to his defense and, if it had been disclosed to trial counsel, she would have been able to successfully challenge the admission of the blood evidence. In Respondent's Answer, Respondent grouped all of Petitioner's grounds regarding the blood evidence into one argument pertaining to Fourth Amendment grounds and relied on *Stone v. Powell*, 428 U.S. 465 (1976), to support the argument that Petitioner's claims are not cognizable on federal habeas review because the state of Texas affords an opportunity for full and fair litigation of such a claim and pointing out that Petitioner did in fact litigate his claim in a motion to suppress. Respondent did not, however, address the claim under Brady.

All criminal defendants have a constitutionally protected privilege to request and obtain from the prosecution any exculpatory evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. *California v. Trombetta*, 467 U.S. 479, 485 (1984) (*citing Brady v. Maryland*, 373 U.S. at 87). "Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt." *Id.*

There are three elements of a *Brady* claim: (i) the evidence at issue is favorable to the accused, (ii) the State suppressed the evidence, and (iii) prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 280. Evidence is material if it would have put the whole case in such a different light as to undermine confidence in the verdict. *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006). "*Brady* does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence." *Kutzner v. Cockrell*, 303 F.3d. 333, 336 (5th Cir. 2002).

Brady claims involve "the discovery, *after trial* of information which had been known to the prosecution but unknown to the defense." *Agurs*, 427 U.S. 97, 103 (1976) (emphasis added). Federal courts have long held that evidence uncovered at trial does not form the basis for a Brady claim. *See Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994) (holding there was no basis for a *Brady* claim where the defense learned of several variances between the victim's written statement given immediately following the crime and her trial testimony when the variance was discovered at trial and the defense fully cross-examined the victim on the variance); *United States v. McKinney*, 758 F.2d 1036, 1049-50 (5th Cir. 1985) (holding that the prosecution did not suppress evidence where Brady materials were disclosed at trial and reasoning that "[i]f the defendant received the material in time to put it to effective use at trial, his conviction should

not be reversed simply because it was not disclosed as early as it might have, and indeed, should have been").

At the outset, the Court notes that Petitioner has failed to demonstrate how the DIC-24 constituted exculpatory evidence. Moreover, even if it is Petitioner's contention that he did not discover until Trooper Ponce's testimony during the trial that he was not, in fact, under arrest at the time that Deputy Ojeda gave him the admonishments and had him sign the DIC-24, such "evidence" does not constitute a Brady claim because it was discovered at trial. Petitioner is not entitled to relief on this ground.

In his Ground 34, Petitioner alleges that the State committed prosecutorial misconduct when it used incriminating statements that were the product of an impermissible custodial interrogation by Deputy Shaun Wilson, a jailer and sheriffs deputy who transported Petitioner and another prisoner to a health clinic. In his ground 35, Petitioner again takes issue with the testimony of Deputy Shaun Wilson but here argues that the State improperly used evidence obtained from the police by their deliberate elicitation of statements from Petitioner after his Sixth Amendment right to counsel had attached. The incriminating statements Petitioner refers to were described in detail in the opinion of the Seventh Court of Appeals:

During trial the State sought to introduce testimony from Lamb County deputy sheriff Shaun Wilson that appellant had made a statement indicating he had used cocaine within a day before the collision. After voir dire of Wilson the defense objected on the basis the statement was the result of custodial

interrogation without "proper warnings," in violation of his right to counsel, and the State had failed to give timely notice of its intent to call Wilson. The trial court overruled the objections. Wilson testified that while appellant was confined in the Lamb County jail in November 2003 he took appellant and another inmate to a clinic for medical treatment. According to Wilson, in the clinic's waiting room, while appellant was "talking in general to the other inmate and maybe a nurse ... I happened to ask him what he was incarcerated for." Appellant replied "he was being charged with intoxicated Manslaughter." Wilson asked if the events occurred near the town of Earth. Appellant said it "happened on [highway] 84 up by Amherst." After further defense objections the court recessed for the evening to give the defense the opportunity to investigate the testimony.

The State recalled Wilson during rebuttal.[5] Wilson was asked again about appellant's answer to his first question and replied: "He responded that he was in jail for Intoxicated Manslaughter." Wilson testified appellant then "stated that he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine the day before." Wilson testified he did not document the statement at the time or take any steps then to make an investigator or prosecutor working on the case aware of it. The prosecutor only learned of the statement during a lunchtime conversation the Friday before trial. The prosecutor asked Wilson to reduce his recollection of the event to

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[5] A defense expert testified that no conclusion could be drawn about when appellant consumed cocaine based on the analysis of his blood.

writing and provided a copy to defense counsel the same afternoon.

The State's rebuttal evidence also included testimony from Brian Cantrell, the other inmate at the clinic. Cantrell's testimony supported Wilson's version of events. He recalled that appellant asked Wilson, "How can they charge me with Intoxication Manslaughter when I wasn't drunk, when I was on cocaine at the time. According to Cantrell that statement was not in response to questioning by Wilson.

Banister v. State, slip op. at 2-4.

Petitioner contends that as a result of the allegedly improper custodial interrogation by Wilson, the jury was able to hear that he had admitted to using cocaine and also "that he was the one who ran over" the cyclist, and he places special emphasis on the variations of Wilson's recollection of Petitioner's statements during the conversation. For instance, at one point, Wilson said that Petitioner "stated that he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine the day before" (5 RR 209); during cross-examination Wilson testified that Petitioner "stated that... he had used cocaine earlier." (5 RR 211-212).

Respondent notes that the appellate court found that Wilson's statement was not the product of a custodial interrogation in violation of Petitioner's Fifth and Sixth Amendment rights and argues that the appellate court's findings are entitled to deference, as it is the last reasoned state court opinion. *Ylst v. Nunnebaker*, 501 U.S. 797, 803 (1991). In his Response, Petitioner argues that the appellate

court applied the wrong standard, using the Fifth Amendment custodial interrogation standard of review to his Sixth Amendment claim, instead of the standard of review set out in *Fellers v. United States*, 540 U.S. 519 (2004), and *Massiah v. United States*, 377 U.S. 201 (1964), and that such failure made the state court's conclusion objectively unreasonable.

The Sixth Amendment rubric announced in *Massiah v. United States* held that a defendant may not have "used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. 201, 206 (1964). "A *Massiah* violation has three elements: (1) the Sixth Amendment right to counsel has attached; (2) the individual seeking information from the defendant is a government agent acting without the defendant's counsel's being present; and (3) that agent 'deliberately elicit[s]' incriminating statements from the defendant." *Henderson v. Quarterman*, 460 F. 3d 654, 664 (5th Cir. 2006) (alteration in original) (quoting *Massiah*, 377 U.S. at 206). Although Wilson did ask Petitioner why he was in jail, he did not ask him any iteration of "what he did." Moreover, Petitioner has not and can not show that Wilson's question regarding what he was in jail for was in any way designed to elicit the incriminating response that he had used cocaine [earlier/the day before]. Indeed, the Court notes that although Wilson asked what he was in jail for, and Petitioner responded, "Intoxicated Manslaughter," there is nothing in the record to suggest that Wilson knew, or could have known, that Petitioner would expand on his answer with the additional information that he

could not understand how he could be facing charges of intoxication manslaughter when he had used cocaine. Petitioner is not entitled to relief on these grounds.

In his Ground 46 and 47, Petitioner argues that the cumulative effect of prosecutorial misconduct rendered the proceedings fundamentally unfair and also that the cumulative effect of the State's misconduct coupled with the ineffective assistance of trial counsel rendered the proceedings fundamentally unfair. As the Court has concluded that Petitioner's claims of prosecutorial misconduct are without merit, Petitioner is not entitled to relief on these grounds.

For the reasons stated above, with respect to Petitioner's claims of prosecutorial misconduct, the Court finds that Petitioner states no violation of federal law or of his due process rights under the federal Constitution. The state court's determination of these habeas claims was not contrary to or an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d).

C. Illegal Arrest (Grounds 19, 20, and 21)

Petitioner alleges that he is entitled to relief based upon the circumstances of his arrest/detention, which led to the blood draw:

(1) his consent to the blood search was the product of an illegal detention or illegal arrest (Ground 19);

(2) DPS Trooper Manuel Ponce misinformed him that it was "mandatory" that he submit to blood withdrawal (Ground 20); and

(3) Deputy Ojeda misstated the consequences flowing from a refusal to submit to the blood withdrawal (Ground 21).

In support of these grounds, Petitioner refers to testimony of Trooper Ponce, who testified that after the accident he did not suspect Petitioner to be under the influence of alcohol or drugs and that he did not appear to be sleepy or fatigued, but he would have detained Petitioner if he had tried to leave the scene. Ponce also testified that he believed it was mandatory that a blood sample be drawn from the driver. Petitioner notes that Abel Delacruz's affidavit supported Petitioner's belief that he was ordered into the police vehicle and told that it was mandatory, and that Petitioner would not have gotten into the vehicle if he had not been ordered to do so after Ponce took his driver's license. Moreover, Petitioner again raises the matter of Deputy Ojeda giving him allegedly inapplicable warnings from the DIC-24 Form, causing his consent to be involuntary.

These grounds are merely restatements of his Fourth Amendment claims that have already been analyzed in this opinion with regard to his Ground 17. For the reasons stated in that section and in the Respondent's Answer, the Court finds that Petitioner has also failed to demonstrate that the state court's denial of his claims regarding the circumstances surrounding the drawing of blood evidence was contrary to or an unreasonable application of clearly

established Supreme Court law. Petitioner is not entitled to relief on these grounds.

D. Ineffective Assistance of Trial Counsel

Twenty-eight of Petitioner's fifty-three grounds for review concern various instances of alleged ineffective assistance of trial counsel. Specifically, Petitioner argues that his trial counsel, Angela Overman, nee French, was constitutionally ineffective because she

(1) failed to move for a directed verdict (Ground 3);

(2) failed to move to strike the State's expert testimony of D.P.S. toxicologist, Kathy Erwin, when she failed to "connect it up" (Ground 4);

(3) failed to object to the State's improper arguments (Ground 5);

(4) failed to educate the jury on the State's burden of proof as it related to the "as a result of the introduction of cocaine into the body" element contained in the indictment (Ground 7);

(5) failed to request a jury instruction on the lesser-included offense of reckless driving (Ground 10);

(6) failed to object to the trial court's charge instructing the jury that Petitioner had been convicted of other offenses (Ground 11);

(7) failed to object to the trial court's charge instructing the jury to use prior convictions to evaluate Petitioner's credibility when he

exercised his constitutional right not to testify (Ground 12);

(8) failed to object to the prosecutor's improper argument that the Texas implied consent law applied in his case (Ground 18);

(9) failed to speak with Deputy Ojeda about the written and oral warnings he gave Petitioner prior to extracting his blood (Ground 23);

(10) failed to object to the trial court's holding that his blood draw was done by a qualified individual (Ground 24);

(11) stipulated to the chain of custody on the blood evidence (Ground 25);

(12) failed to object to the State's failure to satisfy its burden of proof with regard to warrantless searches (Ground 26);

(13) failed to file a timely motion to suppress the blood evidence within the trial court's timeline (Ground 27);

(14) affirmatively stated "no objection" to the admission of the blood evidence (Ground 28);

(15) failed to speak with witness Abel Delacruz until the third day of trial (Ground 29);

(16) called witness Abel Delacruz as a witness, consequently establishing elements of the State's case (Ground 30);

(17) failed to investigate the wind conditions at the time of the accident (Ground 31);

(18) failed to request a continuance in order to validate the information contained in the weather report (Ground 32);

(19) failed to properly preserve the trial record for appellate review of Petitioner's Sixth Amendment right to counsel claim (Ground 36);

(20) failed to enlist the services of a guilt/innocence fact investigator (Ground 40);

(21) failed to conduct an investigation into the facts and the law of the case (Ground 41);

(22) failed to impeach the State's accident reconstruction expert, Trooper Phillip Vandergrift, with his inconsistent testimony (Ground 42);

(23) failed to consult or hire an independent accident reconstruction expert (Ground 43);

(24) failed to adequately consult with Petitioner prior to trial (Ground 44);

(25) erroneously informed Petitioner that he was eligible for probation (Ground 49);

(26) failed to object to the admission of the accident reconstruction evidence that was obtained as a result of the authorities' illegal detention of a vehicle without probable cause (Ground 50); and

(27) failed to object when the State called witnesses Brian Cantrell and Deputy Wilson as rebuttal witnesses (Ground 51).

Petitioner further asserts that the cumulative effect of trial counsel's errors rendered the proceedings fundamentally unfair (Ground 45).

"The Sixth Amendment guarantees criminal defendants the effective assistance of counsel." *Yarbrough v. Gentry*, 540 U.S. 1, 5 (2003). The proper standard for reviewing a claim of ineffective assistance of trial counsel is enunciated in *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Under the two-pronged *Strickland* standard, Petitioner must show that defense counsel's performance was both deficient and prejudicial. *Id.* at 687. An attorney's performance was deficient if the attorney made errors so serious that the attorney was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment to the United States Constitution. *Id.* That is, counsel's performance must have fallen below the standards of reasonably competent representation as determined by the norms of the profession. A reviewing court's scrutiny of trial counsel's performance is highly deferential, with a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 689. Strategic choices made after a thorough investigation of both the law and facts are "virtually unchallengeable." *Id.* at 690-91. This is a heavy burden that requires a "substantial," and not just a "conceivable," likelihood of a different result. *Harrington v. Richter*, 562 U.S. 86 (2011); *see also Cullen v. Pinholster*, 563 U.S. 170 (2011).

Additionally, Petitioner must show that counsel's deficient performance prejudiced the defense. To establish this prong, Petitioner must show that counsel's errors were so serious as to deprive

Petitioner of a fair trial. *Strickland*, 466 U.S. at 687. Specifically, to prove prejudice, Petitioner must show that "(1) there is a reasonable probability that, but for counsel's unprofessional errors, the ultimate result of the proceeding would have been different... and (2) counsel's deficient performance rendered the trial fundamentally unfair." *Creel v. Johnson*, 162 F.3d 385, 395 (5th Cir. 1998). "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). A showing of significant prejudice is required. *Spriggs v. Collins*, 993 F.2d 85, 88 n. 4. (5th Cir. 1993). If a petitioner fails to show either the deficiency or prejudice prong of the *Strickland* test, then the Court need not consider the other prong. *Strickland*, 466 U.S. at 697.

When a state prisoner asks a federal court to set aside a conviction or sentence due to ineffective assistance of counsel, the federal court is required to use the "doubly deferential" standard of review that credits any reasonable state court finding of fact or conclusion of law and that presumes that defense counsel's performance fell within the bounds of reasonableness. *Burt v. Titlow*, U.S., 134 S. Ct. 10, 13, 187 L. Ed. 2d 348 (2013). Petitioner's ineffective-assistance-of-counsel claims were adjudicated on the merits in a state court proceeding, and the denial of relief was based on a factual determination that will not be overturned unless it is objectively unreasonable in light of the evidence presented in the state court proceeding. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

In his Ground 3, Petitioner argues that trial counsel rendered ineffective assistance by failing to move for a directed verdict on the grounds that the State failed to prove that the accident occurred "as a result of the introduction of cocaine into his body." The indictment charged Petitioner with aggravated assault with a deadly weapon by intentionally, knowingly, or recklessly causing serious bodily injury to B.J. Mitchell by failing to control a motor vehicle without sufficient sleep, as a result of the introduction of cocaine into his body and thereby causing his motor vehicle to collide with B.J. Mitchell. In support of his contention, he points to the record wherein both the State's expert (DPS Chemist Kathy Erwin) and defense expert (Dr. James Booker) testified generally as to the "cocaine crash" effect but affirmatively testified that they could not conclude based on the evidence that Petitioner was experiencing "cocaine crash" at the time of the incident.

Respondent argues that the State's determination of this claim was not unreasonable, given that trial counsel moved for a mistrial based on the argument that the evidence was insufficient to prove the introduction of cocaine and that such motion for mistrial was denied. Moreover, the State argues that Petitioner has failed to show that the evidence was so meager that a directed verdict would have been granted. Consequently, Petitioner has shown neither deficiency nor prejudice. Petitioner objected to this argument, placing special emphasis on the fact that trial counsel's first affidavit in his state habeas proceedings reflected an incorrect recollection of Erwin's testimony regarding the cocaine crash. Petitioner also contends that the only evidence

presented was so weak that the only way the jury could have found him guilty was based upon an impermissible surmise or suspicion and, as such, the trial court would have been bound by law to enter a verdict of not guilty following proper motion for directed verdict.

Although the expert testimony did not conclude that Petitioner was, in fact, experiencing a "cocaine crash" at the time of the accident, it is the jury's unique role to judge the credibility of witnesses, evaluate witnesses' demeanor, resolve conflicts in testimony, and weigh the evidence in drawing inferences from basic facts to ultimate facts. *Tibbs v. Florida*, 457 U.S. 31, 45 n. 21 (1982); *United States v. Millsaps*, 157 F.3d 989, 994 (5th Cir. 2009). Indeed, the record reflects that evidence was presented to support the allegation that the accident was the result of the introduction of cocaine into Petitioner's body.

Finally, even if Petitioner could somehow demonstrate that failure to move for a directed verdict was deficient, he has not shown that he was prejudiced by that failure, given that trial counsel made the argument in her motion for mistrial and it was denied. Trial counsel did not render ineffective assistance by not raising a meritless motion, and Petitioner has failed to show that but for counsel's actions, the result of the proceeding would probably have been different. *See Parr v. Quarterman*, 472 F.3d 245, 256 (5th Cir. 2006) (counsel is not ineffective for failing to raise meritless claims); *Smith v. Dretke*, No. 4:04-cv-4122, 2006 U.S. Dist. LEXIS 47215 (S.D. Tex., June 30, 2006) (failure to file meritless motion to dismiss is not ineffective assistance of counsel). Petitioner's claim on this point is without merit.

In his Ground 4, Petitioner argues that trial counsel was ineffective for failing to move to strike the State's expert testimony of D.P.S. toxicologist, Kathy Erwin, when she failed to "connect it up." In support of this ground, Petitioner argues that the trial court conditionally allowed Erwin to testify regarding the "cocaine crash" effect, finding that "[b]efore she can give testimony as to the crash effect she's going to have to establish some way that she can tell from these tests that he would be suffering from the crash effect...." (5 RR 38). Respondent argues in response that trial counsel did object to the testimony and moved for a mistrial; however, Petitioner objects to Respondent's answer on this ground because he asserts that Respondent misconstrued this claim. The Court agrees that Respondent did not directly address the allegation that trial counsel failed to specifically move to strike the testimony based on Erwin's failure to connect it up; however, assuming arguendo that failure of trial counsel to move to strike such testimony was deficient, it does not necessarily follow that Petitioner is entitled to relief. As previously explained, in addition to showing that his counsel's performance was deficient, Petitioner must also show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Petitioner is not entitled to relief on this ground.

Petitioner has raised nine (9) instances where he contends that trial counsel was deficient for failing to object (or made an affirmative statement that she had no objection). Specifically, he asserts that trial counsel failed to object to the State's improper arguments

(Ground 5); the trial court's charge instructing the jury that Petitioner had been convicted of other offenses (Ground 11); the trial court's charge instructing the jury to use prior convictions to evaluate Petitioner's credibility when he exercised his constitutional right not to testify (Ground 12); the prosecutor's improper argument that the Texas implied consent law applied in his case (Ground 18); the trial court's holding that his blood draw was done by a qualified individual (Ground 24); the State's failure to satisfy its burden of proof with regard to warrantless searches (Ground 26); the admission of the accident reconstruction evidence, which was obtained as a result of the authorities' illegal detention of a vehicle without probable cause (Ground 50); and the State's calling Brian Cantrell and Deputy Wilson as rebuttal witnesses (Ground 51). Finally, Petitioner argues that trial counsel's affirmative statement of "no objection" to the admission of the blood evidence was ineffective assistance of counsel (Ground 28).

The Fifth Circuit continues to adhere to the rule that "the failure to 'raise meritless objections is not ineffective lawyering." *Halley v. Thaler*, 448 Fed. Appx. 518, 524 (5th Cir. 2011) (*citing Clark v. Collins*, 19 F.3d 959, at 966 (5th Cir. 1994)). Even with a basis to object, however, an attorney may render effective assistance despite a failure to object when the failure is a matter of trial strategy. *See Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) (noting that a failure to object may be a matter of trial strategy as to which courts will not second-guess counsel). Failure to make frivolous objections does not cause counsel's performance to fall below an objective level of

reasonableness. *See Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998). On habeas review, federal courts do not second-guess an attorney's decision through the distorting lens of hindsight, but rather the courts presume that counsel's conduct falls within the wide range of reasonable professional assistance and under the circumstance that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

Relying on the trial record and trial counsel's affidavit and amended affidavit, the Texas Court of Criminal Appeals denied Petitioner's state habeas application and his claims of ineffective assistance of trial counsel. The Court has considered the pleadings, counsel's affidavits, and the state court records, and finds that Petitioner has failed to demonstrate that any of the objections above would have been granted or that, had they been raised or granted, there was a reasonable probability that the outcome of the trial would have been different. Petitioner has also failed to demonstrate that the state court's denial of his claims regarding trial counsel's failure to object to the specific instances listed in his grounds was contrary to or an unreasonable application of clearly established Supreme Court law. Petitioner is not entitled to relief on these grounds.

In his Ground 7, Petitioner argues that trial counsel was ineffective for failing to educate the jury on the State's burden of proof related to the "as a result of the introduction of cocaine into the body" element contained in the indictment. Petitioner contends that trial counsel herself did not understand that element noting that there was discussion on the first day of trial that resulted in agreement between

trial counsel, the State, and the trial court that it was an independent element that the State had the burden of proving. Petitioner asserts that the jury was not privy to this conversation or provided any clarification that the cocaine element had to be proved apart from the other elements of the indictment. Petitioner argues that the lack of education by defense counsel "reasonably likely resulted in the jury not knowing that the state had to prove that not only did [Petitioner] suffer a cocaine crash, but that the cocaine crash was the proximate cause of the collision." Doc. 1, p. 21. In other words, Petitioner claims that trial counsel was ineffective for failing to direct the jury to the fact that they had to find him guilty of every element of the crime with which he was charged. In support of this ground, Petitioner points to (1) the jury's request to see the board with proof of elements; (2) a letter and affidavit from Juror Garcia, which stated that the jury's decision was based on whether Petitioner ran over the person instead of whether the accident occurred as a result of the introduction of cocaine into the body, and that the jury had questions and wanted clarification; (3) the fact that trial counsel, the court, and the prosecution couldn't readily understand the same language of the indictment that was given in the jury charge; and (4) the fact that the jury returned a guilty verdict despite the absence of any evidence establishing that Petitioner suffered a cocaine crash or that cocaine was the proximate cause of the accident. In sum, Petitioner contends that given the absence of any proof by the State of the causal connection between the inactive metabolite in his system and the collision, it is reasonably likely that had defense counsel

properly educated the jury on the "as a result of cocaine" element, the jury would have returned a verdict of not guilty.

Respondent notes that the record directly contradicts Petitioner's assertion that trial counsel did not educate the jury on the State's burden of proof, quoting trial counsel's closing argument. The Court does not repeat the specific quote here; however, it is abundantly clear that trial counsel did in fact explain every element that was required to be proved by the State in her closing argument and admonished the jury that there was reasonable doubt that cocaine was in his system at the time he operated the vehicle. Petitioner has failed to demonstrate that counsel was ineffective in this ground or that the state court's determination of this habeas claim was contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this ground.

In his Ground 10, Petitioner argues that trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of reckless driving. In support of his claim, Petitioner argues that there was more than a scintilla of evidence that if he was guilty, he was guilty only of reckless driving; and he asserts that the jury requested to "add guilty by reckless" as an option. Petitioner avers that if counsel had requested the instruction, the court would have been bound by law to give it, and the jury would have had a third choice, other than guilty of aggravated assault or acquittal. Moreover, Petitioner complains that he does not remember counsel making the

request and that, if she did, her failure to make sure it was on the record meant the issue was not preserved for appeal. Respondent counters that counsel stated in her affidavit in the state habeas proceeding that she did request reckless driving and simple assault during the charge conference, which was not on the record. Respondent also argues that Petitioner has failed to demonstrate that if he is guilty, he is guilty only of reckless driving. Respondent also notes that trial counsel provided her strategic reasons for her actions with regard to the lesser-included offense instructions in her affidavit.

The Court finds that Petitioner has failed to demonstrate that trial counsel's actions with regard to the lesser-included offense instructions were not strategic and has therefore not demonstrated that the state court's adjudication of his ineffective-assistance-of-counsel complaints was contrary to or an unreasonable application of clearly established Supreme Court law. Accordingly, Petitioner is not entitled to relief on this ground.[6]

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[6] Moreover, to the extent that Petitioner argues that the trial court would have been bound by law to give the reckless driving instruction, it is well settled that in a noncapital case "the failure to give an instruction on a lesser included offense does not raise a federal constitutional issue." *Creel v. Johnson*, 162 F.3d 385, 390 (5th Cir. 1998) (citation omitted); *see also Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988); *Alexander v. McCotter*, 775 F.2d 595, 601 (5th Cir. 1985) (holding lesser included offense instruction is not a federal constitutional matter in non-capital cases). The Texas Court of Criminal Appeals denied this claim. Absent a violation of the Constitution, we defer to the state court interpretation of its law for whether a lesser-included-offense instruction is warranted. *See Valles*, 835 F.2d at 128. It is beyond this Court's habeas authority to question a state-court judgment

In his Ground 23, Petitioner avers that trial counsel was ineffective for failing to speak to Deputy Ojeda about the written and oral warnings he gave to Petitioner prior to extracting his blood. Petitioner claims that if she had, she would have discovered that the warnings given to Petitioner prior to the blood draw were inapplicable and thus it was reasonably likely that she would have challenged the admission of the blood evidence. Respondent counters that this assertion is refuted by trial counsel's affidavit and the evidence in the record wherein she stated that to her recollection she did speak to Ojeda. This is further evidenced by the fact that trial counsel filed a motion to suppress the blood evidence. In his Reply, Petitioner argues that Respondent has misconstrued his claim and fails to address his allegation that had trial counsel spoken with Ojeda, she would have discovered that the warnings given to him prior to the blood draw were inapplicable, which caused her to fail to object to the evidence on that specific basis. Petitioner also argues, essentially, that trial counsel's affidavits were inconsistent and therefore unreliable.

"Mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983). Petitioner's contention that trial counsel's affidavits are wholly unreliable, even after the original affidavit was amended, is conclusory. Moreover, even if the Court were to conclude that counsel failed to speak to

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on the state-court jury instruction issue when no constitutional question exists. *Wood v. Quarterman*, 503 F.3d 408, 413 (5th Cir. 2007) (*quoting McGuire*, 502 U.S. 62, 67-68 (1991)) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Ojeda and that such failure was deficient on this ground (which it does not), Petitioner cannot demonstrate that such failure was also prejudicial because he has not demonstrated how his allegation regarding the warnings given by Ojeda would have resulted in a favorable outcome at trial. Petitioner cannot show that the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner is not entitled to habeas relief on this ground.

In his Ground 25, Petitioner argues that trial counsel was ineffective because she stipulated to the chain of custody of the blood evidence, relieving the State of its burden to prove that the blood that was seized, tested, and admitted belonged to him. Respondent argues that Petitioner has given no reason for his trial counsel to have objected to the blood evidence and pointed to trial counsel's affidavit wherein she explained her reason for not objecting. Moreover, Respondent notes that the DPS chemist who conducted the analysis of the blood sample testified as to how she received the blood sample. In his Reply, Petitioner argues that he has in fact given a reason for trial counsel to have objected to the chain of custody of the blood evidence: specifically, that the record proves that none of the people who actually witnessed the withdrawal of his blood ever testified or were even on the witness list. Consequently, there is a reasonable probability that the State would not have been able to produce the witnesses necessary to establish the beginning of the chain of custody.

Petitioner's argument that the State did not list or call witnesses to testify as to the chain of custody is

not the same as evidence to suggest any impropriety with regard to the chain of custody, and therefore Petitioner has failed to show how he was prejudiced by counsel's alleged failure to challenge the chain of custody. Accordingly, Petitioner is not entitled to relief on this ground because he has failed to show how he was prejudiced as a result of this alleged deficiency on the part of counsel.

In his Ground 27, Petitioner argues that trial counsel was ineffective when she failed to file a timely motion to suppress within the trial court's deadline. Petitioner states that trial counsel did not file the motion to suppress until the first day of trial, September 13, 2004, even though she was given three months' notice that the deadline for filing pretrial matters was August 23, 2004. Petitioner states that the notice specifically warned that matters not filed prior to the deadline would be deemed waived. In support of this Ground, Petitioner argues that if trial counsel had filed the motion in a timely manner, he would have received a pretrial suppression hearing where he could have demonstrated that he was illegally detained, that he was told it was mandatory to give his blood, that he was given inapplicable warnings contained in the DIC-24 form, and that he did not voluntarily consent to the seizure of his blood. Petitioner alleges that he could have made the above demonstration with the testimony of Abel Delacruz, Trooper Ponce, and Deputy Ojeda. Respondent argues that this ground is conclusory and, as such, does not raise a constitutional claim. The Court agrees. Petitioner has not demonstrated that the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established

Federal law. Petitioner is not entitled to habeas relief on this ground.

Petitioner next claims that trial counsel was deficient for failing to speak with witness Abel Delacruz until the third day of trial (Ground 29) and for calling Delacruz as a witness, consequently establishing elements of the State's case (Ground 30). In support of these grounds, Petitioner notes that Delacruz was listed on the State's subpoena list but was not ultimately called to testify during the State's case. Petitioner argues that had trial counsel spoken to Delacruz prior to trial, it is reasonably likely he could have testified at a pretrial suppression hearing concerning the blood evidence and trial counsel would have also realized that it was not a good idea to call Delacruz as a witness because he would bolster the State's claim that Petitioner had consciously disregarded the risk of the victim through his testimony. Moreover, if trial counsel had not called Delacruz, she would not have elicited testimony from Delacruz that (1) identified Petitioner as the driver of the car an element that had not previously been proven by other testimony in the case; (2) Petitioner had told him "that we had hit a bicyclist"; and (3) Petitioner had told him that he had seen the bicyclist in his peripheral vision before striking him. Petitioner asserts that had Delacruz not been called, the jury would have had reasonable doubt and points to the affidavit of one juror who believes that he is not guilty.

In response, Respondent points to trial counsel's affidavit submitted in the state habeas proceedings wherein she explained her strategic decision for calling Delacruz as a witness and that Petitioner has failed to demonstrate how her interviewing Delacruz

when she did amounted to deficiency or prejudice. The Court agrees. As Petitioner has not overcome the presumption of reasonableness that should be attributed to the strategic reasons for counsel's handling of Delacruz as a witness, Petitioner is not entitled to relief on these grounds.

In his Grounds 31 and 32, Petitioner complains that trial counsel was deficient for failing to investigate the wind conditions at the time of the accident and for failing to request a continuance in order to validate the information contained in the report. In support of his claim, Petitioner states that he knew the day to be windy and informed counsel of that at their first meeting. After several witnesses testified that it was not a windy day, Petitioner gave trial counsel a copy of a weather report that indicated that the wind speed was 25.3 mph at the very hour and vicinity of the accident. The Court refused counsel's offer of the report, questioning its reliability. Petitioner concludes that it was reasonably likely that if trial counsel had investigated the wind conditions in advance, she would have been able to satisfy the court's concerns with more reliable information and the jury would have heard the truth about the wind conditions. Petitioner argues that the wind report was important not only to impeach the credibility of the aforementioned witnesses, but also to help the jury understand the circumstances of high winds on a bicyclist. Petitioner further argues that had counsel requested a continuance in order to validate the information contained in the report, she would have been able to satisfy the trial court's concerns about its reliability.

Respondent counters that trial counsel explained in her affidavit that her strategy was to cross-examine the state's witnesses of weather conditions in order to leave doubt in the jury's minds, rather than to enter into evidence a weather report and open up the possibility for the State to counter with testimony regarding the weather that possibly could have dispelled doubt. Consequently, Respondent argues, Petitioner has failed to overcome the presumption of correctness that should be attributed to the strategic decision. In his Reply, Petitioner argues that trial counsel's affidavit is unreliable and that there was no possible downside to having the jury hear about the high winds. Moreover, Petitioner avers that counsel's reason for not admitting the weather report was not strategic and, if it was, it was an unreasonable one.

"Mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983). As stated before, Petitioner's contention that trial counsel's affidavits are wholly unreliable, even after the original affidavit was amended, is conclusory. Moreover, even if the Court were to conclude that failure to investigate the wind conditions was deficient (which it does not), Petitioner cannot demonstrate that such failure was also prejudicial because he has not demonstrated how his allegation regarding the weather report would result in a favorable outcome at trial. Petitioner cannot show that the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner is not entitled to habeas relief on these grounds.

In his Ground 36, Petitioner argues that trial counsel was deficient for failing to preserve the trial record for appellate review of his Sixth Amendment right-to-counsel claim. More specifically, Petitioner argues that counsel was deficient for failing to ensure that the record contained evidence of his intoxicated manslaughter indictment and, as a result, the record was not sufficient to establish that his right to counsel carried over from his initial charge of intoxicated manslaughter (for which he was in custody at the time of his conversation with State's witness Deputy Wilson) to his subsequent and convicting charge of aggravated assault. Petitioner is referring to the appellate court analysis of statements made to Deputy Wilson while he was in jail on intoxicated manslaughter to the effect of, "[h]ow can they charge me with Intoxicated Manslaughter when I wasn't drunk, I was on cocaine at the time," and whether its admission during Deputy Wilson's testimony violated his Sixth Amendment right to counsel. *Banister*, slip op. at 3, 8-9.

Respondent responds that trial counsel explained in her affidavits that she did all she could to preserve error with regard to Wilson's testimony. Respondent also notes that the appellate court found the statement was not the product of a custodial interrogation and implicitly found in the alternative that the Sixth Amendment right to counsel did not attach. Also, Respondent argues that in any event it was not trial counsel's responsibility to insure that the indictment for intoxicated manslaughter was made part of the clerk's record. In his Reply, Petitioner contends that the appellate court's rationale was that if the Sixth Amendment Right were to attach, it could

only attach if Petitioner was indicted at the time for manslaughter and this, Petitioner claims, bolsters his argument.

Whether or not inclusion of the indictment for intoxicated manslaughter was the responsibility of trial counsel, the Court finds that its absence from the record to be considered by the appellate court is of no moment because the appellate court expressly found that the statement in question was not made in response to a question that was designed or reasonably likely to elicit incriminating information. Petitioner cannot show that the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner is not entitled to habeas relief on this ground.

In his Ground 40, Petitioner complains that trial counsel was deficient because she failed to enlist the services of a guilt/innocence investigator. In Ground 41, Petitioner complains that trial counsel was deficient because she failed to conduct an adequate investigation into the facts and law of the case. In support of his claims, Petitioner describes a laundry list of instances where he claims that the lack of a reasonable investigation prevented trial counsel from properly employing a sound trial strategy and making informed tactical decisions in Petitioner's best interest.

In response, Respondent argues generally that Petitioner has failed to satisfy his burden of proof with regard to this claim, asserting that while counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary, *Strickland*, 466 U.S. 691; *Moore v. Johnson*, 194 F.3d 586, 616 (5th Cir. 1999), counsel is not required to pursue every path until it bears fruit or all conceivable hope withers. Moore, 194 F.3d at 616. Respondent also argues that Petitioner's assertion that counsel did not investigate is controverted by her affidavit and that he has failed to demonstrate what the investigation would have revealed and how the trial's outcome would have changed had counsel hired an investigator or investigated more than she did. In his Reply, Petitioner notes that he did in fact demonstrate what additional investigation would have revealed and again contends that counsel's affidavits in the state habeas proceedings are unreliable regarding these grounds.

At the outset, the Court notes that Petitioner has failed to provide any legal basis (much less a constitutional basis) for an attorney's duty to enlist the services of a "guilt/innocence investigator." Consequently, Petitioner's Ground 40 is wholly without merit, and he is not entitled to relief on that claim.

As to his claims that trial counsel was ineffective for failing to investigate the law and facts of the case, "mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983). Although the Court notes that Petitioner did point to specific instances where, he believes, further investigation by trial counsel would have led to a different result, such contention is purely conclusory and does not demonstrate that any such investigation would have in fact been favorable to Petitioner. Moreover,

Petitioner has failed to demonstrate that counsel's strategic decisions regarding the investigations that she did conduct in relation to his case, as described in her affidavits, were unreasonable. Petitioner cannot show that the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner is not entitled to habeas relief on Ground 41.

In his Ground 42, Petitioner contends that trial counsel was deficient for failing to impeach the State's accident reconstruction expert, Trooper Phillip Vandergrift, with his inconsistent testimony. In his Ground 43, Petitioner states that trial counsel was deficient for failing to consult or hire an independent accident reconstruction expert. Respondent counters that trial counsel refuted these claims in her affidavit and quoted the portion of her affidavit regarding her recollection of the matter and explaining her strategic reason for her decision not to continue questioning Vandergrift. In his reply, Petitioner argues that trial counsel's assertions are unreasonable, referring the Court to his "rebuttal affidavit" submitted in his state habeas proceedings. Nevertheless, the Court has considered the record on this matter and finds that Petitioner's allegation that trial counsel's affidavit is unreasonable on these grounds is conclusory; and as such, he cannot show that the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner is not entitled to habeas relief on Grounds 42 or 43.

In his Ground 44, Petitioner contends that trial counsel was deficient for failing to adequately consult

with him prior to trial. In support of this ground, Petitioner points to specific matters that he believes counsel should have conferred with him about, which he believes would have led to a different outcome at trial. Respondent counters that this ground is controverted by trial counsel's affidavit and should be dismissed as conclusory. This Court agrees. Petitioner has failed to demonstrate that the state court's denial of this ground was contrary to or an unreasonable application of clearly established Supreme Court law.

In his Ground 49, Petitioner claims that trial counsel was deficient for erroneously informing him that he was eligible for probation. Specifically, Petitioner states that a few weeks prior to trial, he and his brother spoke with trial counsel regarding who should assess the punishment in the event of his conviction. In support of this ground, Petitioner included his own affidavit and the affidavit of his brother, recounting that during that conversation, Petitioner alleges that trial counsel advised him that he should have the judge assess punishment because "the judge can give you probation, the jury cannot." Petitioner alleges that based upon this advice, he elected to have the judge determine the punishment in this case. However, Petitioner contends that counsel prepared an application for community supervision and noted in her trial notes to "make sure judge can do prob on Agg/Assault." Petitioner argues that counsel should not have advised him that he was eligible for probation, based on the fact that the deadly weapon finding as well as his prior felony conviction would preclude him from receiving probation. Petitioner contends that if she had informed him that he was not eligible for probation, he would have

elected to have the jury determine punishment and may have even decided to plea the case. Respondent refers again to the trial counsel's affidavit in the state habeas proceedings and contends that trial counsel did not tell Petitioner that he was eligible for probation but that she did ask for leniency.

In *Sauceda v. Scott*, 51 F.3d 1042 (5th Cir. 1995) (Table) (available on WESTLAW at 1995 WL 152976), the petitioner claimed that counsel rendered ineffective assistance by failing to advise him that under Texas law, the judge could not assess a probated sentence while the jury could have. The district court found that even if counsel was inept, there was no evidence that had the petitioner been sentenced by the jury, he would have received probation. The Fifth Circuit affirmed, holding that the petitioner only alleged that he might have received probation, but that he failed to establish a reasonable probability that but for the alleged ineffectiveness, he likely would have received a lesser sentence if the jury had sentenced him.

Similarly, in the present case, Petitioner has failed to set forth a reasonable probability that he would have received a lesser sentence had the jury, rather than the judge, sentenced him. He was convicted of aggravated assault with an affirmative finding that he had used a deadly weapon, as a repeat offender. This was a first-degree felony, carrying a minimum of 15 years to a maximum of 99 years to life in prison; nonetheless, the judge gave him a 30 year sentence.

Petitioner has failed to establish a reasonable probability that he would have received a lesser sentence had it been imposed by the jury; on the

contrary, based on the facts offered during the guilt-innocence phase and the punishment phase of the trial, it is plausible (if not likely) that the jury could have given him a harsher sentence than he actually received, which sentence was well short of the maximum available under the law.

Thus, even if trial counsel rendered ineffective assistance by incorrectly advising him that the judge could grant probation, Petitioner has failed to show that but for this dereliction, the result of the proceeding would probably have been different, in that he would probably have received a lesser sentence from the jury or even accepted a plea. The fact that Petitioner waived his right to be sentenced by a jury does not itself show a constitutional violation. He has failed to meet the prejudice prong of *Strickland*, and so this claim of ineffective assistance of counsel is without merit.

Finally, Petitioner argues in his Ground 45 that the cumulative effect of trial counsel's errors rendered the proceedings fundamentally unfair. Federal habeas relief is only available for cumulative errors that are of a constitutional dimension. *Coble v. Dretke*, 444 F.3d 345, 355 (5th Cir. 2006); *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir. 1997). Petitioner here has failed to establish any constitutional error in the conduct of his counsel. Therefore, relief is not available on this basis. *See Shields v. Dretke*, 122 Fed. Appx. 133, 154 (5th Cir. 2005) (claim that cumulative effect of trial counsel error was denial of effective assistance of counsel fails where petitioner has shown no such error); *United States v. Moye*, 951 F.2d 59, 63 n. 7 (5th Cir. 1992) ("Because we find no merit to any of Moye's

arguments of error, his claim of cumulative error must also fail"). Accordingly, the Court concludes that Petitioner is not entitled to relief on his claims of ineffective assistance of counsel.

E. Ineffective Assistance of Appellate Counsel

Petitioner also claims that his appellate counsel, Brian W. Wice. was ineffective when he

(1) failed to challenge the legal sufficiency of the evidence (Ground 1);
(2) failed to challenge the factual sufficiency of the evidence (Ground 2);
(3) failed to raise as error the prosecutor's improper closing argument that Petitioner suffered a cocaine crash (Ground 6);
(4) failed to raise as error the trial court's denial of trial counsel's request for a lesser-included offense instruction on deadly conduct (Ground 9);
(5) failed to raise the ineffective assistance of counsel claims raised in Petitioner's Grounds 11-15 (Ground 16);
(6) failed to include the intoxicated manslaughter indictment with the record on appeal and failed to cite crucial portions of the trial record in his brief (Ground 37);
(7) raised factually insupportable errors on appeal while abandoning clearly meritorious ones (Ground 48); and
(8) failed to raise as error the trial court's allowance of extraneous conduct (Ground 52).

The *Strickland* standard for reviewing claims of ineffective assistance of counsel also applies to claims of ineffective assistance on direct appeal. *Evitts v.*

Lucy, 469 U.S. 387, 395 (1985). Thus, to demonstrate that appellate counsel's performance was constitutionally inadequate, Petitioner must show that (1) appellate counsel was objectively unreasonable and (2) there is a reasonable probability that, but for appellate counsel's deficient performance, he "would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (*citing Strickland v. Washington*, 466 U.S. at 687-91, 694)). *See United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000) ("In the appellate context, the prejudice prong requires a showing that [the court] would have afforded relief on appeal.").

As listed above, Petitioner argues that appellate counsel Wice was ineffective for failing to raise multiple issues that he asserts would have been meritorious had they been presented by appellate counsel on appeal. For example, in support of his argument that appellate counsel Wice was ineffective for failing to raise the legal and factual sufficiency of the evidence on appeal, Petitioner relies on the Amended Affidavit submitted by Wice during the state habeas proceedings, wherein Wice states:

> In the two years since I have filed my original affidavit, I have had the chance to review that original affidavit, pertinent portions of the trial record, and pertinent portions of the court of appeals' opinion affirming Mr. Bannister's conviction. Viewed against that backdrop, I now believe that my assertion as to why I did not challenge either the legal or factual sufficiency of the evidence was mistaken, and that there was no tactical downside to having raised either of these issues. While I cannot say that either claim would

> have been meritorious, I recognize that, in the exercise of reasoned professional judgment, that I should have raised both of these appellate issues.

SHCR-03 at 6.

In a counseled appeal after conviction, the key is whether the failure to raise an issue worked to the prejudice of the defendant. *Sharp*, 930 F.2d at 453. This standard has been affirmed by the Supreme Court. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000) (holding that the petitioner must first show that his appellate attorney was objectively unreasonable in failing to find arguable issues to appeal, and also a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief raising these issues, he would have prevailed on his appeal). See also *Williams v. Taylor*, 529 U.S. 362 (2000); *Briseno v. Cockrell*, 274 F.3d 204, 207 (5th Cir. 2001).

An appellate counsel's failure to raise certain issues on appeal does not deprive an appellant of effective assistance of counsel where the petitioner did not show trial errors with arguable merit. *Hooks v. Roberts*, 480 F.2d 1196, 1198 (5th Cir. 1973). Appellate counsel is not required to consult with his client concerning the legal issues to be presented on appeal. *Id.* at 1197. An appellate attorney's duty is to choose among potential issues, using professional judgment as to their merits - every conceivable issue need not be raised on appeal. *Jones v. Barnes*, 463 U.S. 745, 749 (1983).

Although Petitioner places special emphasis on Appellate Counsel Wice's statement in the Amended Affidavit that he should have raised the issue of legal or factual sufficiency, the Court also notes Wice's

statement that he "cannot say that either claim would have been meritorious." This Court agrees.

Petitioner has failed to show that his appellate attorney was objectively unreasonable in failing to argue the issues he believes should have been raised on appeal. He has also failed to show a reasonable probability that, but for his counsel's alleged unreasonable failure to file a merits brief raising these issues, he would have prevailed on his appeal. *Robbins*, 528 U.S. at 285. Petitioner raised this claim in his state writ of habeas corpus, and the Court of Criminal Appeals rejected this issue when it denied state habeas relief. He has failed to show deficient performance or that there is a reasonable probability that, but for appellate counsel's alleged unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Petitioner cannot show that the state habeas court's denial of his claims of ineffective assistance of appellate counsel was contrary to, or involved an unreasonable application of, clearly established federal law. Petitioner is not entitled to habeas relief on his grounds asserting ineffective assistance of appellate counsel.

F. Other (Grounds 13, 38, 39, 53)

Finally, Petitioner has raised grounds that do not fall into any of the previous categories, including:

(1) Petitioner was actually or constructively denied appellate counsel because the court clerk omitted the court's final charge to the jury from the appellate record (Ground 13);
(2) Petitioner was denied a fair, factual first appeal as of right because the Seventh Court of

Appeals analyzed his Fifth Amendment interrogation claim with a question not supported by the record (Ground 38);

(3) Petitioner was denied a fair, factual, first appeal as of right because the Seventh Court of Appeals analyzed his right to counsel claim with the inapplicable Fifth Amendment interrogation standard (Ground 39); and

(4) he was denied due process and a fair trial because a member of the jury based her verdict on non-evidentiary factors and failed to obey the mandatory instructions given by the trial court (Ground 53).

In his Ground 13, Petitioner argues that he was "actually or constructively denied appellate counsel because the court clerk omitted the court's final charge to the jury from the appellate record." In support of this ground, Petitioner notes that despite appellate counsel's Motion for Designation of the Appellate Record requesting the trial court's charge at both stages of the trial, the clerk's record failed to contain the court's final charge given to the jury during the guilt/innocence phase. Petitioner also contends that once the omission was discovered, appellate counsel requested that the clerk be ordered to supplement the record with same, but it was not. Additionally, Petitioner argues that the jury charge that was orally given to the jury was not dictated word for word in the record but rather the record contained a parenthetical displaying, "[c]harge read by the court." Petitioner has utterly failed to provide any legal basis for this ground, much less how the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly

established federal law. Petitioner is not entitled to relief on this claim.

In his Ground 38, Petitioner argues that he was denied a "fair factual first appeal as-of right because the Seventh Court of Appeals analyzed his Fifth Amendment interrogation claim with a question not supported by the record, [all sic]" Specifically, Petitioner takes issue with the Seventh Court of Appeals' finding that "[h]ad Wilson asked what appellant had done rather than what he was charged with, the question would likely have elicited an incriminating response." *See Banister v. State*, No. 07-04-0479-CR, at 6 (Tex. App. Amarillo Sept. 29, 2006). In his Ground 39, Petitioner argues that the Seventh Court of Appeals analyzed his right-to-counsel claim with the inapplicable and more stringent Fifth Amendment interrogation standard. The Court has already discussed Petitioner's claims regarding his contention that the Seventh Court of Appeals analyzed his claims under the wrong standard (see discussion of Grounds 34 and 35). For the reasons stated herein and in the Respondent's Answer, the Court finds that Petitioner has not demonstrated that the state court's adjudication of his constitutional claims was contrary to, or involved an unreasonable application of, clearly established federal law. Petitioner is not entitled to relief on these grounds.

Finally, in his Ground 53, Petitioner contends that he was denied due process and a fair trial because a member of the jury based her verdict on non-evidentiary factors and failed to obey the mandatory instructions of the trial court. In support of his claim, Petitioner refers to testimony of juror San Juanita

Garcia, who had reasonable doubt during the jury deliberations and still believes that Petitioner was not guilty at all. Garcia also testified that she eventually gave in because other women on the jury (whom she knew because they were from the same town), belittled her and made her feel stupid. Respondent counters that Garcia's affidavit is not admissible in this forum pursuant to state and federal law. This Court agrees and finds that, based upon the law stated in Respondent's Answer, Petitioner has failed to demonstrate that the state court's adjudication of this claim was objectively unreasonable. Petitioner is not entitled to relief on this claim.

IV. CONCLUSION

For the reasons set forth above, the Court finds that Petitioner has not demonstrated that the state court's adjudication of his claims was contrary to or an unreasonable application of clearly established Supreme Court law as required by 28 U.S.C. § 2254(d). In addition, the Court finds that, pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), Petitioner has failed to show that reasonable jurists would (1) find the Court's "assessment of the constitutional claims debatable or wrong" or (2) find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling," and any request for a certificate of appealability should be denied. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

It is, therefore, ORDERED:

1. The instant Petition for Writ of Habeas Corpus is DENIED and dismissed with prejudice.

2. All relief not expressly granted is denied and any pending motions are denied.
3. Any request for certificate of appealability is denied.

Dated May ____, 2017.

SAM R CUMMINGS
Senior United States
District Judge

Gregory Dean Banister Petitioner, v. LORIE DAVIS, Director, TDCJ-ID, Respondent.	)	CIVIL ACTION NO. 5:14-CV-049-C

BANISTER'S MOTION TO ALTER OR AMEND JUDGMENT WITH BRIEF IN SUPPORT

* * *

Gregory Dean Banister, Petitioner proceeding pro-se, hereby moves the Court pursuant to Federal Rules of Civil Procedure, Rule 59(e), to alter or amend the judgment entered in this case on May 15, 2017, in order to correct manifest errors of law and fact. In this motion Banister addresses some, but not all, of the grounds in his 2254 petition. The failure to address a particular ground in this motion is not intended as a waiver of the right to seek appellate review of that ground, nor is intended to convey that Banister agrees with the Court's findings on the unaddressed grounds. Due to time and page constraints, Banister is focusing this motion on the most obvious errors and the strongest grounds. In support of this motion, Banister offers the Court the following.

ERRORS OF LAW & FACT

1. The Court committed an error of fact by accepting the Seventh Court of Appeals summary and concluding that Banister "provided no evidence to refute the summary."

The Seventh Court of Appeal's summary states that "[n]ear the city of Amherst [Banister's] vehicle **left the roadway**, striking and killing a bicyclist **on the shoulder**.". (See Opinion at **PX-48** p.2). Banister pointed out in his Reply Brief that this statement is incorrect and contradicted by the transcripts (4RR-101, 171, 174, 176; & 5RR-174, 183); the police report (**PX-2**); and by the newspaper account of the trial.(See Doc.17 at p.8-9). Contrary to the Court's finding, Banister Gregory Dean Banister, Petitioner proceeding pro-se, hereby moves the Court pursuant to Federal Rules of Civil, Procedure, Rule 59(e), to alter or amend the judgment entered in this case on May 15, 2017, in order to correct manifest errors of law and fact did provide evidence to refute the appeal court's summary. Contrary to the appeal court's claim, the record unequivocally proves that the collision occurred in the roadway not on the shoulder.

2. The Court committed errors of fact and law in concluding that the state proved the accident was as a result of the introduction of cocaine into Banister's body.

The Court acknowledges that the elements of the indictment included prove of "cocaine crash", and that neither expert ever testified whether Banister ever suffered from a cocaine crash. In spite of this recognition, the Court relied on *Tibbs v. Florida* and *U.S. v. Millsaps*, stating that the jury may judge the credibility of witnesses, resolve conflicts in testimony and weigh the evidence in drawing inferences from basic facts to ultimate facts. Although Banister accepts this well established law regarding the jurys role, the Court wrongly applied this law to Banister's case in an attempt to justify the states failure to prove

the essential element of the offense, that the accident was due to cocaine. In *Tibbs* and *Milisaps* there were eye witnesses who gave direct testimony about the facts of the crimes which they witnessed. In contrast, in Banister's case, the jury was presented with two competting experts with differing interpretations of scientific literature, of which neither expert tied or applied to the specific facts of Banister's case. In Banister's case, as this Court itself recognizes, "the expert testimony did not conclude that [Banister].. .experienced] a cocaine crash at the time of the accident...". As a matter of fact, neither expert even testified that Banister "could" have suffered, or it was "possible" that he suffered a cocaine crash.

Although the jury is permitted to judge the credibility of the witnesses, resolve conflicts in testimony, and to weigh the evidence and draw inferences from that evidence, here there were no credibility or conflicts in testimony to resolve because neither expert testified whether Banister ever suffered from a cocaine crash let alone that the cocaine crash was the cause of the accident. It is too much of a stretch to conclude that the jury could have reasonably inferred an ultimate fact on the basis of expert testimony that was neither "directly related" nor "tied" to the specific facts of the case.[1] *See e.g.*, *Turpin v. Merrell Dow Pharmaceuticals, Inc.,* 959

[1] The Seventh Court of Appeals recognized in their opinion denying Banister's appeal that: "Erwin was not asked for an opinion whether [Banister] experienced cocaine crash; that her "testimony was not related directly to [Banister]"; and "Erwin's testimony did not apply the cocaine crash theory to [Banister]." See Opinion at PX-48 at p. 12 & 13.

F.2d 1349, 1360 (6th Cir. 1992)(Granting summary judgment because expert's testimony that drug was "capable of causing", "could cause" or its effects are "consistent with causing" birth defects was insufficient to allow a rational jury to find that drug caused the babies birth defects.); *Acevedo v. State*, 255 SW 3d. 162,170 (Tx. App. San. Ant. 2008) (Concluding that experts failure to tie the methamphetamine facts to Acevedo "was merely speculative and, thus unreliable and irrelevant."); *Morales v. State*, 32 SW 3d 862,865 (Tx Cr. App. 2000) (Expert's "testimony must be sufficiently tied to the facts to meet the simple requirement that it be helpful to the jury...testimony which is unreliable or irrelevant would not assist a juror in understanding the evidence or determining a fact in issue...".). It goes without saying that if neither expert could conclude from the evidence that Banister suffered a cocaine crash, how could the jury determine beyond a reasonable doubt that he did.

Although the jury is permitted to draw **reasonable** inferences from the expert's testimony regarding scientific acceptance of the phenomenon known as "cocaine crash", the jury was not permitted to disregard the beyond a reasonable doubt standard of proof and base its verdict on the mere "possibility" that Banister may have suffered a cocaine crash, and that that cocaine crash—if it did happen—may have caused Banister to fail; to control, or to drive without sufficient sleep. *See Hooper v. State*, 241 SW 3d 9,16 (Tx. Cr. App. 2007) ("A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt.").

In Banister's case both experts agreed that there was "no cocaine" found in Banister's blood (5RR-17,67,114); that the metabolite that was found is "inactive" and has absolutely "no effect" on the body (5RR-16, 24, 55, 67, 93, 111, 112, 113, 114, 115); that all the studies done on cocaine crash were based on "chronic users" or people who ingested large amounts (5RR-30, 33, 118, 119); and that neither expert knew whether Banister was a chronic user, how much cocaine he previously used, or when it was used. (5RR-12, 62, 114).[2] This meager evidence came no where near to proving the required element that the accident was a result of cocaine. As one court in Austin recognized, albeit in a different circumstance (cocaine as a deadly weapon), "[t]estimony that there is an unknown possibility of a serious adverse physical effect arising out of the use of some cocaine by some persons under some circumstances does not satisfy

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[2] Texas courts have consistently found that an expert's failure to know how much of a substance was used, and when it was used, renders that testimony inadmissible and not helpful to the jury, *e.g., Acevedo v. State*, 255 SW 3d 162, 169 (Tx. App. San. Ant. 2008) ("An expert testifying to the effects of methamphetamine on a given individual must know more about the individual and quantity ingested.") *DeLarue v. State*, 102 SW 3d 388 (Tx. App. Hou. 2003, pet. ref'd) (failure to know quantity and when Marijuana was consumed, no causation between appellant's behavior and the presence of marijuana in his system."); *Layton v. State*, 280 SW 3d 235 (Tx Cr. App. 2009) (Evidence defendant ingested two prescription drugs more than 24 hours and 14 hours prior to stop held inadmissible because no scientific evidence as to dosage, time of ingestion, or other evidence showing effect drugs could have on intoxication.). *Dow Pharmaceuticals Inc.*, 116 SW 3d 176,183 (Tx App. Hou. 2003) pet. den. (Concluding that unsupported opinions of experts is no evidence.)

[the sufficiency of evidence] burden." *Rodriquez v. State*, 31 SW 3d 772,779 (Tx. Aust. 2000); *also see Manning v. State*, 114 SW 3d 922,927 (Tx. Cr. App. 2003) (Judge Price recognized that the cocaine metabolite in Mannings blood "may not have been sufficient, by itself, to Drove that Manninc's actions were the result of his ingestion of cocaine...,[and that] just because he had consumed at some time before the blood was drawn, **does not establish that he was under the influence of cocaine when the collision occurred**.")

Just because the state's expert discussed a phenomenon known as cocaine crash, cited studies of chronic cocaine abusers, and that Banister had a "trace" amount of the "inactive" metabolite benzoylecgonine in his system, does not translate to allow the jury to reach the multiple inferences required by the jury charge, *e.g., Berryhill v. State*, 501 SW 2d 86, 87 (Tx. App. Ama. 1973)("The rule permitting logical deductions from evidence does not permit logical deductions from non-evidence."). In Banister's case the state did nothing more than pile one inference upon another to attempt to prove its caste The Fifth Circuit has held that "a verdict may not rest on mere suspicion, speculation, or conjecture, or an overly attenuated piling of inference on inference." *United States v. Roils Alvarez*, 451 F.3d 320, 333 (5th 2006). In Banister's case the first inference the jury had to draw from the expert's testimony was that Banister suffered from a "cocaine crash" at the time of the accident. The second inference they had to draw, was that the cocaine crash—if it did happen—caused Banister to fail to control or to drive without sufficient sleep, which, resulted in him colliding with the cyclist. Drawing

these multiple inferences and basing Banister's conviction on them was unreasonable in light of the evidence available to the jury. This is especially true when, as this Court and the Direct Appeal Court recognized, the state's expert's testimony on cocaine crash was not directly related nor applied to Banister. The Court in Merrell Dow Pharmaceuticals recognized that "a flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious.[3] Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence." *Merrell Dow Pharmaceuticals v. Havner,* 953 SW 2d 706, 714 (Tex. 1997). It follows, that if an expert failure to "tie" or "fit" its testimony to the specific facts of the case is "unreliable" and legally no evidence", then it is likewise unreasonable to find that same expert's testimony was sufficient evidence for the jury to make reasonable inferences on essential elements of the offense.

The Court's intimation that the jury could; "reasonably infer" that Banister suffered from a cocaine crash becomes even more unreasonable when you consider the testimony of the "well trained" eighteen year veteran DPS officer who interviewed Banister immediately after the accident. This officer testified that Banister exhibited "no signs" of

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[3] The studies relied on by the state's expert were all based on "chronic users" or people who ingested large amounts.(5RR-30-33). Throughout trial no one testified whether Banister was a chronic user or the amount of cocaine he previously used and when it was used. The state's expert admitted that she did not have any of that information available to her.(5RR-12-13).

impairment, intoxication, fatigue, or any symptoms described by the scientific literature on cocaine crash.(4RR-118; 4RR-145-46; & 5RR-166; 5RR-64-65). *See United States v. Quatrone*, 441 F.3d 153, 169 (2nd Cir. 2006) (Stating that Courts cannot "credit inferences within the realm of possibility when those inferences are unreasonable.").

The Court wrongly disagrees with Banister's arguments that the only evidence presented was so weak that the only way the jury could find him guilty was based on an impermissible surmise or suspicion. The Court claims that "the record reflects that evidence was presented to support the allegation that the accident was the result of the introduction of cocaine into [Banister's] body", but the Court does not point to any specific facts or record citations to support this conclusion. The Court, much like Respondent in her show cause answer, avoids addressing the specific facts in the record which supports Banister's position that the "as a result of cocaine" was not proven. Banister also points out that the Court and Respondent selectively rely on portions of trial counsel's affidavits as justification for denying Banister's claims. They credit portions of trial counsel's affidavits when they support their positions, but fail to credit or even discuss the portions of trial counsel's affidavits that support Banister's positions. In particular, trial counsel recognized in her amended affidavit that the state's expert "testified as to the general symptoms of cocaine but [that] this testimony could at best only lead to an inference." (Px-42 p.11). In addition, the Court failed to discuss or recognize this same portion of trial counsel's amended affidavit

which confirms Banister's claim that the state failed to prove Banister did not get sufficient sleep. *Id.*

Because the Court's judgment and Order denying Banister's insufficiency grounds was based on its mistaken view of the trial evidence, the Court should take another look at the trial evidence and re-evaluate Banister's claims.

3. The Court committed errors of law and fact in concluding that trial counsel's moving for a mistrial was the equivalent of moving for a directed verdict.

The Court endorsed Respondent's argument that trial counsel's moving for a mistrial was the equivalent of moving for a directed verdict, and thus Banister was not prejudiced. The Court's reasoning is based on both errors of fact and law.

The portion of the transcript where trial counsel made her oral motion for mistrial proves that she was not making a sufficiency of evidence argument as the Court claims. The following record excerpts proves that trial counsel used the mistrial motion not to attack the insufficiency of the evidence but to attempt to get Banister a new trial "based on the introduction of cocaine into the case", because counsel "believe[d] that it prejudiced the minds of the jurors, caused confusion, blurred the issues… [and] that it caused harm...[and] cannot be repaired by striking testimony or by asking that the jurors disregard the testimony." (6RR-8). It is well established that the purpose of moving for a mistrial is not to challenge the sufficiency of the evidence, but to obtain a new trial when highly prejudicial and incurrable errors occur. *See Woods v. State*, 18 SW 3d 642 (Tx. Cr. App. 2000). Banister also points out that when a mistrial is

granted you receive a new trial, when an instructed verdict is granted there is an acquittal and no new trial.

Although Banister acknowledges that trial counsel did make reference, in her motion for mistrial, that "[t]here was not sufficient evidence...that Banister was under any kind of influence of cocaine", this was said in the context of the prejudicial effect of the admittance of the expert's testimony, not in the context of an attack on the state's failure to prove the as a result of cocaine element.

The Court's adoption of Respondent's argument that the motion for mistrial was the equivalent to an attack on the sufficiency of the evidence is simply not fairly supported by the record, nor is it supported by the law. Assuming arguendo, that counsel's motion for mistrial was an attack on the sufficiency of evidence, it was a poor one because it did not come at the close of the state's case for one,[4] and for two, it did not even ask the court to direct a verdict of not guilty once the state's direct evidence failed to prove the accident was as a result of cocaine. This failure on counsel's part cannot reasonably be characterized as "strategy." Given the state of the evidence, which counsel herself admits "could at best only lead to an inference", there is a reasonable probability that

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[4] Banister points out that a directed verdict is made at the close of the state's direct evidence, not after the defense closes and then the state rebuffs. This is important because Deputy Wilson, Brian Cantrell, and Officer Thompson all testified in the state's so-called rebuttal, thus their testimony cannot be considered in assessing the quantum of evidence and whether trial counsel's request for a directed verdict would or should have been granted.

Banister was prejudiced by counsel's failure to move for a directed verdict of "not guilty" at the close of the state's case. Contrary to the Court's claim that Banister has to show that "the result of the proceeding would probably have been different", "a 'reasonable probability' does not mean that counsel's conduct more likely than not altered the outcome in the case… Rather, the appropriate standard of review should be somewhat lower." *Strickland*, 466 U.S. 693-694 "The result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of evidence to have determined the outcome." *Id. See e.g., Holsclaw v. Smith*, 822 F.2d 1041 (11th Cir. 1987) (Counsel's-failure to raise insufficiency of trial evidence and move for dismissal found deficient and prejudicial.).

4. The Court committed errors of fact and law in concluding that Banister has not shown that his trial counsel rendered prejudicial ineffective assistance by failing to move to strike the state's expert's testimony.

The Court does not determine whether trial counsel was deficient and instead "assum[es] arguendo that failure of trial counsel to move to strike such testimony was deficient...". The Court moves on to the prejudice prong but does not discuss or analyze the facts or law that Banister argued in support of this ground. (See Doc. 1 & Doc. 2 §2 p.1-5). The Court simply cites the prejudice prong and finds that Banister "is not entitled to relief on this ground." In making this finding the Court did not adequately address Banister's arguments nor the case law he argued in support of those arguments. (*See Id.* and Reply Doc. 17 p. 29-32).

The Court is wrong, Banister has provided both a factual and a legal basis for why his counsel was deficient and just how he was prejudiced by the deficiency. First, he has shown that the expert's testimony was never "connected up" to the facts of the case. *Id.* Second, he has shown that the law in Texas requires testimony that is not "connected up" by the close of the state's case to be stricken, if a motion to strike is made. *Id.* Third, he has shown that there is a reasonable probability that had his trial counsel moved to strike the expert's testimony (presuming the judge would have followed the law as this Court must), it would have been stricken from the record and thus the jury would not have been able to consider the expert's testimony as evidence of guilt. Without the expert's testimony, the state's already feeble case would have been doomed to fail. This Court cannot reasonably conclude that the striking of the expert's testimony wouldn't have mattered. Especially in light of the emphasis the state placed on that testimony in its closing argument in urging the jury to convict. (6RR-15-16, 23-24, 26).

The Court's failure to acknowledge, analyze, or otherwise reconcile the legal and factual arguments Banister made in support of this claim casts doubt on the process by which the finding was reached and hence the correctness of the Courts' finding. *See Taylor v. Maddox*, 366 F.3d 922, 1008 (9th Cir. 2004). Banister respectfully asks that this Court revisit this claim.

5. The Court errored by combining several of Banister's claims and not addressing them individually on their own specific merits. *See* Doc. 26 at p. 28-29.

The Court has a duty to address each individual claim that Banister raised and to make factual determinations on each claim. With regard to Grounds 5, 12, 18, 24, 26, 50, 51 and 28, the Court did not address each claims operative facts or their individual merits and merely cursory disposes of these grounds by citing case law dealing with "meritless objections" and "strategy." The Court claims that Banister "has failed to demonstrate that any of the above objections would have been granted, or that, had they been raised or granted, there was a reasonable probability that the outcome of the trial would have been different."

The Court's failure to make any factual findings or to specifically address each ground on its individual merits, calls its conclusions into serious question.

The Court intimates that counsel's failure to object may have been "strategic", but it doesn't point to any specific strategic reason that counsel offered. The Court also intimates that all of these objections are "meritless", but it does not discuss the facts or the law that Banister argued showing that they were not "meritless" objections. It is important for Banister to point out that trial counsel was never even required to address some of these grounds,[5] and the grounds that the state court ordered her to address she avoided and never gave a strategic reason for not raising the

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[5] Counsel never had to do an affidavit on the amended grounds, 5, 50 & 51.(See explanation in Reply, Doc. 17 p.4-7). Banister's attempts to have counsel address these grounds were rebuffed by the state court (SHCR 1611, 1713, 2270 & 2272) and this Court (Doc. 17 p.4-7; Doc. 21 (request for interrogatories); & Doc. 23 p. 16, Motion for evidentiary hearing.)

objection. This "Court is not required to condone unreasonable decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Moore v. Johnson*, 194 F. 3d 586, 604 (5th Cir. 1999); *also see Wood v. Allen*, 558 U.S. 290, 306 n. l (2010) (Stevens, J. dissenting, joined by Kennedy, J.) ("Although we afford difference to counsel's strategic decisions, *Strickland*, 466 U.S., at 690-691, for this difference to apply there must be some evidence that the decision was just that: strategic.").

Banister respectfully asks that the Court address the above grounds on their individual merits and alter or amend its judgment to include an analysis of these grounds.

6. The Court committed errors of law in affording Section 2254(e)(1)'s presumption of correctness to the state court's denial of Grounds 4, 5, 6, 7, 25, 50 51 and 52.[6]

The Court applied the presumption of correctness to the above enumerated grounds in spite of the fact that the state courts never required either trial or appellate counsel to submit affidavits or otherwise address the allegations of ineffective assistance in these grounds. These grounds each alleged facts that were material to the legality of Banister's confinement, but the state courts as well as this Court have denied Banister the avenues to resolve these

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[6] Banister also raised the question whether the state court's failure to have counsel respond to these allegations could be considered an "adjudication on the merits" under 2254 (d). See Doc. 23 p. 12-16. This Court never addressed this.

previously unresolved facts that are material to the legality of his confinement. Instead, each Court denied Banister's claims without ever learning what trial or appellate counsel's reasons were for doing, or not doing, what Banister claims they should have done. For these same reasons, Banister claims that this Court errored in denying Banister an evidentiary hearing. The reasons and legal basis for granting an evidentiary hearing was set out in great detail in "Banister's Motion for Evidentiary Hearing and Memorandum in Support, which was summarily denied by this Court. Doc. 23.

Banister respectfully asks that this Court amend or alter its order and judgment, and in so doing grant him an evidentiary hearing.

7. The Court's findings and conclusions that appellate counsel was not deficient or prejudicial is based on errors of fact and law. Doc. 26 p.43-46.

The Court recognizes that appellate counsel admitted that he should have raised both the legal and factual insufficiency issues on appeal. The Court does not say whether or not counsel's admittance was sufficient to prove deficient performance but claims that because appellate counsel also stated that he cannot say that either claim would have been meritorious, that appellate counsel was not ineffective on appeal. Just because appellate counsel stated in his affidavit that he cannot say whether either claim would have been meritorious does not mean that the claims were not meritorious. Perhaps, he is saying that he doesn't know whether either claim would have been meritorious because/ as is evident by his initial affidavit, he never analyzed the relevant case law as

it applied to the facts of Banister's case nor assessed the likelihood of success of these claims because he never had to. The very fact that he says that he "should have" raised these claims and that he made a "mistake" says it all. *See Joshua v. Dewitt,* 341 F.3d 430, 461 n.2 (6th Cir. 2003) ("If petitioner's counsel should have raised the issue... this would certainly demonstrate that counsel's performance was, in fact deficient under Strickland."); *also see Young v. Dretke*, 356 F.3d 616, 621 (5th Cir. 2004) (Counsel stated in affidavit that "mistake" was an oversight, therefor "deficient performance of counsel is not contested."). The Court's finding and claim that Banister has not shown that appellate counsel was "objectively unreasonable" is contradicted by both the facts and the law. The Court points out that "fa]n appellate attorney's duty is to choose among potential issues, using professional judgment" (*Id.* 45), but it fails to credit appellate counsel's affidavit where he "recognize[s] that, in the exercise of reasoned professional judgment, [he] should have raised both of these appellate issues." (PX-41 p.4)

The Court claims that Banister has not shown that he was prejudiced by appellate counsel's failure to raise the issues he claims he should have raised. The court makes this conclusion without addressing any of the factual or legal arguments that Banister set out in his petition/ memorandum, reply, discovery motion, or his request for an evidentiary hearing. In particular, with respect to appellate counsel's failure to challenge the factual sufficiency in the direct appeal. In addition to the facts set out supra, the Court did not properly consider the following facts which prove that there is a reasonable probability that Banister would have

prevailed on appeal had appellate counsel adequately raised the factual insufficiency ground.

1. At the time of Banister's appeal, in 2006, there was a "factual sufficiency" review available to Texas appellants. *Clewis v. State*, 922 SW 2d 126 (Tx. Cr. App. 1996). This review was done away with in 2009, well after Banister's appeal. The factual sufficiency review was independent of a legal sufficiency review and much more favorable to the appellant than a legal sufficiency review. Specifically, a factual sufficiency review required the Court to view all of the evidence without the prism of "in the light most favorable to the prosecution." *Id.*

2. The unapplied and not "directly related" cocaine crash testimony was factually insufficient or too weak to support a rational finding that Banister experienced a cocaine crash at the time of the accident. Trooper Ponce's and DeLaCruz's testimony establishes that Banister did not exhibit any of the cocaine crash symptoms described by the cocaine crash literature. 4RR-118,145-146, 5RR-166-167.

3. The testimony concerning the trace amount of benzoyleconine found in Banister's system was factually insufficient or too weak to support a rational finding that it was the cause of the accident. The expert's both admitted that the metabolite is "inactive" and has absolutely "no effect" on the human body. 5RR-62, 111, 112, 113,115. Expert's also testified that the 0.36 that was found in Banister's blood was "barely" over the 0.3 "cut off" level for work place testing and for someone flying an airplane. 5RR-54. The state offered no testimony establishing a

causative relationship between the trace amount of "inactive" metabolite and the collision with the cyclist.

4. Under the factual sufficiency balancing scale review, the contrary evidence on cocaine crash is strong enough that the beyond a reasonable doubt standard could never be met. Consistent with the scientific literature on cocaine crash, Dr. Booker testified that in order to determine in any scientific reliable manner what the effect of a drug on an individual is, three things had to be known: 1) when the drug was used?; 2) how much of the drug was used?; and 3) the means by which the drug was administered? 5RR-114. Both experts admitted that not one of these factors were available in this case.[7] 5RR-12, 114, 121. In addition, all the cocaine crash studies relied upon by the expert were done on chronic users. The state presented no evidence that Banister was a chronic user or the amount he ingested. Lastly, all the witnesses who observed Banister testified that he was not impaired in any way. Trooper Ponce 4RR-118, 145-146 5RR-166, 167; Delacruz 5RR-130, 132, 151; other cyclist Rodgers 4RR-44. The state's expert described the symptoms of cocaine crash as being "fatigue and extreme tiredness and loss of energy." 5RR-65.

5. A finding that Banister failed to get sufficient sleep is greatly outweighed by contrary proof. Specifically, no testimony was offered to the jury that Banister failed to get a sufficient amount of sleep. To

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[7] The Courts have required these factors to be known as well. *See Acevedo*, 255 SW 3d 162, 170, and the cases cited therein in support.

the contrary, Delacruz testified that Banister went to sleep around 11:30 pm and awoke around 7:30 am. 5RR-128, 130 & 143. And Trooper Ponce testified that Banister did not appear to be sleepy or fatigued after the accident. 4RR-145, 146 & 5RR-166.

6. A finding that Banister failed to control his motor vehicle is contrary to and greatly outweighed by contrary proof. Specifically, Trooper Ponce's initial police report and his supplemental police report depict one of the cyclist in the lane of traffic at the point of impact. PX-2 In fact, the portion of that report that asks the "Investigator's Narrative Opinion of What Happened" states that: "**Unit 2 was a bicycle and was riding in the right far lane**." And the State's accident reconstructionist, Trooper Vandergriff, testified both the cyclist and Banister were both "legally in the roadway" when the collision occurred, and that Banister actually had the "right of way." 4RR-173, 174, 178. Although Banister admits that the state did offer evidence, Strickland's and Harris testimony, that Banister failed to control his motor vehicle some 20 miles before the accident in the construction zone, Banister points out that this was not enough because the state alleged that he failed to control his motor vehicle at the time of the impact with the cyclist. There simply is no evidence that Banister failed to control his motor vehicle at the time of the collision. And because aggravated assault is a "result of conduct" offense it is not enough that the state proved that Banister failed to control his motor vehicle 20 miles prior to the accident, the state had to prove that he failed to control at the time he struck the cyclist. *See Cook v. State*, 884 SW 2d 485, 490 (Tx. Cr. App. 1994), and *also Ford v. State*, 38 SW 3d 836,

844 (Tx. App. Hou. 2001) (Stating that "in a result oriented offense, it is not enough for the state to prove that the defendant engaged in the conduct with the requisite criminal intent, the state must also prove that the appellant **caused the result** with the requisite criminal intent." (emphasis mine).

In light of the fact that all of the above facts would have been considered without the prism of in the light most favorable to the prosecution, it is reasonably likely that had appellate counsel raised the factual insufficiency ground on appeal it would have been successful. *See Clewis* at 133-34 (The appellate court considers all of the evidence in the record related to appellant's sufficiency challenge—not just the evidence which supports the verdict.) (see factual sufficiency argument and brief at Doc. 2 §1 p.16-21).

Banister asks that this Court revisit this ground and amend and alter its order and judgment. In doing so, Banister asks that the Court address the facts that Banister set out in support of this ground.

8. The Court's finding that appellate counsel was not ineffective for failing to raise the prosecutor's improper argument on appeal is incorrect.

Although the Court listed this ground in page 43 of its order, it did not specifically address the merits of this ground. The Court did, however, recognize in page 26 of its order that neither expert testified that Banister suffered from a cocaine crash. If no one testified that Banister suffered from a cocaine crash how could the prosecutor's closing argument, that the cocaine crash was proven "without question", be found to be acceptable closing argument. If it was not acceptable closing argument, appellate counsel should

have raised it on appeal because for one, it was preserved for appellate purposes by trial counsel's timely objection, and for two, it was prejudicial because it misled the jury into thinking that the state had proven the cocaine crash "without question." The very fact that the jury might have been misled by the prosecutor's closing argument is bolstered by the fact that the Trial Court overruled the objection of trial counsel which had the obvious effect of celling the jury that the prosecutor's argument was in fact correct. Given the state of the record, and considering the elements the state obligated itself to prove, it is likely that the prosecutor's misleading argument, combined with the Court's endorsement, effected the jury's evaluation of the evidence and prejudiced Banister's ability to receive a fair trial. As the Court in Glasser so aptly pointed out: "[Where] the scales of justice may be delicately poised between quilt and innocence... error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward quilt." *Glasser v. United States*, 315 U.S. 60, 67 (1942).

Although appellate counsel was never required to address his failure to raise this ground, his decision not to do so could not have been strategical because his amended affidavit reveals that, at the time of drafting the appeal, he erroneously believed that the state's expert had given testimony that Banister suffered a cocaine crash. Banister has shown how he was prejudiced by appellate counsel's failure to raise this claim (Doc. 2 § 2 p.8-10), he has also shown why

this claim was stronger than those appellate counsel did raise. Doc. 2 § 13 p 10-15.

With respect to the rest of the grounds dealing with appellate counsel, the Court lists grounds 6, 9, 16, 37, 48 and 52 in page 43 and 44 of its order but it does not address, analyze, or otherwise discuss the specific facts of any of these grounds. The Court merely combines them all together and summarily denies them. In failing to address the factual basis for these claims the Court has failed to acknowledge significant portions of the record which are inconsistent with its conclusion that appellate counsel was not ineffective.

Banister respectfully asks that the Court address the facts of these grounds and amend or alter its judgment to include an analysis of these issues.

9. The Court committed errors of fact and law in concluding that trial counsel was not ineffective for failing to request a lesser included offense instruction of reckless driving.

The first reason the Court gave for denying this claim was because Banister "failed to demonstrate that trial counsel's actions with regard to the lesser-included offense instruction were not strategic...". The Court is wrong, Banister did not have to demonstrate any lack of strategic basis because counsel claims that her strategy did include requesting the reckless driving instruction. In fact, the Court and Respondent apparently believe counsel's affidavit where she claims to have requested the reckless driving instruction. Even if strategy was relevant to this ground, it is unreasonable strategy for counsel to have allegedly requested a reckless driving instruction but

fail to assure that it was preserved by making sure it was on the record as Texas law requires. *See* Tx. C. Cr. Proc. (2004) Article 36.14 (mandating that objections and exceptions to charge be dictated into the trial record in order to preserve error.). The trial record is void of counsel's alleged request for a reckless driving instruction. (see charge conference 6RR-5).

The second reason that the Court gave for denying this ground is because the failure to give an instruction on a lesser included offense does not raise a federal constitutional issue. First, Banister points out that because he raised this claim under the Sixth Amendment right to effective assistance of counsel, this is a "federal constitutional issue." And second, because the State of Texas provides a statutory right to a lesser included offense if the required factors are met, Banister had a due process and equal protection right to this instruction which is also a "federal constitutional issue." *Stephens v. State*, 806 SW 2d 812, 817 (Tx. Cr. App. 1990) ("[T]exas law provides for consolidating greater and lesser included offenses by including both in the charge to the jury—".); *also Miniel v. State*, 831 SW 2d 310 (Tx. Cr. App. 1992) (Due process requires that lesser-included instruction be given when evidence warrants such an instruction.). *See* Tx. C. Cr. Proc. art. 37.09 (2004);[8] *also Hoover v. Johnson*, 193 F.3d 369-370 (1990) ("The Supreme Court has held that when a state guarantees a structural protection, it violates the due process

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[8] In Jacob v. State, the Texas Court of Criminal Appeals stated that "Article 37.09 [is] constitutional." 892 SW 2d 905,907 (Tx. Cr. App. 1995).

clause of the federal constitution if it fails to meaningfully vindicate that guarantee."). Here, the Court is incorrect in suggesting "no constitutional question exists", one clearly does exist and it is Banister's Sixth Amendment right to effective counsel. The Court is mistaken, it is not beyond its habeas authority to determine if Banister was denied his Sixth Amendment right to counsel as a result of being denied a lesser included offense instruction. *See e.g., Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009) (Finding trial counsel ineffective and granting habeas because counsel failed to request lesser included offense).

The Court does not discuss, analyze, or otherwise mention the case law that Banister set out in his Memorandum of Law which shows that he met the criteria for the lesser included instruction, nor does the Court mention the facts that Banister pointed out that indicates that the evidence was "subject to two different interpretations", and that there was "some" evidence in the record where a reasonable jury could find that if Banister was guilty, he was only guilty of reckless driving. see Habeas Memorandum §3, Doc. 2. Contrary to the Court's finding, Banister did provide evidence demonstrating a reasonable probability that the jury would have found him guilty of reckless driving had counsel properly requested the instruction. Banister also has shown that the trial court would have errored in denying such instruction. See Richards at 569 (Agreeing with the District Court's finding that "state trial court would have committed error in refusing [Richards] such an

instruction" thus trial counsel was ineffective for not requesting it.).[9]

Because the Court did not acknowledge significant portions of the record which are inconsistent with its conclusions, Banister respectfully asks that this Court, revisit this ground and address the facts that Banister advanced in support of this ground, *see* Doc. 2 §3, Memorandum of Law.

10. The Court committed errors of law and fact in concluding that trial counsel and appellate counsel were not ineffective for failing to raise or object to the jury instruction that wrongly informed Banister's jury that he had other convictions. *See* Grounds -11-12 & §4 of Doc. 2.

The Court did not address either of these grounds and merely list them in a heading and denies them by combining them with other grounds. The Court did not address the specific facts of these grounds. However, the Court did address Banister's claim that the trial judge errored and became a witness when he told the jury, and gave them the jury charge, showing that Banister had been "convicted of other offenses. Doc. 26 p. 9-10. The Court found that the judge was not the functional equivalent of a witness, and that Banister has not shown a "substantial and injurious effect" as a result of the judge informing the jury Banister had been convicted of other offenses. In

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[9] Banister points out that trial counsel's failure to get her alleged reckless driving request on the trial record prejudiced Banister because it prevented his appellant attorney from raising the claim on direct appeal under the "any harm" standard of review. *Arline v. State*, 721 SW 2d 348, 351 (Tx. Cr. App. 1986).

making this conclusion the Court did not distinguish or discuss the case law that Banister advanced in support of this ground. Doc. 2 §4 & 4½. In these sections, Banister provided Texas case law not only showing that "the applicability of Rule 605 does not hinge on the judge leaving the bench to testify formally as a witness, *Duvall v. Sandler*, 711 SW 2d 369, 373 (Tx. App. Texas. 1986); that "[r]emarks or questions from the bench that convey factual information not in evidence run afoul of the rule", *In re M.E.C.*, 66 SW 3d 449, 457; and that the Court of Criminal Appeals has construed Rule 605 to prohibit not only direct testimony by the judge but also that which "is the functional equivalent of witness testimony." *Hammond v. State*, 799 SW 2d 741, 746 (Tx. Cr. App. 1990). Banister also presented a case where the exact same instruction was given, where the appellate judges stated that a "judge should not tell the jury to use such unproved prior convictions to evaluate the credibility of the defendant when the defendant did not testify...[and] that [t]here was no room for disagreement about these matters." *Bailey v. State*, 848 SW 2d 321, 324 (Tx. App. Hou. 1993) pet. granted for Almanza harm analysis at 867 SW 2d 42 (Tx. Cr. App. 1993, en banc).

The Bailey court applied the less favorable harm analysis because it was an unobjected to jury charge error. The court applied the "egregious" harm standard instead of the objected to standard of "some harm." The Court found that Bailey did not meet the egregious harm standard because the evidence against him was overwhelming, and the jury deliberated for only a very short time. *Bailey* 1994 Tex. App. Lexis 1732 (Tx. App. Hou.) Banister's case

is different because for one, the evidence was not overwhelming, and for two, his jury deliberated for over six hours, *see* Doc. 17, Reply at p. 38-42, for detailed analysis.

In the context of appellate counsel's responsibility to have raised this in the direct appeal, it is reasonably likely that he would have prevailed in light of the *Bailey* case and *Lyons v. McCotter*, 770 F.2d 529, 534 (5th Cir. 1986) and the other cases Banister set out in his Memorandum (Doc. 2 §4-4½) and his Reply (Doc. 17 p.41). In the context of trial counsel's responsibility to have objected to this erroneous instruction, the case law shows that the charge was clearly in error and that trial counsel should have objected to it. *Bailey* at 848 SW 2d 322, 324. This Court must concede that the jury charge and the judge informing the jury that Banister had been convicted of other offenses was in fact an error. "There is no room for disagreement about these matters." Bailey at 324 And with regard to harm, if counsel would have objected it would have resulted in one of two things: counsel's objection would have been sustained and the jury would not have learned that Banister was a convicted felon; or it would have been overruled in which case the error would have been preserved under the favorable appellate analysis of some harm. Either scenario, shows a reasonable probability of a different result. This Court cannot reasonably conclude that the jury learning that Banister had been convicted of other "offense" had no effect on their decision to find him guilty of

aggravated assault,[10] *see e.g., Spencer v. Texas*, 385 U.S. 554, 565 (1967) (Chief Justice Warren wrote that "it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime charged against him."); *also see Bonner v. Holt*, 26 F.3d 1081 (11th Cir. 1994) *cert. denied*, 514 US 1010 (Finding defendant entitled to habeas relief where the evidence showed state made defendants status as a habitual offender known to the jury, which was reversable error.); *also Clark v. State*, 878 SW 2d 224, 226 (Tx. App. Dal. 1994) *no pet*. (Finding that trial court's comments regarding appellant's prior convictions tainted penalty phase, **even though jury was not informed of specific offenses which defendant was convicted**.)

Banister respectfully asks that the Court amend or alter its judgment to address the facts of Banister's ineffective trial and appellate counsel for not raising the jury charge errors at trial or on appeal. Grounds 11, 12, 16.

11. The Court committed errors of law and fact in concluding that Banister has not shown that he was actually or constructively deprived of appellate counsel, and that he has provided no legal basis for the claim. Doc. 26 p.47

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[10] *U.S. V. Vasquez*, 597 F2d 192 (9th Cir. 1979) (Held: Possibility that at least one juror had been exposed to evidence of previous conviction, was too great for the Court to conclude that the verdict had not been affected.); *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988) (Granting habeas because bailiff told two jurors that defendant had did something like this before.).

In making the above conclusion and finding, the Court did not acknowledge section 4½, p. 18-19 of Banister habeas Memorandum of Law, *See* Doc. 2. There, Banister set out the legal basis for this claim, and he has shown that his appellate counsel was prevented from raising the charge errors discussed above because the court clerk omitted the jury charge from the appellate record. Banister has shown by both state and federal law that this omission was error. *See* Tex. R. App. P. 34,5 (4); and *see Hardy v. United States*, 375 U.S. 277 (1964) (Concluding that appellate "counsel's duty cannot be discharged unless he has a transcript of the testimony and evidence presented...**and also the court's charge to the jury**." (emphasis mine)). Because the clerk of the court failed to perform her mandatory duty to include the charge in the appellate record, Banister's appellate attorney was prevented from raising the charge errors on direct appeal. *See Pollan v. State*, 612 SW 2d 594,596 (Tx. Cr. App. 1981) (Information not found in the appellate record may not be utilized for appellate review). This resulted in a "constructive" denial of appellate counsel. *See Strickland*, 466 U.S. 668, 693 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of **interferences with counsel's assistance**." *citing Chronic*, 466 U.S. 659.

Banister respectfully asks that the Court revisit this ground and in doing so amend or alter its judgment to reflect an analysis of the facts and legal basis that Banister argued in support of chis ground. Doc. 1 & 2 § 4½ p.18, & Doc. 17 p. 94-96.

12. The Court committed errors of law and fact in concluding that his Fifth amendment was not

violated. Doc. 26 p.19-20 The Court mentioned this ground in its heading in page 17 of its order but it combined this ground (34) with Sixth Amendment ground (35), and in doing so it fell victim to the same misunderstanding of this ground that the direct appeals court did. Specifically, this Court's order shows that it applied the Sixth Amendment standard and never analyzed Banister's Fifth Amendment ground and never discussed or distinguished the cases that Banister aligned himself with. The Court's conclusion and finding that Banister is not entitled to relief because: "he cannot show that Wilson's question regarding what he was in jail for was in any way designed to elicit the incriminating response" is misplaced.[11] First, this designed to elicit inquiry is not the Fifth Amendment standard of review. The question is whether Wilson subjected Banister to express questioning or its functional equivalent, after his request for counsel and in counsel's absence. *See Rhode Island v. Innis*, 466 CJ.S. 291, 300-301 (1980). There is no doubt that Wilson asked Banister at least two express questions: (1) what was he in jail for?; and (2) was he the one who was involved in the manslaughter case in the Earth area? 4RR-204, 208 Contrary to this Court's conclusion, both of these express questions meet the requirements of Fifth amendment violations because for one neither of these questions were questions "normally attendant to arrest and custody" *Id.*, and for two, they were express

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[11] United States v. Montgomery, 714 F.2d 201, 202 (1st Cir. 1983) ("Appellant made incriminating statements only after agent Sherman had interjected questions.... Since the questioning here was express, we have no occasion to go farther. This was custodial interrogation.").

questions about the reasons why Banister was in jail, and an inquiry into whether Banister was involved in a manslaughter case. To say that neither of these questions meet the requirements of a Fifth Amendment violation is unreasonable in light of the following cases.

United States v. Webb, 755 F.2d 382 (5th Cir. 1985) (Finding jailer's question of "what kind of shit did you get yourself into" was impermissible interrogation.)

Ethridge v. Johnson, 49 F. Supp. 2d 963, 983 (S.D. Tx. 1999) (Stating that "Officer Day should have known that asking whether Ethridge knew **why he was under arrest** would likely elicit an incriminating response" and Ethridge was "thus exposed to interrogation in custody....The Court therefore concludes that the trial court violated Miranda when it denied Ethridge's motion to suppress custodial statement made to Officer Day.")

Pirtle v. Morgan, 313 F.3d 1160, 1165 (9th Cir. 2002) ("District court explained that it was undisputed that Pirtle was in custody when Deputy Walker asked him if he knew **why he was under arrest**, and Pirtle was being interrogated because the statement was reasonably likely to elicit an incriminating response.")

Smiley v. Thurmer, 542 F.3d 574 (7th Cir. 2008) (Finding that state court misapplied Supreme Court doctrines on "interrogation" to admit statement taken without Miranda warnings. (Applied "functional equivalent" instead of "express questioning.")

This Court and the state appellate court who denied Banister's Fifth Amendment claim misapplied the holding in *Rhode Island v. Innis* to the facts of Banister's case. The state appeal court found that "[t]he record does not support appellant's conclusion that Wilson should have known the questions he asked were reasonably likely to elicit an incriminating response. *See* PX-48 p. 6 Banister did not need to show that the questions were "reasonably likely" to elicit an incriminating response", all he had to show was that he was subject to **express questioning**." The reviewing court unreasonably applied Supreme Court precedent by applying the "functional equivalent" test instead of the "express questioning" test to Banister's Fifth Amendment claim. The functional equivalent test and its definition of statements that "the police should know are reasonably likely to elicit an incriminating response from the suspect". *Id.* at 301, "does nothing more than define when police practices, **other than express questioning,** constitute interrogation." *See Smiley v. Thurmer*, 542 F.3d at 582 "Because Mr. Smiley was in custody and was subject to express questioning the state court had no reason to apply the rule for 'the functional equivalent' of express questioning." *Id.* at 583. "Consequently, the decision of the court of appeals was an 'unreasonable application of clearly established Supreme Court precedent because it "unreasonably extend[ed] a legal principle from [Supreme Court] precedent to a new context where it should not [have] appl[ied]."' *Id.*

Banister respectfully asks the Court to revisit the Fifth Amendment claim under the proper standard of **express questioning**, and in doing so amend and alter its judgement and order to reflect that the state

appellate court did unreasonably apply Supreme Court precedent on Fifth Amendment principles.

13. The Court committed errors of law and fact in concluding that Banister is not entitled to relief on his failure to consult claim. Ground-44.

The Court failed to address the operative facts of this Ground and denied it by summarily stating that Banister's claims are "controverted by trial counsel's affidavit and should be dismissed as conclusory." Doc. 26 p.41. The Court is incorrect with respect to counsel's failure to consult with Banister about the consequences of going to trial and rejecting the state's fifteen year plea offer. *See* Memorandum of Law §12 p.3(e). This issue was the only issue that the state habeas court completed finding of fact and conclusions of law on. *See* state habeas court's findings. Banister has shown in both state and federal court that those state findings were based on an unreasonable determination of the facts in light of the evidence presented. Neither this Court nor Respondent, in her show cause answer, addressed the facts Banister submitted in support of his claim that the state court's determination was an unreasonable determination of the facts. Doc. 17, Reply p.2-3. In Banister's Reply he informed the Court that Respondent did not address this claim in her answer and Banister asked that the Court consider the "Opposition to the Adoption of the Trial Court's Findings of Fact". *See* "Opposition" at PX-54.

This Court did not properly consider Banister's Opposition to the state court's findings because had it done so the Court would have discovered that those findings were based on unreasonable determinations

of fact in light of the evidence presented. Specifically, the state court found that counsel was not ineffective with respect to her advice on the lesser included offense of deadly conduct because Banister could have accepted the state's plea offer after learning that the deadly conduct instruction was not going to be included. Banister proved in his opposition motion that this finding was incorrect and could not be reconciled with the pre-trial letter that the trial court sent to trial counsel, informing her of the "Court's Policy" of not excepting any plea agreements once the case is placed on the Court's trial docket. *See* Appendix in Opposition at PX-54. This letter directly contradicts the state court's finding that Banister could have accepted the state's 15 year plea offer at the end of the trial when he learned that the deadly conduct instruction was not going to be given to the jury. It also directly contradicts the conclusion that Banister was not harmed by counsel's misadvice on the deadly conduct instruction.

Banister also claimed in his opposition that the habeas court unreasonably-applied Strickland when it denied Banister's claim based on its finding that "counsel did not make an affirmative guarantee that the charge would be included." *See* Findings at p.4. Banister relied on *Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007) to show that "by focusing on [counsel's] guarantee rather than the analysis required by Strickland, the state post-conviction court's application of governing federal law was objectively unreasonable." *Id.* 497. This Court should amend and alter its judgement and order to include an analysis of this ground and its facts.

14. The Court committed errors of law in finding that juror Garcia's unobjected to an invited testimony is not admissible. Ground-53. The Court agreed with Respondent's argument and asserts that juror Garcia's testimony—that she had a reasonable doubt and didn't believe Banister was guilty—cannot be considered because its inadmissible. Doc. 26 p.48. In making this conclusion the Court does not address any of the case law that Banister provided showing that her testimony was admissible because the state was present when the testimony was given, and actually invited her to come back to the stand and give the testimony, and didn't raise an objection when the testimony was given. There are several cases in Texas which shows that the testimony was admissible in spite of the Rules of evidence Rule 606(b) because the state waived any objection by not objecting to the testimony when it was given. As this Court and Respondent mentioned throughout its order and pleadings, "[I]t is not the province of a federal habeas court to reexamine state court determinations on state-law questions." Doc. 26 p. 32. As such this Court is bound by the Texas contemporaneous abjection rule which requires a party to object or have the error waived. This Court is likewise bound by the case law that Banister provided in his Reply that shows that Rule 606(b) does not apply absent an objection. *See* Reply Doc.17 p.84. Banister respectfully asks the Court to amend or alter it judgment and order.

To conclude, Banister prays that this Court will amend and alter its order and judgment denying habeas relief and denying him a Certificate of Appealability.

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY DEAN BANISTER,	§	
Petitioner,	§	
v.	§	CIVIL ACTION NO. 5:14-CV-049-C
LORIE DAVIS, Director, TDCJ-ID	§	ECF
Respondent.	§	

ORDER

Before the Court is Petitioner's Motion to Alter or Amend Judgment with Brief in Support dated June 12, 2017. By his motion, Petitioner moves under Federal Rule of Civil Procedure 59(e) to "correct manifest errors of law and fact" in this Court's Order entered May 15, 2017. After consideration of the motion, and review of the underlying materials in this case, the Court concludes that the motion should be DENIED.

SO ORDERED.

Dated June 20, 2017.

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY DEAN BANISTER,	§	
Petitioner,	§	
v.	§	CIVIL ACTION NO. 5:14-CV-049-C
LORIE DAVIS, Director, TDCJ-ID	§	ECF
Respondent.	§	

NOTICE OF APPEAL BY BANISTER

Pursuant to Rule 4(a), Federal Rules of Appeallate Procedure, Petitioner Gregory Dean Banister, hereby appeals from the judgment of the Court denying his 2254 petition and dismissing the action with prejudice and denying him a Certificate of Appealability. The Order and Judgment was issued on May 15, 2017, by Senior U.S. District Judge Sam Cummings. An application for a COA accompanies this notice.

Signed on this 20th Day of July, 2017.

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Gregory Dean Banister, Pro-se

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY DEAN BANISTER,	§	
Petitioner,	§	
v.	§	CIVIL ACTION
	§	NO. 5:14-CV-049-C
LORIE DAVIS, Director, TDCJ-ID	§	ECF
Respondent.	§	

BANISTER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY

Petitioner Gregory Banister moves this court for a certificate of appealability, and in support states:

A. Standards for granting a certificate of appealability

A petitioner is entitled to a certificate of appealability if he makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2254(c) (2). The U.S. Supreme Court in *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), held this means that the appellant need not show that he would prevail on the merits, but must "demonstrate that the issues are debatable among jurists of reason;" that a court could resolve the issues in a different manner; or that the questions are "adequate to deserve encouragement to proceed further." This means that the petitioner does

not have to prove that the district court was necessarily "wrong"—just that its resolution of the constitutional cairn is "debatable":

> We do not require petitioner to prove— that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Miller-El v. Cockrell, 537 U.S. 322, 338 (2003). Therefore, "[a]ny doubt regarding whether to grant a COA is resolved in favor of the petitioner." *Haynes v. Quarterman*, 526 F3d 189,193 (5th Cir. 2008); *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997).

B. Federal Habeas Filing Summary

Banister filed his 2254 petition and Memorandum in support in April of 2014. (Doc. 1 & 2) The State was ordered to answer. (Doc.6) Banister filed a Reply to the State's answer (Doc. 17-18[1]), a motion for discovery (Doc.21) and a motion for an evidentiary hearing (Doc. 25) Both were denied. (Doc. 26) On May 15, 2017 the District Court issued an order denying all of Banister's motions, his 2254 petition, and a certificate of appealability. (Doc. 26 & 27) Banister filed a motion to alter or amend which the Court denied on June 20, 2017. (Doc. 28 & 30) Banister

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[1] Banister filed 53 exhibits along with his Reply. Those petitioner exhibits will be referenced as "PX" followed by the number of his document. (Doc. 18)

hereby files this application seeking a certificate of appealability on the following issues:

1. Appellate counsel's failure to challenge the factual and legal insufficiency or the trial evidence on appeal. p.3-10;

2. Trial counsel's failure to move for a directed verdict or not guilty. p.10-13;

3. Trial counsel's failure to move to strike the state's expert's testimony after they failed to "connect it up." p.13-15;

4. Appellate counsel's failure to raise the improper closing arguments or the prosecutor on appeal, p.15-17;

5. Failure of appellate counsel to raise the denial of the lesser included offense of deadly conduct, p.17-18;

6. Trial counsel's failure to properly request the lesser included offense instruction of reckless driving. p.18-21;

7. Trial counsel's failure to object to the court's charge informing the jury that Banister had been convicted of other offenses, p.21-24;

8. Appellate counsel's failure to raise the jury charge errors. p.24-25;

9. Constructive or actual denial of appellate counsel, p.25-26;

10. Admission of incriminating statements that were the product or impermissible custodial interrogation, p.26-29;

11. Admission of incriminating statements obtained by police as a result of deliberate elicitation without counsel being present, p.29; and

12. Denial of due process and a fair trial because a juror based her verdict on non-evidentiary factors and failed to obey the mandatory instructions given by the court, p.30.

Because Banister is proceeding pro-se and without an attorney, he requests that this Court liberally construe this application for certificate of appealability.

1. Appellate Counsel's failure to Challenge the Legal and Factual Insufficiency Issues on Appeal. Grounds 1 & 2, Doc.1, & Section 1 of Memorandum, Doc.2.

The Court cites appellate counsel's (Brian Wice) amended affidavit and acknowledges that Mr. Wice admitted that he "should have raised both of these appellate issues" on appeal. (Doc. 26 p.45-46) However, the Court claims that because Mr. Wice also stated "that 'he cannot say that either claim would have been meritorious' ", Mr. Wice was not ineffective. (*Id.* 46) The Court goes on to state that Banister "has failed to show deficient performance oi that there is a reasonable probability that, but for appellate counsel's alleged unprofessional errors, the result of the proceeding would have been different." (*Id.*)

a. Reasonable Jurists Could find the Court's Conclusion that Mr. Wice was not Deficient Debatable or Wrong.

The very fact that Mr. Wice admits that he made a "mistake", and that he "should have raised these

appellate issues" is sufficient proof that his performance was "deficient" under Strickland's first prong. *See Joshua v. Dewitt*, 341 F.3d 440, 461 n.2 (6th Cir. 2003) ("If petitioner's counsel should have raised the issue...this would certainly demonstrate that counsel's performance was in fact deficient under Strickland."); *Young v. Dretke*, 356 F.3d 616, 621 (51 h Cir. 2004) (Counsel stated in affidavit that "mistake" was an oversight, therefore "deficient performance is not contested."); and *Washington v. Strickland*, 693 F.2d 1243, 1257 (5th Cir. 1982) (Recognizing that the "presumption can be rebutted, however, when trial counsel testifies credibly at an evidentiary hearing that I is choice was not strategic."); *also see Carter v. Bowersox*, 265 F.3d 705, 716 (5th Cir. 2001) ("The presumption that [appellate] counsel's failure to raise the due process claim was a tactical decision, however, is undermined by counsel's affidavit that the instructional error was simply overlooked.").

Mr. Wice's initial affidavit proves that at the time of drafting the appeal he believed that a legal and factual sufficiency challenge would not be meritorious because he wrongly believed that the state's expert, Kathy Erwin, had given testimony that Banister could have been suffering a cocaine crash at the time of the accident. The portion of Mr. Wice's initial affidavit addressing his reasons for failing to raise the sufficiency issues reads as follows:

> I did not believe it to be meritorious. Department of Public Safety chemist, Kathy Erwin, testified that Mr. Banister's blood contained 0.36 milligrams per liter of benzcylcgonine, which she described as a

> cocaine metabolite indicating that he had consumed cocaine sometime before the crash. Based on her expert testimony that Mr. Banister could have been suffering from a cocaine withdrawal at the time of the crash, and because the jury could have rationally inferred that this cocaine crash withdrawal and resultant fatigue was the proximate cause for the crash, I believe that a rational juror could have found all of the elements beyond a reasonable doubt. (*See* Mr. Wice's Initial Affidavit at PX-36 p.5)

But the trial record and the court of appeals opinion denying Banister's appeal proves that Erwin never gave the testimony Mr. Wice claims she did. Immediately after learning of Mr. Wice's rationale for not raising these grounds, Banister wrote him a letter informing him that his view of the testimony Erwin gave was incorrect. (*See* Letter at PX-51) In response to this letter, Mr. Wice admitted he had made a "mistake" and agreed to amend his initial affidavit. (*See* Letter at PX-40) Shortly thereafter, Mr. Wice filed an amended affidavit stating the following:

> In the two years since I have filed my original affidavit,] have had the chance to review that original affidavit, pertinent portions of the trial record, and pertinent portions of the court of appeals' opinion affirming Mr. Banister's conviction. Viewed against that backdrop, I now believe that my assertion as to why I did not challenge either the legal or factual sufficiency of the evidence was mistaken, and that there was no tactical downside to having raised either of these issues. While I cannot say

> whether either claim would have been meritorious, I recognize that, in the exercise of reasoned professional judgment, that I should have raised both of these appellate issues. (*See* Amended Aff. at PX-41 p.4)

The letter that Banister wrote Mr. Wice was clearly the motivation for the amended affidavit and proves that he filed it because Banister made him realize that his view of the evidence was "mistaken." (PX-51) Specifically, that Kathy Erwin had never given any testimony that Banister could have suffered from a cocaine crash. Because Mr. Wice's reasons for not challenging the sufficiency issues is based on his "mistaken" belief of the evidence, his decision not to raise either of these claims can not be reasonably categorized as "strategy" or "professional judgment" as the Court suggest. *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) ("Describing [counsel's] conduct as 'strategic' strips that term of all its substance.").

Further, the very fact that Mr. Wice prepared the grounds for appeal with an erroneous view of the testimony given indicates that he could not have engaged in the required informed selection of potential claims in order to "maximize the likelihood of success on appeal." *McCoy v. Court of Appeals of Wisconsin*, Dist.1 108 S.ct. 1895, 1902 (1988) ("The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal."). Mr. Wice's erroneous belief, that Irwin had applied the cocaine crash theory to Banister had serious consequences because one of the primary reasons the court of appeals gave for denying points 5, 6, & 7, was that Erwin's cocaine crash testimony was

"never applied" or "directly related" to Banister. *See Bannister v. State*, 2006 Tex. App. Lexis 8512 at p. 12, 13. In fact, the appellate court recognized that Mr. Wice's challenge is to testimony that Erwin did not give." (*Id.* p.14) Jurists of reason could disagree with the Court's conclusion that Mr. Wice was not deficient or objectively unreasonable. *See e.g. Biagas v. Valentine*, 2007 U.S. Dist. Lexis 30296 ("If the state courts' decision in this case rests on the assumption that counsel's admitted mistake was reasonable strategy, then that decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.").

b. Reasonable Jurists Could Disagree that the Evidence was Legally and Factually Sufficient and that Banister was not Prejudiced by Mr. Wice's failure to raise the issues.

Here the state was bound by the indictment, which alleged the following elements:

- that Banister intentionally, knowingly, or recklessly caused serious bodily injury to B.J. Mitchell,
- by failing to control or by driving his motor vehicle without sufficient sleep,
- as a result of introduction of cocaine into the body
- and thereby caused his motor vehicle to collide with B.J. Mitchell.

(*See* Indictment at CR-1, and final charge at PX-3) (emphasis mine)

While hearing trial counsel's motion to strike surplusage prior to trial, the State argued against

striking the as a result of cocaine language because it was an element of the offense. (3RR-24-25, 49) The Court agreed and stated that the as a result of the introduction of cocaine into to body was 'going to be one of the elements that the states going to prove." (3RR-52) The Court clarified further and stated that "It's the Court's understanding...that the intent is to indicate that Mr. Bannister failed to control his motor 'vehicle or drove his motor vehicle without sufficient sleep and that either of those was a result of the introduction of cocaine into his body which resulted in the accident." (3RR-48) And in voire dire of Kathy Erwin, the Court gave further clarification: "we're not alleging that he was under the effect of any cocaine. It was a result of the use of cocaine that caused the crash effect, and that's what we're dealing with is the crash effect." (5RR-33)

In light of the above, there can be no doubt that the state had to prove that Banister suffered a cocaine crash in order to obtain a valid conviction.[2] But the trial record is void of sufficient evidence to prove: (1) that Banister ever suffered from a cocaine crash; (2) that Banister failed to control his motor vehicle as a result of cocaine; and (3) that Banister drove his vehicle without sufficient sleep. The District Court did not discuss these facts in its order other than stating that "the record reflects that evidence was presented to support the allegation that the accident was the result of the introduction of cocaine into Petitioner's

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[2] *See Brown v. State*, 888 SW 2d 216 (Tx. Ap. Ama.) ("If matter not essential to charged crime is included in charging instrument and that matter is not mere surplusage but, instead, is descriptive of essential element, it must be proven.").

body." (Doc. 26 p.26) The Court cited no evidence or record citations in support of this claim. However, in its show cause answer, Respondent claims the evidence was sufficient and relies on the state's expert, Kathy Erwin, testimony to support her argument. (Answer p. 63) First and foremost, the record proves that there was absolutely "no cocaine" found in Bannister's blood. Erwin's testimony and her lab report establish this. (5RR-17 & Report at PX-33) Although the evidence did reveal the presence of a "trace" amount of benzoylecgonine, a metabolite of cocaine, Erwin testified that the metabolite is "inactive" and has absolutely "no effect whatsoever on the body." (5RR-55, 62, 67)

Erwin was allowed to testify, generally, about the after effects of cocaine and a phenomenon known as "cocaine crash" but she "never applied" nor "directly related" that testimony to Banister. As the direct appeal court recognized in denying Banister's appeal:

> Erwin **was not asked** whether [Banister] had experienced cocaine crash withdrawal.(*See Bannister*, 2006 Tex. App. Lexis 8522 p.12);
>
> Erwin's testimony **was not related** directly to [Banister] (*Id.*);
>
> Erwin's testimony **did not apply** the cocaine crash theory to [Banister]." (*Id.* p.13); and
>
> Before the jury, [Erwin] **was not asked** if [Banister] experienced cocaine crash or withdrawal." (*Id.*)

At trial Erwin admitted that all the cocaine crash studies were done on people who were "chronic users" or who had ingested large amounts. (5RR-30, 33, 118, 119) She also admitted that she did not know whether

Banister was a chronic user, how much cocaine he had previously used, how it was used, or when it was used. (5RR-12, 62, 114) Her failure to know these facts made her general testimony on the phenomenon of cocaine crash irrelevant, unreliable, and legally insufficient to prove that Banister suffered a cocaine crash or that he was otherwise affected by the metabolite. *See Manning v. State*, 114 S.W. 3d 922, 929 (Tx. Cr. App. 2003) (Stating that evidence of cocaine metabolite "was not relevant because there was no indication when the appellant consumed the cocaine that was metabolized into benzoylecgonine and discovered in the blood.") (Price J., which Meyers, Johnson, and Holcomb joined in concurring opinion); *Acevedo v. State*, 255 S.W. 3d 162, 169 (Tx. App. San. Ant. 2008) ("an expert testifying to the effects of methamphetamine on a given individual must know more about the individual and quantity ingested."); *Rodriguez v. State*, 31 S.W. 3d 772, 779 (Tx. App. Aust. 2000) (cocaine as a deadly weapon) ("[t]estimony that there is an unknown possibility of a serious adverse physical effect arising out of the use of some cocaine by some persons under some circumstances does not satisfy [the sufficiency of evidence] burden."); *also Layton v. State*, 280 S.W. 3d 235 (Tx. Cr. App. 2009) (Evidence that defendant ingested two prescription drugs more than 24 hours prior to stop held inadmissible because no scientific evidence as to dosage and time of ingestion.).

Although Erwin testified about crash effects in general, and described the crash symptoms as "fatigue, extreme tiredness, and loss of energy" (5RR-64-65), she never testified that Banister suffered these effects or exhibited these symptoms. (5RR-1-68)

In fact, the state did not produce one single witness who could testify that Banister exhibited any of the cocaine crash symptoms described by the scientific literature and Kathy Erwin. To the contrary, the DPS Trooper who interacted and observed Banister for some time after the accident testified that Banister did not exhibit any signs of intoxication, sleepiness, or fatigue. (4RR-118, 145, 5RR-166) Trooper Ponce also testified that he is well trained in detecting impairment in drivers and that based on his training he did not conduct any field sobriety tests on Banister. (4RR-118, 146, 5RR-166) The other cyclist, Ronnie Rodgers, answer to whether he noticed anything unusual about Banister when he got out of the car was that "I think he was just scared like the rest of us." (4RR-44) And DeLaCruz testified that Banister had slept the night before and that he was behaving normally before and after the accident. (5RI-128, 130, 132) These witnesses description of Banister's behavior is not consistent with the behavior of a person who is suffering from a cocaine crash. In fact, this testimony, especially the "well trained" 18 year DPS veteran's, is compelling evidence that Banister was not suffering from a cocaine crash. *American Interstate Ins. Co. v. Hinson*, 172 S.W. 3d 108, 120 (Tx. App. Beaumont 2005) ("[C]ircumstantial evidence that a person behaved normally is some evidence that a person is not intoxicated.")

The state's unapplied cocaine crash, coupled with the testimony that Banister behaved normally after the accident, made it unreasonable for the jury to infer that Banister suffered from a cocaine crash and that that crash caused him to fail to control or to drive his motor vehicle without sufficient sleep. Although

inferences from established facts are accepted methods of proof when no direct evidence is available, it is nevertheless essential that there be a logical and convincing connection between the facts established and the conclusions inferred. *Juan H. Allen*, 408 F.3d 1262, 1277 (9th Cir. 2005) (Stating that a "reasonable inference is one that is supported by a chain of logic, rather than, as in this case, mere speculation dressed up in the guise of evidence."). Based on the review of the evidence given in Banister's case, the picture is simply not there and the cocaine crash cannot be inferred absent the kind of guesswork that due process prohibits. This Court cannot accept the state's view of the evidence without choking all vitality from the requirement of proof beyond a reasonable doubt. Here there is nothing but rank speculation to suggest that Banister ever suffered from a cocaine crash. Deference to a jury's verdict does not allow rank speculation to substitute for proof beyond a reasonable doubt. *Hooper v. State*, 241 S.W. 3d 9, 16 (Tx. Cr. App. 2007) ("Speculation is mere theorizing or guessing about the possible meaning of facts [(the presence of the metabolite in Banister's blood)] and evidence presented. A conclusion reached [(that Banister suffered a cocaine crash)] by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt."); *Urbano v. State*, 837 S.W. 2d 114, 116 (Tx. Cr. App. 1992) ("Proof that only amounts to a strong suspicion or mere probability of guilt is insufficient to sustain a conviction."); *see also Acevedo*, 255 S.W. 3d at 170 (Concluding that experts failure to "tie" the methamphetamine facts to Acevedo "was merely speculative and, thus unreliable

and irrelevant."). As Judge Price so aptly stated in the concurring opinion in *Manning*, "just because [Manning] had consumed cocaine at some time before the blood was drawn, does not establish that he was under the influence of cocaine when the collision occurred." And Judge Keasler recognized that the metabolite "evidence may not have been sufficient by itself, to prove that Manning's actions were the result of his ingestion of cocaine...". *Manning*, 114 S.W. 3d 922, 927, 929. Because the evidence presented by the state relating to the "as e result of cocaine" element, even when viewed in light most favorable to the verdict [3] does not permit any rational jury to conclude—beyond a reasonable doubt— that Banister suffered a cocaine crash or that that crash was the proximate cause of the accident, the evidence was neither legally or factual sufficient to sustain the conviction. Consequently, reasonable jurists could disagree with the Court's conclusion that there's not a "reasonable probability" that these claims would have been successful had Mr. Wice raised them in the appeal.

Banister respectfully requests that the Court issue a COA on Grounds 1 & 2. (For a more in depth view of these grounds please see Section 1 of the Appendix).

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[3] Banister points out that at the time of his appeal, in 2006, there was a "factual sufficiency" review available to Texas Appellants. *Clewis v. State*, 92 2 S.W. 2d 126 (Tx. Cr. App. 1996). This review was done away with in 2010, well latter Banister's appeal. A factual sufficiency review was much more favorable to appellants and independent of a legal sufficiency review. A factual sufficiency review required a review of "all the evidence" without the prism in light most favorable to the prosecution. *Id.*

2. Trial Counsel's Failure to Move for a Directed Verdict of "Not Guilty." Ground-3, Doc.1, & Section-1 of Memorandum, Doc.2; Reply at p.25, Doc.17

The Court acknowledges that the state had to prove the accident was caused "as a result of the introduction of cocaine", and it recognized that neither expert testified that Banister was under the influence of cocaine at the time of the accident. (Doc. 26 p.26) The Court, however, suggest that because Erwin testified about the general scientific principles of "cocaine crash" the jury could have reasonably inferred that the accident was caused as a result of cocaine into Banister's body. (*Id.*) The Court also found that "the record reflects that evidence was presented to support that the accident was caused as a result of the introduction of cocaine into Petitioner's body." (*Id.*) The Court cited no testimony, evidence, or other facts to back this finding up. Banister respectfully disagrees with the Court's finding and contends that it is inaccurate and does not find support in the trial record. (4RR-5RR)

In light of the trial evidence which was discussed supra, jurist of reason could disagree with the Court's finding that the jury could reasonably infer that the accident happened as a result of cocaine, and that there was sufficient evidence in the record to support this allegation. (*See* Appendix at Section-1 for an in depth evidence break-down.)[4]

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[4] This in-depth break-down of the trial evidence also goes into detail how the trial evidence was lacking with respect to the elements of "failure to control" the motor vehicle, and "driving the motor vehicle without sufficient sleep."

a. The Court's Finding that Banister was not Prejudiced by Trial Counsel's Failure to Move for a Directed Verdict is Debatable Among Jurist; of Reason.

The Court found that even if counsel were deficient in not moving for a directed verdict, Banister "has not shown that he was prejudiced by that failure, given that trial counsel made the argument in her motion for mistrial and it was denied." (Doc. 26 p.27) The following record excerpts prove that counsel used the mistrial motion not to attack the insufficiency of the evidence, bat to get Banister a new trial "based on the introduction of cocaine into the case[,]" because counsel "believe[d] that it prejudiced the minds of the jurors caused confusion, blurred the issues... caused harm...[and] cannot be repaired by striking "testimony or by asking that the jurors disregard the testimony."(6RR-8) It is well established that the purpose of moving for a mistrial is not to take the case away from the jury because of insufficiency of evidence, but to obtain a new trial when highly prejudicial and incurable errors occur. *See Woods v. State*, 18 S.W. 3d 642, 648 (Tx. Cr. App. 2000). The granting of a mistrial results in a new trial, whereas, the granting of a directed verdict results in an acquittal with no further prosecution. A directed verdict is made at the close of the state's direct evidence, not at the end of the trial as the mistrial motion was. This is important because DeLaCruz (5RR-125), Deputy Wilson (5RR-207), Cantrell (5RR-195), and Officer Thompson (5RR-213) all testified and gave damaging testimony after the close of the

state's direct evidence.[5] Even if trial counsel's mistrial motion could be construed as a challenge to the sufficiency of evidence, counsel's belated challenge resulted in all of these witnesses prejudicial testimony to be added to the sufficiency inquiry. Although trial counsel did draft a motion for an "Instructed Verdict", for some reason she never filed the motion with the court. (*See* Doc.18 PX-27) Had trial counsel moved for a directed verdict at the close of the state's case none of the above witnesses testimony would have been considered in determining if a directed verdict of not guilty was appropriate. There simply could not have been a reasonable strategic basis for counsel waiting for more evidence to be admitted before challenging the sufficiency of evidence.

Although counsel's motion for a mistrial did make the argument that "[t]here was no sufficient evidence...that Banister was under any kind of influence of cocaine," this argument was made in the context of the prejudicial effect of the admittance of Kathy Erwin's testimony, not in the context of an attack on the state's failure to prove elements of the offense. (6RR-8) Assuming that counsel's motion for a mistrial was an attack on the sufficiency of the evidence, it was a poor one, because it didn't come at the close of the state's case, and because it didn't even ask the trial court to direct a verdict of not guilty once the state's direct evidence failed to prove the elements

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[5] The prejudice of these witnesses testimony is underscored by the fact that the prosecutor emphasized their testimony in its closing arguments in urging the jury to convict. (6RR-12-16, 24)

of the offense.[6] In light of the trial court's recognition at trial, that the cocaine crash was an element the state was going to have to prove, and in light of the law that requires federal Courts to presume that the state courts know and follow the law, reasonable jurists could disagree with the Court's conclusion that it was not "reasonably probable" that the directed verdict would not have been granted had it been requested. As such, a COA should issue on Ground-3.

3. Trial Counsel's Failure to Move to Strike the Cocaine Crash Testimony When it was Never "Connected up." Ground-4 Doc.1; Mem. § 2 Doc.2; Reply p. 29 Doc. 17.

In denying this ground, the Court did not address whether the state's expert ever "connected up" her cocaine crash testimony nor did it address whether her failure to do so would have been vulnerable to a motion to strike. (Doc. 26) The Court denied the ground by concluding that even if counsel's failure to strike the testimony was deficient, "it does not necessarily follow that [Banister] is entitled to relief." (*Id.*) The Court then mentions Strickland's prejudice prong and finds that Banister "is not entitled to relief." (*Id.*)

The state's expert, Kathy Erwin, never "tied" or "connected up" her cocaine crash testimony to Banister. Although counsel objected on this basis

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[6] Counsel's objection to the state's closing arguments and recognition that: "Neither expert said [Banister] was crashing… They spoke generally of a crash effect and they said in this case they couldn't testify whether he was crashing", indicates that she was aware of the state's failure to prove the cocaine crash. (6RR-26-27)

several times during Erwin's testimony, counsel did not re-urge these objections and move to strike the testimony at the close of the state's case. (5RR-21, 22, 27, 33, 43, 44, 55, 58-61) In response to counsel's objections, the trial court cave the following reasons for allowing Erwin to continue to testify:

> I'm going to go ahead and allow the state to proceed with this witness. I do think there's additional foundation that you're going to need to lay before she goes into any of her opinions. (5RR-29, Lines 1-4)
>
> Now, several things. Before she can give testimony as to the crash effects **she's going to have to establish some way that she can tell from these tests that he would be suffering from the crash effect, otherwise. I don't see that it's relevant**. (5RR-38 Lines 13-17)
>
> But before she'll be allowed that testimony **she'll need to be able to connect scientifically the results of the test with this**. (5RR-39 Lines 8-10)

I'm going to withhold a ruling. Before you go through and ask her to testify as to an opinion or anything, let me know and I'll make a ruling at that time.(5RR-56 Lines 3-4)

I'll withhold my ruling as I previously announced. (5RR-58-59)

These pronouncements by the court indicate that it was "conditionally" admitting Erwin's testimony under Texas Rul.es of Evidence, Rule 104(b). As the Court of Criminal Appeals recognized in interpreting this Rule in *Fuller v. State*, "a trial judge cannot error in most cases by overruling a relevancy objection so

long as the challenged evidence might be 'connected up' before the end of the trial." *Fuller V. State*, 829 S.W. 2d 191, 198 (Tx. Cr. App. 1992) In Fuller, as in this case, "the trial court's ruling was correct when made and only became challengeable when a connection by the close of the case had not been made." (*Id.*) Here, as in Fuller, it seems probable from the record that the trial judge overruled each relevancy objection, not because he thought the testimony to be relevant at the time, but because he wanted to give the state its full opportunity to "connect up" the testimony. (*Id.* 199)

Although counsel did repeatedly object, moved for a mistrial, and moved to strike mention of cocaine in the indictment, [7] each of these actions were not adequate challenges to the "conditionally" admitted testimony so there irrelevant. The law indicates that counsel was required to re-urge her relevancy objection and move to strike Erwin's testimony when a connection was not made by the close of the state's case. *Fuller* at 198 ("In spite of his clearly expressed desire to exclude the evidence, we are constrained by rules of procedure to hold that appellant forfeited the right of appellate review by his failure to move that it be stricken after the close of the state's evidence."). The Fuller Court further recognized that "it is not the judge's duty to notice whether the evidence is eventually 'connected up' in fact. Instead **the objecting party must re-urge his relevancy objection after all**

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[7] Respondent, in her show cause answer, attempted to use these actions as justification for counsel's conduct relating to this ground. (Answer at p.19-20) Banister rebutted Respondent's argument in his Reply. (Doc. 17 p.29-32].

the proof is in and ask that the offending evidence be stricken, and that the jury be instructed to disregard it." (*Id.*) (emphasis mine) Banister has proven that Erwin's cocaine crash testimony was not "connected up" to the facts of his case. Therefore there is a reasonable probability that had counsel "re-urged" her relevancy objection, and moved to strike the testimony at the close of the state's case, (presuming the judge would have followed the law as this Court must) it would have been stricken from the record and thus the jury would not have been permitted to consider it as evidence of guilt. Without the use of Erwin's testimony the state would not have been able to mislead the jury—as it did—into believing that Banister had suffered from a cocaine crash. (*See* state's closing argument, where it was allowed to argue that it had proven the cocaine crash "without question." (6RR-26) (*see* Infra p.16)). Further, the emphasis that the state placed on Erwin's testimony in its closing arguments in urging the jury to convict also proves the testimony helped the state convince the jury that Banister was guilty. (6RR-16, 23, 24, 25, 26). Reasonable jurists could disagree with the Court's conclusion that trial counsel was not deficient, and that her failure to move to strike Erwin's testimony did not prejudice Banister. *See Acevedo*, 255 S.W. 3d 162, 167-68 (Finding trial court abused its discretion in denying Acevedo's motion to strike expert's testimony when expert failed to "tie" the methamphetamine testimony to Acevedo).

4. Appellate Counsel's Failure to Raise the Prosecutor's unsupported Closing Argument, that the Cocaine Crash was Proven "Without Question." Ground-6 Doc 1; Memorandum § 2 Doc. 2; Reply p.91-92.

Although the Court listed this ground in page 43 of its order, it did not address the specific facts of this ground. (Doc. 26 p. 43) The Court generally denies this ground by concluding that Banister "is not entitled to habeas relief on his grounds asserting ineffective assistance of appellate counsel." (*Id.*)

As already established supra, no evidence was before the jury that Banister suffered a cocaine crash. In spite of this, the trial court permitted the prosecutes to make the following closing argument:

> And **you know from a cocaine crash without question**…[A]nd you [know] **he's going to be crashing and you know he was fatigued**. (6RR-26)(emphasis mine)

Trial counsel immediately objected, pointing out that: "Neither expert said he was crashing. They said they could not testify that he was crashing." (6RR-26) The Federal Habeas Court also agreed that neither expert ever testifies that Banister suffered a cocaine crash. (Doc.26 p.26) As such, it is uncontested that state didn't produce evidence to support its closing argument that they had proven the "cocaine crash without question." Because the state's closing argument was not supported by the evidence it was error and the court should have sustained counsel's objection instead of overruling it. The overruling of the objection no-doubt signified to the jury that the state's representation of the expert's testimony was

correct, and that the state did prove the cocaine crash 'without question." *Good v. State*, 723 S.W. 2d 734, 738 (Tx. Cr. App. 1986) (Recognizing "[t]hat a trial judge by overruling an objection to an improper argument, puts 'the stamp of judicial approval' on the improper argument, thus magnifying the possibility of harm.") In essence, the trial court permitted the prosecutor to "tie" the cocaine crash to Banister when his expert couldn't at trial.[8] *U.S. v. Morris*, 568 F.2d 396, 401-402 (5th Cir. 1978) ("The purpose of summations is for the attorneys to assist the jury in analyzing, evaluating and applying the evidence. It is not for the purpose of permitting counsel to testify as an expert witness.")

This claim was preserved for appellate review by counsel's objection but appellate counsel did not raise this claim on appeal. His failure to do so cannot be considered "strategic" or based on "professional judgement" given his admission that he mistakenly believed that the state's expert had provided testimony that Banister had suffered a cocaine crash. (*See Supra* p.4) And the failure to raise this claim on appeal prejudiced Banister because, given the state of the record, and considering the elements of the offense, it is likely that a reviewing court would have found the prosecutor's unsupported closing argument, combined with the court's endorsement, affected the jury's evaluation of the evidence and prejudiced

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[8] Banister also points out that "the prosecutor's opinion carries with it tie imprimatur of the Government and may induce the jury to trust the Governments' judgment rather than its own view of the evidence." *United States v. Young,* 105 S.Ct. 1038, 1048 (1985).

Banister's ability to have a fair trial.[9] Jurists of reason could disagree with the Court's conclusion that Banister has failed to show deficient and prejudicial performance of appellate counsel for failing to raise this claim on appeal. As such, a COA should issue on Ground-6.

5. Failure of Appellate Counsel to Raise the Denial of the Lesser-Included Offense of Deadly Conduct on Appeal. Ground-9, Doc.1; Mem. § 3, Doc. 2.

Although the Court listed this ground on page 43 of its Order, it did not address the specific facts that Banister advanced in support of this ground.(Doc. 1 & Doc. 2) The Court simply combines all of Banister's appellate counsel claims and finds that he "is not entitled to habeas relief on his grounds asserting ineffective assistance of appellate counsel." (Doc. 26 p.46)

Reasonable jurists could disagree as to whether appellate counsel rendered deficient and prejudicial performance in failing to raise the trial court's denial of the deadly conduct instruction. First, the record proves that counsel preserved the appellate issue by requesting that the deadly conduct initaructi.cn be included in the charge to the jury. (6RR-4-6) The case law on this subject shows that on appeal the denial of a requested lesser-included offense is reviewed for "some harm", a very favorable standard for the

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[9] Banister reminds the Court that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 104 S.Ct. at 2069.

appellant. *Arline v. State*, 721 S.W. 2d 348, 351 (Tx. Cr. App. 1986) ("In other words, any harm—regardless of degree—requires reversal.").[10] Second, Banister has shown that it was error for the trial court to have denied him the deadly conduct instruction because he met both of the requirements under Texas law for inclusion of the instruction. Specifically, he has shown that deadly conduct was included in the proof necessary to establish aggravated assault, and he has shown that there was "some evidence" in the record where a rational jury could have found Banister only guilty of deadly conduct. Third, appellate counsel's affidavit shows that he die assume that deadly conduct is a lesser-included offense in Banister's case bit the reason he gave for not raising the ground was because he believed that there was no evidence in the record from which a rational jury could have found him only guilty of deadly conduct. (PX-38 p. 8-9). Banister has already proven, and appellate counsel has admitted, that he didn't have a firm grasp of the facts of the case, as such, his failure to raise this claim could not have teen based on an informed selection or professional judgment. Contrary to appellate counsel's claim, there is some evidence in tine record for a rational jury to convict Banister only of deadly conduct.[11] For a detailed account of those

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[10] "If the charge error involves the absence of a lesser-included offense that leaves the jury with the sole option to convict appellant of the charged offense or to acquit him, some harm exists." *Saunders v. State*, 913 S.W. 2d 564, 572 (Tx. Cr. 1996).

[11] *See* facts, *Infra* at p.21, which details the trial evidence permitting a rational jury the basis to find Banister guilty of only the lesser-included offense. *See* Appendix to this application.

facts, and application of the facts to the law, please see Section-2 of the Appendix to this Application. Banister respectfully requests that a COA be granted on Ground-9.

6. Trial Counsel's Failure to Properly Request the Lesser-Included Offense Instruction of Reckless Driving. Ground-10, Doc. 1; Mem. § 3, Doc. 2b Reply p. 37-38, Doc.17.

The first reason the Court gave for denying this ground is that Banister "failed to demonstrate that trial counsel's actions with regard to the [Lesser-included offense instruction were not strategic...". (Doc. 26 p.32) Reasonable jurists could disagree with the Court's finding that trial counsel's failure to properly request the reckless driving instruction was "strategic." First, Banister points out that counsel's alleged strategy did include requesting a lesser included offense of reckless driving. The Court and Respondent apparently believe counsel's affidavit where she claims to have requested the instruction. However, the transcript of the "charge conference" does not indicate that counsel ever requested that a reckless driving instruction be included in the charge. (6RR-5) Even believing that counsel requested a reckless driving instruction, it cannot be considered strategy to request a lesser included offense but fail to assure that it was preserved by making sure it was on the record as Texas law requires. *See* V.A.C.C.P. art. 36.14 (2004) (Mandating that "[t]he requirement that the objections to. the court's charge be in writing will be complied with if the objections are dictated to the court reporter...before the reading of the court 'a charge to the jury.") Indeed, it was trial counsel's duty, not the judges or court reporters, to make sure her

alleged request for reckless driving was on the record. *See e.g.*, *Moore v. State*, 999 S.W. 2d 358, 367 (Tx. Cr. App. 1999) ("[T]hough the defendant had requested that the trial proceedings be recorded, it was nevertheless incumbent upon him to object if the bench conferences were not recorded."). Banister also points out that counsel's failure to properly request the reckless driving instruction also prevented Banister's appellate counsel from raising the error on appeal. *Pollan v. State*, 612 S.W. 2d 594, 596 (Tx. Cr. App. 1981) (Information not found in the appellate record may not be utilized for appellate review.) Jurists of reason could find that trial counsel's failure to properly preserve her reckless driving request was not strategical."[12]

The second reason the Court gave for denying this ground is that the failure to give an instruction on a lesser-included offense does not raise a federal Constitutional issue. (Doc. 26 p. 32 n. 6) Banister points out that because he raised this claim under the Sixth Amendment right to effective assistance of counsel, this is a federal Constitutional issue. And because the state of Texas provides a statutory right to a lesser included offense if the required factors are satisfied, Banister had a due process and equal protection right to this instruction which is also a federal Constitutional issue. *See* V.A.C.C.P. art. 37.09 (2004); *Jacob v. State*, 892 S.W. 2d 905, 907 (Tx. Cr.

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[12] *Moore v. Johnson,* 194 F.3d 586, 604 (5th Cir. 1999) ("The Court is... not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate-tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all.").

App. 995) (Stating that "Article 37.09 [is] constitutional...".); *also Stephens v. State*, 806 S.W. 2d 812, 817 (Tx. Cr. App. 1990) ("Texas law provides for consolidating greater and lesser included offenses by including both in the charge to the jury.") The Court also suggests that the trial court would not have been bound by law to give the instruction if it were properly requested, but that suggestion is at odds with long-standing Texas case law which shows that a judge abuses his discretion in failing to include a properly requested instruction that meets the requirements of art 37.09. *Bell v. State*, 693 S.W. 2d 434, 442 (Tx. Cr. App. 1935); *also see Ford v. State*, 38 S.W. 3d 836,841 (Tx. App.—Hou. 2001) (The "Trial court has the duty and responsibility to instruct on the 'law applicable to the case.") It is not beyond the Court's habeas authority to determine if Banister was denied his Sixth Amendment right to counsel as a result of being denied a lesser-included offense instruction. *See e.g.*, *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009) (Finding counsel ineffective for feeing to request lesser-included offense.)

The Court does not determine whether Banister met the Texas standards for submission of the reckless driving instruction, and it does not discuss, analyze or otherwise mention the extensive factual and legal arguments contained in Banister's habeas Memorandum. (Doc. 2 § 3, *also see* Appendix to this Application) Banister has shown that he meets the requirements to be entitled to the lesser included offense of reckless driving. First, he has shown that the driving element of reckless driving is included within the facts required to establish aggravated assault in this case. *See e.g., Benge v. State*, 94 SW 3d

31 (Tx. App. Hou. 2002 pet. ref'd); and *Brown v. State*, 183 SW 3d. 728, 733 (Tx. App. Hou. 2005) (Cases holding reckless driving is lesser included offense of aggravated assault.). Second, Banister has shown that there is "some evidence" in the record that would have permitted his jury to acquit him of aggravated assault and only find him 12 guilty of reckless driving.[13] That evidence is discussed in greater detail in Section three of Banister's habeas Memorandum, which Banister has included with this COA Application for this Court's convenience. (*See* Appendix & Doc. 2 § 3) For purposes of determining whether a COA should issue, Banister respectfully requests that the Court consider the facts and law in his Memorandum.

Because jurists of reason could find the Court's conclusion, that Banister is not entitled to habeas

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[13] Banister points out that there is at least one juror who doesn't think he is guilty of aggravated assault (*See Infra* p.30); that the jury sent the judge a note asking to add guilty by reckless (6RR-31); and that the state, during its closing argument, told the jury that we are "going to say he did recklessly cause this."(6RR-13) Banister also points out that the following witnesses provided testimony where a rational jury could conclude that Banister drove recklessly 20 miles prior to the accident in the construction zone, but that at the time of the accident he was not driving recklessly. Vandergrift's testimony that he was legally in the roadway (4RR-173-174); had the right of way (4RR-179); no evidence that Banister ever crossed the fog line (4RR-177); the cyclist was in the road when he was struck (4RR-174); and that Banister was only going 4 miles over the speed limit (4RR-170, 175-176). Ponce's testimony that the cyclist was in the roadway when he was hit and that the car was within the lane (5RR-174, 182-183; 4RR-139). "If evidence from any source raises the issue of a lesser included offense, the charge must be given." *Bell v. State*, 693 SW 2d 434, 442 (Tx. Cr. App. 1985)

relief on this ground, debatable or wrong a COA should issue on Ground-10. *See Richards*, at 569 (Agreeing with District Court's finding that the "state trial court would have committed error in refusing [Richards] such an instruction…thus trial counsel was ineffective for not requesting it.")

7. Trial Counsel's Failure to Object to the Court's Charge Which Informed the Jury that Banister had been Convicted of Other Offenses. Grounds-11-12, Doc 1; Memorandum Section-4, Doc. 2; & Reply p. 38-42, Doc. 17.

The Court did not address any of the facts of this ground and denied it by combining it with eight other instances of trial counsel's failure to object, (Doc. 26 p.29) The Court denied all nine grounds by generally citing strategy, meritless objections, and clearly established Supreme Court case law. (*Id.*) The Court ultimately concluded that Banister "has failed to demonstrate that any of the objections above would have been granted or that, had they been raised or granted there was a reasonable probability that the outcome of the trial would have been different." (*Id.*)

Throughout the trial no evidence was admitted before the jury showing that he had a prior conviction. Banister opted not to testify specifically because he didn't want the jury to learn that he had a prior conviction. (5RR-124-125) In response to the state's request to inform the jury of Banister's prior, the trial court ruled that it was "not going to allow those prior convictions to come in." (5RR-154) In spite of this ruling, and the fact that Banister did not testify, the court's final charge to the jury contained the following information:

> You are instructed that certain **evidence was admitted before you in regard to the defendant having been charged and convicted of other offenses** other than the one for which he is now oil trial. Said evidence **was admitted before you** for the purpose of aiding you... **in passing on the credibility of the defendant as a witness**... .(See Charge at PX-3 p.2, Doc. 18)(emphasis nine)

This instruction was wrong because evidence was not admitted before the jury that Banister had been convicted of other offenses, and it couldn't have been admitted because Banister didn't testify. (4RR-5RR) By law, the jury should have never learned that Banister had been convicted of other offenses, and they surely should have not been told by the trial judge that they had received evidence of those convictions when they had not. (Charge read by the Court 6RR-9) The jury charge also inexplicably instructed the jury to use the unproved and inadmissible and unadmitted prior convictions to evaluate the credibility of Banister's nonexistent testimony.[14] Although this instruction was clearly in error, trial counsel raised no objection to it.

In Bailey v. State, where the exact same jury charge was given td Bailey's jury, all three appellate judges agreed that this instruction to the jury was

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[14] In *Old Chief v. U.S.*, where a similar instruction was given, the Court stated "[t]his instruction invited confusion.[and] referred to an issue that was not m the case. While it is true that prior offense evidence may in a proper case be admissible for impeachment.. petitioner did not testify at trial; there was no justification for admitting the [prior convictions] for impeachment...". *Id.* 519 U.S. 172, 177 n.2.

wrong. Although one of the judges dissented because she disagreed with lie majorities harm analysis, she ultimately agreed with the majorities take that:

> Some standards should never be violated, no matter what the evidence shows. One is that a judge should never tell a jury a defendant has been convicted of other crimes when the evidence does not show that. Another is that a judge should not comment on the defendant's failure to testify by telling the jury to use unproved prior convictions to evaluate the credibility of the defendant's nonexistent testimony. *See Bailey v. State*, 848 SW 2d. 321, 322 (Tx. App. Hou. 1993) (emphasis mine)

The Bailey Court also stated that "[i]f a judge does that, both lawyers normally will object. Here, the judge did and the lawyers did not." (*Id.*) This case indicates that jurists of reason would disagree with the Court's general denial of this claim as being a "meritless objection."

With regard to the Court's general denial of this ground under "strategy." Banister points out that there could have been no strategical basis fee counsel to allow the jury to learn that they were judging a convicted felon. *Profit v. Waldron*, 831 F. 2d 1245, 1249 (5th Cir. 1987) (Refusing to indulge presumption of reasonableness as to "tactical" decision that afforded no advantage to the defense.) *also see Lyons v. McCotter*, 770 F. 2d 529, 534 (5th Cir. 1986) ("To pass over the admission of prejudicial and arguably inadmissible evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissible evidence... has no strategic value.") Reasonable jurist

could disagree with the Court's conclusion that counsel's failure to object was reasonable strategy.

With respect to the Court's denial of these grounds on the basis that there is no reasonable probability that counsel's failure to object prejudiced Banister, the following facts and case law indicates that jurists of reason could disagree. First, counsel's failure to object allowed the jury to wrongly learn that they were judging an already multiple convicted felon.[15] "Numerous state and federal courts have found that evidence of prior convictions is prejudicial. In fact, very state and federal court have created rules to prevent the jury from learning the accused has prior convictions unless he testifies and there used to impeach his credibility. While Banister didn't receive the benefit of testifying and telling his side of the story, he nevertheless received the adverse effect on his jury of the stigma of being a convicted felon. *See e.g., Spencer v. Texas,* 385 U.S. 554, 565 (1967) (Chief justice Warren wrote that "it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime charged against him.") Because the jury charge was clearly in error and had the grave potential to negatively influence the jury, trial counsel should have objected. Had counsel done so, the court would have been obligated to have sustained the objection and the jury would have never

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[15] Banister points out that he only has one prior conviction, out the court told cue jury that he had been convicted of other "offenses" implying to the jury that he had multiple prior convictions. This invited the jury to speculate is to now many other "offenses" he had been convicted for.

been aware that they were judging a convicted felon. And in the unlikely event that the judge would have overruled counsel's objection, the charge error would have been preserved under the "any harm" standard for appellate review. *Arline v. State*, 721 SW 2d 348, 251 (Tx. Cr. App. 1999) ("The presence of any harm, regardless of degree, which results from preserved charging error, is sufficient to require reversal of conviction.")

Jurists of reason could find the Court's denial of these grounds debatable or wrong, and could disagree with the Court's general denial of these grounds on the basis that Banister has not shown he was prejudiced by counsel's failure to object to the erroneous instructions. *See Bonner v. Holt*, 26 F.3d 1081 (11th Cir. 1994) (Held actual prejudice by trial courts error of revealing petitioner's habitual offender status to the jury.); *Ard v. Thaler*, 2011 U.S. Dist. Lexis 44614 (Habeas granted because-counsel found ineffective for offering recording containing defendant's statement on prior aggravated assault conviction.); *U.S. v. Field*, 625 F.2d 862, 872 (9th Cir. 1980) ("It is probable that the admission of any prior conviction prejudices a defendant...".); *Nero v. Blackbrun*, 597 F.2d 991 (5th Cir. 1979) (Finding counsel ineffective for failing to move for a mistrial after prosecutor presented prejudicial remarks to jury concerning defendant's priors, which was inadmissible under Louisiana law).

Banister respectfully requests that this Court issue a COA on Grounds 11 and 12.

8. Appellate Counsel's Failure to Raise the Jury Charge Errors—Mentioning Prior Convictions—on Direct Appeal. Ground-16, Doc. 1; Mem. § 4, Doc. 2.

Although the Court listed this ground in page 44 of its order, it did not address the specific facts that Banister advanced in support of this ground. The Court simply combined this appellate claim with the others and concluded that Banister is not entitled to relief. (Doc. 26 p. 46)

Jurists of reason could disagree with the Court's conclusion that Appellate counsel's failure to raise the jury charge errors discussed in Grounds 11 and 12 was not ineffective and prejudicial assistance of appellate counsel. First, because trial counsel did not object to the jury charge error, it would have been reviewed under the less favorable "egregious harm" standard of review on appeal. *Bailey v. State*, 867 SW 2d 42, 43 (Tx. Cr. App. 1993) (When charging error is rot preserved "egregious harm" is required.) The Bailey case is strikingly similar to the facts m Banister's case in that the exact same jury instruction was given to Bailey's jury and Bailey's attorney, like Banister's, didn't object to it. Unlike Banister's case however, Bailey's appellate attorney raised the charge error as error in the direct appeal.

All three appellate judges agreed that trial court's charge to the jury was error. *Bailey v. State*, 848 SW 2d 321, 342 (Tx. App. Hou. 1993) The dissenting judge, however, did not believe the error warranted reversal because 1) the trial was very short; 2) the jury only deliberated for 13 minutes; and 3) because the evidence was overwhelming. (*Id.* at 342) On petition for discretionary review, the Court of Criminal

Appeals vacated and remanded the case back to the Court of Appeals to conduct a proper harm analysis pursuant to *Almanza v. State*. *See Bailey*, 867 SW 2d at 43. On remand, the Court of Appeals affirmed Bailey's conviction finding that:

> The trial court clearly erred in including this language because it was a misstatement or the evidence. To determine whether this error in the charge was so egregious that appellant was deprived of a fair and impartial trial, we must review not only the evidence and the charge, but also any other relevant information revealed in the record of the trial as a whole. *Bailey*, 1994 Tex. App. Lexis 1732.
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> In light of the overwhelming evidence of appellant's guilt, the absence of alibi or other types of witnesses for the defense; the lack of any mention, during the opening and during arguments or otherwise about appellants prior criminal record; the brevity of the trial; the shortness of the jury deliberation; and the jury charge read as a whole, we hold that the charge error was not so egregious that it deprived appellant of a fair and impartial trial. *Id.*

Reasonable jurists could conclude that if appellate counsel would have raised the charge error on appeal, and these same factors would have been applied to the facts of Banister's case, there is a reasonable probability that Banister would have satisfied the standard tor egregious harm. In Banister's case, unlike Bailey's, the evidence was not overwhelming; the trial was not brief and lasted four days; and Banister's jury did not deliberate for 13 minutes as

Bailey's did, they deliberated for over 6 hours. Banister all so points out that the prosecutor specifically mentioned the fact that Banister didn't testify in its closing arguments. (6RR-11) Because reasonable jurists could find the Court's determination, that appellate counsel was not deficient aid that Banister was not prejudiced by his failure to raise this claim in the direct appeal, a COA should issue on Ground 16.

9. Constructive or Actual Denial of Appellate Counsel as a Result of the Clerk's Failure to Include the Court's Charge in the Appellate Record. Ground 13, Doc. 1; Mem. 4 p.1 8-19, Doc. 2; Reply p. 94-96, Doc. 17.

In denying this claim, the Court addressed the facts relating to the court clerk's failure to include the jury charge in the appellate record but it found that Banister "failed to provide any legal basis for this ground...[and] is not entitled to relief." (Doc. 26 p. 47) Jurists of reason could find these conclusions debatable or wrong. First, the legal basis that is at the heart of this ground is the fact that Banister's appellate counsel was prevented, by state interference, from raising the jury charge errors in a motion for new trial and on direct appeal. That state interference came from the court clerk's failure to perform her required duty to include the jury charge in the appellate record. *See* Texas Rules of Appellate Procedure, Rule 34.5 (2004) (Appellate record must include copies of the court's charge.) According to appellate counsel's affidavit, he didn't raise the jury charge errors because they "are unsupported by the record." (*See* PX-36 p.8, Wice's Aff. Doc.18) Banister has already shown, supra, that the jury charge was

in error. As such, the clerk's failure to include it ;n the appellate record resulting in appellate counsel's inability to raise the claim on direct appeal or a motion for new trial, harmed Banister and resulted in the actual or constructive denial or appellate counsel. *See Hardy v. United States*, 375 U.S. 277 (1964) (Concluding that appellate "counsel's duty cannot be discharged unless he has a transcript of the testimony...and also the court's charge to the jury."); *Smith v. Robbins*, 120 S.Ct. 746, 765 (Recognizing that "various kinds of state interference with counsel's assistance can warrant a presumption of prejudice.") Reasonable jurists could find that Banister was actively or constructively deprived of appellate counsel. A COA should issue on Ground 13.

10. Admission of Incriminating Statements that were the Product of Impermissible Custodial Interrogation. Ground-34, Doc.1; Mem. §8, Doc.2; Reply p.71, Doc.17.

In denying this ground, the Court combined its discussion of this ground with Banister's 6th Amendment claim. (Doc. 26 p.18-20) Although the Court did make a fleeting reference to the fifth Amendment claim it did not discuss the Fifth Amendment standard of review and did not apply that standard to the incriminating statements that were admitted at Banister's trial. (*Id.*)

Those statements were elicited while Banister was in custody and questioned by Deputy Wilson without his counsel being present and without him waiting his Miranda rights. In spite of trial counsel's 5th and 6th Amendment objections, Deputy Wilson was allowed to testify that the asked Banister the following questions

and that Banister gave the following incriminating responses:

> Q. You asked him what?
>
> A. Asked him what he was incarcerated tor in our jail at that time.
>
> Q. What was his response?
>
> A. He said he was being charged with intoxicated manslaughter.
>
> Q. Did he say anything else?
>
> A. I asked him—at first I didn't remember who he was or anything and he stated that he was the one who ran over—[the cyclist], (4RR-203)

And then, during the state's rebuttal, Wilson testified as follows:

> Q. Did Mr. Banister make any other statements to you at that time concerning this case that's on trial here today?
>
> A. Yes, he stated that he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine the clay before.
>
> (5RR-209)
>
> Q. Now, you said on the stand that he said what, now, when re made this statement?
>
> A. That he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine earlier.
>
> (5RR-211)

Not only did the jury near that Banister admitted to using cocaine, it also heard that he confessed that he was the one who ran over the cyclist. (4RR-203) These alleged statements were ail brought about by Wilson's "express" questioning of Banister without his counsel present, while he was in custody, and without the required Miranda warnings or waiver thereof. Counsel's objections were overruled (4RR-195, 202; 5RR-208, 209), and the prosecutor was allowed to repeatedly refer to these alleged statements in its closing arguments in urging the jury to convict.(6RR-16, 24) Appellate counsel challenged the admission of these statements under the 5th and 6th Amendments in the direct appeal but they were denied. The opinion of the direct appeals court indicates that it analyzed Banister's custodial interrogation claim under the "functional equivalent" standard instead of the "express questioning" standard. *Bannister v. Texas*, 2006 Tex. App. Lexis 8522 P.6.

a. Jurists of Reason Could find the Application of the "Functional Equivalent" of Interrogation is Inappropriate when " Express Questioning" has Occurred.

The state appellate court misapplied the holding in *Rhode Island v. Innis* to the facts of Banister's case. Specifically, the court found that: " [t]he record does not support appellant's conclusion that Wilson should have known the questions he asked were reasonably likely to elicit an incriminating response" (*See Id.*) Contrary to the appellate court's analysis, because Wilson admittedly asked Banister at least two "express questions" Banister did not have to show that Wilson's questions were "reasonably likely to elicit an incriminating response," because this definition of

interrogation applies only to tire "functional equivalent" of interrogation and to police practices that do not involve "express 15 questioning."[16] All Banister had to show was that he was in custody and subjected to "express questioning" by Wilson. As the Supreme Court in *Rhode Island v. Innis* explained: the Miranda safeguards come into play "whenever a person in custody is subjected to either express questioning or its functional equivalent." *Id.* 446 U.S. 291, 301 (1980). Because it is uncontested that Wilson asked Banister at least two "express questions", resulting in incriminating responses, there was no reason for the appeals court to apply the "functional equivalent" end "reasonably likely to elicit" definition to Banister's case.

Jurists of reason could debate whether the reviewing court unreasonably applied Supreme Court precedent by applying the "functional equivalent" test instead of the "express questioning" test to Banister's Fifth Amendment claim. *See United States v. Montgomery*, 714 F.2d 201, 202 (1st Cir. 1983) ("Appellant made incriminating statements only after agent Sherman had interjected questions[17]...since the

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[16] As the Court pointed out in *Smiley v. Thurmer*, "[t]he functional equivalent test and its definition of statements that the police should know are reasonably likely to elicit an incriminating response from the suspect, does nothing more than define when police practices, **other than express questioning**, constitute interrogation." *Id.* 542 F.3d at 582 (emphasis mine).

[17] In voir dire, Wilson testified that he "kind of interrupted [Banister] while he was talking out there with everybody else and [Wilson] heard him talking about his case and other things going on in the jail and that's when [Wilson] asked [Banister], you Know, **what he was incarcerated in our jail for**." (4RR-193).

questioning here was express, we have no occasion to go farther. This was custodial interrogation."); *also Smiley v. Thurmer,* 542 F.3d 574, 583 (7th Cir. 2008) ("Because Mr. Smiley was in custody and was subject to express questioning the state court had no reason to apply the rule for the 'functional equivalent' of express questioning… Consequently, the decision of the court of appeals was an unreasonable application of clearly established Supreme Court precedent because it 'unreasonably extend[ed] a legal principle from [Supreme Court] precedent to a new context where it should not [have] appli[ed].'") *Id.*

In addition, even if the reviewing court were right in applying the "functional equivalent" and "reasonably likely to elicit" criteria, the following cases indicate that jurists of reason could disagree with the finding that Banister has not met that criteria. Consequently, a COA should issue on Ground-34.

> *United States v. Webb*, 755 F.2d 382 (5th Cir. 1985) (Jailer's question of "**what kind of shit did you get yourself into**" found to be impermissible custodial interrogation because the seemingly innocuous question to the defendant was not an inquiry normally attendant to arrest and custody within the exception to interrogation, and because the jailer "expressly questioned Webb, and the questioning falls within the Supreme Courts definition of interrogation.") *Id.* at 389.[18]

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[18] The appeal court attempted to distinguish Banister's case from Webb's by stating that "Wilson had no involvement in the investigation of the charges", but "[t]he jailer in Webb placed himself into the law enforcement role by admitted he 'saw his

Ethridge v. Johnson, 49 F. Supp. 963, 983 (S.D. Tex. 1999) (Finding that "Officer Day should have known that asking whether Ethridge knew why he was under arrest would likely elicit an incriminating response", and that Ethridge was 'thus exposed to interrogation in custody....The Court therefore concludes that the trial court violated Miranda when it denied Ethridge's motion to suppress custodial statements made to Officer Day.").

Pirtle v. Lambert, 150 F. Supp. 2d 1078, 1092 (E.D. Was. 2001) (Court granted habeas because it found that Deputy Walker's question was impermissible custodial interrogation and "had nothing to do with routine information… Rather the question was directly relevant to the offense, i.e. '**Do you know why you are under arrest**?" The Court found "that the Washington Supreme Court decision... unreasonably refused to extend the governing legal principles of Miranda to the facts of this case.") *Id.*

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own role as one of helping in the FBI's investigation.'" *Bannister*, 2006 Tex. App. Lexis 8522 at p.6-7. Banister points out to this Court that there is no mention in either *Innis* or *Miranda* that the fundamental constitutional protections in the 5th Amendment only apply to someone like the jailer in *Webb*. At the end of the day, it is irrelevant whether the court of appeals felt that Deputy Wilson placed himself into the law enforcement role as the jailer in *Webb* did, because, as a certified peace officer and jailer, he was already there.

11. Admission of Incriminating Statements Obtained by Police as a Result of Deliberate Elicitation Without Counsel Being Present. Ground-35, Doc.1; Mem 9 8, Doc.2; Reply p. 71-72, Doc.17.

The Court found that Banister is not entitled to relief on his 6th Amendment claim because Wilson's question of what he was in jail for was in no way designed to elicit the incriminating response that he had used cocaine earlier or the day before. (Doc. 26 p.20) Reasonable jurists could disagree with these conclusions. *Fellers v. United States*, 540 U.S. 519 (2004) (Held officers violated 6th Amendment by deliberately eliciting information in absence of counsel or waiver even though there was no interrogation. A COA should issue on Ground-35.

12. Denial of Due Process and a Fair Trial Because a Juror Based her Verdict on Non-Evidentiary Factors and Failed to Obey the Mandatory Instructions Given by the Court. Ground-53, Doc.1; Reply p.83-84, Doc. 17.

The Court did not reach the merits of this claim because it found that the evidence that Banister presented for this claim (Juror Garcia's Affidavit and testimony at an evidentiary hearing) "is not admissible in this forum pursuant to state and federal law." (Doc. 26 p.48) The Court agreed with Respondent's argument that Rules of Evidence, Rule 606(b), precludes consideration of juror Garcia's affidavit or testimony. (Respondent's Answer p.58) Rule 606(b) does not apply because the state was present when juror Garcia testified but raised no objection. (*See* Transcript from hearing at PX-35 p.30-34) In fact, the testimony that Respond ant claims is

inadmissible was given as a result of the state's request to the court to recall Garcia back to the stand. (*Id.* p.30) The state should not now be able to complain of the very testimony it invited and raised no objection to when it was given. The following cases indicate that reasonable jurists could rind the Court's application of Rule 606(b),to bar consideration of Garcia's testimony, debatable or wrong.

> *Rose v. Lee*, 252 F.3d 676, 691 n. 12 (4th Cir. 2001) ("The state did not object pursuant to Federal Rule of Evidence 606(b) to our consideration of the Chapman Affidavit. Thus, to the extent Rule 606(b) is applicable, the state has waived the argument that the affidavit fits within the prohibition of Rule 606(b)." (emphasis nine)
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> *Salazar v. State*, 38 SW 3d 141, 147 (Tx. Cr. App. 2001) ("[P]arties withdrew their 606(b) objections, leaving the testimony and affidavits of the jurors available for our consideration in determining whether reversible error occurred.")
>
> *Brantley v. State*, 48 SW 3d 318, 329(Tx. App.—Waco 2001) ("[B]ecause no objection was raised at the hearing to the admission into evidence of this testimony, the applicability of Rule 606(b) is not before us."(emphasis mine).
>
> *Jennings v. State*, 107 SW 3d 85, 87 (Tx. App.—San. Ant. 2003) ("State recognizes, we may consider the foreperson's affidavit because the State did not object to its admission into evidence." (emphasis mine)
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> *Bader v. State*, 777 SW 2d 178, 181 (Tx. App.—Cor. Chr. 1989); *Lee v. State*, 816 SW 2d 515 (Tx.

App.—Hou1991); *Lopez v. State*, 779 SW 2d 411, 415 n.5 (Tx. Cr. App 1989); *Tucker v. State*, 456 SW 3d 194, 210 (Tx. App San. Ant. 2014); (Cases supporting that a juror's testimony is admissible if the state does not object at time it is admitted)

Because jurists of reason could find that juror Garcia's affidavit is admissible in this forum, A COA should issue on Ground-53.

13. The Cumulative Effect of the State's Misconduct Coupled With the Ineffective Conduct of Trial Counsel Rendered the Proceedings Fundamentally Unfair. Ground-47, Doc.1; Mem § 13, Doc.2; Reply p.72-73, Doc.17.

The Court denied this claim by finding that Banister has not shown any errors therefore he is not entitled to relief. In light of the denial of any lesser included offenses; the erroneous jury charge mentioning other convictions; the erroneous admission of incriminating statements; the unsupported and improper closing arguments by the state; the confusing jury charge; the failure to allow Banister to impeach the credibility of the witnesses with the weather report; combined with all the errors by trial counsel discussed in the petition and memorandum, Reasonable jurists could disagree with the Court's conclusion that Banister has not shown that the combined effect of these errors rendered the proceedings fundamentally unfair so as to deny him due process. *Chambers v. Mississippi*, 93 S.Ct. 1038 (1973). The state's case was weak and the combined effect of these errors rendered the criminal defense

"far less persuasive." [19] A COA should issue on Ground-47.

Conclusion and Prayer

For the foregoing reasons, Mr. Banister prays that the Court issues a Certificate of Appealability as to each of the issues discussed in this application.

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[19] Even trial counsel admits in her affidavit that she do[es] not believe Mr. Banister received a fair trial" and "was not afforded due process." (*See* PX 42 p.5) Banister's appellate counsel also stated in his affidavit "that Mr. Banister had not gotten a fair shake in the trial court or in the court of appeals." (PX-36 p 4)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10826

GREGORY DEAN BANISTER,

Petitioner-Appellant

v.

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

Respondent-Appellee.

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

O R D E R:

Gregory Dean Banister, Texas prisoner #1265563, was convicted by a jury of aggravated assault with a deadly weapon and sentenced to 30 years of imprisonment. He filed a 28 U.S.C. § 2254 application asserting numerous claims, which the district court denied on the merits. Banister now moves for issuance of a certificate of appealability (COA) with respect to 12 issues rejected by the district court: (1) ineffective assistance of counsel (IAC) based on appellate counsel's failure to challenge the legal and factual sufficiency of the evidence; (2) IAC based on trial counsel's failure to move for a directed verdict; (3) IAC based on trial counsel's failure to move to strike expert testimony; (4) IAC based on appellate counsel's failure

to challenge an unsupported statement by the prosecutor in closing argument; (5) IAC based on appellate counsel's failure to raise the denial of a lesser-included offense instruction on the offense of deadly conduct; (6) IAC based on trial counsel's failure to properly request a lesser-included offense instruction on the offense of reckless driving; (7) IAC based on trial counsel's failure to object to the trial court's limiting instruction; (8) IAC based on appellate counsel's failure to challenge the limiting instruction; (9) constructive or actual denial of appellate counsel based on the failure to include the jury charge in the appellate record; (10) admission of an incriminating statement in violation of the Fifth and Sixth Amendments; (11) denial of due process and a fair trial based on a juror's affidavit regarding the basis for her verdict; and (12) cumulative error.

To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If a district court has rejected the claims on their merits, the movant "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). This court must decide whether to grant a COA "without full consideration of the factual or legal bases adduced in support of the claims" and without deciding the merits of the appeal.

Buck v. Davis, 137 S. Ct. 759, 773 (2017) (internal quotation marks and citation omitted).

The court has an independent duty to examine whether it has jurisdiction over an appeal. *Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003). Banister is seeking a COA that would allow him to appeal the district court's denial of his § 2254 petition. Filing a timely notice of appeal within thirty days of entry of judgment is a jurisdictional prerequisite. 28 U.S.C. § 2107(a); *Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 16-17 (2017) ("[A]n appeal filing deadline prescribed by statute will be regarded as 'jurisdictional,' meaning that late filing of the appeal notice necessitates dismissal of the appeal."). Judgment on Banister's petition was entered by the district court on May 15, 2017. Banister filed his notice of appeal on July 20, 2017—66 days later. The notice of appeal was not filed within thirty days, so we lack jurisdiction unless there was a reason the time to file was extended.

Banister timely filed a Rule 59(e) motion, which could extend the time for filing a notice of appeal until the entry of an order disposing of the motion. Fed. R. App. P. 4(a)(4)(A)(iv). However, a Rule 59(e) motion that "add[s] a new ground for relief" or "attacks the federal court's previous resolution of the claim on the merits" is construed as a successive habeas petition "since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Williams v. Thaler*, 602 F.3d 291, 302 (5th Cir. 2010) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005). A successive habeas petition filed

in the district court is not among the motions that extends the time to file a notice of appeal. Fed. R. App. P. 4(a)(4)(A).

Here, Banister does not seek a COA on the denial of his Rule 59(e) motion but instead seeks to appeal the district court's reasoning in denying his initial § 2254 petition. Moreover, Banister's Rule 59(e) motion merely attacked the merits of the district court's reasoning in denying the § 2254 petition and is properly characterized as successive petition. Because the Rule 59(e) motion was a successive petition, it did not toll the period for timely filing a notice of appeal. Fed. R. App. P. 4(a)(4)(A); *Uranga v. Davis*, 879 F.3d 646, 648 (5th Cir. 2018) ("[A] purported Rule 59(e) motion that is, in fact, a second or successive § 2254 application is subject to the restrictions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and would not toll the time for filing a notice of appeal."); *Williams*, 602 F.3d at 303-04 ("[W]e do not believe that a habeas petitioner should have the opportunity to circumvent AEDPA's jurisdictional bar on second or successive applications based on little more than the petitioner's ability to [timely file a Rule 59(e) motion]."). As such, even if Banister's petition for a COA were construed as seeking a COA on the district court's denial of his Rule 59(e) motion, we would lack jurisdiction because the Rule 59(e) motion is a successive habeas petition that did not extend the notice of appeal filing period.

We DENY Banister's petition for a COA because we lack jurisdiction over the appeal.

/s/Jennifer Walker Elrod

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